Social Risks, Social Damages and the Courts: Theoretical Causes and Social Effects of a Defective Judicial Opinion

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Introduction

“Find out the case of this effect;
Or rather say, the cause of this defect,
For this effective defective comes by cause”

For at least 40 years, the Brazilian High Courts insist on keeping to the understanding that violent criminal acts perpetrated inside the public transportation system do not represent a risk for the businesses activities, meaning, they do not define this situation as “defective service”. This article aims to demonstrate that this

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1 This article is a summary of the ideas explored in my PhD thesis, entitled “Solidariedade e Responsabilidade: O tratamento jurídico dos efeitos da criminalidade violenta no transporte público de pessoas no Brasil” (Saraiva: São Paulo, 2009).
3 The Federal Supreme Court and is the guardian of the Constitution. Among other duties, it has exclusive jurisdiction to: (i) declare federal or state laws unconstitutional; (ii) order extradition requests from foreign States; and (iii) rule over cases decided in sole instance courts, where the challenged decision may violate the Constitution. Before the Federal Constitution of 1988 the Federal Supreme court was responsible for upholding federal legislation and treaties too, but now this is the duty of the Superior Court of Justice.
4 The Brazilian Consumer Protection Code in its article 14th establishes that a service supplier will be responsible, regardless the existence of negligence, for providing the necessary reparations for the damage caused to consumers due to any defects pertaining to service provision.
predominant judicial understanding is caused by a “defective” interpretation of the law by the Courts.\(^5\)

When I define the High Courts orientation as “defective,” I intend to highlight that it suffers from two problems: first, it does not consider the social context in which the normative text is inserted and, second, it does not take into consideration legal rules and doctrinal concepts that, more than simple authorize, impose a decisive orientation.

The crimes against passengers inside the public transportation, leading to severe harm to the individual and their goods, does not exactly represent something new to a significant part of the population living in big cities in Brazil\(^6\); indeed, they are the culmination of a myriad of problems affecting public transport in Brazil. In this sense, the demonstrations that occurred in June of 2013 in many Brazilian cities, which started as protests against the elevation of public transportation fares, indicate that old and endless problems had reached an unbearable point.\(^7\) Therefore, this article, when investigating the connection between the victimization through violent criminality and the public transportation system in Brazil, intends to contribute to the

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According to art. 14, § 1 the service is deemed defective when it does not provide the safety level expected by the consumer, taking into consideration relevant circumstances such as the way it was supplied, the results and risks reasonably expected from it and the date when it was provided.

\(^5\) According to articles 19 and 20 of the Brazilian Consumer Protection Code it is considered defective the product or the service that has a vice making it inadequate for their purpose.


\(^7\) It is important to recall that the first demonstrations had as an aim to decrease the buses fees. In São Paulo, for example, the increase from R$3,00 to R$3,20, occurred on Sunday, 02 of July of 2013, generated the demonstration on Thursday (06 of July of 2013) whose violent repercussion due to the use of excessive Police force of São Paulo ended up motivating new demonstrations. (noticias.bol.uol.com.br/ultimas-noticias/brasil/2013/06/06/transito-acidente-entre-caminhao-e-moto-bloqueia-duas-faiXas-do-aviuoto-grande-sao-paulo.htm). From this moment on, the demands presented in the demonstrations were no longer about the buses fees and start to be about the improper spending of public money and the quality of public services.
comprehension of the strategies whereby the High Courts’ understanding amplifies the vulnerability of a relevant segment of the Brazilian population, and perpetuates the unfair distribution of social risks and damages.

For that, the research identifies, first, the theoretical discourse used in the construction of the jurisprudential orientation of both the Federal Supreme Court and the Superior Court of Justice in order to promote the idea of the impossibility of charging the company for criminal acts occurred inside the vehicle and, at a later moment, seeks to demonstrate its technical fragility.

It is been a while since a relevant sector of the national dogmatic juridical private group defended the value of the social solidarity reflected in the norms included in the Private Law. There are those who defend that this value appears in the principle of social function of the contract, when it imposes the extension of the contractual effects over the juridical sphere of other individuals, doctrinal opinion which slowly is being disseminated at some decisions made by the high courts.

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9 In the statement n. 21 approved in the Civil Law Journey promoted by the Judicial
In the area of torts, the association between the value of the social solidarity and the institute of the strict liability is not new, but it is unquestionable why this connection was left unexplored for a long period of time, only recovered after the 1988 Federal Constitution and, more recently, with the edition of the 2002 Civil Code. For this reason, the article will investigate if, besides this alleged extension of contractual effects towards other individuals, the social solidarity considerations would be also capable of producing the extension of the carrier liability in regard of third part’s acts that cause damage to the passengers.

In the end, the intention would be to demonstrate that:

Studies Centre of the Council of the Federal Court in the period from 11 to 13 September 2002, under the scientific coordination of the Justice Ruy Rosado from the Superior Court of Justice, it is included the following comment: "the social function of the contract provided in art. 421 of the new Civil Code, constitutes of general clause to impose the review of the principle of relativity of the contract in relation to third parties, involving the external credit protection ", For Luis Renato Ferreira da Silva, one of the members of that committee, the incidence of the principle of the social function of the contract, expressed in the art. 421 of the Civil Code, can produce the extension to third parties of the effects of a contract (SILVA, Luis Renato Ferreira da. A função social do contrato no novo código civil e sua conexão com a solidariedade social. SARLET, Ingo (Org.). O novo Código Civil e a Constituição. Porto Alegre: Livraria do Advogado, 2003. pp. 127-150). According to Ferreira da Silva it is possible to find in the Superior Court of Justice some cases assuming this perspective, e.g, RESP nº. 97590/RS e RESP nº. 187.940/SP (Idem, pp. 142-143).

In Brazil, the precursor of this perspective was Alvino Lima. In the opening lesson made in the Law Faculty in São Paulo, in march of 1939, spoke about the need of change in the area of the extra-contractual responsibility, justifying: "[...] the big companies creating for the worker a scaring source of rights violation and, to the bosses, a source of money, generates the idea that the risk, as an element in the economic organization, should be supported for its creator". It is the extension of this idea which allows “the acceptance of the strict liability in the airplanes, mines or iron roads accidents, as well as in other special cases” (Da influência, no Direito Civil, do movimento socializador do Direito. Revista da Faculdade de Direito de São Paulo, v. XXXV, 1939, pp. 199-213). Tais ideias já constavam de sua obra Da Culpa ao Risco. São Paulo: Revista dos Tribunais, 1938.

it is still possible to state that according to the Brazilian Law the rules of strict liability were designated to realize the value\textsuperscript{12} of social solidarity and the guideline\textsuperscript{13} of sociability\textsuperscript{14};

(b) this assumption allows, through the use of dogmatically consistent arguments, to justify strict liability for companies of urban public transportation in case of harm caused to the passengers due to urban violence, as a hypothesis of “defective service”;

(c) wrongly, this is not the dominant orientation at Brazilian high Courts. And it is wrong because these decisions are technically defective and social unjustifiable.

1. The (Unbearable) Weight of the Social Facts

Starting at the end of the 1970’s and beginning of the 1980’s in Brazil, the “violent urban criminality”\textsuperscript{15} finds its peak\textsuperscript{16}, and the users of public transports its preferred victim. From that period on\textsuperscript{17}, passengers, besides being obliged to deal with

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\textsuperscript{12} It is adopted the notion of value as an epistemological category, using it in the sense which Miguel Reale also uses when proposes the notion of “\textit{a priori} cultural” (REALE, Miguel. Cinco temas do culturalismo. São Paulo: Saraiva, 2000, pp. 37-45).

\textsuperscript{13} For guideline it is understood as a deontological category which focus in the hermeneutic conduct. Using the classification developed by Humberto Ávila, it is possible to speak about over-principle with interpretative function which is designated “to understand the norms constructed from the expressive normative texts, reducing or amplifying its sense” (ÁVILA, Humberto. Teoria dos princípios – da definição à aplicação dos princípios jurídicos. 4. ed. São Paulo: Malheiros, 2004, p. 79).

\textsuperscript{14} Miguel Reale, in interview conceded in June of 1998 to the Professor Judith-Martins Costa, tells that the Orlando Gomes project, inserted as a subsidy in the confection of the text of the new Code, “[…] reflected in the anti-individualist spirit, in the sociality guideline which ended up to impregnate the new work.” MARTINS-COSTA, Judith; BRANCO, Gerson Luiz Carlos. Diretrizes teóricas do novo Código Civil brasileiro. São Paulo: Saraiva, 2002, p. 92.

\textsuperscript{15} In the expression, “violent urban criminality”, the reference to violence as a qualifying for this type of crime seems for us that should be comprehended inside of the sense given to this word-violence- by the World Health Organization as “the intentional use of physical force or power, real or potential, against the self, other people, a group or a community, which results or has high chance to result in lesion, death, psychological damage, lack of development or privation”. ORGANIZAÇÃO MUNDIAL DA SAÚDE. Relatório mundial sobre violência e saúde. Brasília, 2002. The same idea is used by Yves Michaud: “There is violence when, in a situation of interaction, one or more actors act in a direct or indirect, massive or sparse, way, causing harm to one or more people at different levels, in regard to its physical or moral integrity, in its goods, or in its symbolical and cultural participations.” MICHAUD, Yves. A violência. São Paulo: Ática, 2001, pp. 10-11.


the structural flaws of the system start to be exposed to another problem: the increase of the “violent criminality.”

