

“OS CONSTITUCIONALISTAS” NO ESTADO NOVO BRASILEIRO: UM OLHAR SOBRE O DIREITO DE GREVE¹

"THE CONSTITUTIONALISTS" IN THE BRAZILIAN ESTADO NOVO:

NOTES ON THE RIGHT TO STRIKE

*Gustavo Silveira Siqueira*²

*Gabriel Pitta Pinheiro de Souza Melgaço*³

*Viviane Maria de Oliveira*⁴

Resumo

Durante toda a primeira república, juridicamente, a greve era reconhecida como um direito pela doutrina do período, tribunais incluindo o Supremo Tribunal Federal. O Estado Novo considerou a greve um recurso antissocial, nocivo ao trabalho e aos interesses da nação, na Carta de 10 de novembro de 1937. O presente artigo pretende entender como os autores da época interpretavam esta inovação do sistema jurídico. A pesquisa selecionou alguns dos mais relevantes comentadores da Constituição vigente e analisou, em cada produção doutrinária, o posicionamento sobre o objeto de nosso estudo. Com isso, se pretende saber se os autores do período eram fiéis ao texto da lei, ao governo Vargas ou interpretavam o direito segundo sua construção histórica e social.

Palavras-chave: Direito de greve. Legitimidade. Legalidade. Fascismo. Getúlio Vargas. Legalismo.

Abstract

During the first republic, the right to strike was legally recognised as a right by the doctrine of that period, by courts including the Supreme Court. The Estado Novo considered strike harmful to workers and interests of the nation, in the 1937 Constitution. This article seeks to understand how the authors of that time interpreted this legal system innovation. The research has selected some of the most important commentators on the Constitution in force and analysed each jurisprudential production. Thus, it aims at comprehending whether the authors of that period were

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² Adjunct Professor at the State University of Rio de Janeiro Law faculty - UERJ and researcher with a productivity fellowship from CNPQ. E-mail: <gustavosiqueira@uerj.br>.

³ Graduated at the State University of Rio de Janeiro - UERJ law faculty - research field: Theory and Philosophy of Law. E-mail: <gabriel.melgaco@uerj.br>.

⁴ Historian by the Federal University of Rio de Janeiro - UFRJ and bachelor in Law at the State University of Rio de Janeiro - UERJ law faculty - CNPQ Technical Support Scholar. E-mail: <vivianemoliveira@yahoo.com.br>.

faithful to the law text, to Vargas' government or, still, whether they interpreted the law according to their social and historical construction.

Keywords: Right to strike; legitimacy; legality; fascism; Getúlio Vargas; Legalism.

Sumário: 1. Introduction; 2. The right to strike and the 1937 Constitution; 2.1. The Authors; 3. Conclusion; 4. References.

1 INTRODUCTION

During the First Republic, strike was legally recognised as a right (SIQUEIRA; AZEVEDO, 2013, p. 68-84) by the doctrine of the period, courts including the Supreme Court (SIQUEIRA; AZEVEDO, 2013, p. 68-70). From 1935, the National Security Act criminalised, for the first time in the history of Brazil, the peaceful strike. Laws of the Estado Novo (Articles 18 e 19, Law 38, enacted on April 4th, 1935), period which began in November 1937 and lasted until mid-1945, considered the strike an anti-social resource, harmful to work and interests of the nation's interests, the Constitution granted on November 10th, 1937 (See article 139 of the 1937 Constitution).

This article aims at understanding how the authors of that period, by emphasising their publications in comments on the Constitution, interpreted this legal system innovation. The hypothesis tested aimed at understanding whether the authors of that period were faithful to the text of the law or whether they interpreted the law according to their social and historical conception.

The research selected some of the most important writers on the 1937 Constitution and analysed, in each jurisprudential production, their position towards strike. Theoreticians as Antonio Almeida de Figueira, Araújo Castro, Augusto Emillio Estellita Lins, Julio Barata, Francisco Cavalcanti Pontes de Miranda and Helvecio Xavier Lopes contributed significantly to the research. Also deserved special attention, the analysis of Francisco Luis Campos Silva's thought (CAMPOS, 2015), author of the Constitution.

This article aims at analysing the legal thinking on the right to strike in the Estado Novo, limiting our sources to these authors' works and confrontating their bibliographies to the current legal system. The legal thought does not contain in itself

all the legal experience of strike (SIQUEIRA, 2011) in the Estado Novo⁵, but allows a better understanding of how jurists were related to the 1937 Constitution and its innovations.

The research intends to investigate whether they simply reproduced the constitutional text or took into account the history and sociology of the right to strike and other social issues to justify its prohibition or not.

2 THE RIGHT TO STRIKE AND THE 1937 CONSTITUTION

The criminalisation of violent strike was under Brazilian law since 1890 (SIQUEIRA, 2015, p. 91), the promulgation date of the Republican Penal Code. The peaceful strike was only criminalised in 1935, with the enactment of the National Security Law⁶. It is important to bear in mind that, from the 30s, the authoritarian ideas gained space and sympathy around the world. Such ideology reduces the individual importance by giving precedence to concepts of nation and race represented by an autocratic government, centered on the figure of a dictator. The Estado Novo's doctrine proposed the concentration of power in the state, as being considered the only institution capable of ensuring national cohesion and promote public welfare. There are significant similarities of the authoritarian doctrine with common aspects of the Estado Novo (FGV/CPDOC).

