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Legal Narratives and Compensation Trends in Tort Law: The Case of Public Apology

NICOLA BRUTTI*

Abstract

The metanarrations about legal concern reached an increasing role in criticizing overcompensation cases. Litigation-adversarial system is perceived as too expensive for private and public finances. Someone underlined that emphasis on communication and voluntariness renders mediation more likely to resolve disputes.

Today public apology is playing a positive role in policies centered on alternative-informal dispute resolution, due to a restorative justice model. A public gesture of apology by the wrongdoer could help to prevent litigation expecially in moral or punitive damages cases. The article suggests that a different narrative of facts by legal means can be achieved.

Different legal meanings of public apology in eastern and western legal traditions are here investigated. According to a comparative analysis, the article focuses on different solutions issued by case law and legal transplants. It points out that the situation is very patchworked, although some jurisdictions have provided a specific legal framework for apologies.

However, its proper legal effects could shift in a wide range of solutions depending on certain circumstances: shaming sanction, mitigating factor on damages assessment, admission against interests, moral redress, self-reputation healing. Some criticisms referred to each specific meaning are here underwrited. In particular, the threat about apologies as metanarrations enforced by Courts concerns: insincerity, rule of law violations, harm to freedom of expression, mediatic manipulation.

1. Role of Metanarrations in Policy Options: Overcompensation Critics and "Mediation Style"

The negative impact of overcompensation and overdeterrence cases in tort system has been strongly criticized in the last years and many voices claimed for a reform of tort law. Media narration often focuses on ethical and moral concerns, instead of considering attentively repairing the damage itself (exemplified by *no-fault* systems or by the French old fashioned concept of *reparation integrale*).[1] Weird cases and a propensity

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[1] About balance between deterrence and compensation in Tort Law, see G Calabresi, *The Cost of Accidents. A Legal and Economic Analysis* (New Haven/London, Yale University Press, 1970); PS Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997); C. Coutant-Lapalous, *Le principe*

to claim damages for personal injury became a current topic in the press. The malicious use of phrases like 'compensation culture' in the English national printed media has increased since 1995 according to statistics relating to the Queen's Bench, County Courts, and employment tribunals.[2] A recent lawsuit has become an icon of media distortion of tort litigation.[3] The famous example is constituted by the case of woman burned by Mc Donald's coffee in which a Jury incredibly awarded " $2.9 Million for Coffee Spill".[4] By retelling the story in ways that downplayed the woman's injuries and ignored other important aspects of the case,[5] even today, more than a decade after the case concluded, the case is frequently cited as an example of what is wrong with the civil justice system. ("[T]he hot coffee case virtually jump-started the stalled movement to reform tort law … .").[6] Someone cited the McDonald's coffee case as part of a broader argument that the current tort system has worked but juries should be more focused on compensation rather than punishment.[7]

Geertz referred to the relationship between media and legal policies as the role of discourse (or stories) in "imagining the real."[8] Narrations about legal cases influence how we, and maybe the Courts, imagine the real world.[9] Legal communication tactics can deeply influence our common representation.[10]

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de réparation intégrale en droit privé 93 (Aix-en-Provence, 2002); G Alpa, *Strict Liability in Italian Law* 17 European Business Law Review 1441–1472 (2006).

[2] See J Hand, *The Compensation Culture: Cliché or Cause for Concern?* 37 Journal of Law and Society 569–591 (2010); E Lee, *Compensation Crazy: Do We Blame and Claim Too Much?* (London: Hodder & Stoughton, 2002); A Morris, *Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury* 70 Modern Law Rev. 349 (2007).

[3] W Haltom, M McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* 142 (University of Chicago Press 2004).

[4] See A Gerlin, 'How Jury Gave $2.9 Million for Coffee Spill: McDonald's Callousness Was Real Issue, Jurors Say, in Case of Burned Woman', Pittsburgh Post-Gazette, 4 Sept. 1994, B2; see M McCann, W Haltom, A Bloom, *Java Jive: Genealogy of a Juridical Icon* 56 U. Miami L. Rev. 113, 114, 117 (2001) (examining how a case "over hot coffee evolved into a cultural icon and staple of shared knowledge about the inefficiency, inequity, and irrationality of the American legal system"). See See A Bloom, *Milking the Cash Cow" and Other Stories: Media Coverage of Transnational Workers' Rights Litigation* 30 Vermont L. Rev 181 (2006).

[5] *Ibid.*

[6] W Haltom, M McCann, *cit.* at 225.

[7] See TF Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation In American Society* 46–51 (University of California Press 2002) (analyzing the Association of Trial Lawyers of America's (ATLA) efforts to stop tort reform).

[8] C Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 184 (NY: Basic Books 1983); A Bloom, *Milking the Cash Cow" and Other Stories: Media Coverage of Transnational Workers' Rights Litigation* 30 Vermont L. Rev 181 (2006).

[9] *Ibid.*

[10] S Engle Merry, *Getting Justice and Getting Even: Legal Conscousness Among Working Class Americans* 9 (University of Chicago Press 1990); DL Rhode, *A Bad Press on Bad Lawyers: The Media Sees Research, Research Sees the Media*, in Patricia Ewick et al. (eds), *Social Science, Social Policy, and the Law* 140 (Russell Sage 1999) ("Journalists' profiles of legal institutions affect … policy agendas."); RM Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 51 J. Comm. 55 (1993); WA Camson, A Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Construction-*

According to this trend particular attention was paid to the the *pros* of a "mediation style" against the *cons* of an "adversarial style" litigation.[11] In fact, the culture of mediation has recently reached a more important role, whereas the litigation-adversarial system is considered in most cases too expensive for private and public finances. As recently shown, an equal access to justice is a more acute problem in common law countries than in civil law jurisdictions, because the legal process tends to be more lawyer-intensive and therefore, inevitably, more expensive.[12] In general, arbitration or other more informal means of dispute resolution, if properly resorted to and fairly conducted, have a supremely important contribution to make to the rule of law.[13]

The focus is on the role of dialectic or voluntary tools in western legal tradition.[14] As Deborah Levi notes: 'According to some advocates of mediation, the emphasis on communication and voluntariness renders mediation more likely to resolve disputes than adversarial-style litigation.'[15] Otherwise such an alternative policy to adversarial style is concerned with many tools, as best practices, corporate codes of conduct or corporate social responsibility[16] whose purpose is to facilitate a conversation between the parties "that can help them transform the dynamic between them, which could help them resolve the dispute."[17] Klausner explains the shortcomings of corporate law and advocates an emphasis on extra-legal influences on governance, which is consistent with New Governance scholarship.[18] The same Author notes that professional norms are "fostered by the financial press every time they write a story that exposes bad board

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ist Approach Am. J. Soc. 1 (1989) (showing how media shape public perception and public discourse of nuclear power).

[11] See DL Levi, *The Role of Apology in Mediation* 72 NYU L. Rev. 1176 (1997). For some critical remarks, see RA Baruch Bush & JP Folger, *The Promise of Mediation* (1994); G Klein, *Sources of Power: How People Make Decisions* (Cambridge, The MIT Press 1999); RS Adler & EM Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations* 5 Harv. Negot. L. Rev. 1, 6–28, 77–110 (2000).

[12] T Bingham of Cornhill, *Lectio Magistralis*, *14 marzo 2008 (Cerimonia di Conferimento Laurea Honoris Causa a Lord Thomas Bingham), Roma Tre-Università degli Studi*, 13–14.

[13] *Ibid.*

[14] About western legal tradition, see HJ Berman, *Law and Revolution; The Formation of the Western Legal Tradition* (Harvard University Press, 1983); JH Merryman Et Al., *The Civil Law Tradition: Europe, Latin America and East Asia* 1 (Stanford University Press, 1994); HK Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation* 18 Emory Int'l L. Rev. 54 (2004); but see PG Monateri, *Comparer les compairaisons. Le problème de la légitimité culturel et le nomos du droit*, 1 Op. J. (2009); Paper n 1, at 24, <http://lider-lab.sssup.it/opinio, online publication 05.03.2009>.

[15] See DL Levi, *The Role of Apology in Mediation* 72 NYU L. Rev. 1176 (1997).

[16] See RP Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theatre. Is Nike just doing it?* 15 Ariz. J. Int'L & Comp. Law 905 (1998).