To this condition, Teresa Caldeira affirms that “people from the working classes live the violence in their day-by-day, not only in their neighborhood”, but also “at other spaces where the working classes actually spend their days, as in their working places or in the public transport.” For certain users, this, which can be classified as urban criminality, especially theft, happens with an incredible recurrence at the public transportation vehicles, as being defined as “usual.”

The urban criminality’s increase produced two connected situations: the shift of part of the security service to the hands of the private sector, under the argument that it is more effective than the security offered by the State, and the medium and high classes choosing to live, work and consume in gated condominiums, as well as in guarded houses and protected commercial establishments.

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21 Cesar Caldeira, using the data from the State Secretary of Public Security of Rio de Janeiro about the theft occurred in buses in 1997, finds in this “usual facts” an unequal, and usual for Brazilians standards, pattern of risk distribution: This criminal practices weak especially the intercity and suburban transportation users, who are low-waged workers, with no other transportation alternative. Using the year of 1997 as a reference, it is concluded that the South Zone in the city of Rio more guarded due to its importance as a touristic area and for hosting wealthier dwellers- is less affected by these crimes. CALDEIRA, César. Assaltos a passageiros de ônibus no Rio de Janeiro: um estudo sócio-jurídico. Revista de Informação Legislativa, Brasília, ano 38, n. 149., jan./mar. 2001, p. 162.
The first of these situations can be labeled as “security privatization”, meaning, the increase of private security services as well as patrimonial and personal protection by private companies. This phenomenon, besides implying an increase of the social costs, also puts at stake the role of the State as the institution responsible for exercising the monopoly of the legitimate use of physical force.

The other phenomenon is the appearance of a new pattern of spatial segregation, the enclosure of the high and medium classes in what can be called “fortified enclaves”, meaning, “privatized spaces, closed and monitored, designated to residency, leisure, work and consume”. These areas, which may include malls, shopping centers and residential condominiums, play a role for those who are afraid from social heterogeneity of the older urban neighborhoods and prefer to leave them for the poor or the homeless.

Both situations produce a paradox and perverse effect over the poorer classes of the population, since, if at the same time they are indicated as violent agents, they are also the ones who most suffer while victims of this violence. And this is the justification for thinking of the urban violence issue in face of the materialization of the “right to social security.”

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24 It is true that according to Max Weber this monopoly does not mean that only the government may use physical force, but that the state is the only source of legitimacy for all physical coercion or adjudication of coercion. For example, the law might permit individuals to use force in defense of self or property, but this right derives from the state’s authority (WEBER, Max. *Economia y sociedad: esbozo de sociología comprensiva*. Buenos Aires: Fondo de Cultura Económica, 1992, p. 1056). But the problem is then how to control such a quantity of places in which violence is almost invisible to the public sphere: in a City of Walls how control the violence perpetrated “within the walls”.
25 According to Alba Zaluar “in some cities, crime and violence are devices to think about otherness” (ZALUAR, Alba. Para não dizer que não falei de samba: os enigmas da violência no Brasil. Lília Moritz Schwarz (Org.). *História da Vida Privada no Brasil*, p. 248).
To comprehend the meaning of this right one must understand that protection from social harms must assume the differences in risk expositions in regard of certain groups of people, i.e,
The increased victimization of the poorer classes in regard to violent urban
criminality, as everything points out, happens because there is a shift from this
criminality to the places where concentrated vigilance and protection are missing: the
public spaces.

And it is exactly at this arena of insecurity that the public transportation is
located. Besides all the structural problems (lateness, discomfort, etc.), the public
transportation’s user is obliged to face one more problem: the closed environment of
the bus turns into a trap which exacerbates their vulnerability, therefore amplifying
the probability of suffering from this violent urban criminality28.

Assuming that this is the panorama - even if simply presented - it is worth
asking: Isn’t the Law the way to materialize values in citizens which are components
of the social experience29? And, if that is the case, which role does social solidarity
(as a value) play in the described social context? Why, apparently, does this value (of
social solidarity) seem incapable of altering the way Courts comprehend what are
“social risks” and how they spread differently between social groups. And, finally,
which are, in the relation between the user and the transporter the “inherent risks” of
the activity played by the first.

For that purpose two decisions will be reviewed, one made by the Federal
Supreme Court and another one made by the Justice Supreme Court, both from a
previous period30 of the edition of the 2002 Civil Code, related to the liability of the
people’s transportation in face of the occurrence of events classified as violent urban
criminality acts (which will lead to the analysis of the concept vis major/force


p. 175.
30 The decisions were made between 1980 and 2005 and they deal with facts occurred
in the 70's and 90's respectively.
majeure and its applicability as a break on contractual liability from the perspective of acts done by “third parties”) 31.

2. The (Dis)proportion of the Decisions

The first cases to ask the Federal Supreme Court to take a position regarding the liability of the carrier of persons in the face of criminal violent acts suffered by the passengers are dated from the 70’s; these cases, which initially were about episodes occurred outside public vehicles 32, slowly start to be about events that happened inside them 33.

The fundamental milestone in the jurisprudential line which defends that the criminal act occurred in the transport is a hypothesis regarding an act of God or/and event of force majeure and, for this reason, do not hold the carrier responsible in case of occurrence of these events—expressed in the Extraordinary Appeal 88407/RJ 34. Because of this, it is worth to take into account the case and the discussions it raised in the Supreme Court.

31 It is observed that in relation to the concepts of “caso fortuito” and “força maior”, there was no alteration in regard of the legislative conformation-keeping the article 393, unique paragraph, from the CC/02 to both concepts the same text we found in the article 1058, unique paragraph, from the CC/16-. In regard of the rules pertinent to the transporter responsibility, there is a relevant alteration between the text of the article 17, from the Decree-Law 2681/12 and the current in the article 734 from the CC/02. About the role of the excluded people and the implicit values in its use, check: HART, Herbert. L. Legal responsibility and excuses. In: Punishment and responsibility: essays in the philosophy of law. Oxford: Clarendon Press, 1968, pp. 33-34.

32 In 1973 the Federal Supreme Court was called to speak up about the following fact: after a traffic conflict between a bus driver and the other’s vehicle driver, the second one pointed a gun, and trying to shoot the bus driver, shot another passenger. From this, a liability sue was made against the transportation company. (RE 73294/GB – Guanabara. Segunda Turma. Relator Min. Xavier de Albuquerque. Judged in 03.12.1973). In 1986 the same court is called to speak up about the existence of the carrier liability in face of harm suffered by a passenger hit by a stone thrown against the wagon he was travelling in. (RE 109068/RJ. Segunda Turma. Relator Min. Aldir Passarinho. Julgado em 09.05.1986)

33 In 1986 the Federal Supreme Court judges the Extraordinary Appeal proposed at a liability sue in which the wife and the daughters of the victim, killed at a theft in the interior of a public transportation vehicle, intend to blame the transporter company. (RE 109223/RJ. Segunda Turma. Relator Min. Djaci Falcão. Julgado em 30.06.1986).

This case was about the compensation lawsuit presented by a widow and the sons of a passenger who was killed due to a robbery occurred in a bus in which he was travelling in. In 04 of September of 1974, the bus was at President Kennedy Avenue, in Rio de Janeiro, a vehicle which belonged to the Taxi Rei Ltda Company; in its interior, as a passenger, there was the policeman José Vieira dos Santos. In the corner of the ‘Vila de São José’ road, 4 men entered in the vehicle and, announcing it was a robbery, took out guns, when the policemen, with two guns and one pistol, reacted killing two of the thieves. However, he was also wounded, dying afterwards.

The District Court awarded damages for the plaintiffs. The defendant company appealed to the State Court, and the appeal was accepted on the grounds that there had been “[…] an intervenient occurrence which turned impossible the fulfillment of the obligation of transporting the passenger safely and sound to his destine - the robbery in the bus was, in this situation, a vis major in the sense that was a fact the transporter did not own means to avoid”. Moreover, it was raised that it was “impossible to impede the courageous, but equally sudden reaction of the victim, fact which also cannot be addressed as the transporter’s fault”.  

Finally, the State Court added that it was not able to take “the argument in this place, that the frequency of the thefts makes them predictable because “they are case of fortune and surprise, labeled as unpredictable”, unpredictable due to general fear and the abstract possibility of occurrence. In the decision it made a reference to the Aguiar Dias’ doctrine supporting that a homicide practiced by a passenger against another one or a person who is outside “can not but lead to exclusion of liability, for its unpredictability and irresistibility of interference that represents in the transporter activity”. The decision’s summary of the State Court of Rio de Janeiro was worded as follows:

“Civil liability of the transporter. In the so called 'obigation de résultat' the cause exonerates the civil liability of the obliged since it has been acted, inevitably or irresistibly, fact which prevents the fulfillment of the safety

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35 Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority
36 Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority
duty, which happens when, at a robbery during the transport, the victim seeks to react and end up mortally wounded.”

In contrast, the attorney-general’s opinion was in favor of the widow and the victim’s children. To justify its opinion, it quoted the Arnoldo Medeiros da Fonseca’s doctrine supporting that the occurrence was an act of God and force majeure could only be evaluated “case-to-case”, once there were no facts which could, first, be always considered always included in these categories; everything depending on the circumstances surrounding the occurrence of the event. Consequently, the opinion would reach the conclusion that the frequency with which these crimes happen would add a different element to the case. And this would highlight that the robbery “could no longer be labeled as uncommon to the activities, since it became routine in the passengers’ transport, in the Baixada Fluminense. The theft occurrence is public and noticeable at the public transportation in this area.”

