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AND THE BOUNDARIES BETWEEN CRIMINAL
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PUNITIVE DAMAGES IN BRAZILIAN LAW AND THE BOUNDARIES BETWEEN CRIMINAL AND CIVIL LIABILITIES

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ABSTRACT:
This article demonstrates the existence of civil responsibility with punitive purposes in Brazilian Law, explaining how it was introduced by jurisdictional activity in cases involving moral damages. Next, it points out main problems this situation represents to Brazilian Law from the standpoint of our juridical dogmatics and public policies. Additionally, it proposes the execution of an empirical research for comprehension of the structure and fundamentals of jurisprudence on the punitive character of civil responsibility for moral damages and establishes criteria for use in this research based on theories of punishment. Finally, it positions the problem of punitive function of civil responsibility in the broader ambit of relationships and boundaries between civil and criminal responsibility.

KEYWORDS: civil responsibility / punitive civil responsibility / relationship between civil law and criminal law / moral damages / punishment / jurisprudence / empirical research

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Article 944, heading, of the Brazilian Civil Code establishes: “indemnification is measured by the extension of damages”.

With this article the Civil Code expressly restates the “principle of restitution” according to which the function of civil responsibility is to indemnify for loss, an idea which was already considered of the essence to the notion of civil responsibility under the preceding Civil Code.

Therefore, during the legal effect of the Civil Code of 1916, J. de AGUIAR DIAS stated: “civil reparation in actual fact restores the injured party to its preceding net worth status”.

In another passage he concluded: “... the unanimity of the authors admits that there cannot be responsibility without the existence of damage, and it is actual truism to defend this principle, because, since civil responsibility results in the obligation to indemnify, logically it cannot operate where there is nothing to indemnify”.

However, even prior to legal effect of the Civil Code, a doctrine was developed on responsibility for moral damages, a trend to acceptance – although not unanimous and frequently neither

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Although Sole Paragraph of the same Article 944 – which I shall discuss hereinafter – could be interpreted as relativization of the “principle of restitution” in view of the fact that it considers the degree of fault of the agent, it expressly allows only *reduction* and not increase of indemnification amount. Which means that rule expressly admits that damage could be indemnified only in part, but not the sentence over and above damages.

2 The first Brazilian Civil Code was enacted in 1916. The current Civil Code was enacted in 2002 and became effective one year later.

3 *op. cit.*, p. 9.

4 *Idem*, p. 712
problematized nor justified – of punitive function of civil responsibility in these cases\textsuperscript{5}.

So that ahead of the Civil Code’s legal effect, within the doctrine of civil responsibility there appeared a type of curious contradiction between what is considered to be the function of civil responsibility in general and the functions frequently attributed to a specific case of responsibility, namely the responsibility for moral damages\textsuperscript{6}.

Only as an example, we could observe this phenomenon in one volume with reference to the Civil Code currently in legal effect:

\textsuperscript{5} With regard to both description of civil responsibility functions and description of punishment functions I shall work in this text with \textit{types}. These types are proposed to essentially represent widely disseminated traditional dogmatic conceptions with repercussion on contemporary doctrine. Which is not intended to say that all doctrine supports precisely these models of civil and criminal responsibility in all their aspects. Naturally, there are discussions in both areas. The utilization of types is simply intended to emphasize and analyze the most relevant aspects of civil and criminal responsibility with regard to the issue of punitive function of civil responsibility.

\textsuperscript{6} Authors who expressly admit a \textit{general} punitive function alongside the indemnificatory function of civil responsibility are an absolute exception in Brazilian doctrine. C. M. da SILVA PEREIRA [\textit{Responsabilidade Civil}, 9th ed., Rio de Janeiro, Forense, 2001, pp. 10-11] could possibly be mentioned as an example of the said position as he states alongside the purpose of damage reparation: “in civil responsibility there will be a punitive purpose with regard to offender associated to the necessity that I designate as pedagogic, that is no stranger to the idea of a guarantee for the victim and of the solidarity that human society should provide him/her with”, however, as he makes this statement, he does not justify the assumption of punishment by Civil Law or approaches any of the issues derived therefrom. There is also the possibility that C. M. da SILVA PEREIRA would make reference to a punitive \textit{effect} in the generic and secondary sense, as a result of simple imputation of responsibility, irrespective of sentence value. J. de AGUIAR DIAS, for example, recognizes a punitive \textit{effect} in the obligation to indemnify, without, however, recognizing in punishment a function of civil responsibility capable of justifying an increase in the amount payable by the offender: “for the civil responsibility system we propose, prevention and repression of offense result from indemnification itself, which is indifferent to gradation of indemnification amount. Even the rich undergo a powerful moral discipline that leads to prevention and repression of the practiced offense when they are obliged to fully repair the damage suffered by another person.” (\textit{op. cit.}, p. 735). The idea of a generic punitive effect of civil responsibility relates to the moral content that civil responsibility acquired in modern Law. For more details see note 13 below.
C. A. MENEZES DIREITO and S. CAVALIERI FILHO\(^7\) when addressing the function of civil responsibility in general, stated: “the aim of civil responsibility is the restoration of the injured party to the condition it would be in if no damage had occurred. To indemnify means to render the injured party undamaged; redress all damage incurred by it […] The damage caused by an illicit act disturbs the previously existing juridical economic balance between the agent and the victim. There is a fundamental need to re-establish the balance, which is done by restoring the victim to the \textit{statu quo ante}”.

Later in the book when dealing with quantification of moral damages the same authors\(^8\) assert that the value determination system in these cases has purpose of: “imposing a reparation so as to attain satisfaction of the injured party and fair punishment of the injurer”.

The authors do not explain the apparent contradiction between the purpose of the punishment of the injurer and that which they stated with regard to aim of civil responsibility. Would moral damages be an exception to the rule? In this case what is the underlying principle?

Only in works that deal specifically with responsibility for moral damages there is discussion of the theme of punitive function of civil responsibility in Brazilian doctrine. However, even in these cases the approach normally used in domestic doctrine leaves the above questions without a satisfactory response.