The Constitution of November 10th, 1937 was influenced by European (BERCOVICI, 2003, p. 230) authoritarian constitutions and the inspiration for strike ban came from the Portuguese Constitution of 1933.

Article 139 of the 1937 Constitution prescribed that (LINS, 1938)⁷:

"Art. 139 – To settle disputes arising from the relationship between employers and employees, regulated in the social legislation, the Labor Court is established. The

⁵ In another article we research the right to strike in the Estado Novo, in addition to legal doctrines: Siqueira (2015, p. 226-253).

⁶ Art. 19. Inducing employers or employees to cease or suspend work for reasons unconnected to work conditions. Penalty – From 6 months to 2 years in prison cell. Brasil. Law n. 38 of April 4th, 1935. Retrieved on October 15th, 2015, from <http://www.planalto.gov.br/ccivil_03/leis/1930-1949/L0038.htm>.

⁷ **Constituição Portuguesa de 1933:** Article 39. In economic relations between capital and labour is not permitted the suspension of activities by either parties in order to enforce their interests.

Labour Court is regulated by law and the Constitutional provisions relating to jurisdiction, recruitment and prerogatives of common jurisdiction do not apply to it. (Brazil, 1937)

The strike and lockout are considered anti-social resources harmful to labour and capital and incompatible with the superior interests of national production. "

The labour courts, which emerged in 1939 (Decreto-Lei nº 1.237, de 2 de maio de 1939), did not served as a stage for the strikers conflict during the Estado Novo (SIQUEIRA, 2015, p. 226-253). A great part of conflicts over the right to strike occurred in police stations and were repressed by police battalions. The study of authors' period aims at understanding how the criminalisation of peaceful strike, a novelty in Getúlio Vargas' government, was legitimised by the legal doctrine.

2.1 The Authors

Antonio Almeida de Figueira⁸ is the author of "The Constitution of 10th November explained to the people" (ALMEIDA, 1937). His work, the Constitution of November 10th, was published by the Department of Press and Propaganda (DIP)⁹, and its purpose was to extol the Estado Novo regime. According to Leonardo Pinheiro Mozdzenski, Almeida's work inaugurates the creation and dissemination of the so called "legal booklet" to the people (ALMEIDA, 1937, p. 1226), a text that was intended to easily explain the legal text to people. The rhetoric made by Antonio Almeida de Figueira, according Mozdzenski, consists of "in the quotation of law stretches (in this

⁸ Antonio Almeida Figueira was born in the city of Barra Mansa, in the State of Rio de Janeiro, in 1892, and died in 1950. He was a historian, jurist, writer, graduated in Law, professor, Education Technicians, Secondary Education inspector and member of Fluminense Academy of Letters. See on: Meirelles (2014).

⁹ The DIP was a body originated from the former Department of Propaganda and Cultural Diffusion (DPDC) of 1934, and consisted of a kind of official propaganda machine of the state. The Estado Novo did without a legitimisation mechanism, and the creation of its own propaganda machine was the formal means of forging this legitimacy, with the creation of the DIP and Getúlio Vargas' glorification as a father of the poor. The DIP was essential for Getúlio Vargas, who took power without the existence of any partisan support, so Vargas needed to strengthen his image among the population. Therefore, the head of the Federal Executive Power needed to have under his control an agency to manage the official publicity surrounding your image. The main investment effort was in the direction towards workers, hence the most important measures of Vargas were focused in the field of Labour Law, resulting in the labour market structure and investment in innovations in this sphere of labour relations. Thus, among other functions, it was also DIP's assignment to approach the President to people.

case, of the Constitution), followed by a 'translation', i.e. an explanation in a supposedly simpler language." As other booklets published by DIP, the work is full of patriotic and legal- political "clichés", seeking to obfuscate the repressive character "of the Constitution. In this way, it is therefore not surprising that the book is dedicated "to President Getulio Vargas – founder of the Estado Novo”

If the function of legal booklet was to instruct layman citizen, the work "Constituição de 10 de Novembro explicada para o povo" served as a Vargas government instrument to propagate its ideology and strengthen respect to that legal system.

About the content, Almeida, the article 136 of the 1937 Constitution would be the inspiration of all Brazilian labour law (ALMEIDA, 1937, p. 128).

"Art 136 – Work is a social duty. Intellectual work, technical manual and is entitled to protection and special state concern. Everyone is guaranteed the right to stand by their honest work and this, as the individual subsistence means, is a good that is the state's duty to protect, assuring him favorable conditions and means of defense." (Art. 136, *in verbis*, Constituição Brasileira de 1937).

It is essential to be careful in interpreting the author gives this legal rule. It is that work is a social duty, ie only one who works does his duty to society. In this sense, the work ceases to be an individual right and becomes a duty. Labor relations do not respect the interests of workers, but of society. This change of interpretation retired worker the legitimacy of fighting for decent work, placing it in state hands, in the form of a duty to protect and create mechanisms for their defense. Thus the legitimacy for the defense of workers' rights was the state and not the worker.

The work of social duty becomes the essence of the legislation. Therefore, for the author, the strike by result in work stoppage an antisocial resource is understood, since, for the settlement of disputes between employers and employees, the Constitution already provided a special justice, "fast nature". In this line, it would be inadmissible to accept the strike and lock-out. Almeida's argument is clear by saying that such "resources have no reason to be and should be treated as being of anti-social nature." (ALMEIDA, 1937, p. 124).