Finally, it would hold inadequate the qualification of the victim’s act as the cause of damage, blaming only the victim for the harm, since “even if the victim’s fault is severe, it cannot exonerate the transporter’s fault, even if it is not a grave one, as it does not compensate the victim’s responsibility.”

When examining the issue in the Federal Supreme Court, Judge Thompson Flores would affirm that the reason would help the authors of the compensation lawsuit. And would defend the reestablishment of the District Court's decision, as “being a fact which already was incorporated to the life’s routine of whom live in that region, the robberies occurrence cannot be faced as an unpredictable fact, in this sense it is not correct qualify them as an act of God.”

To confirm the argument, Judge Thompson Flores would refer to the report by the São João de Meriti Police station, which stated that in that city crime was lower.
than in the nearby city, Duque de Caxias, where the crime occurred. And, when analyzing the qualification presented by the defendant which blamed the victim when trying to react to the robbery, affirms: “about the victim’s interference, already in this act it is characterized the non-fulfillment of the safety warranty (garantia de incolumidade), since, not only one passenger, but other people were in risk of being shot by the criminals, which indicates the lack of precaution of the defendant in order to avoid the crime”41. He explains the argument like this:

“[…] It is not the harmful result that would characterize the transporter’s non-compliance with ensuring the physical safety to the passenger, but the simple creation of a concrete possibility of its verification. In the case, the result only determines the incidence of a second obligation, in which concerns the reparation of the harms. If the passenger was submitted to a concrete risk of injury and this in end does not happen, there is no way to deny the non-compliance with the warranty of physical safety (obrigação de garantia de incolumidade), however, the compensation is not adequate for this case, since there was no damaged.”42.

Summarizing: while the State Court assumed that the transporter’s safety obligation should be based on the result, whose fulfillment was not possible due to the robbery, perceived as an unavoidable and unpredictable act, Judge Thompson Flores thought it was a safety warranty (obrigação de garantia). In this case, the act of third party – the robber - is not a fact that exonerates the carrier for fulfilling the obligation, but is its cause, as an insurance. This was an obligation that would force transporter to incorporate the transportation risks. In this last perspective, it is more interesting to define if the event is predictable, meaning, if is possible to reduce the risk, to define whether is unavoidable, because the point is to find out the possibility (or not) to internalize this as an inherent risk of the activity (to include it as a cost). The fact that an event is of common occurrence means that the performance of the activity turns this occurrence in a likely phenomenon to happen - a risk - even if its effects are unavoidable.

When he affirmed that the case was related to a third party, generating only the right of recourse to the company against him or her who caused the damage (in the

terms of the article 10, from the Decree-Law 2681/12 interpreted in the sense that have been given by the Súmula 187/STF\(^{43}\) Judge Thompson Flores also supported his judgment in the Aguiar Dias’ opinion:

“(...)”Any third party act, since it is not strange to the business activity, meaning, does not represent risk involved in the safety concern, it is the transporter’s liability, creating, however, the recourse right in favor of the transporter without fault in the disaster. \(^{44}\)

The point was, then to define when a third party’s factor is or is not strange to the business activity of the carrier. Noticing the issue, Judge Thompson Flores argued that it was not a case of act of God, since it cannot be considered

“(...)”strange to the activity of the company which is willing to explore the transport of people in the referred area and, whose risks, against itself, in its revenues and, noticeable in the passengers’ safety, were predictable and, therefore, if they were not possible of avoidance, at least the damage could probably be mitigated. \(^{45}\)

Although he mentions “revenues”, what would allow appealing to the application of a criteria based in the idea of correspondence between expectance of risk and gains, the Judge preferred to adopt an approach based in the idea of the transporter’s fault (negligence) in face of the robbery risks which were “known”, being of “high noticeability” \(^{46}\).

And he refused the allegation of fault exclusively by the victim, based in René Rodière’s lesson who, when analyzing the procedures of the French court in regard of sabotage acts at public transportation, concludes that the transportation company “is responsible in face of acts done without the company being able to prove that its agents have not participated in the act\(^{47}\).”

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\(^{43}\) It was enacted in 1963 and consolidates the following judicial understanding of the Federal Supreme Court: “The contractual liability of the carrier, by the accident with the passenger is not elided by a third party's fault, against which the carrier has regressive action.”

\(^{44}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority

\(^{45}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority

\(^{46}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority

\(^{47}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority
In opposition, there was Judge Décio Miranda’s vote. To support the opinion that the transportation company should not be responsible for these facts, he affirms that “the obligations doctrine lies, basically, in the moral rule, meaning, it is necessary a minimum of affluence to the damage, so that somebody can be convicted”\(^{48}\). Using rules set forth in the legislation on railways (articles 17 and 19 of the Decree Law 2681/12) the Judge affirms that, in regard of the presumed liability, the law requires always “some fact that the iron road, or the carrier, has some possibility of intervention”. Finally, he concludes that there is

“(...) always a connection, for thinnest that it may be, between the damage and the interference possibility, to avoid it, from its supposed cause. It is there that, precisely, it exist the moral rule of the obligation. The requisite of the fault may be reduced, can be alleviated, can be decreased to a minimum, but this minimum needs to correspond to the reservation of the ethical principle that anybody should respond for a damage that it did not commit. \(^{49}\).

It is perceived in this argument an understanding which results in the combination between the fault and the casual connection, meaning, the judge defends “not being moral” to condemn someone to repair a damage that he has not caused. Underneath this opinion is a vision of the tort system as a reflection of the idea of moral responsibility, and the assumption of moral responsibility as a personal responsibility: in this sense the liability can only be attributed to an individual and only if he acted in an improper way (fault) and if this action originated damages (casual connection).

Actually, for Judge Décio Miranda, it was not possible to attribute the damage to the transporter, since it does not violate any duty, due to the fact that “a robbery against the bus, practiced by the common criminal is, noticeably, case of force majeure”. The transporter “did not have a way to react against the fact”\(^{50}\). It was taken as arguments that the cost of safety measures - according to some opinions - should be

\(^{48}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority

\(^{49}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority

\(^{50}\) Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Vote by the majority.
adopted by the transporter. In Judge Décio Miranda’s opinion, these measures constitute:

“(…) Providences which the businessmen cannot freely adopt because it is a public service provided by a private company under concession. The security clauses, of more service perfection, will be, surely, connected to the fee consideration. Above all this, who sovereignty ordinates is the conceiving power. If this one does not order, among the concession expenses, the guard maintenance, as it is predicted the driver and the bus collector, is not possible to demand that the transporter does it. Probably, the transporter would receive a fine and be penalized if adopted providences non-predicted in the clauses and rules of the concession. 51.

To this argument, Judge Thompson Flores responded by highlighting that the increase of the safety expenses, even though not predicted in the concession, is a business risk which the concessionaire assumes, not being able to claim the inexistence of the contractual provision to this expense with the argument of liability exclusion.

Another interesting point of Judge Décio’s vote regards the comment over Súmula 187, intending to justify the focus in the hypotheses for which they were created, therefore comprehending the situations in which, together, the direct author of the damage can be identified and there is a high chance of it being also the responsible:

“It will be said that this Court’s súmula 187 predicts the liability of the transporter for third party’s fault. But there, it took into account the predictable solvability of the third party, and it expressly predicted also the right to recourse. The prediction of right to recourse is the condition which keeps the moral rule, when admits the direct and presumed liability. All of this comes to show that what mainly rules the problem is this moral principle: somebody responds, because the other, who is the real cause of the damage, follows that response.” 52

Judge Décio Miranda’s manifestation, when deviating from the incidence of the súmula 187 of the Federal Supreme Court and affirming the inexistence of the similarity between the present case and the precedent invocated by the Judge

Thompson Flores\textsuperscript{53}, made this to manifest himself again. And he will clarify that from the precedent he had used what he found relevant was “the repetition of the facts which, for being known, do not need proves. Here is the repetition of robberies in Caxias; in the paradigm, the discussion and the competition among the drivers”\textsuperscript{54}.

For Judge Thompson Flores, the reason for the decision about the precedent was not the worker’s fault (meaning, the liability was not affirmed because the company had badly chosen its worker for the reason that he had already had traffic citations, since such facts are common), but the fact that these discussions are a daily routine which allow one to predict the tragic end of them.

On the other hand, Judge Soares Muñoz defended that he could not consider the robbery as an unpredictable fact, as “in 1974, the year of the occurrence, and especially nowadays, armed robbery cannot be called unpredictable anymore” in face of the “frequency with which they happen in the streets and in the public transportation”\textsuperscript{55}. However, in his vision the case was related to the liability due to fault, because, it could not be possible to demand from companies measures such as the hiring of security agents properly armed, since “the companies did not assume this commitment in the contract of concession celebrated with the Government”\textsuperscript{56}. Moreover, these private security guards would end up generating the “organization and coexistence of several private police forces who would be working in parallel with the Police promoted by the State”, which would consist in the State’s death”\textsuperscript{57}.

The adoption of the premise which assumes that the carrier’s liability is based on fault is even clearer when the Judge affirms that if the company had done something, still these measures would not prevent the fact from happening. Therefore, the company could not be blamed for the occurrence of the damage once

\textsuperscript{53} RE 73294/73, mentioned to footnote 40.
\textsuperscript{54} Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Vote by the majority.
\textsuperscript{55} Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Vote by the majority.
\textsuperscript{56} Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Vote by the majority.
\textsuperscript{57} Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Vote by the majority.
“(...)” The measure, even if it requires a lot of effort, of every bus to own its own police, would not prevent the robberies”, pointing out the case’s circumstances, consisting with the fact that the passenger who reacted was “a policemen who owned, in the occasions, two guns and one pistols, having shot 6 bullets out of these weapons.” 58.

