

## Maintenance obligation: An analysis of civil and criminal liability



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### ABSTRACT

The maintenance obligation, in the Brazilian legal system, finds support in the civil and criminal spheres, with the aim of preserving the maintenance of life in society of the individual, who, for reasons beyond his will, cannot sustain himself with his own effort. Hence, for the law, maintenance in the broad

sense encompasses sustenance, clothing, education, medicines, etc. Based on these considerations, not forgetting to present the characteristics and classifications of alimony, the article proceeds to analyze the liability of the agent in the civil sphere, in which, in the face of non-compliance with the duty, the legislation provides for the possibility of civil imprisonment, which is used as a means of coercion. In the criminal sphere, the agent's excuse from aiding, whether in pecunia or in resources, to the family member who needs and is entitled to it, may constitute the crime of material abandonment provided for in article 244 of the Penal Code. To better understand, we sought to present the subjects who hold the right, as well as those who have the obligation. Finally, briefly, the possibility of applying criminal detraction in view of the fulfillment of the sentence of restriction of civil and criminal liberty was discussed.

**Keywords:** Material abandonment, Maintenance Obligation, Civil imprisonment, Responsibility.

## 1 INTRODUCTION

The maintenance obligation arises from the binomial need versus possibility, provided that the family bond between the creditor and the debtor is proven. In addition, the amount may be agreed upon by means of wills or fixed by the competent court. Regardless of the form adopted, there will be liabilities on the part of the debtor in both the civil and criminal spheres.

In view of this, the first part of the article deals with the analysis of the civil aspect, bringing the concept of alimony accepted by this branch of Law, as well as its characteristics and classifications. In this area, it is understood that food encompasses a set of needs, namely, food, medicines, education, housing, etc. Below, the subjects capable of receiving maintenance are presented, as well as the provision in law for the imprisonment of the debtor who fails to provide the established obligation.

In the second part, there is an analysis of responsibility in the criminal aspect, addressing the objective types, which can occur through three distinct conducts provided for in *the caput of* article



244 of the Penal Code; active and passive subjects; as well as the need for the agent to act impelled by malice, since the Law does not provide for the culpable modality.

The article will end by briefly discussing the possibility of applying criminal detraction. This benefit is not expressly included in the provisions of article 42 of the Penal Code, however, according to the majority doctrine, it is possible for the judicial authority to use such an institute to avoid *bis in idem*.

The method of approach used in the elaboration of the article was inductive. The method of procedure will be monographic. Data collection was carried out using the technique of bibliographic research.

## 2 CIVIL ASPECT

The blood or socio-affective kinship bond, the need of the person being fed and the possibility of the person receiving maintenance are the prerequisites for the maintenance obligation, which will be agreed or fixed based on the reasonableness and proportionality of the creditor's need and the debtor's possibility.

The term food, if interpreted in the strict sense, may lead one to believe that it is only "food". However, in the field of Civil Law, alimony encompasses, in addition to food, everything necessary for the maintenance of life in society. (VENOSA, 2019). According to article 1,920 of the Civil Code, "The legacy of maintenance covers maintenance, healing, clothing and housing, as long as the legatee lives, in addition to education, if he is a minor." (Brazil, 2002).

### 2.1 CHARACTERISTIC FEATURES

The nature of food brings with it characteristics, which are arranged according to each indoctrinator, since there is no single understanding between them. According to Tartuce (2019), the maintenance obligation has the following characteristics: to be a very personal, reciprocal, non-waivable, divisible, imprescriptible, incessable and inalienable, non-compensable, unseizable, unrepeatable, non-negotiable and transferable.

According to the author (TARTUCE, 2019), the right is classified as very personal due to the impossibility of transmission to the creditor's heirs. Reciprocity, on the other hand, is supported by article 1,696<sup>1</sup> of the Civil Code (BRASIL, 2002), which allows the payment of maintenance from ascendant to descendant and vice versa.

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<sup>1</sup> Art. 1.696. The right to maintenance is reciprocal between parents and children, and extends to all ascendants, the obligation falling on those closest in degree, some in default of others.



