TARIFF OF EXTRAPATRIMONIAL DAMAGE AND HUMAN DIGNITY VIOLATION

TARIFAÇÃO DO DANO EXTRAPATRIMONIAL E VIOLAÇÃO À DIGNIDADE HUMANA

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ABSTRACT

This scientific article seeks to analyze whether the charging of extra-asset damage, in the light of Law No. 13,467/17, is unconstitutional in view of the fundamental principles of equality and dignity of the human person, embodied in the Constitution of the Federative Republic of Brazil of 1988. To achieve this goal, the work was organized into three items and demanded instruments such as books, articles, laws, and jurisprudence, to demonstrate how compensation was granted for non-material damage before the new law, as well as to exemplify discussions on the subject. The first item carries out a historical retrospective on the origin of non-material damages in the Brazilian legal system, as well as a detailed analysis of certain species of damage, in addition to providing doctrinal and jurisprudential quotations to corroborate the thought herein exposed. The second item, on the other hand, aims to outline the non-material damages from the rule set out in Title II-A of the Consolidation of Labor Laws (CLT). Furthermore, the way in which the repair takes place was questioned. Finally, in the third item, an analysis regarding the Direct Action of Unconstitutionality No. 6069, filed by the Federal Council of the Brazilian Bar Association, was carried out in order to declare unconstitutional this charge for non-material damage, as well as the violation of the fundamental principles of the dignity of the human person and equality, embodied in the Federal Constitution of 1988. At the end of this article, it shall be demonstrated whether the new rule of article 223-G of CLT harms fundamental and individual principles and guarantees.

Keywords: Off-balance labor damage. Human dignity. Unconstitutionality.

RESUMO

O presente artigo científico busca analisar se a tarifação do dano extrapatrimonial, à luz da Lei nº 13.467/17, é inconstitucional frente aos princípios fundamentais da igualdade e da dignidade da pessoa humana, consubstanciados na Constituição da República Federativa do Brasil de 1988. Para se alcançar essa finalidade, organizou-se o trabalho em três itens e utilizou-se de instrumentos como livros, artigos, leis e jurisprudências, para demonstrar como se dava a indenização por dano extrapatrimonial antes da nova lei, bem como para se exemplificar as discussões acerca do tema. O primeiro item realiza uma retrospectiva histórica sobre a origem do dano moral no

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ordenamento jurídico brasileiro, bem como se faz uma análise minuciosa de determinadas espécies de dano, além de realizar citações doutrinárias e jurisprudenciais para corroborar com o pensamento ali exposto. O segundo item, por outro viés, visa delimitar o dano extrapatrimonial a partir do regramento exposto no Título II-A da Consolidação das Leis do Trabalho. Ademais, foram realizadas críticas quanto à forma em que se dá a reparação. Por fim, no terceiro item, realizou-se uma análise acerca da Ação Direta de Inconstitucionalidade nº 6069, ajuizada pelo Conselho Federal da Ordem dos Advogados do Brasil, a fim de declarar inconstitucional essa tarifação por dano extrapatrimonial, bem como se observou, detalhadamente, as afrontas aos princípios fundamentais da dignidade da pessoa humana e da igualdade, consubstanciados na CRFB/88. Ao final do presente artigo, será demonstrado se o novo regramento do art. 223-G, da CLT, fere princípios e garantias fundamentais e individuais.

Palavras-chave: *Tarifação do dano extrapatrimonial. Dignidade humana. Inconstitucionalidade.*

1. INTRODUCTION

Law No. 13,467/17, popularly known as Labor Reform, arose multiple discussions, several of which had already been targeted by the Direct Action of Unconstitutionality (ADI), such as the new article 223-G of the Consolidation of Labor Laws (CLT), contained in its Title II-A, which regulates how compensation will be granted for non-material losses in the labor sphere (BRAZIL, 2017).

The issue's constitutional relevance caused the Federal Council of the Brazilian Bar Association (CFOAB) to file, before the Supreme Court (STF), ADI No. 6069, in order to question the repairing parameters. The trial on the matter is pending.

In view of this, Law No. 13,467/2017 instituted the off-balance labor damage, consisting of the payment of such compensation in order not to reproduce the scenario of very high figures as restitution for damages, since, from now on, the new article 223-G, §1 and its respective items, consider the last contractual salary of the offended to calculate the compensation for the offense suffered (BRAZIL, 2017).

Thus, if two employees suffer the same offense, in the same situation, and both resort to Labor Justice to seek judicial relief claiming non-material damage, they shall receive different amounts if they earn different salaries. In this context, it is observed that the dignity of workers is measured by the figures presented on their paycheck.

Regarding the compensation for moral damages, it should be noted that the Consolidation of Labor Laws (CLT), before undergoing these modifications, followed the Civil Code's (CC/02) rules to determine such restitution. Thus, the value of indemnity was reached based on the individual analysis of each case, added to the judge's reasoning.

However, such discretion is not present in the new legal text, for the judge is bound to article 223-G of the CLT, because it is only possible to reach the amount of compensation owned through the off-balance labor damage, a process that takes into consideration the severity of the damage and the victim's last contractual salary.

This perception of inequality, brought to the legal world by article 223-G of the CLT, provokes a series of questions about possible unconstitutionality, inequality itself, and violation of fundamental rights and guarantees, because it is allowed to unequally treat human lives according to the salary they earn.

Thus, this article intends to analyze the unconstitutionality of the new text of article 223-G, which violates several constitutional principles, such as the fundamental principle of equality and dignity of the human person, for this regulation's objective parameters of compensation enable different responses to the same offense (BRASIL, 2017).

As for the methodology used, theoretical research techniques were adopted, such as books, articles, laws, and jurisprudence – secondary sources. Moreover, the hypothetical-deductive method was elected, since the hypothesis developed consists of the violation of equality and human dignity principles by the off-balance damage in Labor Reform.

For a better analysis of the theme, the present work was divided into three parts: the first one characterizes the non-material damage and presents a historical retrospective of the damage in the Brazilian legal system, as well as the beginning of its effective application; the second part seeks to outline the non-material damage, in addition to analyzing the fundamental principles of isonomy and dignity to investigate their possible transgressions; and finally, the third part deals with the unconstitutionality of the off-balance labor damage, as well as what are the practical consequences of the article 223-G, CLT.

