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Parâmetros de indenização dos danos morais no Direito do Trabalho

Parámetros de la indemnización por daños morales en el Derecho del Trabajo

Parameters of compensation for moral damages in Labor Law

Othon de Azevedo Lopes[1]

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1 Effective Professor and Vice-Director at the Law College at the Brasília University. Doctor in Law and State Philosophy at the Pontifical Catholic University of São Paulo.

1 Professor efetivo e Vice-Diretor da Faculdade de Direito da Universidade de Brasília. Doutor em filosofia do Direito e do Estado da Pontifícia Universidade Católica de São Paulo.

https://orcid.org/0000-0001-8057-5936

RESUMO

O presente artigo tem como objetivo analisar os parâmetros para quantificação das condenações por danos morais introduzidos pela Reforma Trabalhista (Lei nº 13.467/2017) e busca avaliar se estes parâmetros contribuem para a proteção simbólica da personalidade. O artigo se inicia com uma reconstrução histórica do instituto do dano moral e apresenta discussão sobre seu legado para nossa sociedade e para o Direito Privado. Em seguida, a reflexão situa os danos morais dentro do marco da proteção à dignidade humana e apresenta seus desdobramentos para os direitos da personalidade. Posteriormente, apresenta-se discussão jurídica sobre o instituto do dano moral individual e o papel das sanções de natureza civil, introduzidas historicamente pelo Direito Moderno, na proteção dos direitos da personalidade. Por fim, à luz das reflexões teóricas sobre o dano moral, o artigo avalia as inovações trazidas pela Reforma Trabalhista quanto aos parâmetros de quantificação dos danos morais e se tais inovações permitem interpretação conforme da legislação vigente sobre dano moral.

PALAVRAS-CHAVE: Dano moral. Direitos da Personalidade. Reforma Trabalhista. Critérios para fixação. Função preventiva fiduciária.

ABSTRACT

The purpose of this article is to analyze the parameters for quantifying moral damages convictions introduced by the Labor Reform (Law No. 13.467/2017) and seeks to evaluate whether these parameters contribute to the symbolic protection of the personality. The article begins with a historical reconstruction of the institute of Moral Damage and discusses its legacy for our society and for Private Law. Next, the reflection places moral damages within the framework of the protection of human dignity and presents their consequences for the rights of the personality. Subsequently, a legal discussion is presented on the institute of individual moral damages and the role of sanctions of a civil nature, historically introduced by Modern Law, in the protection of personality rights. Finally, in light of the theoretical reflections on moral damages, the article evaluates the innovations brought by the Labor Reform regarding the parameters of

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quantification of moral damages and whether such innovations allow interpretation according to the current legislation on moral damages.

KEYWORDS: Moral damage. Personality Rights. Labor Reform. Criteria for fixation. Fiduciary preventive function.

RESUMEN

El propósito de este artículo es analizar los parámetros para cuantificar las condenas por daño moral introducidas por la Reforma Laboral (Ley No. 13.467/2017) y busca evaluar si estos parámetros contribuyen a la protección simbólica de la personalidad. El artículo comienza con una reconstrucción histórica del instituto de Daño Moral y discute su legado para nuestra sociedad y para el Derecho Privado. A continuación, la reflexión sitúa el daño moral en el marco de la protección de la dignidad humana y presenta sus consecuencias para los derechos de la personalidad. Posteriormente, se presenta una discusión jurídica sobre el instituto del daño moral individual y el papel de las sanciones de carácter civil, históricamente introducidas por el Derecho moderno, en la protección de los derechos de la personalidad. Finalmente, a la luz de las reflexiones teóricas sobre el daño moral, el artículo evalúa las innovaciones aportadas por la Reforma Laboral en cuanto a los parámetros de cuantificación del daño moral y si tales innovaciones permiten la interpretación de acuerdo con la legislación vigente sobre daño moral.

PALABRAS CLAVE: Daño moral. Derechos de la personalidad. Reforma Laboral. Criterios de fijación. Función fiduciaria preventiva.

INTRODUCTION

The Federal Constitution of 1988, in its art. 5, X, affirmed the indemnity for moral damages. This same charter inaugurated a Democratic Rule of Law, which, in addition to the guarantees of democratic procedure and the forms of the rule of law, brought a generous and ambitious project to transform legacy society into the aspirations of the postwar European welfare states at the heart of which was the dignity of the human person. Thus, a constitutional text was shown, which inserted civil liability in another plan of debate and construction.

In a complex society and in a scenario of transition to a post-positivist conception of law, in which a fluid and ethical conception of fundamental rights thereby predominates, civil responsibility assumes a central role in the organization of social relations. The social order structure emphasizes the role of subject of interests, that is, an individual who constantly seeks to maximize their welfare, and the judiciary is also an arena for this.

The widespread behavior of this subject of interest is an instrumental action, in which the whole environment, including other people, is a means of maximizing well-being. The first good put at risk by this approach is the dignity of the human person, which demands that all human beings are treated as ends in themselves. The Judiciary has the role of arbitrator of this conflict between the subject of interest, in the selfish determination of their freedom, and the subject of law, whose dignity is indispensable.

Within this approach, individual moral harm poses nontrivial problems for its application. It turns out that the moral damage imposes a reorganization for the civil liability, that, as reflected by art. 944 of the Civil Code, was based on the firm criterion that compensation should be measured by[1]. Material damage deals with available property rights, while moral damage deals with off-balance-sheet and unavailable rights. They are two completely different categories.

Its meeting in the field of civil liability is due to the evolution of the Aquilian liability, which has led to a general rule of the obligation to compensate the culpable damage or arising from a risky activity. It is the existence of an open rule as a source of the obligation of compensation that justifies the inclusion of moral damages within the civil liability, as an instrument of materialization of the fluid list of rights that make up the construction of personality, as a plastic sphere of the construction of the dignity of the human person.

In labor law, the issue assumed importance in the late 1990s, when the Labor Court began to judge material and moral damages, which was legitimized by Constitutional Amendment No. 45/2004. The volume of demands made the issue one of the concerns of the labor reform, introduced by Act No. 13,467/2017, which dedicated a title to address the issue.[2]

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[1] The penalty is distinguished from compensation in that the latter is “carried out to compensate (indemnify) what is wrongful” (Kelsen, Hans. *Teoria Pura do Direito.* Trad. João Batista Machado. 3. ed. Coimbra: Armênio Amado — Editor, successor, 1974, p. 164).

[2] “Art. 223-A. Only the provisions of this Title apply to the repair of off-balance sheet damages arising from the employment relationship.’

‘Art. 223-B. Damages of an off-balance sheet nature cause an act or omission that offends the moral or existential sphere of the individual or entity, which are the exclusive holders of the right to reparation.’

‘Art. 223-C. Honor, image, intimacy, freedom of action, self-esteem, sexuality, health, leisure and physical integrity are the legally protected property inherent in the individual.’

‘Art. 223-D. Image, brand, name, business secret and confidentiality of correspondence are legally protected assets inherent to the legal entity.’

The innovations introduced by the legislature are being the subject of intense debate, due to the specific enunciation of the rights of the personality subject to moral damage and the legal gradation of the condemnation parameters linked to the contractual wage. In labor law, the subject is even more delicate, due to the constitutive asymmetry of the employment relationship, in which the employee presents themselves as hyposufficient, therefore vulnerable to abuse by the employer.

