THE COMMUNICATIVE FUNCTION OF CIVIL LIABILITY:
EVIDENCE FROM A CASE OF IMPUNITY

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The communicative function of civil liability: evidence from a case of impunity

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1. Introduction
From 1964 to 1985 Brazil was under a military dictatorship. During this period, government opponents were subjected to different kinds of legal sanctions, such as suspension of political rights, ejection from office, expulsion from public schools, exile and prison. Besides that, although the death penalty was never officially applied, many opponents were tortured and killed by state agents.

In 1979, as part of a democratization process conducted by the military regime, an Amnesty Statute was passed, under which – according to the dominant interpretation¹ – the possibility of sanctioning any political crime or politically motivated crime committed until that date, either by opponents of the regime or by state agents, was excluded.

The Amnesty Statute, having been enacted still under the authoritarian regime, was written in terms imposed by the government and its goal was mainly to reestablish the relationship between the government and its opponents, in order to make the transition to democracy possible. The search for the truth about crimes that had been committed or the punishment of state agents who had violated human rights was not part of the government’s objectives².

Two other statutes, the so called Missing Persons Act, from 1995, and the Act n. 10559, from 2002, created a compensation scheme for victims of the military regime, determining the payment of damages by the State, besides other measures, such as the acknowledgment of the death of persons who had gone missing during the dictatorship period.

The Dead and Missing Persons Commission – formed by representatives from the government, the military, the Public Attorney’s Office, Congress and relatives of people killed by the military regime – was created to operate this compensation scheme. This Commission has judged 339 cases and has awarded damages ranging from approximately $50,000.00 to $75,000.00.

In addition to that, in 2007, the National Secretary of Human Rights published a book called “The Right to Memory and Truth”, which registers the stories of more than 400 victims of the military dictatorship.

This way, the State acknowledged its responsibility for acts of violence practiced by its agents, but the initial idea of individual irresponsibility of state agents established by the Amnesty Statute was preserved.

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¹ Some authors defend that the Amnesty Statute does not apply to state agents who committed torture using various arguments, but until this day such interpretations have not been accepted by the Judiciary.
So that, even though the amnesty process, started in 1979, has developed from its initial limited scope of allowing dialogue with the opposition and transition to democracy to the acknowledgment of state responsibility and compensation of the victims, it has not included an effort to identify and punish the individuals who perpetrated the violation of human rights that characterized the authoritarian regime. Generally speaking, it is possible to say that the main trait of the Brazilian amnesty process continued to be reconciliation and not a search for the truth or punishment of the guilty individuals.

It is important to note that, apart from some very active groups, especially of victims and their relatives, one cannot say that there ever was or that there is today a general claim for a revision of the original terms of the political amnesty in Brazilian society\(^3\).

It was against this background that, in 2005, five members of the same family filed a very intriguing lawsuit\(^4\).

According to the plaintiffs, in December 1972, officers under the orders of the defendant – who was then a major of the Brazilian army – arrested two of the plaintiffs, husband and wife, together with a friend of theirs. They were taken to a building belonging to the army in the city of São Paulo, where they were continuously tortured. The next day, police officers arrested the other plaintiffs: the wife’s sister – who was pregnant – and the couple’s two children, then aged 5 and 4. They were all taken to the same place as the others, where the pregnant plaintiff was also tortured. The children were kept locked in the building, were used as a means of psychologically torturing their parents, in addition to being forced to see their mother and father badly hurt. The adults were imprisoned for periods varying from four months to five years\(^5\).

Since any lawsuit (even if not a criminal one) requiring any kind of legal sanction to be applied to the defendant would not be admissible according to the dominating interpretation of the Amnesty Statute, the plaintiffs require only that the Court \(\textit{declare}\) that the defendant has tortured them. It is a civil liability lawsuit, but no compensation is asked for.

No judgment has been passed yet, but the simple fact that this lawsuit was admitted for trial by the judge\(^6\) (regardless of the way it turns out in the end) is enough to make us wonder: what sense can a civil liability lawsuit make, which cannot lead to imposing on the defendant the obligation to pay damages?

Apparently, none of the functions traditionally ascribed to civil liability – compensation of losses suffered by the victim, deterrence, punishment of the wrongdoer, risk distribution – can be attained through this kind of lawsuit. So, what function can such an action have for the plaintiffs, the defendant and for society?

In this paper, I will try to show that an action that seeks only the declaration that torture was perpetrated by the defendant brings forward something that is actually present in every civil liability suit, although obscured, something that in fact constitutes the distinctive function of civil liability.