When developing concepts of freedoms such as the expression to reject the right to strike, Antonio Almeida de Figueira is categorical by saying that this freedom

can not be used arbitrarily to promote disorder and cause fights among citizens, which allows one to understand it as a working mass control tool and socio-political movements.

Yet the arbitrary use of the free expression of thought within democracy would occur by distribution of roles, rumors, clandestine pamphlets and even foreign newspapers which would disseminate false news in order to create confusion in the public's mind leading possibly the people to riot or revolution.

Thus, according to Almeida, it would be authorities' responsibility to prevent the occurrence of such facts (ALMEIDA, 1937, p. 101), by censorship and even by prohibition of dissemination, representation and circulation of newspapers, stage plays, films and radio broadcasts, when necessary (ALMEIDA, 1937, p. 100).

Antonio Almeida Figueira points out to the importance given to trade union organisation, recognised by the State as a legitimate categories representation of workers and employers, being a bridge communication to the State, in defense of their rights before this and other professional associations, as provided by article 138 of the 1937 Constitution. According to the author "If there was only one union to legally represent the production category for which it was made, there would be differences among unions and these could not carry out their destiny's purpose (ALMEIDA, 1937, p. 124).

From Antonio de Almeida Figueira's work analysis, one observes a justifying stance on new state actions. The author stated that in the name of national sovereignty power, its defendable ideas and rules would be beneficial to workers, facilitating labour relations from the construction and development of a political organisation and from centralised public authority.

If Almeida's work intended to achieve the status of legal doctrinal work, it did not surpass the level of being Vargas regime's ideological-political pamphlet. Moreover, by being the strike a forbidden provision of the regime's Constitution, his conclusion could not be different: the strike is harmful and should be combated.

Raimundo de Araujo Castro¹⁰ is the author of "The 1937 Constitution" (CASTRO, 1938). The author stresses that the 1937 Constitution deviates, in some

¹⁰ Raimundo de Araújo Castro was federal judge in Maranhão, General Director of the Ministry of Agriculture in 1912, and the National Labour Council member in 1923. See on: TRIBUNAL REGIONAL ELEITORAL DO MARANHÃO; Retrieved on June 20th 2014 from <http://www.tre->

points, from the 1891 and 1934 Constitutions, by establishing indirect election for the office of President of the Republic, by creating the National Economic Council as a Legislative and Public Administration advisory body, as well as by adopting a single court for all cases decision. The author also points out to innovations in relation to education, aiming at ensuring protection and youth's improvement (local power struggle between church and military forces)¹¹, as an effective element of work and moral and civic formation directed to fulfillment of duties to the fatherland (CASTRO, 1938, p. 5-6). The author also deals with sensitive issues for constitutionalism, such as concepts of nation, state, people, sovereignty, etc., in addition to support the thesis that individual freedom was not violated by the laws which restrict the free locomotion of those who threaten the peace, welfare or safety of other members of society (CASTRO, 1938, p. 269).

In relation to the Labour Court, the author recognises the importance of its institution to resolve the conflict between forces of production, "Capital versus Labour" disputes, and to settle conflict between providers and service users. For him, there was an intense desire for justice in these sectors, within the capital city and other parts of the country, and all this required a permanent judicial organisation, able to develop quickly the cases brought to its assessment and decision (CASTRO, 1938, p. 326).

In regard to the right to strike, Araújo Castro faithfully reproduced the Constitution's article, without reservations or comments. So, the absence of comments allows a number of problematisations, but noting that the text of the book repeats the Vargas's speech when introducing the Estado Novo, it can be inferred that the fact of not commenting means simply to confirm. On the other hand, for discussion purposes, one can keep in mind that the author, unlike the previous one, whether he did not agree with the criminalisation of the right to strike, or whether he was discouraged from expressing an opinion against the regime, for whatever reason, kept certain doctrinal modesty and did not capitulated completely, encouraging further reflection.

ma.jus.br/institucional/conheca-o-tre-ma/breve-historia-do-tribunal-regional-eleitoral-do-maranhao> Data de acesso: 20 de jun de 2014; LE RÉFÉRENTIEL DES AUTORITÉS SUDOC; Retrieved on February 10th. 2016 from:<<http://www.idref.fr/autorites/autorites.html>>.

¹¹ These power groups held more conservative positions in educational debates, and were advocates of educational principles consistent with Estado Novo's social policy, which involved order, discipline, and family and homeland's exaltation. For details about, see: Schwartzam (1984).

Augusto Emilio Estellita Lins¹² wrote "The New Constitution of the United States of Brazil" (LINS, 1938) and intended to demonstrate, according to his views, which the 1937 Constitution's articles had been inspired by other countries' laws, from a serie of comparisons, tables and analysis of articles and orthographic sentences contained in the Constitution's article.

Regarding the strike, as stated in the article 139 of the 1937 Constitution, the author asserts that the inspiration was the article 39 of the 1933 Portuguese Constitution (LINS, 1938, p. 129). For Lins, when Brazilian law restricts the right to strike and lock-out, just followed a "modern trend sketching" (LINS, 1938, p. 391).

