

THE AGGREGATION THEORY AND NEED OF COMPENSATION TO FACE WORK FLEXIBILIZATION IN BRAZIL

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ABSTRACT

Considering Brazilian labor flexibility an undeniable reality, it becomes essential using tools to make it effective in a fair and efficient way. In this sense, the objective of this paper is seeking through its objects of analysis, to show need of flexibilizing collective negotiations being globally beneficial for the employees (aggregation theory) and also the need of verifying every each time a favorable condition for workers be withdrawn, in contrast (and as compensation) a benefit will be awarded to compensate the loss.

Keywords: flexibilization; aggregation theory; compensation.

INTRODUCTION

In the face of current ravaging global economic crisis and its consequent high unemployment rates and labor informality, Labor Law needed to adapt to this new labor market reality. Therefore, flexibilization of labor aims to reduce negative effect that extremely rigid laws imposed to the dynamics of employment and labor interconnection, by limiting it. This flexibilization – in a broad sense, is the introduction of mechanisms allowing workers and employers to flatly regulate, through reciprocal concessions, its relationships.

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Bearing in mind that current Brazilian Federal Constitution foresees labor flexibilization hypothesis in its laws, it must be studied how this will be performed. In other words, establish how will be reduced these labor laws protecting workers, in order to have an effective adaptation of norms to the reality, and not simply the withdrawal or exclusion of labor rights.

Within above mentioned context, this paper seeks to analyze flexibilization under the guidance of aggregation theory and need of compensation. For this, in next second and third chapters we will conduct a detailed study of these two doctrines. The analyses of this flexibilization norm will be performed disregarding partial verifications. This would allow changes even considering harmful features for workers, if at the same time they would include other elements in contrast benefiting them.

The objective of this paper is not studying Brazilian labor flexibilization in itself, but a research regarding use of aggregation theory and need of compensation when adopting flexibilization measures, particularly based in latest doctrines and jurisprudence.

Knowing the way aggregation theory and need of compensation is applied to Brazilian labor flexibilization is a very complex task for people trying to convert Labor Right into an effective work, without putting aside its impressive protection approach.

1 GENERAL ASPECTS OF BRAZILIAN LABOR FLEXIBILIZATION

Flexibilization laws arose with economic recession crisis that hit Europe in the early 1980s, due to a need for new human resources management¹. Therefore, as Carlos Roberto Cunha (2004, p. 123) states, Labor flexibilization Laws are ensured in: “technological revolution, economic globalization, neoliberalism, intense informal work-flow and an alarming unemployment rate”. Brazilian flexibilization is still in its initial phase, with few norms regulating it. However it became an increasingly discussed issue in our country, particularly in the last decade; and this discussion is intensified in times of crisis such as current one².

The noun “flexibilization” is used in different areas of knowledge, such as Economics and Sociology. However it is most used in the juridical area, particularly in Labor Law. The concept of flexibilization in Labor Law alters in accordance with the law of each country, but in its broad outlines, Sérgio Pinto Martins (2004, p. 25-26) defines as:

[...] flexibilization of working conditions is a set of rules aimed to establish mechanisms allowing working with current existing economic, technological, political or social changes in the relationship between capital and work.

1. For additional information, read Martins (2004, p. 17-20).

2. For additional information, read: Nitahara (2009).

[...] The flexibilization of working conditions also is a way of lessening the principle of protection in employment relationships. This principle will not be eliminated, however in certain specific situations, its effects will decrease.

It is worth stressing that flexibilization, where state intervention is reduced through the alteration of existing rules, must not be confused with **de-regulation** or absolute lack of state participation in labor matters, due to the absence of heteronomous labor laws. For the time being, there are no plans to deregulate Brazilian legal system.

In our country, flexibilization will have to be performed through collective negotiation with trade union participation. As foreseen in the Constitution, flexibilization must grant minimum rights to workers, therefore it is inadmissible simply accept abolition of these rights. There are important constitutional and legal limits, such as: norms protecting public order and government economic policies. Nevertheless, the Federal Constitution foresees three cases where flexibilization could get worse, all stated in the 7º article. They are: clause VI (allowing wage reduction) clause XIII (allowing compensate working days) and clause XIV (admitting rotating shifts exceeding six hours).

2 AGGREGATION THEORY

A juridical system uses its hierarchical data sources to establish criteria to be followed, in case it would be necessary resolve normative conflicts to harmonize norms, hence bringing order to legal standards. They become organized and graded. In this sense, Delgado (2004, p. 175) states:

Insofar as Right is a system, a set of parts logically and dynamically coordinated among them, it must be studied harmonization criteria of these parts, particularly when two or more rules of law regulate in a different way same concrete situation.

Alice Monteiro de Barros (2008, p. 129) states that from a philosophical point of view the ideal would be absence of hierarchical laws, because this will drive to a coincidence between legal system and “must be”. But she admits that in practice this does not happen, considering that “laws are long term running, have a variable binding force and may apply severe sanctions”. And all these factors, she states, “conclude with demand of classification of laws”.