The non-waivability is supported by article 1,707 of the <sup>2</sup> CC (BRASIL, 2002), which provides for the possibility of the creditor not requesting maintenance, however, if he does so and starts to receive it, he cannot renounce it, except in cases of divorce and dissolution of the stable union, since this characteristic is only admitted as long as the family bond is not dissolved. (TARTUCE, 2019).

With regard to divisibility, it allows the obligation to be performed by more than one individual, calling on them to contribute in proportion to their respective resources. To this end, the order of degree of kinship from the most remote to the closest will be observed, according to article 1,698 of the <sup>3</sup> CC. (BRAZIL, 2002).

The statute of limitations is the possibility for the creditor to apply for maintenance at any time. To support this understanding, Venosa (2019, p. 432) said: "The necessity of the moment governs the institute and gives rise to the right to action (*actio nata*)".

In accordance with articles 373, II<sup>4</sup> and 1,707<sup>5</sup> of the CC (BRASIL, 2002), the obligation will not be subject to offsetting. However, Tartuce (2019) explains that the issue has not yet been settled by jurisprudence, which once allows the compensation of maintenance (rent expenses, property tax, etc.) overpaid, when it constitutes unjust enrichment of the person receiving maintenance.

Likewise, article 1,707 of the CC prohibits the unseizability, but it is not absolute, since, under the terms of article 833, IV<sup>6</sup> of the Code of Civil Procedure (BRASIL, 2015), it is possible to seize the amount that exceeds 50 (fifty) minimum wages.

The obligation is also unrepeatable, given that it is impossible for the payer to recover what has already been paid. However, if the mistake is evident, it is possible to claim compensation for moral damages. (TARTUCE, 2019). With regard to the impossibility of a transaction, this characteristic is extracted in article 841 of the <sup>7</sup> CC. When dealing with the subject, Venosa (2019, p. 432) states as follows: "The right to maintenance is a private right, but of a personal nature and with a public interest".

In addition, the obligation will be transferable under the terms of article 1,700 of the <sup>8</sup> CC, that is, it will be up to the estate to provide maintenance in the event of the death of the debtor (alimoner),

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<sup>2</sup> Art. 1.707. The creditor may not exercise it, but it is forbidden to waive the right to maintenance, and the respective claim is not subject to assignment, set-off or attachment.

<sup>3</sup> Art. 1.698. If the relative, who owes maintenance in the first place, is not in a position to bear the burden in full, those of immediate rank shall be called upon to apply; If several persons are obliged to provide maintenance, all of them must contribute in proportion to their respective resources, and if an action is brought against one of them, the others may be called upon to join the litigation.

<sup>4</sup> Art. 373. The difference in cause of the debts does not preclude offsetting, except: II - if one originates from lending, deposit or maintenance;

<sup>5</sup> Art. 1.707. The creditor may not exercise it, but it is forbidden to waive the right to maintenance, and the respective claim is not subject to assignment, set-off or attachment.

<sup>6</sup> Art. 833. The following are exempt from seizure: IV - salaries, allowances, salaries, salaries, remunerations, retirement benefits, pensions, savings and sums, as well as amounts received by the generosity of a third party and intended for the support of the debtor and his family, the earnings of a self-employed worker and the fees of a liberal professional, except for § 2;

<sup>7</sup> Art. 841. Only in the case of property rights of a private nature is the transaction permitted.

<sup>8</sup> Art. 1.700. The obligation to provide maintenance is transferred to the debtor's heirs, in accordance with article 1.694.



provided that there is a prior conviction before the death. In addition, the obligation will be up to the limit of the inheritance. (TARTUCE, 2019).

## 2.2 RATINGS

About the classifications, these can be five. As for the sources, the food may be legal, arising from a legal norm; conventional, instituted by the settlor's own will; and indemnities, resulting from conviction for the practice of an unlawful act. As for the extent, they may be civilians, who intend to maintain the previous condition of the individual; or, indispensable, which cover only the food that is indispensable to the dignity of the person being fed. (TARTUCE, 2019).

