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THE SINGULARITIES OF MORAL HARASSMENT AND ITS CLASSIFICATION AS PERSONAL INJURY AND/OR EXISTENCIAL DAMAGE

AS SINGULARIDADES DO ASSÉDIO MORAL E SUA CLASSIFICAÇÃO COMO PREJUÍZO PESSOAL E/OU DANOS EXISTENCIAIS

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ABSTRACT

The purpose of this study is to analyze Moral harassment, legally, is mainly grounded in the principle of dignity of the human person and in the right to health and honor (arts. n. 1, III, n. 6, and n. 5, x, of the Federal Constitution of 1988). If it is necessary to identify various forms of characterization about moral harassment as a modality of moral harm or existential damage. Understanding about the destination of moral harassment and moral aggression and the classification of moral harassment in the public service as an act of dishonesty. Finally, to be recognized as existential harm, proof that moral harassment has compromised the employer's social relationships or their life project is indispensable

KEYWORDS: Harassment; Moral; Personal Injury; Existential Damage;

RESUMO

O objetivo deste estudo é analisar o assédio moral. Legalmente, baseia-se no princípio da dignidade da pessoa humana e no direito à saúde e à honra (arts. n. 1, III, n. 6 e n. 5, X da Constituição Federal de 1988). Se for necessário identificar várias formas de caracterização sobre o assédio moral como uma modalidade de dano moral ou dano existencial. Compreender o destino do assédio moral e agressão moral e a classificação do assédio moral no serviço público como um ato de desonestidade. Finalmente, reconhecer o dano existencial, como a prova de que o assédio moral comprometeu as relações sociais do empregador ou seu projeto de vida é indispensável

PALAVRAS-CHAVE: Assédio; Moral; Lesão Corporal; Dano Existencial.

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INTRODUCTION

The theme of moral harassment in Brazil is new, as well as all that is related to moral harm. All the same, it has not been long since studies on existential damage have started in our country.

The Brazilian Federal Constitution, of 05/10/1988, guarantees, in article n. 5, item x, inviolability of intimacy, of private life, of honor and image of people. As a result, it ensures the right to pecuniary damage or mental distress claims due to violations of the rights previously mentioned.

Before this constitutional provision, cases of mental distress claims were very rare in Brazilian Law. There was not even doctrinal opinion on moral harassment, let alone court decisions.

In a pioneering work, Professor Flaviana Rampazzo pointed out the emergence of a new legal category called *existential damage* in Italy in the 1990s. This scholar makes it clear, however, that "the Italian Supreme Court explicitly confirmed the existence of existential damage for the first time on June 7th, 2000, with Decision n. 7713". (SOARES, 2009, p. 43)

This brief study, which is grounded in jurists' opinions and court precedents, aims at presenting moral harassment as a modality of moral harm or existential damage.

2 SINGULARITIES OF MORAL HARASSMENT

When working, human beings do not seek only and solely their survival. They also want to be fulfilled as a human person, achieving consideration and respect of their dignity.

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When examining the workplace and the importance of work in individual and social contemporaneous dimensions, one must understand its ethical significance. Two major aspects should be mentioned in this respect. First of all, in any event and circumstance, people must affirm and consolidate, at any time and culture, their condition of human beings. Secondly, through work, "men must also feel fulfilled and reveal themselves in their social identity and political emancipation". (DELGADO, 2015, p. 206-207)

It is necessary to understand the psychosocial occurrence called "labor uprooting." Simone Weil used this concept, based on her working experience in factories in Paris in the years of 1935 and 1936, to describe and analyze the suffering generated by the organization of factory work. This author dedicated several studies to the analysis of causes of social oppression and its relationship with the capitalist mode of labor organization. In her view, there is a very clear problem:

> It is a question of knowing whether it is possible to conceive an organization of production, which, though powerless to remove the necessities imposed by nature... would enable these at any rate to be exercised without grinding down souls and bodies under oppression. (WEIL, 1996, p. 298)

The texts by Simone Weil provide important contributions to the current research and reflections on moral harassment, especially: a) the analysis on social oppression, in which she argues about the humiliation and uprooting generated by the capitalist organization of production; b) her analyses of factory work are not simply theoretical reflections, but informed by a very close relationship with workers. The text entitled "Diary of life in the factory" states that factory work is intrinsically related to an experience of social humiliation. Such a humiliating aspect is due to the pressure of reaching a strong production rate, to the constant threat of dismissal if the proposed goal is not fulfilled, to the way orders are handled, to the continuous simplification and fragmentation of the activities. (WEIL, 1996, p. 89-114)

The suffering generated by the organization of factory work, according to Simone Weil, should be understood as an acute way of uprooting. This concept of "uprooting" is linked to the impediment of "real, active and natural participation in the

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life of the community which preserves in living shape certain particular treasures of the past and particular expectations of the future". (WEIL, 1996, p. 411)

Recently, research carried out on *social humiliation* took up the idea of *uprooting*, revealing that it can be understood as an impediment to egalitarian participation in the governance of the city (civil governance?) or work, a shrinking of the field of the initiatives and words, a decrease of citizens and workers to servile roles. (GONÇALVES FILHO, 1998, p. 57)

Considering that employment relationships involve a system in which the employer organizes the activities and the employee performs the tasks, there is a tendency for conflicts and abuses involving the dignity of the human person to concentrate mainly in such space.

2.1 THE LATE RECOGNITION OF THE PHENOMENON

From the historical point of view, it is not possible to know precisely when the abuses committed in employment relationships started to be recognized and punished. It can be noted, however, that moral harassment in employment relationships is not a recent phenomenon; it can be said that "it is as old as work itself." (FERREIRA, 2004, p. 37)

Nonetheless, the issue here is not to present a historical course of the development of the jurists' opinions on moral harassment. However, why hasn't the practice of moral harassment been recognized and treated in the legal scope until very recently? According to Rodolfo Pamplona Filho, Adriana Wzykowski and Renato da Costa Lino de Goes Barros, such non-recognition, or late recognition, of the causative attitudes of moral harassment, took place for two major reasons: a) the worker was not aware of the attitudes that constituted moral harassment; and b) the victims' fear to report such violence. (PAMPLONA FILHO, 2015, p. 115)

Differently from what might be inferred, the recognition of moral harassment did not take place in the scope of human relationships, with its categories established by law. Research started in the field of biology, by ethologist Konrad Lorenz. His

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studies were based on the analysis of conduct of certain small-sized animals that, when confronted with invasions of their territory by other animals, adopted aggressive behavior. The animal group that had been "invaded" tried to expel the lonely invader with collective aggressive attitudes and intimidation. The researcher called this animal group behavior mobbing, “an English term that connotes the idea of a riotous mob or crowd.” (FERREIRA, 2004, p. 38)

Only in the 1960s did Peter Paul Heinemann, a Swedish physician, use the same terminology to describe the hostile behavior of certain children towards others at school. In 1972, this author published the first book on *mobbing*, approaching "the issue of group violence among children". (HIRIGOYEN, 2008, p. 69)

In the 1980s, Heinz Leymann, a German psychologist settled in Sweden, introduced the concept of *mobbing* to describe severe ways of harassment in organizations. (HIRIGOYEN, 2008, p. 69)

The importance of Heinz Leymann’s research is that he found out that, as observed in schools, there also existed a certain level of violence in employment relationships. He explained that in the procedure of moral harassment in the workplace, physical violence is rarely used; however, it is marked by insidious conduct, difficult to demonstrate, such as social isolation by the victim. He also noticed how “devastating the effects on the victims’ mental health are”. (FERREIRA, 2004, p. 39)

Through research by Heinz Leymann, it was possible to find out that "3.5% of the salaried workers in Sweden suffered from moral harassment, and that 15% of the suicides were caused by it". (HIRIGOYEN, 2002, p. 78)

Such studies highlight the importance of recognizing the phenomenon, studying it and presenting preventive and punitive ways regarding its occurrence, avoiding pecuniary damage and personal injury to the human being.