To do this, I will analyze the functions and justifications traditionally invoked for the attribution of civil responsibility, in order to show that they are all directly and essentially

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3 See Glenda Mezarobba, cit., p. 22 and 26.
4 Proc. 583002005202853-5/SP.
5 In his defense, the defendant claims mainly that, since he was an officer of the Brazilian army, any lawsuit could be filed only against the army and not himself as an individual; that there is no cause of action due to the Amnesty Statute; that the adult plaintiffs were wanted criminals at the time, so that he was only performing his lawful duty by arresting them; that the children were taken with their aunt only because the officers did not want to leave them home alone; that no torture was ever practiced under his orders.
6 Recently, relatives of a journalist killed in 1971 have filed a similar lawsuit against the same major (today, a retired colonel). See \textit{Folha de São Paulo}, 04/13/2008, p. A10.
linked with the sanction applied to the person held responsible (I). Following that, I will identify another function of civil liability, which does not depend upon any kind of sanction. I will do that on the basis of the theory of responsibility developed by Klaus Günther. I will also demonstrate that this is the characteristic function of responsibility, that is, its distinctive trait (II). Finally, I will sketch out the consequences of these conclusions from the point of view of public policy.

2. The functions traditionally attributed to civil liability and the undifferentiation resulting thereof

From the point of view of public policy, decisions about attributing civil liability to one person or to another, establishing fault or non-fault liability, along with the decision about using liability at all to regulate different kinds of situations are justified with reference to certain social goals to the achievement of which society considers civil liability to be a more or less adequate means.

The search for achieving these social goals is what I will call here the functions of civil liability, which are, traditionally: (i) the compensation of losses; (ii) deterrence; (iii) punishment of the wrongdoer (this function is usually associated with the function of deterrence, as will be shown below); (iv) distribution of risk and losses.

The debate about these functions is carried out in the form of economic arguments, as well as arguments of justice.

I don’t intend to say that these are the only possible functions of civil liability (on the contrary, this paper tries to show there is at least one more), but they are certainly the ones considered its main functions, and are those most often discussed in legal literature.

Some of them can be central to the point of being used to define civil liability in some legal systems. In Brazil, for instance, civil liability is very commonly defined as “the duty to compensate for wrongfully caused damage”. This not only gives a great importance to the compensation function, but turns it into the very essence of the idea of civil liability, fixing with an almost natural character a certain policy vision about the regulation of losses.

These functions of civil liability are all subject to a lot of discussion among lawyers. This paper doesn’t mean to deal with every question related to the functions of civil liability, nor present a complete picture of the debate about it around the world. On the contrary, this text will present only examples of specific arguments.

It’s also important to say that the aim of this paper is not to discuss the values implied by the many arguments. I won’t discuss, for instance, if risk and loss distribution is in itself a value or only a means of achieving another value, such as a certain resource allocation, nor if resource allocation, in order to allow prices of goods to reflect their production costs, is or is not a goal one should try to achieve.

My goal is only to sketch out arguments that are generally made, to check if an action seeking only declaration of responsibility could make any sense in the terms of this debate and why.

Naturally, the fact that functions are presented here separately does not mean that there aren’t any relations between them, that they don’t affect one another, or that they can always be combined.

2.1 Compensation

One of the functions attributed to civil liability is the compensation of damage, i.e., the function of transferring the burden of a loss from the person who suffered it to some other person.
The discussion related to this function of civil liability refers to the circumstances under which such transfer should be made and includes arguments of justice and economic arguments. Sometimes the compensation of losses suffered by the victim appears as a goal in itself and sometimes as a means of achieving another goal.

From the point of view of a certain conception of justice, for instance, one should be considered liable for every loss caused by one’s own fault. In this case, compensation of the loss suffered by the victim is itself a goal, demanded by justice in cases where the person who caused the damage was at fault.

From an economic point of view, an example of argument in favor of transferring the burden of compensating the victim to someone else is the fact that attributing this burden to the victim would result in distorting the cost of certain activities, since such costs would not be paid by the people who practice them. In this case, compensation is a means of achieving a goal related to resource allocation.

Either way, and this is what I want to demonstrate, in order for civil liability to in fact reach the goal of compensating the victim, it’s necessary that someone pay. It is not enough that the person who caused the damage be declared responsible. If civil liability is to be a means of compensation, the person considered to be responsible must have the duty to pay damages.

This shows that the goal of compensation depends essentially on the sanction applied to the person held responsible. The fact that it is generally associated with insurance, as a way of reducing the risk of the liable person being incapable of paying, as well as the existence of compensation systems for accidental damages that do not include the idea of civil liability (such as the one that exists in New Zealand) show us the, on the other hand, the function of loss compensation does not belong exclusively to civil liability, but can also be achieved – often with advantages for the victim and more efficiency – by means of other legal instruments.

