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NEW BOUNDERIES OF THE PUBLIC AGENTS' CIVIL RESPONSIBILITY IN THE PANDEMIC CONTEXT CONCERNING PUBLIC FUNDING POLICIES

NOVOS CONTORNOS DA RESPONSABILIDADE CIVIL DO AGENTE PÚBLICO EM MEIO À PANDEMIA NO QUE TANGE ÀS POLÍTICAS PÚBLICAS DE FOMENTO

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ABSTRACT

Objective: Regarding the global pandemic scenario, the aim of this article is not only to describe the old and current outlines of the civil public managers' responsibilities but also understanding at which level they are responsible by their choices and legal motivations, as well as when they can be considered responsible under contemporary circumstances. Even though the initial hypothesis is the most varied from common perception, the real answer to the problem comes from scientific research.

Methodology: Considering the dogmatic methodology of deductive and exploratory research, in which the construction of concepts in legislation, doctrine, and jurisprudence.

Result: It will be demonstrated – in a concise and structured way – that the motivation of public agents' decisions is very important to determine the degree and how they will take responsibilities.

Contribution: The article represents an innovative and highly relevant theoretical tool in view of the COVID-19 pandemic context, explored in the national academic debate, to understand the process of interpretation and accountability of public agents. The present study, therefore, may be of great value to guide the application of the device in this specific context.

Keywords: Responsibility; Motivation; Public funding policy; Pandemic; Public agent.

RESUMO

Objetivo: *Diante do cenário da pandemia que se instaurou em âmbito global, o escopo precípuo deste artigo passa a ser, além de descrever os antigos e atuais contornos da responsabilidade civil do gestor público, de entender como os mesmos podem ser responsabilizados na motivação de suas escolhas, bem como em que momento isso pode/deve acontecer. As hipóteses iniciais podem ser as mais variadas oriundas de uma percepção comum.*

Metodologia: *A real resposta ao problema vem a partir de uma pesquisa científica, considerando a metodologia dogmática de pesquisa dedutiva e exploratória, na qual se demonstrará a construção de conceitos na legislação, na doutrina e na jurisprudência de forma concisa e estruturada*

Resultado: *O artigo evidenciará que a maneira pela qual se constrói a motivação das decisões dos agentes públicos é determinante no grau e na forma de sua responsabilização.*

Contribuição: *O artigo representa uma ferramenta teórica inovadora e de grande relevância tendo em vista o contexto de pandemia da COVID-19, explorado no debate acadêmico nacional, para entender o processo de interpretação e responsabilização*

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dos agentes públicos. O presente estudo, por este motivo, poderá ser de grande valia para orientar a aplicação do dispositivo nesta conjuntura específica.

Palavras-chave: *Responsabilização; Motivação; Política pública de fomento; Pandemia; Agente público.*

1 INTRODUCTION

This study begins with the presentation of the most important points regarding civil responsibility and its development throughout time, starting from a patrimonial position to one founded on the damage. As it will be demonstrated, there are pre-normative institutes that precede the article. It means pre-normative values, the ones that will result in an inherent combination of responsibilities not only in Brazil, but also in France, Italy, and Germany, orders that share the same common dogmatic basis.

It occurs that there is no regulation regarding the Administrative State Emergency in Brazil, in other words, it does not exist, in a synthesized form, a set of rules, principles, and administrative measures related to the conflict resolution in an Emergency State, exactly as it happened in a pandemic COVID-19 scenario.

Undoubtedly, the level of civil responsibilities related to the public agent tends to grow in the State of Emergency and its effects may still be felt in the subsequent years.

In that way, notwithstanding this context installs an agenda of tension, such as sanitary protection x protection to the free enterprise; state's vigilance x persons secrecy; police force x freedom to come and go for the individual; informative activity x disciplinary activity; social distancing x lockdown; the public agent's responsibilities might be questioned, depending on the embraced stance related to the tensions and its scientific or legal basis to take stands, among the stimulation activities.