2.2 THE CONCENTRATION OF THE ANALYSES IN THE LEGAL AREA

Even though the first studies on moral harassment have been introduced in biology and psychology, law and sociology also got interested in the subject. It is, thus,

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an understanding that demands a cross-disciplinary study, not fully comprehended by just one area of human knowledge. Based in important contributions by sociology and law, there is an attempt to know "the main originating focuses of the problem, as well as the means to restrain and solve them". (FERREIRA, 2004, p. 39-40)

It was only at the end of the twentieth century that the French psychologist and victimology expert Marie-France Hirigoyen concentrated in a text the discussion of moral harassment in the legal sphere. This work, translated in Brazil, presents the problem based on real cases, pointing out the aspects related to the aggressor's perversity and to the conduct typical of harassment, especially the serious effects they may cause to the victim's health. (HIRIGOYEN, 2002)

Although *moral harassment* is the best known expression to denominate the phenomenon that is being examined now, other terms are also used In Italy, Germany and Scandinavian countries, they use the word *mobbing,* which derives from the verb *to mob,* meaning to harass, besiege, attack, or assault. In Spanish-speaking countries, they use the terms *psicoterror laboral* or *acoso moral*. In Portuguese-speaking countries, they mention the expressions *terror psicológico, tortura psicológica* or *humilhações no trabalho.* In Japan, *ijimi;* in France, *harcèlement moral*; in the United States, harassment; and in the United Kingdom, bullying.

After scientific studies proved the existence of the phenomenon called *moral harassment*, the next step was the legal regulation and the analysis of concrete cases by the Supreme Courts of several countries, first in Sweden and then in Belgium, Finland and the Netherlands. (SIMM, 2008) In France, the legal concept of *mobbing* is extracted from the Social Modernization Law of November 2001, which established:

> No worker should suffer repetitive conduct of moral harassment aiming at the degradation of their working conditions, or be susceptible to their rights or their dignity being endangered, or to alter their physical or mental health, or the compromising of their professional future. (ROMERO RODENAS, 2004, p. 9)

While sociologists, legislators and jurists tried to identify the occurrence of the phenomenon, a naturally slow process, moral harassment kept being practiced without any punishment.

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2.3 THE FIRST LEGISLATIVE AND JURIDICAL RECOGNITION IN BRAZIL

From the legislative point of view, according to Maria Aparecida Alkimin, the first initiative on the theme in Brazil was in the town of Iracemópolis, in the State of São Paulo, when it provided penalties to the practice of moral harassment in the government sphere, with the enactment of Law n. 1163/00. This author mentions that after that, Law n.3.921, of 23.08.2002, of the state of Rio de Janeiro, was enacted with the same aim.

The Law of the town of Iracemópolis, in art.n.1,considers moral harassment:

> Any type of action, gesture or word which affects, by repetition, the self-esteem and safety of an individual, making them doubt themselves or their career, implying damage to the working environment, to the evolution of professional careers, or to the stability of the employment relationship of the employee (...). (ALKIMIN, 2012, p. 41)

The referred provision further clarifies the kinds of actions, gestures or words that affect, by repetition, an individual's self-esteem and safety:

> Setting tasks with unattainable deadlines; transferring someone from an area of responsibility to trivial tasks; taking credit for somebody else's idea; ignoring or excluding an employee by addressing them through a third party; denying information insistently; spreading malicious rumors; criticizing persistently; underestimating efforts. (ALKIMIN, 2012, p. 41)

From the jurists' point of view, the theme moral harassment started to be recognized and publicized in Brazil from May 2000 onwards, with the defense of a Master's thesis by the occupational physician Margarida Barreto, published by the Department of Social Psychology of PUC University (SP), entitled "A journey of humiliations".

When dealing with the subject in his work, Mauricio Godinho Delgado clarifies that it is about a new concept of apprehension for jurists and in labor jurisprudence, stimulated "by a more careful perception of unlawful potential dynamics experienced

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in the employment relationship, which did in Brazil not warrant the necessary analysis and emphasis before the Constitution of 1988". (DELGADO, 2016, p. 1363)

It is notable that the understanding of moral harassment is absolutely recent in Brazil, mainly in the law area.

2.4 THE CONCEPT OF MORAL HARASSMENT

The concepts of *moral aggression* and *moral harassment* can be can be legally distinguished. Moral aggression is restricted to an only act sufficient by itself to cause damage. Amauri Mascaro Nascimento presents, as examples of such practice, acts harmful to honor and reputation exercised by the employer or immediate superiors against the employee, except in self-defense, possibly y marked by offensive publication by the media. According to this author, moral aggression differs from moral harassment in the aspect of the "reiteration of the practice that configures the latter and in the instant act that characterizes the former". (NASCIMENTO, 2013, p. 344-345)

How could one, thus, conceptualize the expression *moral harassment*? Martha Halfeld Furtado de Mendonça Schmidt claims that the development of modernization of the employment relationships and of the strict hierarchies of the companies, began to facilitate harassment, which may be moral, psychological or sexual. This author, who is a labor judge, states that moral harassment can be considered a kind of emotional abuse in the workplace, in a malicious way, with the aim to "move the employee away from the employment relationships, through rumors, intimidation, discredit and isolation". (SCHMIDT, 2002, p. 142-143)

> Actually, moral harassment can be defined as the reiterated conductpursued by the active individual in the sense of eroding the emotional balance of the passive individual, through significant acts, words, gestures and silence that aim at the victim's weakening and loss of self-esteem, or any other form of imbalance or serious emotional tensions (DELGADO, 2016, p. 1363).

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In Marie-France Hirigoyen's view, moral harassment must be understood as every and any abusive conduct that is expressed, above all, by "behavior, acts, gestures, words that may bring damage to the someone`s personality, dignity, or physical or psychic integrity, jeopardize their job or degrade the workplace.(HIRIGOYEN, 2002, p. 65) Marcelo Rodrigues Prata broadens this concept, pointing out that moral harassment is characterized by any kind of hostile attitude, individual or collective, addressed to the worker by their immediate superior (or client upon whom they depend economically), by a workmate of the same hierarchical level, subordinate, or by a third party related with the employer, which provokes degradation in the working atmosphere, "capable of offending their dignity or causing physical or psychological injury, as well as leading them to the practice of attitudes contrary to their own ethics, which may exclude or harm them in the progression of their career" (PRATA, 2008, p. 57).

By decomposing the expression, it can be said that the word *harassment* derives from the verb *harass*, in the sense of chasing insistently, teasing, molesting with insistent pretensions, or assaulting. As for the word *moral*, in its philosophical aspect, it refers to the ethical act, that is "in accordance with the moral or written rules which regulate conduct in society, what it is and should be, aiming at doing good and avoiding evil to others" (ALKIMIN, 2012, p. 39).

