

LABOUR LAW REFORM, HYPERSUFFICIENT EMPLOYEE AND PRECARIZATION

REFORMA TRABALHISTA, EMPREGADO
HIPERSUFICIENTE E PRECARIZAÇÃO

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ABSTRACT

In face of the changes of the reality of labour's market and of the economic crisis of 2015, there's a strength-ness of the neoliberal speech. In the meanwhile, the pressure to change the labour legislation arises in a sense that this will make Brazil overcome the economical recession and the high unemployment level's by turning it market friendly. So, a Labour Law reform is approved urgently, modifying many rules of the labour's juridical system. One of the changes was the incorporation of many stratified employee regimes, which objective was to precarious the classical employment contract (done by a person, subordinated to the direct employer, inside the company during a labour's journey of 8 hours per day and 44 hours by week). Under the focus of the hypersufficient employee and the precariousness of the employment relationship, this text proposes to analyze, through a theoretical-normative study, the reflexes of the modification introduced in the Brazilian legal system, by Law nº 13.467 / 17 - known as Labor Reform - in face of the Constitution, Comparative Law and International Human Rights Treaties.

Keywords: Labour Law Reform. Hypersufficient employee. Precarization.

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RESUMO

Diante das mudanças da realidade do mercado de trabalho e da crise econômica de 2015, percebe-se o fortalecimento do discurso neoliberal. Nesse diapasão, cresce a pressão para flexibilizar a legislação trabalhista de modo a tornar o país market friendly e superar a recessão econômica e os altos índices de desocupação. Assim, aprova-se a reforma trabalhista em caráter de urgência, modificando diversas normas do sistema justralhista. Dentre as mudanças, destaca-se a incorporação de diversas modalidades empregatícias estratificadas, voltadas a precarizar a relação de emprego clássica (prestada por pessoa física, subordinada diretamente ao seu tomador, prestado dentro da sede da empresa, com direito à jornada de trabalho de oito horas diárias e 44 horas semanais). Sob o enfoque do empregado hypersuficiente e a precarização da relação empregatícia, o presente texto se propõe a analisar, por meio de um estudo teórico-normativo, os reflexos da modificação introduzida no ordenamento jurídico brasileiro, pela Lei nº 13.467/17 - conhecida como Reforma Trabalhista – em face da Constituição, do Direito Comparado e dos Tratados Internacionais de Direitos Humanos.

Palavras-chave: Reforma trabalhista. Empregado hypersuficiente. Precarização.

1. INTRODUCTION

Brazil is going through the most severe and lasting economic crisis. Among its reflexes, there are high unemployment rates, low levels of consumption, shrinking production and closure of companies. In this sense, data from the Brazilian Institute of Geography and Statistics (IBGE) indicate that before the changes in labor legislation, the 2016 GDP (IBGE, 2018) decreased 3.6%, as well as 3.5% in 2015 (IBGE, 2017). On the other hand, the Gross Fixed Capital Formation (GFCF) indicated a decrease in investments of 10.2%. In addition, the unemployment rate was the highest in the historical series, reaching 13.7% in the first quarter of 2017, according to data released by IBGE.

The recession established since 2015 was caused by a combination of political and socioeconomic factors. And, like the European countries that faced post-economic crisis austerity measures of 2008, it led to the strengthening of the neoliberal discourse, accompanied by austerity measures, such as the labor reform of 2017.

Amid advances in Brazilian doctrine and jurisprudence aimed at promoting decent work, there is the resumption of allegations aimed at reducing labor rights to make the country Market Friendly, in order to increase the pressure to adopt austerity measures, like new atypical forms of employment contract. And so, with the approval of Laws 13,429/2017 and 13,467/2017, the labor legislation is amended and the Brazilian legal system now provides for new employment modalities, increasingly distant from the indefinite subordinated employment relationship with a defined working day.

The objective of this text is to reveal, through a theoretical-normative study, the precarious reflexes of the modification introduced in the Brazilian legal system, by Law 13,467/17, specifically regarding the hypersufficient employee.

The present article is structured in five items, this introduction being the first; followed, respectively, by one in which the panorama of the Labor Reform is approached; later, the third item presents the stratified employment modalities; the fourth item is intended for the study

of the hypersufficient worker, and the fifth, and final item, discusses the need for a rereading of labor law, from this new employment modality, moving then to the conclusion of the study.