Finally, he would conclude that the robbery was a “necessary and unavoidable fact”, which is the cause of the damage and, with this “taking out from the transport the quality of the cause”59. It is worthwhile to transcribe the text in which this understanding is perfectly explained:

"The gun conflict had as a related cause the robbery fact that, at those circumstances, the transporter could not avoid, and as immediate cause, the resistance that the passenger, afterwards being identified as a police officer, did against the criminals. The transport itself was not the direct and immediate cause that the 1060 article of the Civil Code makes reference, [it], was not the adequate cause of the death of the husband of the appellant60.

Judge Cunha Peixoto defended that the transporter company was not responsible, and to giving some doctrinal base to his opinion he quoted Josserand who stated that “transport accidents are only those caused by transport facts”61. In his opinion the fact can be predictable and does not address responsibility to the hirer “as long as it is unavoidable"62. He concludes by alleging that public safety is a problem of sole responsibility of the State, and only the financial institutes, according to a legal dispositive (Decree-Law 1034/69), would be authorized to use the “private security agents”63.

60 Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Vote by the majority.
63 Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority. Contradictorily the same Judge, in another appeal (Recurso Extraordinário 130764, whilst recognizing that it was up to the State the duty to ensure public safety concluded that from such recognition was not possible to derive the state's liability face the occurrence of a crime. The argument used to justify the lack of state liability was the used to
Judge Moreira Alves, at her preliminary vote, as well as Judge Xavier Albuquerque, also at his preliminary vote, defend the understanding that there was no liability.

In Judge Xavier Albuquerque’s opinion: “It was never intended to hold, both at the common literature, as well as at the French jurisprudence, the transporters responsible, for the crimes practiced against the passengers, on the iron roads”. He would also highlight that, in Brazil, “since the transporter companies are concessionaries of the public service, have remunerated fees for its service, which do not predicted these exceptional events”. It would be “even unfair”, he stated “to transfer to the transporter the insurance for its events of force majeure”.

The arguments - expressed by Judges Xavier Albuquerque and Décio Miranda - about a possible raise of the transport fees in case it was made “a uniform law, demanding a type of protection adequate to dangerous zones, protections which would be unnecessary at other areas” aimed to reinforce the idea that the imposition of safety measures in face of the acts occurred at certain regions of the city would lead to an unfair distribution [in their vision] of the transportation costs, since all the users – even the ones using the public transport in the “safe areas” - would need to pay for it.

However, this argument ends up revealing another injustice, more important than the one previously pointed out: the unjust geographic distribution of the relative risks related to the occurrence of events that can be classified as violent urban criminality.

It cannot be contemplated that the criminality phenomenon is equally distributed, at an identical way in all the city areas; for the opposite, just as the

64 Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority
65 Supremo Tribunal Federal. RE 88407/RJ. Tribunal Pleno. Relator para acórdão Min. Décio Miranda. Julgado em 07.08.80. Voting by the majority
advantages of living in a metropolis are concentrated only with some segments of the population, and the disadvantages, the social risks in face of the violent criminality, although spread, have, doubtless, concentration with some groups, generally, those ones who are less wealthy and therefore live in the suburbs and need to use more the public transportation system.

The orientation which was adopted - both in the occasion of the precedent examined above for the Federal Supreme Court as for the one that establish the predominant understanding nowadays in the Superior Tribunal of Justice which will be analyzed below - ends up consolidating the unfair distribution of risks contained in the violent urban criminality phenomenon.

From the 90’s on, cases involving acts of violent criminality occurred inside the public transportation started to be presented to the Superior Court of Justice. Following the orientation provided by the Federal Supreme Court, the understanding that these violent acts are not the transporter’s responsibility eventually consolidate.

The orientation will be established in the trial of 09 of October of 2002, by the Second Section of the Superior Justice Court, in an appeal originated from the Rio de Janeiro State Court in which was discussed if the plaintiff, Severino de Souza, had or not the right to be compensated for wounds caused by a gun when there was a robbery, committed by two criminals, in the bus he was traveling in owned by Evanil Transportes e Turismo Ltda.66

The lawsuit was partially upheld by the District Court and the company was charged to pay two compensations, one related to the victim’s temporary incapacity (15 days) and another one for moral damages. The defendant company presented then an appeal to the Sate Court of Rio de Janeiro. This Court denied the appeal in accordance with the following argument:

“Civil Appeal. Compensatory lawsuit for damage due to bus transportation. The damage caused to the passenger of the bus due to the

The robber is the transporter’s company responsibility, which cannot plead in its favor third party’s factor, since this does not exonerate the objective fault of the transporter. Recourse dismissed.67

In its recourse to the Superior Court of Justice, the defendant would argue that the decision of the state court had been against the article 1058 of the Civil Code of 1916 (related to act of God and force majeure), as well as the article 14 § 3º, item II, from the Consumer’s Code Defense (which talks about factors that could exclude the service’s provider liability, meaning, in case of third party exclusive interference). It would argue, still, with a lack of synchrony between that understanding and the one established by the Federal Supreme Court. Summarizing, it would defend that it could not “be convicted to pay damages which were not caused by it, since the robbery inside the bus is a force majeure case and therefore it is not in the sphere of company’s liability.”68

The reporter for the Second Session of the Superior Court of Justice was Judge Barros Monteiro who started to delimitate the rights issue when he affirmed that “the most important point of the litigation, whatever it is, the allusive theme to third party’s fault as excluding or not factors of the transporter responsibility”69 had been appreciated by the District Court. Moreover, he indicated the facts taken as uncontroversial ones: the victim was traveling in the defendant’s bus when was a hit by a gunshot and “two individuals were inside the bus and called the robbery out, and in the end a gun shot was made against the plaintiff.”70 Taking the assumption that the robbery is “a total external factor to the transportation itself”71, the Judge decided for the application of the “exclusionary concept of force majeure, in the article 17, according to the paragraph, item I, of the Decree nº 2681, of 7.12.1912, and in the art. 1058, from the Civil Code.”72

The reporter takes as a starting point a finding related to the factual world, which is: that the robbery inside the bus is not an event which maintains connection with the transporter’s activity. In other words, the reporter defended that there is no relation between the robberies and the public transportation activity. Adhering to this discourse is facilitated because, when presenting his assumption as something really proved (meaning, to facts and true things socially verifiable) and disconnected of the preferable (related to values), it excludes its premises from the sphere of argumentation. The recourse to the topos of self-evidence is perceivable when one realizes that this adopted assumption is presented, by the Judge, without any data and information that could give support to it.

A fact taken as assumption always presents itself as an uncontroversial fact73. It happens that in the reporter argument, the assumption is not a fact, but an opinion. There are two facts really uncontroversial and connected, which are: (a) the victim travels in the bus in which the robbery happened; (b) he was hit by a gun shot from one of the criminals. It is not added justification for the assumption that the robbery would be an external fact of the transportation. Indeed, it would be possible to affirm exactly the opposite, because even if the violent criminality facts, as the robberies, are not inserted in the urban transportation of passengers (as above stated), they are facts whose common and trivial occurrence, in that period and nowadays, do not allow them to be perceived as external events of this business activity.

The reporter supported, still, the inapplicability of the súmula 187 of the Supreme Federal Court. The justification for this opinion is, again, the plea that the robbery is an external fact to the transport. According to Judge Barros Monteiro, because there was no connection between the robbery and the transport activity in its essence, that fact (the robbery) was “comparable to the act of God or force majeure, exonerating the transporter of its responsibility”74. Summarizing, the robbery could

not be considered an event connected to the transport due to the fact that it was an unavoidable occurrence.

The argument basis was that the existence of an defective transport service could not been alleged, meaning, a defect in the security expectation the user could have in respect of the company’s activity, because “even if the company had a numerous amount of guard, this could not prevent an event of this type to happen, considering that daily millions of passengers use the trains.” So, the fundamental issue seemed to be the concrete unavoidability of the event, meaning: there is nothing else the company could do in order to guarantee that a robbery will not happen sooner or later.

The underlying argument was expressed under the following equation: if the robbery is qualified as an unavoidable fact and if the unavoidability of the event is the defining element for qualifying it as an act of God or force majeure, the conclusion is for the inexistence of liability.

After the judgment of the Recurso Especial 435865/RJ, the subsequent decisions of the Superior Court of Justice had gone towards recognizing that the robberies did not own connection with the public transport of passengers, therefore should be characterized as force majeure, bringing, consequently the exclusion of liability.

The maintenance by the Superior Court of Justice of the orientation initiated in the Federal Supreme Court - characterizing the violent criminality act occurred during

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76 The Judge Barros Monteiro, in the two recourses votes, refers to another Recurso Especial which had already approached the same issue (Recurso Especial 35436-6/SP) and also another one which had approached similar situation, since this time it was not about a wounded passenger in a robbery, but a stone thrown from outside of the vehicle. Recurso Especial 13351/RJ), besides mentioning the judgment of the Justice Supreme Court here analyzed (Recurso Extraordinário 88407/RJ). And also another one which had approached similar situation, since this time it was not about a wounded passenger in a robbery, but a stone thrown from outside of the vehicle.

