

THE AFTER-EFFECT OF COLLECTIVE BARGAINING AGREEMENTS AND ADPF 323

A ULTRATIVIDADE DAS NORMAS COLETIVAS E A ADPF 323: REPERCUSSÕES NO DIREITO COLETIVO DO TRABALHO

LA ULTRAACTIVIDAD DE LAS NORMAS COLECTIVAS Y LA ADPF 323



<https://doi.org/10.56238/sevenced2026.013-004>

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ABSTRACT

This article analyzes the developments arising from Allegation of Breach of Fundamental Precept No. 323 (ADPF 323), ruled by the Brazilian Federal Supreme Court, in relation to Precedent 277 of the Superior Labor Court, in light of the foundational principles of Collective Labor Law. The study examines the constitutionality of the ultra-activity of collective agreements after the expiration of their formal validity, discusses the normative function of collective bargaining, the grounds for the Supreme Court's decisions, and the impacts of this jurisprudence on the protection of workers' rights and the dynamics of collective labor relations.

Keywords: Ultra-Activity. Collective Labor Agreements. Collective Bargaining. Action for Breach of Fundamental Precept No. 323. Precedent 277 of the Superior Labor Court.

RESUMO

O presente artigo analisa os desdobramentos da Arguição de Descumprimento de Preceito Fundamental n. 323 (ADPF 323), julgada pelo Supremo Tribunal Federal, em face da Súmula 277 do Tribunal Superior do Trabalho, à luz dos princípios estruturantes do Direito Coletivo do Trabalho. O estudo investiga a constitucionalidade da ultratividade das normas coletivas após o término de sua vigência formal, discute a função normativa da negociação coletiva, os fundamentos das decisões do STF e os impactos dessa jurisprudência na proteção dos direitos dos trabalhadores e na dinâmica das relações coletivas de trabalho.

Palavras-chave: Ultratividade. Normas Coletivas de Trabalho. Negociação Coletiva. Arguição de Descumprimento de Preceito Fundamental nº 323. Súmula 277 do Tribunal Superior do Trabalho.

RESUMEN

Este artículo examina el debate brasileño sobre la ultraactividad de las normas colectivas, entendida como la subsistencia de los efectos de cláusulas convencionales tras el término de vigencia del instrumento, hasta la celebración de un nuevo acuerdo. A partir de la evolución jurisprudencial del Tribunal Superior del Trabajo —especialmente la

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reinterpretación de la Súmula 277—, se analizan los argumentos que buscaron evitar vacíos normativos en períodos de impasse negocial y, al mismo tiempo, las críticas relativas a la legalidad, la reserva de ley, la separación de poderes, la seguridad jurídica y la dinámica de incentivos en la negociación colectiva. En ese marco, se aborda la ADPF 323, en la cual el Supremo Tribunal Federal declaró inconstitucional la ultraactividad automática derivada de la referida súmula, reconfigurando el equilibrio entre continuidad protectora y temporalidad de las pactaciones. Finalmente, se discuten las repercusiones prácticas de la decisión, en especial respecto de la efectividad de los derechos sociales y de la autonomía colectiva en escenarios de desigualdad estructural, indicando posibles alternativas institucionales para mitigar discontinuidades sin desfigurar la negociación periódica.

Palabras clave: Negociación Colectiva. Ultraactividad. ADPF 323. Súmula 277. Seguridad Jurídica.

1 INTRODUCTION

Collective bargaining occupies a central position in the Brazilian labor protection system. More than a simple technique for the composition of interests, it represents a democratic mechanism of sectoral self-regulation, through which unions and employers — or their representative entities — build, in an institutionalized environment of social dialogue, norms aimed at disciplining working conditions, accommodating productive specificities and promoting social peace. The Federal Constitution of 1988 reinforced this design by recognizing the legitimacy of collective bargaining agreements, along with structuring guarantees such as freedom of association (article 8), the social valorization of work (article 1, IV) and the catalog of social rights (article 7).

This normative protagonism of collective instruments has always coexisted with a tension inherent to Labor Law: on the one hand, the need to ensure minimum continuity of protection — especially in scenarios of economic inequality and institutional fragility; on the other hand, the preservation of the temporary, bilateral and dynamic character of collective agreements, whose legitimacy derives from reciprocal concessions and the periodic reassessment of conditions. It is at this point that the debate about the validity of collective bargaining agreements is inserted, that is, the possibility of maintaining the effects of conventional clauses after the end of the instrument's term, until a new agreement is signed.