2. OFF-BALANCE SHEE DAMAGE: HISTORICAL RETROSPECTIVE, CONCEPT, AND CHARACTERIZATION

Before approaching Law No. 13,467/17, it is necessary to recall what the moral damage was like in the Consolidation of Labor Laws before the Labor Reform, as well as its emergence and initial incidence in Brazil (BRASIL, 2017).

Oliveira explains that claiming damages used to be considered embarrassing. However, the need to validate the emotional suffering and the repercussion of offenses of such kind in a person's life, which in several scenarios becomes more harmful than the property damage itself, transformed moral damage into something fair and refundable, demystifying all prejudice in requesting repair for violations of this nature. (OLIVEIRA, 2019, p. 260).

Considering this, Oliveira states that:

> The first thought that arises, when talking about compensation, is linked to property effects, which are financially measurable. Currently, however, the law protects not only our assets but the immaterial values of personality, that is, in addition to protecting what we have, it guards and values who we are (OLIVEIRA, 2019, p. 261).

Unfortunately, it took the Brazilian legal system some time to formally recognize the compensation for moral damage. It was the Civil Code of 1916, in its article 159, that made such reparation mandatory, although there was no distinction between the moral and the material damage at first. It used to mention only the damage itself, without the legal distinctions that are currently observed.

The compensation for non-material losses was finally recognized in 1988, by the Constitution of the Federative Republic of Brazil (CF/88) and its article 5, items V and X (BRASIL, 1988).

Soon after, article 186 of the Civil Code of 2002, expressly referred to moral damage (BRASIL, 2002), consolidating the compensation for moral damage in Brazilian legislation.

Although non-pecuniary losses are part of the daily routine of legal practitioners, as well as of the whole society, being widely discussed and applied every day, it is still necessary to agree with the words of André Gustavo Andrade, who states that "moral damage is, in fact, a concept under construction". (ANDRADE, 2003, p. 139).

Given that, it is not wise to limit the scope of moral damage, nor to stipulate what fits or does not fit into this context of damage, since the constant evolution of the law has not yet reached the damage that resides in the future. It is not possible to predict, effectively, what shall configure moral damage and what shall not, because it is possible that future violations may only be seen upfront.

After this short introduction to moral damage in Brazil, the focus on the off-balance sheet damage and its characteristics must be resumed.

The term "off-balance damage" was used in legislation and is considered inconvenient by some researchers. Oliveira argues that the term "off-balance damage" is inappropriate because "moral damage" had already been consolidated in the Brazilian legal system. Thus, by using a new term, not only does the Labor Reform cause confusion but it also legitimizes the creation of a mitigated kind of moral damage in labor-related laws (OLIVEIRA, 2017, p. 02).

Moreover, it is verified in the constitutional text itself, article 5, item V, the guaranteed right of reply in case of moral damage, not off-balance sheet damage. It is evident that the legislator sought to innovate a term that had already been widely consolidated in our legal system.

Article 223-B, of the CLT, comes to conceptualize the off-balance damage: "The pff-balance sheet damage encompasses the action or negligence that offends the moral or existential sphere of the natural or legal person, which are the exclusive holders of the right to compensation." (BRAZIL, 2017).

It is verified that the expression "off-balance sheet damage" is used to understand the other species of damage, which are: aesthetic or moral damage, damage to the personality, among others.

The aesthetic damage occurs when there is an injury, resulting from the working relationship that eventually generated an accident at work, compromising the moral integrity of the victim due to a morphological change in their body, which may or may not be a deformity, a mark, a scar, as well as any change that causes shock or impact, implying a feeling of inferiority, low self-esteem and thus, violating the dignity of the human person of that worker (OLIVEIRA, 2019, p. 311).

In this context, it is observed that the aesthetic damage is even more delicate because it is not abstract, such as moral damage or damage to personality. Instead, it is exposed to the worker and the environment around, making it inevitably harder to cope with the injury. The employee must face the result of that work accident day after day having to deal with society's repulsive looks, which certainly hurts their self-esteem.

As Oliveira says (2019, p. 313), "the aesthetic damage is shown by the body; the moral damage is felt by the soul." Thus, moral damage is strictly linked to the victim's psychological and emotional suffering as well as mental exhaustion in the face of what has occurred and its

consequences, such as psychological diseases like depression or anxiety disorder. Abstract vulnerability is certainly harder to measure, for it is only sensitive to those who feel it.

Existential damage, on the other hand, compromises the very existence of the individual. As its name suggests, it is the damage to the existence of a being, it could be called "trauma". The damage to the existence of a subject affects their whole life because there is the rupture of a project, a plan, a dream. Not only does the individual itself suffer from existential damage, but their entire family and friends, as they face a new reality with the victim.

All things considered, complete repairing of such damage is required, which is nearly impossible, since the victim's quality of life is diminished along with their well-being, due to the sudden interruption of projects and dreams. What the worker once understood as "life", is no longer possible to obtain in practice, leaving, forever, the feeling of helplessness before the new facts that now affect him.

Thus, even if the Labor Court establishes a fair and reasonable amount for compensating the existential damage suffered, still, the worker will not be widely repaired, since it is very difficult to return to the status preceding the injury.

The Superior Labor Court (TST) has been delivering the same understanding:

> Existential damage is a kind of immaterial damage. In the case of work relationships, existential damage occurs when the worker suffers damage/limitations in relation to their life outside the work environment due to illegal conduct carried out by the employer, making it impossible to practice a set of cultural, social, recreational, sports, affective, family activities, etc., or to develop their life projects in the professional, social, and personal spheres. (TST, 2018, *online*)

In addition, Feliciano and Pasqualeto state that the legislator sought to clarify the application of existential damage as a kind of off-balance damage, in so far as it is imposed by article 223-B of the CLT, which says that "an action or omission that offends the moral or existential sphere of the individual or legal entity, who are the exclusive holders of the right to reparation, causes damage of an off-balance sheet nature. " (2018, p. 02).