It appears to me that a reasonable hypothesis to explain this situation of the doctrine is the authority of the “principle of restitution”,

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\(^8\) C. A. MENEZES DIREITO and S. CAVALIERI FILHO, \textit{op. cit.}, p. 351.
to be precise, the power of the idea according to which the purpose of civil responsibility is to indemnify, restoring the injured party to the position the party would be in if the damage had not occurred.

The “principle of restitution” appears to be so deeply rooted that it is one of the most commonly used criteria to differentiate specifically between civil and criminal responsibility areas: civil law should deal with indemnification and criminal law should deal with punishment of the injurer.\(^9\)

In addition to this situation internal to doctrine, an interesting phenomenon is observed in the relationship between doctrine and jurisprudence in this theme.

We have in both the state courts and the Superior Tribunal of Justice\(^{10}\) (STJ), especially in decisions on civil responsibility for moral damages, many decisions in which the idea of punishment to determine

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\(^9\) Cf., for example, H. THEODORO JR. Dano Moral, 4th ed., São paulo, Juarez de Oliveira, 2001, p. 54: “From the moment when modern State assumes the function of applying sanction to offenders to suppress unlawful acts, the notion of responsibility undergoes a remarkable change that causes it to develop in a twofold manner: firstly, by establishing the criminal responsibility meant for punishment of offenders, and secondly, the civil responsibility meant only to indemnify the private damage suffered by the victim”. J. de AGUIAR DIAS (op. cit., pp. 7-8), making reference to H. MAZEAUD and L. MAZEAUD, asserts that “the difference between civil responsibility and criminal responsibility (...) is the distinction between Criminal Law and Civil Law,” with both being instruments for restoration of the social order: Criminal Law by means of punishment, and Civil Law by means of reparations. For a critique of the use of this criteria to distinguish between the areas of civil and criminal responsibility, cf. F. P. PÜSCHEL and M. R. de ASSIS MACHADO, Questões Atuais Acerca da Relação entre as Responsabilidades Civil e Penal, in B. Garcia, Instituições de Direito Penal, forthcoming.

\(^{10}\) The Superior Tribunal of Justice (STJ) is the highest court in the Country as regards issues in connection with application of federal law such as the Civil Code, where civil responsibility is regulated. For constitutional issues the highest court in the Country is the Supreme Federal Court (STF).
the amount of indemnification is either expressly admitted or used in a latent manner, in clear contradiction with the “principle of restitution”\textsuperscript{11}.

Anyone studying or working on civil responsibility matters knows through his/her own experience that such jurisprudence exists. However, a systematic analysis of these decisions still has not been carried out by us so as to enable a rational reconstruction of them as well as a reflection on how they fit – or not – in the Brazilian responsibility system. Moreover, there is no information on their practical effects.

I think this is attributable to the following reasons. Firstly, there is the large number of decisions. Since these matters are handled by state courts that judge independently, in order to know the full extent of this matter in the country it would be necessary to know the decisions from each state court. Even if we limit ourselves to the Superior Tribunal of Justice (STJ) [that can review decisions of state courts in this area, in event of appeals thereto], the number of decisions in this area still is very large – and increases every day – which makes their follow up difficult.

Additionally, there is the structure of the Brazilian legal system, where superior courts – although they can review decisions from lower courts – do not directly bind the aforementioned decisions.

Finally, as precedents set by one court also do not bind their own upcoming decisions, coherence requirements are low in each

court. Thus, the consolidation of uniform decisions in one same path could take decades to happen or may not happen at all.

When superior courts understand to be convenient, they can issue “digests” (Súmulas) consisting of official court statements in connection with a specific problem, prepared from consolidation of one decision guideline by the pertinent court. These “digests” are issued as general and abstract rules and may be revoked by the court that issued them. With regard to attribution of punitive character to responsibility for moral damages, currently there is no “digest” from the Superior Tribunal of Justice (STJ).

When coping with the function of civil responsibility in general our doctrine does not appear willing to openly discuss this jurisprudential trend and does not usually treat it as relevant fact. The doctrine is aware of existing decisions that attribute a punitive character to civil responsibility for moral damages but does not replicate the meaning of this to our civil responsibility system in general.

At this point I would like to clarify that here I am not proposing to defend or censure the use of civil responsibility as means to punish.

The purpose of this article is firstly to demonstrate the existence of civil responsibility for punitive purposes in Brazilian Law, explaining how it was introduced by jurisdictional activity in moral damage cases. Secondly, to specify the main problems this situation represents for Brazilian Law from the standpoint of our juridical dogmatics and public policies. I will deal with these first two objectives in Section I of this article.
In Section II I will propose to carry out an empirical research so as to comprehend the structure and the fundamentals of jurisprudence on the punitive character of civil responsibility for moral damages establishing the criteria to be used in such research consistent with punishment theories.

Finally, in Section III I will present my conclusions and position the problem of punitive function of civil responsibility in the broader ambit of relationships and boundaries between civil and criminal responsibility. My argument is that the acceptance of the punitive character of civil responsibility – along with other discernible phenomena today in Brazilian Law – represents a change in the way boundaries are traditionally drawn between civil and criminal responsibility and that the problems of dogmatics and public policies specified in Section I can only be appropriately resolved when the said tradition is outdone and the approach to articulation of these two types of responsibility is reviewed. Although the current stage of my research still does not allow to propose solutions to public policy issues relating to the punitive function of civil responsibility, I believe it is possible to assert that distinction between pecuniary damage and moral damages is not the appropriate method to determine when civil responsibility should be punitive. For this reason, it is fundamental in Brazil today to hold open debate on this theme so that it may emerge from the restricted ambit of moral damages quantification. Without a debate in which this issue is openly treated it appears to me that it will not be possible to form a belief – in favor of or against – the punitive function of civil responsibility in the various cases it could be applied to.
I – THE RELATIONSHIP BETWEEN THE PROBLEM OF MORAL DAMAGES QUANTIFICATION AND THE PUNITIVE FUNCTION IN BRAZILIAN DOCTRINE

As stated hereinabove, moral damages is the area where the expression of a punitive character of civil responsibility tends to occur in clearer manner.