2.2 Deterrence

Civil liability is also often viewed as a means of avoiding future losses. In this case, the idea is that, by attributing the duty to pay for losses to the person who caused them, one creates an incentive for people to develop safer ways of practicing certain activities or to abandon those activities, in favor of activities that cause less harm.

Once again, achieving the goal depends on the liable person being made to pay, i.e., deterrence is an expected effect of the fact that the person considered responsible can be forced to carry the costs of her own activity. Otherwise, the incentive doesn’t exist.

Just like in the case of the compensation function, civil liability is not the only legal instrument capable of increasing the degree of safety of some activities or the elimination of activities considered to be too dangerous. This can be achieved directly, for instance, by forbidding activities considered to be too dangerous or by creating security rules sanctioned by administrative fines.

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7 For an account of the relation between the idea of civil responsibility and the moral idea of guilt in the historical development of European law in the continental tradition, see Michel Villey. Esquisse historique sur le mot “responsable”. In: Archives de Philosophie du Droit, t. 22, 1977.

2.3 Punishment of the wrongdoer

Punishment of the wrongdoer is hardly ever considered in itself to be a function of civil liability. It is more often considered a means of achieving deterrence. Still, it is a peculiar means of doing that, since it is based on the idea that by inflicting some kind of suffering on the wrongdoer one will avoid future harm.

This function is relevant in legal systems that accept punitive damages, i.e., systems that accept the idea of calculating damages in a way not strictly related to the harm caused, but so as to establish an amount that is large enough to be an incentive for the wrongdoer or other people to refrain from committing illegal actions.

If the idea of punishment is linked to the idea of suffering, in the case of civil liability it consists in economic loss, so that this function also depends on applying a sanction to the person considered to be responsible.

Just as in the case of the other functions treated above, punishment in order to obtain deterrence is something that can be done through other instruments, such as criminal and administrative responsibility. It isn’t therefore an exclusive function of civil liability either.

2.4 Risk and loss distribution

The risk and loss distribution function of civil liability is sometimes defended with an argument of justice. In this case, it is said that distributing the burden of a certain loss among a great number of people diminishes the individual burden and is for that reason fairer than letting the victim alone take all the loss.

From the point of view of economic argument, it is said, for instance, that taking a large sum of money from one person is more likely to cause economic dislocation and therefore secondary losses.

Also in this case it is evident that achieving the social goal of distribution depends on attributing to the person considered responsible the duty to pay damages. It depends, that is, like all the other goals referred above, on the sanction applied to the liable person.

The goal of risk and loss distribution can also be achieved through other means, like an accident compensation scheme financed by taxes. Even when civil liability is the instrument chosen for this, the possibility of making insurance (another instrument for risk and loss distribution) is usually a factor taken into account in analyzing its distributive potential. So that, risk and loss distribution cannot be considered an exclusive function of civil liability either.

From the brief analysis made above, we can draw two important conclusions. First, that the so called functions of civil liability are linked in an essential way to the sanction applied to the person held responsible, so that they are, in fact, functions of the sanction.

Second, that all of these functions can be performed by other legal instruments, so that they cannot be said to be exclusively functions of civil liability (or, to be more precise, of its sanction).

The punitive function presents a peculiarity, for punishment seems to have an intrinsic relation with responsibility. Still, this says more about punishment than it does about responsibility. For if it is true that there is no punishment without responsibility, it is not uncommon for law systems to have civil responsibility with no punitive aim. In other words, holding a person responsible is a prerequisite for punishing her, but not vice versa. This is

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10 Guido Calabresi. Some Thoughts, cit., p. 518.
why, when it comes to punishment, the alternatives to civil liability are other types of responsibility, namely criminal and administrative responsibility.

So that we can conclude that none of the traditional functions analyzed is really typical of civil liability and that if we consider those to be its only functions, civil liability turns into an undifferentiated instrument in regard to other means of achieving the same social goals. This would mean that the choice between one or the other instrument would be only a matter of degree, i.e., a matter of determining which one better achieves the selected goal, according to the circumstances of the situation being regulated, there being no function that only civil responsibility would be able to perform.

3. The typical social function of civil responsibility
If the social functions of civil responsibility are really specifically attached to the sanction applied to the person held responsible, then it makes no sense to attribute responsibility to someone when it isn’t possible to sanction them, as is the case of the lawsuit seeking declaration described above. From this point of view, the judge simply made a mistake by accepting the lawsuit and trial in this case would be nothing more than a huge waste.