Hence, the greater need for the protection of personality rights, as unfolding of fundamental rights in the private sphere, since the instrumentalizing compulsion of capitalist society endangers the dignity of the human person. Thus, a firm and clear action by the Labor Judiciary in the consolidation of personality rights is required. Therefore, the question to be

'Art. 223-E. Offenders are liable to all those who have contributed to the offense against the protected legal property, in proportion to the action or omission.'
'Art. 223-F. Compensation for off-balance-sheet damages may be claimed cumulatively with compensation for material damage arising from the same injurious act.
§ 1. If there are accumulated claims, the court, when issuing the decision, shall break down the amounts of indemnities for property damages and compensations for off-balance sheet damages.
§ 2. The composition of losses and damages, including loss of profits and emerging damages, does not interfere with the assessment of off-balance sheet damages.
Art. 223-G. In assessing the claim, the court will consider:
I - the nature of the protected legal property;
II - the intensity of suffering or humiliation;
III - the possibility of physical or psychological overcoming;
IV - the personal and social reflexes of the action or omission;
V - the extent and duration of the effects of the offense;
VI - the conditions under which the offense or moral prejudice occurred;
VII - the degree of deceit or guilt;
VIII - the occurrence of spontaneous retraction;
IX - the effective effort to minimize the offense;
X - forgiveness, tacit or expressed;
XI - the social and economic situation of the parties involved;
XII - the degree of publicity of the offense.
§ 1. If the claim is upheld, the court shall determine the indemnity to be paid to each of the offended members, in one of the following parameters, without any accumulation:
I - offense of a mild nature, up to three times the last contractual wage of the offended;
II - average offense, up to five times the last contractual salary of the offended;
III - serious offense, up to twenty times the last contractual salary of the offended;
IV - offense of a very serious nature, up to fifty times the last contractual wage of the offended.
§ 2. If the offended person is a legal entity, the indemnity shall be fixed in compliance with the same parameters established in § 1 of this article, but in relation to the offender's contractual salary.
§ 3. In the recurrence between identical parties, the judgment may double the amount of the indemnity."

answered by this article is whether, in any way, the parameters introduced by Act No. 13.467 for moral damages contribute to the symbolic protection of personality.

The first step in answering the question will be a historical self-reflection about the legacy that constitutes moral damage in our society. The second one will be to place moral damages within the framework of the dignity of the human person and its unfolding in Private Law, which are the rights of personality. The third will be to expose the roles of sanctions and, afterwards, showing how they provide parameters for quantifying the conviction in moral damages, showing how the labor reform is situated in such a context, to conclude that a consistent interpretation of the current legislation is possible.

1 INDIVIDUAL MORAL DAMAGE

The moral damage, not by chance, was accepted in the constitutional text, art. 5, X. It is that it has a significant role in building the autonomy and dignity of the human person, especially in the private sphere. The constitutional project of a Democratic Rule of Law, which retains a dogmatic core, namely the idea of autonomy[3], it demands the horizontal effectiveness of fundamental rights and suitable instruments to sanction their aggression. Thus, exposing the circulation of meaning that occurs between moral damages and the Democratic Rule of Law, which has in the dignity of the human person one of its pillars, provides a rich theoretical material for organizing and guiding civil liability, removing casuism and the uncompromising resource to liability as a means of unjust enrichment.

1.1 Historical Reconstruction

It is common among scholars of moral damage to begin their historical reconstruction in ancient times[4]. However, this cut poses risks for building short bridges between such different societies. Admittedly, in ancient times there was responsibility for offending non-

[3] HABERMAS, Jürgen. *Factidad y Validez.* Trad. Manuel Jiménez Redondo. 3. ed. Madri: Editorial Trotta, , 2001.
[4] This is what is stated by SILVA, Wilson de Melo. *O dano moral e a sua reparação.* Rio de Janeiro: Forense, 1955, p. 21 e ss.

patrimonial property. The problem is that such goods were defined above all by an amalgam of religious traditions and kinship ties. In such a context, in these societies, honor itself pointed to the collectivity maintained by such mystical ties of loyalty and blood.

The contrast with the honor of contemporary society, which is mainly an individual good, of each person, already allows us to glimpse the difficulties of the enterprise to recover the moral damage from antiquity. Indeed, the great difficulty in constructing ways of communication between the meanings of such a period and those of present times is that the very notion of the individual was diluted within the social body.

Therefore, the historical self-reflection of the present work takes as its initial mark the period of pregnancy and formation of the modern conception of the individual. In fact, even starting the study from the Modern Age, a warning is necessary about the emergence of the notions of moral rights and rights of personality:

> It must be understood at the onset that the two notions [moral rights and rights of personality] are relatively recent. If we can find common ancestors in Roman law, the school of natural and peoples' law, or Kant's philosophy, it is only the prehistory of such concepts. Among the personality attributes protected today, only life, physical integrity, and honor were then taken into account in the early nineteenth century. However, it is mainly philosophers who are interested in them, while jurists, when speaking of them, consider that their protections are in the field of criminal law.[5]

Indeed, it is in the second half of the nineteenth century that jurists of private law, from the conceptions of liberty and dignity of the human person of the philosophers of the seventeenth and eighteenth centuries, came to accept the idea of protection of the immaterial personal interests of the individual by Private right.

1.1.1 Liberal Subjective Rights (Property) and Moral Damage in France

[5] Free translation by LUCAS-SCHLOETTER, Agnes. *Droit moral et droit de la personalité:* – étude de droit comparé français et allemand. Aix-en-Provence: Presses Universitaires D´aix-marseille – PUAM, 2002, T. I, p. 29.

The granting of the Civil Code in France in 1804 was a milestone in legal history. Napoleon's Code affirmed the individualistic values, from the legal-labor idea of protecting the freedom of the French Revolution, particularly in the contractual and economic sphere.[6] It was the Civil Code that introduced bourgeois equality, especially in recognizing private property with absolute contours and recognizing private autonomy by placing contracts at the same level as the law (art. 1,134). However, on the abstract rights of personality, the French Civil Code had no specific provision, which inhibited doctrinal discussions on the subject.

Property occupied a prominent position in such a Code and property was a keyword in its text.[7] It was an *inviolable and sacred right*, in accordance with the 1789 Declaration of Human and Citizen's Rights[8], and therefore an attribute of the human person. The centrality of property was so significant that French legal literature at the time dealt with freedom and personality from the concept of property. It is the case of Troplong: “property is man's freedom exercised over physical nature”[9]. In a similar sense, Aubry et Rau: “A man's right to his patrimony is a property right that has its foundation in his own personality. Patrimony is, ultimately, no more than man's personality placed in relation to the objects over which there may be rights to be exercised.”[10]

Ultimately, the property extended to objects other than its own application. Man was conceived as the owner of himself, his name, his body, his honor, and his creative faculties. Property occupied the space of all debates. Thus, in the first three quarters of the nineteenth century, bodily integrity, honor, and name were protected as decompositions of property rights or criminal law. On the other hand, the broad formulation of the general rule of the obligation to indemnify inserted in art. 1382 of the French Civil Code made it possible to resolve most of the conflicts arising from offenses to name, image, and honor without having

[6] WIEACKER, Franz. *História del derecho privado de la Edad Moderna.* Madri: Aquilar: 1957, p. 317.
[7] LUCAS-SCHLOETTER, op. cit., T. I, p. 46.
[8] The art. 17 of this statement reads as follows: “Since property is an inviolable and sacred right, no one may be deprived of it except when the public need, legally verified, clearly requires it, and on the condition of a fair and prior indemnity” *COMPARATO, op. cit., p. 153).
[9] *Apud* LUCAS-SCHLOETTER, op. cit., T. I, p. 47.
[10] *Apud* Same. Ibsame.

to determine the nature of the powers of individuals over such aspects of their personality. Ownership was a concept large enough to encompass them.