[17] See JR Cohen, *Legislating Apology: The Pros and Cons'* 70 Univ. of Cinc. L. Rev. 819 at 849 (2002) cited by D Leon, B Barrett, *Canada: Safe to Apologise: New Law in British Columbia* (*Litigation, Mediation & Arbitration,* 8 November 2006).

[18] M Klausner, *The Limits of Corporate Law in Promoting Good Corporate Governance* in Jay W Lorsch, Leslie Berlowitz & Andy Zelleke (eds), *Restoring Trust in American Business* 98 (Mass: MIT Press 2005).

behavior … ."[19] Borden, discussing the extra-legal role of the media in compelling corporate wrongdoers to act within ethical and legal norms, notes that "one of the functions of the press in enforcement is its role as an alternative or supplement to legal enforcement".[20]

In conclusion, all of these tools could be interpreted as serving essentially to improve the alternative dispute resolution purpose.[21] The role of media (like press) in influencing legal policies and dispute assessment is evident.[22] In this context, specific focus should be dedicated to policy options based on reconciliation between wrongdoer and the injured party and on restoration of essentially moral prejudices through dialectic (non mandatory) tools.[23] If one thinks about moral or punitive damages cases,[24] a public gesture of apology by the wrongdoer sets up an opportunity to prevent or mitigate litigation harshness.[25] The article suggests that a public apology is not only a voluntary gesture but a narrative tool used by public policy to incentivate mediation. Should an alternative narration of facts be enforced by courts or otherwise recognized in its legal effects by public policy? We will focus on this subject from a comparative perspective as a part of a wider investigation on the role played by metanarrations in legal issues, expecially in assessing moral damages and seeking moral redresses.

2. The Case of Public Apology: Definition and Legal Meanings

Voluntary public apologies are often requested by victims of wrongdoing directly from the wrongdoer as a measure to repair reputation and honour. Frequently we find news

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[19] *Ibid.*

[20] See MJ Borden, *The Role of Financial Journalists in Corporate Governance* 12 Ford. J. Corp. & Fin. L. 311, 325–326 (2007). About media distorsion of damage cases, see also A Bloom, "*Milking the Cash Cow*" *and Other Stories: Media Coverage of Transnational Workers' Rights Litigation* 30 Vermont L. Rev 181 (2006).

[21] See, for example, M Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation* 48 Clev. St. L. Rev. 545, 546 (2000); S Keeva, *Does Law Mean Never Having to Say You're Sorry?* ABAJ 64 (1999) (suggesting that 30 per cent of medical malpractice cases could be resolved with an apology); DL Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century* 18 Ohio St. J. On Disp. Resol. 829, 835–36 (2003).

[22] See ME Katsh, *Law in a Digital World* 9 (Oxford University Press, 1995): "[s]cholars seem to view the powerful realms of law and media as distinct and independent, each having an impact on behavior and attitudes, but having little influence on each other." cited by MB Runnels, *Dispute Resolution & New Governance: Role of the Corporate Apology* 34 Seattle Univ. L.R. 501 (2011).

[23] See J Braithwaite, *Restorative Justice and Responsive Regulation* 10 (Oxford, 2002): "Restorative justice seeks to extend the logic that has informed mediation beyond the settlement of business disputes to the resolution of individual conflicts that have traditionally been addressed within a retributive paradigm".

[24] About urban legends and overestimation of punitive damages, see PS Ryan, *Revisiting the United States Application of Punitive Damages: Separating Myth From Reality* 10 ILSA J. Int'l & Comp. L. 69 (2003); T Eisenberg, *John M. Olin Program in Law and Economics Conference on "Tort Reform": The Predictability of Punitive Damages* 26 J. Leg. Stud. 623, 634 (1997).

[25] See DW Shuman, *The Role of Apology in Tort Law* 83 Judicature 180 (2000); LL Riskin, *Mediation and Lawyers* 43 Ohio St. L.J. 29, 33, 45–46 (1982); E Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions* 81 B.U. L. Rev. 289, 320 (2001).

like this: "The newspaper apology to Mr Ryder, and his company Telecom Watch, appeared on page five of The Daily Post in north Wales yesterday. It read: "We, the National Westminster Bank acknowledge that there was no foundation for our action in refusing on 29 March to pay a cheque drawn by Mr Richard Patrick Ryder on the account of Telecom Watch Ltd at our bank in favour of Hywel Davies and Co. "We apologise and express our regret to both Mr Richard Patrick Ryder and Telecom Watch Ltd for any embarrassment."[26]

From a broad perspective, public apology can be defined as a statement of error or contrition for harmful conduct coming from the wrongdoer.[27] This speech is publicly available and is focused on the following criteria: 1) recognition of the truth; 2) an expressive and clear statement that wrongdoing occurred, with identification of the guilty and the offended and recognition of responsibility for the wrongdoing; and 3) a clear and expressed statement that an apology is offered. Public apologies open the door for the forswearing of revenge and the possibility of cooperation, but do not address individual resentment as forgiveness does.[28]

The tortfeasor's public regret as a remedy for damages incurred is deeply aknowledged in the tradition of social harmony of far eastern countries, like China and Japan.[29] Traditional rituals of reconciliation are also well known in African tribal communities. On the other hand, apology is traditionally considered as a private act and usually not encouraged or enforced by legal institutions.[30] Its legal interpretations and functions can vary widely due to some circustances, as the specific legal system considered and cultural-traditional backgrounds. Normally, court-ordered apologies are not common as a civil remedy in western legal systems, as the United States, U.K, other European countries.[31] Other solutions could be found in systems where apologies are enforced

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[26] See B Williams, 'You Can Bank on A Public Apology. NatWest Forced to Say Sorry in Advert' The Mirror, 5 July 2001, available at <http://www.thefreelibrary.com>.

[27] See N Funk-Unrau, *Renegotiations of Social Relations Through Public Apologies to Canadian Aboriginal Peoples, in Pushing the Boundaries: New Frontiers in Conflict Resolution and Collaboration* 29 Research in Social Movements, Conflicts and Change 1–19, 2–3 (2008); N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* 19–20 (Stanford University Press, 1991). See also M Alberstein, N Davidovitch, *Apologies in the Healthcare System: from Clinical Medicine to Public Health* 74 Law and Contemporary Problems 153 (2011): "[t]he more generally accepted modern usage of the word … is 'an expression of error or discourtesy accompanied by an expression of regret.'" See also MH Tanick, *Alternative Dispute Resolution By Apology: Settlement By Saying I'm Sorry*, The Hennepin Lawyer (1996) (now available at <http://www.mansfieldtanick.com/CM/Articles/Alternate-Dispute-Resolution.asp.)>.

[28] CL Griswold, *Forgiveness. A Philosophical Exploration* (Cambridge University Press, 2007). About the relationship between truth and religion in ancient societies, see also R Sacco, *Antropologia giuridica* 229 (Bologna, 2007).

[29] See H Wagatsuma, A Rosett, *The Implications of Apology: Law and Culture in Japan and United States* 20 Law & Society Rev. 461 (1986); I Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and the United States in Mind)* 27 *Mich. J. Int'L Law* 1 (2005).

[30] M Alberstein, N Davidovitch, *Apologies in the Healthcare System: from Clinical Medicine to Public Health* 74 Law and Contemporary Problems 152 (2011).

[31] See JK Robbenolt et al., *Symbolism and Incommensurability in Civil Sanctions: Decision Makers as Goal Managers* 68 Brook. L. Rev. 1121, 1147 n.114 (2003).

by Courts as a civil legal remedy, expecially for psychological harm caused by copyrights and intellectual property infringement.[32] Such countries include China, Japan, Vietnam, Indonesia, Ukraine, Korea, and the Czech Republic.[33] As previously mentioned, the main usage of legal apologies is represented by far eastern countries.

3. Apologetic Traditions: A Background for Mandatory Apology

In countries where traditions and religious issues are deeply rooted with legal issues, public apologies are often treated as a mandatory tool and they are usually adopted by courts, if not issued spontaneously by the individuals. In China wrongdoing, such as trademark infringement, is not deterred by the risk of facing prison time or paying fines but due to the Chinese people's fear of shame and dishonor among society.[34] As thought in Chinese culture, such an embarrassment serves as a deterrent.[35] Even today, it is not uncommon practice to make a public apology in acceptance of a wrongdoing. Indeed, apologies are often ordered by the court in its judgments.[36] They are generally published in newspapers and other media to eliminate the "adverse effect" of the infringement.[37] If an infringer fails to apologize as ordered, the court may draft and publish an apology instead and charge the expense to the wrongdoer. In conclusion, an apology is both a shaming penalty and an alternative remedy of "eliminating the effects of the [infringing] act".[38]

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[32] See H Wagatsuma, A Rosett, cit. at 461.

