

## The accomplishment of collective dignity through collective moral damage<sup>\*†</sup>

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### ABSTRACT

Collective moral damage is an aspect of collective dignity as it repairs offense against the *sensu lato* collective rights. Thus, the existence of collective moral damages– as defined by the Constitutional concept of collective dignity – will be investigated, taking into consideration their trends in the Superior Courts. The research carried out a literature review, which focused on the investigation of how moral damages were highlighted in STJ (Brazilian Superior Tribunal of Justice) and STF (Brazilian Supreme Court) websites. The study argues that the achievement of collective dignity permeates the arbitration of collective moral damage, as the judiciary feels obligated to reinforce the notion of belonging and restrain any act against the *sensu lato* collective rights.

Keywords: Collective moral damages. Collective dignity. Collective rights. Collective tutelage.

### 1. INTRODUCTION

There is currently a constant preoccupation of the Judiciary Branch with the realization of collective guardianship, because in order to protect rights entitled to humanity, it is necessary to develop procedural mechanisms to enable reparative, educative and preventive means to combat infringements to these kinds of fundamental rights. Given the fact that the classical idea of process no longer persists, class actions came to occupy a place of primacy within this jurisdictional function. Within that context, collective moral damage emerges as a nonpatrimonial expression of social damage and as a way of achieving collective dignity and repairing the affront to *sensu lato* collective rights, which are described in article 81 of the Consumer Defense Code.

Thus, the objective of this study is to demonstrate the existence of collective moral damage, whose foundation derives from the constitutional concept of collective dignity, to examine the jurisprudential evolution of Superior Courts, as far as the subject is concerned, and

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<sup>\*</sup>Translator's Note: See Saul Litvnof, *Moral Damages*. "There is no semantic obstacle to borrowing from the French tradition and speaking of 'moral damages' to mean damage that cannot be technically viewed as sustained by a person's patrimony, or damage to an interest for which a current market-value cannot be readily ascertained, as is always the case when the injury sustained consists, in whole or in part, in the experience of a negative state of emotional distress." Available at <http://digitalcommons.law.lsu.edu/lalrev/vol38/iss1/4/>

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lastly, to establish parameters pertaining to sentencing, so that the magistrate arbitrates the pecuniary amount on a constitutionally-adequate level.

The research method used on the development of this article was essentially bibliographical, focusing particularly on the websites of the Brazilian Superior Court of Justice and Supreme Federal Court, in relation to the expression of collective moral damage. In that sense, this work consists of, in its first section, the analysis of the dignity of the human person and, subsequently, the development of the constitutional concept of collective dignity as the mainstay of *sensu lato* collective rights. Hereupon, the types of collective rights, as well as the existing procedural mechanisms to their guardianship.

Lastly, collective moral damage is examined through its constitutional foundation, and there is study of concrete cases in order to verify whether or not it exists and examine the guidelines to establishing its stipulation by the magistrate.

Following these considerations, we therefore intend to demonstrate the relevance of collective moral damage as a means of accomplishing collective dignity, which cannot be infringed, at the risk of harming the values of Brazilian society.

## **2. FROM THE DIGNITY OF THE HUMAN PERSON TO THE COLLECTIVE DIGNITY.**

At the end of the Second World War, the human being returns to its place of primacy in Legal Sciences and, consequently, there is a preoccupation of Europeans legal systems, notably the German and Italian ones, to protecting the dignity of the human person (BARROSO, *on line*). This concept obviously does not hail from the 20<sup>th</sup> century, but human dignity represents the central concept of the contemporary constitutional and democratic State (BARZOTTO, 2010, p. 39-40).

Therefore, even though it is not the primary goal of this article, we can define human dignity as the foundational value from which all fundamental rights and duties derive (MIRANDA, 2008, p. 197). It is listed as one of the foundations of the Federal Republic of Brazil, in article 1, III, of the Federal Constitution, as well as it is mentioned in other constitutional provisions, such as the acknowledgement of children's, teenagers' (article 227, FC) and the elderly's dignity (article 230, FC).

Having made this initial conceptual delimitation, Ingo Sarlet (2009) identifies five dimensions of this definition: ontological, social, cultural-historical, autonomic and provisional.

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Synthetically, such dimensions can be expressed in the lesson of Jesús González Pérez (2011, p. 27), as:

The person's dignity does not admit discrimination by reasons of birth, race or sex; options and beliefs. It does not regard age, intelligence and mental health; nor the situation in which one finds oneself and the qualities, as well as the conduct and behavior.

Therefore, the sedimentation of human dignity in the post-war period has inevitably led to the strengthening of the basic protection core of fundamental rights. This is why the Universal Declaration of Human Rights of 1948 outlines in its preamble that dignity, inherent to all members of the human family, is the foundation of freedom. However, the guardianship of freedom, in itself, is not able to protect the holistic perspective through which we should examine human beings, who cannot have a dignified existence without the promotion of health, education, housing, consumer defense, and the environment, among other equally fundamental rights. Within that view, Luísa Cristina Pinto e Netto (2009, p. 54) teaches that:

The dignity of the human person is not accomplished or guaranteed only by freedom, nor it is rendered plain only by guaranteeing material state provisions, the fundamental rights should be accomplished in their coherent group, in favor of the human dignity's fullness.

This passage of liberal state to social state cemented the idea that state interventionism (BONAVIDES, 2007), through the consecration of numerous social, economic and cultural rights, in the current constitutional discourses, is necessary to promoting humanity. There used to be a fiction in liberalism that the autocratic individual of the bourgeois society was self-sustaining. However, "the image of an individual simultaneously in need of the State and responsible in the social community emerged" (PIEROTH; SCHLINK, 2012, p. 68). Therefore, in this very form of State, which is currently under a possible crisis (NETTO, 2009), there begins to emerge a preoccupation not only with the individual, considered in and of itself, but with the development of the individual's own existence in society.