2. LABOR REFORM AND SOME CONSIDERATIONS

As explained in the introduction, the national socioeconomic situation - caused by the worsening of the economic crisis of 2015 - provided a reform in the legislation *justabalhista*. In addition, the economic issue was used as a subterfuge so that there would be a rapid legislative process of urgent processing (CHAMBER OF DEPUTIES, 2017; SENATE, 2017), which culminated in Laws 13,429/2017 and 13,467/2017 (COUTINHO, 2017).

Under the focus of the legislative process of Law 13.467/2017 (which was responsible for a more comprehensive reform of labor legislation), it should be noted that it began with the sending of Bill 6.787/16 by the government Temer, in December 2016. Originally, it contained the proposal to amend only ten points agreed between employers' confederations and trade union centrals.

Still in the Chamber of Deputies, the mentioned Bill was expanded to about 100 amendments of labor legislation, with the approval by 296 votes (with opposition of 177 deputies). Already in the Senate, It was appointed as the Complementary Bill (PLC) No 38/17, which was approved (by 50 votes in favor and 26 votes against) without any change in the text sent by the House of Representatives. And, finally, President Michel Temer sanctioned Law 13.467/2017, without any veto, in 13 July 2017 (MARTINS FILHO, 2017, p. 59).

That is, in close synthesis, after the interval of approximately seven months, more than a hundred changes were promoted in the *justabalhista* system. And, in the face of this, following the neoliberal doctrine, the motives of PLC nº 6787/16 praised that the labor reform would be the means capable of guaranteeing employability and combating informality, as well as generating legal certainty (BIAVASCHI, 2017).

Under this line of thought, it was still argued that the labor reform in Brazil would be in accordance with the context of changes in European labor laws promoted since the first decade of the 21st century. Thus, it emerged that such reforms have flexisecurity⁴ as a common feature (MARTINS FILHO, 2017, p. 55).

In short, it is a speech stating that the reduction of labor rights is the solution to the evils of the Brazilian economic crisis. But such a speech cannot prevail. First, it should be pointed out that labour legislation is not capable of changing the reality of the labour market itself. Second, it is notorious the contradiction between the neoliberal discourse of modernization of labor norms and the reality posed by the Brazilian labor reform, because, in fact, the labor conquests were made more flexible with formulas already tested (without success) in other countries (SANTOS, 2017, p. 249).

Thus, it should be understood, as does Viegas (2017, p. 74), that:

4 Flexisecurity means promoting the deregulation of the employment relationship in order to enhance collective bargaining and, at the same time, adopting measures to relax legislation in order to prevail the will of the parties, so that safety and security does not depend on the rigidity of the legislation.

In the legal field, the labor reform has divided opinions, some argue that the Law is already old, due to the lack of necessary social dialogue; others say that, despite having as a basis the modernization, the law uses glaring formulas of labor flexibilizations already experienced in some countries of Europe, however, did not have good results; others go beyond, and point out unconstitutionality and setback in labor gains.

Finally, it should be noted that, after two years of the Law 13,467/17, the results expected by the neoliberal discourse did not correspond to reality. On the contrary, Lameiras et al (2019) found only a slight improvement in the indications of the General Employment and Unemployment Registry (CAGED) and the National Household Sample Survey (PNAD) of the unemployment rate in the first quarter of 2019 (decrease of 04 p.p.); 22.7% of households with no income still remain; given that the increase in the occupation rate occurred mainly in the informal market. In addition, the PNAD continues to point out that the unemployment rate ranged from less than 1 p.p. in the third quarter of 2017 (12.4%) to the third quarter of 2017 (11.6%)⁵.

In addition, according to DIEESE (2018), there was a reduction in the number of collective standards already noticeable in 2018, "reduction in almost 50% of the agreements in the first quarter of 2018 compared to the same period of 2017, compared to a reduction of almost 30% in the agreements, according to the same comparison parameters".

Likewise, according to the statistics of new actions distributed before the Labor Court, the Superior Labor Court (TST, 2019) found that there was a reduction of 2,013,241 labor complaints in 2017 to 1,287,208 labor complaints in 2018. This corresponded to a decrease of 36% in the number of labor complaints. However, in 2019, 3,377,013 new processes were distributed, demonstrating the resumption of labor complaints.

Thus, there is only the deleterious effects of the labor reform, since there was a reduction in the compensation of employees; decrease in typical work contracts and increase in stratified hiring; increase in informality; decrease in the work of the trade union movement; Only momentary decrease in the number of labor complaints.