In relation to the establishment of labour courts¹³ by the 1934 Constitution, which, according to him, would be the place to resolve disputes between employers and employees, he cites the decree law n. 39 of December 3rd 1937, which gave the tribunal of labour disputes the power to deal with cases, until the creation of the Labour Court.

However, what the right to strike concerns, Augusto Lins Estellita also appealed to the French doctrine, citing Cloude Hoche, emphasising that the French drew a parallel between the right to strike and war. According to Cloude Hoche's interpretation, the role of the state would neither keep nor suppress the war, but only "ensure" that public order was not disturbed and that the individual rights and freedoms were not injured. According to Lins, the 1937 Constitution was not indifferent in relation to its protective functions of individual rights and freedoms by recognising the harmfulness of the strike and lock-out, "in the face of both capital and labour" (LINS, 1938, p. 392). Lins received the influence coming from other dictatorial constitutions in the 1937 Brazilian and defended the use of state power to deal with social conflicts.

¹² Augusto E. Estellita Lins was born in 1892 in the city of Recife. He studied law and social sciences at the the University of Rio de Janeiro, School of law, current Faculdade Nacional de Direito (FND), when it was a free School, graduating in 1915. Augusto Lins was a lawyer, journalist, poet, speaker and member of the Academy of Letters, Member of the Historical and Geographical Institute of Espírito Santo (IHG), Press Association and Association of lawyers, all these were institutions in Espírito Santo. Also, was mayor of Itapemirim, in the state of Espírito Santo, from 1922 to 1924, and later was state deputy for two terms, one from 1929 to 1930 and the other from 1935 to 1937. He was Professor of Constitutional and Administrative Law at Victoria Law School and had several publications in journals such as The maul, Fon Fon, Free Land and Canaan. He published eight books of poetry, five literary prose and three books of law. For more details, see on: DEPARTMENT OF TREASURY OF THE STATE OF ESPÍRITO SANTO. Space Burle Marx. Retrieved on june 30th 2014, from <<http://www.sefaz.es.gov.br/painel/vultos75.htm>>.

¹³ HOCHÉ, Claude. *La Responsabilité de l'État et des Comunes dans le Grèves d'Occupation*, p. 13 e 19 *apud* LINS, 1938, p. 392.

He sought other argumentations, in addition to the legal line of reasoning, to justify the prohibition of the right to strike. This should be prohibited not only by law but also for social reasons.

Lins defended his position on the basis of totalitarian systems. As not all countries in the 30's and 40's decades adopted totalitarian regimes, one can probably say that the author sympathised with this political system thought, only by naturalising the Brazilian legal system and by making clear the influence of positivism on his arguments. There is an attempt to justify the law by demonstrating supposedly that the present time is the natural way of the historical process, in a false historical linearity, leading to a supposed progress, in an evolutionary history conception to culminate in the head of a legal system (LINS, 1938, p. 27-29).

Júlio de Carvalho Barata¹⁴ was the author of "The Spirit of the New Constitution" (BARATA, 1938), and he justified Getúlio Vargas's coup in 1937, by arguing that the Parliament had already been dissolved, so it was up to the President to endorse a new constitution on November 10th 1937 (BARATA, 1938, p. 27-29). Then, the author asserted that the law should be tangible, malleable and plastic and should suffer adjustments according to environment changes and progress of the people (BARATA, 1938, p. 20).

¹⁴ Júlio de Carvalho Barata was born in Manaus in 1905 and died in Rio de Janeiro in 1974. He studied law and social sciences at the University of Rio de Janeiro, School of Law, and undertook his PhD studies in philosophy and classical literature at the State University of Guanabara. In 1926, he began his journalistic career going to work as a writer in the *Gazeta de Notícias*, where he stayed until 1928. In 1929, he became director of the *Jornal do Comércio* of Santos (SP), and two years later Júlio Barata returned to Rio de Janeiro to be the director of the morning newspaper "A Batalha". At that time, he was a member of the *Ação Social Brasileira*, (Brazilian Social Action), the political movement of fascist inspiration which was founded in Rio Grande do Sul by J. Fabrino in the early 1930s and was extinct soon after its creation. In 1938, he was admitted as a Latin teacher at *Colegio Pedro II* and as professor of logic at the Faculty of Philosophy of Rio de Janeiro. Also in 1938, he left the direction of the newspaper *A Batalha*. In 1940, Júlio Barata was appointed by Getúlio Vargas to manage the broadcasting division of the *Departamento de Imprensa e Propaganda* (DIP) and resigned his post in 1942. From there on, Júlio Barata integrated the US Nelson Rockefeller businessman's offices, Nelson Rockefeller was coordinator of the Inter-American Relations for propaganda planning, becoming pan-american, which he headed the Brazilian section of the Coordination of Inter-American Affairs until 1944. He was Minister of *Tribunal Superior do Trabalho* (Labour Superior Court -TST) in 1960. His management was focus on the homogenisation of cultural diffusion by radio and he defended publicly of the need for radio's social sanitation. He was Minister of Labour and Social Welfare during *Medici's* government (1969-1974). As a writer, he wrote in 1934 "Artur Bernardes's word." The second edition of "The Spirit of the New Constitution" came out 25 days after the first. He had extensive publication production on unionism. He was also known for writing texts in national newspapers on the relationship between the Catholic Church, Integralism and the *Estado Novo*. See more at: Velloso, Monica Pepper. *Intellectuals and the New State political culture*. Rio de Janeiro: FGV-CPDOC, 1987, p. 25. Retrieved on October 14th, 2015 from <<http://www.fgv.br/cpdoc/acervo/dicionarios/verbete-biografico/julio-de-carvalho-barata>>.