Mobbing or moral harassment, in Márcia Novaes Guedes's con*ception*, comprises all the actions and behavior derived from the boss, manager or immediate superior, or even from workmates, which convey an attitude of continuous and ostensible harassment that may cause major damage to the victim's physical, psychic and moral conditions. (GUEDES, 2003, p. 33)

Law n.13.185, of 2015, was recently enacted in Brazil, and it established the "Program against Systematic Intimidation" (*Bullying*). Such legal instrument, in fact, is not addressed to labor situations, but brings an important conception, such as the one in paragraph n.1 of article n.1, with the following content:

> In the context and for the purposes of this law, it is considered systematic intimidation (bullying) every act of physical or psychological violence,

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> intentional and repetitive, which occurs without evident motivation, exercised by an individual or a group, against one or more people, with the aim to intimidate or assault them, causing pain and anguish to the victim, in a relationship of imbalance of power between the involved parties. (BRASIL, 2015)

This recent classification of the concept of *bullying* (or systematic intimidation), however, does not change the understanding of mental distress claim due to moral harassment. In accordance with what is established in article n.5, *caput*, and items I, V and X of the Brazilian Federal Constitution, such harms guarantee relief "on moral equity of the human beings, including workers, due to injuries to their physical and psychic health, to their welfare, to their personal safety, to their equality, to their image and self-esteem, and to their dignity" (DELGADO, 2016, p. 1365).

Today, the phenomenon of moral harassment is discussed all over the world, varying only its denominations, as it has been previously mentioned. In Brazil, the word mobbing is used to designate the existing moral harassment in the labor relationships, and bullying for the occurrences verified in the school relationships. (DALLEGRAVE NETO, 2014, p. 285)

In Brazil, concerning the legislated aspect, in can be noticed the existence of state and municipal rules geared to public servants. Besides the town of Iracemópolis-SP, which has the first Brazilian law that protects the citizen against moral harassment, several other towns also enacted laws in this same regard (according to data in the website "*Assédio moral no trabalho: chega de humilhação!*"): in the state of São Paulo, 24 towns altogether; seven in Paraná; seven in Rio Grande do Sul; four in Santa Catarina; four in Minas Gerais; two in Mato Grosso do Sul; one in Rio de Janeiro; one in Rio Grande do Norte; one in Bahia; one in Mato Grosso and one in Rondônia. Apart from these cities, eleven bills by towns spread throughout the country await passing. The Federal District also possesses its own law. As for the states, Rio de Janeiro adopted the first state law regarding the subject, enacted in August, 2002. (PAMPLONA, 2016, p. 178)

These texts present a certain uniformity in their content regarding the concept of moral harassment and also regarding the sanctions caused by abusive conduct, which conform to a criterion of gradation, starting from warning, up to suspension

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(eventually cumulative with the participation in a course of professional development, and fine) and even causing dismissal. Regarding laws intended for civil servants, there is a provision where "the offended party or the authority that is aware of the violation can, on their own motion, start an administrative procedure to ascertain the former, assuring full defense". (PAMPLONA, 2016, p. 178)

An important point should be presented with regard to these municipal and state laws: they are not labor rules, but administrative rules which aim at the regulation of the relationships between the governments and their servants. As it is known, the competence to legislate on labor law is exclusive to the Union, as established in art. n.22, I, of the Federal Constitution of 1988. (NASCIMENTO, 2008)

2.5 LEGAL NATURE

What would be, thus, the legal nature of moral harassment? It can be said that moral harassment, from the legal point of view, is grounded in the principle of dignity of the human person; that is a Brazilian foundation, as provided in article n.1, item III, of the Federal Constitution. It also arises from the right to health, more specifically, mental health, encompassed in the protection verified by art. n. 6 and the right to honor, provided in art. n. 5, item X, both in the Federal Constitution. (PEDUZZI, 2007)

As grounds that may be linked to the legal nature of moral harassment, art. n.5, X, of the Federal Constitution can be cited, providing full protection of the values of honor, intimacy, image and private life, and also art. n.1, III, of the Federal Constitution of 1988, which ensures protection to the dignity of the human person. It may also be asserted, on legal grounds, that every practice of moral harassment implies "the victim's negative and hateful discrimination, which is forbidden by art. n.3, IV, of the Federal Constitution of 1988, and by articles n.1 and 2 of Convention n. 111 of the ILO, which was incorporated in our legal system through Decree of Enactment n. 62150/68". (DALLEGRAVE NETO, 2014, p. 288)

A definition of *dignity of the human person* is not very simple. It can be said, however, that it is about the intrinsic and distinct quality recognized in every human

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being that makes them deserve the same respect and consideration by the state and the community. Having observed this, it implies a complex of fundamental rights and duties that protect the person against every and any action of a degrading and inhuman characteristic. And that aim, as well, at ensuring the minimum existential conditions “to a healthy life, apart from propitiating and promoting their active and co-responsible participation in the destinies of their own existence and in the life in communion with other human beings". (SARLET, 2007, p. 62)

Considering that the principle of dignity of the human person is embodied in the contemporary constitutionalism, using it as a basis and making use of all the sections of law, it has been established, thus, from the adoption of this principle onwards, a new way of thinking and experiencing "the social political relationship based on the legal system. It started to be the beginning and end of law contemporaneously produced and given to the observance in the national and international plans". (ROCHA, 1999, p. 24)

When studying the principle of dignity of the human person, the importance of the Encyclical *Rerum Novarum* by Pope Leo XIII, of May 15th, 1891, on Workers’ Conditions must be emphasized. This document is highlighted as an instrument for valorizing workers in the context of the Industrial Revolution. Being 125 years old in the year of 2016, this Encyclical, when describing the duties of workers and employers, referred to dignity: "concerning the rich and the employers, they should not treat workers as slaves, but respect the human dignity in them". (LEÃO XIII, 1965, p. 23)

The Constitution of the International Labor Organization, adopted in Conference n.29 in Montreal, in 1964, includes an annex in the Declaration of Philadelphia, which provides, in item II, 'a':

> All human beings, irrespective of race, creed or sex, have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, or economic security and equal opportunity. (ORGANIZAÇÃO INTERNACIONAL DO TRABALHO, 2016)

In Germany, the Basic Law of the Federal Republic of Germany, in art. n.1, sanctioned the principle: "Human dignity shall be inviolable. To respect and protect it

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shall be the duty of all state authority." Likewise, the charter of Fundamental Rights of the European Union, enacted in December, 2000, in Nice, guarantees, in its article art. n.1: "Human dignity is inviolable. It must be respected and protected". (PEDUZZI, 2009, p. 27)

2.6. MODALITIES OF MORAL HARASSMENT

It is often noticed, in the scope of employment relationship, the occurrence of moral harassment in the vertical (descending and ascending) and horizontal directions. The most common modality, in the labor world, is the descending vertical one, from employers towards employees. Although it is unusual, in the ascending vertical direction, it may occur from employees towards employers. With regard to harassment in the horizontal direction, it is characterized by workmates towards other workmates. (DELGADO, 2016, p. 1363)

It can still be registered a fourth kind of moral harassment, called mixed. In this event, “the mistreatment originates from both the victim’s employers and workmates”. (SIMM, 2008, p. 138) This modality of harassment would demand the presence of at least three subjects: the vertical harasser, the horizontal harasser, and the victim. In this situation, the harassed is targeted “on all sides”, such a situation which, in the short term, becomes unbearable. (PAMPLONA FILHO, 2016, p. 133-134)

Nonetheless, a position contrary to the existence of the modality of mixed moral harassment can be detected in jurists’ opinions. The justification for this understanding may be due to the fact that, in a company, the number of people indirectly involved with moral harassment is high.