Labor Right is also characterized in this aspect of normative order of importance. Delgado (2004, p. 177) tells us that “in principle, in the Field of Labor Courts, we cannot talk about hierarchy in horizontal legislation (Law in the material sense), but of hierarchy of juridical norms (heteronomous and autonomous)”. Barros (2008, p. 129) shares this understanding stating:

In Law, where unique sources are State principles, hierarchy respects the category of the authority from where source comes. In Labor Law, hierarchy issue

is exacerbated, because besides State sources there are others sources of Law, such as normative rulings, collective conventions and agreements.

In her book *Labor Law Course*, Alice M. de Barros (2008, p. 131) lists rules used by doctrine when analyzing hierarchy, being them:

a) in case of conflict between State sources (laws) and international sources, last one will prevail; b) if a conflict is established between State sources (laws) and a normative ruling, first one will prevail; c) if there would be a conflict among normative rulings and custom and practice, internal orders and collective convention, the first one prevails, d) to conclude, if conflict arises between custom and practice, internal orders and collective convention, the prevailing will be those whose environment is more generalized.

Another particular feature of this analysis is the principle of most favored rule, incompatible with typical Common Law's hierarchical inflexibility. For this principle, as Sérgio Pinto Martins (2004, p. 79) states, "highest level of labor standards hierarchical is workers' most favored rule". Therefore we conclude that "highest level" is changing, since it will always be possible upgrading to a new norm establishing better working conditions. Based in this, and excepting cases of prohibitive heteronomous state norms³ that will always preserve its supremacy, norm more beneficial for worker shall prevail (regardless of being a state heteronomous rule or a private collective autonomous rule). Regarding this issue, Alice M. de Barros (2008, p. 130) wrote:

Prevalence of most favored rule for employees is relevant when examining sources' hierarchy, since this rule makes presented hierarchy to become malleable. Therefore we must apply the rule providing better conditions for employees, even if they are included in an inferior hierarchy.

In view of above exposed, it is understandable the need of studying theories interested in checking which is the most beneficial norm, considering that rather flexible Labor Law normative hierarchy criteria hampers clarity and objectivity of the verification. Delgado defends this when talking about two theories intended to be used for this particular purpose: the accumulation theory (atomist) and the aggregation theory (for grouping, global or inseparability):

[...] Legal Science, when applied to the Labor area, seeks to develop theories being consistent and clever, to check maximum possible of objectivity and universality in execution of hierarchical criteria prevailing in Labor Right.

3. Article 623, Consolidated Labor Laws: "Dispositions regarding Convention or Agreement that directly or indirectly fights against prohibition or Government economical financial policy disciplinary norms regarding current wage policy, not causing effects to authorities and public agencies, including price review and goods and services tariffs, will be null and void". Single paragraph: "If this would happen, it will be declared invalid by official letter or representation, by the Ministry of Labor or Labor Courts, in a case submitted to judgment. Consolidated Labor Laws of Brazil" - DL-005.452-1943).

Two theories highlight in this attempt: accumulation and aggregation. Both try to inform about criteria for determination of most favored rule – indicator element of normative pyramid highest level –, starting point of logical assessment and evaluation studies among analyzed and compared juridical norms. (DELGADO, 2004, p. 181)

In present situation, when Accumulation theory analyzes juridical norms, it takes most favorable part for workers from each normative text. Therefore, as Sérgio Pinto Martins (2004, p. 79) states “[...] it is possible to apply first clause of convention A and second clause of convention B [...]”. This explains the name of the theory, since favorable fractions of each norm bound for workers are accumulated. Therefore always a different result arises, depending of each interpreter; and precisely this characteristic is base for main critic done to this theory. Alice M. de Barros (2008, p. 131) defines it as:

Theory of accumulation implies in extracting from each object of comparison source, most favorable rules for employees, and put together these little pieces to be applied into a concrete case. Theory of accumulation is countlessly criticized, among others we can mention one stating that transform judges into law-makers (Mario Pasco) since applied norm does not exist; it was created breaking internal harmony of compared rules.

In turn, when Aggregation Theory compares sources, one is exclusively chosen: the source that in joint will be most beneficial for workers. Therefore and according to this theory, legal institutions object of dispute are not split, driving to process a true miscellanea of normative clauses coming from different sources. It is important to stress that when checking most globally favorable norm, interested collectivity is taken into consideration and not workers individually⁴.

Maurício Godinho Delgado (2004, p. 182) defines as follows:

In Aggregation Theory precepts or juridical rules are not split. Each normative set of rules is globally apprehended, considering same thematic universe. Respecting this selection, referred set is compared to others, also globally apprehended. Then more favorable normative rule is determined through analytical comparison. Such Theory advocates organizing normative instruments based in subject-matter jurisdiction (*ratione materiae*), to obtain from set the most favorable instrument, seen from a unit angle. Thus we face a systematic criterion, where each normative regime is respected in its entire and global unit. More favorable norm is noticed by considering its sense in the universe of the

4. In this sense, Delgado (2004, p. 183) states: “it must be highlighted that parameter to compare most favorable norm will not be an isolate individual, but the interested collectivity, for example a working category or a worker objectively considered as a member of a category or segment included in a nature global scenario”.

system where is delivered, to avoid through selection and comparison normative antagonism between solution achieved in the concrete case and basic and determining line of the system as a whole.