3. OF THE STRATIFIED EMPLOYMENT MODALITIES

Nowadays, the rise of financial capitalism and the transformations of the reality of the labor market (competition in the global market, corporate restructuring and the 3rd Industrial Revolution) gave room for thinking under strong economic bias to become hegemonic. Amid this scenario, the employment relationship - although it is a fundamental activity in the constitution of social relations - is now questioned (DELGADO, Mauricio, 2015, p. 111-113).

In this process, there is a change in the identity of workers as a social group, to the point of reconfiguring the forms of work. Under such logic, there is a doctrine focused on the erosion of the typical employment relationship (DELGADO, Gabriela, 2015, p. 161-162). That is, it

5 The data mentioned are available at the link: https://www.ibge.gov.br/statistics/socials/work/9173-national-research-by-home_sampstra-home_maintenance_quarterly.html?&t=series-historicas&utm_source=landing&utm_medium=explica&utm_campaign=unemployment. Accessed: 29 Jul. 2020.

starts to question the employment relationship established in an indefinite employment contract under the organization and direction of a single well-defined employer (NASCIMENTO, 2017, p. 277-278).

And, following this movement, the labor reform incorporated into the Brazilian legal system several atypical labor relations. In this sense, Nascimento (2017, p. 278) highlights that:

The Law 13.467/2017, which translated in Brazil what was called labor reform, came in the wake of the movement, seductively called flexibilization of labor relations, a movement that has privileged atypical labor relations, through the insertion into the legal system of plastic forms of employment, which are adapted to purely economic interests, the most diverse.

Therefore, what can be seen is that Law 13,467/2017 aims to reverse the logic of labor law, in order to relativize worker protection through the standardization of new forms of work and the legitimization of old labor fraud (ROCHA, 2018, p. 51). At this fork, Coutinho argues that:

It will continue to be the regulatory framework of capitalism, a Capitalist Labor Law that was born from the Industrial Revolution as a framework for the modernization of living conditions, the result of struggles and resistance. But now it introduces a new system, as it replaces the myth of foundation, of tutelage and protection of the low-quality worker for individual and collective private bargaining autonomy. It rejects and highlights the State, abandoning the Welfare to welcome the Minimum, sheltering the neoliberal ideology and abstracting the need for state intervention in the market, in the economy. It replaces the project of a wage society, that is, a universalization of regulated wage earners as a standard for the economy by a fragmented and precarious labor society, whose income perspective can be replaced by welfare (COUTINHO, 2017, p. 119).

Thus, it can be said that the erosion of the typical employment relationship caused by the Labor Reform caused the "stratification" of this type of relationship. Delgado and Delgado, in dealing with the subject, describe it as a specific phenomenon of the hyper-sufficient worker. Follow:

As it is perceived, the Labor Reform Law creates stratified segment in the universe of employees of institutions and employers companies, from two factual data that highlights: the fact of being the employee with higher level diploma; the fact that this employee perceives monthly salary equal to or greater than twice the maximum limit of benefits of the General Social Security System (DELGADO; DELGADO, 2018, p. 171).

Thus, it is understood that, in fact, this stratification process is a broader phenomenon, not limited to the hypersufficient worker. It is necessary to take into account, as a parameter, the employment relationship typically conceived by the constitutional and celetist norms (prior to Laws 13,429 and 13,467/2017).

That is, on the basis of the contract of employment for an indefinite period, directly subordinated to the service taker, provided within the company's headquarters, with the right to the working day of eight hours a day and forty-four hours a week, It can be said that the reforming legislator inserted atypical, or rather stratified, employment contract modalities.

In this tuning fork, they identify themselves as modalities of stratification of the employment relationship adopted by Laws 13,429/2017 and 13,467/2017: the intermittent employee,

the teleworker, the hypersufficient, the outsourced in the end-activity and the autonomous work (combined with the effect of “pejotization⁶”). However, this study has as its object only the analysis of the hypersufficient employee, reason why the other types of stratified work are not addressed.

4. THE HYPER-SUFFICIENT WORKER

As already discussed, the hypersufficient worker was one of the figures of the stratification of the typical employment relationship created by Law 13,467/2017.

In accordance with the sole paragraph of Art. 444 of the CLT, there is provision for this specific modality of employees to negotiate directly with the employer matters considered of relative irrenunciability, that is, those provided for in art. CLT 611-A, regardless of union assistance or representation.

According to Boucinhas Filho (2018, p. 129), the reforming legislator, by political choice, instead of creating a specific law guaranteeing fewer rights for parasubordinated workers, or senior executives, has fixed that employees carrying higher education degrees and, concomitantly, notice monthly salary equal to or greater than twice the maximum limit of benefits of the General Social Security System (RGPS) would have greater autonomy to negotiate their rights.

