Derecho, gobernanza e innovación:

Dilemas jurídicos de la contemporaneidad en perspectiva transdisciplinar

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2017

UNIVERSIDADE PORTUCALENSE

FCT Fundação para a Ciência e a Tecnologia

IJP INSTITUTO JURÍDICO PORTUCALENSE

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Ficha Técnica

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Dirección:

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Coordinación:

© Maria Manuela Magalhães (Universidade Portucalense, Portugal)

1ª edición, 2017

ISBN: 978-972-9354-46-5

DOI: http://dx.doi.org/10.21788/isbn.978-972-9354465

Universidade Portucalense – Infante D. Henrique

Rua Dr. António Bernardino de Almeida, 541/619

4200-072 Porto

Portugal

Como citar:

APA (6.ª ed.):

Miranda Gonçalves, R., Veiga, F. S., & Magalhães, M. M. (Eds.). (2017). *Derecho, gobernanza e innovación: Dilemas jurídicos de la contemporaneidad en perspectiva transdisciplinar*. Porto: Universidade Portucalense. ISBN 978-972-9354-46-5. doi: http://dx.doi.org/10.21788/isbn.978-972-9354465

ISO 690:

MIRANDA GONÇALVES, Rubén, VEIGA, Fábio da Silva e MAGALHÃES, Maria Manuela, eds. *Derecho, gobernanza e innovación: dilemas jurídicos de la contemporaneidad en perspectiva transdisciplinar*. Porto: Universidade Portucalense, 2017. ISBN 978-972-9354-46-5. Doi: http://dx.doi.org/10.21788/isbn.978-972-9354465

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Social Damages - Portuguese and Brazilian Perspectives

João Pedro Leite Barros [336]
University of Lisbon (Portugal)

SUMMARY

1 INTRODUCTION

The paradigmatic model of Welfare State of the Portuguese and Brazilian Federal Constitutions presents a large list of essential rights, which consolidates public assistance in a greater or lesser extent, in reason of the social and economic weak context of the country, or because of the historical and political moment herein analyzed.

This way is how works the social entitlement to health. Because of Brazil's inefficient governmental structure and faulty public services, currently, approximately 25% of Brazilians are enrolled in private health services.[337] However, the excessive searching for health services provided by private entities did increase, proportionately, the necessity of accessing the judiciary branch, considering the ineffective behavior of such private institutions and consequent agreements infringements.

As will be demonstrated, the aim herein is to encourage the judiciary branch to shelter the modern institute of social damage, with the view to prevent and especially punish the private entities that violate unreasonably such agreements, being for the greed of profits or even for mere negligence, consequently breaching the entitlement to healthcare expressed in Federal Constitution.

Thus, the health service provided by private entities will be analyzed under a civil and fundamental perspectives, presenting that the enforcement of the social damage institute (prominent civil) in cases of

[336] PhD student at University of Lisbon.
[337] See official information of the Brazilian government. Available at: <http://www.ans.gov.br/aans/noticias-ans/numeros-do-setor/3434-dados-da-saude-suplementar>. Accessed on August 29, 2016.

infringement of contracts by the insurance firms has forthwith reaction in the provision of health services (fundamental field).

Accordingly, the innovative character of this article is about demonstrating that the inefficient health services provided by private entities equally generates damages to the society and are subject of punishment, considering that it causes a low in the life welfare of the society, which entails in a reprehensible behavior. Such damage is nowadays called as social damage.

Ultimately, in a propositional sphere, it will be shown that the institute of social damage is applicable in the Portuguese legal system by means of class action and that, in an indirect way, it will ultimately improve the health service itself.

2 SOCIAL DAMAGES

On the triumph, the crisis and the rebirth of civil liability, the magistrate of the Spanish Constitutional Court Diez-Picazo[338] has for a long time seen the need to restructure this institute, in particular regarding the socialization of liabilities, functions and, especially, the specificities of types of torts.

Rather, it is important brief that contemporary books of authority has always divided the damage[339] into two species: property damage and non-property damage. The first[340] corresponds to the legally relevant damage attributable to the injury of a property or normatively protected interest that is quantifiable. The second[341] is the one that reaches the spiritual order, ideal or moral, besides being unsusceptible of pecuniary evaluation. That is, when there is an offense to goods of an immaterial character, devoid of economic content.[342]

Notwithstanding, there are still situations of transgression to interests that go beyond the individual scope, which violate not only the public interest but the society itself in its welfare level of life, whether by

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338 DIEZ-PICAZO, Luis; LÉON, Ponce de. Derecho de daños. Madrid: Civitas Ediciones, 1999. p. 238-241. See: LOURENÇO, Paula Meira. A função punitiva da responsabilidade civil. (Free translation: The punitive function of the civil liability) Coimbra: Coimbra Editora, 2006. p. 219 et seq.

339 See: CORDEIRO, António Menezes. Direitos das Obrigações. (Free translation: Contract Law) v. 2. Lisboa: AAFDL, 1986. p. 285 et seq.

340 In Portugal, see: LEITÃO, Luís Manuel Teles de Menezes. Direito das Obrigações. (Free translation: Contract Law) v. 1. 11. ed. Coimbra: Almedina, 2014. p. 300. See: CORDEIRO, 1986, p. 285 et seq; VARELA, Antunes. Das obrigações em geral. (Free transalation: Contract Law in general) v. 1. 10. ed. Coimbra: Almedina, 2003. p. 597 et seq.