The issue gained prominence in Brazil from the jurisprudential evolution of the Superior Labor Court, notably with the amendment of Precedent 277, which began to affirm the integration of normative clauses into individual contracts and their persistence until further collective bargaining. The orientation sought to respond to a recurring practical problem: the occurrence of "normative gaps" in periods of negotiation impasse, in which previously assured benefits and conditions could be abruptly suppressed, shifting the cost of the conflict to the worker. At the same time, however, the ultraactivity was criticized for supposedly reducing the incentive for periodic renewal, shifting the deliberative arena to the Judiciary and producing general effects without explicit legislative support.

The 2017 Labor Reform (Law No. 13,467/2017) added new elements to this scenario. By expanding the space for collective private autonomy through article 611-A of the CLT — and by delimiting rights unavailable in article 611-B — the legislator reinforced the idea that collective bargaining can operate as a primary source of regulation on relevant issues. Paradoxically, this valorization of the "negotiated over the legislated" intensified the debate on the duration and effectiveness of the agreed clauses: the greater the normative role of negotiation, the greater the concern with the stability of expectations and with the protection against discontinuity of guarantees.

It was in this context that the Allegation of Non-Compliance with a Fundamental Precept No. 323, filed by the National Confederation of Educational Establishments (CONFENEN), reached the Federal Supreme Court with the objective of removing the effectiveness of Precedent 277 of the TST. The controversy presented sensitive constitutional contours: it was discussed whether ultrativity, as affirmed by labor jurisprudence, would offend principles such as legality and reservation of law, separation of powers, legal certainty and collective autonomy; and, in the opposite direction, whether the lack of ultrativity would compromise the effectiveness of social rights, accentuating business asymmetries and encouraging holdout strategies on the part of the economically stronger pole.

The STF's decision, by declaring the unconstitutionality of the automatic ultrativity derived from Precedent 277, reorganized the balance between protective continuity and negotiation temporality, repositioning periodic negotiation as the structuring axis of the collective system. However, the jurisprudential solution did not eliminate the fundamental problem: how to reconcile the pact dynamics of collective norms – by definition temporary – with the need to avoid abrupt setbacks and regulatory gaps that weaken the worker in the interval between negotiation cycles.

In view of this, this article examines, from a critical-dogmatic perspective, the legal and constitutional foundations that supported the judgment of ADPF 323, placing it within the framework of the principles of Collective Labor Law and in the post-2017 normative evolution. It seeks to: (i) delimit the meaning and limits of ultrativity in the Brazilian legal system; (ii) analyze the arguments adopted by the STF and their implications for the normative function of collective bargaining; and (iii) to discuss the practical repercussions of the decision, especially regarding the protection of social rights in environments of structural inequality. In the end, it is intended to contribute to the reflection on institutional mechanisms capable of preserving legal certainty and protective effectiveness without disfiguring collective private autonomy and the periodicity inherent to agreements.

2 FOUNDATIONS OF COLLECTIVE LABOR LAW

Collective Labor Law is a specialized branch of labor legal science that regulates the relations between collective groups – notably workers' and employers' unions – in the exercise of their institutional representation and in the normative production resulting from social dialogue. Unlike Individual Labor Law, which protects the bilateral relationship between employee and employer, Collective Law deals with the political and organizational dimension of work, being fundamental for the balance of social forces and the democratization of labor relations.

Among the main structuring principles of Collective Labor Law, the principle of freedom of association stands out, guaranteed by Convention No. 87 of the International Labor Organization (ILO) – although not yet ratified by Brazil – and by article 8 of the Federal Constitution, which guarantees full freedom of professional or union association, prohibiting State interference in union organization. This principle is essential to ensure that trade unions are true instruments of autonomous representation of the interests of the categories.

The principle of union autonomy is directly linked to the idea that unions should be free to organize and function as they see fit. This means that they can create their own statutes, choose their leaders and define their strategies of action without external interference. For this reason, the principle of equivalence between collective contractors materializes the premise that, in collective bargaining, there is balance between the parties.

Another essential foundation is the principle of loyalty and transparency in collective bargaining, which requires good faith and cooperation between the parties during the negotiation process, ensuring that the negotiations are not conducted with abuses or omissions that could harm one of the parties. Connected to this is the principle of legal creativity, by which the parties, in the exercise of collective autonomy, can innovate in the content of the agreed norms, creating solutions appropriate to the local economic and social realities, provided that the constitutional and legal limits are respected.