In this passage, Delgado and Delgado (2018, p. 171-172) defend that the legislator - through art. 444, sole paragraph, of the CLT - would have inserted a device diametrically opposed to the principle of harmful contractual inalterability, provided in the head of the same article. Thus, in a confused wording, marked by remissions, the hyper-sufficient worker and the employer would have ample freedom to negotiate individually the various multidimensional themes amenable to collective bargaining (art. 611-A, da CLT).

Given the lack of clarity of the norm, it is argued that the hyper-sufficient employee would have his relativized subordination, since he could impose his will in the employment⁷ relationship. Thus, some doctrinators (RODRIGUES et. al., 2017, p. 159), when analyzing the debates on this normative amendment, point out that legislators judged that the worker with a degree in higher education and salary above the average salary of the population (estimated 2% of employees with formal ties) could not be considered vulnerable - subject to state protection or union protection.

Corroborating this position, Bastos (2018, p. 170) notes that it should be borne in mind that Labor Law was designed for the purpose of protecting subordinate workers, mediating conflicts and negotiations between asymmetrical parties. In this sense, the lawyer argues that the rules established in Articles 9,444, caput, and 468 of the CLT - which were not altered by labor reform -, when interpreted in a teleological way, leave certain that there is a

6 The term “employment” refers to the employer’s requirement or the employee’s own initiative to conceal the employment contract by constituting a legal entity, as if it were an inter-company contract.

7 In the same sense, Bastos (2018, p. 173) argues that the protection of the standard ended up unprotecting the “high employees” by preventing him from negotiating differential negotiations, since there was no legal backing and the agreement was annulled before the Labor Court with adjacent convictions.

freedom of contract in the labor field. However, such autonomy is subject to rules of interest and public order of protection of the worker (present in the law, collective norms or decisions of competent authorities) and, therefore, if the clauses agreed may be declared null and void.

But, for the aforementioned author, although the normative framework of labor is born against the "imperialism of the contract", the legislation, however modern, would not be able to follow the transformations of the models of service provision, since it is inherent in the dynamics of industrial relations themselves that they are adaptable to the needs of the market. Hence the need to relax the standard through contracts. But, faced with the resistance of labor courts to allow the adaptation of the legislation to the peculiarities of the employee, the reforming legislator adopted the infamous "negotiated on legislation", including in the individual harvest (BASTOS, 2018, p. 170-171).

From this perspective, the doctrinaire argues that Law 13.467/2017 brought a paradigm break by establishing that "not every employee will be considered as hyposufficient or every employer will be considered a dominant part of the work relationship" (BASTOS, 2018, p. 171). From then on, it is up to the interpreter to go beyond the limits of the law and analyze numerous variables present in the labor pacts - including, the legal brocardo *pacta sunt servanda*, since the contract between hyper-sufficient and employer will make law between the parties; beyond objective good faith, legality and equality. Thus, in a close synthesis, Bastos understands that:

[...] the worker must assume his role as an integral negotiator of this relationship and aware of what he is adopting as a contractual clause, claiming responsibility for their choices and their performance in the contract with the employer and bearing the consequences.

From the moment the State returns to the citizen the responsibility for his actions, in *casu*, to the worker, who, in theory, can *assumela*, this citizen/worker evolves allowing it to be reached to other people who do not have the same conditions and opportunities and who really need it (BASTOS, 2018, p. 173).

However, such a current of thought must not prevail. Because, in line with Padilha (2017), it is understood that the figure of hypersufficient is an attempt to reverse the logic of Labor Law - the protection of the hyposufficient worker, appealing only to the subjective side of the employee's degree of technical knowledge. It should be forgotten, however, that hyposufficiency also arises from the economic dependence that the employee has, since he needs to sell his labor force to subsist. In this sense, Padilha (2017, p. 126-127):

In this perspective, some proponents of neoliberal theories intend to remove the "myth" of the employee's contractual weakness and even fight for the return to the autonomy of the parties' will, as they understand that the protective evolution of the *juslaboral* branch resulting from this "myth of permanent genetic incapacity of the worker" happens "the recognition of the excesses and perverse defects of the protectionist objective, as well as the uncertainty about the economic viability of the system", which makes - for this current of thought - clear the importance of weighing the costs brought by excessive labor protection.

(...)

[o] that has been witnessed in the current economic situation is that, increasingly, the force of agreement of working conditions is returning to the employ-

er's side. And it seems that it is precisely what advocates of these currents of thought want: the return to the parties' negotiating freedom to enable the employer to operate for the benefit of his sole and exclusive interest.

