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The Effects of Succumbence Fees After the Labor Reform

Letícia Lisboa Souza Serralvo | leticia.serralvo@gmail.com
Sueli Ester Gitelman | suelygitelman@gmail.com

1 – Pontifícia Universidade Católica de São Paulo (PUC-SP) | Doutorado em Direito | São Paulo – SP
2 – Pontifícia Universidade Católica de São Paulo (PUC-SP) | Doutorado em Direito | São Paulo – SP

Abstract

Law No. 13.467/2017, known as the Labor Reform, introduced significant changes to labor procedural law, among which the provision for succumbence fees (attorney's fees awarded against the losing party) stands out, as established in Article 791-A of the Consolidation of Labor Laws (CLT). From that point onward, the condemnation of the losing party to pay attorney's fees to the prevailing party became admissible, even if the former is a beneficiary of free legal aid (*justiça gratuita*), generating intense doctrinal and jurisprudential debates. This article analyzes the practical effects of this legislative innovation, particularly regarding its impact on access to Labor Justice and the consequent reduction in the number of lawsuits filed. It is observed that the imposition of succumbence burdens has functioned as an inhibiting factor for judicialization, provoking a redirection in labor procedural culture. The analysis proposes a critical reflection on the constitutionality of the measure and its ramifications for the realization of workers' fundamental rights.

Keywords: Labor reform, CLT succumbence fees, Federal Constitution.

Introduction

This paper addresses the impacts of succumbence fees following the labor reform established by Law No. 13.467/2017. The reform sparked various discussions even before its effective date, especially regarding the introduction of succumbence attorney's fees in Labor Justice. This topic, hitherto controversial, demands a critical and in-depth analysis, which constitutes the purpose of this research.

The issue of succumbence fees in labor proceedings has generated significant debates since the entry into force of Law No. 13.467/2017, which significantly modified various aspects of labor legislation, including the introduction of the possibility of condemnation in succumbence attorney's fees. However, even before this reform, there were regulations dealing with the matter in a more restricted manner, notably Precedents (*Súmulas*) 219 and 329 of the Superior Labor Court (TST).

The 2017 labor reform brought the possibility of setting succumbence fees—the fee that the losing party pays to the winning party within the scope of Labor Justice—altering previous legislation that basically excluded this institute. Before the reform, Labor Justice adopted the principle of gratuitous justice for the parties, which, to a certain extent, prevented the charging of attorney's fees, barring some exceptions, such as in cases of bad faith or malice. Oliveira (2020) believes that the adoption of succumbence in labor justice impacts both the lawyers of the losing parties (succumbent) and payment conditions in situations involving free legal aid. When there is no free legal aid, succumbence fees will be charged according to the general rule established by the labor reform. The losing party will be responsible for paying the attorney's fees of the winning party.

Teixeira (2022) considers that the Labor Reform of 2017 (Law No. 13.467/2017) brought a series of changes to the Brazilian labor legal system, including relevant modifications to workers' fundamental rights. Regarding the inadmissibility of jurisdiction and free justice, the reform had important implications that generated debates on the impact of these alterations on access to fundamental rights. Mellado (2022) presumes that the declaration of unconstitutionality of Paragraph 4 of Article 791-A of the CLT, inserted by Law No. 13.467/2017 (Labor Reform), has been a debated topic due to its implications for the fundamental right of access to justice and free legal aid, in addition to its possible conflict with the Federal Constitution. To understand whether there is unconstitutionality or not, it is

necessary to analyze the norm in light of the Federal Constitution, especially fundamental rights and constitutional principles.

The Labor Reform of 2017, with Law No. 13.467/2017, brought significant changes to Labor Law in Brazil, highlighting among them the introduction of succumbence fees in labor proceedings. Before the reform, the labor legal system did not provide for this charge, which created a situation distinct from civil procedural law, where the losing party pays the fees of the winning party's lawyer. The inclusion of succumbence fees in the labor context generated discussions and concerns, especially regarding their effects on access to justice, procedural equality, and the effectiveness of workers' rights.

This article aims to analyze the effects of succumbence fees after the Labor Reform, utilizing a theoretical approach that compares the changes brought by the reform with constitutional principles, the Code of Civil Procedure (CPC), the CLT, and the 1988 Federal Constitution itself. The main effects of these changes will be discussed, identifying both the benefits and criticisms of the new model adopted, in addition to addressing the practical and legal problems that arose from this implementation.

Attorney's Fees

Attorney's fees are amounts due to the lawyer for services rendered in judicial or administrative proceedings. They constitute a form of remuneration for the work of the professional acting on behalf of one of the parties in a lawsuit. The subject of attorney's fees involves legal, ethical, and contractual aspects and is of great importance in various branches of law, including civil and labor law, among others.