[33] See BT White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, Arizona Legal Studies Discussion Paper, No. 06–28, August 2006, available at <http://ssrn.com/abstract=924500>, 2; JO Haley, *Comment*: *The Implications of Apology* 20 Law & Soc'Y Rev. 499, 500 (1986); C Morris, *Legal Consequences of Apologies in Canada*, Working Paper presented in the workshop "*Apologies, Non-Apologies, and Conflict Resolution*, *University of Victoria, 3 October 2003*".

[34] See D Hoover, *Coercion Will Not Protect Trademark Owners in China, but an Understanding of China's Culture Will: A Lesson the United States has to Learn* 15 Marq. Intellectual Property L. Rev., 325, 345 (2011); M Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation* 48 Clev. St. L. Rev. 545 (2000); about apology in Korea, see D Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks* 8 Cardozo J. Int.l. & Comp. L. 205 (2000). About "written public apology" in Japan, see Ouchi, *Defamation and Constitutional Freedoms in Japan* 11 Am. J. Comp. L. 73–81, 74 n 5 (1962).

[35] *Ibid*. The Author notes that "Not surprisingly, courts have been ordering a public apology in many trademark infringement cases."

[36] See Hoover, cit. at 345; see also BT Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws* 12 Depaul-LCA J. Art & Ent. L. & Pol'Y 63, 83–85 (2002) (discussing apology as a remedy for copyright infringement in China); MH Wang, *Filling the gaps in protection, World Trademark Review*, October/November 2010, available at www.WorldTrademarkReview.com who observed that: "As the basis of damages with regard to portrait rights is psychological harm caused to the subject, the infringer shall bear civil liability for offering a public apology, remedying any negative effects and paying compensation for mental anguish at most."

[37] Hoover, cit. at 345.

[38] PK Yu, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Article: From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO-China* 55 AM. U. L. REV. 901, 953 (2006).

Despite China's rapid political and economic growth in the recent years, the "cultural mores and the laws that reflect them have consistently retained a Confucian and Marxist basis of subjugation of individual interest to the greater good of society."[39] Consequently, many Chinese people consider state laws as the last recourse.[40] Thus, even today, the Chinese still prefer settling a dispute through an informal process.[41] Art. 46 of the Chinese Copyright Act[42] reads: "Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating its ill effects, making a public apology or paying compensation for damages (…) depending on the circumstances, and may, in addition, be subjected by the copyright administration deparment to such administrative penalties as confiscation of unlawful income from the act, or imposition of a fine". The above mentioned infringements include: 1) plagiarizing work created by others; 2) reproducing and distributing work, for commercial purposes, without the permission of the copyright owner; 3) publishing a book where the exclusive right of publication belongs to another publisher; 4) producing and publishing a sound recording or video recording of a performance without the permission of the performer; 5) reproducing and distributing a sound recording or video recording produced by others without the permission of its producer; 6) reproducing and distributing a radio programme or television programme without the permission of the radio station or television station which has produced that programme; or producing or selling a work of fine art where the signature of the author is forged. In the Vietnamese civil code (Art. 310) is expressly stated that a person causing spiritual damage to another person by infringing on the life, health, honor, dignity and reputation of another person must make pecuniary compensation to the injured person in addition to ceasing the violation, offer an apology and effect a public rectification.[43] The same provision is also contemplated for personal rights violations (Art. 27), liability for spiritual damages (Art. 310), author or owner's rights protection (Art. 759), rights of performers (Art. 775), protection of civil rights (Art. 12). Further case discussion is provided by the press. The Jakarta Post, May 18, 2005, reported a civil suit by an American lobbyist who sought $50 million in damages and a formal apology in an Indonesian court, alleging that an article falsely accused him of bribery.[44] A Kiev Court ordered former Ukrainian prime minister Viktor Yanukovych to apologize publicly to a man whom he had insulted by using an obscenity.[45]

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[39] *Ibid.*; see also Hoover, cit. at 345.

[40] AM McGill, *How China Succeeded in Protecting Olympic Trademark and Why This Success May not Generate Immediate Improvements in Intellectual Property Protection* in China, Loy. Law & Tech. Ann. (2010), available at <http://works.bepress.com/aileen_mcgill/2/> cited by Hoover (p. 345).

[41] *Ibid.*

[42] See also Copyright Law (Promulgated by Order No. 31 of the President of the People's Republic of China on 7 September 1990. Effective as of 1 June 1991).

[43] The Code was promulgated in October 1995.

[44] *Id.*, 'Court to Hear Civil Action Against "AWSJ"', at 4.

[45] See also 'Yanukovych Ordered to Apologize to Veteran, Pay Fine', Interfax, 19 May 2005, available at <http://www.interfax.ru/e/B/0/28.html?id_issue=11293945>.

In some asian and african jurisdictions, public apology is linked with a tradition-centered legal framework.[46] Such a feature could be a result of the strong religious influence on law.[47] But in a wider analysis it could also be a simple policy option with regard to moral damages.

4. Moral Damages and Public Apology: Satisfactive Remedy

An important step in reparation of moral damages is that psychic and status injuries cannot be healed by money alone.[48] Can moral damages be repaired by public apology? As pointed out by Wagatsuma and Rosett: "while there are some injuries that cannot be repaired just by saying you are sorry, there are others that can *only* be repaired by an apology. Such injuries are the very ones that most trouble American law. They include defamation, insult, degradation, loss of status, and the emotional distress and dislocation that accompany conflict. To the extent that a place may be found for apology in the resolution of such conflicts, American law would be enriched and better able to deal with the heart of what brought the controversy to public attention."[49] Can legal apology work as a compensation, or is it more similar to a sanction or to something else?

The question requires drawing a line between compensative function and punitive function attached to civil remedies in Tort Law. According to H. Stoll analysis, compensation for injury is the most important, but not the sole, approved purpose governing remedies afforded by private law.[50] In fact, in numerous legal systems tort liability serves other objectives as well, objective which supplement the main one and which may sometimes even gain preponderance. Most prominent among these are the vindication of the legal authority by condemning the tortfeasor's conduct, particularly by punishing him, and preventing further action through deterrence and education of the wrongdoer.[51] The common distinction between compensation in the framework of private law and punishment threatened by criminal law does not exclude certain interrelationships between the two branches of law and the dislocation of functions among them.[52] To this extent, private law institutions also assume functions, which

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[46] See HK Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 Emory Int'l L. Rev. 53 (2004).

[47] See M Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation* 48 Clev. St. L. Rev. 545, 546 (2000).

[48] See White, cit. at 12.

[49] *Id*., at 69.

[50] See H Stoll, *Consequences of Liability: Remedies*, in *Intern. Enc. Comp. Law*, XI, 8, 9, reminding the theories of CC Burkhardt, *Die Revision des Schweizerischen Obligationenrechts in Hinsicht auf das Schadensersatzrecht. Referat am 41. Schweizerischen Juristentag* 1903: ZSR 22 (1903) 469–586.

[51] *Ibid*.

[52] *Ibid.* From a comparative perspective, see CR Calleros, *Punitive Damages, Liquidated damages, and* Clauses Penale *in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code* (Bepress Legal Series, 2006), Paper 1180 (available at <http://law.bepress.com/expresso/eps/1180>), 16, observed that "punitive damages serve a broad retributive purpose, allowing

are regularly administered by criminal law. For example, institutions of criminal law like public apology or retraction can serve the esclusive or predominant purpose of satisfying the person injured by the offence.[53] The case for punitive damages in the U.S. legal system is another brilliant example of such an interrelationship. Public apology differs widely from other legal solutions, like punitive damages or moral damages. In fact it is essentially directed to compensate victim, not to punish the tortfeasor. So, except for some specific cases, it is generally a "non-mandatory tool", growing in ethical and social, and sometimes political, fields. Some authors show that more attention should be paid to public apology as a satisfactory remedy.[54]

On the other hand, western legal tradition doesn't normally follow such a model for civil liability although the situation is quiet different in criminal law.[55] As appropriately noted, occasionally declarations of honour, apologies, retractions, judicial reprimands and judicial declarations that a wrong has been committed are recognized as measures of satisfaction which may be imposed by a civil court.[56] According to some attempts, mainly in common law, "public apology" as a legal tool has gradually emerged from its main moral-social ground. As pointed out by the Scottish Executive Environment Group,[57] "this alternative remedy cannot be a straightforward matter of transplanting into western legal tradition because of the different legal, cultural and operational contexts and clearly, a great deal of work would be required to develop models suitable for a civil law or common law country".