In line with the above, Delgado and Delgado (2018, p. 172-173) clarify that there is no empirical, theoretical or scientific basis to support the criterion adopted by the reforming legislator. Therefore, one could not detach the logical and systemic matrix of labor law to those workers who receive above a certain value. The vulnerability and the typical hypo-sufficiency of the work contract (made by adhesion) remains in the figure of the hyper-sufficient worker and, therefore, he has the same level of negotiation as the employer.

Moreover, Goulart (2018) points out, the legislator made an option for a patrimonial aspect, ignoring the essential quality of the good hired in the employment relationship of the hyper-sufficient worker, human work. However, the valorization of work cannot be seen as mere philanthropy, because without it there is no citizenship and social inequalities are aggravated. Therefore, it is understood that "there can be no differentiated legal regime due to schooling or salary level, because the political option of the constituent legislator of 1988 is human dignity, inherent to any working person" (GOULART, 2018, p. 124).

It is also worth mentioning the position of Melhado (2017, p. 95), for whom labor reform promotes the "fetishization" of the autonomy of the will by allowing negotiation in the individual work relations of expensive topics, such as hours banks, intraday break, warning, teleworking, intermittent work, pay and even unhealthy degree.

Thus, it can be said that Law 13.467/2017 causes the false impression that the worker, if it meets the requirements of the sole paragraph of the art. CLT 444 would no longer be hyposufficient, or at least mitigate it. Therefore, the figure of the "pseudo-sufficiency" arises, which has a false understanding of reality. It is forgotten that there is precarious employment relationship in all employment contracts in Brazil - since until today art has not been regulated. 7th, I, of the Constitution, whose sealing of arbitrary or unjust dispensation is seen as a rule of limited effectiveness. Thus, adds Melhado (2017, p. 96-97), there is no talk of worker autonomy because it only perfects an accession contract with conditions set without real dialogue by the service provider, leaving the option to "accept" or opt for unemployment.

Under the same bias, Boucinhas Filho (2018, p. 126-127) clarifies that the expression "hyper-sufficient" was originally used by Cesarino Júnior as one of the categories used in economic law to distinguish the economic power of related companies. There was no application with the Labor Law, since the absolute hypo-sufficiency stems from the need for the worker to sell his labor force to maintain himself, fitting the division of men only into owners and non-owners.

Under this logic, Melhado (2017, p. 97-98) questions whether a formal university education and higher remuneration would justify the differentiated treatment of the aspect of hypo-sufficiency typical of the work relationship. He clarifies that the subjection of labor to capital is not a result of contract or intellectual deficit, but of a structural factor intrinsic to the capitalist mode of production: the oversupply of labor. Therefore, the fear of unemployment is what makes the employee hyposufficient - including the high official or one who meets the requirements of art. 444, sole paragraph, of the CLT because it is afraid of having a brutal drop in its income if it is dismissed and has to receive unemployment insurance with values below its usual income.

In addition, it is worth noting that Boucinhas Filho (2018) argues that emotional stress and anguish, which characterize hypo-sufficiency, would increase proportionally with the employee's responsibility and remuneration. Follow:

The fear of unemployment is umbilically related to insecurity (...) Once dismissed, the senior executive faces more and greater difficulties than other employees to relocate to the labor market. To one because there aren't that many job openings for top executives. A duas porque as notícias corre muito rapidamente no mundo corporativo e a dispensa de um executivo em razão de maus resultados will surely negatively affect your image in the market, reducing your hiring possibilities (BOUCINHAS FILHO, 2018, p. 127).

Another point raised by Melhado (2017, p. 98-99) that should be taken into account is the unconstitutionality of the criterion of differentiation of the hypersufficient worker because he has a higher level. For, on the one hand, the high tech subjection of the means of production would eventually equal the workers under machinery and robotic control and, on the other hand, the Constitution would have forbidden the distinction between manual, technical or intellectual work (art. 7º, XXXII of the CF).

In addition, there is a flaw in the wording of the device under analysis that is worth mentioning in the section where the standard provides that direct negotiation between the hyper-sufficient worker and the employer will have "same legal effectiveness and preponderance over collective instruments". Given the lack of precision of the term, Melhado (2017, p.100) understands that what is laid down in the law, regardless of the intention of the legislator, is that "these contractual clauses have no and could not have preponderance over the law".