After these considerations regarding the species of damage that are included in the broad concept of off-balance damage, it is necessary to point out that all the aforementioned species have something in common since they are necessarily "centered on the human person in the social, economic and legal order, with its various related principles, led by the principle of the dignity of the human person", as provided by Feliciano and Pasqualeto (2018, p. 02).

Therefore, it is necessary to define the off-balance labor damage.

3. THE DEFINITION OF THE OFF-BALANCE SHEET LABOR DAMAGE

The off-balance damage is firstly regulated by article 223-A of the CLT, but the controversy is consolidated in article 223-G of said Law (BRASIL, 2017). This article initially establishes what the judge must consider when assessing the request for off-balance damage.

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This article limits the compensation for off-balance damage to objective and static guidelines, imposing legal criteria and restrictions regarding the *quantum* to be repaired.

The non-material damage has particularities, to the extent that each one feels it differently, which necessarily entails different legal consequences since the magistrate must have the sensitivity to analyze case by case. However, the legislator, in the light of the Labor Reform, ruptured this understanding, by equally addressing the compensation for the damage regardless of the case's circumstances.

It is important to observe that the compensation for the damage suffered is fair and legitimate, although nowadays there are several discussions concerning what would be the "industry of moral damage", an expression that refers to the individual who requests legal remedy solely intending to earn profit for "minor annoyances". In cases like this, it is expected that the opposing party seeks to mischaracterize the psychological damage alleged by the victim.

However, it is questioned whether human interactions have not evolved, which results in new violations of fundamental rights and guarantees, liable to compensation, or if it seeks, on the other hand, to silence off-balance sheet damages by using the mere annoyance narrative, to intimidate the injured to resort to the judiciary and seek the due reparation for the offense suffered.

Hence, it is essential that the magistrate is invested with due sensitivity to proceed with the analysis of the off-balance labor damage. After these exceptions, follow what is available in Art. 223-G of the CLT:

> Art. 223G: When assessing the request, the court shall consider: I - the nature of the protected legal interest; II - the intensity of suffering or humiliation; III - the possibility of physical or psychological overcoming; IV - the personal and social consequences of the action or omission; V - the extent and duration of the effects of the offense; VI - the conditions in which the offense or moral damage occurred; VII - the degree of intent or fault; VIII - the occurrence of spontaneous retraction; IX - the effective effort to minimize the offense; X - pardon, tacit or express; XI - the social and economic situation of the parties involved; XII - the degree of publicity of the offense.. (BRAZIL, 2017)

Feliciano and Pasqualeto (2018, p. 03) point out that such restrictions imposed by the off-balance damage are motivated by legal certainty. The Labor Court was criticized for the way the magistrates were analyzing and deciding on compensation for off-balance sheet damages.

The fact that jurisprudence used to corroborate compensations of very high figures and, often, disproportionate to the damage suffered by the worker, also motivated the legislator to act in such a way, putting an end to several related complaints filed by employers.

However, the legislative change resulting from Law No. 13,467/2017 did not observe article 7 of the CF/88, which, when listing the urban and rural workers' rights, mentioned the insurance for occupational accidents borne by the employer, as shown in item XXVIII (BRASIL, 1988).

Given this fact, it is the employer's constitutional duty to fully compensate the off-balance damage that has occurred, which is not seen in real cases, since the amount to be received as off-balance labor damage is pre-determined by art. 223-G of the CLT (BRASIL, 2017).

It is noteworthy that there will be situations in which the value established by law will not serve as a full, fair, and reasonable repair to the worker, due to the impossibility of the legal standard to reach every possible event.

Moreover, it is also observed that the principle of the judge's free conviction is no longer respected therein since the discretionary margin of the magistrate ceases to exist. It should be noted that determining compensation for off-balance labor damage is more delicate than doing it for property damage. It is in the thorough and cautious analysis that a value worthy of repair is addressed, and it is essential that the judge, when analyzing the circumstances of the case, considers a fair value.

A doctrinal divergence is observed regarding the circumstances brought by the caput of article 223-G (BRASIL, 2017). According to Silva and Lima (2017, p. 08), this article, in its caput, shall only apply to off-balance damage, which for these authors would be the sum of moral damage with existential damage, thus not fitting aesthetic or biological damage.

On the other hand, Feliciano and Pasqualeto (2018, p. 02) already defend the idea that off-balance damage is the genre, being moral damage to the person, aesthetic, and existential considered species. Thus, these authors elucidate that aesthetic damage is seen as a parting genre that does not suffer charging and is therefore not included in the list of article 223-G, of the CLT (BRASIL, 2017).

That said, the paragraphs of article 223-G, subject of greater discussion among jurists, must be analyzed. The Labor Reform establishes, in §1 of said article, that in case the motion for off-balance damage compensation is granted, the judgment will set the amount to be paid, to each of the offended, according to the following parameters:

> I - offense of a light nature, up to three times the last contractual salary of the victim;
>
> II - offense of a medium nature, up to five times the last contractual salary of the victim;
>
> III - offense of a serious nature, up to twenty times the last contractual salary of the victim;
>
> IV - offense of a very serious nature, up to fifty times the last contractual salary of the victim.
>
> § 2 - If the offended person is a legal entity, the indemnification will be fixed with observance of the same parameters established in § 1 of this article, but in relation to the contractual salary of the offender.
>
> § 3 - In the event of a recidivism between identical parties, the court may double the amount of the indemnity.'" (BRAZIL, 2017)

From the guidelines above, it is verified that the criterion for assessing the amount of compensation for the off-balance damage is the value of the last contractual salary of the victim. Setting a limit in such cases has already become a matter of discussion among law practitioners. However, the establishment of compensation based on the employee's salary as determined by the Labor Reform intrigues and raises questions of all sorts.

Initially, it is worth demonstrating that Oliveira disagrees with the so-called "taxation of off-balance sheet damage", to the extent that the word "taxation" invokes its own rule. See:

> It is worth mentioning that the doctrine and even the judicial decisions present the expression "taxation of moral damage", but we prefer saying "charge of moral damages" because the word taxation has its own meaning in legal science and bears the nature of public price, treated in the field of administrative law (OLIVEIRA, 2017, p. 11).