Procedural instructions studies showed, since the exposed critics by Pontes de Miranda, an increment in the concept of disinheritance of the civil responsibility, in which the state's responsibility, originally founded on the damage, turns to be objectively allocated on the risk. By those terms, when the State omits itself and offers

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risk to the society, ends up being responsible for the risk of injury to the legal interest that it predisposed tutelary.

Following that perspective, the initial hypothesis to be confirmed or refuted, based on a dogmatic methodology of speech and instrumental analysis, would be if the public agent could/should be held accountable civilly by action or omission relating the stimulation activity in a pandemic scenario – especially here, where there is no possibility to motivate the decision to be taken in exact data and scientific proof.

2 THE RESPONSIBILITY OF PUBLIC AGENTS IN COMPARATIVE LAW

Civil liability presupposes the obligation of full restitution of property to the innocent party by the person who has contributed to a harmful event. Its archetypes go back to Roman law and Justinian's ideals, having subsequently radiated influences to the most diverse orders, especially those of Common Law.

Regarding the definition of damage, the German Civil Code - BGB -, *Bürgesliches Gesetbuch* (Germany, 1980) does not define it expressly. Article 249, of the BGB, foreshadows the imposition of restitution of the legal property unduly harmed (life, property, health). According to the wording of the provision, it would be understood that the pecuniary reparation would take place when restitution of the thing would be impossible, that is, restoring the property would be preferable to indemnify it.

Also, noticing that the German code and doctrine differentiated contractual from non-contractual responsibilities is interesting. The former would impose the presumption of guilt arising from failure to comply with a pact in its respective terms previously stipulated (DULLIGER, 2020, p. 16). The latter would demand, at least, negligence or a lack of care in the community exercise, based on the social pact of western democracies.

Therefore, the wording of art. 879, of the aforementioned Germanic code, ended up establishing the boundary limits of what became known as the delimitation between contractual liability (*Schuld von die Veltrag*) and non-contractual liability.

Concerning Administrative Law, German jurisprudence has repeatedly reinforced its non-contractual character, especially when recognizing the cogent duty of care to all public agents when exercising their administrative function.

The jurisprudential pronouncements, therefore, have implied the civil servant's liability not only as a result of damage that he has caused to a citizen or user of the public service but also when, in the exercise of this function, it ends up limiting some constitutionally guaranteed right. Besides, the German courts (GERMANY, 2019) (BAYERN, 2019). have reinforced the rational concepts of clear and precise delimitations of the duties of civil servants, above all, by denying any exclusions of illegality or guilt that have not been, previously and expressly, standardized.

Therefore, it can be observed from the agreements reached would be that neither the work overload nor the limitations of the function performed were accepted as conditions capable of excluding or limiting the liability of public agents when the fact does not appear in their respective functional sheet - standardized - and is not timely communicated to the superior (GERMANY, 2019).

However, because of its Roman origins, its dogmatic foundations are based on the Italian rules. Due to this fact, some elementary concepts of civil liability such as the inter-party limitations of the contracts' effects (*Libro IV del obbligazzioni*), excluding guilt (art. 2044) and imputation to the tutor for the responsibility arising from his incapacitated (art. 2048 c / c / art. 249), originally, remained established, radiating late effects to the other *Civil Law* orders, in the light of the Italian Civil Code, of (ITALY, 1942).

As for the damage, specifically, the Italian Civil Code, like the German, does not define it, but reaffirms, in its article. 2056, that the indemnifiable amount should be as broad as possible, (*valutazione dei danni*) able to cover not only what was lost but the opportunity that was wasted, the resulting damage and loss of profit arising from the breach of contract - contractual obligation - or even the negligent omissive/commissive conduct of others - non-contractual obligation. In these terms, one of the most important fundamental archetypes of the whole theory of civil liability was conceived: the integral reparation of the offense (arts. 1223, 1226, and 1227).