Finally, the principle of collective private autonomy stands out, an expression of the autonomous normativity of collective bargaining agreements, which allows the parties to regulate aspects of labor relations in a manner different from ordinary legislation, including prevailing over it in specific topics defined by article 611-A of the CLT. This autonomy, however, must be exercised with responsibility and commitment to the social function of Labor Law.

These fundamentals reveal that Collective Labor Law is not just a set of rules about union entities, but rather a normative system of its own, with principles and values aimed at promoting social justice through collective and dialogical action among social actors. At the center of this system is collective bargaining, whose effectiveness and legitimacy depend on the strengthening of representative institutions and respect for democratic and constitutional values.

3 COLLECTIVE AGREEMENTS AND CONVENTIONS: NOTIONS AND REGULATION

In the context of collective labor relations, the normative instruments par excellence are collective bargaining agreements (ACT) and collective bargaining agreements (CCT), both regulated by articles 611 et seq. of the Consolidation of Labor Laws (CLT). These

instruments are the result of negotiation between unions and employers – in the case of the ACT, with companies considered individually; in the case of the CCT, with the employers' union – and constitute formal sources of law, endowed with normative effectiveness and the ability to change, complement or even remove certain legal provisions, according to the current legal system.

The Labor Reform promoted by Law No. 13,467/2017 significantly reinforced the role of collective instruments by introducing article 611-A in the CLT, which provides for the prevalence of what is negotiated over what is legislated in a series of matters. Among the topics listed in the aforementioned article, the working hours, the bank of hours, the intra-workday break, the job and salary plans, and adherence to the Employment Insurance Program (PSE) stand out. This valorization of collective bargaining strengthens collective private autonomy and expands the decision-making space of social actors, giving greater flexibility to labor relations.

However, the legislation itself imposes limits on the action of collective entities. Paragraph 3 of article 611-A establishes that, in cases where the collective bargaining agreement establishes a reduction in wages or working hours, there must be a provision for protection mechanisms against unjustified dismissal, thus preserving the essential core of worker protection. In addition, article 611-B of the CLT lists unavailable rights, which cannot be subject to suppression or reduction through negotiation, such as the minimum wage, the 13th salary, the FGTS, the overtime bonus, among others.

The contractual and temporary nature of collective bargaining agreements is also worth mentioning. As they are agreements entered into between specific parties, based on reciprocal concessions, ACTs and CCTs have a stipulated term of validity, usually between one and two years. After this period, the agreed clauses lose, as a rule, their normative effectiveness, unless there is a legal provision or new collective agreement that renews them. It is precisely this temporary nature that gives rise to the debate on ultrativity, that is, on the possibility of the clauses remaining valid after the end of the formal validity of the instrument.

Collective norms play an important role in the Brazilian legal system. More than simple agreements on working conditions, these instruments reflect the concrete action of workers' and employers' organizations, functioning as a democratic form of self-regulation and the construction of social peace.

In summary, collective bargaining agreements and conventions are instruments of great relevance in contemporary Labor Law, allowing normative adaptations to sectoral and regional realities. However, its effectiveness and legitimacy require observance of the constitutional principles of the dignity of the human person, the valorization of work and the

social function of the agreed norms, in addition to the need for constant renewal through institutionalized social dialogue.

4 EXTENSION, DENUNCIATION, REVIEW AND REVOCATION

In Labor Law, collective norms are valid for a fixed period of time and depend on constant action by unions to continue producing effects. This characteristic gives these instruments a transitory character, always linked to the dynamics of collective bargaining. To deal with the continuity or modification of these norms, there are specific mechanisms such as extension, denunciation, review and revocation. Each of them has practical importance and generates relevant legal impacts for the workers and employers involved.

An extension occurs when the parties decide to maintain the validity of a collective agreement or convention for a certain period of time, usually before its expiration. When the previous conditions need to be agreed, there is talk of a new negotiation.

The denunciation, in turn, is a unilateral act that officially communicates the decision not to renew the collective agreement. The objective is to provoke a new round of negotiation and prevent the previous agreement from continuing to be valid automatically. Revocation occurs when both parties, by mutual agreement, decide to terminate the effects of a collective bargaining agreement before the deadline. As it is an exceptional measure, it needs to be formalized through a new agreement. Finally, the revision allows the clauses of a collective norm to be modified during its validity, as long as there is consensus between the parties.