341 See: LEITÃO, 2014, p. 300.; CORDEIRO, 1986, p. 285 et seq; VARELA, 2003, p. 597 et seq. See case law: entry of judgment 793/07.4TBAND.C1 issued by the Court of Appeal of Coimbra, reporting judge: Henrique Antunes, date of trial: 21/03/2013.; See entry of judgment 5505/05.4TVLSB.L1-2, issued by the Court of Appeal of Lisbon, reporting judge: Ondina Carmo Alves, date of trial:13/12/2012. There is also collective pain and suffering (or moral) damage, it corresponds to the unfair and intolerable injury to interests or rights securitized by the collectivity, considered in its whole or any of its expressions, which are distinguished by the off-balance nature and by reflecting fundamental values and goods protected by the legal order. See: MEDEIROS NETO, Xisto Tiago de. Dano moral coletivo. (Free translation: collective pain and suffering damage) 3. ed. São Paulo: Ltr, 2012. p. 170 et seq.

342 See: MARTINEZ, Pedro Romano. Direito das Obrigações. (Free translation: Contract Law) 3. ed. Lisboa: AAFDL, 2011. p. 111-112.; LOURENÇO, 2006, p. 278 et seq; VARELA, 2003, p. 597 et seq.

lowering its moral patrimony or reducing the quality of life.[343] Such injuries to society are called as social damages.[344]

In fact, the social damage comes from an unlawful act[345] that, overcoming the barriers imposed by the economic or social purpose, generates damages or even exposes the right of others to a risk.[346] In other words, unlawfulness is characterized not only by the cause of another person's damage, individually identified, as well as by the violation of social and economic interests, collectively considered[347]. In the event of social damage, the perpetrator is sentenced according to the extent of the damage, taking into account the individual and social aspects.

This brand new type[348] of civil liability, based on article 6, section VI, of the Brazilian Consumer Defense Code, addresses the public interests that involve rights of this nature, in which the victims are indeterminate[349] or indeterminable.

Is important clarify that these rights are also classified as "metaindividuais" (which exceeds the individual), and although their violation directly affects only one or a few individuals (undetermined or indeterminate victims), they call into question principles that affects all society and which are tacitly or explicitly guaranteed by Federal Constitution.

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343 Vide AZEVEDO, Antônio Junqueira de. Novos Estudos e pareceres de direito privado. (Free translation: New studies and opinions in private law) São Paulo: Ed. Saraiva, 2010. p. 378.

344 The collective pain and suffering damage violates individual homogeneous and collective rights in the strict sense, since social damage violates eminently natural rights. Professor Antônio Junqueira explains that social damage does not exclude collective pain and suffering damage, since social damage would be only for intangible rights of the collectivity, while collective pain and suffering damage would be applied to homogeneous, collective and natural individual rights. See AZEVEDO, 2010, p. 380 et seq. Tartuce explains that social damages can generate material or moral repercussions. At this point, social damages are distinguished from collective pain and suffering (moral) damages, since the latter are only out-of-balance. See: TARTUCE, 2014, p. 706.

345 See articles 186, 187 and 927 of te Brazilian Civil Code.

346 Regarding tis topic, see the paper of Professor Jorge Souto Maior, available at: < http://www.jorgesoutomaior.com/uploads/5/3/9/1/53916439/a_responsabilidade_civil_objetiva_do_empregador_com_rela%C3%87%C3%83o_a_danos_pessoais_e_sociais_no_%C3%82mbito_das_rela%C3%87%C3%95es_de_trabalho..pdf> accessed on September 3, 2016.

347 MAIOR, Jorge Luiz Souto. O dano social e sua reparação. (Free translation: The social damage and its compensation) In: Revista da Associação dos Magistrados da Justiça do Trabalho da 15a Região, São Paulo, n. 1, 2008. p. 115.

348 For more, see TARTUCE, 2014, p. 708. Professor Nelson Rosenvald explains that there is still great difficulty in applying punitive fines, in this case instrumented by social damage, since it is an arduous task because of the innumerable possibilities of heterogeneous figures that could be subsumed to their contours. He has also remarked that criticism is also made due to the absence of a legal provision for punishment, a deviation from the compensatory perspective of the proving sphere, and due to the commodification of justice. See: ROSENVALD, Nelson. Cláusula penal: A pena privada nas relações negociais. (Free translation: Criminal Article: The privative penaulty in negotiable relationships) Rio de Janeiro: Editora Lumen Juris, 2007. p. 201.

349 The section I of the Article 81 of the Consumer Defense Code provides as follows: "The collective defense shall be exercised in the case of: natural interests or rights, thus understood, for the purposes of this Code, the "transindividual" nature indivisible, of indeterminate persons bound by actual circumstances."

Social damage is supported by the principle of the social function of civil liability[350], under the rule of the dignity of the human person, as well as susceptible to punitive compensation[351] caused by fraud or gross negligence. Thus, the institute should not enroll itself in the reparatory function of civil liability, since there is no actual injury, but rather it will be reflected in the punitive function before the injury to the society.

Such interests penetrate a number of areas, such as the social right to labor, the right to consumer protection, the right to health, and are susceptible to private relations[352], which can be subject of suits at any time.

It should be noted that the severity of the act itself is not observed, but rather the degree of failure of the conduct towards society.

These interests are in harmony with the constitutional guidelines of social solidarity[353] and distributive justice, valuing the collective to the detriment of the individual. In other words, it is the interpretation of the relationship between individuals based on a Constitution, dynamic and protective of intangible fundamental rights.