As for time, those that have not been received, but can be pleaded within 2 years; present, which can be pleaded at the moment; or, future, those that can be pleaded at any time. As for payment, they will be their own, paid in kind, that is, with food, lodging, etc.; or, improper payments by way of pension. (TARTUCE, 2019).

As for the purpose, those already established in a court judgment or agreement of wills may be definitive; provisional, those fixed, in accordance with Law 5,478/68 (Maintenance Law), before the judgment; provisional, fixed by means of an anticipation of guardianship or in an injunction; or, transitory, those that are fixed for a determined period. (TARTUCE, 2019).

## 2.3 SUBJECTS OF LAW

Pursuant to article 1.694 of the Civil Code:

Relatives, spouses or partners may ask each other for the food they need to live in a manner compatible with their social status, including to meet the needs of their education. (BRAZIL, 2002).

As for the last part of the aforementioned article, the inclusion of the need for education should be analyzed with caution and applied only to children, whether they are minors or young people who are attending higher education, and this right is excluded from spouses or partners. (VENOSA, 2019).

In addition, in view of the provisions of article 1,695 of<sup>9</sup> the CC, Venosa (2019, p. 419) understands that: "[...] Only those who prove that they cannot sustain themselves with their own effort can claim food", since for the aforementioned author, "food cannot become a prize for the foolish, indolent and uncommitted to life". (VENOSA, 2019, p. 419 and 420).

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<sup>9</sup> Art. 1.695. Maintenance is due when the person who wants it does not have sufficient goods, nor can he provide for his own maintenance by his work, and the one from whom it is claimed can provide it, without embezzlement of what is necessary for his maintenance.



In addition, it is expressed in the Civil Code, in its article 1,696, that: "The right to maintenance is reciprocal between parents and children, and extends to all ascendants, with the obligation falling on those closest in degree, some in default of others". (BRAZIL, 2002).

In view of this, maintenance will be due to the unborn child through its mother, in accordance with article 2 of<sup>10</sup> Law No. 11,804/08. To minor children, whether legitimate or illegitimate, according to article 22 of<sup>11</sup> the Statute of the Child and Adolescent and article 1,703 of the<sup>12</sup> Civil Code. To children born out of wedlock, under the terms of article 1,705 of the CC, as<sup>13</sup> well as to children who have already reached the age of majority, however, Venosa (2019, p. 441), explains that:

"[...] The prevailing idea is that food ceases with it. It is understood, however, that the pension may be extended for some more time, until the child completes higher or vocational studies, at a reasonable age, and can provide for his or her own subsistence"

Maintenance can still stem from the marriage. With the breaking of the bond of the conjugal partnership, that is, with the de facto or de jure separation or with the divorce, the spouse with a lower financial situation may claim maintenance against the former partner, as provided for in article 1,704 of the CC. (VENOSA, 2019).

## 2.4 IMPRISONMENT IN THE CIVIL SPHERE

Currently, the Magna Carta provides in its article 5<sup>o</sup>, LXVII that: "There shall be no civil imprisonment for debt, except that of the person responsible for the voluntary and inexcusable default of alimony obligation and that of the unfaithful depository". (BRAZIL, 1988). That is, the subject may be imprisoned for civil debt due to the default of the alimony obligation.

Capez (2018, p. 212, *apud* Gonçalves, 1997, p. 146-7) points out that "civil imprisonment for maintenance is not punitive. It is not a penalty, but a means of coercion, an expedient designed to force the debtor to comply with the maintenance obligation."

Therefore, in order for such an arrest to occur, it is necessary that the maintenance, whether provisional or definitive, constitute a judicial or extrajudicial enforceable title. Upon receiving the request for enforcement, the judge will give the debtor a period of three (3) days to settle the default

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<sup>10</sup> Article 2 The alimony referred to in this Law shall comprise the amounts sufficient to cover the additional expenses of the period of pregnancy and arising therefrom, from conception to childbirth, including those related to special food, medical and psychological assistance, complementary examinations, hospitalizations, childbirth, medicines and other indispensable preventive and therapeutic prescriptions, in the judgment of the physician, in addition to others that the judge deems pertinent.