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Also, its contribution to the administrative branch is observable, above all, in art. 2055 of the Italian codification, where the joint liability of all agents who have contributed, to a greater or lesser degree for the harmful event, safeguarding, however, the right of return among the co-debtors, in the divisible part of their participation. Guardianship for the victim, therefore, is not based on the idea of giving it the least costly means of recovering the usurped property. However, like the German model, the Italian code does not define damage.

Among the Italian authors, Pietro Sirena (2019, p. 545) recognizes the undeniable contribution of the French School of Thought to the subject of civil liability, above all, in the administrative sphere and the face of administrative litigation in that country. According to the author, the honest contribution would be observable, in particular, in concepts studies that are not very tight and would require a greater theoretical-argumentative effort (eg as in the differentiation between damage and harm).

In French doctrine, specifically, Keller, Weber, and Chappuis (2018, p. 214) analyze the Swiss Civil Code. The conclusions were that the order of that country, like the others of the Common Law of Roman basis, would impose the objective responsibility in several articles: as a) tutor or curator under the tutelage and guardianship b) of the employers about the employees c) holders of animals as a logical consequence of the duty to care for the moving good, which, by definition, would dispense with any valuative-volitional analysis of culpability (art. 19, 321, 321b, 490) (Switzerland, 1911).

It is observed, therefore, that, similar to contractual default, the responsibility of others occurs objectively due to the expected duty of care. In other words: while the contractual responsibility is based on the frustration of the expectation generated by the innocent party, on the responsibility for others, the exemption from any volitional analysis of conduct arises from a burden imposed on those who would have the duty of guardianship over the acts produced by a property (or being) in its care.

Complementarily to this perspective, Franz Werro (2017, p. 319-320), analyzing the Swiss provisions, concludes that, while state responsibility would be objective, breaching social contract theory - diffuse contractual responsibility -

(WERRO, 2017, p. 45), the responsibility of public agents would be essential to the valuation of their actions or administrative decisions, remaining punishable only in cases which: a) legal limits are exceeded or b) public agents exercise a strong mismatch regarding the standard.

It is observed, therefore, that the Swiss order would share the same Roman theoretical basis, whose articles find similarities in the other rules that were developed under similar dogmatic stereotypes. This time, several studies corroborate the thesis that there is a certain confluence of essential concepts in organizations that share the same Roman conceptual origin.

Among these studies, Martin Hlawon and Laura Jaillet (2016, p. 1275-1280) developed research on the similarity of the Franco-German systems at the University of Saarland - (*Staatsrecht von Saarlandes*). The researchers concluded that the civil liability of the civil servant, as a rule, would require the measurement of his conduct in comparison with the perfect delimitation provided for in the statutes that would regulate his career (HLAWON; JAILLET, 2015, p. 361; p. 444). There would be as much responsibility for this in cases that go beyond the pre-established legal limits, as well as in cases of different attitudes from what was standardized.

Based on the same perspective, Marième Lacroix (2012, p. 25) shares the analysis of the distinctions in the concepts of contractual and non-contractual civil liability provided for in Canadian law - art. 1457, of the Québec Civil Code (CANADA, 2020) and, subsequently, in a new analysis of the Canadian Aquilian civil liability archetypes in comparison to their closest match, German law (LACROIX, 2013, p. 474). The author's research concluded that it is possible to observe, nowadays, a certain relativization of the Aquilian civil liability (LACROIX, 2013, p. 453).

There would be inherent proximity between Aquilian and contractual civil liability in multiple orders, because, in the end, both would protect damage, an illicit act, which would make its generating source irrelevant: whether it comes from contractual default. or an imposing duty of *erga omnes* care.

As mentioned in the introduction, the goal of this article is to get into more controversial issues on the topic. The first is that of the multiple causes that Caio Mario da Silva Pereira would already point out as one of the most controversial issues in the

academics field. However, "if several causes contribute to the harmful fact, one must in concrete, be the one that imposes the duty of compensation" (PEREIRA, 2016, p. 110). This is the theory of adequate causality, mostly adopted by the greatest indoctrinators (ROSENVALD, FARIAS E BRAGA NETTO, 2016, p. 559).