Attorney's fees are the financial compensation paid by the client to the lawyer, or, in certain cases, by the losing party to the winning party's lawyer, in the context of a judicial or administrative process. The obligation to pay fees can occur in three main ways:

- Contractual fees: These are amounts agreed upon between the client and the lawyer in a service provision contract, regardless of the success of the cause.
- Succumbence fees: These are amounts that the losing party of a lawsuit is obliged to pay to the winning party as a form of compensation for legal costs.
- Reciprocal succumbence fees: When both parties are partially winners and losers, the judge may establish the division of fees.

Types of Attorney's Fees Attorney's fees can be classified into different types, depending on the nature of the relationship between the lawyer and the client and the circumstances of the process.

- Contractual Fees: These are fees agreed upon between the lawyer and the client before the start of the action, paid regardless of the outcome of the process. The value can be set in different ways, such as a fixed amount, a percentage of the value of the cause, or according to the complexity of the case. The fee contract is an ethical and legal obligation that the lawyer must formalize with the client. It must obey the principles established by the Code of Ethics and Discipline of the OAB (Brazilian Bar Association), with payment being independent of the process result.
- Succumbence Fees: Succumbence fees are provided for mainly in procedural law, paid by the losing party to the winning party to cover advocacy costs. Succumbence occurs when one of the parties does not succeed in their demand, being obliged to bear the costs of the process, including the attorney's fees of the winning party. Even if there is no express request from the winner, reimbursement of their lawyer's fees is due. And, even if the lawyer is acting in their own cause (*in causa propria*), they will be entitled, if victorious, to indemnification for their fees (JÚNIOR, 2007, p. 106).

In Brazil, Law No. 13.105/2015 (New Code of Civil Procedure) establishes that the losing party must pay attorney's fees to the winning party, according to the percentage fixed by the judge, taking into consideration the value of the cause, the complexity of the case, and the work performed. The value is usually between 10% and 20% of the condemnation amount or the value assigned to the cause.

The 2017 Labor Reform (Law No. 13.467/2017) also brought succumbence fees to Labor Justice, which did not occur before due to the protective nature of labor relations. Now, the losing party, regardless of being a worker or employer, can be condemned to pay the attorney's fees of the winning party, except when a beneficiary of free justice. In some cases, there may be reciprocal succumbence, meaning when both parties are partially winners and losers, the judge may establish the division of succumbence fees between the parties, according to the proportion of success of each.

Legal Aspects of Attorney's Fees in Brazil In Brazil, attorney's fees are regulated mainly by the Code of Civil Procedure (CPC) and Law No. 8.906/1994, which institutes the

Statute of Advocacy and the OAB. The 2015 CPC treats fees in various articles, one of the most important being Art. 85, which disciplines the fixing of succumbence fees.

Art. 85 of the 2015 CPC:

"The judge shall fix succumbence fees between 10% to 20% of the value of the condemnation or the economic benefit obtained, being able to take into consideration the work performed by the lawyer, the complexity of the cause, and other subjective criteria."

Furthermore, the 2015 CPC also provides for the possibility of exceptions in cases where the litigant is a beneficiary of free legal aid. In these cases, the payment of succumbence fees will only be required if the beneficiary of free justice subsequently acquires the conditions to pay. Free justice is a benefit guaranteed by the Federal Constitution of 1988, which ensures access to justice for those who cannot afford procedural costs and attorney's fees. However, the 2017 Labor Reform established that, even for beneficiaries of free justice, it is possible for succumbence fees to be charged, provided that, after the end of the process, the losing party has the conditions to bear these costs.

In Comparative Law, succumbence fees are a common practice in many legal systems around the world. In civil law tradition countries, such as France, Italy, and Spain, it is common for the losing party to pay the winning party's fees. These systems aim to discourage abusive lawsuits and ensure that the winning party is compensated for the lawyer's work. In common law tradition countries, such as the United States and the United Kingdom, succumbence fees are not as common. However, in some jurisdictions, such as the United States, it is possible for attorney's fees to be awarded based on specific rules, such as in civil rights litigation cases or situations involving abusive procedural behavior.

The ethical and contractual aspects of attorney's fees are fundamental to ensuring justice, transparency, and respect in relations between lawyers and clients, in addition to maintaining the dignity of the profession. In Brazil, attorney's fees are also regulated by ethical principles defined by the Brazilian Bar Association (OAB). The Statute of Advocacy establishes that the lawyer must sign a fee contract with the client and ensure that this contract is clear regarding the amount to be charged, the form of payment, and the service conditions. Regarding the fee contract, it must be formalized in writing between the lawyer and the client and must clearly reflect the agreed value, which can be a fixed amount, a percentage of the cause value,

or a part of the value to be obtained in the process. The fee clause is of great importance as it ensures transparency and legal certainty for both the lawyer and the client.