5 THE VALIDITY OF COLLECTIVE NORMS

The ultraactivity of collective bargaining rules consists in the possibility of maintaining the effects of clauses agreed upon in collective bargaining agreements even after the end of the term of validity of these instruments. In practical terms, it is the normative continuity of the conditions previously agreed until a new negotiation is formalized. This topic has been the subject of intense doctrinal and jurisprudential debates, given its relevance for the stability of labor relations and for the protection of workers' social guarantees.

There is no express provision for ultraactivity in the Consolidation of Labor Laws. The wording of article 614, paragraph 3 of the CLT establishes, on the contrary, the prohibition of the validity of more than two years for collective bargaining agreements and conventions, indicating the temporary and renewable nature of these rules. However, jurisprudence began to admit the incorporation of normative clauses into individual employment contracts. It was in this context that the Superior Labor Court issued Precedent 277, in its new wording, establishing that "the normative clauses of collective bargaining agreements and conventions

are part of individual employment contracts and may only be modified or suppressed through new collective bargaining."

It did not take long for this position to be strongly contested by constitutional and principled arguments. It is argued that, by indefinitely extending the effects of agreed norms for temporary validity, ultrativity would violate the principle of collective private autonomy, emptying the dynamic character of collective bargaining and discouraging social dialogue. From a theoretical point of view, there is debate about the legal nature of collective norms: whether they would be norms of limited effectiveness in time or whether, on the contrary, they would be able to be definitively incorporated into the individual contract as tacit clauses.

The controversy surrounding ultrativity, therefore, reveals a latent tension between the principles of continuity of labor protection and collective autonomy, requiring from the interpreter a thoughtful analysis that considers the negotiating reality of the categories, the dynamics of the Brazilian union system and the constitutional values that inform Labor Law.

6 ADFP 323 AND THE GROUNDS FOR THE SUPREME COURT'S DECISION

The Allegation of Non-Compliance with a Fundamental Precept (ADPF) No. 323 was filed by the National Confederation of Educational Establishments (CONFENEN), with the object of Precedent 277 of the Superior Labor Court, which enshrined the thesis of the ultrativity of collective norms. The controversy brought to the Supreme Court was about the compatibility of this precedent with the constitutional precepts of separation of powers, legality, legal certainty and the autonomy of the collective will. The judgment of ADFP 323, concluded in 2020, had great repercussions in the labor scenario, as it represented the definitive rejection of the automatic ultrativity of collective norms in the Brazilian legal system.

The rapporteur of the action, Justice Gilmar Mendes, argued that Precedent 277 of the TST created a binding general rule without legal support, which would constitute an affront to the principle of legality and the separation of powers. It argued that the incorporation of normative clauses into individual contracts without legal provision would compromise legal certainty, in addition to emptying the role of periodic collective bargaining. For the rapporteur, article 114, paragraph 2 of the Federal Constitution, by providing for the competence of the Labor Courts to settle conflicts of a collective nature through mediation and conciliation, presupposes the need for a new agreement, reaffirming the transitory nature of collective normative instruments.

Although there were dissenting votes, such as those of Justices Edson Fachin and Rosa Weber, who pointed to ultrativity as a mechanism to protect the continuity of social

rights and as an element of balance in contexts of negotiation asymmetry, the majority of the Court followed the rapporteur, establishing an understanding in the sense that, after the final term of validity of collective bargaining agreements or conventions, its clauses do not remain effective, except for legal provision or new negotiation.

The decision declared the incompatibility of Precedent 277 with the fundamental precepts of the Constitution, stating that the effectiveness of collective norms depends on express renewal, repositioning the centrality of negotiation in the construction of working conditions.

7 REPERCUSSIONS OF ADPF 323

The decision of the Federal Supreme Court in ADPF 323 produced relevant practical, doctrinal and jurisprudential repercussions in the Brazilian labor scenario. By ruling out the possibility of automatic ultrativity of collective norms, the Supreme Court redirected the dynamics of union relations, demanding greater protagonism from representative entities in conducting periodic and timely negotiations.

In practice, the extinction of the automatic effects of expired rules implies the loss of effectiveness of clauses that are not expressly renewed in a new collective agreement. This imposes on the unions the need for greater negotiation planning and reinforces the importance of mobilizing the categories so that achievements obtained in previous cycles are not lost over time. On the other hand, it also generates legal uncertainty for workers, especially in contexts of high unemployment or fragility of trade unions, where the renewal of clauses may not occur with the same frequency.

Doctrinally, the decision was entered into by sectors that see in the limitation of ultrativity an appreciation of collective private autonomy and the pactitious nature of normative instruments. For these authors, negotiation should be encouraged as a democratic and dynamic process, not as a means of freezing rights. On the other hand, critics of the decision warn of the risk of precarious working conditions and loss of rights historically guaranteed by collective norms that, without renewal, become ineffective.