The conformists would be the viewers who do not get directly involved in the perverse action, but are not exempt from liability because they do nothing to prevent the violence caused by the perverse subject (passive conformists). At other times, they actively act, clearly favoring the aggressor’s action (active conformists). These viewers, in spite of practicing mobbing, would not be considered direct opponents of the victim. (GUEDES, 2003, p. 62)

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Other legal studies, more recently, recognize the existence of a new modality, or type, of employer's abuse, identified by the designations *organizational moral harassment*, *institutional moral harassment*, or, also, *business moral harassment*. While traditional mobbing would have as a purpose the victim's exclusion individually from the labor world, discriminating and stigmatizing them in front of the group, in organizational moral harassment the aim is the forced subjection of a group of workers to the aggressive policies of performance of the company. Both situations, nonetheless, have in common the characteristic of offending the citizen's fundamental rights and constituting "moral harm arising from the employer's insistent illegitimate methods". (DALLEGRAVE NETO, 2014, p. 292-293)

In this line of reasoning, it is also possible to distinguish *interpersonal* moral harassment from *organizational* moral harassment. Conceptualize the latter requires a broader study of management methods employed by the company. Organizational harassment relates to a set of reiterated practices, inserted in management strategies and methods, using pressure, humiliation and constraints to fulfill certain business or institutional purposes. (GOSDAL, 2009, p. 37) Such foundations are related to the worker's control (their body, behavior, time), cost of work, increase in production and outcomes, or the exclusion or injury of individuals or groups with discriminatory goals (GOSDAL, 2009, p. 37).

As examples of organizational harassment, the following can be mentioned: a) companies that deal with sales and make use of techniques of humiliation and persecution as a strategy of encouragement to increase sales; b) companies that adopt moral harassment to replace discharge without cause in order to reduce costs, making the employee resign or be discharged with cause when reacting against harassment; c) companies that set excessive performance targets for workers, controlling even their time in the bathroom (generally five minutes). (GOSDAL, 2009, p. 37-38)

It is possible to distinguish interpersonal harassment from organizational harassment through some important aspects: in the first case the company removes itself from the situation, allowing the occurrence of the practices, while in the second one the company promotes and encourages the occurrence of the practices; b) in the

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first situation the harasser may be hierarchically superior or subordinated to the harassed person, whereas in the second one the company promotes harassment through its agents, managers or teams; c) in interpersonal harassment the goal is to harm, frame, humiliate and/or exclude the harassed person from the group or company, while in the organizational form the aim is to reach or keep certain business or institutional goals, controlling workers and the cost of work. (GOSDAL, 2009, p. 39-41) In order to determine the scope of organizational moral harassment, it is necessary to understand that such modality does not depend on the perversity of a resolute harasser, and in the vast majority of cases, it does not aim at removing the employee from the company, but harassment is constituted specifically from the way work itself is organized to maintain the profitability of capital. Violence as a method of management is the core of organizational moral harassment. (TELES, 2015, p. 155)

Organizational or institutional harassment generated by the new ways of organizing work, demobilizes and excludes an immeasurable number of employees from the labor market. The employee who is psychologically ill may never recover and may be permanently discarded from the labor market, disrupting their families and "eventually creating invaluable loss to the Brazilian society". (CALVO, 2016, p. 17)

Scientific analyses in specialized publications use the expressions *moral harassment through abusive goals* and *moral harassment through overwork*. In the first instance, the category of bank workers may be used as an example, since this group is the most affected class when subjected to evaluations of individual performance and exposed to humiliating and embarrassing situations when they do not achieve the abusive goals. (GOLDSCHMIDT, 2015, p. 199) In the second situation, harassment occurs because of habitually excessive working time to which, because of their dependency, employees are repeatedly subjected. (SILVA, 2016, p. 570-571)

3 HARMS DUE TO THE PRACTICE OF MORAL HARASSMENT

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Whatever modalities or kinds of moral harassment practiced, there should always exist an adequate reaction to this practice by law, not only with a punitive aim, but also pedagogical. The publicity of legal decisions, for instance, was an important element in curbing moral harassment. Companies, however, both private or public, have a greater responsibility for these practices. Clear attitudes and methods of prevention are major allies in such indefatigable struggle against aggressions caused by moral harassment.

3.1 PROHIBITORY INJUNCTION AS A PROCEDURAL MEASURE TO AVOID THE OCCURRENCE OR THE RECURRENCE OF DAMAGE

At this point, it is necessary to verify what specific kind of response law should give to current or imminent moral harassment. An important mechanism to prevent the occurrence of moral harassment, or its recurrence, is the prohibitory injunction. In this respect, to realize the guarantees in articles n. 1, III and IV (dignity of the human person and social appreciation of work); n. 7, XXII, (healthy workplace), and n. 6, *caput* (fundamental right to decent work), all enshrined in the Brazilian Federal Constitution,judicial action can inhibit organizational moral harassment with the power to avoid the habitual breach of the legal order and to prevent episodic damage – which is a possible fruit from the unlawful – to workers' health and dignity. (GIZZI, 2015, p. 93).

The previous Brazilian Code of Civil Procedure (Law n. 5869 of 1973) established, in its art. n. 461:

> In a cause of action whose goal is to fulfill an obligation of doing or not doing something, the judge should grant specific relief on the obligation, or, if the request is valid, determine measures which assure the practical outcome equivalent to the performance of the obligation. (BRASIL, 1973)

The New Brazilian Code of Civil Procedure (Law n.13105, of 2015), that came into effect in March 2016, has, in *caput* of art. n.497, similar drafting to the previous rule:

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> In a cause of action whose goal is the intent of doing or not doing something, the judge, if the request is valid, should grant specific relief or determine the actions that assure the attainment of relief through the equivalent practical outcome. (BRASIL, 2015)

The difference is in the sole paragraph of art. n.497, which does not have a match in the repealed Code of 1973:

> For the granting of specific remedy to inhibit the practice, reiteration or persistence of an unlawful action or its elimination, the demonstration of the occurrence of harm or the existence of fault or fraud is irrelevant. (BRASIL, 2015)

Thus, it can be stated that prohibitory injunction does not have among other suppositions damage and fault, requiring only demonstration of the probable illegality of the practice and its recurrence or continuation, along with the imputation of this behavior to someone. (MARINONI, 2015, p. 477-480) There is no doubt, therefore, that prohibitory injunction is constitutes an adequate procedural measure to impede the occurrence of moral harassment or its potential repetition.

3.2 THE CLASSIFICATION OF MORAL HARASSMENT IN THE PUBLIC SERVICE AS AN ACT OF DISHONESTY

It can be stated that Labor Courts have the jurisdiction to try cases of moral harassment when the workplace is private, or, even better, when the employee is subject to the Brazilian Consolidation of Labor Laws. When harassment takes place in a government agency, the employee is subject to a different regime, where the jurisdiction belongs to the courts of general jurisdiction (state or federal, depending on the agency where the practice occurred).

It is known, however, that even though private sector workers are more vulnerable to this kind of abuse, tenured employment for public servants does not impede harassment.