The breadth of the wording of art. 1382, coupled with the doctrinal breadth of the concept of property, allowed the indemnity to be set in cash as of June 25, 1833. The Assembled Chambers of Civil and Criminal Jurisdiction of the Court of Cassation, on that date, “considered that the moral damage should, in principle, be repaired in the same way as all damage.”[11] Likewise, the legislator himself established specific cases of compensation for moral damages, as in the press laws of July 29, 1881 and, in matters of defamation and injury, from July 12, 1905.[12]

In this context, the first notions about personality rights appeared in French law only in the last years of the nineteenth century, as demonstrated by authors such as Bazille et Constant, Beaussire, Boistel[13]. However, the first consistent work on personality rights was that of Bérard in 1902, which listed copyright, right to honor, right to name, and right to physiognomy. Its purpose was to establish that French jurisprudence “recognized certain rights to the human person as such, apart from offenses against the property”[14]. A From then on, the notion of personality rights would be imposed doctrinally and jurisprudentially, until in 1991 the legislator himself[15], albeit incidentally, used the expression to prevent trademarks offending personality rights from being registered.

Thus, the way in which property, as understood by most French Civil Code scholars, metonymically encompassed the material and immaterial sphere of protection of the individual and his freedom, enabling the French courts to receive compensation from an early age offenses to exclusively moral rights.

1.1.2 Personality rights and moral damages in Germany

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[11] TORNEAU, Philippe e CADIET, Loïc. *Droit de la responsabilité et des contrats.* Paris: Dalloz, 2002, p. 408. No mesmo sentido, JOURDAIN, Patrice. *Lês príncipes de la responsabilité civile.* 5. ed. Paris: Dalloz, 2000, p. 139.

[12] TORNEAU, Philippe e CADIET, Loïc, op. cit., p. 409.

[13] LUCAS-SCHLOETTER, op. cit. T. I, p. 47.

[14] *Apud* LUCAS-SCHLOETTER, op. cit. T. I, p. 86.

[15] at art. 4 of L. 711-4 CPI (LUCAS-SCHLOETTER, op. cit. T. I, p. 131).

Unlike in France, nineteenth-century German civil law was not dominated by the notion of property. Maintaining fidelity to the romanistic conception, a property for the historical school and its pandectistic unfolding was limited to corporeal things. For Savigny, recognition of a property right over man would lead to the legitimation of suicide.[16] It was this refusal to extend the notion of property to immaterial goods that allowed the development of personality rights and moral rights in the context of private law.

Savigny perfectly recognized the existence, along with material goods, of a moral heritage. They were innate goods as opposed to acquired goods. It turns out that, for such a thinker of the historical school of law, the effective protection of such rights would not be properly private law.[17]Pursuant to the words of Savigny[18]:

> Generally, the powers inherent in man are united among the rights, that is, the rights that the quality of man has given to the individual, the right to come and go, to respect to one's person, that is, the various manifestations of freedom. They are rights originating from the individual, innate goods. These prerogatives do not fall within the sphere of private law.

For Savigny, clearly influenced by Kant[19], These rights were above private law and did not need to be upheld or defined by positive laws. He conceived of some positive law institutions as possible, protecting certain immaterial prerogatives of human beings against offenses of their fellow men, such as the sanctioning laws of defamation, but they only applied the principle of the inviolability of the human person to certain specific situations. Thus, discussions about personality appeared to be linked and restricted mainly to a right to personality, that is, to a key right to be recognized as a person, and therefore to be subject to rights under private law.[20]

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[16] *Apud* Same, p.60.

[17] DORVILLE, Armand. De l'interêt moral dans les obligations. In CARVAL, Suzanne. *La construction de la responsabilité civile.* Paris: PUF, 2001, p. 269.

[18] *Apud.* Same as before, p. 270.

[19] KANT. *Fondazione della Metafísica dei Costumi.* Trad. Pietro Chiodi. Roma: Laterza, 1980, p. 68; KANT. *Doutrina do direito.* São Paulo: Ícone, 1993, p. 176.

[20] In the following excerpt from Savigny (SAVIGNY, M.F.C of. System of the current Roman derecho. Trad. Jacinto Meia and Mauel Poley T.I. Madri: Editorial Center of Cóngora, as a subject of law: "every right is the sanction of

It is on this basis of personality right, with the sense of legal capacity, that the other personality rights would be developed. As for Puchta[21], there has been an extension of the right to personality (*Recht der Persönlichkeit*) to understand the legal capacity and the right to honor.

However, it was with Karl Gareis, in 1877,[22] that personality rights have been systematized as a category of subjective rights with definition and attributes close to those of today, as private, absolute subjective rights, such as real rights and, therefore, opposable *erga omnes*. The basis of personality rights would be that each subject has the right to see his or her individuality recognized as such. Although with marked differences, they could be classified into three categories: 1) rights of individuals to maintain their existence: to life, integrity and an activity; 2) rights of identity of the individual: to name, trademark rights and protection of honor 3) rights of authenticity and enjoyment of a benefit: copyright and inventor.

Otto von Gierke had the great merit of disclosing such rights, which he defined as "rights that give the holder control over a part of their own personal sphere."[23] They were absolute private rights that understood the power to prevent any other from interfering in that protected sphere. To protect them, in the civil sphere, their holder would have the right to obtain injunctive and condemnatory measures against possible offenses. They were highly personal, being born initially with a determined person and disappearing with it. They were, therefore, undisposable at first, although in some cases such as copyright and inventor rights there could be their transfer.

In 1900, the BGB (*Bürgerliche Gesetzbuch*), the German Civil Code, came into force, protecting, within the framework of civil liability (§ 823), life, body, health and freedom.[24]

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moral freedom inherent in rational being (§ 4, 9, 520, and therefore the idea of person or subject of law is confused with the idea of man, to formulate the primitive identity of both ideas in these terms: every individual, and only the individual, has the capacity of right." LUCAS-SCHLOETTER, op. cit., mentioned p. 61*".*

[21] LUCAS-SCHLOETTER, op. cit., p. 61.

[22] Same, p. 64.

[23] Same, p. 97.

[24] § 847 (non-property damage) of the BGB reads as follows: "In the event of injury to the body or health, as well as in the case of deprivation of liberty, the injured party may also, because of the damage that is not property damage, demand an equitable money satisfaction. The claim is not transferable and does not pass to the heirs unless it has been recognized by contract or has a pending judicial decision.

Concerning body, health and freedom, § 847 was expressed in granting the possibility of compensation to the offended.

However, under a general rule of the obligation to indemnify, such as the French Code (art. 1382), the Supreme Court (*Reichsgericht*) pointedly stated in 1908[25], that "a general personality right, conceived as a subjective right, was alien to the civil law currently in force," with only particular personality rights enshrined in the law, such as the right to name (§ 12 BGB) and those enshrined in copyright law personality rights had already been recognized as an autonomous category by the doctrine. However, the text of the BGB made it difficult to speak of a general right of personality.

After the 1949 Constitution, in which it was consecrated that "the dignity of man is intangible" (art. 1, 1) and granted to each citizen the "right to the free development of his personality" (art. 2, 1), the discussion on the subject has gained new impetus to assert the existence of such a general right.