<sup>11</sup> Art. 22. Parents have the duty of support, custody and education of their minor children, and they are also responsible for complying with and enforcing court orders in their interests.

<sup>12</sup> Art. 1.703. For the maintenance of the children, the legally separated spouses will contribute in proportion to their resources.

<sup>13</sup> Art. 1.705. In order to obtain maintenance, the child born out of wedlock may sue the parent, and the judge may determine, at the request of either party, that the action be carried out in secrecy.



or, if this is not possible, justify why he or she did not do so, in accordance with article 911 of<sup>14</sup> the CPC. (BRAZIL, 2015).

If the debtor does not pay the arrears or does not have a plausible justification, the provisions of article 528, § 1 et seq. of the Code of Civil Procedure shall be observed, which provides for the possibility of the judicial authority ordering imprisonment for a period of one (1) to three (3) months to begin in a closed regime and separately from ordinary prisoners. Moreover, imprisonment does not remove the obligation to pay instalments already due, which, if made, will suspend the arrest order. (BRAZIL, 2015).

Venosa (2019, p. 212) states that:

Once the maintenance debt has been paid and the civil imprisonment has been revoked, such a situation does not have the power to interfere in the configuration of the crime of article 244 of the CP, which has already been consummated with the non-payment of pensions.

Finally, there will be no civil imprisonment for non-payment of conventional and indemnity maintenance, since the latter constitute compensation due to the practice of an unlawful act, while the former result of the settlor's free will. (TARTUCE, 2019).

### 3 CRIMINAL ASPECT

In the criminal sphere, failure to comply with the maintenance obligation may give rise to the crime of material abandonment, typified in article 244<sup>15</sup> Chapter III – Crimes against family assistance, which is part of Title VII – Crimes against the family of the Penal Code. Such conduct is attentive, in the words of Capez (2018, p. 209), "[...] against the subsistence of the family organism, due to its members not providing the proper material and moral assistance to others".

#### 3.1 TARGET TYPE

The criminal type conjectures three possible behaviors of the agent. The first of these, provided for at the beginning *of the article's caput*, occurs when, regardless of the existence of a pension established in a judgment in the civil sphere, the individual refrains from providing the necessary resources, i.e., food, medicine, clothing, etc. (MIRABETE; FABBRINI, 2019).

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<sup>14</sup> Art. 911. In enforcement based on an extrajudicial enforcement order that contains a maintenance obligation, the judge will order the party against whom enforcement is sought to be summoned, within three (3) days, to make the payment of the instalments prior to the start of the enforcement and those that fall due in the course of the enforcement, to prove that he has done so or to justify the impossibility of doing so.

<sup>15</sup> Art. 244. Failing, without just cause, to provide for the subsistence of the spouse, or of a child under 18 (eighteen) years of age or unfit for work, or of an invalid ascendant or over 60 (sixty) years of age, not providing them with the necessary resources or failing to pay judicially agreed, fixed or increased alimony; failing, without just cause, to help a seriously ill descendant or ascendant: Penalty - imprisonment, from 1 (one) to 4 (four) years and a fine, from one to ten times the highest minimum wage in force in the country. Sole Paragraph – The same penalties apply to anyone who, being solvent, frustrates or rebuts, in any way, including by unjustified abandonment of employment or function, the payment of alimony judicially agreed, fixed or increased.



However, ignorance of the creditor's need drives away the agent's conduct. Lopes (2014, apud Fabbrini; Mirabete, 2011, p. 34), when dealing with the subject, states as follows: "In order for the crime to be verified, it is also necessary that the defendant is aware of the needs of the people to whom he must provide subsistence". Since the subjective element is intent, there is no provision for the culpable form. (CAPEZ, 2018).