5. Legal Trends and Case Law in Western Legal Tradition

In western legal tradition a pecuniary compensation for moral damages is often preferred to alternative compensation in cases of liability for copyright infringement,

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the jury to express the community's outrage at egregiously wrongful conduct by imposing punishment that the wrongdoer deserves and by providing the victim of the wrongdoing with a sense of satisfaction that justice has been done or perhaps providing the victim with a sense of satisfaction that may come with exacting revenge on the wrongdoer."

[53] H Stoll, cit. at 9.

[54] M Bell, I Chopin, I Palmer, F Palmer, *Developing Anti-Discrimination Law in Europe*, European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities (July 2007). See L Ervo, J Lavapuro, T Ojanen, *Thematic Legal Study on Assessment of Access to Justice in Civil Cases in The European Union. Finland* (October 2009), at 53 (evidentiating the absence of forms of satisfaction such as public apology).

[55] See CJ Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System,* 20 Behavioral Sciences & the Law 337–362(2002) (suggesting that apology is worthy of further study as a potentially valuable addition to the criminal justice process).

[56] H Stoll, cit. at 8, 86.

[57] See *Id.*, *Strengthening and Streamlining The Way Forward for the Enforcement of Environmental Law in Scotland* (November 2006) at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>, p 25.

defamation, libel, personal reputation and consumer protection.[58] Public apology is hardly used as an alternative remedy to compensation. Otherwise a judicial order (injunction) binding the offender to make a public rectification or retraction doesn't involve any statement of contrition.[59] At least, apology has also been judicially upheld as a method of settling legal disputes.[60] Expressing public apology has helped resolve a myriad of disputes, including a charge of contempt against a TV network for failing to abide by a judicial order, a lawsuit based on a defamatory broadcast implying parents were partially responsible for their daughter's suicide, and a dispute involving the damaging "leak" of confidential government data.[61] Notwithstanding, courts cannot coerce settlements in litigation and must instead utilize their powers of adjudication where appropriate if agreement is lacking.[62] Settlement may be reached only by "voluntary acquiescence of both sides based upon intelligent self-interest."[63] As recently observed: "apology in western thought is both individualistic and moralistic. It includes acknowledgment of a wrong and transformation of the interpersonal relationship through a sequence of acts. It might occur between parties on the private level, but is not susceptible to genuine enforcement or regulation by law. Law begins when the dynamic of private relationship ends and parties pursue their rights in courts. The courts determine their rights and, traditionally, will not enforce interpersonal reconciliation through apology. Apologizing signifies a human gesture beyond the structural relationships created by law."[64]

In most civil law jurisdictions, offender's apologies could be at least considered as a mitigating factor in the assessment of moral damages caused by criminal acts. According to legislation, courts award only a compensation for psychological harm suffered by the victim (*pretium doloris*) but rarely exemplary damages. In American

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[58] See for example, Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25, 39; R von Ihering, *Legal Opinion "betreffend die Vollendung und den Betrieb der sogenannten Gäubahn von Solothurn nach Scöhnbühl"*, in *Iher. J.* 18 I, 51 (1880), in particular, p 59; see also H Stoll, cit., at 10 (discussing the *Schmerzensgeld* doctrine); more recently see: L Ervo, J Lavapuro, T Ojanen, cit. at 53.

[59] See, for example, V Roppo, *Il diritto alla rettifica nella disciplina dei mezzi di comunicazione di massa*, in *Foro it.* I, 463 (1983); V Meli, *La pubblicazione della sentenza nei procedimenti in materia di proprietà intellettuale*, in *Ann. It. Dir. Aut.* 301 (2000).

[60] See Tanick, in footnote 5, citing *U.S. v. Cable News Network*, 752 F. Supp. 1037 (S.D. Fla. 1990). See also J Robbenolt, *Apologies and Legal Settlement: an Empirical Examination* 102 Mich LR 460 (2003); *Id.* et al., *Symbolism and Incommensurability in Civil Sanctions: Decision Makers as Goal Managers* 68 Brook. L. Rev. 1121, 1147 n.114 (2003) (observed that court-ordered apologies are not available as a civil remedy in the United States); see also SE Rush, *The Heart of Equal Protection: Education and Race* 23 N.Y.U. Rev. L. & Soc. Change 1, 50–57 (1997) (stating that court-ordered apologies should be but aren't available as an equitable remedy in civil cases).

[61] See Tanick, footnote 5.

[62] See Judge Vincent L Broderick in *Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 18364, at *5–6 (S.D.N.Y. Dec. 17, 1994). See LJ Dhooge, *Aguinda v. Chevrontexaco*: *A Pyrrhic Victory for The Environment?* 41 Academy of Legal Studies in Business National Proceedings 1–29 (2010) see footnote 305.

[63] *Ibid*.

[64] See M Alberstein, N Davidovitch, *Apologies in the Healthcare System: from Clinical Medicine to Public Health* 74 Law and Cont. Problems 154 (2011).

common law, there are more chances for treating apologies as a legal concern.[65] A reason might be that usually common law jurisdictions are more familiar with deterrence (punitive damages) and with equitable remedies than civil law jurisdictions.[66] In the U.S.A., apology was considered a mitigating factor in the assessment of penalties for contempt [67] or a mitigating factor in the assessment of punitive damages.[68]

According to *Desjardins v. Van Buren Community Hosp.*, an employer was forced to apologize in a wrongful discharge case.[69] In *Kicklighter v. Evans County Sch. Dist.*, it was affirmed that "[T]o require a simple apology for truculent and disruptive in-school behavior falls well within the ambit of an institution's balanced comprehensive authority. If the school board can determine what manner of speech is inappropriate in the classroom, it can also dictate what speech is proper when fulfilling its charge to inculcate the habits and manners of civility … ." (citations and quotations omitted)).[70] On the other hand, the US Courts normally refuse to impose apologies to the tortfeasor.[71] In *Wilkinson v. Bensalem Township*, the court rejected requiring an apology prior to speaking at public meeting.[72] According to *Frederick v. Shaw & McClay*, damages, not written apologies, were deemed proper sanction for defamation.[73]

From a wide perspective, it must be considered the attitude of an apology[74] to constitute an admission against interests (*id est*: an admission of wrongdoing).[75] In medical malpractice field, the defendant doctor's apology was found to be admissible

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[65] About judicial lawmaking in common law and civil law, see JP Dawson, *The Oracles of the Law* 382, 390–393 (1968); M Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System* 104 Yale L.J. 1325, 1342 (1995); U Mattei *Comparative Law and Economics* 180 (University of Michigan Press, 1997).

[66] See EC Stiefel, R Stadler, *The Enforceability of Excessive U.S. Punitive Damage Awards in Germany* 39 Am. J. Comp. L. 779 (1991); Zekoll, *Recognition and Enforcement of American Product Liability Awards in the Federal Republic of Germany* 37 Am. J. Comp. L. 301 (1989); Stoll, cit., at 93–94; P Rescigno, voce *Personalità (diritti della)*, in *Enc. Giur.*, XXIII, 12 (Roma, 1991); M Béhar-Touchais, *L'Amende Civile Est-elle un Substitut Satisfaisant A L'Absence de Dommages et Intérets Punitifs?*, *Petite Affiche* No 232, 36–44 (20 Nov 2002) (discussing whether the *amende civile* is adequate to compensate for the absence of punitive damages under French law).

[67] For example, *Groppi v. Leslie*, 404 U.S., 496,506 n 11 (1972).

[68] See *Jhonson v. Smith,* 890 F Supp. 726, 729, n 6 (N.D. III. 1995). See also in Italy, *Trib. Civile di Trieste* 29 agosto 2009, *Dott.ssa Carlesso* (discussed the lack of any tortfeasor's apology as a relevant factor in assessing damages).