Improving such idea, there is the overcoming of the schemes of a procedural guarantee of a merely individualistic mark, to replace it with the social or collective aspect, as forecasted by Mauro Cappelletti.[354]

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[350] MELO, Diogo L. Machado. A função punitiva da reparação dos danos morais (e a destinação de parte da indenização para entidades de fins sociais – artigo 883, parágrafo único, do Código Civil). (Free translation: The punitive function of compensation of pain and suffering damages (and the allocation of part of the indemnification to social purpose entities - article 883, sole paragraph, of the Civil Code) In: Questões Controvertidas no Novo Código Civil. (Free translation: Controversial Matters in the New Civil Code.) v. 5. São Paulo: Ed. Método, 2006. Regarding the subject, Eugênio Facchini Neto explains: "Se o Direito, muitas vezes, sente-se incapaz para evitar e neutralizar os riscos, se os danos são inevitáveis, frutos inseparáveis da convivência social e do desenvolvimento tecnológico, ao menos o Direito deve buscar formas de fornecer segurança jurídica, no sentido de que todo o dano injusto (entendendo-se por dano injusto todo aquele para o qual a vítima não deu causa) deve ser, na maior medida possível, reparado". (Free translation: "If Law often feels unable to avoid and neutralize risks, if damages are inevitable, inseparable fruits of social coexistence and technological development, at least the law must seek ways to provide legal certainty, in the sense that all unfair damage (meaning unfair damage any one for which the victim has not given cause) should be, to the greatest extent possible, repaired." See: FACCHINI NETO, Eugênio. A função social do direito privado. (Free translation : The social function of private law) In: Revista da Ajuris: books of authority and case law. Porto Alegre, v. 34, n. 105, p. 153-188, 2007.

[351] The liability for social damage has an important dissuasive aspect, in order to avoid the reiteration of the conduct in the future. Herein lies its pedagogical and prevention character. AZEVEDO, Antônio Junqueira. Por uma nova categoria de dano na responsabilidade civil: o dano social. (Free translation: For a new category of civil liability damage: social damage.) In: RTDC, v. 19, July / September 2004. In turn, the Minister Augusto César Leite de Carvalho points out that social damage may have the characteristic of material damage, for having extensibility and pecuniary expression. It clarifies, for example, the omission of the employer regarding the installation of collective protection equipment when this omission results in an explosion and contamination of the residences bordering the production unit. Carvalho explains that being socially reprehensible damage, causing property damage to people without legal ties with the employer, would be patent the social damage of patrimonial content. Finally, for conceptual purposes, that collective moral damage is not synonymous with social damage. This is because social damage can reflect in the sphere of equity in society; However, collective pain and suffering damage reverberates only out-of-balance. CARVALHO, Augusto César Leite de. Labor Law: Course and Discourse. São Paulo: Ltr, 2016. p. 302 and 303.

[352] MANCUSO, Rodolfo de Camargo. Interesses Difusos. (Free translation: General public interests) 6. ed. São Paulo: Ed. Revista dos Tribunais, 2006.

[353] Professor Souto Maior understands that this teleological (and axiological) view of the subject of liability allows the operator to broaden his vision and see in the disrespect of social rights antisocial behavior that, for this reason, demands not only the replacement of the victim's damage, but the reconstruction (or rescue) of the social pact itself of pursuing a more just and solidary society. See: MAIOR, Jorge Luis Souto; MOREIRA, Ranúlio Mendes; SEVERO, Valdete Souto. Dumping Social nas relações de trabalho. (Free translation: Dumping in labor relations) 2. ed. São Paulo: Ltr, 2014. p. 151.

[354] CAPPELLETTI, Mauro, GARTH, Bryant. Acesso à Justiça. (Free translation: Access to Court) translated by Ellen Gracie Northfleet. Porto Alegre: Sérgio Antônio Fabris, 1988. p. 26-29.

Social damage, as a legal category,[355] in addition to being effectively applied to socially reprehensible behaviors, arises to compensate for hitherto unsustainable situations of indemnity, especially when fundamental rights are violated (such as the case of health, under analysis).

In fact, the social damage institute already has a wide application in the Brazilian Labor Court[356], especially to repair damages from antisocial conducts in the labor scenario, which reflects throughout society.

Under the view of the minister Augusto César Leite de Carvalho[357], it causes social damage, for example, the passenger transport company that demands excessive travel time from the drivers, since such conduct causes insecurity on the highways in which they travel, hence increasing the risk of accidents.

In the present case, it is clear that the right to health provided by private entities is often violated, especially by the greed for profits performed by insurers of plans that violate consumer contracts, as well as inefficient state control, which prejudices not only those directly affected but also all collectivity.

In other words, reimbursement through social damage must achieve true social rebalancing, especially through punitive character, mainly to give a response to the society, in view of the practice of offensive conduct in relation to collective conscience[358].

Lastly, it is worth mentioning that the application of such institute is still timid, although it has already been accepted by the civil commentators, through the statement 456 approved by the V Civil Law Journey, which recognizes the existence of social damage, *verbis*: "The expression 'damage' in art. 944[359] cover not only individual, property or non-property damages, but also the social, natural, collective and homogeneous individual damages to be claimed by those legitimated to propose collective law suits."

3 SOCIAL DAMAGES IN PORTUGAL

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[355] See argumento developed by BULOS, Jaime Leandro. Dano Social e reparação no Processo Coletivo. (Free translation: Social damage and relief in collective law suits.) Curitiba: Ed Prismas, 2015. p. 100.