Solidarity, acknowledged since Aristotle (*apud* MORRIS, 2002) as an inherent characteristic of the human being, leads us to the existence of fundamental rights pertaining to the collective. These rights would hence be within the third nucleus of the protection of human rights, which are those rights that are "highly endowed with humanism and universality" (BONAVIDES, 2008, p. 569), and therefore preoccupied with the construction of a more solidary society, according to article 3rd, I, of the Federal Constitution (henceforth, simply "FC"). In addition to that, the theoretical grounds of recognizing such rights are obligatorily linked to collective dignity, which provides it with the dogmatic and judicial basis of collective

guardianship. We note that this definition is not only linked to the third nucleus of the protection of human rights, but, in the present article, we shall emphasize this particular relationship.

This way, as taught by Pontes de Miranda (1987, p. 178), since the people control the state power, they will value their own dignity, which, by the juridical consciousness, will be reflected by the constitutional text on the affirmation of Brazilian identity. It is the collective dignity that it “the essential value, protected by all [in the] community, which comprehends all the longings captured by the judicial consciousness, and spread on the constitutional identity” (SOUZA, 2012, p. 67), hence the need to imbue the notion of the Brazilian citizen’s belonging to a nation-wide community which protects this right.

Surely, the individual and the collective dignity co- exist harmoniously in the judicial system, because the former is a prerequisite to the latter, along with judicial consciousness and constitutional identity, which form the cornerstone of the concept of collective dignity. Therefore, society is viewed as the holder of fundamental rights and duties, without finding itself in a totalitarian context, given the fact that individualities continue to be preserved through the unequivocal recognition of the dignity of the human person. Thus, since each one of us has participated in the construction of the legal order, there is a duty to uphold protection that emanates from collectivity, such as if this social dignity is violated by, for example, unconstitutionality by omission.

The preoccupation with the development of collective dignity, within this work, is to provide theoretical basis for the very existence of *sensu lato* collective rights, as well as for the possibility of establishing reparation for the collective moral damage. By analyzing the concept of collective dignity, we shall advance to the study of collective rights on the Brazilian legal order and its instruments of guardianship before the Judiciary Branch.

### **3. COLLECTIVE RIGHTS AND THE PROCEDURAL INSTRUMENTS FOR COLLECTIVE GUARDIANSHIP.**

In the classification of Karel Vasak (*apud* BONAVIDES, 2008, p. 569), the rights related to the defense of environment, ownership of humanity’s common patrimony, and property development are examples of collective rights, as the entire human race is asserted to be the recipient of these rights’ consequences.

The current constitutional discourse, along with the classical rights to defense and provision, discuss the collective rights, which can be found in article 5. These include the consumer’s defense (article 5, XXXII, FC) and the protection of public patrimony,

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administrative morality, environment and historical-cultural patrimony in the context of the popular action (article 5, LXXII, FC).<sup>1</sup>

Through the illustration of the varied collective rights, we verify that they all bear solidarity guardianship, rather than collective entitlement. To that respect, Dimitri Dimoulis and Leonardo Martins (2007, p. 72) explain that:

A different situation is configured with the emerging of the so-called new collective rights which are those of collective nature, often called “diffuse rights”, which started to be guaranteed in the 20th century, mainly after the Second World War, and constitute rights of collective, or even diffuse, entitlement. [author’s emphasis]

We then highlight that solidarity, here utilized as a synonym for fraternity, intends not to foment the *jusfundamental* collectivism (NABAIS, *online*), but rather the notion of collective dignity itself, because the former is understood as a manifestation of justice which occurs in actions that are favorable to both individual and common good (LORENZO, 2010). It is undoubtedly a matter of a constitutional principle, as stated in article 3, I, FC. Besides, we cannot mix solidarity up with collective dignity, given the fact that the latter is formed by fundamental values of certain collectiveness, which deserve protection by the entire society, given that solidarity is a characteristic that we need for communal life.

Through such preliminary differentiations, in order to better understand the *sensu lato* collective rights, as stated by article 81 of the Consumer Defense Code (CDC), there are the following types of such rights: diffuse, *sensu stricto* collective, and homogenous individual.

For Teori Zavascki (2011), the transindividual rights, which are the first two types, do not present an individualized entitlement and, therefore, have undetermined recipients and are materially indivisible. Ergo, the diffuse rights are verifiable through a factual circumstance, which in fact unites its recipients, even if they are undetermined. This can be seen with environmental aggressions. As far as *sensu stricto* collective rights are concerned, the entitlement is seen through a judicial-based relationship in which a category or classes of people are connected to the opposing party, *e.g.* the abusive readjustments of tuition.<sup>2</sup> On the other hand, the homogenous individual rights are accidentally collective, because the entitlement is either determined or determinable, since the holders’ interests hail from a common origin. Additionally, it is indispensable that the guardianship is collective, necessitating that one

<sup>1</sup> Translator’s note: in Brazilian legal system, a “popular action” (*ação popular*) is a form of class action.

<sup>2</sup> It is important to highlight that the Supreme Federal Court (STF), in its Summary # 643, understands that it is possible that the Public Prosecutor’s Office is legitimate to file a public civil action (ACP) whose basis is the illegality of tuition readjustment.

considers a more adequate constitutional protection (DIDIER JR.; ZANETI JÚNIOR, 2011).

Accordingly, in order for the judiciary branch to provide an adequate constitutional defense of collective rights, the native legal system holds a specific procedural subsystem for collective guardianship, notably the CDC, Law # 7.375/1984 – Public Civil Action Law (LACP) – and Law # 4.717/1965 – Popular Action Law (PAL) –, because the Civil Procedure Code (CPC) only recognizes the possibility of *res judicata* between parties, which neither benefits nor harms third parties, according to article 472, CPC, which, at first, renders impossible a proper procedural solution to collective actions. Therefore, we present the solution of Mauro Cappelletti and Bryan Garth (1988, p. 49-50) on the traditional perspective of civil procedure:

It was only seen as a matter between parties, which was destined to the solution of a controversy between them, to what their own individual interests were concerned. Rights that belonged to a group, to the general public or to a segment of the public did not fit well within this structure. The determining rules of legitimacy, the procedural norms and the performance of judges were not destined to facilitate suits filed by individuals under diffuse interests.