Attorney's fees are a fundamental part of lawyers' remuneration and involve a series of legal, contractual, and ethical issues. The labor reform and current civil procedural legislation expanded the application of succumbence fees, making them more common and applicable even within the scope of Labor Justice, but always with the exception of free justice. Succumbence fees play a crucial role in procedural equity, ensuring that winning parties do not bear unforeseen costs, in addition to providing fair remuneration for lawyers acting in lawsuits.

Succumbence Fees In Law

Succumbence fees in the context of the Code of Civil Procedure of 1939 (CPC/1939) played a significant role in the structure of Brazilian civil procedure. The 1939 Code was an important stage in the evolution of Brazilian civil procedural law and, regarding succumbence fees, had its own provisions reflecting the dynamics of the time. The Code of Civil Procedure of 1939 (Decree-Law No. 1.608/1939) was a landmark in Brazilian procedural law, and, similarly to other legal systems, established rules on succumbence fees.

Succumbence fees, in this context, were linked to the concept of the losing party's responsibility for paying the winning party's lawyer fees. This understanding remained until the creation of Law No. 4.632/1965, which altered Article 64 of the 1939 CPC, remaining with the following composition: Art. 64 – “The final sentence in the cause shall condemn the losing party to the payment of the winning party's lawyer fees, observing, where applicable, the provisions of art. 55.”

Therefore, this provision was important because it dispensed with the need to prove bad faith or fault of the losing party for the collection of fees. That is, regardless of the circumstances that led to the party's defeat in the process, they would be responsible for paying succumbence fees to the winning party's lawyer. The main innovation brought by Law No. 4.632/1965 was the automatic liability of the losing party for attorney's fees, without the need to prove fault or malice. Before this alteration, there was certain flexibility, with the judge being able to evaluate the issue of bad faith or malice of the losing party to decide on fee payment. From Law No. 4.632/1965 onwards, succumbence ceased to be analyzed only from the perspective of fault or bad faith. The focus shifted to the simple loss of the lawsuit; that is,

whoever lost the cause should pay the fees of the winning party's lawyer, reflecting a more objective concept of succumbence.

Law No. 4.632/1965 modified Art. 64 of the 1939 CPC, and, with the promulgation of the 1973 CPC, this alteration was received by the new code, which maintained the provisions relating to succumbence fees of the 1965 Law, without necessitating a new specific text on the issue. Consecutively with the creation of the Code of Civil Procedure of 1973, this norm was received in Article 20. In 1976, this article was altered by Law No. 6.355/1976.

Law No. 6.355, of September 8, 1976, altered the *caput* of Article 20 of Law No. 5.869, of January 11, 1973, which instituted the Brazilian Code of Civil Procedure (CPC). Article 20 of the 1973 CPC dealt with the condemnation of the loser to pay procedural expenses and attorney's fees. The wording given by Law No. 6.355/76 established that the sentence would condemn the loser to pay the winner the expenses they anticipated and attorney's fees. This fee amount would also be due in cases of dismissal of the process without judgment of merit. It is important to highlight that the Code of Civil Procedure of 1973 was revoked by the current Code of Civil Procedure, instituted by Law No. 13.105, of March 16, 2015. Thus, previous provisions were replaced by the current procedural rules.

Article 20 of the 1973 CPC established: Art. 20 “The sentence shall condemn the loser to pay the winner the expenses they anticipated and attorney's fees.” Law No. 6.355/76 altered the *caput* of Art. 20 of Law No. 5.869/73, which instituted the Code of Civil Procedure, and came to enforce with the following wording: Art. 20 “The sentence shall condemn the loser to pay the winner the expenses they anticipated and attorney's fees. This fee amount shall also be due in cases where the lawyer acts in their own cause.”

Article 20 of the 1973 CPC, despite establishing condemnation to the payment of attorney's fees by the losing party, did not specify completely clearly that these fees belonged exclusively to the lawyer. This generated doctrinal debates about the ownership of this amount. Some jurists, including Humberto Theodoro Júnior (2007, p. 107), maintained that succumbence fees should belong to the winning party, it being up to them to decide whether to use this value to compensate for contractual fees adjusted with their lawyer. This understanding was based on the interpretation that the final beneficiary of the condemnation was the party, not directly the lawyer. Thus, according to the understanding of the aforementioned legal scholar and others of the time, succumbence fees should be paid to the winning party, as they had the purpose of

reimbursing process costs, preventing them from being financially prejudiced, even after succeeding in the demand.