I will nevertheless try to show that the social functions of the sanction should not be confused with the real typical social function of the attribution of responsibility in itself. In order to do this, I will draw on the theory of responsibility developed by Klaus Günther\(^{11}\), which demonstrates that the attribution of responsibility is a social practice with a meaning of its own when the rules for attributing responsibility have democratic legitimacy.

Departing from the observation of situations in which we speak of responsibility – not only legal responsibility – Günther arrives at the conclusion that there are two constant characteristics in all of them: a certain formal structure and a social function deriving thereof.

Situations of responsibility always involve attributing certain actions or omissions and their consequences to a person so that she can account for them in relation to other people. This is the formal structure of responsibility. The rules that determine how, when and who is to be held responsible vary according to the case – they are different for criminal and civil responsibility, for instance – but the basic formal structure is always the same.

From this formal structure derives the characteristic social function of responsibility: by means of this social practice we choose among the infinite, obscure and entangled chains of cause and probability that involves an event the ones that will be considered relevant to explain what has occurred. Responsibility is the means by which we structure the infinite flow of events, interrupting the search for causal connections at a certain chosen point: a person who acts, to whom the event is attributed as being authored by.

The meaning of attributing responsibility to a person becomes clear when we notice that there are alternative explanations to that: a fact can be attributed to circumstances, to society, to nature, to fate, etc.

To sum it up, in the various contexts where it is present, responsibility structures social communication about problems, conflicts, risks, etc., by attributing them to people and not – as would also be possible – to non-individual processes.

Imputation rules vary according to context and their content is politically defined. By politically deciding about responsibility rules they are going to be subjected to in the future,

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citizens assume of what Günther calls “responsibility for responsibilization”, a process he explains by reference to the theory of deliberative democracy of Jürgen Habermas.

As Günther points out, the idea of responsibility is already present in elementary communicative relations, since the competence and the disposition to account for one’s own linguistic utterances is part of the dispositions and competences presupposed by the theory of discourse.

When a speaker raises a validity claim she must be willing to bind herself to the claim she raises, defending it with convincing arguments. If the speaker doesn’t assume responsibility for her own claim, it makes no sense for the listener to react to the validity claim raised by criticizing it and answering it with counter-reasons.

The listener has to assume that the speaker is able to behave critically in relation not only to other people’s claims, but also to her own. As Günther puts it, “this competence for self-criticism and self-correction is the basis of the competence to account for one’s own claims, the competence to become the responsible author of a claim that is relevant from the point of view of validity. In other words, this competence is the basis of the speaker’s imputability”.

The requisite of imputability of the speaker migrates, so to say, to the practice of democratic legislation that is legally structured on the basis of a discursive procedure: the concept of citizen also presupposes the competence and the willingness to self-criticism and self-correction. Therefore, a citizen who takes responsibility for establishing the rules of responsibility is necessarily a deliberative person.

The democratic legislation procedure demands that the legal norm be the result of public decision making procedures, based on reasons, in which every citizen has a right to participate. The mandatory character of the law derives from (and depends upon) this. In other words, the legitimacy of responsibility rules derives from the fact that they are established by the citizens, whose decisions are rational, i.e., from the fact that they are established as the result of a public competition for the best reasons in which everyone can participate.

This means that, in a democracy, citizens assume two different roles regarding the law: they are the authors of norms and also their addressees. As authors of norms, they are in the position of citizens. When they are in the situation of the norm’s addressees, bound by norms, they are in the role of persons (Rechtspersonen). According to Günther, the binding power of legal norms derives from this changing of roles and limits the possibility of disagreement to the moment of political debate. What both roles have in common is imputability in the sense of the theory of discourse.

Another important characteristic of democratic legislative procedure is that, other than discourses, they are organized to allow getting to a majority decision in a limited time frame. Citizens have a right, but not a duty, to participate in public debate, so that legal norms become valid and binding to people even if not everyone has in fact exercised their deliberative competence and even if no unanimous agreement has been achieved.

The fundament of the duty to obey a legal norm is, then, not the fact of having participated in public debate, but only the right and the equal possibility of participation. As Günther puts it: “it’s the competence to assume a critical position, attributed to the deliberative person, and the equal right to an effective exercise of this competence in legally institutionalized democratic procedures that as a whole provide a fundament to law’s claim for binding power”.