77 This happened over the orientation made with an opposite sense, by the time, by other Group of Judges, in the sense of recognizing the transporter’s responsibility in this case. Recurso Especial nº 232649 judged at 15 of August of 2002, Recurso Especial nº 278524 judged at 12 of June of 2001, Recurso Especial nº 218470 judged at 27 of march of de 2001 and in the precursor manifestation of the Min. Torreão Braz no Recurso Especial nº 50129 judged at 29 of August of 1994.
the transport as a case of *force majeure* - is still more disturbing if it is noticed that, simultaneously to the crystallization of this orientation, the same Superior Court of Justice begins to render decisions in which the thesis prevails that the same event (robbery), since it occurred inside closed places, like malls, generates liability for the company.\(^78\)

So, everything indicates that the Court responsible for unifying the interpretation of federal law is ratifying the existent of unfair distribution of risks relating violent criminality in our society: the user of public transport cannot expect safety, therefore cannot claim for it, while the consumers inside a mall are able to have this expectation and consequently own the right to demand for it.

It seems to strengthen the perception of Eros Roberto Grau in regard of the fact that the consumers are being protected not by *solidarity*. He affirms that “the protection they have is not a product of the feeling of *solidarity*, but it expresses a *strategy to promote the market’s maintenance*”\(^79\). This assumption makes Eros Grau concludes that “the limits are clear an undeniable, even though we should regret them”\(^80\).

But in my opinion *regrets* are not the only alternative. For a change, it is essential, from the start, to understand how these limits are supported. In this way, it will be possible to propose options that, even if they do not overcome the market’s maintenance, generate incentives that will alter its dynamic.

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\(^78\) As we previously referred, there are, nowadays, decisions in the Superior Justice Court as the ones made in the Recurso Especial 419059/SP, judged in 19 of october of 2004 by the Third Group. In this appeal it was established, by unanimity, the supermarket’s responsibility for the damages produced at its client, victim of a gun robbery initiated at the parking lot of the commercial location. The decision was based not in the fact that the market charges for its parking lot and therefore for the safety feeling os its clients, but under the understanding that this safety service offered by the market to its consumers was “inherent to the commercial activity promoted by the market”, characterizing , in the opinion of the reporter Judge Nancy Andrighi “an extra attractive which the supplier adds to his services”, and this expectation would stimulate the consumer “to shop more in these places, where the safety item integrates the complex providence of goods and services what, worth emphasizing, is a catcher in favor of the profit of all the suppliers” Recurso Especial 419059/SP. Third Group. Reporter Judge Nancy Andrighi. Judged at 19.10.2004.


To amplify the protection offered to the users of public transport, it is necessary to identify the theoretical basis of the arguments in the decisions related to the contracts of public transportation, in order to comprehend the present judicial understanding, identify its defects and present an alternative interpretation of the rules used to construct that understanding, and after that criticize it and express an alternative and, in some sense, more adequate interpretation of the same rules.

3. The Value in the Rule

It was a common perception among French jurists, in the twentieth century, that in strict liability the discussion over “causality” obtains priority.\(^{81}\) It happens that the judgment over the existence of causal connection between the act’s agent and the damage is frequently presented in Courts as in the legal doctrine as being the simple application of the principle (called “scientific”, but actually “naturalist”) of causality\(^{82}\) (If A exists, then B exists). Moreover, this judgment is presented as value neutral and, therefore, able to justify, as an impartial manner, the application of the normative principle of imputation\(^{83}\) (If B exists, so it should exist C), where A is the action or omission of the defendant, B is the damage and C is the compensation.


\(^{83}\) Paradoxically, according to Kelsen, the understanding of "causality" from the "action-reaction" scheme, is "analogous to the principle of retribution, linking an action to a specific reaction, namely, the evil to the punishment, the merit to the reward." (KELSEN, Hans. *O que é Justiça?* São Paulo: Martins Fontes, 1998, p. 311). This way of "normatively" comprehend the relation between the things has its origin, according to Kelsen, in the natural Greek philosophy, where αίτια means “cause” (originally fault), and it did not completely disappear from the western understanding, although has been modified since Hume’s works up to Heisenberg and the development of quantum mechanics. (KELSEN, Hans. *O que é Justiça?* São Paulo: Martins Fontes, 1998, p. 312-317).
It is precisely from that assumption that Hans Kelsen affirms that the causality principle is “supposed by the regulation which constitutes the imputation”\(^{84}\). However, the question, which arises from this statement, is the following: this precedence of the causality is a necessary presupposition to the imputation?\(^{85}\) Meaning, is only to the author of the damage that can be allocated a duty to repair it?

The answer should be negative since, regarding the imputation, the question is not who has performed the act (question related to the factual world), but: who should respond for this act in face of other people\(^{86}\). This is an issue related to the normative world\(^{87}\), meaning, the world of rights\(^{88}\).

For Hans Kelsen “the norms can refer to individuals without refer to their behavior”, as in the hypotheses in which “[…] an individual or individuals are taken as responsible for the other’s fault, especially if the collective responsibility was established.” He alleged that, in these cases, “the individual to which the sanction is destined to is only an object of another’s individual behavior, meaning, the individual who executes the action. The responsible person is not subjected to any juridical relevant conduct”\(^{89}\). Also according to Kelsen, “[the] individual who responds for an illegal act committed by another person is not submitted to a certain behavior by the juridical order as a condition for the sanction; it is only the object of a certain behavior by the juridical order as a consequence of the coercive act constructed by the sanction”\(^{90}\). For that reason he calls “collective responsibility” the “responsibility for another person’s fault”\(^{91}\), characterizing it as a “strict liability”\(^{92}\).


\(^{85}\) Guido Alpa affirms that once it is noticed that the causal connection is a matter of right, it is clear how towards same situations its comprehension is altered due to new legislative and juridical orientations. (ALPA, Guido. Struttura dell’illecito: dolo, colpa, imputabilità, causalità. Em: *Responsabilità civile e danno: lineamenti e questioni*. Bolonha: Il Mulino, 1991, p. 295).

\(^{86}\) For Klaus Gunther the formal structure of the responsibility always implies in the “the responsibility of a person for an act (or omission) or consequence of an action before others.” (GUNTHER, Klaus. Responsabilização na sociedade civil. *Novos Estudos Cebrap*, n. 63, jul. 2002, p. 108).

\(^{87}\) According to Joel Feinberg, the responsibility, juridical speaking, is something which depends on a decision and not on a discovery (FEINBERG, Joel. Problematic responsibility in law and morals. *The Philosophical Review*, vol. 71, n. 3, jul/ 1962, p. 342).


\(^{91}\) KELSEN, Hans. *La dottrina pura del diritto*. Torino: Giulio Einaudi Editore, 1990,
It is interesting to observe that the Austrian author justifies the existence of this “collective responsibility” due to the existence of a special qualification given by the juridical order to the relation between the author of the damage and the responsible, justifying his ideas at this way:

“If the sanction is directed not against a criminal, but as in the case of collective responsibility, against another individual connected to the one who committed the illicit act by a certain connection determined by the juridical order, the responsibility always owns the characteristic of strict liability”\(^93\).

And this is the perspective observed in the “classical” hypotheses of responsibility by another person’s act\(^94\). That is why, for example, when the contractor is responsible, it is because is understood that exists a special juridical connection - a relationship of subordination\(^95\) - subordinating the conduct of the agent to the interests of the principal and allowing this to direct and control that agents’ activities\(^96\). The guarantee (obrigação de garantia) used by the victim arises as an effect of the existent relation between the author of the damage and his contractor\(^97\).

However, it is possible to justify strict liability (for another’s person act), taking into account the special legal qualification attributed by the Law to the existent relation between the victim and the responsible, due to legal norms which impose


\(^95\) For Albertino Daniel de Melo, the preposition connection “translates the juridic way of understanding the subordination of one person to the other.” (MELO, Albertino Daniel de. *A responsabilidade civil pelo fato de outrem nos direitos francês e brasileiro*. Rio de Janeiro: Forense, 1972, pp. 45-46).


solidarity duties. Actually, if the expression “be obliged to” takes us to an individual field (since, according to Kelsen, it is not possible to be obliged to perform something without being an individual conduct), the expression “be responsible for” can take us either to the individual field or to the collective one. Still according to Kelsen, it is possible someone to be responsible for his/her individual act as well as for another person’s act.

This opinion may seem, first, against the idea that it is not possible, by the tort rules, to obtain a compensation in the situations in which, even without the intervention of an agent, the damage would need to be verified and be absorbed, definitely, by the injured party. This is because the reintegrative (compensatory) function of the tort law does not admit that the system operates in a way to place the victim in a better situation to the one that the person would be without the agent’s intervention. It happens that not all the forms of liability demand such a strict construction of causal connection in which the damage is a result of the conduct of the responsible, as it happens in situations which involve the responsibility for illicit acts. At the cases in which the liability happens due to the risk (assumed or imposed), that one (strict factual and precedent causal connection) is not necessary, since at these hypotheses it will be a case of “a fact comprehended in the sphere of risk objectively addressed to the responsible”. In this sense, we can conclude that a particular definition of act/fact as the hypotheses contained in the risk sphere assigned to the subject constitutes the axis of the discussion about strict liability.