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When discussing practice of impropriety, it is necessary to resort to the legal definition of art. n. 11 of Law n. 8429/92 (Law of Administrative Impropriety):

> It is an act of administrative impropriety, which undermines the principles of government, any action or omission that violates the duties of honesty, impartiality, legality, and loyalty to the institutions. (BRASIL, 1992)

In at least two cases, the Superior Court of Justice recognized moral harassment as an act of administrative impropriety. In the first one, the mayor harassed a public servant who had brought charges to the Prosecution Office about a problem with the town's debt. In reprisal, the mayor "grounded" the servant in a meeting room for four days, threatening to make her available for other tasks, and granting her a thirty-day vacation against her will. On appeal, these acts of misconduct were recognized as a case of moral harassment reestablishing the judgment that had sentenced the mayor to the loss of political rights and a fine equivalent to five years of her monthly wage at the time of the facts. ("REsp 1.286.466, Rel. Min. Eliana Calmon"). (CONJUR, 2013)

In another appeal, the decision by the court of Santa Catarina was upheld; it sentenced a math teacher of a state school to the loss of his job based on the Law of Administrative Impropriety. The teacher was charged with sexually harassing his female students in exchange for good grades. In the judge rapporteur's opinion, adopted by the Supreme Court of Justice, intent was clearly demonstrated, since the teacher aimed at harassing the students and obtaining improper advantage based on his position, "which subverts the fundamental values of society and corrodes its structure" ("AREsp 51.55, Rel. Min. Humberto Martins"). (CONJUR, 2013)

Based on these two judgments, it can be observed that moral harassment in public service has deserved strong repudiation before the Superior Court of Justice, which characterizing it, also, as an act of impropriety.

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3.3 CAN THE PRACTICE OF MORAL HARASSMENT CONSTITUTE A CRIME?

When studying situations of harassment, the existence of the what is labeled *sexual harassment can be confirmed.* This practice was categorized as a crime by operation of Law n.10.224/01, which included in the Brazilian Penal Code art. n.216-A, with the following wording:

> To constrain someone with the aim of obtaining sexual advantage or favoritism, when the agent avails themselves for their condition of hierarchical superiority or ascendance inherent in the exercise of the job, position or function. Penalty - detention, from 1 (one) to 2 (two) years. (BRASIL, 2001)

According to a specific study on the theme, such criminal law does not impede the practice of harassment, statistics demonstrating that workers remain unprotected against recurrent violence. There is not a specific law to curb moral harassment in the work sphere; as a result, workers are harmed by being in a legal void. There is, therefore, a "lack of a specific rule which meets all kinds of harassment and establishes mechanisms of prevention, investigation of charges and punishment for the harassers". (LEIRIA, 2012, p. 163)

Within legal doctrine, there is also a proposal of criminalization of moral harassment. Theoretically, defamation, crimes of bodily injury (mild, serious, very serious), criminal coercion and violation of someone else's correspondence could provide a ready response to moral harassment in penal law. However, "such rights have not been effective in more efficiently curbing such assaults on the victim's rights of personality". (BERALDO, 2012, p. 93-95)

As for the criminalization of moral harassment, it is even claimed that the principle of minimum intervention should be used in its correct measure. It would not be possible to ignore its force, where penal Law is arrogating to itself the role which, in this subject, should be granted to other fields of the legal system; nor should such principle be employed as an excuse to renounce the application of criminal law, "on

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the grounds that it is conduct that, having a place in the work realm and violating the rules of labor law, should be exclusively regulated by it". (CARVALHO, 2013, p. 164)

What is fundamental is the gap verified in the protection of this juridical value in the Brazilian legal system. Thus, the seriousness, regularity and intensity of this practice in the labor sphere, either public or private, highlights the great need of legal intervention, "by both, labor law and criminal law, as an intention to suppress and, if possible, eradicate this type of behavior". (CARVALHO, 2013, p. 164)

The potential categorization of moral harassment as a crime will still deserve deeper studies. However, it seems that classifying sexual harassment as a crime has not concretely reduced its occurrence. Maybe, it will be better to follow the new Labor Code of Portugal (2003), which, in its art. n.24, conceptualizes harassment:

> 1. Harassment of job candidates and workers is discrimination.
> 2. Harassment should be understood as all kinds of undesirable behavior related to one of the factors pointed in n. 1 of the previous article, practiced when having access to the job, or in the workplace itself, work or professional education, with the aim and the effect of affecting the person's dignity or creating an intimidating, hostile, degrading, humiliating or destabilizing environment.
> 3. In particular, harassment represents all kinds of undesired behavior of a sexual character verbally, non-verbally or physically, with the aim and effect referred in the previous number. (LIPPMANN, 2004, p. 15)

In fact, the ideal would be the existence of a rule at the federal level, inserted in the Brazilian Consolidation of Labor Laws, combatting harassment. Besides establishing measures of prevention, this rule should curb moral harassment with the remedies of relief, transfer, discharge or disciplinary punishment, "providing the damaged party with constructive discharge, all with no loss of the compensation for the damage caused (pecuniary damage and/or moral harm), since the subject is treated in an incomplete way by the Brazilian national legislation". (BARROS, 2016, p. 609)

Nonetheless, even if legislation on this matter is still missing, collective bargaining (collective agreements and conventions) can (and should) be an efficient instrument to "establish the concept of moral harassment, as well as the violations and

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sanctions in this field, besides measures intended to avoid this kind of practice". (BARROS, 2016, p. 609)

3.4 COMPENSATION MEASURES

What would be the remedies and/or compensations in the specific events of the occurrence of damage? From the point of view of employment relationships, the proper remedies may be distributed in four possibilities: a) constructive termination of the employment contract; b) pecuniary damages; c) mental distress claim, compensation for psychological and psychic injury; d) compensation for the occurrence of existential damage.

3.4.1 CONSTRUCTIVE TERMINATION OF THE EMPLOYMENT CONTRACT

It is perfectly possible to frame part of harassing conduct adopted by some employers as a matter of discharge with cause, which would lead to constructive discharge. (PAMPLONA, 2016, p. 164-165) It is important to remember that *caput* (the caption) of art. n. 483 of the Brazilian Consolidation of Labor Laws says that "the employee may consider the contract rescinded and plead the due compensation when…" and lists the relevant situations in sub-items 'a' to 'g'. (BRASIL, 1943)

Therefore, legal prevention of moral harassment in businesses has its grounds in art. n. 483 of the Brazilian Consolidation of Labor Laws, which regulates termination of the individual employment contract by the employee, based on the faulty conduct of the employer, known as "indirect termination" (or constructive discharge in U.S. law). Taking into account the characteristics of each concrete situation, the characterization of discharge with cause should involve a) the requirement of tasks higher than the employee's competence, against the law, or contrary to good moral, or unrelated to the contract; b) excessive severity; c) breach of contract; or d) defamation and harmful acts to the physical integrity of the employee or their family. (PINTO, 2016)

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There also occurs termination with cause by the employer. Even though the occurrence is restricted, it is possible to frame the harasser employer as subject to termination with cause as provided in the Brazilian Consolidation of Labor Laws. In effect, art. n.482, *caput*, "defamation in the workplace against anyone, or physical offenses, in the same conditions, except in self-defense or other's defense" (BRASIL, 1943) are bases for termination with cause by the employer. Legal doctrine inclines similarly, explaining that "moral harassment practiced by an employee against workmates is clearly a situation of termination with cause, based on art. 482, sub-item 'j' of the Brazilian Consolidation of Labor Laws". (BRASIL, 1943)

3.4.2 Pecuniary damages

Considering the economic aspect, harm may be classified as *pecuniary* (economic or material) and *non-pecuniary* (moral injury in a wide sense, non-material or immaterial). Thus, moral harassment may provoke injury of a proprietary character, that is, when its effects include expenditures on health treatment are included, as well as decrease in income in general, loss of a promotion, unemployment and other economic losses. (SIMM, 2008, p. 44)