On May 25, 1954, the Constitutional Court, in its celebrated precedent *Leserbrief[26],* stated:

> [...] from the recognition by the Constitution of the right to respect for dignity (art. 1) and the right to the free development of personality also as a private right, and must be respected by all, provided that this right does not offend the rights of others and does not violate the constitutional order or the moral law (art. 2), the general right of personality must thus be regarded as a fundamental right guaranteed constitutionally.

In other precedents, the same court stated that its role was to protect personality in all its aspects, creating a personal sphere and covering all the gaps in particular personality rights.

Violation of a personality right would in most cases only give rise to an intangible damage. (*immaterieller Schaden)*, which created difficulties for their protection. However,

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An equal claim is made by a woman, against whom a crime or misdemeanor has been committed against good morals, or who has been cunningly threatened or abused in a dependent relationship to consent to an extra equity cohabitation."

[25] RG 7, nov. 1908: RGZ 69, 401,403 (LUCAS-SCHLOETTER, op. cit., T. I, p. 107).

[26] BGH 25.05.1954, Leserbrief: BHZ 13, 334 403 (Same. Ibsame, p. 107).

although the BGB has a narrow wording on the reparability of non-material damage, German case-law applying analogously to § 847 of the BGB[27] and subsequently invoking only the horizontal effectiveness of the Constitution in private law[28], established the indemnity for moral damages for serious offenses against the general right of personality.

1.1.3 Moral damage and personality rights in Brazilian law from the 1916 Civil Code

The Brazilian Civil Code of 1916 was strongly influenced by the Pandectas School and the German Civil Code BGB. However, with regard to civil liability, it adopted the general rule of obligation to indemnify, following the French model, although discarding the distinction between offenses and quasi-offenses. In this sense, the Brazilian Civil Code of 1916 expressly established as elements of the unlawful act: the action or omission; the respective subjective element — guile or guilt; the damage, consisting of injury of right or injury; and the causal relationship between the event and the damage.[29]

The dual French and German influence on the Code at the time, in the area of civil liability, generated strong controversy over the reparability of moral damage. Although there was a general rule of the obligation to indemnify (art. 159), following the French model, the Code provided for specific cases of moral damages, such as compensation for slander and injury (art. 1,547), for the aggravation in honor of women (art. 1,548), for sexual crimes (art. 1549), as well as in cases of offense to personal freedom.

[27] BGH, 14.20.1958, HERRENREITER (Same. Ibsame. T. I, p. 140).
[28] BGH 19.09.1961, Ginseng-Wurzel 403 (Same. Ibsame).
[29] Main articles of the Brazilian Civil Code of 1916 about illicit act: “Art. 159. He who, by a willful act or omission, negligence or imprudence, violates right, or causes injury to another, is obligated to repair the damage.
The verification of guilt and the assessment of liability are governed by the provisions of this Code, arts. 1,518 to 1,532 and 1,537 to 1,553.
Art. 160. The following are not unlawful acts:
I - Those practiced in self-defense or in the regular exercise of a recognized right.
II - The deterioration or destruction of the thing of others, in order to remove an imminent danger (articles 1.519 and 1.520).
Sole paragraph. In the latter case, the act is legitimate only when circumstances make it absolutely necessary, not exceeding the limits of what is indispensable for removing the danger.
Art. 1.518. The property of the person responsible for the offense or violation of the rights of others is subject to compensation for the damage caused, and in case of more than one author, the offense will all jointly and severally be liable for the compensation.”

Until the 50s of the 20th century, much of the doctrine was in favor of indemnity for moral damages, as the jurisprudence placed serious obstacles to the possibility of compensation in such cases[30]. Until then, the Supreme Court was impervious to this thesis.[31]

As for in 1953, a change in the positioning of such a Court is seen with a precedent by Min. Orozimbo Nonato[32] where compensation for moral damages was accepted. From this precedent the jurisprudence of the Supreme oscillated during the 1950s, sometimes openly accepting compensations, sometimes denying it or even accepting it within narrow limits[33].

Only in 1960, with the decision of the embargoes in the RE 42,723, the compensation of moral damages was pacified, within the Federal Supreme Court.[34] It was not yet about unrestricted compensation. The prevailing understanding, in this Court, was that it was not appropriate to cumulate material damages with moral damages.[35]

It was, however, the 1988 Constitution, complementary to the positivation of the dignity of the human person, that welcomed, in constitutional law, some rights of personality and the possibility of their indemnity, with the following wording for art. 5, X: "The intimacy,

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[30] SILVA, Wilson de Melo. *O dano moral e a sua reparação.* Rio de Janeiro: Forense, 1955, p. 259 e seg..

[31] RE 11.786, reported by Min. Hahnemann Guimarães, from 11.07.1950 has been amended as follows: "IT IS NOT ADMISSIBLE THAT MORAL SUFFERING MAKES PLACE FOR PECUNIARY COMPENSATION, IF NO MATERIAL DAMAGE ARISES FROM IT".

[32] RE 22.993, re by Min. Orosimbo Nonato, from 07.31.1953, with the following amendment: "MORAL INJURY SPAWNS A CONGRUE COMPENSATION. LAWYER FEES".

[33] The following example can be highlighted:
Against: RE 42,723, reported by Min. Nelson Hungria and judged on August 13, 1959, with the following statement: "EXTRAORDINARY APPEAL; ITS DEVELOPMENT. COMPOUND INTEREST; WHEN NOT ALLOWABLE. MORAL DAMAGE; NOT RESTRICTED UNDER OUR RIGHT. "In favor with restrictions: RE 35558, reported by Min. Ribeiro da Costa and judged on 12.10.1957 with the following statement:" IF MORAL DAMAGE IS INDEMNABLE IN THOROUGHLY PECULAR CIRCUMSTANCES, IT IS UNSERVEABLE, PARALLELLY, WITH INDEMNITY, ALREADY COVERED BY FOODS".

[34] The embargoes in RE 42,723, reported by Min. Henrique D'Avilla (summoned) were decided, on January 08, 1960, with a decision thus amended: "MORAL DAMAGE - REVERBERATES IN THE PRIVATE ECONOMY, CAUSING LOSSES TO WHICH THE PERSON IN CHARGE SHALL RESPOND FOR LAW INDEMNITIES*".*

[35] This is what is meant by RE 55.646, reported by Min. Evandro Lins with rel. to judgment by A Min. Gonçalves de Oliveira, on 28.09.1965, which reads as follows: "CIVIL LIABILITY. LOSSING PROFITS BASED ON FOREIGN WAGE AT THE TIME OF THE PAYMENT OF INDEMNITY. SIMPLE INTEREST FROM QUOTE. MORAL DAMAGE IMPLIED IN DEFERRED COMPENSATION. EXTRAORDINARY APPEAL KNOWN AND PROVIDED IN PART".
The impossibility of accumulation is clearly expressed in RE 83,766, reported by Min. Moreira Alves, on August 19, 1976, with the following statement: "MORAL DAMAGE. CIVIL LIABILITY FOR IRON ROAD IN THE EVENT OF DEATH IS NOT ACCUMULABLE WITH INCREASING PROFITS. REQUESTS OF ARTICLE 1537 OF THE VICIL CODE COMMUNICATED WITH ARTICLE 21 OF ACT 2,681 FROM DECEMBER 7, 1912. EXTRAORDINARY APPEAL KNOWLEDGE UNDER JURISPRUDENCE, WHERE THE PROCEDURE IS DISMISSED".

privacy, honor, and image of persons shall be inviolable, ensuring the right to compensation for material or moral harm arising from their violation.”