Unlike the causal chain, which is infinite, the imputation alignment always has an end, which is not discovered, but chosen. The definition of the causal link is

98 An issue similar to this one is the allocation of positive duties of aid, under the criminal law, when it justifies its existence "they did not come from the general status of the person, but from a special relationship, e. g. the relationship between public officials and the citizen, parents and children, doctor and patient, etc. " (JAKOBS, Günther. Ação e omissão no direito penal. São Paulo: Manole, 2003. p. 25).
103 According to Klaus Günther, in the imputation process there is a time when "among the many factors which involve the whole event, the complex and obscure skein of causality and probability relations is reduced to a chosen point by more or less an arbitrary way." GUNTER, Klaus.
not a matter of discovery, but *modeling*, meaning, it is a normative question more than as empirical one, and besides that, being factual is epistemological\(^{104}\). Or in the words of François Ewald:

"In order to introduce the responsibility in the indefinite chain of causes, we must make a choice, stop somewhere, favoring some of them; choice that of course is not natural; the responsibility does not have in the things its reason, but in the judgment that makes of these things"\(^{105}\).

What can be noticed in the decisions previously analyzed is the use of concepts or qualities such as *unpredictability* and *inevitability* to build justifications for limiting the responsibilities of carriers for damages suffered by its clients due to damages caused by criminal acts committed by third parties. These judicial justifications are supported by a doctrinal tradition. That is why its analysis is needed to understand how court decisions are formed and what are their assumptions.

As was stressed in the initial part of this work, it does not seem to be possible to argue that in Brazil, currently, the risk related to exposure to the violent criminality is distributed identically among all social groups.\(^{106}\). Considering this fact, it is worth to question which discourses and practices respond, or not respond, to the special vulnerability of this users (of basic public services such as transport).\(^{107}\) And it should

\(^{104}\) "'Imposing a risk' on a person is not a simple factual state of affairs, like pointing a gun at him. So far as we can deal with the matter in purely factual terms, risk must be conceived in an objective rather than in an epistemic sense, and it must generally be regarded as the joint creation of two interacting actors or activities rather than as something that on person has unilaterally imposed upon another. There is, to be sure, a sense in which one person can unilaterally impose a risk on someone else, and a distinction can accordingly be drawn between cases of joint risk creation and cases of unilateral risk imposition. But that distinction is based on an epistemic rather than on an objective conception of risk; more importantly, the distinction is normative rather than empirical." (my remarks) (PERRY, Stephen R. Responsibility for Outcomes, Risk, and the Law of Torts. Philosophy and the law of torts. Gerald J. Postema (Ed.) Cambridge Studies in Philosophy and Law, Cambridge Univ. Press, Cambridge, 2001, p. 74).


be noted that the discourse employed by the Courts - in which the criminal act that reaches the passenger in the public transport is configured as an extraordinary and unpredictable fact, therefore not generating to the victim any right of compensation - ends up maintaining and legitimizing the vulnerable situation of this service users.

Therefore, there is a naturalization of the violent event through the use of a grammar whose premise is "the weightlessness of the uncontrollable laws of nature, the inevitability of this fact since it was always like this." In this perspective, "being unemployed, living in a slum or to be killed by the police or criminals is a fate which lies on the luckless people- finally, it is only about some 'poor people' - subjected to pity and who are charity targets instead of persons holders of legal entitlements. In this sense compensation is indulgence and not right (which can be imposed by a proper legal assimilation of the dictates of social solidarity values).

The collective representation expressed at this institutional manifestation (the Courts juridical orientation) is that the victim of violence, in Brazil, is a victim of chance chosen, randomly, by an act of God. With the doctrinal guidance that defines the violent act of a third party as a necessary and inevitable fact, the Brazilian higher courts converted into mere fatality, what could be otherwise understood as an effect of social choice.

One result of this construction is that assuming violent urban crime as misfortune allows the continuity of the structural arrangements which feed that violence regardless of any process of debate and collective decision. This is in itself already negative since, according to Calabresi and Bobbitt, the possibility of choice, even if it involves the assumption of costs, "is releasing and leads to progress", while

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111 "By making the result seem necessary, unavoidable, rather than chosen, it attempts to convert what is tragically chosen into what is merely a fatal misfortune." (CALABRESI, Guido; BOBBIT, Philip. *Tragic Choices*. New York: W. W. Norton and Company, 1978, p. 21).
the non-choice "allows those who already owns a better position to maintain unquestioned the allocations which favor them".  

The maintenance of the current orientation leads to the spread of a stimulus for acceptance, within the legal system, of the fact that the damage caused by violent crimes is a problem arising from the relationship between two individuals (direct author and the victim) and therefore only imposes to the legal system an approach according to the commutative justice parameter: the duty to repair the damage should only lie on the one who caused it. In short, the courts, when adopting this particular judicial orientation, end up providing no concrete effectiveness to the constitutional speech of solidarity.

Indeed, when they establish that the damages resulting from acts of violent crimes occurred during transportation are unique problems of the passengers, it becomes clear that the theoretical and dogmatic discourse about the right to social security has no role in regard of the materialization of the judicial practices connected to the coping with the issue of social violence.

There are indications that this doctrinal and judicial orientation also spreads itself and became dominant in the state courts. In a survey covering the jurisprudence of the Justice Court of Rio de Janeiro and the, already extinct, Court of Appeals of Rio de Janeiro, between 1975 and 2000, César Caldeira realized that the increased frequency of violent incidents which affected users of public transport turned out to

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112 CALABRESI, Guido; BOBBIT, Philip. *Tragic Choices*. New York: W. W. Norton and Company, 1978, p. 48. At a similar note, we could, based on Mary Douglas’ opinion, to state that, by exposing the violent urban crime as a risk, it is possible to connect the debate about its distribution with the question of the role of moral principles and political decisions, and we could complement, more specifically, the issue concerning the distributive justice (vide: DOUGLAS, Mary. *Risk acceptability according to the social science*. New York: Sage, 1985, p. 60, 91).


114 "The judicial practices - the way in which, among men, it is arbitrated the damages and responsibilities, the way in which, in the Western history, was conceived and defined the way men could be judged on mistakes they had committed, the way it has imposed on certain individuals to repair some of their actions and the punishment of others, all these rules or, if you want, all this regular practice, of course, but also changed constantly throughout history – seem to me one of the ways in which our society has defined types of subjectivity, forms of knowledge and, therefore, relations between man and the truth which deserve to be studied” FOUCALUT, Michel. *A verdade e as formas jurídicas*. Rio de Janeiro: Nau Editora, 1999, p. 11.
qualitatively change the public recognition of the problem. In his thinking, "this change in social perception of the risks in public transport and the growing attempt to seek legal compensation for the damages demand a new approach to solve the legal problem," but he identified in the courts of Rio the same trend perceived in the Federal Supreme Court and in the Superior Court of Justice: The framework of the crime issue not as a social problem - "urban violence" - but as an individual problem, meaning, the victim’s fault.

Part of the doctrine confirms this perspective by arguing that these violent acts committed by third parties are external and fortuitous and, in this sense, not inherent risks to the transporter’s activity. It is alleged that the harmful event occurred due to the occasion of transportation, but it is not its cause; the reason would lie exclusively on the third party act. Thus, as an example, Sergio Cavalieri Filho, argues that the wrongful act of a third party, the stones hurled toward vehicles and the assaults, could not be considered internal fortuitous. It would be, on the contrary, "absolutely unpredictable and inevitable" thereby sustaining not to keep any

According to the author, legal studies about the legal regulation of violence are predominantly made in the criminal field, but he believes that, given the current circumstances, it is necessary to review the practice of the courts towards damage repair requested in cases involving violence against the physical and moral integrity of public transport passengers carried by buses. (CALDEIRA, César. Assaltos a passageiros de ônibus no Rio de Janeiro: um estudo sócio-jurídico. Revista de Informação Legislativa, Brasília, ano 38, n. 149, jan./mar. 2001, p. 159).


MENEZES DIREITO, Carlos Alberto; CAVALIERI FILHO, Sérgio. Comentários ao novo código civil: da responsabilidade civil, das preferências e privilégios creditórios. Rio de Janeiro: Forense, 2004. vol. XII, p. 91. This argument is not new, as it can be observed in the opposition which Josserand does to Vasteenberghe’s opinion”, for whom “the attempt directed against the passenger is not a transportation accident: the trip is not the cause, not being also the occasion. (apud JOSSERAND, Louis. Les Transports. Paris: Editions Arthur Rousseau, 1910, pp. 762-763).

DIREITO, Carlos Alberto Menezes; CAVALIERI FILHO, Sérgio. Comentários ao
connection with the risks of the transporter because such acts are "[...] strange factor to the organization of his business, by which it cannot respond to. Therefore, the best doctrine characterizes the erroneous fact of the third party, worth mentioning, the exclusive fact of that third party as *external fortuitous*, with which we are in full agreement. He excludes the own causal link, comparable to force majeure, and, in consequence, exonerates the responsibility from the transporter "121.

The argument that transportation is not the cause of a violent third act, just being the space in which this, by chance, ended up occurring, meaning, the harmful event would not have as a cause the transportation, it just found an “occasion” to happen inside the transportation, it can oppose with the assertion that, when there is the identification of a usual strategy performed by a third party who performs his violent act taking into account the transport, the journey is no longer mere occasion and becomes one of the causes.122.