According to Júlio Barata the 1937 constitution was more democratic than the previous one, as it repealed the errors which had plagued the old Republic, improving the regime and aligning it to legitimate conception and tendency towards genuine democracy (BARATA, 1938, p. 37).

Júlio Barata did not mention the article about the right to strike and little debate on issues arising from labor relations. There is a general idea in the book that the 37 Constitution, was something specifically Brazilian, and not a compilation of foreign laws. It was a specialised recipe for Brazil, in a diametrically opposite understanding to Augusto Estellita Lins, for example, who tried to show that the 1937 Constitution was actually a kind of patchwork quilt which had brought ideas of various constitutions, reflection of a modern evolution.

Francisco Cavalcanti Pontes de Miranda¹⁵ is the author of "Commentary on the Constitution of November 10th, 1937" (MIRANDA, 1938) and intended to expose the new Constitution to lawyers, judges, politicians and schools, as he warned in the opening pages of his work himself. No doubt, it is the densest and the most elaborate work on the 1937 Constitution. There are several comparisons with the 1934 and 1891 constitutions as well as several references to other countries constitutions.

According to Pontes de Miranda, in the 1937 Constitution, the trends coming from correcting the steps taken in the early years of the Republic Proclamation had been reinforced. So he asserted that the new constitution was also the daughter of the 1934 Constitution, from which it inherited principles, thus, being a source for the 1937 constitution (MIRANDA, 1938, p. 9).

According the author, the 1937 Constitution was born in unfavorable circumstances in a structure which symbolised a real breakthrough in the political country's life, representing, in fact, a strong centralisation of power in the figure of the chief executive, ie the President of the Republic, from arise of fear of the red danger between 1935 and 1937, as well as exacerbation of economic and political individualism.

¹⁵ Francisco Cavalcanti Pontes de Miranda was born in Maceió in 1892 and died in Rio de Janeiro in 1979. He graduated in law at age 19, at the Faculty of Law of Recife, in 1911. He was professor of the National University, the University of Recife and Judge of the Court of Justice of the Federal District until 1939, when it was transferred to the diplomatic service. He was also a philosopher, mathematician, lawyer, sociologist and Brazilian writer. See more at: LETTERS ACADEMY OF BRAZILIAN. Biography: Miranda Bridges. Available at: <<http://www.academia.org.br/abl/cgi/cgilua.exe/sys/start.htm?inford=276&sid=130>> Date of access: 01 jul 2014.

The 1937 Constitution, according to Pontes de Miranda, has not precisely expressed itself in relation to ideological conflicts around the class struggle, however, it intended to prevent class struggle solution based on violence, which would put the entire nation under an imminent civil war. Thus, one of the main purposes of that constitution was to suppress movements which would probably endanger national unity (MIRANDA, 1938, p. 173). The allusion, existing in Constitution preamble, to a possible communist infiltration was linked to the threat of an escalating and uncontrollable violence which could probably turn into a civil war. There was a capital's concern to safeguard national sovereignty. Pontes de Miranda believed in "political (elective) inability of the mass population" in Brazil (MIRANDA, 1938, p. 166), and, according to him, the Constitution, despite all appearances in regard to the union activity, was less fascist than the 1934 Constitution. Pontes de Miranda believed that "fascist elements appear as a possibility for administrative structuring and as a program to be held". One would not say that concentrated power is itself sufficient to characterise the fascism of the 1937 Constitution, as this concentration is common to contemporary authoritarian solutions, whether fascist or not fascist" (MIRANDA, 1938, p. 165).

According to Pontes Miranda, the article 122 of the 1937 Constitution was one of its central texts. Thus, no law could be interpreted contrary to the dictates of that article. The article 122 described the rights and individual guarantees (MIRANDA, 1938, p. 375).

In Pontes Miranda's point of view, the article 122 contained absolute right which exists regardless of which government is in power (MIRANDA, 1938, p. 375) which would comprise *jus gentium*, and could not be violated by the State. The author gives an example: freedom of conscience, association, religion, among others. However, Pontes Miranda states that the right to strike was not one of these rights, and the Constitution may ban those rights without violating *jus gentium*. Thus, the State "would have a constitutional expression power" which would not have in relation to those other rights (MIRANDA, 1938, p. 375).

According to Pontes Miranda, the text of the 1937 Constitution placed duties before rights. In the chapter "The economic order", specifically in the article 136, it was said that "work is a social duty." This one has the right to protection and special state concern. The guarantee of surviving of one's work should be guaranteed to all, thus

constituting a good and it is State’s duty to protect it. The author pointed out that this constitutional position was a displacement, with the result of being more programmatic than the 1934 Constitution. Even with the difficulty in the structure of State’s purpose, the Charter would be able to ensure the implementation of major policy agendas (MIRANDA, 1938, p. 383).

Pontes Miranda attempted a systematic interpretation of the constitutional text. He was strict in establishing the text structure and the legal scope of the rights within this framework. The right to strike – different to, according to Pontes, the right to association and assembly – was banned and this ban was a constitutional power.