Following the advent of the new constitutional text, the possibility of compensation for moral damages was widely conceived. The Superior Court of Justice, in the exercise of its competence to standardize jurisprudence and guard the federal legislation, inserted, in its Summary, statements, enabling the accumulation of material damage with moral (Summary 37)[36], recognizing that the legal entity may undergo moral damages (Precedent 227)[37] and considering that the legal limitation on the arbitration of its compensation under the Press Law (Precedent 281)[38]. The Federal Supreme Court, appreciating the constitutionality of this latter limitation, also considered the Press Law not to be[39].

Finally, in the late 90s of the 20th and early 21st century[40], the Superior Labor Court began to adjudicate disputes involving material and moral damages, having initially issued Jurisprudential Guidance on the subject (327 of SBDI-1) and after the Court's Precedent No. 392, it should be noted that Constitutional Amendment no. 45, dated 12/30/2004, expressly conferred to the Labor Court the competence to judge actions for indemnity for moral damages.

1.2 Human dignity, personality rights and moral damage

As seen, the applicability of moral damages was coupled with the affirmation of an ideal sphere of rights for individuals. In the French experience, since the 19th century, the

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[36] d. 12.03.1992, DJ from 03.17.1992.
[37] d. 08.09.1999, Dj from 10.08.1999.
[38] d. 28.04.2004, Dj from 05.13.2004.
[39] On the subject RE 396.386, reported by Min. Carlos Velloso, in judgment of 04.29.2004.
[40] “MORAL AND MATERIAL DAMAGE. WORK RELATIONSHIP. COMPETENCE OF LABOR JUSTICE (new wording) - Res. 193/2013, DEJT published on 13, 16 and 17.12.2013.
Under the terms of art. 114, inc. VI, of the Constitution of the Republic, the Labor Court is competent to prosecute and judge actions for indemnity for moral and material damage, arising from the employment relationship, including those arising from occupational accidents and diseases similar to it.
History:
Original wording (conversion from SDI-1 Jurisprudential Guideline 327)
- Res. 129/2005, DJ 20, 22 and 04.25.2005.
No. 392 Moral Damage. Jurisdiction of Labor Justice
Under the terms of art. 114 of CF/1988, the Labor Court is competent to settle disputes regarding indemnity for moral damages, when arising from the employment relationship (former OJ No. 327 of SBDI-1 – DJ 12.09.2003)”

judiciary considered the indemnity for moral damages applicable, since it metonymically understood several rights inherent to the human personality in the property. In Germany, compensation for moral damages evolved concurrently with the theory of personality rights. In Brazil, on the other hand, only with the constitutional consecration of the dignity of the human person and of some personality rights, has it been established that a wide compensation for moral damages has been established.[41].

The problem is that much of the doctrine still conceives moral damage from moral and psychological pain and suffering, which obscures the clear link between moral damage and the dignity of the human person, especially in its reflection on private law, which they are the rights of personality.

This attitude of linking moral damage to pain leads to an improper confusion between damage and injury. The legally repairable damage is not to be confused with any damage, or even any physical damage[42]. The damage consists in the serious alteration of reality. This change can be a natural work or a human work. The legal concept is diverse, characterized by an offense of a right, as a sphere of autonomy protected by a legal standard.

The concept of damage is linked to that of subjective right injury, whether absolute or relative. It is therefore a violation of a legally protected property. Not all damage can thus be regarded as legal damage. Injury must be qualified by a standard to be considered unfair, characterizing legal damage. Hence, Italian act (art. 2.043 of the CC) refers to unfair damage, “understood as injury to legally relevant interests”[43] and the Civil Code of 2002 speaks of violation of rights and damage, in its art. 186.

It could not be otherwise since the law does not have the necessary instruments to deal directly with human suffering and pain. In fact, it must neutralize these realities from their own theoretical concepts, such as subjective law. The direct action of the law, without

[41] As recalled by Prof. Paulo Luiz Netto Lôbo: “the 1988 Constitution is an important milestone in the respersonalizing conception of law, including expressly recognizing the legal protection of personality rights and moral damages.” (LÔBO, Paulo L. N. Danos Morais e Direitos da Personalidade. In *Doutrina Adcoas.* v. 7, No. 12, 2nd fortnight, June, 2004, p. 235).
[42] BONVICINI, Eugenio. *La Responsabiltà Civile.* Tomo I. Milão: Dott. A. Giuffrè Editore, 1971, p. 30.
[43] PERLINGERI, Pietro & CORSANO, Luigi. *Manuale de diritto civile.* Napoli: Edizioni Schientifiche Italiane, 2003, p. 649.

filters, in the face of any inconvenience or damage, would result in an overload of demands and interventions that could lead the institutions that instrument it to collapse. It is not a possible task for the right of replacement and the protection of all people from their misfortunes and disappointments. Inevitably, there will be damage and pain that cannot be repaired and must be definitively borne by the victims.

The importance of the theoretical framework that legal dogmatics undertook in the nineteenth century lies precisely in the neutralization of social interests foreign to the law through its filtering by abstract concepts that synthesize the concerns and emphases proper to institutions and jurists[44]. As a matter of fact, the increasing complexity of contemporary society has imposed on dogmatics an increase in the abstraction of its theoretical instrumentality[45], to decide the multiplicity of conflicts from the most diverse origins. Moral harm, the dignity of the human person, the rights of personality are theoretical elaborations that have arisen in response to such environmental needs by law.

Thus, the law and its institutions are solely responsible for equalizing intervention in the allocation of goods through their own filters. The role of subjective rights and, in the case of moral damages, of personality rights is to circumscribe which damages and which moral offenses will be compensable. Therefore, the definition of individual moral damages must be linked to the protection of a sphere of immaterial and ideal rights, defined by the rights of personality, as reflections of the dignity of the human person in civil law[46], materializing an intangible sphere of constitutive protection of one's own legal role.

Within this order of ideas, the personality is formed from the conditions of possibility of the exercise of autonomy, which, as freedom, is a plastic sphere of possibilities, built from the individual affirmation of the will, with personality rights being the expression and the legal form, which in the private sphere constitute the natural person. There is a strict link between moral damage and offense to the dignity of the human person, since it is through the coercion

[44] FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito.* 4. ed. São Paulo: Atlas, 2003, p. 80.
[45] FERRAZ JR., Tércio Sampaio. *Função social da dogmática jurídica.* São Paulo: Max Limonad, 1998, p. 191.
[46] It is clear from the following passage by Karl Larenz: “It cannot be doubted that individuals also undertake to respect the dignity of other men and that acts that harm the dignity of another are anti-juridical. From that point on, jurisprudence developed a 'general right of personality', the concretization of which made clear progress.” (LARENZ, Karl. *Derecho Justo:* Fundamentos de Ética Jurídica. Trad. Luiz Díez Picazo. Madri: Civitas, 1985).

of offenses against the constitutive rights of the personality that the existence of dignified persons worthy of equal respect and consideration is symbolically affirmed[47].