Although it is dominant, this thesis can and should be criticized. Because, as already shown above, it is appropriate to require that the transporter repair the victims because their responsibility does not originate exclusively from the events taken, at the time of the edition of the summary 187 of the Federal Supreme Court, by commonly verified facts in the performance of their activity, such as traffic accidents, "but from all those which might be expected as possible or expected to happen, within a wide range of variables inherent in the environment, internal and external, in which the bus travels."123. Thus, under the current historical circumstances, the assault and

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122 In this sense, Josserand affirmed that if it is true that when an individual finds an enemy in a station or in a wagon and takes advantage of the situation to perform an aggression in response to a previous complaint, the injuries or death resulting from this would have no reason to be attributed to the transport operation. But the situation changes if the violence against property or against the person are the result of a criminal action, since here the traveler who is attacked by a third party is the victim of a transport accident as much as those who suffer injuries resulting from a derailment or skid (JOSSERAND, Louis. *Les Transports*. Paris: Editions Arthur Rousseau, 1910, pp. 762-763).

theft of the bus passengers should be considered as a risk hypothesis of the transportation business\textsuperscript{124}.

By the way, still in the 50’s of the XX century, Arnold Wald, influenced by the work of Boris Starck\textsuperscript{125}, would affirm that “what the modern law recognize under the technical covers are the thing’s guard, the risk responsible, the contractual safety obligation, is in fact the unreachable right that every ones has the right to, health, physical integrity and maintenance of its goods”\textsuperscript{126}. In other words, once that the right to safety is recognized, every non-authorized damage becomes, due to this, an illicit damage, the violent right of another person\textsuperscript{127}.

According to Wald, Starck’s conclusions, when defending the existence of the safety right, it allows the reconciliation of the actors who recognize “in the conflict’s base the imperative of not harming, which is explained by the right that every men have to safety\textsuperscript{128}. However, he ends up concluding that, although starting from the recognition of the right to safety, there is a distinction between the justification of the imputation to the compensation of illegal damages connected to the performance of illegal acts and to the imputation of illegal acts connected to the execution of illegal acts. While for the last ones we would be facing an obligation coming from the idea of social solidarity which imposes the acceptance of certain drawbacks, in regard of the first we would be facing the derived obligation of the responsibility idea\textsuperscript{129}.


\textsuperscript{125}In Wald’s opinion, the revolution made by Boris Starck with his work \textit{Essai d’une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée}. Paris: L. Rodstein, 1947 “consists on abandoning the point of view of the author of the justice damage from his behavior to pay attention on the victim, the passive agent. Instead of the right of not repairing the involuntary caused damages, we come back to our thought of the inherent right of every human being to safety” WALD, Arnold. A evolução da teoria dos Direitos de Vizinhança. Revista do Serviço Público, ano XVII, v. 67, n. 3, jun. 1955, p. 509 apud DANTAS, Francisco Clementino de San Tiago. O conflito de vizinhança e sua composição. Rio de Janeiro: Forense, 1972, p. 158.


So it could be concluded that:

a) while in the first form of analysis the concern is to describe the behavior of the person to whom it is intended to assign the responsibility for the damage (the basic procedure is to assign an intentional or wrongful act);

b) in the second the interest is on identifying if the harmful event in question has a quantitatively important occurrence, that is, if it is a recurring phenomenon in society, if it corresponds to a risk with a significant probability of occurrence.

At the root of these guidelines is Adolphe Exner’s opinion to support that criminals are included in situations taken as usual and ordinary in the transport of passengers, capable of generating responsibility to the transport company, which would not be strange even to the Roman law, by the figure of the receptum.  

Following this same path, it is suggested here that the rules of strict liability are similar to an insurance established by law; and that is why its extension must meet objective limits, because it can only be charged to the carrier the liability for the damages resulting from facts whose occurrence is statistically relevant. As such, it is supposed the adoption of criteria by which it is possible to judge a priori if the case in question enters the rule or the exception, without being necessary to appreciate the particular circumstances of the event, but also allowing to incorporate, objectively, practices which become to be recurring performances of the business activity in question.

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130 EXNER, Adolphe. La notion de force majeure, théorie de la responsabilité dans le contrat de transport. Paris: L. Larose & Forcel Éditeurs, 1892, p.113-118. In free translation: "The theft and other attacks against property are not force majeure cases because as we have said previously they are part of the life course, unless they have been due to the organization of criminals or gangs of pirates whose number and force produced terror and paralyzed the functioning of the commerce. The attack of these groups should be assimilated to the force of the elements. It is an extraordinary greatness accident. The normal conditions of life are such that it should provide the damaging attack an of individual or a few individuals, but not the overwhelming aggression of organized masses.


132 According to Arnoldo de Medeiros, in view of the Exner thesis, we would have to "the force majeure, that could be in verified at such case, not to contradict the exception of the own foundation, would have to be characterized by an objective and abstract criteria, that the Austrian
Already in the 40’s of the twentieth century, José Dias de Aguiar admitted that, in face of the “positive violation of contract” (Hermann Staub’s *positive Vertragsverletzung*) by the passenger carriers "it matters little, also that the disaster’s cause is a third party, because this is not sufficient to exempt the transporter, unless when it is a case of act of God or force majeure, knowing that not always the third party’s fact is assimilated to it “^^133^^.

So, it must be concluded that the assimilation between a third party’s fact and *force majeure* is currently still more reprehensible^^134^^, since, in face of an increasingly violent sociability, it is necessary to impose special responsibilities which need to be considered in the field of law of damages.

teacher intended to find in the event’s *externality* and in its *reputation* and *importance*. For Arnoldo Medeiros da Fonseca, the Exner’s theory, to distinguish the force majeure from the act of God by the material externality constitutive of the first event, required that *unavoidability* was characterized "beyond this *qualitative* element, another *quantitative* element, which to treat a *notorious* and *important* event, in the sense of being superior to those in the ordinary course of life, showing, on the one hand, the inability to escape to its consequences, for the violence of its manifestations; and, second, the certainty of the alleged fact. " (FONSECA, Arnoldo Medeiros da. *Caso fortuito e teoria da imprevisão*. São Paulo: Revista Forense, 1958, p. 89).


Conclusion

We cannot know why the world suffers.
But we can know how the world decides that suffering shall come to some persons and not to others.[…]
For it is in the choosing that enduring societies preserve or destroy those values that suffering and necessity expose.

At this point, would be worth asking: what would be the effect of sharing this responsibility through establishing that carriers should compensate the victims of robberies and other crimes occurred inside the buses? This will solve the problem? According to some, e.g. Cesar Caldeira, these convictions would eventually indirectly regulate the conduct of these companies through the financial burden resulting from the payment of the compensations. It happens, however, to consider the actual impact of this measure when such costs can be transmitted to users through a diffusion in the price of the amount paid for the service.

More than a possibility, this is, indeed, one of the reasons for the adoption of the strict liability system for the supplier of products and services. From an

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136 However, Cesar Caldeira emphasizes that the “compensatory actions do not have impact enough in order to result in an effective control over the transportation activities and the semipublic spaces. This happens due to the doctrinaire and jurisprudential functions which do not properly incorporate the constitutional dimension of the social ethics and the public interest in the damage repair” CALDEIRA, César. Assaltos a passageiros de ônibus no Rio de Janeiro: um estudo sócio-jurídico. Revista de Informação Legislativa, Brasília, ano 38, n. 149, jan./mar. 2001, p. 169.
economic point of view, this is what makes the guarantee due in this regime a certainty to the consumer.\textsuperscript{139} And if the strict liability regime acts as insurance, it would be also relevant to ask if the limit of the imputation should not be the degree of predictability and not the inevitability margin of the event.

The adoption of predictability as a criterion occurs if one agrees with Luiz Gastão Paes de Barros Leão, for whom the claim that by setting up an instauration of a regime of liability based in the risk is, in itself, due to the conclusion that in the capitalist system of production there are a large number of anonymous and inevitable damages linked to own structure of the business activity\textsuperscript{140}.

In this sense, Schäfer and Ott say that, in assuming that the purpose of the strict liability regime is the internalization by the entrepreneur of the financial burden which the damage represents to the victim and is the consequent share of this burden among all consumers of products or services of that company, it is necessary that the harm or potential harm, although it has not been predicted by the person to whom the liability is placed, need to be predictable. Otherwise, there would be no way to demand that resources to be used to reduce the likelihood of occurrence and/or to create a payment insurance for the costs of its occurrence\textsuperscript{141}. In short, they argue, "we must take into account that for the birth of the objective responsibility not only it is interesting the causation based on the knowledge of the damage, but also its noticeability based in a supposition"\textsuperscript{142}.

Starting from the conclusion that the relation between the carrier and the passenger is a contractual one, it is true that the first shall be responsible for damages arising from events whose outbreak neither parties could have avoided fully since it constitutes, within the contract, the one who holds the best position to address the

\textsuperscript{139} Ulhoa. \textit{O empresário e os direitos do consumidor}. São Paulo: Saraiva, 1994, p. 35.


risks associated with the situation, since it has the lowest cost of information to identify the risks and the possibility to spread the risk (more specifically, its cost), meaning, it constitutes a superior risk bearer.\textsuperscript{143}

But the responsibility of the transporters by third-party criminal acts which affect the passengers is not yet the most adequate measure for consolidating social solidarity. If, after the conviction, the transport companies could transfer that "violence cost" to the users of the service, through the bus fee, the condemnation would only create a restricted solidarity situation and, therefore, it would be insufficient because, once again, the negative effects of the social phenomenon in question - violent criminality – would be limited to the most fragile and in-danger group (the users), instead of been spread among those people who benefit most or are less vulnerable to its persistence.