Provisional Measure (MP) No. 808/2017 modified this calculation base on article 223-G, through Law No. 13,467/17 (BRASIL, 2017). According to the MP, the parameter would be conditioned to the value of the maximum limit of benefits of the General Social Security System, in addition to excluding from this charge the result of death. However, this Provisional Measure has neither been converted into law nor had its effects regulated by legislative decree. Thus, MP 808/2017 expired.

Feliciano and Pasqualeto consider that although MP No. 808/2017 presented a calculation basis divergent from the current sums in the CLT, providing a better scenario for the worker who has a lower income, in addition to resolving the discriminatory aspect – which will still be addressed in this article – the pricing, in the words of the authors, "still does not consider the diversity of off-balance sheet damage and its existing extent" (FELICIANO; PASQUALETO, 2018, p. 04).

Even though the majority of doctrine has established the understanding that this pricing, or rather, stabilization of off-balance sheet damages is a setback in labor legislation, Santos argues that establishing standard parameters, as well as objective criteria, generates predictability of judicial decisions, in addition to ensuring isonomy, a principle embodied in the Federal Constitution:

> [...] in the name of the highest principles emanating from the Federal Constitution of 1988, including isonomy, legal certainty, as well as the predictability of judicial decisions, to avoid colliding, conflicting, or contradictory decisions, we consider it good to establish criteria, to parameterize the values of reparations for off-asset damage [...] (SANTOS, 2017, p. 02).

However, what is maintained as discriminatory and liable to violations of fundamental rights and guarantees is not only the restrictive nature of article 223-G of the CLT, but precisely how the classification of the off-balance labor damage occurs. Establishing that the compensation will be following the last contractual salary of the victim is like affirming that the damage suffered by the employee is measured in accordance with his income.

Several constitutional principles remain incompatible with the rule herein questioned, as well as the free conviction of the magistrate and the discretionary analysis of each case, essential to earn a fair value, worthy and capable of repairing the damage suffered. The compensation's purpose is to cover the existing damages and enable the restoration to the condition there was before the injury. However, it is rather complex to measure off-balance sheet damages.

Thus, it is observed that, because one employer has workers in several positions and functions, it occurs that each one earns their income according to the performed task. Hence, as the parameter established by the new legal device is objective, the reparation is based solely on the financial aspect of that employee.

Imperative to say that in the dynamics of employment relations, the same employer will certainly have, under their command, employees earning different salaries. If two of them suffer the same offense, in the same situation, and both resort to Labor Justice to seek remedy for the off-balance damage suffered, they will receive different amounts.

Analyzing the legislation, the discrimination is clear, as it legitimizes employees to receive discrepant treatment exclusively on account of their salaries. Such conduct violates a series of constitutional principles, such as the caput of article 5 of the CF/88, which reveals the decay brought by the Labor Reform after years of attempts to extend the labor rights.

Moreover, the legislation still fails to comply with article 944 of CC/02, which states that compensation is addressed according to the extent of the damage (BRASIL, 2002). Given this, it is unacceptable that the award calculation for off-balance damages may be based on the salary of the victim. The worker's paycheck might be disproportional to the damage caused, which might result in losses and the maintenance of the effects of the damage, as well as unfair enrichment.

In addition, the magistrate must consider the seriousness of the damage, its extent, and the offenders' financial possibilities to set a value worthy of reparation. The payment for off-balance labor damage should aim for the greatest degree of reparability that is possible, as returning to *pre-injury status*, in most cases, is very difficult. Nevertheless, reparation must be as fair as possible, so that the employee, who is not to blame for the damage suffered, is granted the opportunity to restructure life in a peaceful and dignifying way.

All things considered, one might question the best way to earn a value that is worthy of reparation for an employee who perceives a minimum wage per month, in the face of damage caused by the employer, being this a multimillion-dollar multinational, based only on the last contractual salary of the offended. The indemnity must also meet both the pedagogical and punitive aspects of the penalty. The order to award compensation for damages should discourage future unrighteous practices as well as restore the loss, at least as much as possible.

The 4th Panel of the Superior Labor Court has already ruled on the theme:

> Regarding the amount set as compensation, it is necessary to highlight the pedagogical character of the conviction for moral damage. Since Article 5, V, of the Federal Constitution is considered a criterion of proportionality between restoration and the injury inflicted on the victim, it seems appropriate to affirm that reparation, in addition to fulfilling a purpose of compensation, also bears a clear punitive character to the offending agent, intended to inhibit or discourage, by the intimidating effect of economic value, the recurrence of offense to precious immaterial property subject to legal protection. [...] .....
>
> [...] Summarizing: it is up to the judicious body, in the face of the open system of setting the value by judicial arbitration, to be guided by the reasonableness and fairness in the stipulation, avoiding: on the one hand, an exaggerated and exorbitant value, to the point of leading to a situation of unjust enrichment or leading to the financial ruin of the offending; on the other, a value so low that it is derisory and despicable, to the point of not fulfilling its pedagogical function. (TST, 2015, *online*)

Thus, it is necessary to emphasize that the charge imposed by the Labor Reform does not reach a decent and fair value of reparation. The legal certainty offered by article 223-G, of the CLT, does not corroborate the pedagogical function of reparation. So, it is difficult for the employee to earn an amount capable of truly restoring the damage only based on their last contractual salary, although this criterion is discriminatory and limiting, even if there was no discussion concerning this aspect. Yet, it is worth stating that the available legal answer is insufficient in the face of a concrete case, due to the peculiarities of each one.

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Hence, when the magistrate carries out a thorough analysis of the severity of the damage, the extent of the loss (which cannot be determined through a legal and objective parameter, due to the multitude of circumstances), the financial capacity of the offenders (which also varies from case to case) and the principle of reasonableness (the amount must not be too high, nor too low as explained before), besides inhibiting future harmful acts, it results in the compliance with the pedagogical function of the conviction.

Therefore, it is imperative to highlight these facts, as well as raise these questions, in view of the way that the new labor legislation imposed on the Brazilian employee regulation regarding off-balance damage. It is necessary that the legislation allows judicial discretion since the free conviction of the judge allows the magistrate to analyze the case with the sensitivity that is necessary for the proper application of the law, especially when unavailable or fundamental rights and guarantees are regarded.