Pecuniary damage is the one susceptible to economic valuation, encompassing both pecuniary loss and profit loss (art. n. 402 of the Brazilian Civil Code). In these events, the following situations may be included as examples:

> […] from labor incapacity due to triggered occupational disease (such as burn-out syndrome), the victim's expenditures on medicine or psychological treatment, or even wage loss because of persecution by the harasser (absence at work, demotion or promotion of frustration). (DALLEGRAVE NETO, 2014, p. 301)

Therefore, expenditures on medical or hospital treatment due to moral harassment can be an object of requests for pecuniary damages. Articles n.949 and n.950 of the Brazilian Civil Code, applicable to these situations dealing with civil violations are explicit when determining the damages for losses caused by

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harassment. The Brazilian legal system supports the search for compensation for disruptions directly connected to the loss of mental or physical health caused by harassment. Thus, suits for pecuniary damages may be filed:

> […]the reimbursement of psychiatrist or psychological treatment that the victim has undergone to overcome the trauma and the loss of self-esteem and episodes of anxiety and anguish, as well as medicine prescribed as a result of these therapies, such as antidepressants, tranquilizers, etc, [...] and with payment to be determined when medically prescribed, of others used for chronic conditions as a result of clinical symptoms resulting from tension, such as gastritis, heart problems, spine problems, etc. (LIPPMANN, 2004, p. 66)

From this perspective, the award of damages should be as wide as possible, restoring to the victim all that they lost/spent as a result of harassment.

3.4.3 MORAL HARM CLAIMS AND COMPENSATION FOR PSYCHOLOGICAL AND/OR PSYCHIC INJURY

The theme of moral harm claim gained space in Brazil from 1988 onwards, with the advent of the "Citizen Constitution." Before that, the cases in which this legal feature was discussed were rare.

Taking into account civil redress, it can be said that, as a specific legal category:

> Moral harms are those borne in the sphere of values of personal or social morality and, as such, reparable, in its integrity, in the legal sphere. It is perceptible by common sense – because it is linked to human nature – and can be concretely identified by the judge, in the light of factual circumstances and the peculiarities of the case, respecting the basic criterion of effects harming the injured party". (BITTAR, 2008, p. 305)

Commonly, two meanings of the expression *moral harassment* must be kept in mind, both involving injury of a non-pecuniary nature. In a broad sense, it expresses all kinds of immaterial or non-pecuniary damage, that is, the ones which strike the person and their psycho-physical integrity, causing, for example, physical and/or

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psychological pain, shame, depression, inner suffering, humiliation, difficulty in social relationships and other consequences that are economically non-assessable. In a strict sense, “it corresponds to spiritual damage, that commonly linked to the violation of personal dignity and to the rights of personality (like honor, image, freedom of expression and creed)”. (SIMM, 2008, p. 305)

Moral harm no doubt results “from the violation of the general right of personality, the pain caused by it being presumed (*hominis* presumption), usually for violation to objective and subjective honor, image and intimacy". (DALLEGRAVE NETO, 2014, p. 301)

There is a relationship between the principle of dignity of the human person and moral harm, making it possible to emphatically state that:

> Personal injury has as its cause the unfair violation of a non-pecuniary subjective legal situation protected by the legal system through the general clause of protection of personality, which was established and has its source in the Federal Constitution, particularly and directly due to the principle (founding) of dignity of the human person (also identified as a general principle of respect to human dignity). (MORAES, 2003, p. 132)

Two aspects, in principle, should be taken into account, when dealing with moral harm and damage award: compensatory damages and punitive damages. Compensatory damages attempt to compensate for the injuries the harassed suffered. Punitive damages seek to punish, hitting the company in its financial aspect “in a mildly serious way so that it has an interest in taking action in a way that harassment cases do not happen again in its establishment ". (LIPPMANN, 2004, p. 60)

The Federal Constitution of 1988 established, among the fundamental rights, moral harm claim (art. n.5, sub-items V and X), settling the jurists’ and precedents’ debates about its existence. In this respect, the Brazilian Civil Code of 2002 updated the normative provision on the subject, asserting that moral harm is categorized as an unlawful act. Even exclusively moral, the harm e received express provision in art. n. 186 of this code: One who, through voluntary omission or action, negligence or recklessness, violates a right and causes damages to another person, even if exclusively moral, commits an unlawful act. (BRASIL, 2016)

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In the labor sphere, moral harm claims aim at the protection of the worker's dignity. Therefore, the provision in item III of art. n. 932 of the Brazilian Civil Code applies, holding responsible for civil award "the employer or contractor to their employees in the exercise of their work". (BRASIL, 2002) That provision justifies "the liability of the employer for acts caused by their agents to the employees, assigning them the direct obligation of compensation". (PEDUZZI, 2007, p. 41)

Moral harassment causes, consequently, moral harm. Threatening the dignity of the person is threatened, violating a subjective situation, constitutes moral harassment as long as it occurs in a reiterated and systematic way. Such violence, repeated over time, causes, beyond any doubt, much greater damage to the victim's self-esteem, personal consideration, image, respectability with workmates and social group. Thus,

> damage awards for moral harm stemming from harassment, as prescribed in art. n. 964 of the Civil Code, will certainly be greater than those based on liability for simple moral aggression, since compensation is assessed on the extend of the injury .(MUÇOUÇAH, 2014, p. 158)

Proving some conduct characterized as moral harm is very hard. It rests with the victim (the harassed) to present evidence which leads to reasonable suspicion, the appearance or presumption of the offense being examined. Thus, the defendant (harasser) assumes the burden of demonstrating that their conduct was reasonable, in other words, did not violate any fundamental right. If there is not "adequate distribution of the evidentiary burden, the rule regarding the issue will not be effective and it will remain in the realm of a statement of good intentions". (BARROS, 2016, p. 611)

To evaluate the compensatory aspect of moral harm, the judge can order a medical examination by a psychiatrist or psychologist in which they check aspects of individual suffering of each case. This exam can determine the extent of psychological injury, the tension generated by the incident, the loss of self-esteem, the intensity of other symptoms generated by the tension, and even

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> if there are permanent consequences, such as a heart attack, or ulcer, or even milder problems such as gastritis, headache, backache or pain in the neck, if the incident caused loss or disturbance in a stable relationship maintained by the harassed, if there is need of psychological or psychiatric treatment as well as loss of professional productivity. (LIPPMANN, 2004, p. 60)

At this point, it is important to ask: does psychic injury constitute a separate basis of compensation, or is it subsumed within the mental distress claim?

Psychic injury assumes a modification or alteration of personality, which is expressed through symptoms, inhibitions, depression, blocks. Such manifestations allow the assessment of the degree of injury suffered. Psychic injury and its evaluation are registered, thus, in a psycho-pathological plane; for this issue, moral and axiological assessment are irrelevant. (GHERSI, 1997, p. 68)

Some legal decisions in Argentina hold that the amount of damages for psychological injury should incorporate moral harm. Others, however, assert that psychic injury should be compensated independently of aesthetic damage and moral harm, if medical expertise recognizes the existence of emotional alteration as a result of the incident. (GHERSI, 1997, p. 388-390)

In Brazilian Law, the recognition of moral harassment is centered in the employer practice that systematically humiliates, denigrates image and honor, causing psychic injury to the employee. (MUÇOUÇAH, 2014, p. 159) The terminology *psychic injury* is not expressly codified in our legal system, even though it is protected by it in its broad and ever widening notion of moral harm. (MUÇOUÇAH, 2014, p. 159)

If the judge recognizes the existence of the aggravation of *psychological* or *psychic injury*, through expert report presented by a psychiatrist or psychologist, the judge can augment the sentence of moral harm with this other ground. It is not, therefore, at least in Brazil, about adding a new kind of damage, but including it in moral harm injury itself.