Despite eventual critique⁵, aggregation theory is the most appropriate to verify normative hierarchy in Labor Law. Down here is opinion of Sérgio Pinto Martins (2004, p. 832):

More accurate is to apply the collective norm being whole more favorable to employees, since it is impossible to pick clauses at the same time from different collective norms. This is the reason of applying collective norms being more favorable in its whole, in relation to other norms.

Alice Monteiro de Barros (2008, p. 131) suggests that it might be a third theory named aggregation theory based in concepts (eclectic, intermediary, of organic aggregation or of mitigated aggregation) and that this theory is the one adopted by Law 7.064, de 1982 in its article 3º, subsection II⁶, giving provision to Brazilian workers status when abroad. However Maurício Godinho Delgado (2004, p. 183) uses the same article to show adoption of aggregation theory based in Brazilian legal system, since most of doctrine and caselaw adopt binary classification, only admitting existence of theory of accumulation and aggregation theory, adopted in Brazil. This differentiation only exists because Alice Monteiro de Barros defines aggregation theory based in concepts, as defined by doctrine, mostly the own aggregation theory. That said, it is important to know how the author defines aggregation theory based in concepts:

[...] the object of comparison is extracted from the set of rules referring to a same concept, as for example, holiday arrangement or dismissal regime (Deveali). Considering that each institute of Labor Law has a unitary regime, it is not possible to apply it partially. Then applied norm will be unending, but only regarding one or each legal concept. This theory has been adopted in the Employment Contract Law of Argentina, article 9. (BARROS, 2008, p. 131-132)

The author concludes that it must be considered critique made to aggregation theory based in concepts because of its difficulty to classify individually legal concepts to be used as unchanging units of comparison in case of dispute.

5. Para Alice Monteiro de Barros (2008, p. 131), aggregation theory "has one disadvantage, because drives judges to subjectivism when comparing norms, to verify which is most advantageous, facing heterogeneity among them (Campos Ruiz, Alonso Olea e Antonio Ojeda Ovilés)". However we understand this is not a plausible critique. It only exists because mentioned author defines aggregation theory in a different way than almost all the doctrine. For her there would not be a comparison of institutes based in its subject but a comparison among institutes of several subjects. For the author, third theory (as we will see below) would do this analysis *ratione materiae*; but this is not the prevailing understanding.

6. Art. 3º, II, Lei 7.064/82: "application of Brazilian Labor Protection Law in what is compatible with arrangements of this Law, when being more favorable than territorial Law, in the set of norms and regarding each subject". (Brazil, Law 7.064, of December 6, 1982).

Once defined concept and how to apply aggregation theory to determine most favorable norm and admitted the fact that this is theory adopted by Brazilian Labor Law, it is important considering its practical use in labor flexibilization cases. It is easy understanding cases where a norm of inferior hierarchy (such as collective convention) goes beyond the law, when its most favorable norm condition is evident. However it is not so obvious to apply a collective convention to the detriment of a law provision, when the convention stipulates clauses less advantageous than those described in the law⁷. This is why in verification of labor norms flexibilization cases in agreements or collective conventions, modified for the worse (*in peius*), when analyzing what legal concept must be applied in a particular concrete case, aggregation theory must allow, legally speaking, prevalence of a norm with modifications that could be a disadvantage for workers if compared to a law dealing with same subject in a more beneficial way for workers, and therefore making viable labor flexibilization in Brazil. It is also fundamental using this theory, not only to lawfully render flexibilization in what regards its normative hierarchy, but also to grant that in validity analysis of certain legal rules allowing labor rights flexibilization, it may be verified - even in a global appreciation, a most workers' favorable situation.

Silvio Beltramelli Neto (2008, p. 100) recognizes use of aggregation when some flexibilization case must be submitted to a judgment:

[...] the judge must proceed to analyze set of concessions and waivers contained in negotiating tool, to think again about nature of covered rights and obligations and its fairness within final result of the agreement intended to govern relationship of directly involved.

In this occasion, jurisprudence shows recognition of need for valid interpretation of a certain sacrifice in the professional category, explained in a collective norm, making use of aggregation theory [...].