The reason for that is, first of all, the very nature of moral damages, which cannot be indemnified but only compensated for, as it is not possible by means of monetary payment to restore an injured party to the position the party was before being harmed.\(^\text{12}\)

\(^\text{12}\) Cf. Y. S. CAHALI, op. cit., p. 42. In specific cases of moral damages, as with damage to honor or to image as a result of inaccurate news publication, it is possible and in some cases sufficient a reparation in kind (\textit{in natura}) as the publication of news corrections, as in the example case. In these hypotheses it is possible to conjecture on the possibility of effective reparation (and not only a simple compensation) for moral damages. However, in most cases a reparation in kind (\textit{in natura}) is either impossible or insufficient. On reparation in kind (\textit{in natura}), cf. A. JEOVA SANTOS, \textit{Dano Moral Indenizável}, 4th. ed., São Paulo, RT, 2003, p. 155.

This in itself already represents a change with reference to the dogma of the indemnificatory function of civil responsibility, but not necessarily an acceptance of its punitive function, since the purpose of mitigation to a victim is different from the purpose of punishment of the person responsible for the damage.

Additionally and as a consequence of this nature, moral damages are very difficult to be evaluated and the theme of its quantification is one of the most intricate and polemical in Brazilian Law.

The non-existence of established legal criteria and the difficulty to evaluate moral damages based on objective criteria results in
significant liberty for the judge at the time of loss quantification, which allows easy introduction of punitive purposes in this calculation, without need for statute modification or major interpretative elaboration.

Therefore it is not surprising that it is in the area of moral damages that among us, both in doctrine and jurisprudence, was brought in the issue of punitive function of civil responsibility.

From a certain viewpoint, the admission of responsibility with punitive function represents the return to a tradition of civil responsibility.

Civil responsibility, as understood among us from the outset of Modern Age, primarily founded on fault, has conducts moralizer character.\(^{13}\)

This characteristic was mitigated with the admission, increasingly more frequent since the end of the 19th century, of non-fault responsibility, which changed the focus of civil responsibility: from the person responsible for an illicit act and his/her conduct, to the victim and its loss. Indemnification for loss became more important than the social reaction to the illicit conduct of the person responsible for the loss. This development, as it can be observed, reinforces the “principle of restitution”.

The admission of a punitive character of civil responsibility resumes the interest for illicit conduct, which is not totally forgotten. On

the contrary, it is quite alive in the concept of responsibility of jurists and, more importantly, of common citizens, among whom the words fault and responsibility are indistinctively used, demonstrating the importance attributed to disapproval of conduct as underlying ground to hold someone responsible.

However, even with its disciplinarian character, civil responsibility did not propose to moralize conducts through decisions ordering the payment of amounts several times larger than the effectively caused damage.\(^{14}\) Moralization was expressed by the adoption of fault as criteria for imputation of responsibility.\(^{15}\)

Therefore, even though it is possible to identify the connection between punitive responsibility and the moralizing tradition of civil responsibility, the truth is that the admission of a punitive function puts forward new problems to us, which should be tackled.

Among the aforementioned problems we could mention the relationship between punitive civil responsibility and the principle of legality, constitutionally established,\(^{16}\) according to which there cannot be punishment without prior legal provision.

Although it is possible to argument in favor of softer application of the said principle to civil law\(^{17}\) – due to lesser severity of the

\(^{14}\) In subjective responsibility fault is considered only as imputation criteria and not for indemnification quantification purposes. Irrespective of degree of fault – from deliberate fraudulent action to ordinary fault (\textit{levis culpa}) – the offender should indemnify the loss value. The 2002 Civil Code introduced a change in this principle in article 944, sole paragraph. For details on this theme, see note 55 below.

\(^{15}\) “Punishment” is dealt with as a generic effect and secondary to the indemnification sentence referred to by J. de AGUIAR DIAS (cf. note 6 above).

\(^{16}\) CF, article 5th, XXXIX.

\(^{17}\) Cf. S. CARVAL. \textit{op. cit.}, p. 224-225.
punishment that is imposed – it is not possible to avoid the issue of its conciliation with punitive civil responsibility.

Another obstacle is represented by the defense guarantees provided to defendants. In view of his being exposed to a punitive decision, it is necessary to verify whether the guarantees provided by civil law to the defendant are sufficient, or if would be necessary to adopt greater strictness as in criminal law.

Also, there is the issue of double punishment for the same offense, which would call into question the need and convenience of punitive civil responsibility in the case of conducts already punished by criminal law or by administrative law (or, in any case, which entails the need to consider the regulation of these conducts in a global manner, observing the way they are dealt with by each one of these Law areas).

An additional problem resulting from punitive civil responsibility is the avoidance by our legal system of victim enrichment without cause. There are no legal grounds for the victim to receive an amount that increases his/her wealth in relation to his/her condition before the offense occurred.

This problem is clearly perceived in jurisprudence of Brazil’s Superior Tribunal of Justice (STJ) when it applies punitive criteria in order to calculate the amount of indemnification for moral damages.\(^{18}\)

In the doctrine favorable to civil responsibility for moral damages with a punitive character the same difficulty is perceived. A. JEova Santos\(^ {19}\), for example, indicating that Brazilian jurisprudence has


avoided the distortion that results from the designation of excessively high amounts as indemnification, affirms: “the limit to be observed is that the amount should never be so high as to denote undue enrichment to the detriment of offender’s wealth.”

However, when applying punitive criteria to calculate the amount of indemnification for moral damages, doctrine and jurisprudence face a complex task, as it is difficult to imagine how to avoid undue enrichment when an amount is attributed to the victim without relationship with the damage suffered.

This problem could be overcome through the adoption of special measures, such as the provision that the part relative to punishment should not be paid to the victim, but to the State, for example, which solutions are dependent on law amendment and, therefore, on open admission of the punishment and on debate thereof.

An additional problem related to punitive civil responsibility is its application in the hypothesis of non-fault responsibility. Punishment only makes sense if the conduct of the offender can be considered reproachable, which does not occur where there is no fault.

For punitive sentence in case of non-fault responsibility it would be necessary then to prove that a fault was committed in actual fact.

The contracting of civil responsibility insurance represents an additional problem for punitive civil responsibility. After all, there is no punitive effect where it is not the offender who in fact pays the indemnification.
The abovementioned problems are only the most evident ones. It is possible that there are many other issues in connection with admission of the punitive function of civil responsibility.