Likewise, Julio Alberto Diáz (1998, p. 45-50), in a specific analysis on the theme of co-responsibility, concluded that solidarity would be appropriate only when it is impossible to identify the agent. In general terms of what has been demonstrated: considering good faith and unjust enrichment as pre-normative values, it would be inappropriate to be lenient with the victim's non-indemnity for the mere impossibility of identifying the causative agent. In this hypothesis, and only in this one, the solidarity of all would be appropriate.

The issue gains greater relevance, in the recent Federal Supreme Court understanding (BRASIL, RE 327904 / SP 2006), which established the precedent of the impossibility of any denunciation to be dealt with in the processes that deal with the evaluation of the public agent guilt, in other words, any procedural mechanism for transferring to other people the refund of the undue payment was not viable.

For all the reasoning here exposed, what was observed is that the civil law, of Roman foundations, would establish several liabilities to state agents when impossible to identify a single and fundamental cause of the illicit.

These traditional boundaries, however, ended up losing strength with the recent case in the municipality of Brumadinho, in which two dams were gnawed, especially that of the Feijão stream whose civil liability would no longer be based solely on damage, to cover issues such as risk created (MINISTRY OF MINAS GERAIS, 2019).

Concerning the pandemic and further accountability of the public agent, more recent studies on the topic will be demonstrated throughout this article. However, it was intended, initially, to present some interpretations and currents of civil liability, before, effectively, analyzing it in the light of the current pandemic context.

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3 CIVIL RESPONSIBILITY FOR THE RISK CREATED AND THE DEVELOPMENT ACTIVITY AMONG THE PANDEMIC CONTEXT

Currently, there seems to be a certain unification of Aquilian and contractual responsibilities for an eminent indemnity duty arising from the risk. This thesis gained more adepts with the rupture of the Vale Company dam, in the municipality of Brumadinho.

In a recent work entitled “Coronavirus and Civil Responsibility”, Nelson Rosenvald (2020, p. 46) points out a new view of the contract, being seen, nowadays, as an instrument of risk allocation. Thus, instruments such as a moratorium fine, a compensatory fine, and earnest payments, would be nothing more than a means of ensuring a created risk, similarly to what happens with an insurance contract. Consequently, every contract, by definition, would have an inherent risk, a factor of unpredictability, whose moratorium clauses should be reduced.

With regard specifically to development activities, Aline França Campos and Luciana Fernandes Berlini (2002, p. 128) expressly expose the possibility of assessing further responsibility on the part of those who fostered a commercial activity when an entire community is exposed to a risk, a tutelary loss *erga omnes*.

Therefore, the thesis that contractual liability would only bind the parties ends up losing space in this new pandemic, notably, to further indemnity benefits for those who exposed a group to a general risk, to a danger that should be observed.

This discussion, however, ends up being questioned in the face of the state of emergency. In these terms, removing a government holding it accountable in the middle of a pandemic, for example, could result in greater damage. To avoid this, what is observed in a thesis that can be confirmed in this study is the possibility that the public manager will be held responsible for the promotion activity, *a posteriori* when it results in a risk of injury to a constitutionally protected right to the community, but whose determination in terms of damage and terms of its effects, it ends up being deferred over time.

To sum up the idea, public security could not be subject to pressure by economic groups, the public manager responsible for doing so activity, but differing in

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time the determination of this responsibility for a more stable moment, after the pandemic.

In turn, state intervention in the economic order has its constitutional basis in article 173, of the 1988 Constitution, which provides that the exploitation of economic activities by the State is allowed to meet the imperatives of national security or relevant collective interest.

The State also plays the role of normative agent and regulator of economic activity, making it legitimate, in the form of the law, to exercise the functions of inspection, incentive, and planning, being decisive for the public sector and indicative for the private sector, under the terms of article 174, of the 1988 Brazilian Constitution. The incentive is emphasized, respecting the epistemological focus of this article.