In this sense, the collective guardianship represents the second wave idealized by the cited authors (CAPPELLETTI; GARTH, 1998) to the access to justice (article 5, XXXV, FC), because as the Public Prosecutor's Office is strengthened as an essential function to Justice (article 127, FC), so too is legitimacy bestowed to the citizen for filing a popular action (article 5<sup>th</sup>, LXXIII, FC and article 1, LAP),<sup>3</sup> the class associations, and the Public Defender's Office of collective defense (art. 1, LACP). These shifts move the jurisdictional function closer to accomplishing collective moral damage.

We observed the universalization of jurisdiction on such actions, bearing in mind that a favorable ruling, in a collective action, will have *erga omnes* effects within the judge's territorial jurisdiction, according to article 16, LACP.<sup>4</sup> This is inherent to collective process, due to the interest that guards a right whose recipient is society. Hence, the jurisdictional

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<sup>3</sup> The LAP, in its articles 1, § 3, clarifies that the proof for citizenship shall be made by presenting the electoral card or related document. Unfortunately, this rule provided a restricting concept of citizenship, by linking the foundation of our Republic (article 1st, II, FC), to the exercise of voting. To José Afonso da Silva (2009, p. 104), citizenship goes beyond the holding of political rights, because it implies recognizing the individual as a member of the state society.

<sup>4</sup> We highlight that the Superior Court of Justice admits that *res judicata* in ACP goes beyond the territorial limits of the judge's jurisdiction, because it must respect the objective and subjective limits of the decision, as well as bring the institute (of *res judicata*) closer to a legal norm on the collective plain, given its coverage (BRAZIL, Superior Court of Justice. Special Appeal n. 1.377.400-SC. Santa Catarina's Public Attorney's Office v. Santa Catarina State and City of Lages. Rapporteur: Justice Og Fernandes. Brasilia, 18 February 2014 and BRAZIL, Superior Court of Justice. Special Appeal n. 1.391.198-RS. Appellant: Banco do Brasil S/A. v. Assets of Laide José Rossato. Rapporteur: Justice Luís Felipe Salomão. Brasilia, 13 august 2014).

provision shall also be experienced by society as a whole.

Now that these considerations on the procedural aspects of collective guardianship in Brazil have been discussed, let us proceed to the analysis of collective moral damage.

#### 4. COLLECTIVE MORAL DAMAGE

Initially, we will develop the concept of collective moral damage, mainly through a constitutional approach related to collective dignity. Then, we will examine the theme's jurisprudential evolution, based on the main cases analyzed by the Superior Court of Justice (STJ) and Supreme Federal Court (STF). We will also analyze the discussion pertaining to the quantification of the repair, which is to be set by the Judiciary Branch.

Judicial Sciences still have not found a more efficient way of repairing *nonpatrimonial* damages<sup>5</sup> – such as those derived from a penal infraction<sup>6</sup> or infringements to personal rights – than by pecuniary means.<sup>7</sup> Within that perspective, it is only possible to verify economic loss when material damage is involved.

Following this initial idea, we note that damage, whether it is moral or patrimonial, occurs when there is conduct or absence of behavior that, before a causal nexus, generates an offensive result to individual or collective patrimony, both of which are protected by the judicial system of the aggrieved one. The damage is therefore associated with the idea of responsibility, which, in Brazil, is subjective, as a general rule.<sup>8</sup> Therefore, according to article 5, X, FC, there will be moral damage when an offense to the inviolability of the right to a person's intimacy, private life, honor, or image occurs. The constitution expressly lists as a fundamental right the ability to utilize the reparation of moral damage as the first nucleus of protection of fundamental rights. In addition to that, such rule is also a fundamental clause (article 60, § 4º, IV, FC).

Through this constitutional premise, we clearly verify the individual understanding of moral damage in the Constitution. However, since this discussion takes place in the article of the FC related to individual and collective rights and duties, it is easy to assert the

<sup>5</sup> In the present article, the expressions moral damage and *nonpatrimonial* damage shall be used as synonyms, according to the teachings of Cahali (2011, p. 20).

<sup>6</sup> According to the article 387, IV, Penal Procedure Code (CPP), the establishment of a minimum value for repairing the damages caused by the penal infraction is one of the requisites for the penal sentence. Furthermore, the articles 63 to 68 of CPP explain the *ex delicto* civil action.

<sup>7</sup> In fact, according to Cahali (2011, p. 636), the sentence which seeks to repair moral damage does so by arbitrating a pecuniary amount, without prejudice to any secondary sanctions, as listed in the article 78, CDC.

<sup>8</sup> We note, for instance, in the administrative scope, that objective responsibility is admitted in the case of nuclear damage (article 21, XXIII, *d*, FC); on the consumer scope, in the case of responsibility for defective products or services, according to article 12, CDC; on the environmental scope, under the article 14, Law # 6.938/1981.



existence of collective moral damage, pertaining to other nuclei of protection of fundamental rights, most notably those related to the right to solidarity, since the constitutional text consecrates mechanisms of collective guardianship in article 5, such as the collective injunction (article 5<sup>th</sup>, LXX, FC) and popular action (article 5<sup>th</sup>, LXXIII, FC). The above-cited norm has not exhausted the possibility of utilizing moral damage when there is violation to other fundamental rights. In fact, it serves as an opening clause,<sup>9</sup> by permitting such a ruling in the case of violation to collective dignity, and consequently, to *sensu lato* collective rights.