In Brazilian doctrine the authors who write about moral damages are those who dedicate some attention the theme of punitive responsibility.

Among the works focused on responsibility for moral damages we find opinions favorable to admission of its punitive character in: J. MARTINS COSTA, C. A. BITTAR, A. JEOVA SANTOS, T. ANCONA LOPEZ, M. C. BODIN de MORAES among others. Among opinions in opposition to the punitive character of civil responsibility for moral damages an outstanding work is the vehement critique by H. THEODORO JR.

Occasionally the doctrine on moral damages makes reference to the abovementioned issues. Reference is found to the principle of legality violation risk, to double punishment risk (in civil and

24 With the exception of M. C. BODIN de MORAES (op. cit., p. 261-263) who admits the punitive character of responsibility for moral damages only in exceptional cases and in cases specifically provided by law, since she opposes the combination of punitive responsibility and judge’s discretion. According to the author (op. cit., p. 258), the afflictive character, “indiscriminately applied to all and any reparation for moral damages jeopardizes the fundamental principles of legal systems that have statutes as their normative source, to the extent that the idea odd to our tradition begins to be accepted that reparation no longer constitutes the final purpose of civil responsibility, but are also attributed to it as intrinsic, the functions of punishment and dissuasion, of penalty and prevention”.
criminal venues)\textsuperscript{27}, the difference of guarantees provided to offender in civil and criminal courts\textsuperscript{28}, the problem of victim undue enrichment\textsuperscript{29}, the issue of a possible civil responsibility without fault\textsuperscript{30} as well as the fact that – in case of civil responsibility – it is not always the offender who in actual fact pays the sentence value [relationship between civil responsibility and insurance].\textsuperscript{31}

It can be observed, however, that in Brazilian doctrine the opinions are still little developed as to the punitive character of civil responsibility. Little legal basis or reflection is found on the consequences of positions assumed, on the convenience of suppressing the punitive character of civil responsibility, or on the possibility of extending it beyond moral damages.

II – Confrontation with reality: Proposal for an empirical research

As stated hereinabove, in Brazilian Law there is a jurisprudential trend apparently already consolidated in several Courts [including the Superior Tribunal of Justice], which accepts the punitive character of civil responsibility in matters of indemnification for moral damages.

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\textsuperscript{27} M. C. BODIN de MORAES, \textit{op. cit.}, p. 260; H. TEODORO JR, \textit{op. cit.}, pp. 56-57.
\textsuperscript{28} M. C. BODIN de MORAES, \textit{op. cit.}, p. 260.
\textsuperscript{29} A. JEOVA SANTOS, \textit{op. cit.}, p. 159.
\textsuperscript{30} M. C. BODIN de MORAES, \textit{op. cit.}, p. 262.
\textsuperscript{31} M. C. BODIN de MORAES, \textit{op. cit.}, p. 262.
\end{flushright}
Considering the said jurisprudence is contrary to the provisions of article 944, heading, of the Civil Code and considering as well that the Brazilian doctrine does not appear to actually incorporate this position of the Courts in its reflections on the objectives pursued by civil responsibility in general, it appears to me that it would be interesting to better investigate the jurisprudence on the theme.

Hereinafter I will mention several examples of judicial decisions in which the punitive character of responsibility is stated. However, it is important to understand the *dimension* of the said jurisprudence, so as to make sure that we are not making reference to a minor trend or to isolated decisions non representative of a true jurisprudential line.\(^{32}\)

This requires more than just searching for examples. It entails the accomplishment of an empirical research in Courts’ databases\(^{33}\) so as to establish the proportions according to which punitive legal bases emerge throughout civil responsibility imputation.

In order to perform the aforesaid investigation it is necessary to determine the types of arguments that are called upon in

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\(^{32}\) Other authors made extensive compilations of judicial decisions on responsibility for moral damages, however, without applying to their researches a method that would enable quantification of the influence of jurisprudence favorable to its punitive character. See, for example, M. Ciancl, *O Valor Da Reparação Moral*, São Paulo, Saraiva, 2003.

\(^{33}\) As mentioned above, in order to know the entire jurisprudence of the Country it would be necessary to investigate jurisprudence in each State Court in addition to the jurisprudence in the Superior Tribunal of Justice (STJ) itself, since STJ’s decisions do not directly bind future decisions from state courts. Considering that this would entail an enormous amount of work and that Superior Tribunal of Justice (STJ) has power to review decisions from State Courts when decisions are appealed, I propose to carry out the empirical research at the Superior Tribunal of Justice (STJ). Through the said research it will be possible to understand jurisprudence of the highest court. Additionally, nothing would prevent the proposed research from being also carried out in each State Court.
decisions and that could be considered an expression of the attribution of a punitive function to civil responsibility by the Court.

For this it is first necessary to determine what should be understood as punishment in this context.

Naturally, the area of Law where punishment is discussed most is Criminal Law. There is no consensus among specialists in criminal law on the concept of punishment or its function\(^3^4\), however, in a broad manner (i.e., whatever theory is adopted with regard to functions of punishment\(^3^5\)) it can be said that it is a sanction through which some hardship is attributed to the offender as a means to achieve some purpose of social interest be it negative or positive general prevention, special prevention or other.\(^3^6\)

\(^3^4\) It is important to emphasize that in this text I shall adopt a concept that corresponds to the most disseminated vision on punishment, which does not mean that it is free from criticism. There are alternative proposals in today’s criminal law debates. The selection is due to its being the traditional concept and still the prevailing one among us.

\(^3^5\) The only theories excluded are those that understand criminal sanction exclusively as a mechanism for offender ressocialization, provided that said mechanism is not punishment. In which case presumably it would not make sense to designate such sanction as punishment.

\(^3^6\) J. F. MARQUES (Curso De Direito Penal, v. 3, São Paulo, Saraiva, 1956, p. 103), understands punishment as a sanction of afflictive nature as it consists of deprivation or reduction of juridical goods as “punishment and hardship imposed upon offender” and making reference to G. BATTAGLINI, affirms that a non-afflictive punishment would be a contradiction.