However, this interpretation generated a long legal debate, as many maintained that succumbence fees were, in fact, remuneration for the lawyer's work, and should belong to them and not the party. This impasse was only definitely resolved with the advent of the OAB Statute (Law No. 8.906/1994), which in its Articles 22 and 23 expressly established that succumbence fees belong to the lawyer. With this, the understanding was consolidated that this amount has an alimentary nature and cannot be appropriated by the winning party, ensuring greater legal certainty for the legal profession.

Art. 22. “The provision of professional service ensures those enrolled in the OAB the right to agreed fees, those fixed by judicial arbitration, and those of succumbence.” That is, the lawyer has the right to three types of fees: agreed fees (established in contract with the client), those fixed by judicial arbitration (defined by the judge when there is no contract), and finally succumbence fees (paid by the losing party in the process).

Art. 23. “Fees included in the condemnation, by arbitration or succumbence, belong to the lawyer, who has an autonomous right to execute the sentence in this part, being able to request that the precatory (court order for payment), when necessary, be issued in their favor.” This means that succumbence fees do not belong to the winning party, but to the lawyer, who can even execute them separately in case of default by the losing party. These articles were fundamental to ending the old controversy over the ownership of succumbence fees, ensuring they are paid directly to the lawyer as a form of remuneration for their work.

Article 85, Paragraph 14, of the 2015 CPC received Articles 22 and 23 of the OAB Statute (Law No. 8.906/1994), definitively reinforcing that succumbence fees belong to the lawyer. Paragraph 14 of Article 85 determines as follows:Art. 85. “The sentence shall condemn the loser to pay fees to the winner's lawyer.” [...] § 14. “Fees constitute a right of the lawyer and have an alimentary nature, with the same privileges as credits arising from labor legislation, compensation being prohibited in case of partial succumbence.”

This provision consolidated the interpretation that:

- Fees belong to the lawyer, not the winning party.

- They have an alimentary nature, meaning they are essential for the lawyer's subsistence, equating to wages.
- They possess the same privileges as labor credits, which guarantees priority in payment in executions.
- And they cannot be compensated in case of partial succumbence; if both parties partially lose the cause, one cannot simply annul the fees between them.

Therefore, the 2015 CPC reinforced and received Articles 22 and 23 of the OAB Statute, ending any doubt about the ownership of succumbence fees and ensuring more protection for lawyers.

Succumbence Fees In Labor Law

Given the above, succumbence fees were received by the Brazilian legal system, but with restricted application in Labor Justice before the Labor Reform of 2017. Before the Reform, the general rule in Labor Justice did not provide for succumbence fees, as the CLT did not contain a specific provision on this. However, Law No. 5.584/70, in Articles 14 and 16, allowed for condemnation in attorney's fees, but only when the worker was assisted by the category's union and proved their economic hyposufficiency.

Art 14. “In Labor Justice, the judicial assistance referred to in Law No. 1.060, of February 5, 1950, shall be provided by the Professional Category Union to which the worker belongs.” Art 16. “The lawyer's fees paid by the loser shall revert in favor of the assisting Union.”

Therefore, Article 14 of Law No. 5.584/70 determines that judicial assistance in Labor Justice shall be provided by the worker's professional category union, provided they prove insufficiency of resources. For this, they would have to be assisted by the union, and in this situation, the union's lawyer would be entitled to attorney's fees. Article 16 of the same law provides that attorney's fees would be due exclusively in cases where the worker was assisted by the union and had succeeded in the action. The succumbent (losing) party should pay attorney's fees to the union, not to the lawyer individually.

Application of Succumbence Attorney's Fees Before the Labor Reform Before the Labor Reform (Law No. 13.467/2017), attorney's fees in Labor Justice followed the understanding consolidated in Precedent (*Súmula*) 219 of the TST, which established that only

workers assisted by the union would be entitled to the condemnation of the losing party to pay attorney's fees. That is, unlike common civil procedure, where succumbence automatically generates the obligation to pay fees to the winning lawyer, in Labor Law, before the Reform, the general rule was that there were no attorney's fees, except in the exceptions provided for in Law No. 5.584/70.

This understanding was duly received and consolidated by Precedent No. 219 of the TST, which dealt with the possibility of condemnation in attorney's fees in Labor Justice only in the hypotheses provided for in the referred law.

ATTORNEY'S FEES. APPLICABILITY (wording of item I altered and items IV to VI added due to the 2015 CPC) - Res. 204/2016, DEJT published on 17, 18, and 21.03.2016 I - In Labor Justice, condemnation to the payment of attorney's fees does not stem purely and simply from succumbence, the party must, concomitantly: a) be assisted by a professional category union; b) prove the receipt of salary lower than double the minimum wage or be in an economic situation that does not allow them to sue without prejudice to their own sustenance or that of their family (art. 14, §1, of Law No. 5.584/1970). (ex-OJ No. 305 of SBDI-I).