Furthermore, the current discourse is permeated by legal mechanisms related to the preoccupation with *sensu lato* collective rights of the environment (article 225, FC), of children and adolescents (art. 227 and 228) and of the elderly (article 230, FC) via protection from administrative improbity (article 37, § 4, FC).

In addition to that, in the scope of infra-constitutional legislation, by disciplining collective moral damage, the LACP, in article 1, states the possibility of filing a responsibility suit, derived from moral damages to diffuse, collective, and homogenous individual interests. The CDC considers as a basic consumer right the possibility of repairing patrimonial and moral damages (individual, collective and diffuse), as stated in article 6<sup>th</sup>, VI.

Thus, we can infer that collective moral damage is that resulting from harming collective dignity, because if the national political community has elected values which were established in the Brazilian constitutional identity, when a violation to that axiological layer occurs, society will be able to demand the reparation of the offense through collective moral damage.

Within that line of reasoning, Bittar Filho (2014) supports our understanding, by asserting that:

With support on all raised arguments, one comes to the conclusion that collective moral damage is the unjust violation of a given community's moral sphere, that is to say, it is the unlawful violation of a given circle of collective values. When one speaks of collective moral damage, one implies the fact that value patrimony of a given community (bigger or smaller), idealistically considered, was attacked in an absolutely unjustifiable manner, from a judicial standpoint; this ultimately means that its own culture was harmed, in its immaterial aspect. Such as it occurs in the scope of

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<sup>9</sup> Article 5, § 2, FC, enables the opening clause of fundamental rights, by enunciating that express constitutional rights and guarantees do not exclude others derived from the regime, adopted principles, and international treaties of which the Federal Republic of Brazil is part. Besides, according to Jorge Miranda (2008, p. 176), there is no restrictive list of fundamental rights, because these rights are not only those formally enunciated in the constitutional text, but also those that are derived from other fronts, according to a broader perspective of the material Constitution.



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individual moral damage, there is no talk of proof of guilt, being the agent responsible by the sole violation (*damnum in re ipsa*).

Therefore, the collective moral damage is an autonomous category in the theory of damage<sup>10</sup> - since its active subject is the harmed collectivity and, as passive subject, the physical and judicial person, or the members of the collectivity that violate said collectivity's dignity – whose scope consists of the guardianship of collective dignity, which is not to be violated through offense to *sensu lato* collective rights. Thus, the collective actions are the adequate procedural instruments to pursue a penalty, which is undoubtedly presumed - *in re ipsa* - since there will be an obvious offense to collective dignity. In the same sense, Mario Peña Chacón (2012, p. 106), explains that:

Within this broad conception of social damage, this type would occur by action or omission of physical or judicial persons, whether they are public or private, by both licit and illicit doings, always and when the general well-being is affected by unjust

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<sup>10</sup> On a recent precedent, the STJ has recognized collective moral damage as an autonomous category of damage, which does not necessarily relate to the traditional attributes of the human person, such as pain, suffering or psychical shock. To that respect, see: COLLECTIVE LAW AND CONSUMER LAW. PUBLIC CIVIL ACTION. HEALTH PLAN. ABUSIVE RESTRICTIVE CLAUSE. HYBRID ACTION. INDIVIDUAL HOMOGENOUS, DIFFUSE AND COLLECTIVE RIGHTS. INDIVIDUAL DAMAGE. RULING. AWARD CALCULATION PHASE. COLLECTIVE MORAL DAMMAGE. RULING. THEORETICAL POSSIBILITY. IN THE SPECIFIC CASE, INEXISTENT MORAL DAMAGE.

1. The tutelage pleaded on public civil actions are not necessarily pure and stagnant. It was not necessary for one to plead, each time, a tutelage related to an individual homogenous right, one related to *sensu stricto* collective rights, and one related to one of diffuse rights, especially when it comes to a motion filed by the Public Attorney's Office, which is broadly legitimate on collective processes. The reason is that a given right cannot simultaneously belong to more than one category. However, this does not imply that, in the same factual or juridical litigating scenario, there cannot be simultaneous violations to rights of different categories.

2. The specific case relates to a public civil action of hybrid tutelage. One notes that: (a) there are individual homogenous rights related to eventual damages sustained by the contractors whose health treatment was hindered due to the illegal restrictive clause; (b) there are collective rights which result from the abstract illegality of such clause, which equally hit, in an indivisible manner, the group of current contractors of the health plan; (c) there are diffuse rights, related to future consumers of the health plan, a group formed by undetermined and undeterminable persons.

3. The violation of individual homogenous rights cannot, in itself, unleash a damage which is also not of individual character, because such separation is part of the institute's own concept. However, it would be different to recognize judicial situations from which violations of homogenous individual, collective or diffuse rights derive. If there are multiple facts or multiple damages, nothing prevents the recognition, apart from individual damage, of collective nature.

4. Therefore, the violation of *transindividual* rights is theoretically liable to be repaired by the recognition of collective moral damage as an autonomous category of damage, which does not necessarily relate to the traditional attributes of the human person (pain, suffering or psychical shock).

5. However, in the present hypothesis, we do not shimmer (I do not know what is meant by "shimmer" here) collective, diffuse or social damages. From the examined illegality on the consumer contracts, no harmful consequences were derived, save for those sustained by the ones whose health treatment were hindered or by the ones who have spent values which were illicitly evaded by the health plan. However, such harms are related to homogenous individual rights whose violation can only lead to reversible penalties to public funds, on the hypothesis of *fluid recovery*, as stated in article 100, CDC. Judgement sustained by distinct fundaments.