Helvecio Xavier Lopes¹⁶ published the article “The strike and the lock-out` as anti-social resources” (LOPES, 1938) in *Forense* magazine by the year 1938. The author distinguished colligation of association. The association would have a lasting character and the colligation would be momentary. This would be the result of a previous agreement among employees or among employers in order to make changes to working conditions. Association would have an indirect end to be attained through a continuous action (LOPES, 1938, p. 489). The colligation leads to strike and assumes a disagreement between employers and workers.

According to Helvécio Lopes, in the history of labour law, it appears that not all the colligations were admitted peacefully and, especially the workers were banned and severely punished. However, the author saw colligations as inevitable. For the worker, it would be the only way to get better working conditions, whereas isolated, he/ she could not demand a higher income compared to the income offered in the employment contract, or impose changes in certain conditions. Thus, the employee would be forced to accept employer’s rules. That would be the explanation of why colligations were born spontaneously in a milieu where there was social relationship among workers, even at the risk of suffering the penalties imposed by law (LOPES, 1938, p. 489).

¹⁶ Helvecio Xavier Lopes studied law at the Law School of Recife, and was part of the committee formed by the Minister of Labour, industry and trade, Waldemar Falcão, for the preparation of project drafts that resulted in Decree-Law no. 1237, 1939, establishing the Labour Court, in Decree-Law no. 1346, 1939, which reorganised the National Labour Council; and also the regulations of the Labour Court and the National Labour Council in Decrees 6596 and 6597, of 1940 respectively. See at: *Diário das Leis, Portal de Legislação*. Retrieved on September 25th, from <https://www.diariodasleis.com.br/legislacao/federal/192037-autoriza-o-governo-para-mandar-admittir-a-exame-das-materias-do-1-ano-da-faculdade-de-direito-do-recife-o-alumno-ouvinte-do-mesmo-ano-helvecio-xavier-lobes.html> and Steinke, Adriane Lemos. The emergence of the first organs of labour courts in the world. In: *Ambito Jurídico*. Retrieved on September 27th, 2015 <http://www.ambito-juridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=5018>.

The author made a general approach on the right to strike and pointed out that some authors regarded the strike as characteristic and general social fact of the nineteenth century. However, Helvecio stresses the existence of workers' movements with striker character even before the nineteenth century, based on their own history of law.

Helvecio Lopes also recognised that it was the free enterprise which generated the social phenomenon of the strike. This work freedom, combined with the prohibition of colligations and professional associations, led to the employer's hegemony, against which only extralegal or anarchic resistance manifestations of workers were possible. In the second half of the nineteenth century, the freedom to work associated with the permission for professional associations, led to a form of proletarian resistance against collective cessations of work. Such movements could not be regarded as illegal as they were constituted by a reaction against the ideology of the principle of freedom and work and expressed themselves with basis on the recognition professional association freedom (LOPES, 1938, p. 489-490).

According to the author, the recognition of the right to strike represented the maximum achievement of the proletariat in the nineteenth century. Liberalism reserved to the State the role of social conflicts spectator, only coming to intervene to safeguard or protect the threatened individual freedom (LOPES, 1938, p. 489-490). In the context of the economic order, the strike was an unusual fact that disturbed the free flow of natural laws, and harmful to the economy of all classes involved in this antagonism (LOPES, 1938, p. 490). The author also explained the origin of the word strike, mentioning the workers' meeting at the Place de Grève, in Paris, when they abandoned their work (LOPES, 1938, p. 490).

Modern strike had been conceptualised as a collective and concentrated suspension of work, with working initiative, in one or more companies, factories or branches of work, in order to achieve goals of professional or political order, or even protest against certain employers and government's measures among others (LOPES, 1938, p. 490).

Helvecio Lopes points out that it is a mistake to link the concept of modern strike to those which occurred in the past. At other times, strike was the cessation of work by some workers of a factory in order to put pressure on the industry. In the 30s, the concept of strike has another meaning. The work stoppage at that time included

workers of all production branches, in order to reach the public and, finally, put pressure on the boss, or even on the Congress (LOPES, 1938, p. 490).

Thus, strike started to have repercussions beyond those originated by the conflict, as it extended to other activities, and it came to destabilise the economic life of the nation. Some examples have been cited as the strike in public transport and energy supply companies, in which the biggest losers were not the companies' directors or shareholders but rather the general public, including the workers (LOPES, 1938, p. 490).

Therefore, strike received the following ratings: legitimate or illegitimate; partial or total; direct or indirect; of sympathy or political and legislative solidarity; symbolic; general corporatist or general revolutionary.

Consequently, legitimate strike would be the one that takes place without contradicting the legal precepts; and illegitimate is the opposite of this. The total strike includes all employees of the same industry, and if the strike comprises only a part, it will be partial. Direct strike only affects the workers and the employers involved in the conflict; and the indirectly strike involves other groups of workers who join the strikers with the intention to increase pressure on employers. The strike of sympathy or solidarity, political and legislative is inspired by solidarity with one or more workers in collective negotiations or which is intended to put pressure on the government or parliament. The symbolic strike occurs when through work cessation, workers seek to carry out a demonstration of force. Corporate general strike a particular industry branch or profession in order to improve their working conditions. And finally, the revolutionary strike is one that aims at abolishing the capitalist system (LOPES, 1938, p. 491).