Thus, for there to be condemnation in attorney's fees in Labor Justice before the 2017 Labor Reform, two cumulative requirements had to be met, as provided in Law No. 5.584/70 and consolidated by Precedent No. 219 of the TST:

- Assistance by trade union entity: The worker had to be assisted by the union of their professional category. This means the labor lawsuit needed to be filed or accompanied by a union lawyer. It was not enough for the worker to hire a private lawyer; union assistance was essential for the applicability of fees.
- Proof of economic hyposufficiency: The worker had to prove they did not possess the financial conditions to bear process expenses without prejudice to their own sustenance or that of their family. As a rule, those earning a salary equal to or lower than two minimum wages were accepted as hyposufficient. Alternatively, there could be a declaration of poverty, provided it was accepted by the judge.

If both requirements were met, the judge could condemn the losing party to pay attorney's fees of up to 15% on the condemnation value, which would be due to the union's lawyer. This was the traditional systematic of Labor Justice, based on the protection of the

hyposufficient worker, until it was modified by the Labor Reform (Law No. 13.467/2017), which started applying succumbence as a general rule, based on the new Art. 791-A of the CLT.

Article 791-A of the Consolidation of Labor Laws (CLT) Article 791-A of the CLT deals with succumbence fees due to lawyers in Labor Justice. This article was included by the Labor Reform (Law No. 13.467/2017) and establishes that the losing party in the process can be condemned to pay fees to the winning party's lawyer, even if the winning party is a beneficiary of free justice (although, in this case, with some conditions).

Art. 791-A "To the lawyer, even if acting in their own cause, succumbence fees will be due, fixed between the minimum of 5% (five percent) and the maximum of 15% (fifteen percent) on the value resulting from the liquidation of the sentence, of the economic benefit obtained or, it not being possible to measure it, on the updated value of the cause." (Included by Law No. 13.467, of 2017) § 1 "Fees are also due in actions against the Public Treasury (*Fazenda Pública*) and in actions where the party is assisted or substituted by the union of their category." (Included by Law No. 13.467, of 2017) § 4 "If the beneficiary of free justice is defeated..."

One of the main innovations brought by the Labor Reform, through Article 791-A of the CLT, was the express provision of the right to succumbence fees in Labor Justice. From Law No. 13.467/2017 onwards, any lawyer acting as patron of the cause, including in demands against the Public Treasury, became entitled to these fees, regardless of being a private or court-appointed lawyer. The main difference in relation to the Code of Civil Procedure (CPC) concerns the percentage fixed for fees. While the CPC establishes a range of 10% (ten percent) to 20% (twenty percent), Article 791-A of the CLT determines an interval between 5% (five percent) and 15% (fifteen percent), calculated on the value resulting from the liquidation of the sentence, the economic benefit obtained or, in the impossibility of measurement, on the updated value of the cause.

Paragraph 4 of Article 791-A of the CLT provides that, if the losing party is a beneficiary of free justice and has not obtained credits capable of supporting attorney's fees, the obligation will remain under a suspensive condition of enforceability for two years, extinguishing after this period if there is no proof of alteration in the financial situation. The inclusion of this article generated debates about its compatibility with constitutional principles of access to justice and integral legal assistance to the needy. Some argue that the imposition of

succumbence fees on beneficiaries of free justice may discourage the filing of labor lawsuits by hyposufficient workers.

Jurisprudential Grounds The Superior Labor Court (TST) has already manifested several times on the constitutionality of Article 791-A of the CLT, especially regarding §4, which deals with succumbence for beneficiaries of free justice. An example is the following decision of the 3rd Panel of the TST:

"§4 of Art. 791-A of the CLT, included by the Labor Reform, is constitutional as it does not violate the principle of broad access to justice. The suspension of fee enforceability for two years, with extinction of the obligation if there is no alteration in the party's financial situation, ensures balance between the right to free judicial assistance and the reimbursement of the winning party." (TST – RR-11264-06.2018.5.03.0051, judged on 14/10/2020).

However, there are decisions to the contrary in lower instances and, indeed, Direct Actions of Unconstitutionality (ADIs) were filed in the Supreme Federal Court (STF) (such as ADI 5766), discussing whether the provision violates access to justice provided for in the Federal Constitution.

Practical Impacts of the Change

- For Lawyers: The alteration valued the work of labor advocacy, mainly for lawyers acting as private counsel, who previously had no legal provision to receive succumbence fees in the labor sphere.
- For Workers: Many started to think twice before filing lawsuits, mainly the economically hyposufficient. This is because, if they lose the action, even being beneficiaries of free justice, they might have to bear fees, even if enforceability remains suspended for up to two years. This ended up generating an inhibiting effect, discouraging the filing of demands due to fear of condemnation in fees, which, for some legal scholars, represents a regression in the fundamental right of access to justice.