In this sense, inhibiting the discretion of law enforcement makes all individuals stand in the same balance, without due investigation of the particularities and individualities of each situation. In view of this, such standardized treatment can reproduce a series of scenarios of inequalities and unconstitutionality, the latter being discussed in the following topic.

However, regarding the scenario of inequalities that may be installed in the labor relationship, a hypothetical example may allow better understanding. Imagine that A, a production assistant of a company, earns a salary of R$ 2,000.00 (two thousand reais) per month, whereas B, general services, same company, earns a salary of R$ 1,000.00 (one thousand reais) per month. On a hypothetical day of work, imagine that both are injured in the same way, experiencing the same psychological and physical results.

In accordance with article 223-G, §1 of CLT and the correspondent paragraphs, the magistrate must perform an analysis to indicate the nature of the offense (BRASIL, 2017). All peculiarities considered, the serious nature of the offense is confirmed, and the compensation must be calculated up to twenty times the last contractual salary of the victim. Therefore, A would receive R$ 40,000.00 (forty thousand reais) as compensation for off-balance damage, whereas B would receive the quantum indemnity of R$20,000.00 (twenty thousand reais).

It should be noted that, in the hypothetical scenario, both employees were injured in the same way and experienced the same psychological and physical results, which seriously affected their moral sphere, making the restoration to the status quo prior to injury virtually impossible, having been violated their fundamental rights and guarantees, and still, they will receive different indemnification amounts. The only basis for establishing the indemnity amount was the last contractual salary of the offended.

It was determined by the legal text that it is allowed to treat human lives unequally due to their salary. The magistrate, when analyzing the case, will not investigate all the aforementioned aspects. In a scenario worse than this, the judgment awards the off-balance damage using as a criterion the employee's income. In addition, it is necessary to discuss the situation of these employees' families in contexts where the compensation is due to the worker's death. Again, the life of the Brazilian worker is quantified according to their salary, generating different indemnities.

There is already an extralegal solution, to national repercussion, regarding these indemnifications for off-balance damage. On January 25th, 2019, Brazil had been the scene of another environmental crime due to the rupture of a dam in Brumadinho, a municipality of Minas Gerais,

which resulted in the death of – by the time of completion of this article – 270 victims, and the Fire Department is still searching for 11 missing persons. (CONECTAS, 2020).

At the time, the fatal victims of this tragedy were, for the most part, Vale employees, each with the most diverse functions, who perceived salaries of different values. According to the reading of art. 223-G, of the CLT, which does not exclude the result of death of that table, each employee would receive, in the opinion, a different amount as indemnification for extra-asset damage, since it will be measured according to the last contractual salary (BRASIL, 2017).

In addition to revolting and inhumane treatment, in the face of a situation of national notoriety and public calamity, those workers, fatal victims of negligence and recklessness of the employer, have lost their lives, their greater good, of which all fundamental rights and guarantees aim to protect and protect, leaving behind projects, dreams, family. There is irreversible dismemberment of the family, which will never live again the same plan that he considered as the ideal. Bonds of friendship are broken forever. Only the pain remains in those who stay and will sustain themselves, both emotionally and economically, in the face of such loss.

Thus, in addition to the irreparable pain of losing a family member, the family still has to face the unequal treatment it receives in the Labor Court, resulting from the pricing that the paragraphs of art. 223-G bring, to the extent that the result of death is no longer excluded from this charge, as seen in Provisional Measure No. 808/2017, which has lost its effectiveness without being converted into law. However, the Public Ministry of Labor (MPT) and Vale signed an agreement in order to obtain fair and dignified compensation for the material and moral damages that occurred.

On July 15th, 2019, this agreement was approved by the 5th Labor Court of Betim, with a forecast of R$ 1,600,000,000 (one billion and six hundred million reais). It was decided that the spouse or partner, son, mother, and father of those fatal victims, employees of Vale, would receive, individually, R $ 700,000.00 (seven hundred thousand reais), and R$ 500,000.00 (five hundred thousand reais) would regard off-balance damage, R$200,000.00 (two hundred thousand reais) as additional insurance for occupational accidents and the brothers of these victims would receive R$ 150,000.00 (one hundred and fifty thousand reais) resulting from off-balance damage. (G1, 2019).

The Public Ministry of Labor also exemplified the following family context: if the worker, victim of this tragedy, was married, had two children, and had a father, mother and two brothers, this family formed by 07 (seven) people will receive R$ 3,800,000 (three million eight hundred thousand reais), (G1, 2019).

Therefore, this was the first major case that put in check the provisions of the Labor Reform on the subject involving compensation for off-balance damage, and due to an extralegal agreement between the MPT and the offending company, it was possible to obtain a value far beyond what would be arranged as a reparation, because if there were any worker who received a minimum wage, that is, R$ 998.00 (nine hundred and ninety-eight reais), the maximum that family could receive would be R$ 49,900.00, according to art. 223-G, paragraph 1, item IV, of the CLT.

However, although there is this extralegal precedent, the Supreme Court has not yet opined on the unconstitutionality of the provision contained in Title II-A of the CLT, therefore, it remains in force and producing its effectiveness, which is why it continues with the considerations about this change resulting from Law 13.467/17 (BRASIL, 2017). It is essential to question why should

the category of workers, which is acknowledged as the hyposufficient and the weaker part of the employment relationship, bear the parameters imposed by article 223-G of the CLT? Labor legislation should impose on the employer and the employee rights and duties, in order to seek, to the greatest extent possible, fair and equitable treatment between the parties.

Thus, establishing parameters of indemnification that will be unable to achieve its purpose, that is, the reparation of damages, in addition to placing at more different levels workers and employers, ends up generating a scenario of discrimination in the legal system, since sentences will be handed down in order to promote inequality between workers for the amount corresponding to their salaries.

In view of this, it is necessary to analyze whether such discrimination and promotion of inequality is unconstitutional in the light of the Federal Constitution of 1988, which is done next.