6. Special appeal not granted (BRAZIL, Superior Court of Justice. Recurso Especial n. 1.293.606-MG [Special Appeal n. 1.293.606-MG]. Public Attorney's Office of Minas Gerais State v. Complementary Healthcare Plan of Juiz de Fora's Santa Casa. Rapporteur: Justice Luís Felipe Salomão. Brasilia, 2 September 2014).

damages that affect collective interests or rights, damages that can bear patrimonial and nonpatrimonial connotations [...]

Such understanding has been substantiated in the 5th Journey of Civil Law, in its 45 # 456:

Utterance # 456. The expression “damage” in article 944 considers not only individual damage, material or immaterial, but also social, diffuse, collective and homogenous individuals, to be claimed by those legitimated to file collective actions.

To illustrate this, the expression *collective moral damage* is here utilized as the *nonpatrimonial* manifestation of social damage (CHACÓN, 2012), which considers any offense to *sensu lato* collective rights. This way, even though the above utterance states a category of social damage in an independent manner – certainly understood as an offense to a diffuse interest (PEREIRA, 2014) – we shall adopt the idea that social damage occurs when there is violation to collective dignity, and its *nonpatrimonial* expression shall be denominated *collective moral damage*.<sup>11</sup>

Bearing in mind such doctrinal and legislative apparatus, in order to assert the existence of collective moral damage in the Brazilian judicial system as a result of the protection of collective dignity, we note that, in 2006,<sup>12</sup> under the report of Justice Teori Zavascki, the STJ recognized that moral damage would relate to the notion of pain, mental suffering, which would be only verified in the case of individual moral damage, since it is incompatible with *transindividuality*, in which there is *undeterminability* of subjects.

In 2008,<sup>13</sup> the STJ once again brought up the possibility of establishing, or not,

<sup>11</sup> Xisto de Medeiros Neto (2012, p. 201) explains that collective moral damage can also be denominated as generical damage or simply diffuse or collective damage.

<sup>12</sup> Precedent: PROCEDURAL CIVIL LAW. PUBLIC CIVIL ACTION. ENVIRONMENTAL DAMAGE. COLLECTIVE MORAL DAMAGE. NECESSARY LINK OF MORAL DAMAGE TO THE NOTION OF PAIN, PSYCHICAL SUFFERING OF INDIVIDUAL CHARACTER. INCOMPATIBILITY WITH THE NOTION OF TRANSINDIVIDUALITY (NON-DETERMINABILITY OF PASSIVE SUBJECT AND INDIVISIBILITY OF THE VIOLATION DAMAGE. COLLECTIVE MORAL DAMAGE. NECESSARY LINK OF MORAL DAMAGE TO THE NOTION OF PAIN, PSYCHICAL SUFFERING OF INDIVIDUAL CHARACTER. INCOMPATIBILITY WITH THE NOTION OF TRANSINDIVIDUALITY (NON-DETERMINABILITY OF PASSIVE SUBJECT AND INDIVISIBILITY OF THE VIOLATION AND REPARATION). SPECIAL APPEAL NOT GRANTED. (BRAZIL, Superior Court of Justice, Recurso Especial n. 598.281/MG [Special Appeal n. 598.281/ MG] Public Attorney’s Office of Minas Gerais v. City of Uberlandia and Empreendimentos Imobiliários Canaã LTDA. Rapporteur: Justice Luiz Fux. Rapporteur for ruling: Justice Teori Zavascki. Brasilia, 2 May 2006). In the same sense, see ZAVASCKI, Teori Albino. **Processo coletivo**: tutela de direitos coletivos e tutela coletiva de direitos. 5. ed. São Paulo: Revista dos Tribunais, 2011.

<sup>13</sup> Precedent: PUBLIC CIVIL ACTION. FILING BY THE PUBLIC ATTORNEY’S OFFICE. RERUNS OF SOAP OPERA IN THE AFTERNOON PERIOD. ARGUMENT FOR INSUFFICIENT SUPPRESSION OF SEX AND VIOLENCE FOOTAGE. REJECTION OF PLEA FOR PRODUCING EXPERT EVIDENCE. ARGUMENT OF NECESSITY UNEXAMINED BY THE ORIGINAL COURT. SPECIAL APPEAL GRANTED. RULING OF EMBARGO OF DECLARATION CANCELLED. Once the argument that the allegation according to which the production of expert evidence was necessary was accepted, the judgement of the

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collective moral damage for the case of a given television network that allegedly disclosed, during an afternoon, violent and sexual footage, which caused an offense to the rights of the underage. Unfortunately, even though Justice Nancy Andrichi has granted the plea, the collegium did not face the thesis of collective moral damage, since the civil public action was cancelled, given the fact that the expert investigation was carried out by a judicial commissioner of the infancy and youth sector.

However, in 2012 and 2013, the 2<sup>nd</sup> and 3<sup>rd</sup> classes of the STJ recognized in three emblematic situations the existence of collective moral damage, by ruling contrarily to the Court's then-adopted understanding.<sup>14</sup>

The first situation of establishment of collective moral damage occurred in the scope of consumer's law, in the Special Appeal # 1.221.756/RJ,<sup>15</sup> when a given financial institution

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embargo of declaration should therefore be cancelled, so that another judgement is conveyed by the original Court, leaving other preliminary and merit issues without ruling, for now. Prevalence of the votes of Justice. HUMBERTO GOMES DE BARROS and ARI PARGENDLER, according to the latter's terms, followed by the vote of Justice SIDNEI BENETI, in detriment of Justice NANCY ANDRIGHI's vote, that voted for not examining the Special Appeal. Special appeal granted (BRAZIL, Superior Court of Justice. Recurso Especial n. 636.021/RJ [Special Appeal n. 636.021/RJ] TV Globo Ltda v. Public Attorney's Office of Rio de Janeiro State. Rapporteur: Justice Nancy Andrichi. Rapporteur for ruling: Justice Sidnei Beneti. Brasilia, 2 October 2009.