ADI 5766 Direct Action of Unconstitutionality (ADI) 5766, judged by the Supreme Federal Court (STF) on October 20, 2021, addressed devices of the Labor Reform that imposed the payment of attorney's and expert fees by beneficiaries of free justice.

STF Decision in ADI 5766 The STF declared the partial unconstitutionality of § 4 of Article 791-A of the Consolidation of Labor Laws (CLT), specifically the expression that

allowed the collection of succumbence attorney's fees from beneficiaries of free justice who had obtained credits in court, even if in another process. The Court understood that this provision violated the fundamental right of access to justice, provided for in Article 5, item LXXIV, of the Federal Constitution. Furthermore, the STF also declared the unconstitutionality of the *caput* and § 4 of Article 790-B of the CLT, which dealt with the responsibility of the beneficiary of free justice for the payment of expert fees.

The decision has binding effect and *erga omnes* efficacy, meaning it applies to all similar cases and must be observed by all bodies of the Judiciary. With this, beneficiaries of free justice cannot be forced to pay succumbence attorney's fees or expert fees, even if they obtain credits in court.

The Decision of the Supreme Federal Court (STF) on ADI 5766 was realized as follows:

- Object of ADI 5766: Discussion on the collection of costs and attorney's fees from beneficiaries of free justice.
- Thesis affirmed: The Tribunal, by majority, judged the request formulated in the direct action partially founded, to declare unconstitutional arts. 790-B, *caput* and § 4, and 791-A, § 4, of the Consolidation of Labor Laws (CLT), with Ministers Roberto Barroso (Rapporteur), Luiz Fux (President), Nunes Marques, and Gilmar Mendes partially defeated. By majority, it judged the action unfounded regarding art. 844, § 2, of the CLT, declaring it constitutional, with Ministers Edson Fachin, Ricardo Lewandowski, and Rosa Weber defeated. Minister Alexandre de Moraes will write the ruling. Plenary, 20.10.2021.

Syllabus: CONSTITUTIONAL. DIRECT ACTION OF UNCONSTITUTIONALITY. LAW 13.467/2017. LABOR REFORM. RULES ON FREE JUSTICE. RESPONSIBILITY FOR PAYMENT OF SUCCUMBENCE BURDENS IN SPECIFIC HYPOTHESES. ALLEGATIONS OF VIOLATION OF PRINCIPLES OF ISONOMY, INAFASTABILITY OF JURISDICTION, ACCESS TO JUSTICE, SOCIAL SOLIDARITY, AND SOCIAL RIGHT TO FREE LEGAL ASSISTANCE. MARGIN OF LEGISLATIVE CONFORMATION. CRITERIA FOR RATIONALIZATION OF JURISDICTIONAL PROVISION. DIRECT ACTION JUDGED PARTIALLY FOUNDED.

1. Legislation presuming the loss of the condition of economic hyposufficiency for the purpose of applying the benefit of free justice merely due to the calculation of credits in favor of the worker in another procedural relationship is unconstitutional, dispensing the employer from the procedural burden of proving eventual modification in the beneficiary's economic capacity.
2. Unjustified absence at the judgment hearing frustrates the exercise of jurisdiction and entails material damages for the judicial body and for the defendant, which does not align with minimum duties of good faith, cooperation, and procedural loyalty, the restriction of the free justice benefit being proportional in this hypothesis.
3. Direct Action judged partially founded. (ADI 5766, Rapporteur: ROBERTO BARROSO, Rapporteur for Ruling: ALEXANDRE DE MORAES, Full Tribunal, judged on 20/10/2021).

The STF decision reinforces the protection of access to justice for people who do not have the financial conditions to bear procedural costs. With the declared unconstitutionality, it is avoided that hyposufficient workers be discouraged from seeking their rights in Labor Justice for fear of being condemned to pay fees.

The introduction of succumbence in Labor Justice was, undoubtedly, an innovation well received by a large part of labor advocacy, especially for representing an advance in recognizing the lawyer's professional activity as an essential function to the administration of justice, with express provision for remuneration in case of success of the represented party. However, the measure also raised founded concerns in the legal and academic sphere, notably due to its potential restrictive effects on access to justice by workers, traditionally recognized as the hyposufficient party in the labor procedural relationship. The possibility of imposing succumbence fees on the claimant, in case of total or partial dismissal of the demand, began to function as an inhibiting factor to the exercise of the right of action, especially given the initial legal uncertainty regarding the application of the free justice benefit.