1.2 Individual moral damage and roles of sanctions

A consistent distinction between civil and criminal liability was only possible once the usefulness of coercive measures became prominent in legal thought with Grotius[48]. Only by obtaining the benefit from such sanctions was it possible to distinguish them, as Kelsen points out:

> It might be better to say that the difference between criminal and civil sanctions lies in the objective they pursue. The civil sanction is established to repair the damage caused by socially harmful conduct; the criminal sanction is a retributive measure or, according to the current point of view, a preventive measure. The difference, however, is only relative, since it cannot be denied that the civil sanction also has a retributive function[49].

The great drama of moral damage is that they render such a criterion of distinctiveness insubstantial. The immaterial nature of such rights precludes an effective compensation. It was precisely the difficulty of fitting them into the limits of equivalence in the replacement of the good that justified the resistance to their acceptance in countries of Roman-German tradition.

From the strictly compensation standpoint of civil liability, compensation for moral damages entails an insoluble paradox. The rights of personality, as a decomposition of the dignity of the human person, according to Kant's lesson, are characterized by having no equivalent or price[50]. The close links linking indemnity for moral damages to the protection of personality rights, with a view to replacement, would require the consideration and

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[47] CAVALIERI FILHO, Sérgio. *Programa de responsabilidade civil.* 5. ed. São Paulo: Malheiros, 2003, p. 98.
[48] GRÓCIO, Hugo. *Le droit de la guerre et de la paix.* Trad. P. Pradier-Fodéré. Paris: PUF, 1999, p. 415 e ss.; p. 447 e ss.
[49] KELSEN, Hans. *¿Qué es Justicia?* Trad. Albert Calsamiglia. Barcelona: Ariel, 1982, p. 171. Probably when speaking of the retributive function of civil liability, Kelsen was only considering the model of liability based on guilt/wrongdoing.
[50] Kant's free translation: “In the kingdom of the purposes, everything has a price or a dignity. Whatever has a price can be replaced by something equivalent, while what is superior to any price, admitting no equivalent, has a dignity” (KANT, Immanuel. *Fondazione della Metafísica dei Costumi,* cit, p. 68).

satisfaction of the injured immaterial right, which by its nature cannot have any market value or equivalent. In other words, focusing on the moral damages caused by reparation encloses them in a contradiction.

The disorganization that the sanction of the offense to moral damage imposes on the distinction between civil and criminal sanctions is striking. Their private punishment character cannot be denied[51]. It is not a satisfaction and a replacement, but rather a private punishment that benefits the victim rather than the state, and it is completely wrong to defend the principle of full compensation for moral damages, as the Public Prosecutor did in its opinion in ADI No. 5,870[52] . It is impossible to return the victim to the *status quo ante*, once the offense materializes there is no way to erase it, at most compensating.

However, it is precisely from this confusion between compensation for moral damages and pity that its paradox can be overcome. In the narrow arena of equivalence and replacement of the injured, there would be no solution to the perplexity of appreciating the inappreciable.

It is Kant who points out that the violation of human rights reduces man to a medium, as the violator will be using the offended as a means to his goals.[53] Injury to personality rights is therefore an offense to the dignity of the victim. Therefore, it is not a matter of repairing the damage, which has no equivalent, but of reciprocating the culpability of the perpetrator of the damage that undermines the dignity of the offended. In other words, it is the application of the **retributive function** of sanctions. This is the title that justifies and legitimizes the victim to receive the punishment of the violator.

However, it is not only with the displacement of guilt punishment that the paradox of moral damage is explained. Another relevant function for understanding the meaning of

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[51] Carbonier rightly observes: "In this case, the allocation of a monetary compensation could be a free enrichment for the victim's assets. The answer is: money can play a replacement here, and it would be unfair, then, that the fault of the person responsible has no sanction (loss and damage are justified as a kind of private punishment, private sanction, which instead of being profitable to the State, as a sanction of criminal law, benefits the victim) (CARBONIER, Jean. *Droit Civil. Les Biens. Les obligations.* Paris: PUF, 2004, p. 2.272).

[52] BRASIL. Federal Public Prosecution Service: Attorney General's Office. Opinion at ADI 5,870 from 12/18/2018.

[53] "Behold, in such a case [breach of liberty and property] it is clear that whoever violates the right of man proposes to use the other person simply as a means, without bearing in mind that the other, in his capacity to be reasonable, must always be considered at the same time as a purpose, because it is capable of assuming himself or herself as the purpose of their own action." (KANT. *Fondazione della Metafísica dei Costumi,* cit., p. 62)

immaterial rights sanction is the preventive function of sanctions. Not especially in special prevention, that is, in preventing the perpetrator from committing a similar offense, or in intimidating prevention, where it seeks to discourage third parties from imitating the prohibited conduct, but above all in **the general didactic or fiduciary prevention**.

General prevention is not just based on fear and intimidation of a concrete threat[54], but also for enabling social learning as regards respect for legal property and maintaining confidence in the rule of law. The establishment of sanctions for certain right offenses strengthens and shapes the collective conscience, showing what the expensive duties for maintaining social order are. These sanctions become a means for pedagogically inducing individuals to understand and respect their duties, voluntarily adhering to their observance, and for the normative recognition that allows them to society.

Another positive role of sanctions is the stabilization of expectations with their possibility of counterfactual imposition. In Jakobs's words, “punishment is not only a means of maintaining social identity, it is already its own maintenance![55] Even in the face of the frustration of normative expectations, it is up to the sanction to reestablish order while maintaining confidence in the legal system. The potential existence and the counterfactual imposition of sanctions ensure confidence in the rule of law, enabling it to continue to conform and avoid transgressions.

In the case of immaterial rights such as personality rights, this pedagogical and fiduciary function is what enables the symbolically tangible assertion of such rights. Because they have an ideal character, without any concrete dimension of their own, it is only by imposing pecuniary sanctions that these rights can symbolically assume some concrete dimension.[56] It is the cash compensation for moral damages that enables individuals to

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[54] About the subject: LESCH, Heiko. *La Función de la Pena.* Trad. Javier Sánchez — Vera Gómez Trelles. Madri: Dykinson, 1999 p. 28 e ss.

[55] JAKOBS, Günther *A Imputação Objetiva no Direito Penal.* Trad. André Luís Callegari. São Paulo: Revista dos Tribunais, 2000, p. 18.

[56] The following excerpt from Habermas allows us to understand how law uses sanctions to symbolically rely on the factual concreteness of the use of force (facticity) to erect a dimension of ideal and abstract rights of obligatory observance: “On one hand, the guarantee that the state assumes to impose the right offers a functional equivalent of stabilizing expectations through a sacred authority. While institutions based on a sacred image of the world fix the delimiting convictions of behavior through delimitation and communication restrictions, the law allows the substitution of convictions for sanctions, leaving the subjects' discretion to comply

become aware of the existence of personality rights and to learn to respect them. Similarly, it is through such sanctions that the sense of order and validity of these immaterial rights is maintained. The limits of such rights, as well as the belief in their existence, are built on the mortar of sanctions. It is the imposition of indemnity for the offenses against such rights that pedagogically teaches how they should be respected and allows society to understand them as a prevailing reality.

The importance of retributiveness and fiduciary and pedagogical prevention point to a strong affinity for indemnity for moral damages with penalties, which raises one last question: what is the justification for leaving it within the scope of civil law and not situating its discipline in criminal law?

Again, the answer to this question refers to the rights of personality and the dignity of the human person. It is that the core of intangible rights defined by the dignity of the human person, within which personality rights lie, is not a rigid and exhaustive cast of rights, but an open and constantly reconstructing list of the rights of each individual.