The second figure occurs at the moment when the agent fails to pay alimony to the child, whether he is under 18 years of age or older, but unfit for work; or to disabled parents or those over 60 years of age, as long as it is without just cause and fixed in the civil sphere in a maintenance action (CAPEZ, 2018). For Fabbrini and Mirabete (2019, p. 1113): "It gives rise to criminal liability, including disobedience to the obligation of alimony, even if provisionally fixed".

However, Greco (2017, p. 1307) points out that:

[...] the agent will only be held criminally liable for material abandonment if, if he or she fails to pay child support. Thus, a relevant fact may arise that prevents you from fulfilling the commitment determined by the court, such as having been dismissed from your job, or finding yourself, as a liberal or self-employed professional, unable to work due to being affected by some disease, or even, even working, being experiencing serious economic difficulties that prevent you from honoring your commitment, in short, some just cause, to use the legal expression.

In turn, the sole paragraph criminalizes the conduct of those who abandon their jobs unjustifiably or frustrate or deny at any time the payment of alimony resulting from a court decision. (CAPEZ, 2018).

Finally, according to Capez (2018), the agent who refrains from helping descendants (son, grandson, great-grandson) or ascendants (father, mother, grandfather, grandmother, great-grandfather and great-grandmother) who are sick is also a crime, as long as it is without just cause.

### 3.2 ACTIVE AND PASSIVE PERSONS

Analyzing article 244 of the CP, the spouses, ascendants and descendants are extracted as active subjects, who "[...] has a legal duty to provide for the taxable person's subsistence [...]" (MIRABETE; FABBRINI, 2019, p. 1112). The obligation may fall on one or more relatives. However, it will be considered as supplied when provided by only one of the obligees, thus removing the responsibility of the others. (MIRABETE; FABBRINI, 2019).

On the other hand, the taxpayers are the creditors of the benefit, which as a rule, under the terms of the aforementioned article, will be the spouse (man and woman), the child under 18 years of age or unfit for work and the invalid ascendant or over 60 years of age. However, some caveats mentioned by laws should be noted.

In the case of a spouse, the subject will only have responsibilities upon proof of the former partner's inability to support himself/herself alone. As far as children are concerned, they will no longer



suffer from discrimination because they are illegitimate, adopted, incestuous or adulterous. (MIRABETE; FABBRINI, 2019).

### 3.3 IMPRISONMENT IN CRIMINAL MATTERS

Imprisonment will occur when it is proven that the perpetrator of the crime, acting intentionally, has consummated one of the objective types provided for in article 244 of the CP, since there is no provision for the culpable modality. Therefore, the consummation will take place at different times, depending on the conduct performed by the agent.

That is, it will occur at the moment when the agent, without just cause, fails to make the payment of the judicially fixed alimony; or leaves the victim deprived of resources necessary for his subsistence; or at the moment when he does not help the sick descendant or ascendant when he should. (MIRABETE; FABBRINI, 2019).

According to Greco (2017), in the last two modalities, as it is a crime of concrete danger, it is necessary to prove in the records the typicity of the conduct practiced by the agent.

Moreover, as well observed by Mirabete and Fabbrini (2019, p. 1115), "Once the unlawful act of material abandonment has been consummated, the return to compliance with obligations or the late payment of debts does not exclude criminal liability".

OrThe debts mentioned above must be dealt with in the civil sphere. In this sense, Mirabete and Fabbrini (2019, p.1116) state:

The criminal judge, when convicting the defendant for the commission of the crime provided for in article 244, cannot impose as a condition *of the sursis*<sup>16</sup> the payment of alimony, which is of a civil nature.

Despite this, it is possible for the judge to apply the criminal detraction in favor of the accused who has been arrested for non-compliance with the maintenance obligation in the civil sphere.

### 4 CRIMINAL DETRACTION

The institute of detraction is expressed in the Brazilian Penal Code, in its article 42, which states:

The time of provisional detention, in Brazil or abroad, the time of administrative detention and the time of internment in any of the establishments referred to in the previous article are computed in the custodial sentence and in the detention measure. (BRAZIL, 1940).