Such concern was confirmed after the sanction of Law No. 13.467/17, upon observing an expressive reduction in the number of labor complaints filed throughout the national territory. Data released by the Superior Labor Court (TST) indicate that, in the first year of the Reform's validity, there was a drop of approximately 36% in the volume of actions filed compared to the same period prior to the norm's entry into force. Such retraction is directly associated with

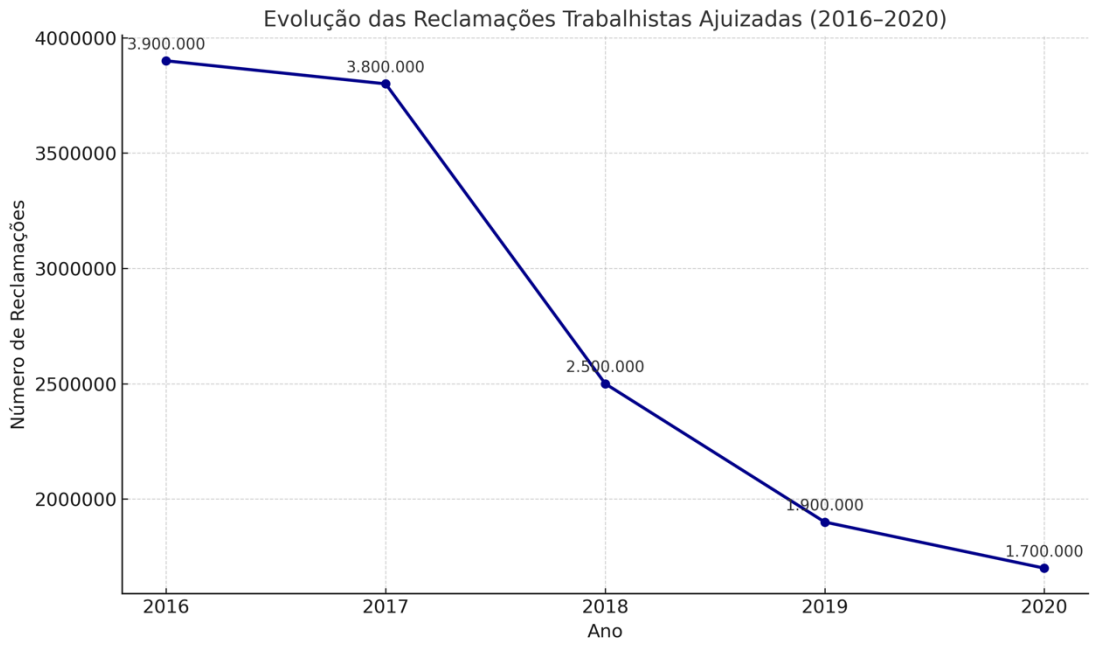
uncertainties generated by the new legal provisions, especially those related to the accountability of the succumbent party regarding the payment of attorney's and expert fees, even in cases of free justice.

The possibility of the hyposufficient worker bearing procedural expenses at the end of the demand, even if under suspensive condition, exercised an evident dissuasive effect, contributing to the phenomenon of de-judicialization due to fear of succumbence. This impact, although recognized by some as an advance in the rationalization of access to the judiciary, raises legitimate concerns regarding the effectiveness of the principle of inafastability of jurisdiction (Art. 5, XXXV, of the CF), especially regarding social rights of alimentary nature. Thus, the reduction in the number of labor actions, more than a reflection of greater legal certainty, may represent a symptom of restriction on the full exercise of the right of action.