[69] *Id.*, 969 F.2d 1280, 1281–82 (1st Cir. 1992).

[70] *Id.*, 968 F. Supp. 712, 719 (S.D. GA 1997).

[71] See SE Rush, *The Heart of Equal Protection: Education and Race* 23 N.Y.U. Rev. L. & Soc. Change 1, 50–57 (1997) (stating that court-ordered apologies should be but aren't available as an equitable remedy in civil cases), cited by White, cit. at 9.

[72] *Id.*, 822 F. Supp. 1154, 1156 (E.D. Pa. 1993).

[73] *Id.*, 1994 WL 57213 (E.D. Pa. 1994).

[74] See EF Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct* 26 Yale L. & Pol'y Rev., 367 (2008).

[75] See *In re: Commodore Hotel Fire and Explosion Cases*, 324 N.W. 2d 245, 247 (Minn. 1982); *State v. O'Hagan,* 474 N.W. 2d 613, 619–20 (Minn. Ct. App. 1991); rev. Denied (25 Sep 1991); *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W. 2d 141, 148 (Minn. Ct. App. 1992); rev. denied (26 Mar 1992).

as an admission against interest but insufficient in itself to establish breach of standard of care.[76]

In civil law jurisdictions the practical issue about public apology as an admission of fault lies with the assessment of *animus confitendi* (intention to admit the one's own fault) into the apologizer's statement.[77] Otherwise the fear of negative consequences of an admission of wrongdoing might deter the offender from apologizing. This is a legitimate concern in some cases, but not necessarily insurmountable. The offer of an apology can be extended in confidential settlement negotiations.[78] However, some statements made in settlement negotiations have been held admissible, if it is not disputed as admissions concerning factual matters.[79] Therefore, the form of the apology should be carefully crafted to avoid admission of wrongdoing.[80]

In trying to avoid the risk of an admission against interests, some States implemented specific legislation about the rule of evidence providing a safe harbour for public apologies.[81] Apology laws have been implemented in more than 20 US states as well as in Australia since the late 1980s.[82] They usually protect apologies made in connection with any matter, other than in a criminal context, and deems them inadmissible as evidence regarding the fault or liability of a person in any court, arbitration or other tribunal proceeding.[83] British Columbia was the first Canadian jurisdiction to introduce such a law (*Apology Act*[84]) according to an increasing evidence that apology laws lead to a reduction in both the number of lawsuits and the time required to settle lawsuits in which apologies are made. In particular, the British Columbia Act states that an apology does not constitute an admission of fault or liability and must not be taken into account determining fault or liability in connection with the matter to which it relates.[85] Outside the framework of formal apology legislation, there are also important extralegal projects like the 'Sorry Works' coalition in Illinois. Its success demonstrated that providing a safe harbour for apologising is a pragmatic approach to dispute resolution.[86] In my opinion, the safe harbour option is questionable because

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[76] See *Phinney v. Vinson,* 605 A.2d , 849, 850 (Vt. 1992). See *amplius* PH Rehm, DR Beatty, *Legal Consequences of Apologizing* J. Disp. Resol. 115, 119–28 (1996),; L Taft, *Apology Subverted: the Commodification of Apology* 109 Yale L. J. 1135 (2000).

[77] See ET Liebman, *Manuale di diritto processuale civile,* II, 141 (Milano, 1984).

[78] See *Minn. R. Evid.* 408.01, cited by Tanick in footnote 6.

[79] See *In re: Commodore Hotel Fire and Explosion Cases*, 324 N.W.2d 245, 247 (Minn. 1982) cited by Tanick, in footnote 7.

[80] See *State v. O'Hagan*, 474 N.W.2d 613, 619–20 (Minn. Ct. App. 1991); rev. denied (25 Sep 1991); *McKay's Family Dodge v. Hardrives, Inc*., 480 N.W.2d 141, 148 (Minn. Ct. App. 1992); rev. denied (26 Mar 1992) cited by Tanick, in footnote 8.

[81] See WK Bartels, *The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents* 28 W. St. U. L. Rev. 141, 156 (2001); MB Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases* 46 San Diego L. Rev. 137, 139–40 (2009).

[82] *Ibid.*

[83] *Ibid*.

[84] It tooks effect on 16 May 2006 (SBC 2006, c. 19). See D Leon, B Barrett, in footnote 14.

[85] *Ibid*.

[86] *Ibid.* (footnotes 4, 5) observed that "The Sorry Works! Coalition believes and advocates that apologies and upfront compensation for medical errors reduce lawsuits and liability costs while provid-

of the asimmetries between factual truth and legal truth.[87] As a result the burden of proof is worse for the victim.

An aknowledgement of public apology as a legal option can be found in Dutch Civil Code, at par. 6:162. According to this provision, the obligation to repair the damage may, for instance, impose a duty upon the tortfeasor to pay a sum of money to the proprietor as a financial compensation for the loss suffered. But it may also impose a duty to return the object to its legitimate proprietor, to restore the situation to its original condition, to withhold from further violating behaviour or to make a public apology or rectification.[88] In 2006 the Scottish Executive Environment Group[89] investigated the potential that new types of penalties/sanctions might have for strengthening the enforcement of environmental law in Scotland. The Group's Opinion specified that the term "alternative sanctions" may include such sanctions as negative publicity orders, public apology orders, environmental service orders and a corporate equivalent of community service orders.[90] Such sanctions would be imposed on operators instead of, or in addition to, more traditional penalties such as fines and imprisonment (....).[91] At a time when consumers are becoming more aware of environmental issues, negative publicity may act as a powerful deterrent as it may raise concerns about loss of customer support.[92] In addition, Australia utilised environmental service orders requiring operators to carry out specific environmental work. Such sanctions focus on remediation but also impose a time and cost penalty on the operator.[93] The Scottish Group concluded: "there is sufficient evidence provided by international examples to suggest that alternative sanctions have the potential to help

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ing swift justice for more victims and reducing medical errors' www.sorryworks.net (accessed 18 May 2006)"…. "As a result of the success of the Sorry Works! programme, the US government introduced, on 29 June 2005, federal bi-partisan legislation (Bill S 1337 – A bill to restore fairness and reliability to the medical justice system and promote patient safety by fostering alternatives to current medical tort litigation, and for other purposes) that will provide grants for similar pilot programmes at the state level. The bill was referred to the Committee on Health, Education, Labor, and Pensions, where it remains, as of this writing date").

[87] See also HK Josephs, cit. at 53; JR Cohen, *Legislating Apology: The Pros and Cons* 70 Univ. Cinc. L. Rev 819 (2002); CA Sparkman, *Legislating Apology in the Context of Medical Mistakes* 82:2 Aorn Journ. 263 (2005).

[88] See: <http://www.dutchcivillaw.com/content/legalsystem044.htm>.

[89] See *Id.*, *Strengthening and Streamlining The Way Forward for the Enforcement of Environmental Law in Scotland* at 25 (November 2006) at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>.

[90] *Ibid.*

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.* About bank's environmental policies, see JJ Norton et al., *Environmental Liability for Banks* (London, 1995); see M Andenas, *International Financial Institutions and the Environment: The Case of the European Bank for Reconstruction and Development*, at 185: "There is also the wider issue of social responsibility: how should banks respond to claims that their responsibility reaches further than their liability?"

strengthen the enforcement of environmental law because they represent an additional and credible sanction."[94]

6. The Moral Repair Issue: Metanarrations and Compulsory Apologies

6.1. Shaming Sanction and Moral Redress

Some scholars underwrite an increasing relevance of the "apology culture", as a non conflictual model to resolve disputes through a simple declaration of regret by the tortfeasor. On the other hand, public apology itself was assessed and interpreted as an instrument to achieve, case by case, a shaming function (alternative to other forms of punishments)[95] or a moral redress function, like a *restitutio in integrum.*[96] Public apology could also represent negative publicity and a threat to businesses, even more menacing than punitive damages, due to the rapid widespread dissemination of the statements through Internet and new media.[97] Even though the trend in some areas seems to be moving away from public apology toward public accountability, as petroleum companies, bailed-out banks, semi-nationalised automotive companies and possibly-juiced baseball players are summoned before senate committees as penitent children before the headmaster to confess past indiscretions, apology remains the token gesture of choice when seeking to right historical wrongs.[98] The idea of restorative justice is strictly interconnected with such a meaning as a method of bringing together all stakeholders in an "undominated dialogue" about the consequences of an injustice and affirming that a restorative justice process should impose less punishments than the courts would impose.[99] As observed "By publicly apologizing, the offender tells a narrative in which he or she committed a wrong that harmed the victim and for which the offender owes the victim an apology".[100] Notwithstanding a minor relevance of public apology as a legal remedy in western democracies, someone has

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[94] See note 90.