4. THE UNCONSTITUTIONALITY OF THE TAXATION OF OFF-BALANCE SHEET DAMAGE AND THE ANALYSIS OF THE FUNDAMENTAL PRINCIPLES OF EQUALITY AND DIGNITY OF THE HUMAN PERSON

This article has been exposing how the new article 223-G, from CLT, created a scenario of inequalities and discrimination (BRASIL, 2017). It was also emphasized that the compensation stemming from off-balance damage, given the legal rule, does not achieve proper reparation, and does not seek fair and reasonable restitution. However, it is now necessary to question whether such discrimination and inequalities are unconstitutional under the provisions of the Federal Constitution of 1988.

Considering the Labor Reform, several questions and discussions arose among legal practitioners and researchers. In this exact context, several Direct Actions of Unconstitutionality (ADI) were filed, such as ADI No. 6069, filed by the Federal Council of the Brazilian Bar Association (CFOAB), with a provisional remedy request, in order to challenge articles 223-A and 223-G, §1 and §2, of the CLT. (STF, 2019, *online*).

It is worth mentioning that under similar arguments and intent as the aforementioned ones, the Association of Labor Justice Magistrates (ANAMATRA) filed ADI no. 5870. At the time, the Provisional Measure (MP) 808/2017 was in effect and shifted the off-balance labor damage base calculation to the salary cap of the National Institute of Social Security – INSS. For this reason, the Minister of the Supreme Federal Court Gilmar Mendes, rapporteur of ADI No. 6069, filed by the CFOAB, determined the thought of the cases, so that they process together. (STF, 2019, *online*).

In the motion of Direct Action of Unconstitutionality No. 6069, the CFOAB argues that:

> It has, therefore, been established that the rules in force are very harmful to the worker and do not comply with the constitutional duty of full reparation of the damage, embodied in Article 5, items V and X, as well as hurt the functional independence of magistrates from the point of view of free conviction (art. 93,

> item IX). Also, they violate the dignity of the human person (article 1, III, of the CF), among others, which is why its unconstitutionality is evident, as it shall be demonstrated (STF, 2019, *online*).

Moreover, it is also exemplified that in regard to the MP 808/2017, although stipulating the compensation in accordance with INSS's salary cap was more beneficial to the employee than the current article 223-G, of the CLT, both cases lead to conflicts and violations of "basic principles of the rule of law because they limit compensation, contradicting the article 5, items V and X, of the Federal Constitution that clearly states that the damage must be fully repaired." (STF, 2019, *online*)

Up to the present date, this ADI's trial is pending as it is currently "held by the rapporteur under advisement" since August 28th, 2019, as extracted from the electronic system of public procedural consultation of the Supreme Court.

Regarding the unconstitutionality of the debated legal provision, it is possible to find several arguments that support such understanding. The 2nd Journey of Material and Procedural Labor Law, centered on the Labor Reform (Law No. 13,467/17), approved Statement No. 18, which provides for the exclusive application of the rule laid down in Title II-A of the CLT, as well as declared that there is discriminatory treatment.

> **OFF-BALANCE LABOR DAMAGE: EXCLUSIVITY OF CRITERIA** Exclusive application of the new provisions of Title II-A of CLT to the reparation of off-balance labor damages: unconstitutionality. The moral sphere of human persons is content of human dignity value (Art. 1, III, of the CF) and, as such, it cannot suffer restriction to broad and integral reparation when violated, and the State's duty is to protect them in the occurrence of illegalities causing off-balance sheet damage in labor relations. All existing rules in the legal system that may evoke the maximum constitutional effectiveness to the principle of the dignity of the human person (Art. 5, V and X, of the CF) must be applied. The literal interpretation of article 223-A of the CLT would result in unfair discriminatory treatment of employees, being unconstitutional for the offense to the articles 1, III; 3, IV; 5, caput and items V and X and 7, caput, all of them from Federal Constitution (AMATRA, 2018).

Given these facts, it is verified that restricting the scope of compensation for off-balance labor damage, as attempted by the legislator in article 223-A, of the CLT, remains incompatible with what the Federal Constitution proposes. In the previous item of the present study, it was demonstrated that when applying such legislation, the magistrate is unable to undergo what would be crucial steps to measure the amount to be restored as off-balance damage, such as the severity of the offense, the dimension of the losses, the financial capacity of the offenders, the principle of reasonability and the compliance with the pedagogical aspect of the conviction.

Thus, there is no way to expect the Brazilian employee to be repaired, even minimally, in view of the possibilities currently presented under the Title II-A of CLT (BRASIL, 2017). This statement comes across several constitutional principles and guarantees, such as the principle of full compensation for damage, provided for in article 5, items V and X, of CF/88, according to which "the right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or damages to the image". Therefore, it is not conceivable that such calculation is carried out based on static standards, for the magistrate is responsible for proceeding with a particular and individual analysis of each case.

Evident is the discrimination of article 223-G of the CLT (BRASIL, 2017), which can be related to debates of the VII Civil Law Day of the Federal Court of Justice, opportunity when Statement No. 588 was approved. It attests that "the patrimony of the offended cannot function as a preponderant parameter for the arbitration of compensation for off-balance damage" (BRAZIL , 2015). In view of this, it was understood that the subject's income can be considered, as long as it is not the only parameter, nor the most important criterion at the time of the magistrate's analysis, under penalty of violating the aforementioned principle of full compensation for the damage.

In order to corroborate this understanding, Oliveira says:

> The inclusion in the Federal Constitution of 1988 of the right to reparation for moral damages indicated that injuries of this nature should be fully compensated, without the ties of limiting parameters. According to Article 5, V, the award must be proportional to the injury; as it is not possible to limit the intensity of the offense, it is also not possible to limit the amount of compensation, under penalty of creating, in certain cases, a disproportionate reparation, for the benefit of the aggressor [...] (OLIVEIRA, 2017, p. 12).

Furthermore, as stated by article 5, item X, of the Federal Constitution, " – the privacy, private life, honor, and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured". It should be noted that the rule herein questioned does not deny that compensation is due for off-balance damage, however, it remains impracticable to apply a reparation that does not comply with the constitutional guidelines, due to the limits imposed on the employee's compensation, which, according to article 223-G, shall be calculated conforming to the last contractual salary (BRASIL, 2017).