Given the breadth of the rights that come to be negotiated by a specific part of workers, regardless of the category to which they belong, it can be said, with support in the opinion of Goulart (2018, p. 120), that among the changes of the CLT, "this, undoubtedly, is perhaps the most emblematic because it reaches the very core of social protection, tracing a new 'category' of worker".

Even, for Delgado and Delgado (2018, p. 174), the figure of the hyper-sufficient worker is a stratification of the worker, in order to offend the constitutional objectives of "building a free, just and supportive society" (art. 3º, I), of "ensuring national development" (art. 3º, II) and "eradicating poverty and marginalisation and reducing social and regional inequalities" (art. 3º, III); as well as undermining the constitutional principles of the social function of property, the pursuit of full employment, the most favourable norm and the closing off of social regression.

For Bastos (2018, p. 174-175), this means that the written agreement will prevail over collective norms and law. However, the limits of constitutional norms and those laid down in international human rights treaties remain, because they have supralegal status.

Thus, it is understood that the stratification of the classical employment relationship occurs due to the possibility of individual negotiation between the hyper-sufficient employee and his employer prevailing over the labor legislation, as it runs counter to principles that govern not only the employment contract in the field of work, but also contracts in general in the civil sphere.

It is salutary that Civil Law has undergone a repersonalization process, so that this branch of legal science is seen under the civil-constitutional bias. This means that the interpretation

of its institutes ceases to be patrimonialist and, from then on, focused on the valorization of human dignity (FACHIN, 2006, p. 39-46). And, one of these interpretative changes occurred with regard to contracts (MORAES, 2010, p. 296).

In this tuning fork, with the repersonalization of Civil Law, the contracts in the civil sector are analyzed from the weighting of contractual freedom with the principles of the existential minimum, contractual good faith and the social function of property (TEODORO, 2016, p. 149). This situation is even more latent in the labor sphere, in which not only the search for human dignity prevails, but also the norms, contracts and individual and collective negotiations must be interpreted based on the principle of protection (ALVES, 2017).

Therefore, if even in the contractual rules where the parties are equal the autonomy of the parties is not absolute, we argue that the contractual freedom of hyper sufficient should be analyzed beyond the "negotiated on legislation". In the same sense, Alves (2017, p. 168) understands that, in the current state of capitalism, employee freedom, whether hyper-sufficient or not, is not guaranteed, given its economic dependence on employment. Therefore, the interpretation of art. 444, sole paragraph, of the CLT must be interpreted according to principles and values laid down in the Constitution, in order to preserve the minimum conditions for the dignified existence of the worker.

Thus, with the repersonalization of labor law, we understand that the interpretation of the clauses of the negotiation of hyper-sufficient should not meet only the protection of the minimum civilization level (including the fundamental obligations of the employment contract - with a view to the horizontal effectiveness of fundamental rights and duties) as well as the duties attached to the employment contract.

Therefore, any agreement made by the hypersufficient with fulcrum in art. 444, sole paragraph, of the CLT must be analyzed in the light of the parties' objective good faith, and the employer must fulfill his duties of clarifying the effects of the negotiation; of the employee's safety; in addition to ensuring his loyalty to his employees; and promote cooperation for the human development of its workers (principle of progressivity). Otherwise, the odd situation will prevail in which civil law will be more protectionist in providing for the social function of the contract, while, in labour law, the individual negotiation of the hypersufficient aggravate its hypo-sufficiency by agreeing conditions below the fundamental labor rights and, therefore, stratify it of the other employees.

Still in this sense, disagreeing with the position of Fincato and Felten (2018, p. 59), for whom there would be no shaking for the trade union movement under the argument that the hyper-sufficient do not represent 5% of the labor market, we argue that the rule discussed is anti-union, considering that the stratification of hypersufficient can cause harm in the scope of the Collective Labor Law by creating an individual and parallel alternative to the union solution for the other workers of the category. For the trade union organizations, which are already weakened by the lack of representativeness and the lack of obligatory union contribution, will still have their category weakened during the paredista movement or collective bargaining, since the portion of the hypersufficient will no longer have interest in negotiating collectively or going on strike, since they can repactuate their employment contracts individually.

It is valid to mention that, despite questions about the content previously made, there are flaws in the writing of art. 444, sole paragraph, of the CLT, which makes the interpretation of the standard difficult. In this sense, the legislator did not specify whether the parameter for the wage criterion should be taken into account the net or gross wage to determine twice the GDPR benefit ceiling. In this sense, Bastos (2018, p. 174) argues that the criterion should be the net wage, based on the most favorable interpretation to the employee.