[95] See DM Kahan, *What Do Alternative Sanctions Mean?* 63 U. Chi. L. Rev. 591, 631–33 (1996); *Id.*, *Social Influence, Social Meaning, and Deterrence* 83 Va. L. Rev. 349, 384–85 (1997).

[96] R Jukier, *Non-Pecuniary Damages in Defamation Cases*, p 364, believes that the awarding of damages for cases of defamation is really not the best solution. In this context, the author suggests 'alternatives' (or perhaps complementary) remedies: injunction (only in limited circumstances, cause dangerous assault on freedom of speech), publication of decision (not that great, cause limited scope), retraction and reply (elective remedy at discretion of defendant).

[97] See AA Curcio, *Painful Publicity. An Alternative Punitive Damage Sanction* 45 De Paul L. Rev. 341 (1996).

[98] As well described by N Dion, *Forgiveness: A Useful Concept? A Psychoanalytic Consideration*, The Religion Beat, at <http://religionbeat.blogspot.com/2010/05/forgiveness-useful-concept.html> (11/10/2011): "Even Bart Simpson, beloved figure of popular culture, was summoned to the Australian parliament years ago to ask forgiveness for having made a fraudulent and rather lengthy collect call."

[99] See also J Braithwaite, cit. at 12.

[100] See BT White, cit. at 16.

recently proposed to treat public apology as a civil rights judicial remedy.[101] In some cases, involving the violation of fundamental rights (like discrimination cases or massive environmental damages),[102] it could appear that public apology can bear a collective redress function, due to its "narrative function". In someone's opinion the "narrative function" of apology could replace social and civil justice driving important social meanings particularly in community sensitive cases.

The Spanish Government decided to publicly apologise for discriminatory acts committed by Spanish police against a Black woman. The apology was issued after that *Human Rights Committee*[103] criticized the Spanish Supreme Court Opinion[104] that had refused to aknowledge the discriminatory nature of police acts. Public apology could also turn into a benefit for the corporation that would maintain a good reputation in the light of corporate social responsibility.[105] International labor abuse by multinational corporations (MNCs) manufacturing in economically developing regions such as Southeast Asia, China, South Korea, the Caribbean, and Latin America, is a significant problem facing the international community. The apparel and garment industry has recently undergone severe criticism, as companies like Nike Inc. (Nike) encounter allegations and reports of sweatshop labor practices, unfair and unlivable wages, unreasonable hours, unsafe working conditions, and physical and mental abuse by supervisors. Workers from nearby Asian countries are subject to similar treatment. In Korea, a Korean owned factory that produces for Nike issued a public apology to their workers for violating a Korean law limiting overtime work.[106]

6.2. Conditional Remedy: Maria Aguinda v. Chevron-Texaco

Should a Corporation be compelled to apologize? Exceptionally courts have treated public apology as a judicial remedy as an alternative to punitive damages. A Court could grant the tortfeasor the choice between fulfilling the total amount of damages or reduce them (in full or in part) by making a proper public apology in a short time after the Court decision.

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[101] *Ibid*.

[102] See M Bell, I Chopin, I Palmer, F Palmer, *Developing Anti-Discrimination Law in Europe*, European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities (July 2007). . See also C Taylor, *The Politics of Recognition*, in A Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton, N.J.: Princeton University Press, 1992); JK Olick, *The Politics of Regret: On Collective Memory and Moral Responsibility* (New York: Routledge, 2007; W Long, P Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution* (Cambridge, Mass.: MIT Press, 2003). See also Directive 2000/43/EC, which, within the context of the "anti-discrimination package" approved by the Commission on 25 November 1995, marks a turning point in the Community's anti-racism policy.

[103] Communication 1493/2006) of 27/7/2009. See F Rey Martinez, D Gimenez Glück, *For Diversity, Against Discrimination*, Working Paper 4/2010, Fundaciòn Ideas Para el Progreso, at 66.

[104] *Id.*, n 13/2001 (case *Williams*) of 29/1/2001.

[105] RP Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theatre. Is Nike just doing it?* 15 Ariz. J. Int'L & Comp. Law 905 (1998).

[106] *Ibid*.

In 2011, the Provincial Court of Justice of Sucumbíos (Ecuador) rendered judgment founding Chevron-Texaco liable for approximately $8.6 billion in damages primarily for the compensation of contaminated soils.[107] The Court awarded ten percent of that amount to the entity representing the Plaintiffs (by operation of law) to execute community rebuilding and ethnic reaffirmation programs within the affected communities of "rainforest indians".[108] The Court granted an additional, punitive award amounting to 100% of the base judgment unless Chevron issues a public apology in Ecuador or in the US within 15 days of the judgment , as "a symbolic measure of moral redress" recognized by the inter-American Court of Human Rights. Chevron appealed the case in March 2011. The judgement was confirmed by the Appellate Panel in Ecuador on 3 January 2012.[109]

In particular the Court affirmed:

> Nonetheless, considering that the defendant has already been ordered to redress the harm, and insofar as it serves the same exemplary and dissuasive purposes, this civil penalty may be replaced, at the defendant's option, by a public apology in name of Chevron Corp., offered to those affected by Texpet's operations in Ecuador.[110] This public recognition of the harm caused must be published at the latest within 15 days, in the principal print media in Ecuador and in the country of the defendant's domicile, on three different days, which, if fulfilled, shall be considered a symbolic measure of moral redress and of recognition of the effects of its misconduct, as well as a guarantee of no repetition, which has been recognized by the Inter- American Court of Human Rights for the purpose of "recovering the memory of the victims, acknowledgment of their dignity, [and …] transmission of a message of official reproval of the human rights violations involved, as well as avoiding repetition of violations.[111]

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[107] Tribunal Superior de Nueva Loja, *Lago Agrio Class v. Chevron Corp*, Lago Agrio Judgment, No: 2003-0002, 14/2/2011, available at <http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team.html>; see S Romero, C Krauss, 'Ecuador Judge Orders Chevron to Pay $9 Billion*', NY Times*, 14 Feb. 2011, *available at* <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html?partner=rss&emc=rss>; LJ Dhooge, *Aguinda v. Chevrontexaco*: *A Pyrrhic Victory for The Environment*? 41 Academy of Legal Studies in Business National Proceedings 1–29 (2010). See also J Kimberling, *Indigenous People and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco* 38 N.Y.U. J. Intern'l Law and Politics 413 (2006).

[108] J Kimberling (on p 416) observes: "Their worlds changed forever, Amazonian peoples have borne the costs of oil development without sharing in its benefits and without participating in a meaningful way in political and environmental decisions that affect them."

[109] Available at <http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team.html>.

[110] Literally: "esta penalidad civil podrà ser reemplazada, a lecciòn del demandado, por una disculpa pùblica".

[111] See *Hermanos Gómez Paquiyauri v. Peru. Merits, Reparations and Costs*. Judgment of 8 July 2004. Series C No. 110, Par. 223.

In such case, the unethical and antisocial behaviour of the defendant protracted for the whole process were considered as determinant factors to establish this type of sanction and maybe the hidden function pursued by the court was to prevent an appeal of the judgment from the defendant.[112] In fact, it was underlined that adversarial process also negatively affects community relations and that an apology and recognition of the harm caused by oil spills would be beneficial in building the trust necessary to work together to rebuild affected communities.[113] Independently from its ethical and deterrent value, such legal reasoning lies on some criticisms argued by the following points:[114]

- in the decision, the lower court judge ordered Chevron to issue a "*public apology*" in "*recognition of the harm caused*" and declared that if Chevron failed to print such an apology in multiple newspapers on three different days, the court would *double* the damages against the company;
- this award plainly violates any notion of due process: by doubling the damages if Chevron refuses to admit fault, the court has charged Chevron over US$ 8 billion to appeal this case;
- there is no basis in Ecuadorian law for imposing such conditional punitive damages;
- in violation of Chevron's due process and free speech rights, the court has attempted to compel Chevron to speak against its will and falsely proclaim its liability. In fact for liability reasons companies are often reluctant to apologise or otherwise admit fault.[115]

Nothwithstanding the Chevron CEO opinion about unenforceability of Ecuadorian judgement, Chevron investors asked the "SEC to probe Chevron over $18 Billion for Ecuador Liability".[116]

6.3. Public Apology as a Narrative Tool

As the emergent trend is to disseminate public apology to avoid litigation, it could turn also into a defense strategy.[117] Specific suggestions are formulated about the adequate approach and best way to formulate the statement. Its proper contents could depend on: the type of damage suffered by the victim; the kind of media publishing

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[112] The Court cited Pizarro, *Derechos de daños* (La Rocca, Buenos Aires, 1996).