According to M. REALE JR. (Instituições de Direito Penal – Parte Geral, vol. I, Rio de Janeiro, Forense, 2002, p. 44), punishment is “infliction of hardship”, even if said hardship is fair and its punishment character is recognized even by specialists in criminal law that deny a retributive purpose to it.

G. JAKOBS (Srafrecht – Allgemeiner Teil, 2nd ed., Berlin/New York, De Gruyter, 1993, pp. 5-6), for example, in an attempt to provide a concept of punishment valid to any legal system, reduces the notion of punishment to a notion of sanction, without indicating a characteristic of the “punishment” sanction that would make it different from other juridical sanctions. For this author, what characterizes the “punishment” sanction is that it is the sanction in relation to criminal rules, whereas criminal rules are rules essential for the maintenance of social order. Which does not mean that G. JAKOBS excludes the fact that punishment is a hardship. He simply affirms that punishment cannot be defined as infliction of evil owing to the practice of another evil, so that the imposition of evil upon offender does not exhaust the function of punishment, although it is an integral part of its concept. According to the author, “punishment (...) is a demonstration of rule effectiveness at the expense of an offender. There is evil in this, however, with such effect
Admission of the principle of restitution results in significant differences between civil and criminal responsibilities. In this context, civil responsibility sanction has the specific purpose of indemnifying the damage. The sentence ordering reparation can be perceived as a hardship by the offender, however, this effect is not essential to civil sanction. The accidental character of this effect in civil responsibility becomes clear as we think that the duty to redress can be attributed to persons that did not directly participate in the offense (vicarious liability) or that did not act in a reproachable manner (responsibility without fault).

In other words, in order to achieve the purpose of reparation it is indifferent whether the sanction is perceived as a hardship. In criminal law, on the contrary, regardless of the purpose attributed to punishment, its punishment character is of the essence, as the purpose of punishment is intended by means of the very infliction of a hardship.\(^{37}\)

Additionally, the admission of the principle of restitution causes the civil sanction to have the immediate purpose of satisfaction of the private interest of the victim. Only in a mediate manner the civil sanction intends – as all juridical sanctions – to protect a public interest

\(^{37}\) This does not mean that Criminal Law will be or should be always like this. As stated above (note 34) reference is made to the most disseminated punishment theories and to Brazilian Law as is today.
[such as rule stability by means of the confirmation of its effectiveness, or other).

In this context, criminal sanction – achieved through punishment, through infliction of hardship – serves, on the other hand, essentially the purpose of protecting public interests.\(^{38}\)

The main theories on the function of punishment, developed in the ambit of Criminal Law, can be outlined as follows.

*Retributivist* theories have absolute character.\(^{39}\) This means that punishment is applied as an end in itself, as punishment imposed to offender for the reason that he/she committed an unlawful act, i.e., as a retribution proportional to the offense.\(^{40}\)

According to the theory of *Negative General Prevention*, the punishment function is to frighten the public and avoid by means of punishment example that people commit offenses in the future. From this viewpoint punishment is a threat directed to everyone of an educational character, i.e., with the purpose of preventing the practice of infraction of law by members of the society.\(^{41}\)

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\(^{39}\) Punishment theory elements considered absolute are those of which the content is defined without reference to contribution of punishment to the maintenance of social order. Cf. G. JAKOBS, *Strafrecht*, p. 15.

\(^{40}\) Cf. M. REALE JR., *op. cit.*, pp. 46-50. According to G. JAKOBS (*op. cit.*, p. 15), it is possible to say nowadays in the ambit of discussions on Criminal Law the notion that punishment is only applied in order to maintain social order is widely accepted. The divergences among theories only cope with the questions *if* and *to what extent* punishment should be established in view of this purpose, or whether it has any content notwithstanding its function.

Consistent with the theory of *Positive General Prevention*, punishment should guarantee the presuppositions of social interaction confirming the expectations of those who trust the rule of law. Hence, punishment is directed not to potential offenders, but essentially to members of the society in general. Under this theory punishment constitutes an “exercise of trust in the rule of law” (*Einubung in Normvertrauen*). 

In accordance with the theory of *Negative Special Prevention* punishment should impress the offender in a negative manner, so that he/she in view of the opportunity to infringe the law should opt not do practice the unlawful act. In other words, from this standpoint the function of punishment is to prevent through infliction of a hardship that the convict would commit offenses again in the future.

Consonant with the theory of *Positive Special Prevention* the function of punishment is to promote repentance on the part of the offender so as to correct the offender and guide him/her to follow the path of legality.

Considering the backdrop provided by the abovementioned statements on the punitive character of civil responsibility and taking into account analyses of punishment theories from Criminal Law, I performed a preliminary research on decisions from the Superior Tribunal of Justice (STJ). My purpose was to identify types of arguments that could be possibly found in decisions by the higher court dealing with quantification of moral

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damages and in particular whether among these arguments there are any that could be associated to punishment theories.

With this purpose I selected decisions from the database at STJ using the keywords “damage” and “moral” and “value”. From among the decisions selected in this manner I read a certain number of decisions so as to explore the viability of and the interest in analyzing these decisions based on doctrinary discussions on punishment. I was not concerned about the number of decisions read during this specific stage of the work, as it was only an exploratory research without intention to quantify the occurrence of the various legal bases in the jurisprudence at the Court. My purpose was only to verify whether or not it would make sense trying to understand the Court’s jurisprudence from the viewpoint of punishment theories, irrespective of the possibility – in this first stage – of becoming aware of its representativeness compared to the total number of decisions from the Superior Tribunal of Justice (STJ).

Based on confrontation between doctrine and the result of this preliminary exploratory research, I could identify seven criteria that applied to the analysis of judicial decisions would allow to answer the question on dimension of the jurisprudential trend under analysis.

First there is, naturally, reference expressly made by the Court concerning intention or purpose to punish the offender or explicit attribution by the Court of this function to civil responsibility.