On the subject, it is interesting to note that the labor reform introduced by Act 13,467/2017 sought to enunciate the rights of personality protected as moral or extrapatrimonial damage, listing in his art. 223-C "honor, image, intimacy, freedom of action, self-esteem, sexuality, health, leisure and physical integrity", as decompositions of the constitutive sphere of protection of the natural person.

Similarly, it is interesting that the law alludes to protection in art. 223-D the protection of the image, brand, name, business secret and correspondence secrecy that constitute an intangible core of moral persons, such as the gathering of natural persons for a common gregarious purpose, which is also a right of personality. However, Maurício and Gabriela Delgado are right in claiming that this role is exemplary, given the plasticity of personality rights.[57]

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with the rules, but coercively enforcing their observance." (HABERMAS, J. *Faticidad y validez.* Trad. Manuel Jiménez Redondo. Madri: Trota, 2001, p. 100).

[57] DELGADO, Maurício Godinho; DELGADO, Gabriela Neves. *A reforma trabalhista no Brasil, com os comentários à Lei nº 13.467/2017*. São Paulo: Ltr, 2017, p. 146.

In this line, criminal guarantees, especially typicality, are incompatible with this open framework of personality rights. It is only, in the face of a broad and general rule of obligation to indemnify, as an open clause, that such rights may be properly protected, as the French and German example show. A similar understanding is adopted by Professor Suzanne Carval[58]:

> The punitive function of civil liability is, as we have just seen, widely used to ensure the protection of personality attributes. As a disguised penalty under the mask of damage repair, it seeks to sanction the violation of rules of conduct that have made an end in itself a means. Prompt and sometimes rigorous, civil condemnation is not only indispensable. Can we reasonably imagine replacing it with massive recourse to criminal sanctions? But it asserts itself as a sanction whose qualities allow it to openly compete with the criminal sanction.

Moreover, the scope and spread of such rights across all spheres of relations requires the plasticity and dynamism of civil liability and civil proceedings. It is not by chance that protection through non-material damage is occupying a relevant position in labor law, administrative law, consumer law, etc.

Thus, the eminently reparative perspective of moral damages is insufficient to understand them. The intertwining of moral damages with the rights of the personality and the dignity of the human person leads to a change of focus. It is in the retributive function of culpability of the offense to the sphere of the dignity of others and in the pedagogical and fiduciary prevention, as a dimension of concrete affirmation of the rights of personality, that is the foundation of the indemnity of such damages. As already mentioned, personality rights are the materialization of the dignity of the human person in private law and, precisely because personality is a multifaceted legal reality, they cannot be exhaustively listed, and they have a plastic and dynamic function. The existing role in the current labor legislation must therefore be understood as an example.

1.4 Criteria for Limiting Individual Moral Damage and Its Effects on Labor Law

[58] Free translation by CARVAL, Suzanne. *La responsabilité civile dans sa fonction de peine privée.* Paris: L.G.D.J., 1995, p. 43.

The subject of limits and quantification of sanctions and penalties is strictly linked to their purposes. In the tradition of Roman-German law, civil liability has established as the main parameter for the quantification of civil sanction the equivalence with the damage by virtue of its compensatory objective. The art. 944 of the Civil Code, the first of the chapter on indemnity, expressly affirmed this understanding by stating that: indemnity is measured by the extent of the damage, which has been understood by the case law as the principle of full compensation of the damage.

It turns out that analyzing the quantification of non-material damage by the equivalence criterion imposed by compensation or satisfaction leads to a contradiction. As I recall, by nature, rights protected by non-material damage have no equivalent or price. Victim satisfaction can, at best, be considered an epiphenomenon of liability in the case of moral damages.

Thus, the classic way of the compensation purpose of civil liability being prohibited, given the strong link between moral damages and personality rights, is necessary to focus its limitation on the purposes of sanctions that can be understood through the lens of the dignity of the human person. This is the case with the retributive purposes of culpability and of fiduciary and pedagogical preventive.

1.4.1 Guilt

In the case of civil liability for moral damages, guilt is a fundamental judgment. In the light of the parameter of equivalence with the material damage and in view of the undeniable criminal nature of the moral damages, grading the compensation according to the degree of disapproval of the offender's conduct is a clear criterion, setting a limit to the sanction that cannot not even be overtaken by criminal law. Accordingly, in Canada, in the province of Quebec, the doctrine has a closed position that compensation for moral damages, as a private punishment, should be calculated only in proportion to the severity of the fault[59].

[59] CARVAL, Suzanne, op. cit., p. 70.

Both in France[60] and in Quebec[61], The distinction between profitable guilt and misconduct has been an important parameter for assessing the objectionability of the offender's conduct. To use an unavailable right of a third party, such as honor or image, to obtain financial gain is undoubtedly reducing it to a medium, which aggravates the culpability, justifying that all the result obtained be reversed in favor of the victim.

Moreover, guilt exists as a manifestation of autonomy, of the unfair exercise of freedom, thus placing the limits to moral damage within the very dignity of the human person. Restricting moral damage by the perpetrator's culpability avoids that this sanction may turn it into a means of enriching the victim, as compensation will only correspond to retribution for his unjust and guilty will resolution.

In this aspect of the retribution of guilt, there is some sense in the attempt by the reformed labor legislation to establish degrees of guilt and clear parameters for indemnity[62]. However, the plastic nature of personality rights is not sympathetic to a fixed tabulation, which retains the value of the innovation introduced if it is considered to be indicative only without the judge being required to be bound. In other words, the parameter of the law should be considered as mere guideline that, given the peculiarities of the specific case, may be dismissed, including and especially in cases of profitable blame, in which the full economic benefit of the unlawful act must be reversed to the victim.

The open role of personality rights and the unique identity of each human person means that concrete cases may reveal hypotheses not exactly subsumed by legal parameters, which will lead to their justified and equitable removal. Guilt in the context of personality rights leads to a much more fluid and plastic reprehensibility of the conduct of the offender than in criminal law, so that at best we can speak of indicative parameters. This means that,

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[60] Same, Ibsame. p. 32.
[61] Same, Ibsame. p. 69.
[62] Act No. 13,467/2017, in § 1 of art. 223-G, in establishing conduct-gravity cranes linking it to bands of pecuniary sanctions, assumes a criminal-type structure, confirming the distressing nature of moral damages:
"§If the claim is upheld, the court shall determine the indemnity to be paid to each offender, in one of the following parameters, whose accumulation is prohibited:
I - offense of a mild nature, up to three times the last contractual salary of the offended;
II - average offense, up to five times the last contractual wage of the offended;
III - serious offense, up to twenty times the last contractual wage of the offended;
IV - offense of very serious nature, up to fifty times the last contractual wage of the offended."

in a consistent interpretation, the criteria of labor reform should be considered as mere indication, without necessary binding of the labor judge.

1.4.2 Fiduciary didactic prevention

On the other hand, the dignity of the human person, unfolded in personality rights, constitutes an intangible sphere of protection for the individual. In this context, none of the rights can have equivalent items. However, one can identify a nucleus and spheres that gradually move away from it. Without life and autonomy there can be no dignity at all, and therefore these rights make up such a nucleus.

In turn, the exercise of autonomy requires other rights such as physical integrity, name, honor, intimacy, etc. These rights are also part of the dignity of the human person, but they constitute protection zones that move away from the core.

In this sense, adopting the perspective of pedagogical and fiduciary prevention, the various possible offenses against personality rights cannot be uniformly punished. Both life and intimacy make up the same unavailable scope of protection, but it is not possible to give them the same treatment because of their diverse position within the dignity of the human person.