[113] Da T Lamboy, M Varner, A Argyrou, *The Corporate Responsibility to Remedy* (3rd Pillar Ruggie Framework) NQHR, Final Draft 25.8.11, at 58.

[114] See *Chevron*'s appeal to the judgment at <http://www.chevron.com/documents/pdf/ecuador/LagoAgrioAppeal_030911.pdf>.

[115] See T Lamboy, M Varner, A Argyrou, footnote 46.

[116] See *Amazon Defense Coalition*, 26 May 2011 available at <http://chevrontoxico.com/news-and-multimedia/2011/0526-investors-ask-sec-to-probe-chevron-over-18-billion-ecuador-liability-.html>.

[117] EA Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach* 48 Hast. L.J. 703 (1997); P Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?* 27 Sidney L. Rev. 483 (2005).

the apology; the moment when the apology is issued (short term or long term apology). Contrition can usually be more effective in the early stages of dispute, before feelings have intensified and attitudes hardened. The earlier in the process that the apology can be extended, the more likely it is to be accepted as a means of settlement in order to avoid large legal expenses. The adequate shaping of a contrition statement could depend also on the granting of a safe harbour by legislation.[118] Moral redress and self-reputational healing can coexist in a public apology. Otherwise, public apology can achieve the goal of reconciliating the tortfeasor(s) with groups or communities which have been directly or indirectly affected by such conduct.[119] In these cases, a court ordered public apology is an incentive to provide an objective and acceptable narration of the event and bear a truth-telling function. While tort remedy is uncertain or too weak for certain kinds of injury, an apology can contribute to rebuild the trust in social or business relationships or in the relationship with public authority.[120] Some evidence shows the many roles of public apology in tort law. They demonstrate that in some cases, involving the violation of fundamental rights (like discrimination cases or massive environmental damages), a public apology can bear a collective moral redress, due to its "narrative function".[121] Some recent equity theories posit that whenever individuals find themselves in unequal relationships, they become emotionally distressed.[122] In such opinion, the symbolic exchange of humiliation and power can rebalance the relationship and restore equity and the restoration of equity in turn helps eliminate the psychological distress.[123] This goal could be achieved by a "quasi-mandatory apology". Otherwise the purpose, *de iure condendo*, is to put the choice between paying monetary redress or making a public apology the responsibility of the tortfeasor. Notwithstanding the symbolic aim of this, the experience lies on the impossibility to bind a tortfeasor on a non mandatory basis. For example, the extralegal codes of conduct are often not enforceable since they are not linked to an international accepted standard of behaviour. As noted by Derrida, the proliferation of historical apologies was made

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[118] B Neckers, *The Art of the Apology* 81 Mich.B.J. 6, 10, 11 (2002); A Allan, *Apology in Civil Law: A Psycho-Legal Perspective* 14 Psychiatry Psychol. & L. 5, 7–8 (2007); R Korobkin, C Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach* 93 Mich. L.Rev. 107 (1994).

[119] See M Harter, PM Japp, J Stephens, *President Clinton's Apology for the Tuskegee Syphilis Experiment: A Narrative of Remembrance, Redefinition, and Reconciliation* 11 Howard Journal of Communications 1 (2000) (arguing that President Clinton's speech of apology for the Tuskegee Syphilis Experiment serves to redefine the role of the Tuskegee Institute in the experiment while embracing the grand narrative of modernism).

[120] See White, cit. at 36; JB Owens, *Have We No Shame? Thoughts on Shaming, White Collar Criminals, and the Federal Sentencing Guidelines* 49 American University Law Review 1049 (2011) (Available at: <http://digitalcommons.wcl.american.edu/aulr/vol49/iss5/2>).

[121] N Funk-Unrau, *Renegotiations of Social Relations Through Public Apologies to Canadian Aboriginal Peoples, in Pushing the Boundaries: New Frontiers in Conflict Resolution and Collaboration* 29 Research in Social Movements, Conflicts and Change 1–19 (2008); A Bagdonas, *State Apologies and the Transformation of International Legal System*, Paper prepared for 6th Pan-European Conference on International Relations, University of Turin, Italy, 12–15 September 2007.

[122] E Walster et al., *New Directions In Equity Research* 25 J Personality & Soc. Psychol. 151, 156, 163 (1973) cited by White, cit. at 14.

[123] *Ibid*.

possible by the institution of a juridical concept of the "crime against humanity", a concept which broken down the spatial borders of international law (a crime against humanity was to be considered "crime" whether or not it was in violation of the laws of the country where it was perpetrated).[124]

7. Critical Remarks

In a critical perspective, one could say that this new-found popularity of public apology has cheapened the gesture itself: "Forgiveness, sought through apology, has become something easily sought and easily granted, desirable but also effortless, both morally seductive and idealised. So an apology is genuine, if I consciously and genuinely feel contrite". [125]

The criticism is also focused on the risk that apology could easily degenerate into a hollow ritual (commodification of apology).[126] Sincerity and real forgiveness from the victim are requisites for the appreciation of any real effect of apology.[127]

The traditional meanings of apology and forgiveness in western legal tradition have changed their aim as warned by Derrida and Ricoeur.[128] Derrida begins by noticing the prominence of apology and forgiveness in today's political sphere and, disillusioned by the trend, identifies it as a form of meaningless political transaction.[129]

In the same direction, Griswold[130] warns against the confusion over a culture of apology and forgiveness by showing its risks and abuses. The analyses of interpersonal forgiveness shed light on public apology, such as the essential component of truth-telling or the use of narrative. This aspect contributes to track a deep distinction

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[124] See J Derrida, *On Cosmopolitanism and Forgiveness*, transl. by M Dooley and M Hughes 28–29 (Routledge 2001).

[125] See N Dion, footnote 3. Dion observed: "the more society tells me not to do something, and the more I internalise this proscription consciously, the greater the unconscious desire to pose the forbidden act. And the more genuine my apology, the greater my ignorance of the opposing unconscious affect. As Freud writes, "When the neurotic appears to be tenderly altruistic, it is merely compensating for an underlying attitude of brutal egotism" (1913, 72)". See S Freud, *Totem and Taboo (1913)* in *CW 13* (London: Hogarth, 2001).

[126] See L Taft, *Apology Subverted. The Commodification of Apology* 109 Yale L. J. 1135 (2000).

[127] See Griswold, cit. at XV: "forgiveness is a concept that comes with conditions attached. It is governed by norms" (p. xv). See the book review by EA Cole, *Forgiveness: A Philosophical Exploration*, Charles L Griswold, *I Was Wrong: The Meanings of Apologies* (Cambridge: Cambridge University Press, 2007); Nick Smith, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* 310ff (Cambridge: Cambridge University Press, 2008); Margaret Urban Walker, *Ethics & International Affairs* 262ff (Cambridge: Cambridge University Press, 2006).

[128] J Derrida, *On Cosmopolitanism and Forgiveness*, transl. by M Dooley and M Hughes 28–29 (Routledge 2001); P Ricoeur, *Memory, History, Forgetting: A Dialogue Between Paul Ricoeur and Sorin Antohi* 8 Janus Head 14–25 (2005); see G Fiasse, *An Encounter with Charles L Griswold. Forgiveness. A Philosophical Exploration* 268 (Cambridge: Cambridge University Press, 2007), 3 *PhaenEx* 195–208 (2008).

[129] *Ibid*.