Promotion is an administrative intervention activity in the economic domain aimed at encouraging private agents, through the granting of differentiated benefits, including the application of financial resources, to promote economic and social development (JUSTEN FILHO, 2018).

It is noted that the performance of public authorities in the economic and social domain can be achieved through indirect intervention, in other words, by inducing individuals to carry out activities that reach public interests, by adopting incentives for voluntary behaviors, for example.

The promotion aims to affect the behavior of individuals, causing them to adopt desirable behaviors for certain purposes, preserving autonomy in making choices, through normative predictions of benefits. Thus, the individual is led to voluntarily choose conduct through the establishment of awards provided for in a legal norm for the achievement of state purposes (JUSTEN FILHO, 2018).

The instruments to engage economic agents can include either financial or non-financial benefits. As financial, it is possible to exemplify the transfer of resources, improved credit conditions, tax incentives, among other incentive tools. Non-financials can be materialized by information, advice, the viability of infrastructure for investments, and, even, functions of honorific bias.

It is emphasized that the constitutional treatment of the economic order is based on the valorization of human work and free initiative, both aimed at ensuring a

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dignified existence for all, according to the precepts of social justice and fundamental principles, among which, they stand out in this thematic area, the reduction of social and regional inequalities, as well as the search for full employment.

This is the constitutional foundation of the purpose sought by the promotion, namely, social-economic development, poverty eradication, reduction of inequalities, increase in the labor supply, and development. Therefore, it is an indirect instrument for the defense and promotion of fundamental rights, based on the admission that poverty and inequality threaten human dignity (JUSTEN FILHO, 2018).

The achievement of this state purpose presupposes different regulatory activity, that is, distinct from the repression of undesirable conduct; on the contrary, the State seeks measures to increase the attractiveness of socially relevant undertakings and activities, reducing risks, charges and increasing advantages in specific cases (JUSTEN FILHO, 2018).

It is clear that this state function, promotional or fomenting, differs from the other functions of the State, namely, the direct attendance of public needs, public services, nor does it involve the conditioning of private activities - the exercise of police power - since the promotion of public interests takes place indirectly through voluntary action by private agents, even if by state induction.

The aforementioned induction occurs through the establishment of counterparts for the benefit of private economic agents, which are responsible for making investments in specific places, producing wealth, and developing benefits for the community. Therefore, the promotion of certain activities fosters social and economic gains that compensate, for example, reductions in revenue or perhaps the transfer of resources promoted by the State (JUSTEN FILHO, 2018).

In the current stage of the Brazilian Public Administration, the combination of administrative activities of promotion with other state actions is relevant for the achievement of state purposes. In this way, there is a real realization of the principles of economic order and fundamental rights, principle norms, at times, apparently colliding.

Specifically, in the COVID19 pandemic period, there were initiatives by some federation entities to establish fostering measures, the analysis of which can give a

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new meaning to civil liability in the post-pandemic period, since nothing was expressly delimited by Brazilian legislation. In this sense, the example of funding implemented in the municipality of São Paulo will be presented.

4 REGARDING THE EMERGENCY PLAN FOR ECONOMIC ACTIVATION IN THE CITY OF SÃO PAULO

For the study of the possibility of civil liability of the public agent when carrying out development activities during the COVID-19 pandemic, the analysis of a specific case is imperative, it was selected the Emergency Economic Activation Plan in the city of São Paulo - Bill / PL No. 217, of April 3, 2020.

The promotion measures are foreseen in the referred plan revolved around 4 (four) structuring axes: (i) creation of transitory tax incentives; (ii) more flexible rules for obtaining licenses and permits; (iii) adoption of urban measures to encourage the real estate and civil construction market - labor-intensive activity; and (iv) emergency opening of vacancies in programs aimed at relocating workers to the labor market and assisting them in the unemployed condition.