In Masson's (2014, p. 721) conceptualization, it is the "[...] discount, in the custodial sentence or in the security measure, of the time of provisional detention or internment already served by the

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<sup>16</sup> Sursis, this is the conditional suspension of the process.





convict". The intention is to prevent the occurrence of *bis in idem*, which according to Luz (2019, p. 102) "[...] it means that no one can be prosecuted or punished twice for the same act."

Although the legislation is silent on the possibility of discounting the time of deprivation of liberty applied in the civil sphere in favor of the penalty applied in the criminal sphere, the doctrine is favorable to such benefit. (GRECO, 2017).

In the same sense, Queiroz (2019) states:

Although the law does not mention civil imprisonment,<sup>2</sup>It is also possible to admit the detraction here, whenever the defendant is taken to prison for non-compliance with alimony (CF, art. 5, LXVII) and responds to criminal proceedings for the respective crime (e.g., material abandonment).

Therefore, the agent who has already served the imprisonment imposed by the civil judge due to the non-compliance with the maintenance obligation, may deduct from the sentence, if convicted in the criminal sphere, the period of deprivation of liberty already served.

## 5 FINAL THOUGHTS

As proposed, this article aimed to research, analyze and describe the prevailing doctrinal understanding about the civil and criminal liability of the taxpayer in the maintenance obligation. To this end, we sought to conceptualize the term "alimony", which encompasses everything necessary for the maintenance of the legatee's life in society. The right to receive them comes from proof of the creditor's need and the debtor's possibility of payment, and the affinity of kinship between them must be proven.

Foods have some characteristics and classifications, these can be five, namely: as for the sources, the foods may be legal, conventional or indemnifying; as to the extent, they may be civil or indispensable; as for time, they may be past, present or future; as to payment, they will be proper or improper; As for the purpose, they may be definitive, provisional, provisional or transitory.

On the other hand, the former do not have a definitive understanding, and may present another in addition to those presented here. In Tartuce's understanding, alimony is very personal, reciprocal, non-renounceable, divisible, imprescriptible, incessable and inalienable, uncompensable, unseizable, unrepeatable, non-negotiable and transferable.

In the civil sphere, the holders of such rights will be relatives (grandparents, parents, children), spouses or partners who cannot support themselves with their own efforts. In addition, unborn children through their mother, minor children (legitimate or illegitimate), children born out of wedlock, as well as children who have reached the age of majority, may also apply.

If the debtor fails to comply with the maintenance obligation, he or she may have civil imprisonment ordered by the judge in his or her favor, if he or she does not prove that he or she did so



motivated by plausible justification. Such imprisonment is not punitive, but coercive, and is applied as a way to force the agent to fulfill his obligation to the creditor.

In the criminal sphere, failure to comply with the maintenance obligation may give rise to a crime of material abandonment, provided for in the Penal Code. The crime encompasses three conducts, that is, failure of the creditor to provide the necessary resources, which do not need to be fixed in a judgment; failing to pay alimony agreed, fixed or increased in a judgment, provided that it is without just cause; abandon the job unjustifiably or frustrate or rebut at any time and in any form the payment of alimony resulting from a court decision.

In this sphere, the active subjects will be the spouses, ascendants and descendants, that is, the debtors. On the other hand, the taxpayers are the creditors of the benefit, which as a rule will be the spouse (man and woman), the child under 18 years of age or unfit for work and the invalid ascendant or over 60 years of age.

The framing of the conduct in the primary precept may lead to the imprisonment of the active subject, when it is proven that he acted intentionally by failing to pay the judicially fixed alimony; or leaving the victim destitute of resources necessary for his subsistence; or at the time when he does not help the sick descendant or ascendant when he should.

In view of this, the criminal conviction will not remove the duty to pay the pension, which has a civil nature. However, if the agent is arrested in the civil sphere, it is possible that the judge of the criminal waiting uses the institute of detraction in favor of the convicted, discounting the time of deprivation of liberty already served, to avoid the occurrence of bis in idem.



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