Dora Maria da Costa, Minister of the Superior Labor Court, in a voting declaration as rapporteur, in motion to review referring to the conflict between agreement and collective convention, confirms need of using aggregation theory:

MOTION TO REVIEW. PUBLIC CIVIL ACTION. MINIMUM WAGE. COLLECTIVE AGREEMENT AND COLLECTIVE LABOR CONVENTION. ENFORCEMENT OF MOST FAVORABLE NORM. SUPERIOR LABOR COURT (SLC) JURISPRUDENCE. Based in current jurisprudence, this Court has the opinion that it is not permitted, by literal interpretation of article 620 of Consolidation of the Labors Law (CLL),

7. In this sense, Alice Monteiro de Barros (2008, p. 132): "It is also investigated if collective convention will be able to stipulate less advantageous clauses than those drafted by law. This is particularly possible as may be deduced from our own Federal Constitution of 1988 (article 7, clauses VI, XIII and XIV).

disregarding a collective employment agreement in the face of a collective convention, signed in the scope of both respective economic categories. This Court considers that since flexibilization is constitutionally granted and by application of aggregation theory, in case of conflict between conventions and collective employment agreements, prevailing norms must be those of legal concepts that, as a whole, will be more beneficial for workers. In this sense, the Court decides not to apply isolatedly norms listed in collective telecom industry workers labor agreements to the employees of Projefibra Telecomunicações Ltda., already included in Collective Bargaining Agreements. Therefore, being this regional decision aligned with current jurisprudence of this Court, there is no violation of articles 5 and 7, V and VI, of Federal Constitution and 444 and 620 of CLL, nor in court dissensus, as stated in article 896, § 4, of CLL and Summary 333 of SLC. Unknown motion to review.⁸

Also in this sense, Alberto Luiz Bresciani de Fontan Pereira, Minister rapporteur of the Superior labor Court, in a process of labor flexibilization, he substantiated:

Process n. RR - 1462/2004-003-21-00 – Third Panel – Rapporteur Minister Alberto Luiz Bresciani de Fontan Pereira – Published at Court Gazette - 31/10/2008. MOTION TO REVIEW. BANESPA SUPPLEMENTING TO RETIREMENT PAYMENT. COLLECTIVE CONVENTION VS. COLLECTIVE AGREEMENT. PREVALENCE. IMPOSSIBILITY OF APPLYING ADJUSTMENT FORESEEN IN BANK EMPLOYEES' COLLECTIVE CONVENTION FOR RETIREES, WHEN NOT APPLIED TO CURRENT EMPLOYEES, FORCED BY A COLLECTIVE AGREEMENT HOMOLOGATED IN CASE FILE OF COLLECTIVE BARGAINING AND RELATED TO BANESPA'S RULES OF PROCEDURE. [...] Therefore the objective is giving support to working conditions collectively negotiated, in consideration to aggregation theory, not being able to highlight one clause of the normative body, being isolatedly favorable. Conventions and collective agreements involve global negotiation of working conditions, in a way to limit some rights, being compensated by the improvement of others; workers cannot pick less beneficial norms, by contesting its applicability. A different result would imply in an evident harm to negotiable balance, discouraging collective negotiation. This would substitute autonomous solutions for heteronomous in collective labor disputes, with consequent unreasonable multiplication of collective agreements.⁹

Finally, in another process regarding labor law flexibilization, a motion to review analyzing longer workdays in rotating shifts, rapporteur Minister Vieira

8. BRAZIL - Superior Labor Court - Process n. RR - 237500-15.2009.5.09.0006. Available at: <http://aplicacao5.tst.jus.br/consultaunificada2/inteiroTeor.do?action=printInteiroTeor&format=html&highlight=true&numeroFormatado=RR-237500-15.2009.5.09.0006&base=acordao&rowid=AAANGhAAFAAAJpOAAAG&dataPublicacao=07/01/2013&query=flexibilização and teoria and conglobamento>. Acesso em: 10/07/2013.

9. BRAZIL - Superior Labor Court - Process n. RR - 1462/2004-003-21-00. Available at: <http://brs02.tst.gov.br/cgi-bin/nph-brs?s1=4542784.nia.&u=/Brs/it01.html&p=1&l=1&d=blnk&f=g&r=1>. Access: 16/02/2009.

de Melo Filho¹⁰ stated that to make a norm beneficial for workers there is no need that in the own clause where right flexibilization was reported, another advantage be expressed in order to compensate loss incurred; compensation showing is a workers' favorable negotiated norm must exist in general scope of the agreement or collective convention, and not in the same clause that suppressed or mitigated the right. He explained that:

Process n. RR - 400/2002-003-15-00 – First panel – Rapporteur Minister Vieira de Melo Filho – Published in: 17/10/2008. MOTION TO REVIEW – OVERTIME - CONTINUOUS ROTATING SHIFTS – ESTABLISHED WORKING HOURS THROUGH A COLLECTIVE AGREEMENT. [...] the analysis of negotiation is not performed in atomizing manner, but globally (aggregation), and for this reason its content prevails, since advantages do not need to be highlighted in the clause that established shifts, but in the scope of collective negotiation set of rules.

3 COMPENSATION

The Principle of protection seeks balancing labor contract by means of a protectionist structure, destined to the insufficient part of the relationship. Whatever it be, workers demand that to grant validity of labor standard flexibilization cases, workers having some right cut off, will receive in compensation – to compensate such loss, some benefit to justify it.