Therefore, it is imperative to affirm that the principle of full compensation for the damage is clearly violated, as it remains impossible to restore the status preceding the injury.

Article 7, *caput*, CF/88, presents the "rights of urban and rural workers, among others that aim to improve their social conditions". Item XXVIII encompasses "occupational accident insurance, to be paid for by the employer, without excluding the employer's liability for indemnity in the event of malice or fault; " (BRASIL, 1988). Therefore, it is the employee's right to obtain fair and dignified compensation for the damage suffered.

It is necessary to emphasize that when referring to the "fair indemnity", this implies that the amount received as reparation for off-balance labor damage does not aim at the worker's enrichment. A refund is sought in order to restore the status preceding the offense to the greatest extent possible, enabling the victim to seek mechanisms for medical and psychiatric treatment, psychotherapy, among others.

Art. 223-G of CLT (BRASIL, 2017) disrespects the constitutional text. Working is a social right, as provided for in article 6 of CF/88, thus, a fundamental right. Therefore, the law should go beyond the code, and mechanisms for its effective implementation should be enabled.

Due to its nature as a fundamental right, working is also a human right, being regulated by the Universal Declaration of Human Rights (UDHR) in the sense that all persons, without any distinction, have the right to decent and fair working conditions, which also regards what is herein discussed. A working environment that fails to allow the worker to seek compensation for any damages that may have proceeded, fails the UDHR itself. Its article 23 states:

> (1) Everyone has the **right to work**, to free choice of employment, to **just and favorable conditions of work**, and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and join trade unions for the protection of his interests. (UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948) (bold added).

It is imperative to consider the constitutional principles of equality and the dignity of the human person in light of the evidence of a constitutional violation. As exhaustively explained herein, the chances of a court order granting compensation for off-balance damage differently to workers with divergent incomes, is not only highly likely but also possible.

Thus, how can we not verify express discrimination, legitimized by the Judiciary itself and corroborated by labor legislation that conditions the damage compensation to the victim's salary? It is a direct and explicit offense to the principle of equality, embodied in the caput of Art. 5 of the CRFB/88, for "**all persons are equal before the law,** without any distinction whatsoever, **Brazilians and foreigners residing in the country being ensured of inviolability of the right to […] equality**." (bold added).

If the Constitutional Charter, guardian of all fundamental rights and guarantees, expressly prohibits the inviolability of the right to isonomic treatment among all, an attempt to obtain ordinary law, in this case, the CLT, to allow discriminatory and unequal treatment motivated by the worker's income would be frustrated. It is imperative to point out that there is no possibility of there being discriminatory treatment because there will always be, in every case, a party harmed by the decision of the magistrate who grants a value, as compensation for non-pecuniary damage, different from another, only for the value of his salary.

The new legislation fell back on the promotion of fundamental rights and guarantees. Saying that it legitimizes degrading and inhuman treatment is an understatement. No one is better, greater, or superior, in any way, to anyone, by the value of their income.

Feliciano and Pasqualeto share the following understanding:

> In this sense, there is no way to understand advanced or modernizing, legislation that tariffs and limits non-measurable damages, that disregards the principles of equality and proportionality and that makes labor legislation go back for centuries (FELICIANO; PASQUALETO, 2018, p. 08).

Moreover, the worker's income, under no circumstances, should be a criterion for the magistrate's analysis regarding compensation for off-balance damage. In the wise words of Oliveira (2017, p. 12), "Why establish several indemnities, according to the victim's income, for off-balance sheet offenses of the same intensity and with the same degree of severity?".

It is necessary to emphasize that one of the fundamental objectives of the Federative Republic of Brazil, as stated in article 3 of the CF/88, item III, is precisely the reduction of social inequalities (BRASIL, 1988). However, the new article 223-G proposes, in the 21st century, a new form of social inequality.

All things considered, solely with what has been explained, it would be possible to discuss the unconstitutionality of the provision in question, given that the fundamental principle of

equality had been put in check, violating guarantees and fundamental rights, such as the right to broad and full indemnification.

The form of compensation for off-balance damage should consider the damage itself and its circumstances. The magistrate's analysis should be focused on the fact, in the case, what occurred and how it occurred, and under no circumstances should one take into question, as a basis of calculation of reparation, the salary of the offended.

Miranda and Lima defend this same perspective by stating:

> [...] it is possible that the device is considered unconstitutional at the time of its validity, because the off-balance sheet damages must be fixed on the basis of the damage itself, not by the worker's salary, under penalty of losing their extra-patrimonial nature, because they relate to the damage to morals suffered by the worker, under penalty of violation of the principle of isonomy (MIRANDA; LIMA, 2017, p. 09).

In addition to the principle of equality, it must also be affirmed that the principle of the dignity of the human person conflicts with what dictates the new labor legislation. First, it is emphasized that article 1 of the CF/88, in its item III, states that one of the foundations of the Federative Republic of Brazil is, precisely, the dignity of the human person (BRASIL, 1988).

It must be ratified that the dignity of a being is unavailable, irreplaceable, and irreducible. It cannot be the object of sale, nor is there any possibility of anyone giving up their dignity, precisely because it is inherent in being because all persons are born invested in this fundamental principle. In this sense, all laws must excel in provisions that respect and encourage the constant respect, progress, and fulfillment of such dignity.

Thus, if there is any legislative change, especially if it is a relevant change, such as the Labor Reform, which provided a series of drastic changes in the text of the CLT, the thematic coherence of the new law with the Federal Constitution must be observed, which is not seen in the contested scenario. The legislator's goal of charging off-balance damage based on the last contractual salary of the offended must be questioned.

In addition to failing to meet the basic purposes of the indemnity, such as the severity of the damage, the size of the losses suffered, and the financial capacity of the offenders, the legal text standardizes that the income of the Brazilian worker shall serve as the basis for reaching an amount of indemnity for off-balance damage, which occurs, precisely, when the worker's dignity is violated.