Finally, the strike has been compared to a war of employees against employers and that could have adverse results for the working class itself, when unwisely declared. The legislative interventions, aimed at preventing or pacifying the collective conflicts, were considered useful. According to the author, such interventions before being taken as causes of workers' impoverishment, they would be a contribution to wages increase, as it was observed until the crisis of 1920 (LOPES, 1938, p. 491-492).

Helvecio Lopes argued that the strike kept close relationship with increased economic activity and, in relation to this issue, he stressed that "the number of strikes increases in times of economic prosperity and growing demand for work; and decreases in times of stagnation and crisis" (LOPES, 1938, p. 492)

The author acknowledged that the strikes were the only means that workers had to get better working conditions in the economic freedom regime. The economic and social repercussions of strikes led to state intervention in the field of individual relations, contributing to the construction of a labour legislation targeted to assist and protect the economically weaker (LOPES, 1938, p. 492).

However, strike was still seen as an illegal phenomenon that, in the Modern State, which was characterised by state interventionism, it was admissible, but not justified (LOPES, 1938, p. 492-493). Since even with practical advantages brought about to the proletariat in times when their rights were denied, strikes caused injury to the industry, higher industry's expenses, which finally reached negatively strikers themselves.

Lopes believes that despite the recognition of the right to strike's legitimacy, it is argued that this phenomenon is always accompanied by illegal activities, either by physical or moral coercion exerted on workers who do not agree either with the motion or by unpeaceful ending or by boycott or sabotage (LOPES, 1938, p. 493).

As states the author, the right to strike in domestic law is related to the law of war in International Law. The war was justified because it was a means to defend or restore the violated law in the absence of other possible means, given the poverty or the weakness of those in the international society. The strike, thus, was justified by being a means of defending workers' demands in a society that lacks other more effective means. The war laws, such as social laws on strike, were designed to contain violence of these struggles (LOPES, 1938, p. 494).

In relation to the Constitution of November 10th, 1937, and the establishment of labour courts to settle conflicts among employees and employers, regulated in social legislation, the author said that the legitimacy of strike or lock-out (LOPES, 1938, p. 494) had also not been recognised.

The art. 139 of the Constitution provides that strike and lock-out are antisocial and harmful resources to labour and capital, and, therefore, incompatible with superior interests of the national production. It is noteworthy to mention that before this device, there was the Decree No. 21396 of May 12th, 1932, establishing the Joint Committees Conciliation to settle collective disputes between employers and employees.

Helvecio Lopes participated in the Labour Justice Project, and he himself stated in the article (LOPES, 1938, p. 495) that individual or collective disputes should be taken to the Labour Justice and submitted to preliminary conciliation. In the absence of agreement, the conciliatory judgment would necessarily turn into arbitration, giving the court decision that would be like a sentence. This project prescribed penalties for employers in case of labour disputes with their respective employees, if employers suspended work in their establishments with basis on their own premises without prior competent court's authorisation. Likewise employees who abandoned the service or collectively disobeyed the regulations in force or the work's conventions, without prior permission of the competent court, would be punished.

Helvecio Lopes' article is peculiar: he made an historical, social and legal approach to the right to strike. One can observe that the author sought historical and social arguments to justify the right to strike, referring to law criminalisation only when the discussion on the legal aspect is made, due to the bodies of labour justice. Whether law is a social and historical construction, one can observe that criminalisation of the right to strike, as it is indirectly demonstrated by Helvecio Lopes, it is a negative legislation aspect, which breaks with the prior rights order and with the construction of history's rights. In this sense, Estado Novo's dictatorship would be a violation system of established rights.

Francisco Luís da Silva Campos¹⁷ is the author of “Estado Nacional” (CAMPOS, 2015), published originally during the Estado Novo. Campos grounded and justified the need for dictatorship, and defended that democracy was an unrealistic and inadequate system of government to address the problems of his time. According to the author, the 30 Revolution was only really effective on November 10th, 1937, date of the new Constitution and the date in which labour laws had organic composition and national cohesion to production and work elements (CAMPOS, 2015, p. 63).

¹⁷ Francisco Luis da Silva Campos was born in Dores do Indaiá, in the state of Minas Gerais, in 1891, and died in Belo Horizonte in 1968. He studied at the Faculdade Livre de Direito in Belo Horizonte, initiated his studies in 1910 and graduating in 1914. He was a lawyer, university professor (in 1920 and, in 1921, he taught philosophy of law and public law and, in 1924, as federal deputy, he took over the professor's chair of philosophy of law, exercising it intermittently until 1930), state deputy in Minas Gerais, federal by the State of Minas Gerais, president of the Inter-American Juridical Committee, Minister of Justice and the coordinator of the legal framework draft in which it the Estado Novo was supported, including the 1937 Constitutional Charter (of which he was almost the exclusive author) and the reform of the main codes and Laws of the time. Retrieved on November 15th, 2015 from <<http://www.fgv.br/cpdoc/acervo/dicionarios/verbete-biografico/francisco-luis-da-silva-campos>>.

The 1937 Constitution, according to Francisco Campos, contained the spirit of progress and reform, without which it would not be possible to communicate its own policy, which would lead to higher end achievements (CAMPOS, 2015, p. 86). According to the author, the 1937 Constitution had a single power (CAMPOS, 2015, p. 125-126) with several powers and one Power, given the realities of a country like Brazil. The constitution recognised ideals and values, which are indisputable, for being a condition of national life (CAMPOS, 2015, p. 127). This is, undoubtedly, a publication in defense of the measures undertaken by the Estado Novo.