Silvio Beltramelli Neto (2008, p. 100) introduced analysis about this issue as follows:

To conclude, since flexibilization being judged is constitutionally authorized and worker's dignity is preserved, Principle of Protection, inherent to Labor Right demands as a condition to validate collective negotiation that worker's advantage being suppressed or reduced, this must correspond in direct proportion to the achievement.

This need of correspondence in cases of flexibilization between what the employee resigned and what was granted by the employer, has been named "compensation" by jurisprudence and doctrine. Though not much has yet specifically been written about this subject, its need is mentioned by several authors and has already been used many times as legal base in Superior Labor Court rulings.

Marcelo Oliveira Rocha *et al.* (2005, p. 57) when talking about modes of flexibilization mentions "conditional flexibilization" (opposite of "unconditional"):

10. BRAZIL - Superior Labor Court - Process n. RR - 400/2002-003-15-00. Available at: <<http://brs02.tst.gov.br/cgi-bin/nph-brs?s1=4538979.nia.&u=/Brs/it01.html&p=1&l=1&d=blnk&f=g&r=1>>. Access: 16/02/2009.

[...] in terms of civil Law it would be more accurate to name it “bilateral or synallagmatic”, where waiver or loss for workers would be compensated by employer and eventually by the State. Workers rights or benefits are assigned in exchange of obligations taken by employer or by the State, and non compliance of these obligations gives back labor right waived or assigned.

In 2003, SLC Minister José Simpliciano, when participating at the International Forum on Flexibilization in Labor Law, he stated:

Discussions held at the Forum were relevant, and I realized about need of studying where is entrepreneurial compensation in labor laws flexibilization process. It has never been essential worrying with this aspect, and as it became clear at the Forum that flexibilization will not generate jobs, from now on we must always verify entrepreneurial compensation. It must be stated that usually, we do not find that compensation when reading processes involving law flexibilization. Most of the times it is about flexibilization with losses for the employee. At the International Forum on Flexibilization in Labor Law, that was a clear concern: losses and gains must exist, but for both parties.¹¹

Superior Court of Justice also made a statement on judged matter, through its rapporteur, currently Minister of the Supreme Court, Luiz Fux, regarding need of compensation:

Process n. Resp 758296 / RS. Special Appeal 2005/0095217-4 – T1 – First panel – Rapporteur Minister Luiz Fux – Published: 04/06/2007. ADMINISTRATIVE AND LABOR. FINE FOR INFRINGEMENT OF LABOR LAW. POLICE POWER. EXEGESIS OF ARTICLE 71, CAPUT, §§ 3º AND 4 AND 75 OF CONSOLIDATED LABOR LAWS. SUPPRESSION OF BREAK SCHEDULE. COLLECTIVE CONVENTION. SECURITY COMPANY. JUDGEMENT WAS DECIDED BEARING IN MIND PHATIC PROBATIONARY NORMS. OBSTACLE OF PRECEDENT 07/Superior Court of Justice [...] **Flexibilization** of working conditions, be it in collective labor agreement or in collective convention can only be applied to wages and working days, even so if this represents a compensation for the professional category.¹²

Delgado, when talking about limits to collective negotiation (2004, p. 1.400) and about sector negotiated adequacy principle, recognizes need of compensation to have a true transaction and not a mere waiver of rights to validate the negotiation:

11. BRAZIL, Superior Labor Court. Notícias do Tribunal Superior do Trabalho. Available at: <http://ext02.tst.jus.br/pls/no01/no_noticias.Exibe_Noticia?p_cod_noticia=1917&p_cod_area_noticia=ASCS>. Access: 15/01/2009.

12. BRAZIL, Superior Labor Court. Notícias do Tribunal Superior do Trabalho. Available at: <http://ext02.tst.jus.br/pls/no01/no_noticias.Exibe_Noticia?p_cod_noticia=1917&p_cod_area_noticia=ASCS>. Access: 15/01/2009.

Negotiation does not prevail if closed through a strict act of waiving (and not a transaction). Collective negotiation process loses its relinquishing capacity regarding third party rights (unilateral devoid of rights without compensation from adverse agent). Therefore a transaction must be promoted (a bilateral or multilateral devoid of rights, with reciprocity among all the agents involved) being capable to generate juridical norms. (DELGADO, 2004, p. 1320)

For Beltramelli Neto, in flexibilization cases players must consider final result of the collective negotiation, in a way to respect the Principle of Protection. This would protect workers if existence of compensation in what was negotiated could be proved. It is to say not only occurrence of reciprocal waiver, but also proportionality between withdrawing and granting. The author also alerts on importance of assessing in a case by case basis, to avoid legitimating cases of effective non observance of human dignity:

To conclude, it is there where we will find last decision to be taken by jurisprudence in charge of flexibilization through collective negotiation: to evaluate if adjustment including devoid of rights from worker's side, is done as compensation of an achievement justifying it.