[356] See case law: (Free translation: MOTION TO REVIEW OF THE UNION-CLAIMANT. INDEMNITY FOR SOCIAL DAMAGE - DISREGARD OF HEALTH AND SAFETY STANDARDS AT WORK. (…) The principle of company preservation is not incompatible with the recognition and redress of social damages, but must be an important parameter for the identification, treatment and quantification of such damages. Compensation for social damages set in the amount of R$ 30,000.00, destined to the training of labor in the base place, in occupational health programs, to be defined previously and in common agreement between the author union and the Public Ministry of Labor, Proven in the records the actual expense. Known magazine feature and provided.) (TST - RR: 18509220105030111, reporting judge: Luiz Philippe Vieira de Mello Filho, date of trial: 23/09/2015, 7st panel, date of official publication: DEJT 23/10/2015).

[357] See: CARVALHO, 2016, p. 303.

[358] On the figure of punitive indemnification in the Brazilian order. See: MORAES, Maria Celina Bodin de. Na medida da pessoa humana: estudos de direito civil. (Free translation: In the measure of the human person: studies of civil law). Rio de Janeiro: Renovar, 2010. p. 343-380.

[359] Art. 944. A indenização mede-se pela extensão do dano. (Free translation: The indemnity is measured by the extent of the damage.)

In Portuguese doctrine there is no development of social damage in the perspective that is found in Brazilian law. However, for some time now, the idea of protecting society through punitive sanctions has been foreshadowed.[360]

The transgression of the intangible rights of man reaches an interest of a public character, which the institute of civil responsibility often fails to encompass. Thus, in these cases, the institute of civil liability has a new aspect reflected through techniques of collective or social reparation, by means of the brand new institute of social damage.[361]

As well as in Brazil, in Portugal social damage is also seen as a new institute, outside the sphere of traditional civil liability, in spite of its different origin.[362]

In the context of the securitization phenomenon[363], Antônio Pinto Monteiro explained that the necessity to protect the victims of the technological revolution of the modern world contributed to a change in the direction of civil liability.

The author explains[364] that it was with the consecration of guarantee funds (intended to reimburse the damage when the person liable for the damage is unknown, not insured or if the insurance company fails) that the process originated for the constitution of a collective redress mechanism, complementary to individual liability.

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[360] On the subject, see: ANTUNES, Henrique Sousa. Da inclusão do lucro ilícito e de efeitos punitivos entre as consequências da responsabilidade civil extracontratual: a sua legitimação pelo dano. (Free translation: The inclusion of unlawful profits and punitive effects between the consequences of non-contractual civil liability: their legitimation for damage.) Coimbra: Coimbra Editora, 2011. p. 551-579. See the punitive aspect of the sanction by Júlio Gomes, when paralleling the punitive damages developed in the United States. See: GOMES, Júlio Manuel Vieira. Uma função punitiva para a responsabilidade civil e uma função reparatória para a responsabilidade penal? (Free translation: A punitive function for civil liability and a reparatory function for criminal liability?) In: Revista de Direito e Economia. a. 15, p. 105-144, 1989. In the perspective of comparative law, the most long-standing mechanism for safeguarding individual interests is the American class action, characterized in this point by punitive damages, correctly translated as punitive damages. For more, see: SOUSA, Miguel Teixeira de. A tutela jurisdicional dos interesses difusos no direito português. (Free translation: The jurisdictional protection of natural interests in Portuguese law.) 2016. Available at: <https://sites.google.com/site/ippcivil/recursos-bibliograficos/5-papers>. Accessed on August 13, 2016.

[361] The social damage is nonetheless non-pecuniary damage. Thus, a parallel can be made here to article 496, paragraph 1, of the Portuguese Civil Code, which explicitly explains non-patrimonial damages.

[362] See: MONTEIRO, Antônio Pinto. Cláusulas limitativas e de exclusão de responsabilidade civil. (Free translation: Limitation clauses and of exclusion of civil liability) Coimbra: Coimbra Editora, 1985. p. 58 et seq.

[363] It is important to highlight the understanding of Antônio Pinto Monteiro regarding insurance law. In summary: the insurance contract brought a peculiarity to civil liability: it left the injured individual to bear the indemnity giving way to a community (insurance company). On the other hand, the insurer distributes the risks by the insured group, and, in the end, the consumer himself pays for these costs, translating into a certain socialization of responsibility. See: MONTEIRO, 198b5, p. 59-63. See also on the phenomenon in CORDEIRO, 2016, p. 136 et seq.

[364] See: MONTEIRO, 1985, p. 59-63.

In fact, such mechanism has risen with Viney[365], which reverberated that the reparatory function[366], already present in civil liability, should be transposed to mechanisms for collective reparation, especially if used in a sanctioning manner.[367]

Better: before the widespread use of insurance techniques and the urgent need to protect citizens, Monteiro[368] addresses the cases in which harm does not only affect the individual but also society, being the first Portuguese commentator to bring the expression "social damages".

Similar to Brazil, the idea of social damages embodied in the concept of punitive damages emerged from the phenomenon of dematerialization of civil law and the need to protect the fundamental rights of citizens, consubstantiating a real social imperative[369] to repair damages.

In practice, the social harm institute is not yet used expressly in Portugal. What exists, in fact, is the similarity of the object that the social damage protects with that protected by the popular action regarding the right to health. Thus, in a propositional way, let us see how this institute could be pleaded through popular actions.

The institute of class action is constitutionally insured by article 52, result of the revision due at the year of 1997. Its object is the defense of natural interests, that is, the refraction in each individual of community interests, global and collectively considered[370].

In this flow of protection to society, Teixeira de Sousa[371] explains that these rights belong to each and every one of the community, a group or a class, but they are not subject to personal appropriation by any of these subjects. Cappelletti[372] summarizes that natural rights are at the same time of all and no one.

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[365] As regards the non-exclusivity of criminal law for the exercise of sanctioning functions, see VINEY, Geneviève. Introduction à la Reponsabilité. Paris: LGDJ, 1995. p. 122-123.