In addition, the liability imputation to the carrier would produce another perverse and paradoxical effect: the compensation awarded due to the materialization of the risks related to the violent urban criminality would be granted only to those who suffered harm during the transport. Its sufficient only to think in a hypothesis in which someone is assaulted in the bus stop while waiting it to go to work or in any other situation in which one is moving in the public space, to discover that the thesis which defends the liability of the carrier takes only into account some situations. Realizing this it is sufficient to conclude its reduced viability as a tool for the implementation of the constitutional value of social solidarity, and the limited usefulness of any "judicial activism" in order to achieve a proper resolution of the problem.\textsuperscript{144}

The question seems really to refer to the limitation of the Judiciary, in other words, to indicate that the jurisdiction exercise by the courts is not the most

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appropriate procedure for the primary definition of allocation of scarce resources\textsuperscript{145}, what Calabresi and Bobbitt labeled as "first-order determinations."\textsuperscript{146}

Thus, being clarified that the relative probability of suffering the effects of violent urban criminality is a social risk, it must be accepted that the damage resulting from the implementation of this risk is a problem that affects the whole community as much as the victim. Therefore, it happens that the socialization of the risks should be established on the basis of a distributive justice criteria, through compensations and obligations of different weights and which would be assigned to different groups of people, through this way, to produce a system ensuring effective social solidarity\textsuperscript{147}. At this sense, it could be considered some of the following ways to address the issue:

The first alternative would be centered on the establishment of a compulsory social insurance, similar to the existing ones\textsuperscript{148}, consisting with the resources coming from the taxation of the profits made in the performance of legal activities related to

\textsuperscript{145} Even if, at our society, important decisions have been delivered to the Courts, this does not mean that these institutions have the best conditions to choose. (CALABRESI, Guido; BOBBIT, Philip. Tragic Choices. p. 71). Nesse sentido e também com base em Calabresi e Bobbit, ver no Brasil: AMARAL, Gustavo. Direito, escassez e escolha. Rio de Janeiro: Renovar, 2001. p. 206.

\textsuperscript{146} CALABRESI, Guido; BOBBIT, Philip. Tragic Choices. p. 19.


\textsuperscript{148} We would have here an insurance coverage in the molds of the current compulsory insurance of personal injury caused by motor vehicles of land (DPVAT) in which, for reasons of distributive justice, the vehicle owners are obliged to pay insurance which provides coverage for risks that exposes also third parties, like pedestrians, cyclists, etc., and to the insurance companies of the vehicles which cause the event is imposed the obligation to pay a compensation to the victims (Law 6194 of December 19, 1974). In the European Union, the Directive 80 of 29 April of 2004 aimed to create a system of cooperation among member countries in order to facilitate, to victims of violent intentional crime, access to monetary compensation to be paid by the authorities of the country in which the crime occurs. In Britain (England, Scotland and Wales) there is, since 1964, a Compensation System of Criminal Damages (Criminal Injuries Compensation Scheme) which states that certain damage - physical, mental, reduction / loss of the ability to raise income, medical expenses, etc. - Arising directly or indirectly from criminal violence generate to the victims the right to obtain compensation determined by the State. This system was in November 8, 1995, reviewed by the Criminal Injuries Compensation Act (for an overview of the system, check: CANE, Peter. Atiyah's accidents, compensation and the law. London: Butterworths, 1999. p. 249-272). Mais recentemente, em 09 de dezembro de 2005, o Act de 1995 foi adaptado à Diretiva 80 da Comunidade Européia.
the “market” of violence, that is, the profits of the so called "industry of the crime control"\textsuperscript{149}, such as the manufacturing and marketing of weapons, armor vehicles and private security.

It should be emphasized that, at this system, the obligation to contribute to the formation of the common monetary fund from where the resources to pay the victims will come, it imposes to certain classes of people not because to them it is imputed a special responsibility, but rather because of them it is required the compliance with the duty of solidarity in a specific way\textsuperscript{150}. One effect of this option would be to turn the social cost of violence into a visible economic cost to the security products and services’ consumers, that is, the high and middle classes, meaning, to make them aware of their responsibility not only regarding the facts, but in behalf of the concrete imposition due to the consolidation of social solidarity as a constitutional value\textsuperscript{151}.

The second alternative would be the creation of a support fund for victims of violent crime, possibly having as a part of its resources the reallocation of existing tax revenues\textsuperscript{152} (as it occurs with several of the funds set up in the country from the

\textsuperscript{149} The term, although it was used by the Norwegian criminologist Nils Christie to describe the profile of the US prison system (Christie, Nils The crime control industry... The way to the Gulags in Western-style Rio de Janeiro: Forensic, 1998), fits perfectly to describe the set of specialized business activities in the sale of security products and services to citizens. In fact, several of these consumer goods offered to ordinary people are described by Christie when it is about the equipment and services – from the paralyzing spray until the private security - offered by US companies to the prisons at that country (CHRISTIE, Nils. A indústria do controle do crime. p.95-132).

\textsuperscript{150} More than spreading the losses among the highest number of people exposed to the same risk, we seek to distribute it to those who have the best solvency conditions, since more than an issue of risk acceptance, it is about solving a management problem of their effects. In this sense Adam Raphael affirms: "Insurance is not about the acceptance of risk, but its management.” (RAPHAEL, Adam. Lessons of Loyd’s: the limits of insurance. In: FRANKLIN, Jane (Ed.), The politics of risk society. Cambridge: Polity Press, Institute for Public Policy Research, 1998. p. 37). Furthermore, by attributing to the companies which profit from the exploitation of market insecurity, the obligation to contribute to the insurance, establishes a link between the solvency required for the system maintenance and a value judgment about the source of this solvency. About the necessary mutuality of the insurance and the solvency demand of the insured see: ALVIM, Pedro. Responsabilidade civil e seguro obrigatório. São Paulo: Revista dos Tribunais, 1972. p. 55-56.

\textsuperscript{151} With this it is intended to avoid the maintenance of a symbolic constitutionalisation, at a negative meaning, from the constitutional text about the social solidarity, meaning, keeping it non-concrete or insufficiently concrete, normative-juridical at a general way. (NEVES, Marcelo. A constitucionalização simbólica. São Paulo: Editora Acadêmica, 1994. p. 83)

\textsuperscript{152} For a discussion about the redistributive effects of the tributary system and the civil responsibility, check WEISBACH, David A. Taxes and torts in the redistributions of
90s\textsuperscript{153}) with part coming from retention, under the force of the penal sentence\textsuperscript{154}, of the tools used for and of the products obtained in the performance of illicit activities related to the so-called "crime industry", such as the illegal trade of arms, drugs, human organs and counterfeit goods, illegal trafficking of people (immigrants, women and children), slavery and/or prostitution these, money laundering, etc.\textsuperscript{155}

One of the effects of this option would be more than redirecting state revenues, but linking them strictly to the completion of a certain project of society, preventing, therefore, that this ends up being subjected to a political whim of a certain government. This would prevent that, for transient reasons and without proof of serious justifications, a certain political majority representation could impound or redirect public expenses substantially changing the desired way to perform a certain value constitutionally declared as fundamental, \textit{in case of}, the social solidarity towards a certain concrete challenge, \textit{in case of}, violent crime.

Another effect of the adoption of this model lies in the fact that, when deciding pro the redistribution of social capital associated with and or produced by the


\textsuperscript{154} Something similar occurs with the Defense Fund of the Diffuse Rights, established by law 7347/85 and regulated by Decree 1306/94, whose resources come from: the convictions in cash due to both the occurrence of the event described in the art. 11 as in the Art. 13 of the Law 7347/85; fines and compensations resulting from the application of Law 7853 of 24 October 1989, since they are not designed to repair damage to individual interests; amounts allocated to the Union due to application of the fine provided for in art. 57 and its sole paragraph and the product of the indemnity provided for in art. 100, sole paragraph of Law 8078 of 11 September 1990; of court convictions mentioned at the paragraph 2 of art. 2 of Law 7913, of December 7, 1989; Fines referred to in the art. 84 of Law 8884 of June 11, 1994; the income from the investment of the resources of the Fund, other income that may be destined to the Fund and donations from individuals or corporations, national or foreign (sections I to VIII of art. 2 of Decree 1306/90).

\textsuperscript{155} Industry that nowadays moves approximately 10% of all the world commerce, according to data obtained by Moisés Naim. (NAIM, Moisés. \textit{Ilícito}: o ataque da pirataria, da lavagem de dinheiro e do tráfico à economia global. Rio de Janeiro: Jorge Zahar, 2006).
economic and financial crime, it is assumed the relation between this and the maintenance of violent criminality and, at the same time, it reduces the burden of legal activities associated with the latter.

Whatever the alternative adopted is, it is left to be said that what is meant by the indication of these strategies is to contribute to the establishment of the constitutional text\(^{156}\). About the risks that such institutional innovations can bring, the only thing left is to lie on lesson formulated by Italo Calvino: that if hell exists, it is already here and is "a hell in which we live every day, that we create by being together" and that towards this hell there are only two ways to escape from suffering, one, the easiest, is, "to accept the hell and become part of this to the point of stopping noticing it" and the other one, risky, is, requiring "attention and constant learning" since it involves the attempt to "know how to recognize who and what, in the middle of hell, is not hell, and preserve it, and open space."\(^{157}\). To lawyers, particularly those who have been touched to live in countries like Brazil, it should not seem possible to choose something rather than the risky path.

\(^{156}\) Thus, it is assumed, as a challenge, the Peter Häberle’s affirmation which “the constitutional texts should be cultivated so that will result in a Constitution.” (HÄBERLE, Peter. Libertad, Igualdad, Fraternidad. p. 47).