Nevertheless, this fact finding cannot be done outside peculiar facts regarding attained workers – particularly low income workers – under penalty of, in each case, allow decrease of human dignity. For example, if a bus driver thinks for him is more convenient not taking his hour break and therefore leave earlier, this will not be true in case he uses that time to work in another job, ceasing enjoying minimum reasonable rest. (BELTRAMELLI NETO, 2008 p. 107-108)

This same author shows compatibility in labor flexibilization cases between requirement of compensation (by existence not only of workers' waivers but also company's concessions) and use of already discussed Aggregation Theory:

[...] judge must analyze set of concessions and waivers contained in negotiating instrument, considering once again nature of rights and obligations and its reasonableness within the pact he intends to govern relationship of all involved. It is a fact that jurisprudence is recognizing need of interpreting effectiveness of such professional category sacrifice, represented by a collective norm, when using the Aggregation Theory [...]. (BELTRAMELLI NETO, 2008 p. 100)

In this sense, current SLC jurisprudence positioning, in words of Minister rapporteur Alberto Luiz Bresciane de Fontan Pereira:

[...] 4. SHORTER NIGHT WORKING HOURS. FLEXIBILIZATION THROUGH COLLECTIVE NORMS. POSSIBILITIES. Collective negotiation is an established rule valued

and protected by constitutional order (Federal Constitution, article 7, clauses VI, XIII, XIV, XXVI, article 8, III). It is a legitimate option for labor rules. The Constitution consecrates agreements and collective bargaining conventions, stipulates minimum rights for working classes, requiring protection for human dignity and labor social values. For example, night shift reduction to protect physical and mental worker's hygiene. Nevertheless this Court, by interpretation of what article 7, XXVI of Federal Constitution states, has admitted flexibilization of rights legally foreseen when, in collective negotiations there is no suppression of guarantees, but in compensation a concession of effective benefits for employees. The establishment in collective instrument of night bonus payment higher than stipulated by labor law (article 73, main section of CLL) to justify sixty minutes night shift expanding, legitimates negotiation, and for this reason it must be considered. Precedents. Proviso of Rapporteur's view. Unknown appeal. [...] ¹³

In the same way, and in appeal, SLC Rapporteur Minister José Simpliciano Fontes de F. Fernandes reflected on labor norms flexibilization, in relation to Aggregation theory and demand of compensation:

Process n. RR - 1473/2004-023-03-00 – Second panel – Rapporteur Minister José Simpliciano Fontes de F. Fernandes – Published: Court Gazette, 17/10/2008. BREAK SCHEDULE. SUPPRESSION PROVIDED BY COLLECTIVE AGREEMENT. WORKING PERIOD OF 12 HOURS SHIFT FOLLOWED BY 36 HOURS REST [...] Agreements and Collective Conventions have relief in norm of article 7, clause XXVI of Federal Constitution, and in the aggregation principle stating that negotiating tools are only an agreement of wills between covenant parties. These parties being therefore Law between them must be considered as a whole, and parties may agree in abolishing rights through granting other compensatory advantages. ¹⁴

Theoretically speaking, there is no controversy regarding need of compensation in relation to flexibilization, but in opposite direction, it is interesting to observe absence of sense in checking if in practice there is yes or no compensation. There are cases heard stating that the simple fact of being a collective negotiation would be enough to prove the existence of compensation, it is mutual and proportional concessions. Trade Union's involvement in negotiations suggests there are advantages for workers, and therefore it could be an implicit transaction. Regarding this issue, Beltramelli Neto (2008, p. 104-105) states:

13. BRAZIL, Superior Labor Court - Process n. RR - 1473/2004-023-03-00. Available at: <http://aplicacao5.tst.jus.br/consultaunificada2/inteiroTeor.do?action=printInteiroTeor&format=html&highlight=true&numeroFormatado=ARR-422-73.2010.5.04.0232&base=acordao&rowid=AAANGhAAFAAAJlgAAS&dataPublicacao=17/05/2013&query=flexibilizaçao and necessidade and compensation>. Access: 10/07/2013.

14. BRAZIL, Superior Labor Court, Process n. RR - 1473/2004-023-03-00. Available at: <http://brs02.tst.gov.br/cgi-bin/nph-brs?s1=4537434.nia.&u=/Brs/it01.html&p=1&l=1&d=blnk&f=g&r=1>. Access: 16/02/2009.

[...] we must stress that court decisions where votes provide based explanation of judges belief that jointly considered collective negotiation is a true transaction and not a simple waiver of rights. This happens because in jurisprudence prevails a thesis that signature of a collective convention (or collective agreement) implies in a reasonable compensation to the divestment, and it was supervised by labor union, achieving its representative obligation.