Finally, regarding Comparative Law, it should be highlighted the criticism of Melhado (2017, p. 98-99) to whom the legislative policy adopted by the labor reform highlighting that, in other countries, the figure of the high employee does not use these two criteria laid down in Law 13,467/2017, but the analysis of the concrete case of exercise of management and management functions, absorbing the alter ego of the capital itself.

It is worth noting that the figure of the high director, in fact, is seen in the Spanish legal system as the person who exercises powers inherent to the legal ownership of the company on functional areas of indisputable importance, acting with autonomy and full responsibility. This figure is governed by the Decree of Alta Dirección and removes several rights provided for in the Statute de los Trabajadores (ET). And it is not confused with the ordinary managers or technicians, because these, although they occupy high positions, with several employees under their command, are below that and are governed by ET (BOUCINHAS FILHO, 2018, p. 125-126).

But in any case, by international bias, Melhado (2017, p. 99-100) adds that the figure of hyper-sufficient is at odds with the precepts of ILO Convention 111, which establishes general parameters against discrimination in employment and occupation. For him, there would be offense to the isonomy of opportunities and treatment by distinguishing him from other workers because of their school education or remuneration.

5. HYPER-SUFFICIENCY AND THE NEED FOR A RE-READING OF LABOUR LAW

About the aforementioned modifications, Nascimento (2017, p. 291) highlights that the challenge is to find the balance “in the inhospitable jungle of capitalism, the Aristotelian medi-ania between the abyss of precarious rights and the abyss of unemployment”. It is therefore necessary to question the scenario (im)put by the labor reform. Thus, if on the one hand the advantage of adopting these entry relaxation measures is evident, since the stratification of the typical employment relationship provides a range of options that allow the company to meet the transitional business needs and adapt to market changes, without the burden of hiring for an indefinite period. One wonders, from another band, what is the human cost of this easing? Would the creation of new jobs, or even the distribution of existing ones, through these new plastic forms of labor, be sufficient justification to admit precarious conditions?

Delgado (2015, p. 27-29) points out that work (world of being) is a fundamental right prior to the Labor Law (world of duty-being), whose regulation allows the promotion of dignity, even if it does not correspond to reality. Even, the author warns of the risk of understand-

ing the right to work broadly and literally, which would include precarious work. The right to work must therefore be restricted to those who are worthy, otherwise it will be used as a device for the commodification of the labour force.

Moreover, as Delgado (2015, p. 114-119) points out, the market alone is not capable of promoting social justice and democratizing power. Thus, the labor legal norms, when intervening in the labor contract, promote a generic pattern of social justice realization in the structurally unequal capitalist system. It should be noted that work is the means by which the individual is inserted into the economy. Thus, by raising the conditions of the labour force's agreement, the formation and preservation of the internal market is made possible.

In this sense, Fabríz (2006, p. 16-17) points out that, in the Brazilian legal system, the right to work is foreseen as a social right, in the terms of art. 6º of the Federal Constitution. Although they are all correlated and interdependent, the right to work is the generating fact of others. Thus, the social value of work is considered the principle of the Constitution (art. 1º, III). It should be borne in mind that it is free and creative work (as opposed to forced labour), capable of man's material and spiritual fulfilment, inherent in the human condition.

Thus, the touchstone must be the dignity of the worker as the north of the juslaboral system and, therefore, the rescue of his main figure, the typical employment relationship. In this sense, the movement of repersonalization of Labor Law stands out.

It is based on the lessons of Teodoro (2016, p. 151), that the rereading of Labour Law is proposed with focus on the fundamental rights provided by the Constitution, placing the worker's person and the off-balance-sheet aspects at the center of the interpretation - in the same way as with Civil Law.

It should be borne in mind that "work and the worker cannot be seen as dissociated elements", because "work is the worker himself on the move" (MOTA, 2016, p. 158). According to this logic, Mota clarifies that:

It is necessary, therefore, that the Labor Law finds its existential matrix, built from an anthropological and personalistic morality, forming a normative system aware that it has no other origin than the promotion of the worker's dignity. If labour law affects the economy, helping to justify capitalism, it does so as a consequence and not as a cause. Only the approximation of Labor Law with its elementary core (the human worker) will make it unfounded to the deconstruction process that has expanded in its direction. (MOTA, 2016, p. 159).

And for the repersonalization of Labor Law to be effective, it is necessary to promote the search for the broad valorization of decent work, regardless of its framework. For Delgado, this should occur so that:

[...] the value of work will be revealed both by the worker and by the historical moment experienced. In other words, the work determines the own valuation of the subject who works (understood: the valuation refers to the subject as a worker). Then it is possible that, in society, the employee, the self-employed worker, the trainee worker, among others, may be valued in different ways. What does not mean, by the way, that the Law should identify this differentiation of values as an exclusion criterion (DELGADO, 2015, p. 102).