<sup>14</sup> In 2008, in the Special Appeal # 960.926, it was already possible to identify, within the scope of administrative improbity, the necessity of establishing reparation of collective moral damage. Such understanding, thereafter, has been ratified by the Court in other occasions (Agravo Regimental no Recurso Especial n. 1.003.126 [Regimental Appeal on Special Appeal n. 1.003.126]), by recognizing the legitimacy of the Federal Public Attorney's Office to file the ACP, with the goal of demanding reparation of collective moral damage, derived from false declarations of medicine distribution, used to bob bidding processes. Both precedents are therefore the beginning of the discussion related to moral damage, in the context of *sensu lato* collective rights.

<sup>15</sup> Precedent: SPECIAL APPEAL. COLLECTIVE MORAL DAMAGE. PERTINENCE. ARTICLE 6TH, VI, CONSUMER DEFENSE CODE. REQUISITES. REASONABLE SIGNIFICANCE AND SOCIAL REPULSE. OCCURRENCE. CONSUMERS WITH MOBILITY ISSUES. NECESSITY OF STAIR CLIMBING FOR CUSTOMER SERVICE. DISPROPORTIONATE AND STRESSFUL MEASURE. COMPENSATION. PROPORTIONAL FIXATION. JURISPRUDENTIAL DIVERGENCE. LACK OF DEMONSTRATION. SPECIAL APPEAL NOT GRANTED. 1. The diction of article 6, vi, CDC, is clear when it enables compensation for moral damages caused to consumers, on both individual and collective orders. 2. However, not every violation to consumer's interest can imply diffuse moral damage. It is necessary that the transgressor fact is of reasonable significance and overwhelms the limits of tolerability. It must be grave enough to produce real suffering, social uneasiness and relevant alterations on the collective *nonpatrimonial* order. Occurrence. 3. It is not reasonable to submit those who already are mobility-impaired, whether by age, physical disability, or a transitory cause, to the stressful situation of climbing stairs, more precisely 23 steps, on a bank agency that is fully capable of providing better customer service to such persons. 4. Collective moral compensation fixated proportionally and 6TH, VI, CONSUMER DEFENSE CODE. REQUISITES. REASONABLE SIGNIFICANCE AND SOCIAL REPULSE. OCCURRENCE. CONSUMERS WITH MOBILITY ISSUES. NECESSITY OF STAIR CLIMBING FOR CUSTOMER SERVICE. DISPROPORTIONATE AND STRESSFUL MEASURE. COMPENSATION. PROPORTIONAL FIXATION. JURISPRUDENTIAL DIVERGENCE. LACK OF DEMONSTRATION. SPECIAL APPEAL NOT GRANTED. 1. The diction of article 6, vi, CDC, is clear when it enables compensation for moral damages caused to consumers, on both individual and collective orders. 2. However, not every violation to consumer's interest can imply diffuse moral damage. It is necessary that the transgressor fact is of reasonable significance and overwhelms the limits of tolerability. It must be grave enough to produce real suffering, social uneasiness and relevant alterations on the collective *nonpatrimonial* order. Occurrence. 3. It is not reasonable to submit those who already are mobility-impaired, whether by age, physical disability, or a transitory cause, to the stressful situation of climbing stairs, more precisely 23 steps, on a bank agency that is fully capable of providing

was sentenced to pay fifty thousand *reais* for not having adequate facilities for attending the elderly, people with special needs, and those who bear mobility impairments. In this situation, the customer service for these individuals was carried out in the second floor, which required customers to climb 3 sets of stairs. This greatly jeopardized the accessibility of bank functions, hence the necessity of collective reparation.

Afterwards, collective moral damage was recognized through both pecuniary reparation and the necessity of environmental reconstitution. The decision ruled in the Special Appeal # 1.328.753/ MG,<sup>16</sup> based on article 5, Law of Introduction to Brazilian Law Norms (LINDB), rendered the understanding that, in the case of environmental damage – taking into

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better customer service to such persons. 4. Collective moral compensation fixated proportionally and reasonably to the damage, in the value of R\$ 50,000.00 (fifty thousand *reais*). 5. It is imperative to recognize that the special appeal is inadmissible under section “c”, if the appellant does not demonstrate the circumstances that identify the confronted cases. 6. Special appeal not granted (BRAZIL, Superior Court of Justice. Recurso Especial n. 1.221.756/RJ [Special Appeal n. 1.221.756/RJ] Itaú Unibanco S/A Bank v. Public Attorney’s Office of Rio de Janeiro State. Rapporteur: Justice Massami Uyeda. Brasilia, 2 February 2012).