It is necessary to exemplify that the dignity of a human being encompasses all the factors essential to a balanced, fair life with individual guarantees and rights. Thus, human dignity is disrespected when life events lead to a shock in this individual's psychic balance, which asks for compensation. It has already been explained in the present research, preferably in item 02, that this mental exhaustion can cause several diseases, such as depression, anxiety disorder, and/or panic syndrome, being these pathologies difficult to treat and sensitive only to those who feel. They can destroy a whole life, end projects, and dismantle families.

Therefore, any legislation that seeks to charge compensation for off-balance damage is unacceptable, precisely because of the subjective and divergent nature of such compensation, since each person feels differently. It is not possible to nationalize, nor to establish a single parameter for damage that does not have such precise accuracy. In fact, this kind of psychic

offense is not solved with mathematical calculations. The value attributed to the worker as a reparation must attempt to provide a dignified, harmonious, and fair life to the greatest extent possible, in respect of the dignity of the human person and the fundamental principle of equality.

The Supreme Federal Court ruled on this matter in the Charge for Non-Compliance with Fundamental Precept (ADPF) No. 130, which referred to Press Law No. 5,250/1967, whose Chapter VI "Civil Liability", especially the articles 51, 52 and 56, sought to charge the moral offense that might be committed by the press. In the decision, the Supreme Court pointed out the need to observe the fundamental principles of equality and reasonability when it comes to fixing compensation for moral damage.

This is the text of article 51 provided by this law:

> Art. 51. **The civil liability of** the professional journalist who contributes to the damage of negligence, malpractice, or recklessness, **is limited**, in each writing, transmission, or news: I - to 2 minimum wages of the region, in the case of publication or transmission of false news, or disclosure of true truncated or misrepresented fact (art. 16, ns. II and IV). II - five minimum wages of the region, in cases of publication or transmission offending the dignity or deca of one person; III - to 10 minimum wages of the region, in cases of the imputation of fact offensive to the reputation of someone; IV - to 20 minimum wages of the region, in cases of false imputation of crime to someone, or imputation of a true crime, in cases where the law does not allow the exception of the truth (art. 49, § 1). (bold added).

Analyzing the ADPF no. 130, it is necessary to enforce that although it regards a slightly different theme from the one herein debated, they are certainly correlated, since both deal with off-balance damages and in both cases, the same consequences can be observed – violation of fundamental principles such as equality, the dignity of the human person and proportionality, as well as the principle of full reparation for damage. Also, and also provides a scenario of inequalities and discrimination.

Given these considerations, the vote of Minister Ricardo Lewandowski filed into the ADPF records, is worth mentioning:

> [...] the principle of proportionality, as explained in that constitutional provision, can only materialize in the face of a specific case. That is, do not lead to a legal aprioristic discipline, which takes into account abstract models of conduct, since the universe of social communication constitutes a dynamic and multifaceted reality, constantly evolving. [...]
>
> .....
>
> [...] In other words, I do not think it is possible for the ordinary legislator to establish, in advance, the material limits of the right of retorsion, given the myriad expressions that can present, in daily life, the injuries conveyed by the media in its various aspects (STF, 2009, *online*).

It may be inferred from the excerpts above, that the effective realization of the principle of proportionality, which avoids exaggerations or insufficiencies in the law, only occurs according to the particularities of each case, therefore, it is necessary that the magistrate, faced with a concrete situation, addresses the fairest and most dignified value as reparation for the injury suffered, in a way that any attempt of limitation by labor law or standardization of compensation does not prevail.

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Therefore, to abstractly analyze the compensation for damage, as if all present and future cases were fully covered by the taxation of the labor legislation, and to believe that article 223-G of the CLT is capable of culminating in a dignified and fair reparation, is another inadmissible attempt of the legislator to put all imaginable and unimaginable situations under the same weight, which is not only impossible, incomprehensible, and impractical but also unconstitutional, because it violates a series of individual rights and guarantees by establishing that a person's compensation will be tied to their last salary, allowing infinite hypotheses of affronts to human and fundamental rights.

Thus, the dynamicity of relations does not allow any legislative framework to restrain how compensation shall take place, since it may be granted in an inferior way than it should have been, reproducing inequalities and discrimination.

Moreover, this discussion around the Press Law culminated in Precedent 281 of the Superior Court of Justice, which states that "compensation for moral damage is not subject to the taxation provided for in the Press Law.". Thus, once again, it is envisioned the understanding of the Superior Courts on the theme around the taxation for off-balance damage, confirming that the standardization of indemnifications imposed by the CLT is harmful to labor rights.

5. FINAL CONSIDERATIONS

The worker is in an unfavorable position compared to the employer, who most of time, has greater technical, legal, and financial possibilities to face labor lawsuits. It cannot be allowed that, in the name of an alleged economic advance for the Brazilian State, labor and fundamental rights are mitigated and constitutional principles violated.

However, if the Constitutional Law stipulates equality between all, the CLT, ordinary law, could not treat the matter differently, as it has been exhaustively exemplified in the present work. Changes must be carried out in the text of Law No. 13,467/17 (Labor Reform), so as to constantly promote development in fundamental and individual rights and guarantees.

Moreover, it was observed in the present study that there are several jurisprudential understandings concerning the subject, in particular, the ADPF No. 130, which considered unconstitutional the objective taxation of moral damage in Press Law No. 5,250/1967. Also, several statements, aiming to challenge the text of article 223-G, CLT, and to avoid the violation of fundamental guarantees, were approved. It is worth mentioning the extra-legal solution promoted by the Labor District Attorney's Office and Vale, in order to repair, in the fairest and most dignifying way possible, the relatives of the victims of the tragedy in Brumadinho.

Therefore, if the current legislation corroborates judicial decisions that promote inequality among employees, both the Federal Constitution and the Universal Declaration of Human Rights are being violated. The fight on behalf of labor rights cannot cease, and rules that disrespect the Consolidation of Labor Laws (CLT) should not be allowed.

In view of what was herein exposed, it is unquestionable the violation of several fundamental principles, such as the principle of isonomy, as stated by article 5 of the Federal Constitution,

which is assertive in declaring unconditional equality before the law, without any distinction, as well as the dignity of the human person, which is one of the foundations of the Federative Republic of Brazil in accordance with article 1, item III of the CRFB/88.

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