[366] Professor Antônio Pinto Monteiro explains that the traditional application of private penalties for preventive purposes has not had a desired effect, either by the imprecise and fluid outlines of their own nature.

[367] As is well known, despite the fact that Portuguese case law has not effectively upheld punitive damages, it is true that in specific cases, such as traffic accidents and offenses, honor and name assign the mixed nature to compensation for non-pecuniary damage. See: Judgment of the Supreme Court of Justice of Portugal 99 to 391. Reporting judge Garcia Marques. Date of publication: 01/26/1999; Also see the ruling issued by the Supreme Court of Justice in 287/10.0 TBMIR. S1, Reporting judge Maria Clara Sottomayor. Date of publication: 02/25/2014. In practice, damage is calculated by observing the following targets: observance of the agent's degree of fault and his economic situation (articles 494 and 496, paragraph 3), the degree of guilt of those responsible in cases of rights of return, according to art. 497 (2) and reducing or excluding compensation in cases of fault of the injured party (art. 570).

[368] MONTEIRO, 1985, p. 59-63. See also on the phenomenon in CORDEIRO, 2016, p. 136 et seq.

[369] CHICORRO, Maria Manuela Ramalho Sousa. O Contrato de Seguro Obrigatório de Responsabilidade Civil Automóvel. (Free translation: The Obligatory Automobile Liability Insurance Agreement.) Coimbra: Coimbra Book Publisher, 2010, pag. 33 et seq. See also the idea in the trial of Court of Appeal of Coimbra No. 597/11.0TBTNV.C1. Reporting judge Henrique Antunes. Date of trial: 16/09/2014.

[370] See CANOTILHO, 2007, p. 698. At the same understanding, see: MIRANDA; MEDEIROS, 2010, p.1035. Also see ANDRADE, 2012, p. 385 et seq.

[371] SOUSA, 2016. Mesmo sentido, veja: LEITAO, Luis Menezes. A responsabilidade civil por danos causados ao ambiente. (Free translation: Liability for damage to the environment.) In: Actas do Colóquio "A responsabilidade civil por dano ambiental" (Free translation: Civil liability for environmental damage). Lisbon: School of Law, 2009. p. 36. See development on the subject by FARINHO, Domingos Miguel Soares. A suspensão de eficácia dos actos administrativos em acão popular. (Free translation: The suspension of effectiveness of administrative acts in popular action.) In: Revista da Faculdade de Direto de Lisboa, v. 47, n. 2, Coimbra: Coimbra Book Publisher, 2001. p. 990 et seq.

[372] CAPPELLETTI, Mauro. In: Revista de processo, n. 30, 1975. p. 372.

Such law[373] provides for the legitimacy of citizens (natural persons) and the collective legitimacy of associations to defend specific interests, as well as the right to claim in favor of the injured party or injured parties, the corresponding indemnity to promote the prevention, cessation or judicial prosecution of violations on public health (guaranteed by Article 64 of the Portuguese Constitution).

In this tone, the right to health is shared by all citizens who are part of the community, understood from a substantive perspective[374]. It is legitimate, therefore, all those who can enjoy it and who are affected, within a civic solidarity[375], by the injuries[376] inflicted to it.

That is to say, where the legal position of individuals deriving from fundamental rights (in this case, the right to health) is concerned, the legal system confers on it a genuine right of defense based on the legitimate claim to obtain the desired protection of a particular good by the State[377]. That is to say, a fundamental right judicially actionable[378], which received qualified constitutional protection.

As to the pecuniary value that may be claimed, it can be understood in two ways. If there is a particular injury, the value of the damage is individualized, and the citizen must be duly repaired. In return, if there is damage to the community, regardless of who is the author of the demand (citizen or associations), the value is fixed to the community[379].

In other words, the damage has a mixed nature[380]: it is born in the individual violation by affectation of the level of enjoyment of a right that can be enjoyed, but its financial translation must be destined to promote the right to health itself[381].

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373 It can be seen the popular action with indemnity function, class action of preventive function of infractions, with nullifying function of infractions and even with repressive function inherent to the perpetrators of the infractions.

374 See GOMES, Carla Amado. D quixote, cidadão do mundo: da apoliticidade da legitimidade popular para defesa de interesses transindividuais. (Free translation: D quixote, citizen of the world: from the non-political content of popular legitimacy to the defense of transindividual interests.) In: Textos dispersos de direito do ambiente. v. 2. Lisboa: AAFDL, 2008. p. 17.

375 Interpretation can be extensive to the associations.

376 Miguel Teixeira de Sousa adds that the protection of natural interests in the Portuguese legal system is carried out through a representative proceeding, that is, through a process in which the author assumes the representation of all other holders of a natural interest and in which, as a consequence of that representation, those holders will benefit from a favorable judgment obtained in the case if they are not excluded from that representation by means of an opting-out (see article 19, no. 1, L 83/95, 31/8) . See: SOUSA, 2016.

377 On the books of authority of the rule of protection and development of the matter, see: SILVA, Vasco Pereira da. Em busca do acto administrativo perfeito. (Free translation: In search of the perfect administrative act.) Coimbra: Almedina, 2003. p. 234-240.

378 For more, see CANOTILHO; MOREIRA, 2007, p. 699.

379 For more see: GOMES, Carla Amado. Accao pública e accao popular na defesa do ambiente: reflexões breves. (Free translation: Public action and class action in the defense of the environment: brief reflections.) In: ATHAYDE, Augusto de et al. (Coord.). Studies in tribute to Professor Diogo Freitas do Amaral. Coimbra: Almedina, 2010. p. 1200 and 1201. See CANOTILHO; MOREIRA, 2007, p. 699 et seq. Professor Miguel Teixeira de Sousa understands that the global indemnity can be destined to a fund constituted to indemnify the injured individually and to those that will be in the future. See in SOUSA, 2003, p. 165-166.