In addition, it is understood, as well as Delgado (2015, p. 178-184) that, although Labor Law restricts its area of protection to the employee, there is a fundamental duty of protec-

tion of other forms of work that require reformulation (expansion of axiological awareness) of such a branch of the right to insert fundamental rights unavailable to any and all workers - universal model of Labour Law.

6. FINAL REMARKS

The present study analyzed the doctrinal discussions on the regulation of hyper-sufficient employees in Brazil, as well as a study compared to the experience of other countries. From this, it can be said, therefore, that the way in which Law 13,467/2017 incorporated the hyper-sufficient employee figure into the Brazilian legal system is unconstitutional.

Moreover, although it is worth the argument of generating jobs, it is a figure focused on the precarization of labor relations, so as to put the economic perspective in front of humanistic. In other words, it is one of the most striking examples of the incorporation of neoliberal discourse and the prevalence of economic reasoning over social logic.

As can be seen, although the comparative study of alien legal systems warns of precarious characteristics, the reforming legislator chose to stratify the typical working relationship in Brazil through the *esdruxula* position of the hypersufficient employee.

In short, it is possible to observe that the hyper-sufficient worker is an anomalous figure in the Brazilian legal system, because his criteria are neither justified nor supported in other normative systems, since it is not a high executive.

One perceives, therefore, that there is a stratification of the working class, by the false impression that the worker would not be subject to hypo-sufficiency, which, in fact, is inherent in the property-free class, irrespective of their monthly salary or educational training.

Finally, the lack of clarity in the wording adopted by the legislator has led to doubts even as to the scope of its application. It should be noted that, in any case, even if the direct and individual negotiation is valid, ignoring the offense to the constitutional principles and objectives and the very essence of Labor Law, still has the protection of ILO Convention nº 111, which prohibits discriminatory treatment. Also, it is in the same sense the statement agglutinated nº 1 of the Commission 4 of the 2nd Day of Material and Procedural Labor Law of ANAMATRA.⁸

Therefore, it is understood that regardless of the content and editorial flaws of the art. 444, single paragraph, of the CLT, the figure of the hypersufficient worker, in fact, has its hypo-presence exacerbated by being stratified by the other workers. In this passage, the question arises of what will be the practical implications of this, from more abstract aspects, such as the psychosocial identification with its category; until more practical aspects, such as the

8 Statement agglutinated No 1 of Commission 4 of the 2nd Day of Material and Procedural Labor Law of ANAMATRA: HYPER-SUFFICIENT WORKER. ART. 444 CLT SOLE PARAGRAPH.

I - The only paragraph of art. 444 of the CLT, plus Law 13,467/2017, contradicts the principles of labor law, affronts the Federal Constitution (arts. 5º, caput, and 7º, XXXII, among others) and the international system of protection of labor, especially the ILO Convention 111.

II - The individual negotiation can only prevail over the collective instrument if more favorable to the worker and provided that it does not contravene the fundamental provisions of protection to the work, under penalty of nullity and affront to the principle of protection (Article 9 of CLT c/c, Article 166, VI, Civil Code).

rights provided in the list of art. 611-A of the CLT could be negotiated by a single worker (even if he has no technical knowledge for it) or even issues of wage equalization.

Thus remains the challenge of indoctrinators, lawyers, labor prosecutors and magistrates perform their arduous functions essential to justice for the construction of the concrete norm for conflict based on systematic interpretation of the current normative system - which includes the minimum level of civilization constitutional and international standards. Challenging hermeneutics in view of the unclear text of the Labor Reform.

Moreover, it is possible to notice that the argument of reducing labor rights did not have the expected economic effects (in the same way as the countries analyzed in the comparative study), considering that the country still faces a recession in the economy with high unemployment.

It is important to emphasize the conclusion that the "touchstone" must be the dignity of the worker as north of the Justralbista system and, therefore, the rescue of its main figure, the typical relationship of work. And for this step to be effective, it is necessary to promote the search for the broad appreciation of decent work.

Given the uncertainties of the scenario, it is questioned whether the valuation of the "hyper-sufficient" worker - even though it perceives more than twice the ceiling of the RGPS and has a higher level - it would not remain present in the rescue of basic principles such as the primacy of reality and the assessment of the effective bargaining power of such a worker, his parity before the employer.

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