Vieira Mello Filho SLC Minister, states that:

Process n. E-ED-RR-867/2002-077-15-00 – SBDI-I – Rapporteur Minister Vieira de Mello Filho – Published: Court Gazette, 22.08.2008. APPEAL OF INJUNCTION FILED BEFORE LAW 11.496/07 COMING INTO FORCE. NULLITY DUE TO DENIAL OF JURISDICTIONAL PROVISION. [...] a collective agreement implies that parties reached an agreement due to urgent interests, therefore being natural giving up certain advantages in exchange of others exclusively seen by them.¹⁵

In opposite direction, Minister Guilherme Augusto Caputo Bastos, as Rapporteur in a Bill of review of a point of Law, highlights importance of effectively showing existence of compensation, and not simply presume it because negotiation was done through the trade union:

Process n. AI-RR-170/2002-038-01-40 – Seventh panel – Rapporteur Minister Guilherme Augusto Caputo Bastos – Published: Court Gazette 31.10.2008. BILL OF REVIEW. POINT OF LAW. OVERTIME. CALCULATION BASE. [...] Rights flexibilization must bring solid compensation for the involved category, considering the principle that CLL sets a minimum regulation to be observed, admitting that through collective negotiation categories will obtain more and better working conditions and not a simple decrease of its rights. Therefore, thesis that once verified trade union intervention, all and every flexibilization would be authorized, cannot be admitted.¹⁶

It may be questioned daring understanding of thinking about compensation just because it is a collective negotiation with trade union's participation; an argumentation based in the fact that trade union's participation would help workers¹⁷. Even worse, it would mean taking away the constitutional judi-

15. BRAZIL, Superior Labor Court, Process n. E-ED-RR-867/2002-077-15-00. Available at: <<http://brs02.tst.gov.br/cgi-bin/nph-brs?s1=4480937.nia.&u=/Brs/it01.html&p=1&l=1&d=blnk&f=g&r=1>>. Access: 29/01/2009.

16. Idem. - Process n. AI-RR-170/2002-038-01-40. Available at: <http://brs02.tst.gov.br/cgi-bin/nph-brs?s1=4559597.nia.&u=/Brs/it01.html&p=1&l=1&d=blnk&f=g&r=1>. Acesso em: 25/11/2008.

17. In this sense it was judged by SLC: "Process n. RR-1320/2000-006-17-00 – Fifth panel – Judge Rapporteur José Pedro de Camargo – Published at Court Gazette 20.01.2006. [...] In collective negotiations, workers do not need or may be guided, especially by the Judiciary, because unbalanced contractual relationship of the employee can only be recognized when he/she acts individually. And if this occurs he will be unprotected and vulnerable". (BRAZIL, Superior Labor Court apud BELTRAMELLI NETO, 2008, p. 106).

cial protection¹⁸ from workers feeling aggrieved by virtue of a merely theoretical supposition, making substance prevail over reality¹⁹.

The First Substantive and Procedural Right Workshop in Labor Justice²⁰, held in 13/11/2007, approved substance number 33, stating need of mentioning and not presume compensation in collective negotiations, granting to workers right of individually request nullity of conventional clause that adversely affects them without the respective compensation:

33. COLLECTIVE NEGOTIATION. SUPPRESSION OF RIGHTS. NEED OF COMPENSATION. Collective negotiation cannot only be used as instrument for suppression of rights. It must always mention compensation granted in exchange of negotiated right. In cases where a worker claims in individual action nullity of a conventional clause, a judge will analyze adequacy of the collective negotiation.

It must be stressed that another proposal was attached to proposal approved as wording 33 (attached proposal # 1, by Cláudio Victor de Castro Freitas)²¹ with an essay diametrically opposite, stating unnecessary specific compensation of advantages taken from a worker by means of collective negotiation. However, as it can be verified, what prevailed was position of making necessary a proof compensation. It is important to know entire content of discussed proposal (8th proposal)²², in Commission III (Union Struggles – Collective Rights) presented by Bóris Luiz Cardozo de Souza. He explains approved wording, stating employee's less benefited conditions even in collective negotiations, removing the possibility of a compensation, and specifies that proposal not only reflects its own existence, but also the need to be clearly mentioned in normative instrument:

In Labor area there is a lively debate regarding Limits of Collective Autonomy and how a judge must act in this matter, since SLC jurisprudence validates signed collective negotiations, highlighting private collective autonomy because the existence of a signed normative instrument by itself allows assuming a good negotiation in progress. This thesis does not demand an express compensation in signed normative instrument to substitute any right foreseen by law.

18. Article 5, XXV, of Federal Constitution, 1988: "Law will not exclude injure risk or threat to Right of being appreciated by the Judiciary" - (Brazil, Federal Constitution of 1988).

19. Regarding Primacy of Reality Labor Principle: "The meaning we attach to this principle is the one of primacy of facts over procedures, formalities or as appearances. With regard to work, it matters what happens in practice, more than what parties negotiated in a more or less solemn way, or express, or what is recorded in documents, forms and instruments of control" (PLÁ RODRIGUEZ, 1994, p. 227).

20. National Association of LABOR COURT JUSTICE JUDGES – Wordings approved at First Substantive and Procedural Right Workshop in Labor Justice. Available at: <http://www.anamatra.org.br/jornada/enunciados/enunciados_aprovados.cfm>.

21. Idem. Entire content of proposals debated. Available at: <http://www.anamatra.org.br/jornada/propostas/com3_proposta8.pdf>.