From a jurisprudential point of view, the STF's decision bound the bodies of the Labor Judiciary, forcing the review of previous understandings and the reinterpretation of ongoing cases that still applied Precedent 277. It also imposed reflections on the adequacy of union action, the need to review negotiation strategies and the strengthening of dialogue channels between capital and labor.

8 CRITICISMS OF AVAILABILITY AND COLLECTIVE AGREEMENT

One of the debates that emerge from the context of ADPF 323 and the limitation of ultrativity concerns the criticism of the logic of the availability of social rights in the context of collective bargaining. In this sense, it is relevant to return to the arguments of Owen Fiss, exposed in his classic text "Against Settlement" (1983), in which the author criticizes the conception that agreements and conciliations are always preferable to judicial decisions. For Fiss, in contexts of structural inequality and power asymmetry, the agreement can function as an instrument for the undue renunciation of fundamental rights.

Fiss's criticism applies with special intensity to Labor Law, in which workers, even represented by unions, often find themselves at a material disadvantage compared to employers. Collective bargaining, idealized as a parity and democratic process, can, in reality, reproduce inequalities and compromise the effectiveness of constitutional labor protection. The availability of rights through collective norms must, therefore, be compatible with the principles of the dignity of the human person, the valorization of work and the social function of the company.

The emptying of ultrativity, by returning normative effectiveness exclusively to the moment of agreed renewal, can contribute to the expansion of this scenario of precariousness, especially if the negotiation is not carried out due to lack of union structure, employer resistance or lack of effective mechanisms to encourage the renewal of collective instruments. At this point, it is necessary to think about compensatory measures, such as the institutionalization of minimum deadlines for the start of negotiations, incentives for mediation and arbitration, and the strengthening of union representation.

In summary, although the judgment of ADPF 323 seeks to reaffirm the temporality and negotiating character of collective norms, it also reopens the discussion on the limits of the availability of fundamental labor rights and on the role of the State in regulating collective relations, especially when they are asymmetrical and unequal. Repercussions of ADPF 323.

The decision implies that, at the end of the term of the collective bargaining agreement, its clauses cease to produce effects, unless there is a legal provision or a new agreement. This reinforces the negotiation dynamics, but can weaken historical guarantees of workers. Therefore, greater responsibility is required from unions and employers in the timely renewal of the rules.

9 FINAL CONSIDERATIONS

The judgment of ADPF 323 by the Federal Supreme Court marks a turning point in the legal regime of collective labor standards in Brazil. By declaring the unconstitutionality of

Precedent 277 of the TST, the Supreme Court reaffirmed the temporary and negotiating nature of collective bargaining agreements, ruling out the possibility of automatic ultractivity. With this, it repositioned the centrality of periodic negotiation and the performance of collective subjects as an essential element in the dynamics of Collective Labor Law.

Although the decision is based on relevant constitutional foundations – such as the separation of powers, the principle of legality and the preservation of collective private autonomy – it cannot be disregarded that it also has relevant practical consequences for workers, especially in contexts marked by institutional fragility of trade unions or by employer resistance to the renewal of clauses. The absence of ultractivity imposes the risk of emptying the achievements historically obtained through negotiation, requiring vigilance and permanent articulation of the categories.

In addition, the debate on ultractivity is part of a broader context of reflection on the limits of the availability of rights in the collective sphere. As Owen Fiss warns, agreement is not always an expression of justice or balance, especially in environments of structural asymmetry between the subjects involved. In the case of labor relations, this translates into the need for compensatory instruments that guarantee the minimum continuity of labor protection while new agreements are not signed.

The challenge that is imposed, therefore, is to build a normative system that values collective bargaining as a democratic and legitimate instrument for regulating working conditions, but that also ensures mechanisms for the preservation of social rights in periods of normative vacuum. This involves the institutionalization of effective mediation procedures, the creation of incentives for timely negotiation, the strengthening of trade unions, and the adoption of legal safeguards that avoid the abrupt discontinuity of essential guarantees.

Ultimately, ADPF 323 not only redefined the legal contours of the ultractivity of collective norms, but also reignited fundamental discussions about the balance between flexibility, legal certainty, and social protection in contemporary Labor Law. The decision should be read not as a final point, but as an invitation to rebuild a more responsible, democratic collective model that is consistent with the founding values of the 1988 Constitution.

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