As example of a decision in which the purpose of punishment expressly appears I mention the decision of the Superior Tribunal of Justice (STJ).
Tribunal of Justice [STJ]\(^{47}\) in a judgment of undue protesting of commercial paper, where it reads that the amount of moral damages should be determined with moderation “proportionally to the degree of fault, the financial size of the parties and use by the judge of criteria recommended by doctrine and jurisprudence, making use of his/her experience and common sense [...], however, without ignoring the disciplinary and punitive nature of indemnification.” (italics added).

Second - the Court’s explicit reference to intention or purpose of avoiding that the offender would repeat the same offense or the attribution of this function to civil responsibility.\(^{48}\)

In this case the Court demonstrates it attributes to civil responsibility a function of negative special prevention, i.e., of dissuasion by means of infliction of a hardship (sentence to pay a monetary penalty). It should be observed that special prevention is an objective devoid of relationship with the purpose of indemnifying the victim and does not contribute at all to restore the victim to the statu quo ante.

As an example of explicit reference to the purpose of special prevention can be mentioned the decision from the Superior Tribunal of Justice [STJ] in one case of aggression practiced by shopping center security personnel\(^{49}\) in which it is written that the indemnification should “contribute to discourage the offender from repeating the offense, inhibiting his unlawful conduct.”


\(^{48}\) In contrast, A. JEOVA SANTOS, to whom the pedagogic purpose decharacterizes indemnification as a civil punishment. However, it should be emphasized that in this case the intention is to reach a pedagogic objective through infliction of evil upon the offender, which confers upon it the character of punishment.

The attempt to dissuade through punishment is a characteristic of punishment theories in special prevention. Which means the application of punitive reasoning to civil responsibility without any connection with attainment of the purpose of restoring the victim to the *status quo ante*.

Third - it could be considered an expression of punitive notion of civil responsibility the explicit reference made by the Court to the intention or purpose of avoiding that other people – i.e., the population in general – would commit offenses similar to the one committed by offender judged by this Court. In this case the Court attributes to civil responsibility a function of negative general prevention that, as with special prevention, is typical of a certain type of punishment theory and also has no link with the purpose of victim indemnification.

As an example of decision with reference to the purpose of general prevention one decision of the Superior Tribunal of Justice (STJ)\(^50\) could be mentioned in a case of undue inclusion in a register of debtors in default, where an increase in the amount of indemnification for moral damages is based on the fact that a sentence to a lower indemnification amount would represent “an incentive to continuation of the said unlawful practice, repeated thousands of times throughout the Country.”

Fourth - there is the case of a sentence issued for a simple violation of a right without evidence of loss.

In order to have the need to indemnify it is necessary that a damage occurs. If the purpose of civil responsibility is to restore the victim to the *status quo ante*, there is no need to indemnify in the absence of loss.

(this is the reason why in civilist doctrine the damage is pacifically accepted as a requisite for civil responsibility.

Naturally, moral damage is a special kind of damage, difficult to be evidenced. But waiver to loss, even from a dogmatic viewpoint, under the disguise of presumption of loss, could indicate that the intended purpose is not reparation, but punishment for breach of rule.\(^{51}\)

An example of this type of case could be the decision issued by Superior Tribunal of Justice (STJ)\(^{52}\) in the case of an undue protesting, stating that: “undue protest, by itself, generates the right to indemnification for moral damages, irrespective of objective evidence of harmed honor and reputation”. See also: STJ – 3rd. T. – RESP No. 233597 – Rel. Carlos Alberto Menezes Direito – 09 15 2000, also in connection with undue protesting of commercial papers, stating that, “in these cases no evidence of loss is necessary.”

By adopting the above criteria, decisions could come near to the theory of positive general prevention currently discussed in the ambit of Criminal Law. According to this theory, the function of punishment is to reaffirm the violated rule before society so as to reinforce recognition and trust with regard to said rule in the minds of people in general.\(^{53}\) From

\(^{51}\) Cf. statement by S. CARVAL with regard to symbolic sentences (franc symbolique) in France (op. cit., p. 30).


\(^{53}\) Cf. G. JAKOBS, op. cit., pp. 6-14.

In analysis of jurisprudence on moral damages this criterion should be carefully dealt with because at the same time sanction application for the simple fact of rule violation brings the situation near to the concept of punishment, the use of the presumption of damage is possibly a necessary resource simply to make possible the responsibility in moral damage cases.
this vision, infliction of punishment is justified by the simple breach of rules.

Fifth - Court’s consideration of the degree of fault of the offender in order to calculate indemnification amount also indicates punitive character of said indemnification.

If the purpose of civil responsibility is to restore the victim to *status quo ante* once all of the legal requisites are present then the degree of fault should not have any consequences. Once sentenced the offender should indemnify the loss caused, no more and no less.\(^{54}\)

\(^{54}\) Making an exception to the principle of full reparation – according to which the offender should indemnify the total loss – the sole paragraph of article 944 of the Brazilian Civil Code establishes: “where there is excessive disproportion between the severity of the fault and the damage the judge may equitably reduce the indemnification”.

The Civil Code expressly authorizes reduction – not increase – of indemnification amount based on the degree of fault of the offender, mentioning equity as a measure.

According to C. A. MENEZES DIREITO and S. CAVALIERI FILHO (*op. cit.*, pp. 333-334), mitigation of the principle of full reparation in this case serves the purpose of guaranteeing fairness in judgment and in order to define the equity mentioned in the Law, the authors assert: “here the notion of equity should be understood as fair judgment, sense of justice, respect to equality of rights of the parties (...).”

By accepting that this is the meaning of equity in the sole paragraph of article 944 of the Brazilian Civil Code, it seems interesting to observe that in this case the notions of equity and justice include a moralizing perspective. When the judge deems equitable that the offender should pay only part of the damage, he is necessarily attributing the victim the burden of paying the remainder part of the loss. In other words, in this case the judge deems fairer to attribute part of the loss to the victim, as a risk one runs in life (although she is at no fault, in contrast to offender) than to attribute to offender the obligation to indemnify a loss that is not in proportion to his/her small degree of fault. By establishing this possibility, the Civil Code attributes less importance to victim indemnification (restore the victim to the *status quo ante*) than to reproachability of offender’s conduct. The focus is not on the damage and its reparation, but on the offender and his/her conduct so that the notion of equity thus set forth reflects the idea that it is not fair to reimburse for damage that is greater than the fault, i.e., the concept that it is nor fair to be *punished* with obligation to indemnify when the fault is small compared to the damage (a retributive concept lies behind this idea). Otherwise, why would the “equitable” solution of the Civil Code need to rely on the degree of fault of the offender and not, for example, on the economic capacity of the involved parties (the wealthier party would pay for the loss) or on its ability to distribute the loss (the party better prepared to disperse the loss among society at large would pay for it)?