380 For more, see: GOMES, 2010, p. 1200-1201.

381 As to the question of the destination of the total compensation, in case the situation can not be restored, the Portuguese doctrine, illuminated by article 22, paragraph 5 of Law 83/95, states that the Court must verify the best destination to be given to the amount, and can follow the example of the US class action fluid recovery. The Portuguese book of authority is unanimous in the sense that the money coming from non-patrimonial damage caused to the environment must be used for policies inherent in the matter. Note that in 1887/04-1, in the face of the pollution of two sources, the rapporteur confirmed the conviction in non-patrimonial damages reverted to the municipal council, in order to disseminate information on environmental legislation, citizens' rights in Promotion of a healthy environment, procedural expedients to which any citizen can resort in case of violation of the environment, advantages of establishing associative structures for the defense of certain places, namely Ave River, or

In the present case, for example, at the time when there is a widespread and unrestricted violation of social law by health insurers, it is the right to health[382] that is being infringed.

What is observed in the Portuguese daily life[383], regarding the violation of the right to health, it is verified is uncommon the handling of collective demands in the private health area. In fact, there are individualized actions pertaining to health insurers seeking to protect contractual rights, specific to demand.

Thus, through class action, social harm may be the missing tool to repress practices of this nature.

4. APPLICABILITY OF SOCIAL DAMAGE TO THE RIGHT TO HEALTH

The subjective public right[384] to health represents the legal prerogative of the Republic, extending its reach to all persons, and imposing on the State[385] the obligation to render integral assistance.

Here, the understanding of the State includes the Union, the State, the Federal District and the Municipalities, since the jurisdiction over the responsibility of the Public Power is common, according to article 23, section II of the Brazilian Federal Constitution.

As already mentioned, in recognizing the importance of providing the health service to citizens and at the same time the impossibility of doing so in the best way, the legislator predicted that health care would also be granted to private initiative. Moreover, it is stressed that the provision of health services, even when performed by private individuals, continues to be a public service, compelling the provider to carry out his activities according to the Administration's precepts, that is, freedom in the contractual sphere by the insurer is mitigated.

Here the phenomenon of the constitutionalization[386] of civil law is made present, when the person (insured) prevails over the thing (object of the contract), or rather, the primacy of the person, during each

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otherwise understood by the board, but always Linked to environmental problems. See: Trial 1887/04-1, issued by the Court of Appeal of Guimarães, reporting judge Vieira e Cunha, dated: 11/17/2004.

382 *Mutatis mutandis*, Menezes Cordeiro anticipates that the need for the punitive function of non-pecuniary damage, when moral values such as health are in vogue. See: CORDEIRO, Antônio Menezes. Da responsabilidade civil dos Administradores das Sociedades Comerciais. (Free translation: The civil liability of the Directors of the Companies.) Lisboa: Lex, 1997. p. 482 et seq.

383 As a rule, citizens, when they have problems with health insurers, seek the system of mediation of conflicts. See the statistics in: <https://www.ers.pt/uploads/writer_file/document/1794/Relat_rio_RECS_2015.pdf> e <https://www.ers.pt/pages/18?news_id=1374>, ambos acessados em 29 de agosto de 2016.

384 See entry of judgment issued by the Brazilian Federal Supreme Court, RE 267.612 – RS, DJU 23/08/2000, Reporting judge: Min. Celso de Mello.

385 See article 88 of CF 88: "Health is the right of all and the duty of the State, guaranteed by social and economic policies aimed at reducing the risk of disease and other diseases and universal and equal access to actions and services for promotion, protection and recovery." (Free translation).

386 In Civil Law founded by the Constitution, the prevalence and precedence must be attributed to existential relations, not to property rights. More than that: in the so-called civil-constitutional law, there can be no legal norm that is not interpreted in the light of the Constitution and that it does not conform with the fundamental principles. On the phenomenon of the constitutionalization of civil law, see: MORAES, 2010, p.30-31 and 400 et seq .; RODRIGUES, Francisco Luciano Lima. O fenômeno da constitucionalização do direito: seus efeitos sobre o direito civil. (Free translation: The phenomenon of the constitutionalization of law: its effects on civil law.) In: TEPEDINO, Gustavo (Coord.). Direito Civil Constitucional. Florianópolis: Editorial Concept, 2014. p. 547-561. Gustavo Tepedino criticizes the Brazilian resilience in not approximating the constitutional right to civil law. For more: TEPEDINO, Gustavo. Normas constitucionais e relações de direito civil na

dogmatic elaboration, in each interpretation of the norm. In other words, to the extent that a greater social dimension is attributed to private relations, of course, the space of negotiating autonomy is diminished.[387]

Given the poor public service rendered by the State derived in particular from the absence of resources and basic problems of lack of doctors and supply of medicines, almost 25% of the Brazilian population sought the health plan operators and insurers.[388]

However, what was to be at least the attempt to resolve part of the state's duty to provide health care with dignity has become an aggravating factor to the judiciary. This is because the Judiciary[389] was overloaded with demands of all kinds regarding the provision of health services by insurers, from those inherent to denials of coverage, amounts of monthly payments and readjustments, through contracts and regulations, among others.