22. Ibidem. Available at: <http://www.anamatra.org.br/jornada/propostas/com3_proposta8.pdf>.

In spite of divergent opinions, I understand that in face of the exceptional thing of this new norm produced by parties, it will be the judge to verify each aspect of such powerful tool that may alter regulation of almost all the legislative protection network so far established. By acting in this way, the judge would be applying the expressions *naha mihi factum dabu tibi jus* (give me the facts and I shall give you the law) and *jura novit curia* (the Court knows the law) trying to preserve current legislation and known unbalanced contractual side of working relationships, including collective negotiation that further undermines the role of Trade Unions, that formerly used normative instruments to grant rights to its members.

Therefore the judge cannot avoid doing an accurate and detailed analysis of normative instruments as a whole, when there is a demand of individual action of nullity in a conventional clause. Because if he would simply admit good health of collective negotiation just because it was concluded, he would establish a reversal of premises that would allow deregulation of such normative instruments of rights recognized by law and consecrated by majority of jurisprudence, besides causing an irreparable damage to Constitutional Principle of Human Dignity and Principle of Non-Regression.

It is within that social context and based in principles that normative instruments must be analyzed. Offered compensation must be related to negotiated rights, always bearing in mind that objective when allowing permission to use collective negotiation is improving life and labor conditions of workers, and not mere removal of rights.

Thus, to allow the judge analyzing adequacy of collective negotiation, all compensations arising from suppression of current law norms must be clearly expressed in the normative instrument concluded, under penalty of being validated in Court collective norms not respecting the normative and jurisprudential framework, in exchange of an implicit promise of holding the job.

Finally and as an example, following appeal (2006)²³ shows a case of declaration of invalidity in a collective agreement due to lack of compensation because of withdrawal of entitlement of hours *in itinere*²⁴:

Process n. TRT-RO - 00681-2005-231-06-00-0 – Second panel – Rapporteur Judge Ibrahim Alves Filho – Published at: Official Gazette of the State of Sao Paulo, 05/04/2006. LABOR LAW. ORDINARY APPEAL. SUPPRESSION OF IN ITINERE HOURS. COLLECTIVE AGREEMENTS. INVALIDITY, FOR LACK OF BENEFITS, IN COMPENSATION, TO THE PROFESSIONAL CATEGORY. In principle, it is lawful negotiate in itinere hours and waiting time even for reducing them for profes-

23. Regional Court of Labor, state of RONDONIA – Sixth region - Process n. TRT-RO - 00681-2005-231-06-00-0. Available at: <<http://peticao.trt6.gov.br/2005/RO006812005231060000.RTF>>. Access: 09/02/2009.

24. The Supreme Court of Labor has admitted in several decisions, flexibilization travel time of the employee to the workplace, or in itinere hours. Legal base for this is the aggregation theory, considering norms as a whole, to validate agreements and collective conventions containing mutual concessions. In this sense: Beltramelli Neto (2008, p. 100-104).

sional and economic categories, through agreements or collective conventions. This does not violate any legal disposition. Trade Unions have broad legitimacy to defend individual and collective interests of the category. They may sign agreements or collective conventions, arising from transaction between the parts. Nevertheless, the constitutional provision for conventions and collective agreements does not allow simply suppressing labor rights. Recognizing adjustments agreed between professional and economic categories does not permit concluding legal precepts can be abolished, particularly if there is not a compensation for one of involved parties. This because in its character, collated working collective agreement is null regarding notice only establishing advantages for the company in detriment of members of the professional category, in frank violation of article 58, § 2º of CLL. I ask to dismiss the appeal.

4 CONCLUSION

In Brazil, labor flexibilization became an undeniable reality. Working conditions, particularly in times of economic crisis, have been discussed again to reduce unacceptable conditions derived from unemployment and informal work. Federal Constitution of 1988, even though in a minimal proportion, included flexibilization possibilities, but to use them safely and truly adapted to labor norms and not only suppressing labor rights hard-won along the years, is responsibility of Right to set ways of conducting flexibilization. Two important modes of granting flexibilization to be done in a fair and efficiently are using Aggregation theory and demanding compensation.

In Labor Right always prevail norms being more beneficial for workers. Aggregation theory who mainly considers set of norms being more beneficial for workers, has a capital role in juridical plausibility of flexibilization. This because is accepted that in spite of most favorable norm rule, theory may overlap collective convention laws with provisions being less advantageous for workers. Therefore, flexibilization mitigating some rights may be possible, since does not analyze collective convention isolated instruments, but the whole set of reciprocal concessions. By using Aggregation theory, valid object of collective negotiation will be the one bringing advantages for working class. Regarding this, there is already established jurisprudence of Superior Labor Court.

In this context, we may speak about demand of compensation, based in need of rewarding with the correspondent benefits, losses suffered by workers in flexibilization negotiations. Compensation preserves application of the Principle of Protection and also grants desired and once mentioned fair and efficient flexibilization. Though there is not still a deep research regarding this matter, current understanding affirms the impossibility of presuming compensation, due to its essentiality

Thus, we have both aggregation and compensation theories as two important tools to make Labor flexibilization stay close to the duty of protecting weak bargaining power of working relationships.

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