It is interesting to compare the sole paragraph of article 944 with another case of application of equity to civil responsibility, i.e., article 928 establishes equitable responsibility of the
To consider the degree of fault makes sense when a punishment is applied, as in this case the infliction of a hardship upon the offender is at issue in response to his/her reproachable conduct (the more reproachable the act, the greater the fault). The principle of proportionality according to which punishment should be proportional to the culpability of the defendant is a principle connected to retributivist theories of punishment.

An example of a decision where the said criteria was employed is the abovementioned one\(^{55}\) in which it is stated that the amount of moral damages should be calculated with moderation, “proportional to the degree of fault”. A similar statement is present in the also mentioned decision: STJ – 4th. T. – RESP No. 215607 – Rel. Salvio de Figueiredo Teixeira – 08 17 1999.

Sixth - Court’s consideration of the economic capacity of offender in the calculation of indemnification amount also denotes a punitive purpose. Under this quantification criteria the Court demonstrates concern to avoid that, where the sentence value is small compared with the offender’s wealth, the latter could repeat or continue to practice the same kind of offense. Application of this criteria demonstrates concern incompetent in cases where “the persons responsible for him/her either are not obliged to do it or do not have sufficient means to do it.”

Invoking the same equity, the Law allows for sentencing to pay an indemnification an incompetent person without any degree of fault. The explanation for this is that here the rationale of the Civil Code is simply to indemnify the victim, which notion in this case is so strong that the Law does not even consider the economic capacity of the victim, that could be considerably greater that that of the incompetent, in the actual case.

If the equity provided in sole paragraph of article 944 were concerned only with indemnification of the victim and did not presume any punitive character of civil responsibility, its solution should be similar to that of article 928 and a reduction of the indemnification, if admitted, would be based on criteria regarding damage reparation and not the offender’s conduct.

with special prevention, i.e., concern with making civil responsibility operate as dissuasion for offender practice of such infraction of law.


The same could be said in cases where the Court takes into consideration gain obtained through an offense to calculate the amount of indemnification\(^5\). Which is the 7th criterion.

In brief, it is possible to consider as expressions of attribution of punitive function to civil responsibility the following criteria for the quantification of moral damages:

1. Express reference to intent/purpose/function of punishing the offender;

2. Express reference to intent/purpose/function of preventing/avoiding offence repetition by offender (special prevention);

3. Express reference to intent/purpose/function of preventing/avoiding that other people...
would practice the same type of offence (negative general prevention);

4. Sentence issued for simple violation of a right without evidence of loss;

5. Consideration of degree of fault of the offender;

6. Consideration of economic capacity of the offender;

7. Consideration of gain obtained through an offense.

The first four criteria numbered hereinabove refer to purpose pursued by the sentence. The last three ones deal specifically with the proportion or measure of the sentence.

The relationship that is established among the various factors in the application of punitive sanction is not aleatory. Measurement criteria could be a means to achieve the purposes pursued by Law through sentence. Not all measurement criteria are appropriate to pursue all ends.

56 For example, the gain obtained through sales of newspapers or magazines whereby someone’s right to privacy or honor was violated.
Some of them can even turn out to be obstacles for the attainment of certain objectives.

For example: the adoption of fault as measure for punishment pursues a retributive purpose. The adoption of fault as measure does not contribute to the attainment of the objectives of a positive general prevention system. On the contrary, it can operate as an obstacle to the pursuit of this purpose considering that fault and prevention are not dependent on each other. The application of fault measurement could, in many cases, result in the application of a punishment too small for the purposes of prevention.

On the other hand, the use of fault as measure for punishment in a positive general prevention system could serve a different purpose, such as legitimation. According to G. JAKOBS\textsuperscript{57}, punishment measurement on the basis of a concept of fault not guided by purposes facilitates the legitimation of punishment under two different aspects. First, the use of fault as a measure could possibly result in useless punishment (from a prevention standpoint) but never in error. Second, the limit that fault imposes to punishment impedes the purpose of prevention from taking it to extremes so that it would not be necessary to adopt the concept of prevention in its entirety or expressly limit prevention by means of other purposes.

The consideration of economic capacity of the offender and the gain obtained through an offense regarded as punishment measurement criteria, interrelates with the purposes of negative special and general prevention.

\textsuperscript{57} op. cit., p. 19.
Therefore, in addition to determining the criteria for quantification of moral damages employed by the Court and their frequency of use, it is also important to verify what criteria combinations are found in the jurisprudence.

Additionally, during the research on jurisprudence it would be important to verify if the cases where the Court applies punitive civil responsibility stand for criminal offenses and/or administrative offenses, so as to allow a verification of the articulation of said jurisprudence with other forms of punishment available in the legal system.

In this manner it will be possible – once demonstrated the punitive character attributed by the Court to justify the award of moral damages, and upon determination of the dimension of this jurisprudence – to verify whether the criteria employed to measure punishment are appropriate for the purposes attributed by the Court to said sanction as well as to verify its basis for legitimation of punishment.

III – Conclusions

In view of the doctrinal and jurisprudential background set forth hereinabove, it appears to me urgent to launch broad debate on the problem of punitive function of civil responsibility in Brazilian Law.

This matter should leave the limited ambit of responsibility for moral damages and be discussed before principles and functions of civil responsibility in general.

The Brazilian Civil Code by expressly reaffirming in article 944, heading, the “principle of restitution” applied to civil responsibility
seems to cast a doubt upon a jurisprudential trend, apparently already consolidated. What could happen to the aforesaid jurisprudence that represents an experience of our Law regarding punitive civil responsibility?

As to said jurisprudential experience, many doubts remain: What is the representativeness thereof? Is it an homogeneous trend? What are its purposes? How does it legitimate itself? The means employed are appropriate for pursuit of the proposed objectives? Is it worthy of being maintained? Is it worthy of being extended to other cases?