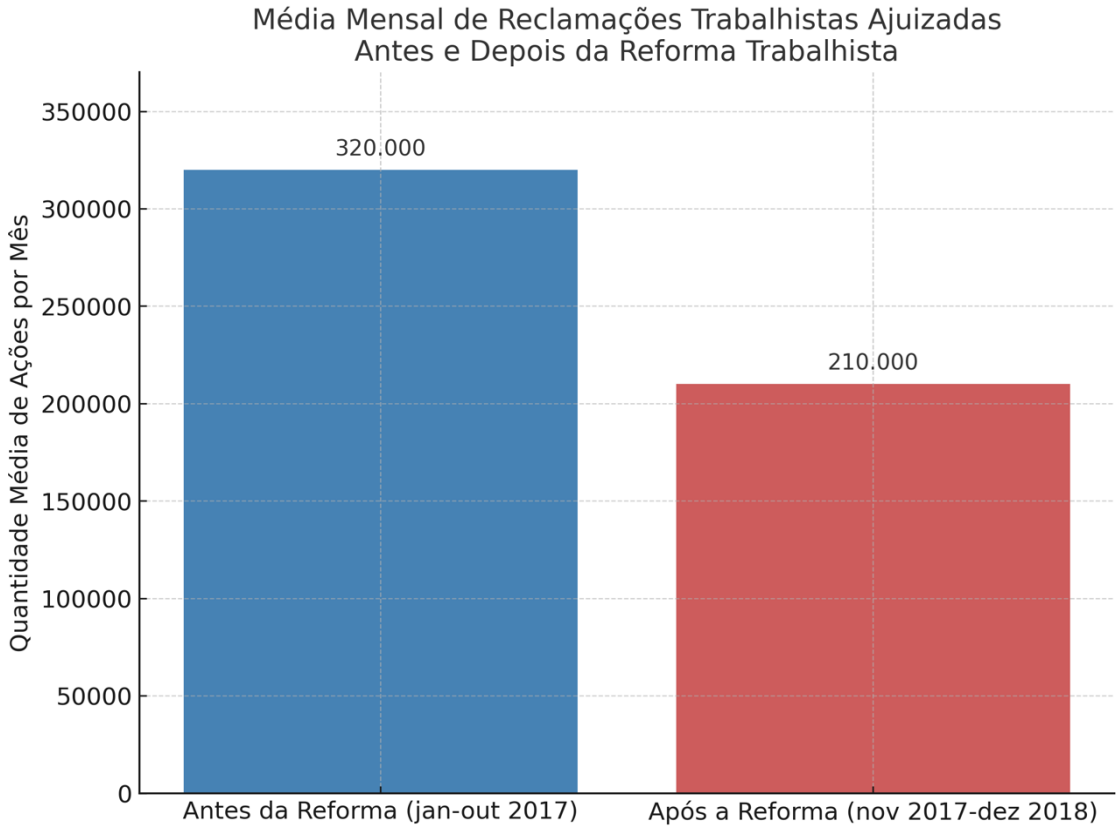
Number of Labor Complaints Filed (before and after the Reform) Source: Superior Labor Court (TST)

- 2016: 3.9 million actions
- 2017 (pre-reform): 3.8 million
- 2018 (post-reform): 2.5 million
- 2019: 1.9 million
- 2020 (pandemic): 1.7 million

With these data, it is possible to verify the sharp drop after the entry into force of Law No. 13.467/17 in November 2017.



Fonte: Dados aproximados com base em relatórios estatísticos do TST. A queda em 2018 reflete os efeitos imediatos da Reforma Trabalhista (Lei 13.467/2017).



Fonte: Estimativas com base nos dados públicos do TST (2017–2018).

The comparative graphs of the average of actions filed annually and monthly before and after the entry into force of the Labor Reform reveal, clearly and objectively, the immediate

effects of the new legislation on the behavior of workers and lawyers regarding the judicialization of labor demands. The significant drop in the number of lawsuits, especially in December 2017, when a reduction of up to 40% was registered in relation to the same period of the previous year, evidences a drastic change in the Brazilian legal-labor scenario. This phenomenon can be interpreted as a reflection of greater caution by workers given the new rules, the expansion of procedural risks, and the increase in responsibilities attributed to the parties. Even though the long-term impact depends on a more in-depth and continuous analysis, initial data point to a repositioning of access to Labor Justice, which raises important reflections on the balance between the modernization of labor relations and the guarantee of workers' fundamental rights.

Conclusion

The insertion of Article 791-A into the Consolidation of Labor Laws, through Law No. 13.467/2017, represented a paradigmatic alteration in the labor procedural systematic by expressly introducing condemnation in succumbence attorney's fees. Such a measure approximated Labor Justice to the parameters established in the Code of Civil Procedure, promoting, in theory, greater isonomy between the branches of the Judiciary regarding the remuneration of advocacy activity.

However, the provision for imposing these procedural burdens also on beneficiaries of free justice, even with suspended enforceability, gave rise to relevant constitutional discussions. In this context, the decision rendered by the Supreme Federal Court in ADI 5766 assumed a central role by declaring the unconstitutionality of collecting succumbence and expert fees from hyposufficient workers, even in the hypothesis of obtaining credits in court. The Supreme Court, by privileging the efficacy of Article 5, item LXXIV, of the Federal Constitution, reaffirmed the fundamental right to integral and free legal assistance, preserving full access to labor jurisdiction.

The referred decision imposes, thus, constitutional limits on infraconstitutional reform, by preventing the financial burden of the process from converting into an obstacle to the exercise of citizenship and the realization of social rights. In this way, it is observed that, although the Labor Reform sought to confer greater economic rationality to the process, the protection of fundamental rights demands permanent control of the constitutionality of legislative

innovations, in order to guarantee compatibility between procedural efficiency and social justice.

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