Psychic injury, in our legal system, hence, has the same protection as moral harm, under the general rubric of the defense of the human person. From this perspective, it can be considered among the list of the so-called non-pecuniary rights, “even though it may appear , depending on the severity of the psychic injury, also in

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pecuniary damage" (MUÇOUÇAH, 2014, p. 164). Furthermore, one should consider that pecuniary damage (job loss, expenditures on medical treatment, etc.), will always be a "reflection of the non-pecuniary injury initially suffered, that is always generated by the psychic injury". (MUÇOUÇAH, 2014, p. 164) Last, as seen in the statement of Precedent n. 37 of the Superior Court of Justice, moral harm is autonomous and perfectly cumulative with possible pecuniary damage caused by the practice of moral harassment. (BRASIL, 2016)

3.4.4 COMPENSATION FOR EXISTENTIAL HARM

The issue of existential harm has been recently accepted in our country. The work by Professor Flaviana Rampazzo Soares, resulting from her master thesis presented at PUC University ("Pontifícia Universidade Católica" of Porto Alegre), with a subsequent book publication, stimulated a thorough analysis for experts on the subject. (SOARES, 2009, p. 160)

Encouraged by this thesis, the Regional Labor Court, Region n. 9, launched an Electronic Journal especially on existential harm , with articles, appellate decisions, synopses of the decisions, Brazilian judgments as well as appellate decisions by the Appeal Court of Porto, Portugal, and a synopsis of the work by this Professor (PARANÁ, 2013)

To analyze the significance, scope and application of existential harm, it is necessary, above all, to examine its conception:

> Existential harm is the injury to the set of relationships which helps the normal development of the subject's personality, comprising the personal order or the social order. It is a negative affectation, full or partial, permanent or temporary, whether an activity or a set of activities that had been normally incorporated in their daily life of the victims of injury, who because of the harmful effects, had to change their way of carrying them out, or even removing them from their routine. (SOARES, 2009, p. 44)

This new concept of harm, also called *harm to life project*, or *harm to the person's existence*, is the violation of any one of the fundamental rights of the person,

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protected by the Federal Constitution, and that causes “a harmful alteration in the individual's way of being, or in the activities carried out by them regarding their life project, regardless of any financial or economic repercussions that may occur from the fact of the injury". (ALMEIDA NETO, 2005)

The life project, the future chosen by the person, that is, what the person has decided to do with their life, cannot lightly be frustrated. Existential harm is characterized precisely by the “unfair fact that frustrates this future (impedes its full achievement) and makes the person resign themselves to their future”. (BEBBER, 2009)

Having mentioned those premises, it is time to ask: does moral harm subsume existential harm, or in other words, are they considered in only one kind of compensation?

Part of legal doctrine disagrees with the viability of an autonomous cause of action for existential harm, advocating for the recognition of such compensation in conjunction with moral harm. In this regard, José Affonso Dallegrave Neto asserts that, despite its conceptual autonomy, existential harm conforms to the concept of moral harm “in that it is offensive to the general right of personality, and, in some occasions, is in the concept of pecuniary damage, above all when the resulting injury is susceptible to economic valuation” (2014, p. 179). Also, in this respect, Renato de Almeida Muçouçah writes that “in the scope of the Brazilian positive law, existential harm, as a type of non-pecuniary injury, is treated as moral harm”. (MUÇOUÇAH, 2014, p. 168)

Other equally well-known authors have a different opinion. In Flaviana Rampazzo Soares’s opinion, moral harm belongs to the person’s inner sphere, being different from existential harm, which is characterized in all the harmful alterations in the victim’s daily life, in others words, “in all their relational components (impossibility to act, interact, perform tasks related to their basic needs, such as taking care of personal hygiene, taking care of the home and family, speaking, walking, etc.).” (SOARES, 2009, p. 99) This author believes that the court precedents in Brazil recognize existential harm, despite its frequent and incorrect classification as moral harm. (SOARES, 2009, p. 99) In this regard, existential harm would exist as an

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autonomous kind of the *non-pecuniary injury*, presenting "distinct and unique conceptual outlines". (SOARES, 2009, p. 153)

Other authors also point out the distinction between existential harm and moral harm. For Ilse Marcelina Bernardi Lora, while moral harm negatively affects the person's mood, being related to a feeling, existential harm amounts to "not being able to act , requiring a change of routine", that is to say, "it frustrates a person's life project, harming their welfare and happiness." (LORA, 2013, p.21) According to Lorena de Mello Rezende Colnago, the distinction between existential harm and moral harm resides in the degree to which existential harm touches on a public aspect of the individual, that is, "their relationship with other beings, with the social world, whereas moral harm consists of injury to the person's inner non-pecuniary patrimony." (COLNAGO, 2013, p. 57)

Júlio César Bebber also maintains that existential harm does not depend on financial or economic effects and does not relate to the victim's intimate sphere (pain and suffering, characteristics of personal injury). According to this author, it concerns injury resulting from a frustration or projection that impedes the worker's achievement (with loss of quality of life and, as a consequence, *in pejus* modification of the personality). (BEBBER, 2009, p. 30)

Some examples of existential harm can be mentioned, mainly in the area of labor law, where its incidence doubtless is more frequent:

> a) moral or sexual harassment that entails psychological disruptions or phobias;
> b) strenuous work that causes physical deformation that affects not only professional capacity, but also inhibits the idealized life project;
> c) degrading or unhealthy workplaces that compromise the employer's health;
> d) submission to permanent and stressful on call regime; e) refusal to grant vacation for long years; f) refusal to grant paid weekly rest on Sundays;
> g) habitual working of excessive overtime with working hours above the ten-hour limit. (DALLEGRAVE NETO, 2014, p. 181)

There are studies that label moral harassment from overwork as existential harm. In this case, the level of severity "strikes even the worker's physical integrity,

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placing their life at risk" (SILVA; WOLOWSKI, 2016, p. 568). This situation constitutes one type of harm that curtails social and family coexistence, preventing the worker from exercising other activities, "conceptualized by the court precedents as existential harm because of the loss of a life project." (SILVA; WOLOWSKI, 2016, p. 568)

Can moral harassment cause moral harm, material injury, and existential harm? And, are these three bases of compensation cumulative in Brazilian Law? In labor law, according to Ilse Marcelino Bernardi Lora, moral harassment, besides causing proprietary losses, due to the impairment of labor capacity (pecuniary damage), "may generate suffering, anguish, discouragement (moral harm), and also losses to the life project, daily tasks, peace of mind (existential harm)" (BOUCINHAS FILHO, 2013)

When the worker's tasks are affected because of injury to their physical or mental health resulting from overwork, "damages can be set cumulatively for both moral harm and existential harm". (BOUCINHAS FILHO, 2013).This possibility of accumulation, with existential harm recognized alongside moral harm, "is seen as indispensable for the full redress of the unfair non-pecuniary harm committed against the person". (ALMEIDA NETO, 2005, p. 68)

According to Professor Teresa Ancona Lopez, "existential harm is a kind of non-pecuniary injury, grounded in the principle of human dignity that is sometimes treated as moral harm and at other times has autonomous treatment". (RODAS, 2015) Nonetheless, this professor points out the difference: "moral harm is based on the person's feeling, on the psychic; existential harm is external, consisting in the fact that the victim can no longer keep up with their routine". (CONJUR)

In a unanimous decision, Panel Number Seven of the Superior Labor Court, in appellate decision where the judge-rapporteur was Judge Vieira de Mello, clarified the difference between existential harm and moral harm: "the first one is a legal concept from the Italian Civil Law and fairly recent, which aims at a way of protecting the person that transcends the limits classically set for the notion of moral". (CORREIA, 2015)

In this situation, the harms appear not only in the moral and physical dimensions, but also include relationships with third parties. The concept of existential

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harm has been applied by labor jurists to employment relationship “in a case of violations of rights and limits inherent to the employment contract which involve, apart from pecuniary damage and moral harm, injury to their life project or to the so-called life of relationships” (CORREIA, 2015).