[130] *Ibid.*

between narrative and story or, in other words, the historical story and the historical narrative.[131]

According to Farber and Sherry, the primary goal of legal scholarship is to identify points of improvement in the law, and proposals for legal change should be based on reasoned argument and empirical data, not stories.[132] In my opinion, most scholars overestimate apology as a legal device.[133] The problem arises because an emerging wide movement supports a stronger legal role of self-regulation and apology to activate informal dispute resolution.[134] Cutting litigation costs by apologizing is not equivalent to internalizing costs, whereas it might constitute only a moral suasion, not a real incentive to change wrongdoer's behaviour. The risk of such an approach is that financial lobbies and corporations would avoid litigations without internalizing costs.[135]

On the other hand, imposing the tortfeasor to issue a public apology can contrast with the rule of law, fundamental (or constitutional) rights,[136] freedom of thought and freedom of speech.[137] The practice of public apology is also questionable as it could establish a "mediatic" or narrative precedent. This is the case for some shaming sanctions or public apologies inflicted, or self-inflicted, by social networks.[138] The impact

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[131] *Ibid.*

[132] DA Farber, S Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* 38 (Oxford U. Press 1997); see also H Whalen-Bridge, *The Lost Narrative. The Connection Between Legal Narrative and Legal Ethics* 7 J Leg. Writ. Dir. 233 (2010); CA Mackinnon, *Law's Stories as Reality and Politics, in Law's Stories: Narrative and Rhetoric in the Law* 237 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996).

[133] LL Riskin, *Mediator Orientations, Strategies and Techniques* 12 *Alternatives to High Cost Litig.* 111 (1994); SS Silbey & SE Merry, *Mediator Settlement Strategies* 8 Law & Pol'Y 7 (1986).

[134] See for a brief discussion on the "Sorry Work's coalition", MB Runnels, *Dispute Resolution & New Governance: Role of the Corporate Apology* 34 Seattle Univ. L.R. 501 (2011); see also G Heal, *Corporate Social Responsibility: An Economic and Financial Framework* 30 The Geneva Papers 387, 387 (2005); DW Shuman, *The Role of Apology in Tort Law* 83 Judicature 180 (2000); DL Levi, *The Role of Apology in Mediation* 72 NYU L. Rev. 1176 (1997); LL Riskin, *Mediation and Lawyers* 43 Ohio St. L.J., 29, 33, 45–46 (1982).

[135] See EF Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?* 26 Yale L. & Pol'Y Rev. 367, 399 (2008)

[136] For a critical analysis of shaming sanctions, see DM Kahan, *What's Really Wrong with Shaming Sanctions*, Faculty Scholarship Series, Paper 102 (2006), at <http://digitalcommons.law.yale.edu/fss_papers/102>; H Garfinkel, *Conditions of Succesful Degradation Ceremonies* 61 Am. J. Soc., 422–423; RA Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment* 27 J. Legal Stud. 557–558 (1998) (discussed the deterrent efficiency of such alternative remedies and their potential conflicts with human dignity). *Contra* E Robbenolt et al., *Symbolism and Incommensurability in Civil Sanctions: Decision Makers as Goal Managers* 68 Brook. L. Rev. 1121, n.114 (2003), at 1140–1141 (noted that civil punishment is a means of restoring the value of equality).

[137] See, for a case analysis, White, cit. at 35–36: *Griffith v. Smith*, No. LT-460-2, 1993 WL 945995, at *13 (Va. Cir. Ct. 4 Mar 1993) ("First Amendment concerns preclude the Court from ordering the apology originally suggested … ."), *rev'd on other grounds*, *Roberts v. Clarke*, No. 930781, 1994 WL 16011491 (Va. May 06, 1994). But see *Kicklighter v. Evans County Sch. Dist*., 968 F. Supp. 712, 719 (S.D. GA 1997).

[138] See: *Public Apology on DomainingTips.com from Reputation.com Over "Domain Squatter Definition*, 18 February 2011, available at *DomainingTips.com*); about an on-line serial apology issued with

of apologies issued through media could be difficult to manage and depends on the specific content of statements and on the issuer's identity. Public redemption's aim is something different from a moral redress and could shift on a paternalitic view of human relationships. Instead of a recognized violation of their rights, the victims continue to be kept in the positions of passive recipients of honor and the key to restoration is in the hands of the offender.[139] Public policy and legal choices can activate or prevent the use of certain kind of apology. The latter framework could disguise a new paradigm of conflict resolution[140] that is directed to strengthen the role of moralistic-mediatic and symbolic justice[141] despite to legal positivistic and coercive attitude.[142] A public apology itself doesn't work as a restoration of ethical values.[143] Expecially when moral content is overwhelmed by self-interested business motivations the satisfactive function of public statement is very doubtful. Griswold, for example, prefers to use other words to qualify the individual to collectivity, or the collectivity to collective apologies, such as "appearance of forgiveness," or "symbolic contrition," while distinguishing the cases which in fact never involved a real apology but are more an apologetic gesture.[144] In my opinion, the theories on public apology as a moral redress must be seriously discussed due to their potential negative impacts on fundamental rights and rule of law principle that must be preserved as the basis of western democracies.[145]

8. Conclusions

Moral redress through apologies is the result of a dialectic process between victims and offenders. A traditional background of its legal aknowledgement is represented by Far Eastern concept of social harmony. In western legal tradition, public apology

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100 repeated messages, during three days, each one 30 minutes distant from the other, see "*No sleep till 100!"*, Monday, 6 June 2011, available at <http://whatsayyouvanilla.blogspot.com/2011/06/public-apology-new-media-way.html>.

[139] About metanarrative of lost and found honor in sexual arrassment apologies, see: WS Hesford, W Kozol, *Just Advocacy? Women's Human Rights, Transnational Feminism, and the Politics of Representation* 132 (Rutgers Univ. Press. 2005).

[140] See Dir. EC/52/2008, and also Resolution of EU Parliament rendered on 11/9/2011, about "Mediation and Conciliation in Civil and Commercial Matters".

[141] See M Klausner, *The Limits of Corporate Law in Promoting Good Corporate Governance,* in JW Lorsch, L Berlowitz & A Zelleke eds, *Restoring Trust in American Business* 91, 97–98 (2005).

[142] See recently MB Runnels, *Dispute Resolution & New Governance: Role of the Corporate Apology* 34 Seattle Univ. L.R. 481 (2011) (discussing the role of public apology practice in building a good corporate governance through a more efficient dispute resolution strategy).

[143] See G Fiasse, cit. at 207.

[144] *Ibid*.

[145] In time of crisis (expecially in security crisis, but also in great economic crisis), such principles are extremely vulnerable, according to T Bingham, *Personal Freedom and the Dilemma of Democracies* 52 ICLQ 841 (2003); WJ Brennan Jr, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises* 18 Israel Yearbook of Human Rights 11 (1988); J Jowell, *The Rule of Law Today* in J Jowell, D Oliver (eds)*, The Changing Constitution* 20–21 (Oxford 2004).

could also be directed to build a metanarration framework functional to reconciliation expecially in criminal law. It serves the public interest of reconciliating victims with offender and, under certain circumstances, courts can require remorse in imposing criminal penalties.[146]

Public apology is also identified with a shaming sanction as an alternative sanction to more traditional criminal punishments (like imprisonment). It implements an afflictive measure that focalizes the attention on the wrongdoer and his culpability independently from victim restoration issues. The question of its legal meaning is discussed in many areas, including tort law. The analysis demontstrates that the role of public apology as a legal tool is increasing in "western legal tradition", expecially in some states of the U.S.A., as a complementary or alternative remedy.

According to an increasing legal impact of p.a., many positive aspects have to be considered, as:

– the mitigating effect on damages assessment;
– its increasing role as a dispute resolution tool (for example in medical malpractice cases);
– the relevant laws providing a safe harbor for p.a. as an incentive to a quick dispute resolution;
– the emerging role of public apology as an alternative remedy to restore moral damages (moral redress).

Critical remarks involve lack of sincerity objections and apology commodification, rule of law compliance and fundamental rights issues. In conclusion, despite their interesting approach, theories attaching a positive moral redress function to apology lie in some criticisms. For example, a) the apology could be opportunistic, b) the economics or mediatics asymmetries between the famous apologiser and his anonymous victim could paradoxically serve the tortfeasor's interest (paternalistic apology), c) the apology wouldn't prevent future wrongdoings as it can't adequately internalise damage costs.

[146] See *U.S. v. Clark*, 918 F.2d 843, 848 (9th Cir. 1990) cited by Tanick in footnote 3.