<sup>16</sup> Precedent extracted from the Newsletter # 526, from September 25th, 2006: PROCEDURAL CIVIL LAW AND ENVIRONMENTAL LAW. CUMULATION OF THE OBLIGATIONS OF ENVIRONMENTAL RECONSTITUTION AND COMPENSATION FOR COLLECTIVE MORAL DAMAGE. In the hypothesis of public civil action filed due to environmental damage, it is possible that the condemnatory sentence cumulatively imposes to the responsible one the obligations of reconstituting the degraded environment and to support pecuniary penalty to compensate for the collective moral damage. In our legal system, the principle of full reparation of environmental damage prevails, which, by determining the liability of the agent for all the effects derived from the harmful conduct, allows the accumulation of obligations of doing, not doing, and compensation. Besides, one should note that, even though article 3rd, Law 7.347/1985 states that “both pecuniary condemnation or the compliance to obligations of doing or not doing can be pursued in public civil action”, it is certain that the conjunction “or” – stated in the cited norm, as well as in the articles 4th, VII, and 14, § 1st, Law 6,938/1981 – operates as an additive value, and not as an excluding alternative. Firstly, because forbidding such accumulation would undesirably limit the Public Civil Action – an important instrument for persecuting civil liability derived from environmental damage – hindering, for example, condemnations due to collective moral damage. Secondly, because it is up to the magistrate, before the norms of Environmental Law – which bear an intergenerational ethical content, linked to present and future generations – to consider the command of article 5, LINDB, according to which, by enforcing the law, one must attend “the social ends towards which it is directed and the demands of common good”, whose corollary is the ascertainment that, in case of doubt of any other technical-textual anomaly, the environmental norm demands interpretation and integration according to the hermeneutical principle *in dubio pro natura*, since all legislation pertaining to vulnerable subjects and diffuse and collective rights should always be understood in the utmost fruitful manner, to enable, from the perspective of practical results, the jurisdictional assistance and the norm’s *ratio essendi*. Lastly, the systematic interpretation of environmental norms and principles leads to the original conclusion that, as a rule, there is nothing to say about compensation. However, the technical possibility, in the future, of *in natura* restoring does not always reveal itself sufficient to entirely revert or reconstitute, within the scope of civil liability, the various dimensions of environmental damage. Hence, it does not exhaust the duties associated to the principles of the polluter-payer and full reparation of damage. One should also note that environmental damage is multi-faced (ethically, temporally, ecologically speaking, as well as patrimony-wise, sensible to the diversity of the vast universe of victims, which range from the isolated individual to collectivity, future generations, and ecological processes). In conclusion, one is wrong, both judicially and methodologically, when one mixes priority of the degraded goods’ priority of *in natura* recuperation with the impossibility of simultaneous accumulation of the duties of natural reinstating (obligation of doing), environmental compensation and pecuniary compensation (obligation of giving), and the absence of utilizing and performing new violations (obligation of not doing) (BRAZIL, Superior Court of Justice, Recurso Especial n. 1.328.753/MG [Special Appeal n. 1.328.753/ MG]. Public Attorney’s Office of Minas Gerais State v. Augustinho Câmara. Rapporteur: Justice Herman Benjamin. Brasilia, 28 May 2013).

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account the objective responsibility and the necessity of total reparation – article 3, LACP, allows the judge to arbitrate reparation of collective moral damage and reconstitution of environment, without offense to the procedural norms of collective guardianship.

Thereafter, with what rights of children and adolescents are concerned, it was established that not only the Public Attorney's Office would bear legitimacy to file the public civil action, but it would also be possible that the pecuniary reparation was destined to go to the Municipal Fund for the Rights of Children and Adolescents, in the amount of five hundred minimum wages, when underage persons are subject to inhumane and vexatious treatment, sustained during a rebellion within the internment unit.<sup>17</sup>

The STF<sup>18</sup> has had the opportunity of recognizing the existence of collective moral damage, in relation to the outsourcing of a company's core activity, because such fact is adjacent to the freedom to contract (article 5<sup>th</sup>, II, FC), which is not broad. Besides, we note that

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<sup>17</sup> Precedent: ADMINISTRATIVE LAW. PROCEDURAL CIVIL LAW. PUBLIC CIVIL ACTION. REBELLION IN SOCIAL-EDUCATIONAL SERVICE CENTER. EXISTENCE OF DIFUSE OR COLLECTIVE INTERESTS RELATED TO TEENAGERS. PUBLIC ATTORNEY'S OFFICE. LEGITIMACY. ARTICLE 201, ECA. STATE'S CIVIL LIABILITY. DIFFUSE MORAL DAMAGE. REVISION ON THE COMPENSATION QUANTUM. IMPOSSIBILITY. UTTERANCE 7/STJ. EMBARGO OF DECLARATION FILED IN THE ORIGIN WITH DELAYING PURPOSES. PENALTY OF ARTICLE 538, SOLE PARAGRAPH, CPC. APPROPRIATE. DECISION MAINTAINED. 1. The original court, due to the elements of the case files, has sentenced the appellant to pay compensation for diffuse moral damage to the Municipal Fund for Children's and Adolescent's Rights, for inhumane and vexatious treatment of the inmates during rebellions occurred in the facility. The judgement cannot be reviewed, since it would require re-examining the facts and proofs of the case, which is forbidden by the Courts Utterance # 7. 2. The Public Attorney's Office bears legitimacy to "promote civil investigation and civil public action aimed towards the protection of individual, diffuse and collective rights related to childhood and adolescence", according to article 201, ECA. 3. The revision of the compensation quantity is also forbidden by the Courts Utterance # 7, being only admitted if the arbitrated value is derisory or abusive, which is not the case. 4. By confirming the delaying intention of the filed embargo of declaration, in order to discuss an already-discussed subject by the original instances, the penalty of article 538, CPC, should be maintained. Regimental Appeal not granted. (BRAZIL, Superior Court of Justice. Agravo Regimental no Recurso Especial n. 1.368.768/SP [Regimental Appeal on the Special Appeal n. 1.368.769/SP] Fundação Centro de Atendimento Socioeducativo do Adolescente v. Public Attorney's Office of São Paulo State. Rapporteur: Justice Humberto Martins. Brasília, 6 August 2013.

<sup>18</sup> Precedent: EMBARGO OF DECLARATION ON REGIMENTAL APPEAL ON EXTRAORDINARY APPEAL. PUBLIC CIVIL ACTION. ILLICIT OUTSOURCING. OMISSION. DISCUSSION OVER FREEDOM OF OUTSOURCING. FIXATION OF PARAMETERS TO IDENTIFYING WHAT REPRESENTES THE COMPANY'S MAIN ACTIVITY. POSSIBILITY. GRANTING OF THE EMBARGO SO THAT EXTRAORDINARY APPEAL IS EXAMINED. 1. The freedom to contract, stated in article 5, II, FC, is compatible with outsourcing services to achieving the company's main exercise. 2. The *thema decidendum, in casu*, is restricted to delineating the hypothesis of outsourcing labor costs for what one understands as main activity, a subject of constitutional implications, under the optics of freedom to contract, according to article 5, II, FC. It is therefore obvious that the general repercussion of such theme, given the existence of thousands of labor outsourcing contracts of which there are doubts related to legality, which could lead to expressive penalties for collective moral damages, similar to those verified in this case. 3. Embargo of declaration granted, so that the Extraordinary Appeal is examined and the theme can be submitted to this Courts Plenum, for purposes of assessing the existence of General Repercussion (BRAZIL, Supreme Federal Court. Embargos de Declaração no Agravo Regimental no Recurso Extraordinário n. 713.211/MG [Embargo of Declaration on Regimental Appeal on Extraordinary Appeal n. 713.211/MG]. Celulose Nipo Brasileira S/A v. Public Attorney's Office of Labor. Rapporteur: Justice Luiz Fux. Brasília, 14 April 2014.