We do not have enough deliberation on the matter and it would be essential to generate it in order to enable us to assess the convenience of its continuation, expansion beyond the limits of responsibility for moral damages (so that it may be applied to civil responsibility in general or to specific cases thereof), or its elimination.

In any case, it is crucial to openly debate this matter seeing that, if the introduction of punitive function of civil responsibility made via jurisprudence based on criteria not clearly established for calculation of indemnification for moral damages has the advantage of avoiding difficulties as to its acceptance in the presence of the principle of restitution, on the other hand the lack of transparency concerning the purposes pursued by the sanction applied by the Judicial Power could produce perverse effects.

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58 A Bill currently being handled, authored by Ricardo Fiuza (PL No. 6960/2002), that changes the text of article 944 of the Civil Code so as to include Paragraph 2 with the following wording: “the reparation of moral damages should consist of indemnity compensation for the victim and appropriate dissuasion of offender”.

59 In the words of S. CARVAL (op. cit., p. 36): “The transparency of the ends pursued by judicial sanction is not a simple ideal (...) It allows the avoidance of certain perverse effects inherent in the hidden functioning of an institution that ultimately cause harm to the coherence of the norm” (“La transparence des fins poursuivies par la sanction judiciaire n’est pas, en effet, un simple ideal (...) Elle permet d’éviter certains effets pervers inherents au fonctionnement occulte
In order to generate the required deliberation the doctrine should dialogue with jurisprudence. In order to hold such dialogue in an informed manner it is necessary to obtain accurate data on the characteristics and representativeness of the foregoing jurisprudential trend, which can be achieved through an empirical research for which I propose application of the above enunciated seven criteria. Accordingly, it will be possible to obtain data on the representativeness of the aforementioned jurisprudential trend and on the consistency thereof.

An open, general and in depth debate on the theme taking into consideration our jurisprudential experience and the development of work to refine the treatment of theoretical issues appears to me as the only way to reach a conclusion on the convenience and possibility of making use of civil responsibility for punishment purposes.

The public policy question regarding in what cases it would be convenient to attribute a punitive character to civil responsibility is dependent on analysis of the circumstances in each case. Yet one point seems clear to me: distinction between types of damage, moral or pecuniary, is not an appropriate criteria for this. The question is ill positioned in Brazilian Law, as it was introduced in absentia of a long established principle (the principle of restitution) and thanks to the freedom to interpret the law due to intrinsic characteristics of moral damages. There is not a rational decision, from the viewpoint of public policies, to attribute a punitive character to responsibility for moral damages in opposition to pecuniary damage.

 Cópia de d’une institution et qui nuisent, en fin de compte, a la coherence de la regle de droit” – Translation mine). Lack of transparency also prevents the discussion of major issues concerning public
Finally, it is important to observe that debate on this problem could contribute to rethinking the relationship between Civil Law and Criminal Law altogether. In our system the attribution of a punitive role to civil responsibility challenges traditional boundaries drawn between Civil Law and Criminal Law mainly based on the difference between the types of sanction (in civil responsibility, obligation to redress or compensate for the damage; in criminal responsibility, the punishment) and the protected interests (in civil responsibility, the private interest; in criminal responsibility, the public interest).

This traditional separation between these two areas of Law is usually dealt with as a presupposition both in Civil Law studies and in Criminal Law studies and is rarely discussed or questioned. Even in the present day this is considered a conquest and although from a theoretical viewpoint the perception of ontological differences between civil and criminal offenses is surpassed, in many cases we continue to deal with this distinction in a natural manner. This approach to coping with the separation between these two types of responsibility is at the root of dogmatic problems that the acceptance of punitive function of civil responsibility proposes, and it is also what possibly prevents us from elaborating creative solutions for problems that are currently brought before the Law.

This is the reason why it is interesting to investigate all cases where positive law challenges the traditional distinction made
between these two areas of Law. Punitive civil responsibility is only one of the cases where this happens today in Brazilian Law. Other examples include: victim valorization trend in the criminal system; introduction of reparation for damage in the criminal system; utilization of civil responsibility to protect collective property – i.e., public interests – such as the environment, the criminal responsibility of corporate bodies, etc.

Therefore, the problem identified in this text and the empirical research proposed herein constitute the first steps toward understanding the broader problem of redefinition of boundaries between Civil Law and Criminal Law in the current context.  

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60 As regards all that shall be said hereinafter, cf. PÜSCHEL, F. P. and MACHADO, M. R. de A., op. cit.
61 The empirical research proposed in this article is currently being carried out in the ambit of works of the Grupo Risco e Responsabilidade (Risk and Responsibility Group), a partnership between the Getulio Vargas Foundation Law School (Direito GV) and the Nucleo Direito e Democracia (Law and Democracy Nucleus) at the Centro Brasileiro de Analise e Planejamento - CEBRAP (Brazilian Center for Analysis and Planning), focused on researching Responsibility, without limitation to the traditional division of Law areas through the application of multiple research methods.

Upon completion of the empirical research on jurisprudence at Superior Tribunal of Justice (STJ) with regard to punitive function of civil responsibility, a similar investigation is scheduled for execution – also in the ambit of Grupo Risco e Responsabilidade (Risk and Responsibility Group) – on the role of reparation in the Brazilian criminal system. The purpose of this second research is to obtain data – unavailable in systematized format until now – on results of the application of Law No. 9099/95 which establishes that in criminal cases considered of lesser offensive potential and in the presence of damage, the judge should seek civil composition between offender and victim. Where a reparation agreement is reached, i.e., through a negotiated solution, the law establishes the end of accusatory procedure and imposition of criminal sanction. This implicates a valorization of the victim in the criminal process and, although in this case reparation does not turn out to be a criminal sanction and maintains its civil nature, it represents an important change in Criminal Law as it opens the possibility for individuals to negotiate the punishment power exercise of State, raising the question of punishment privatization and the public interest on prevention of criminal offenses. As it can be seen, this is a case that – now from the side of Criminal Law – also challenges the traditional boundaries between these two areas of Law.
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