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12 Welchen Personenbegriff... cit., p.
13 Welchen Personenbegriff... cit., p. 84.
The binding character of a legal norm means that a person may disagree with it while in her citizen role, i.e., in the public debate seeking the best reason. In her role as a person (Rechtsperson), on the contrary, she may disagree only in her conscience and must obey the norm or otherwise take responsibility for her illicit behavior.

As Günther says, the democratic legitimacy of the law is different from every other form of legitimacy precisely because it allows the communication between the citizen and the person (the norm’s addressee), by means of the concept of deliberative person, without eliminating the difference between both roles.

By deliberatively deciding about responsibility, citizens not only define rules of conduct, but also the circumstances in which the violation of these norms will be attributed to them in the future, when they are in the position of their addressees. Therefore, the so-called “responsibility for responsibilization” includes determining the capacities and incapacities, the limits of freedom that must be part of the concept of responsible person to be used for the attribution or responsibility. In other words, the deliberative decision about responsibility rules results in the definition of what a given society considers to be a responsible person.

Attributing responsibility in this way, i.e., based on rules and on a concept of responsible person publicly recognized can be understood as a social action with a meaning of its own, as a performative action. Such a performative action is accomplished by the issuing of a sentence, regardless of the sanction that may be applied to the person held responsible.

For instance, as a performative action, a sentence that considers the defendant to be responsible has at least four meanings. It communicates to the wrongdoer, to the victim and to society that the violated norm is still a valid norm. To the wrongdoer, the sentence communicates that what happened was her doing that cannot be attributed to the circumstances, to nature, to society, etc. To the victim, the sentence communicates that the harm she suffered was not the result of her own actions, or bad luck, fate, etc. Finally, to society as a whole, the sentence communicates that what happened cannot be attributed to society, or to bad luck, nature, etc., but is the doing of a responsible person.

It is by means of this communication, based on the public determination of responsibility rules, that responsibility achieves its function of structuring events, determining what will be explained as a consequence of the actions of one person, of another person or of no person at all.

The meaning of a civil liability action that aims only at declaring responsibility is now clear. It is also clear that this meaning is completely independent from the sanction of damage compensation or any other sanction.

4. The consequences of the communicative function of civil responsibility for public policy
The argument developed in this paper allows us to see that the characteristic social function of responsibility gives meaning to the action of the victims of torture during the Brazilian dictatorship: a sentence declaring that the defendant did what he is accused of is a performative action, which communicates to the plaintiffs, to the defendant and to society that those facts actually happened and that according to Brazilian law the defendant is considered their author. This way, the story of the aggressions suffered by the victims is told not as the result of chance, as a cruel twist of fate, as a consequence of the victims’ own doing or of collective social processes, but as a consequence of the actions of the defendant, as an individual.
This is why the defendant is justified in his fear that – as stated in his defense argument – the declaration the plaintiffs require from the judge is a means of obliquely achieving the conviction excluded by the Amnesty Statute. For even if there can technically be no conviction, it is nevertheless true that a declaration is not an act without consequences, even if no sanction is attached to it.

In fact, this lawsuit allows us to clearly see something that is part of every civil liability action, something we usually don’t see because we are too much used to understanding imputation only as a prerequisite for applying a sanction and not as a performative action with a meaning of its own.

Since imputation really is a prerequisite for applying any sanction in cases of civil liability, the communicative effect I described is always present, in every sentence, and is only complemented – according to the case – with the effects of the sanction (compensation, deterrence, punishment, distribution of risk and losses).

This allows us to conclude that pursuing the goals of compensation, deterrence, punishment and distribution of risk and losses by other means is not only a matter of degree, for there is actually something that only responsibility can achieve, namely the communication about who is the author of the illegal action and its consequences.

Regulating compensation and loss distribution through insurance, for instance, does not have this communicative effect. The insurance company’s duty to compensate damages has a contractual basis and doesn’t depend – at least not in principle - upon determining who caused the damage. In any case, it certainly doesn’t mean that the insurance company caused the damage.  

If one wishes to address the problem of authorship, i.e., if it’s important to communicate that according to the law a certain individual or group of individuals is (or is not) the relevant cause of a certain damage or wrongdoing, the attribution of responsibility is the instrument one must use. There is no substitute for it in this case. And as the case of amnesty in Brazil shows us, the question of authorship is far from irrelevant.

Of course, the question of choosing between civil, administrative or criminal responsibility remains. But that’s already another story.

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14 When what is insured is the risk of being held liable in a civil responsibility action, the question of authorship arises, but because of civil liability, not because of insurance. The fact that the insurance company has a duty to pay for losses suffered by the victim when its client can be held responsible for them still doesn’t mean that the insurance company caused the damage.