The concrete case dealt with the award of compensation for existential harm to a newspaper deliverer, who worked overtime, logging about 70 (seventy) extra hours per week. The Superior Labor Court of Region n. 4 (RS), considering all the aspects that comprise the set of basic needs of the human being, found the complaint of overwork proven, precluding the possibility for the employee to spend time with his family, socially interact and perform activities designed for leisure or cultural development.

The decision of the Superior Labor Court highlighted that a single situation may generate, theoretically, two kinds of injury; it asserted, however, that the assumptions and the evidentiary demonstration of each one of them are independent. In the analysis, even though the judge understood the overtime to be proved, there was no demonstration or evidence that it had compromised the employee’s social relationships or his life project, which was a constitutive factual basis of his right. Finally, the appellate decision says that “having proved overtime, it is not acceptable to extracted automatically from that the conclusion that the worker’s social relationships had been broken or that his life project had been suppressed from his horizons”. (CORREIA, 2015)

With this same understanding, on the need of proof, the opinion stated that “the victim must prove the regular development of their daily activities, before the injury, as well its cessation or harmful modification after the injury”. (SOARES, 2015, p. 145-146) This issue is highlighted, asserting that the plaintiff bears the burden of indicating in the complaint all the attendant circumstances and elements necessary for the full understanding of what happened. Also required is, “an accurate and as thorough indication as possible of the injuries experienced (including lost opportunities, as may be the case), in order to assist in the understanding of the controversy by the judge and enable the defendant’s defense”. (SOARES, 2015, p. 146)

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These are the main guidelines, by way of synthesis, that allow recognition of the autonomous cause of action of existential harm in Brazilian law, mainly in the labor field.

FINAL CONSIDERATIONS

The phenomenon of moral harassment was first recognized in biology, in lab experiments with small-sized animals, proving that invasions of territory by other animals generated aggressive behavior. The ones whose territory had been invaded tried to expel the invader with aggressive attitudes. This kind of conduct was called *mobbing*.

This terminology was created in the decades of 1960 and 1970 by the Swedish physician Peter Paul Heinemann to describe the hostile conduct of certain children towards others.

It was only in the 1980s that Heinz Leymann, a German psychologist settled in Sweden, used the concept of *mobbing* to label the forms of harassment in organizations. Comprehension of moral harassment, from the legal point of view, occurred only at the end of the twentieth century, with the studies by the French psychologist Marie-France Hirigoyen.

Besides the word *mobbing*, moral harassment is also recognized in other countries by the following expressions: *psicoterror laboral*, *acosso moral*, *terror psicológico*, *humilhações no trabalho*, *ijime*, *harcèlement moral*, harassment and bullying.

Among so many existing concepts, Márcia Novaes Guedes's seems to be the most illuminating, affirming that *mobbing*, or moral harassment, comprises all the acts and behavior originating with the boss, manager or immediate superior, or even from workmates, that convey an attitude of continuous and blatant persecution that causes pertinent injury to the victim's physical, psychic and moral conditions.

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Even though Brazil has more than 5000 towns, no more than a hundred have recognized the phenomenon of moral harassment in their laws. The town of Iracemápolis was the pioneer, in the year 2000. The State of Rio de Janeiro also legislated on this matter in 2002.

These municipal and state laws are not considered labor rules, but rather administrative ones, as they aim at regulating the relationships between governments and civil servants, since only the Brazilian Union has the jurisdiction to legislate on labor law (art. n. 22, I, of the Federal Constitution of 1988).

Moral harassment, legally, is mainly grounded in the principle of dignity of the human person and in the right to health and honor (arts. n. 1, III, n. 6, and n. 5, x, of the Federal Constitution of 1988).

In the sphere of employment relationships, moral harassment may be identified in the vertical direction (descending and ascending), horizontally and mixed. The descending vertical direction is manifest by employers towards employees. The ascending vertical direction (less frequent) is from employees towards employers. The horizontal one comes from workmates towards other workmates. In mixed harassment, the mistreatment comes from both, the victim's employers and workmates, forming three subjects: the vertical harasser, the horizontal harasser and the victim.

A new modality of employer abuse is called organizational moral harassment, institutional moral harassment or business harassment. This modality, or kind of harassment, comprises a set of reiterated practices, inserted in the strategies and methods of management, through pressure, humiliation and constraint, so that business or institutional goals are fulfilled.

The so-called organizational harassment differs from interpersonal harassment because in the former the company promotes and encourages the occurrence of the practices, while in the latter the company absents itself, allowing the practices to occur.

An important mechanism to stop the occurrence of moral harassment, or to prevent its recurrence, is the prohibitory injunction. In the past provided in art. 461 of the Code of Civil Procedure of 1973, and now in the New Code of 2015 (art. 497 and

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sole paragraph), the prohibitory injunction does not require among its predicates proof of injury and fault, limiting the complaint to the probability of unlawful conduct or its recurrence or continuation, demonstrating the attribution of this behavior to someone.

There are precedents in the Superior Court of Justice recognizing moral harassment in public service as an act of impropriety.

The projection of moral harassment as possibly constituting a crime still deserves profound study. It appears, however, that classifying sexual harassment as a crime did not concretely reduce the occurrence of this kind of abuse. The ideal would be the existence of a rule, in a federal scope, inserted in the Brazilian Consolidation of Labor Laws, combatting moral harassment. In any event, even if legislation regarding it is absent, in the sphere of employment relationships, collective bargaining (Collective Labor Agreements and Collective-bargaining Agreements) may be efficient tools to conceptualize moral harassment, establishing measures to prevent and repress harassment.

Four remedial measures may be identified for ding the practice of moral harassment. The first one is the indirect rescission of the employment contract (constructive discharge) due to serious fault by the employer (art. 483 of the Brazilian Consolidation of Labor Laws), or discharge with cause when the employee is the harasser (art. 482, Brazilian Consolidation of Labor Laws). The second possibility is pecuniary damages, when moral harassment causes injury of a monetary nature, including expenditures on health treatment, reduction of income, loss of promotion, unemployment and other economic losses. The third possibility is a moral harm claim (and/or psychological-psychic injury), taking into account damages awarded as relief for the injury the victim suffers (compensatory damages) and punishment that affects the financial aspect of the company so that it starts to take concrete steps to prevent cases of harassment. The fourth possibility aims at verifying the occurrence of existential harm, which would have caused frustration or a projection that impedes the employee's self-realization, with loss of life quality.

Whether existential harm should be considered in conjunction with personal injury or if it has autonomous existence is debated. It can be said that while moral harm

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is based on the person's feeling, on the psyche, existential harm has external characteristics, consisting of the fact that the victim can no longer follow their daily routine.

Finally, to be recognized as existential harm, proof that moral harassment has compromised the employer's social relationships or their life project is indispensable.

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