However, the biggest Campos' debate on the right to strike is concerning motives' explanation of the 1940 penal code's special part. The Minister Francisco Campos explained the need to update the penal text in order to contemplate "new criminal legal definitions with which the industry and technical progress enriched the list of criminal comminations." (Brasil. Decreto-lei nº 2.848/1940). Thus, for example, they are followed in the title "Crimes against work" with provisions that criminalise strike.

The new Penal Code, in 1943, brought a special title, "crimes against freedom of work". According to Campos, the liberal idea of "a Code that" supply its own interests in the way that seems best to it, and can only intervene when the free action of each affects the rights of others" with the consequent non-criminalisation of strike and "all bloodless and peaceful means in the struggle between the proletariat and capitalism" was not allowed by the 1937 Constitution. This "proclaimed the legitimacy of state intervention in the economic domain" to "address the weaknesses of individual initiative and coordinate the factors of production, in order to avoid or to resolve their conflicts and to introduce the interest of Nation's thought in the game of individual competitions".

Thus, according to Campos, with the labour courts' institutionalisation "to settle the disputes between labour and capital", "it becomes incompatible with the new political order the arbitrary exercise of employees an employer's own reasons". In other words, the establishment of labour courts was the argument to criminalise strike.

Francisco Campos stressed that "legal protection is no longer granted to freedom of work itself, but to organisation of work", "not only inspired by the defense and adjustment of individual rights and interests, but also, and especially, in greater sense, by the common good of all."

In this sense, "offensive or not to individual freedom, all disturbing actions of the legal system, with respect to work, is illicit and subject to penalty sanctions, whether within administrative law or criminal law."

The arguments are sophisticated and perfectly appropriate to dictatorship. In this sense, the reasoning had already been adopted by the aforementioned authors: the strike is not justified by reason of labour courts' creation.¹⁸ The protection of the collective rights must prevail over the protection of individual rights. The liberal rights did not make sense in an authoritarian state.

3 CONCLUSION

Strictly statutory interpretation was commonplace among jurists. Except for Helvécio Lopes, most authors do not problematise the prohibition of the right to strike considering the social point of view or the law history. For most authors, the interest of the individual worker must concede in relation to State. The work is a positive good for society and only the state could, by instruments and actions, act to settle conflicts involving workers and employers. The strike is not seen as a worker's right, but as a manipulative and destabilising resource of the regime.

The influence of fascist ideals is clear, especially when the authors state that the constitutional laws of states which embraced fascist ideals are fruits of modernity, or a "historical development". There are, at least, sympathy with the values of Vargas' regime, especially in relation to the idea to make the state intervention in order to protect "work" and by claiming that the people were not able to conduct themselves.

Pontes de Miranda is one of the authors who made a systematic and legal interpretation of the text. The richness of his legal interpretation can be problematised when compared to other authors: Estellita Lins used comparative law and sociological arguments to describe and support the criminalisation of the strike. Helvecio Lopes sought historical, social and legal arguments to interpret the prohibition, although it is the only one that recognises the legitimacy of this right, but believed that the structure of the labor courts were able to resolve conflicts, removing thus the need of recognising the strike.

¹⁸ Such an argument was used to remove the right to strike in the 1934 Constitution, see at: Siqueira (2014, p. 312-327).

Francisco Campos, besides the legal reasoning, he brought strong political arguments to surface. It is what one can learn from his considerations in “Exposição dos motivos no código penal”, in relation to the right to strike, one of the most enthusiastic not only about the Vargas regime, but also about the fascist ideology of the period.

Nevertheless, the legal argument is preponderant for most authors. It seems that the final decision always falls to the positive law: Helvecio Lopes exemplifies and tries to support the right to strike in the history and with sociological arguments, but he accepted the legal argument that positive law is sovereign. Francisco Campos may be the exception, despite the fact that the legal argument has great force, the author of the 1937 Constitution, knew that the revolution created a new legal system. For him, law represents the supreme power’s creation. Therefore, strong political arguments for establishment or criticism of any legal system were needed.

So what can we say about the "constitutionalists", in relation to the right to strike, in the Estado Novo, were they legalistic? Or were getulistas? The answer is not easy, because one can not distinguish if the authors defended the Vargas regime for agreeing with its ideology, or if they adhere to the Estado Novo’s thought in order to support Vargas. Those who were getulistas could simply adhere to the legality imposed by the Vargas regime, and those who were not getulistas, although sympathetic to authoritarian regimes, they found the ideal conditions of "pressure and temperature" to disseminate their ideas freely, without fear or obligations to the government.

Francisco Campos, in this period, was presented as a getulista and authoritarian. Still, Pontes de Miranda, and others, demonstrated sympathy to the thought of the Estado Novo, but it was not clear if the construction of legal arguments concerning the right to strike was related to a defense of Vargas regime or if it kept alignment with the authoritarian thought, in which the State had predominance over the individuals. Others, perhaps, could only be authoritarian in an authoritative regime or simply alterable voices by the strong wind of the Estado Novo regime.

Thus, as an ongoing research, new questions are raised: What is the law ruling in force in a dictatorship? And as these constitutionalists interpreted the 1946 Constitution which constitutionalised the right to strike for the first time in Brazilian history. Had they changed their minds with the coming of the new constitution?

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