It is through stricter sanctions that symbolically affirms the core value, as well as pedagogically the right indicates to society which respect and behavior is expected in the face of such rights. The severity of coercion is an illuminating parameter of the importance of the law being protected.

The different positions and importance of each offended personality right require, in order to maintain confidence in the validity of the right and to signal to society the respect due to each of them, that the enforcer establishes a clear gradation in sanctioning of moral damage. It is by such variation of the level of indemnity that symbolically the Judiciary will

indicate how each of the rights of personality lies within the scope of protecting the dignity of the human person.

The relationship established between a symbol and its meaning always contains a semantic overflow[63]. This is clearly the case with compensation for moral damages. The financial penalty is only a sign of the existence of unavailable immaterial rights. The correspondence between these quantities is by no means an exchange value, but above all by a state-establishing act that sets such measures of coercion as a gradable dimension of the ideal rights of personality and the dignity of the person.

Another aspect that cannot be forgotten is that not only with convictions in pecuniary damages, the symbolic aspect of sanctions can be explored as a means to achieve general fiduciary and pedagogical prevention. In fact, the publication of compensation news and the conviction decision itself are also valid measures, especially for offenses against honor, reputation and good name.

An important point in general fiduciary and pedagogical prevention is the message that in a democratic society everyone is equal and respectful and considerate, which makes the adoption of the last contractual wage as an indemnity criterion a delicate one, as a distinction is made between workers. Thus, it is certain that, in certain areas, such as the right to life, the freedom to come and go, the physical integrity of this parameter should be removed.

However, it cannot be ignored that the labor world constitutes an economic hierarchy among workers, and thus, in all cases, the legal gradation based on salary cannot be neglected, especially for the cases of personality law that are in the protection periphery by approaching available rights, such as the right to privacy, which in many cases can be negotiated. In short, the gradation established in the current labor legislation cannot be considered unconstitutional at all, reinforcing the reasoning that it is only indicative, which will allow its removal in concrete violations of the principle of equality.

1.4.3 Consistency between guilt and fiduciary preventive function of indemnity for moral damages

[63] In such sense, “a symbol, in the most general sense, functions as an “excess of meaning” (Paul RICOUER. *Teoria da interpretação.* Lisboa: Edições 70, 2000, p. 67).

Although these are different emphases for setting compensation for moral damages, it is not appropriate to speak of an option for one or the other quantification parameter. The value of compensation for non-material damage should be optimal and consistently apply both criteria. Also, because aggression to a right that makes up the core of the dignity of the human person undoubtedly increases the severity of the judgment of reprobation attributed to the conduct of the offender.

In the loose scope of guarantees of civil liability, in which the general and fluid rule of the obligation to indemnity prevails, the guilt parameter should be adopted with more reason and concern. Although it is an open judgment, without a precise connotation and denotation, it is superior to guarantee the dignity of the offender in relation to the discretion of the law enforcer.

Proper fixing of moral damages requires that the decision that quantifies them necessarily undergoes these two levels of analysis and imposes sanction as an optimal synthesis of the retributive and preventive fiduciary purpose, in which the former has an obvious organizational role. Quantification should be carefully and reasonably substantiated, clearly spelling out the parameters adopted and their relationship to such limiting judgments to avoid the impression of participation by the parties in a lottery game[64].

It is mainly in this aspect of indemnity for moral damages at times seeming similar to a lottery game that the legal criteria determined by the labor reform make sense, as some predictability for the setting of monetary values arises. Similarly, when talking about the severity of the offense, it is possible to reconcile the gradation of guilt with the importance of the offended right in the composition of personality. Therefore, the innovation introduced should not be neglected at all, but only understood as a guideline that can be perfectly distanced by parameters of equity.

CONCLUSION

[64] P. Roy *in* CARVAL, Suzanne, op. cit., p. 67.

The positivization of moral damages by the 1988 Federal Constitution as a fundamental right is an evidence of its relationship and importance to the Democratic Rule of Law. The conception of moral damage that binds it to subjective public rights was only possible after the advent of modernity, with labor-legalists such as Grotius and Kant, who systematized an individual sphere of protection. The materialization of subjective rights by the constitutionalist and coding movement was another significant milestone in the history of moral damages.

In the French experience, in which the Civil Code expressed the longings for freedom and formal economic equality, the concept of property metonymically also encompassed immaterial rights. In Germany, Kant's influence combined with the Romanistic conception that restricted property to corporeal things, moral damages were not initially accepted, which led the German Constitutional Court to accept a general right of personality and the possibility of their compensation for moral damages, only after the 1949 Constitution, which enshrined the dignity of the human person.

In Brazil, until the 50s of the 20th century, although much of the doctrine was in favor of moral damages, the jurisprudence rejected it. From this period, the monetary composition of such damages began to be accepted, but with restrictions such as the impossibility of accumulating them with material damages. It was only from the 1988 Constitution that the jurisprudence accepted its broad compensation.

This historical resumption marks the close link between moral damage and the dignity of the human person and the rights of personality as their unfolding in the private sphere. It is by embracing the protection of personality rights, in civil liability, through moral damages, that the plastic principle of the dignity of the human person is densified.

Nonetheless, moral damages are a clearly heterogeneous category in civil liability, radically departing from material damages. Thus, unlike material damage that has a clear parameter for its fixation, damage matching, moral damage is an ideal sphere with no equivalent. Therefore, the classic purpose of reparation for civil liability is not appropriate for moral damages, which are of a private penalty nature. It is, in fact, guilt and general fiduciary and pedagogical prevention that functionally best explains moral harm. Also in a coherent

application of these purposes is the criterion for quantifying moral damages, in order to bring them into conformity with the dignity of the human person, either by reciprocating the guilty exercise of autonomy with compensation for moral damage or by the symbolic importance of moral damages to human beings, to maintain confidence in the validity of personality rights and to indicate the correct behavior and the importance of those rights to society.

The labor reform, introduced by Act No. 13,467/2017, brought a list of personality rights protected by moral damage, as well as a gradation of convictions to be set by the Labor Judge. These innovations, especially the latter, were challenged by some Direct Unconstitutional Actions, the first being ADI 5,870.

Admittedly, the plasticity of personality rights prevents an exhaustive list of these rights from being established, but that does not mean the unconstitutionality of the law. There is, indeed, a need for an interpretation as it sees this statement as exemplary, to be supplemented by the interpreter.

Following the same line of reasoning, the legal gradation for convictions, established by art. 223-G of that Law is not at all unconstitutional. These parameters have the value to remove from the quantification of moral damages the feeling that it is a lottery game subject to a free will by the Judge. Nevertheless, the plasticity of moral damages cannot be ignored and the need for their individualization may require the removal of a legal gradation by imperatives of equity. This leads to the conclusion that the text of art. 223-G must be taken as an indicative, not strictly binding, and the Judge may justifiably adopt other criteria to properly decide the case.

Thus, the legal gradation of art. 223-G is compatible, if merely indicative, with the coherence between guilt and the preventive-pedagogical function of moral damages, removing their dimension of randomness. It turns out that the fluid character of personality rights requires not only that its cast by art. 223-C is understood as exemplary, just as there is a possibility that the Judge may equally use other extralegal criteria. In short, in the point of the regulation of the moral damages, the Act 13,467/2017 includes a proper interpretation to judge art. 223-C, as an exemplary list, and art. 223-G as purely indicative parameters.

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