such theme is usually subject to general repercussion, which cements in which hypothesis the use of this technique - regarding the development of the core activity - is licit, under penalty of numerous sentencings based on collective moral damage.

We therefore realize that, due to this jurisprudential evolution, the STJ revealed itself contrary to the possibility of arbitrating reparation to collective moral damage, because it was linked to the necessity of psychological suffering. As time went by, we verified that the protection of collective dignity, and even the collective guardianship, would be emptied without the recognition of an axiological layer of the Brazilian society, translated through *sensu lato* collective rights, and the penalty to the individual that violates it, which then cements the recognition of collective moral damage, carried out by the Superior Courts.

Finally, in relation to the *quantity* to be arbitrated by the judge for repairing collective moral damage, one should promptly take into account – given the content of the article 944, Civil Code – both the damage’s extension and, for example, the reversibility or lack thereof of the situation that led to the violation of collective dignity. Besides, the violated precept is fundamental to determining the degree of the conduct’s offense to the values of society, according to the teachings of Xisto Tiago de Medeiros Neto (2012, p. 201):

Synthetically speaking, the violation to collective interest, in our judicial system, prompts a reaction and a response equivalent to an adequate reparation, translated essentially by a pecuniary penalty, to be arbitrated by the judge – oriented by the penal and pedagogical function of such liability – which will have specific destination in favor of collectivity.

In addition to that, with how the functions of collective moral damage are concerned, most notably the penal and preventive ones, we highlight that such notions imply the necessity of recognizing that this type of damage implies the penalization of the aggressor, by persuading him/her to not violate collectivity. Also, the social- educational aspect is contemplated, when there is the imposition of such reparation to the offender and the public demonstration that such conducts are not socially accepted (FREIRE, 2009, p. 74). With that in mind, in an analogy to the Utterance # 455 of the 5th Journey of Civil Law,<sup>19</sup> the circumstances of the specific case must be considered, in order to simultaneously respect the penal, preventive, and educational nature of such damage’s reparation.

We agree with the idea that collective moral damage can be promptly arbitrated by the

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<sup>19</sup> Utterance # 455: “Article 944: even though the recognition of moral damage, in numerous cases, does not depend on proof (*in re ipsa*), for its adequate quantification, the judge must investigate, every time it is regarded necessary, the circumstances of the specific case, including through investigation of testimonies by the parties and the witnesses, collected in hearings.”

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judge, without any plea in that regard,<sup>20</sup> because even though the jurisdiction is inert, such type of damage does not depend on proof, hence the arbitration of reparation shall be verified by the judge, in the scope of collective actions, and destined to repair the offense caused to the collectivity.

To finalize, it is therefore up to the magistrate to destine the resources obtained from such compensations to the corresponding funds of collective rights, so that there are preventive measures to combat the violation of collective dignity and to foment these social values within all of the national political community, with the goal of instilling in it the notion of belonging.

## 5. CONCLUSION

One cannot deny the fact that, since human beings - ontologically worthy - lives in society, said society is endowed with an axiological layer which must be defended by all, because we transported to the Brazilian constitutional identity the most important values of the national legal system, such as *sensu lato* collective rights. This way, collective dignity – understood as an essential value, to be protected by all of the community, which comprehends all desires captured by the judicial consciousness – cannot be violated, under the penalty of reparation of the collective moral damage.

The collective moral damage therefore arises from the necessity of penalizing (notably, by pecuniary means) individuals who offend collective dignity and, consequently, collective rights, hence the importance of Superior Courts in such arbitration, since the process is no longer seen under a sole individualistic perspective. The collective guardianship represents a significant portion of lawsuits, since such rights as administrative improbity, consumer rights, and environmental protection involve the human person as its recipient.

In fact, even though the STJ had initially understood that moral damage is only that which can inflict pain or suffering, the 2nd and 3rd classes have recurrently manifested the possibility of recognizing this type of damage in the scopes of environmental, consumer and underage law. This jurisprudential progress has been made by the highest Brazilian Court, in the case of illicit outsourcing.

With what the pecuniary sanction is concerned, it shall be destined to one of the funds related to *sensu lato* collective rights, by verifying the extension of the damage and the

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<sup>20</sup> In the contrary sense, the Superior Court of Justice has ruled that it is not possible to fixate collective moral damage without a plea of any parties. See: BRAZIL, Superior Court of Justice. **Reclamação n. 13.200**. [Complaint n. 13200] Bradesco S/A Bank v. Segunda Turma Julgadora Mista do Estado de Goiás. Rapporteur: Justice Luís Felipe Salomão. Brasília. 8 October 2014.



circumstances of the specific case, so that, through such penalty, a preventive and educational function is contemplated. It also can be arbitrated by the judge, regardless of plea, because it is a type of presumed damage.

We conclude that the accomplishment of collective dignity, obligatorily, passes through the establishment of collective moral damage, since the Judiciary Branch, in the current context of the Constitutional State, necessitates reinforcement, in the national community, of the notion of belonging, as well as the restraint of any offensive act to *sensu lato* collective rights.

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