In fact, the focus on health is the profusion of repetitive actions stemming from contractual noncompliance by insurers, resulting in a greater volume of work for the administration of justice, in a veritable vicious cycle.[390]

It is not only a question of mere contractual non-compliance by health insurers with consumers. Far beyond that. This involves the linking of private entities[391] to the horizontal effectiveness of fundamental social rights, in particular the right to health. It implies that as a State, all private entities are subject to a duty not to prejudice or impede the exercise of fundamental rights.[392]

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experiência brasileira(Free translation: Constitutional norms and civil law relations in the Brazilian experience.) In: Temas de direito civil. Volume 2. Rio de Janeiro: Renovar, 2005. p. 24; See also: TARTUCE, 2014, p. 141.

387 LOBO, Paulo. Contratos. (Free translation: Contracts.) São Paulo: Saraiva, 2011. p. 61 et seq. Professor Fachin understands that the phenomenon of constitutionalisation imposes repercussions on legal institutes, which have gained a greater functionality, attending to social interests. See: FACHIN, Luiz Edson. Teoria crítica do direito civil. (Free translation: Critical theory of civil law.) Rio de Janeiro: Renovar, 2000. p. 72 et seq. On the phenomenon of the constitutionalization of private standards, see: LISBOA, Roberto Senise. Responsabilidade Civil nas Relações de Consumo. (Free translation: Civil Liability in Consumer Relations.) 3. ed. São Paulo: Saraiva, 2012. e-book. P. 83.

388 Both are health care systems. The practical difference between "insurance" and "plan" is, in principle, in the scope of the contract. In health insurance plans the insureds have the medical assistance service provided by the professionals and establishments accredited by the operator, usually in periodical books (the plan booklets). They are supervised by ANS - National Agency for Supplementary Health, linked to the Ministry of Health and created by Law 9.961 / 00, of 2000. Health insurance provides members with free choice of professionals, hospitals and laboratories. The ANS is also the supervisory authority for health insurance, responsible for the regulation, control and supervision of supplementary health care activities. See the statistics for 2016 available at <http://www.ans.gov.br/aans/noticias-ans/numeros-do-setor/3434-dados-da-saude-suplementar> accessed on August 20, 2016.

389 The survey carried out by the Group of Research and Documentation of Health Entrepreneurship of the Federal University of Rio de Janeiro states that, between the processes located on health (special appeal, writ of mandamus and writ of mandamus) between 2010 and 2013, the coverages Of health plans motivated at least half of health care demands. SCHEFFER, Mario. Coberturas assistenciais negadas pelos planos e seguros de saúde em ações julgadas pelo Tribunal de Justiça do Estado de São Paulo. (Free translation: Assistance cover denied by health insurance plans and lawsuits judged by the Court of Justice of the State of São Paulo). In: Revista de Direito Sanitário, São Paulo, v. 14, p. 122-132, 2013.

390 There were so many repetitive demands on the issue that the Brazilian Superior Court of Justice pacified the issue, with the understanding that undue refusal of medical coverage causes moral damages, since it aggravates the context of psychological distress and distress suffered by the insured. See: Resp 907718/ES. 3rd panel. Reporting judge Minister Nancy Andrighi. DJE: 10/20/2008; REsp 1440943/MG, Reporting judge Minister LUIS FELIPE SOLOMÃO, Publication date: DJ 07/04/2015).

391 From article 18, paragraph 1, of the Portuguese Constitution. Develops the idea: MIRANDA, 2014, p. 292 et seq. In Brazil, see: TARTUCE, 2014, p. 141.

392 From article 18, n.1. CANOTILHO; MOREIRA, 2007, p. 385.

The legal protection function of the right to health in private relations points to the courts finding a fair, adequate solution, instilling in the theory of immediate horizontal efficacy[393]. The course[394] is carried out in this way: the magistrate will apply a private law legally positive according to the fundamental rights (in the case under study, fundamental social right to health), according to the Federal Constitutional.

Paulo Mota Pinto[395] states that depending on the situation of danger or injury of the protected property in question, the duties of protection of these rights will oblige public entities to intervene in relations between private individuals, avoiding the inflexibility and rigidity of private relations.

In this regard, Dirley da Cunha[396] emphasizes that the leading and determining force of social rights reverses the classic object of legal pretension based on a subjective right: from a claim of omission by the public authorities, one moves to a prohibition of omission or a duty to act of State.

In the case under study, the social damage to health law would be consubstantiated by the number of claims for individual damages that reflect the same object (contractual noncompliance by the health insurer) and reach results that transcend individuality and reach the community.

Thus, the State's duty to act[397] would be through the application of the theory of social harm by the Judiciary as an instrument of response to inertia and negligence sometimes configured by health care providers.

At the same time, in a study[398] conducted in São Paulo between 2009 and 2010 on the lawsuits filed against private health insurers, it was found that in 88% of the cases, the judgment was favorable to the user, compelling the service provider to comply with the contract agreement. This is more than complete proof of the defective rendering of the service with the citizens.

Or rather, from the purely economic perspective, pursuing maximum profit[399], it becomes advantageous for health insurance insurer to breach the contract, since not all people seek the Judiciary to vindicate about extravagant conduct. Thus, timely is the solution outlined by Antônio Junqueira de

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393 Idea developed by CANOTILHO, 1997, p. 1156; CANOTILHO; MOREIRA, 2007, p. 385. Portuguese jurisprudence has not yet found a definitive position on the subject, see judged: judgment 198/85, issue by the Portuguese Constitutional Court, reporting judge: Councilmember Cardoso da Costa, 2nd section, date of trial: 05/30/1985. "Irrespective of the precise meaning that should be attributed in general, or in the context of other fundamental rights, to the extension of the binding nature of such rights also to private entities, that is to say, to private-legal relations (Article 18, section 1 of the Constitution) "; Judgment 93/92 issued by the Portuguese Constitutional Court. Reporting judge: Councilmember Monteiro Diniz. Date of trial: 11/03/1992.

394 CANOTILHO, 1997, p. 1157.

395 PINTO, Paulo Mota. A influência dos direitos fundamentais sobre o direito privado português. (Free translation: The influence of fundamental rights on Portuguese private law.) In: MONTEIRO, Antônio Pinto et al. (Org.). Direitos Fundamentais e direito privado: Uma perspectiva de direito comparado. (Free translation: Fundamental Rights and Private Law: A Comparative Law Perspective.) Coimbra: Almedina, 2007. p. 157.

396 CUNHA JUNIOR, 2008, p. 692. Vide também CANOTILHO, José Joaquim Gomes. Constituição dirigente e vinculação do legislador. (Free translation: The governing body and the legislator.) Coimbra: Coimbra Editora, 2001. p.365.

397 See the argument developed by CUNHA JUNIOR, 2008, p. 692 et seq.

398 SCHEFFER, 2013, p. 122.

399 SANTOS, Antônio Marques do. Os seguros de saúde. (Free translation: The health insurance) In: Direito da Saúde e Bioética, Lisboa, 1996. p. 236.

Azevedo[400], prescribing the possibility, in situations like this, to apply indemnification with punitive punishment.

In other words, at the moment when a large amount is arbitrated[401], the Judiciary prohibits that such practices continue happening and damaging the provision of the service in an appropriate way.

5 CONCLUSION

The study herein approached, in a unique way, the application of the institute of social damage to the pragmatic reality of social rights to health in Brazil, provided by private health insurers, without forgetting to oppose it to the Portuguese system.

Furthermore, it got explicit as well that what seemed to be an alternative solution or at least a complementary one to the Brazilian health system, through the private initiative, didn´t achieve the expected efficiency.

The scientific research has brought to light that a big part of the demands regarding health in the judiciary power is reflect of the reluctant and relapse posture of the health insurers, which even with a court order still excuse themselves from following the contract correctly.

Finally, in the face of this unfortunate scenario in the private provision of public service, the present work wanted to expose that one alternative to the problem would be the judiciary power to shelter the institute of the social damage, with the purpose of severely punishing and restricting health insurers that reasonless ignore the contracts, harming the right to health inserted in the Brazilian Constitution.

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[400] In this sense, it is worth to analyse a paradigmatic decision issued by the Court of Justice of the State of São Paulo: "PLANO DE SAÚDE. Pedido de cobertura para internação. Sentença que julgou procedente pedido feito pelo segurado, determinado que, por se tratar de situação de emergência, fosse dada a devida cobertura, ainda que dentro do prazo de carência, mantida. DANO MORAL. Caracterização em razão da peculiaridade de se cuidar de paciente acometido por infarto, com a recusa de atendimento e, consequentemente, procura de outro hospital em situação nitidamente aflitiva. DANO SOCIAL. Caracterização. Necessidade de se coibir prática de reiteradas recusas ao cumprimento de contratos de seguro saúde, a propósito de hipóteses reiteradamente analisadas e decididas. Indenização com caráter expressamente punitivo, no valor de um milhão de reais, que não se confunde com a destinada ao segurado, revertida ao Hospital das Clínicas de São Paulo. LITIGÂNCIA DE MÁ-FÉ. Configuração pelo caráter protelatório do recurso. Aplicação de multa. Recurso da seguradora desprovido e do segurado provido em parte. (TRIBUNAL DE JUSTIÇA DO ESTADO DE SÃO PAULO, QUARTA CÂMARA DE DIREITO PRIVADO, APELAÇÃO N. 0027158-41.2010.8.26.0564 – SÃO BERNARDO DO CAMPO, VOTO N. 18512, RELATOR: TEIXEIRA LEITE, JULGAMENTO: 18/07/2013)." Free translation: "HEALTH INSURANCE. Request for coverage for hospitalization. Judgment that deemed a request made by the insured, determined that, because it was an emergency situation, adequate coverage was given, even if within the grace period, maintained. MORAL DAMAGE. Characterization due to the peculiarity of caring for a patient suffering from myocardial infarction, refusal of care and, consequently, seeking another hospital in a clearly distressing situation. SOCIAL DAMAGE. Description. The need to curb the practice of repeated refusals to comply with health insurance contracts, regarding hypotheses repeatedly analyzed and decided. Indemnification with an expressly punitive nature, in the amount of **one million of reais**, which cannot be confused with that destined to the insured, reverted to the Hospital das Clínicas de São Paulo. BAD FAITH'S LITIGATION. Configuration by the delaying tactic of the appeal. Application of fine. Appeal of insurer deprived and partially insured. (COURT OF JUSTICE OF THE STATE OF SÃO PAULO, FOURTH CHAMBER OF PRIVATE LAW, APPEAL No. 0027158-41.2010.8.26.0564 - SÃO BERNARDO DO CAMPO, VOTE N. 18512, REPORTING JUDGE: TEIXEIRA LEITE, DATE OF TRIAL: 07/18/2013)."

[401] Here lies the interesting reflective character of social damage. That is, the reversal pecuniary arbitrated in condemnation to the own society, as it is extracted of the judgment in prominence (note 64), in which the amount was reverted to the "Hospital das Clínicas" of São Paulo.

For last but not least, the study proposed that the institute of the social damage should be applied in the Portuguese judicial order through popular action and that would indirectly serve to improve the public health service.

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