The project was originally elaborated by Councilman José Police Neto, whose main purpose was activating potential for private investment in the municipality of São Paulo, R$ 11 (eleven) billion, as well as creating about 80 (eighty) thousand jobs.

The measures foreseen in the tax area would be: exemption from Property Tax and Urban Territorial Property (IPTU) for trade and services in the period proportional to the closing, deferral of municipal taxes and fees for 90 (ninety) days or while state of public calamity lasts, suspension of enrollment in Cadin - Informative Register of Unpaid Credits of the Federal Public Sector and Municipal Active Debt for 180 (one hundred and eighty) days, an extension of validity of tax compliance certificates for 180 (one hundred and eighty) days after the end of the state of public calamity, exemption from Real Estate Transfer Taxes (ITBI) for those who buy the first residential property, reopening of the Incentive Installment Program, reinforcement of existing tax incentives (IPTU, ITBI, and Tax on Services of Any Nature - ISSQN) for

the Northwest and Fernão Dias axes, reduction of ISSQN for delivery, reduction of ISSQN for companies that migrate to remote work, reduction of IPTU for those who make adaptations for remote work on the property itself.

The economic activation measures (permits and licenses), on the other hand, would be: authorization of low-risk activities to operate without a permit when self-owned or owned by third parties; allow the use of up to 20% (twenty percent) of parking spaces in shopping malls for temporary structures of events and commercial activities; facilitation of the implantation of data antennas in private properties for internet coverage (tacit authorization if there is no response within 60 days of the request), extension by 1 (one) year of approval and execution permits.

About labor measures, the opening of vacancies in the programs for relocation in the labor market and social assistance, respectively called "Operação trabalho" and "Bolsa Trabalho", was authorized.

As for temporary urban measures, there was a provision for more flexible rules for the construction of residential units (increase in density and decrease in the requirement for garages), the channeling of revenue with onerous granting of the right to build for transport infrastructure works on the respective urban structuring axis, the increase of 60% (sixty percent) of the occupancy rate in Areas of Preservation and Sustainable Development for non-residential activities and flexibility (postponement, installment payment) for the onerous granting of constructive potential.

Despite the interesting justification of PL nº 217/2020, which included minimizing the economic impact on the level of employment and income, seeking a reconciling path with the new context established by the coronavirus, materializing the public debate in the categories of laborer and employer, the project was rejected by the Plenary of the City Council, on July 15, 2020, with no proposal implemented.

This rejection occurred because, for the approval of the matter, the quorum would be 3/5 (three-fifths), 33 (thirty-three) favorable votes, and - in the first vote of the 271st extraordinary session of July 15, 2020 - it was counted with 42 (forty-two) manifestations. These: 2 (two) yes, 2 (two) abstentions and 38 (thirty-eight) noes (CÂMARA MUNICIPAL DE SÃO PAULO, 2020).

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Understanding all the reasons for tabling the economic activation requires watching the plenary session, of 8 (eight) hours and 30 (thirty) minutes, which is available on youtube, available at: < https://youtu.be/l8Jhrrmhy-g >.

Councilman Caio Miranda Carneiro, from the Democrats Party (DEM), despite recognizing the importance of the government presenting proposals, asserted that there was no equality with liberal professionals, who had a tax reframing mistaken by the city government for the Tax Regularization Program (PRT) - which did not allow admission for these professionals. He expected liberal professionals to be included in the PL. Remission of taxes to professionals to avoid judicial proceedings.

Councilman Gilberto Natalini voted in favor of the bill and the amendment proposed by Caio Miranda with the purpose to rectify the issue of liberals. However, he stressed that it was not in the government's interest to approve it without detailing such a statement.

Thus, from the context observed and outlined in the previous chapters, as well as the economic reactivation plan of the State of São Paulo, materialized in PL nº 217/2020, the inevitable analysis of the civil responsibility of public managers for the adoption of omissive measures or opposed to the majority guidelines of health authorities at the global level in the pandemic context caused by COVID-19, since it is from it that civil society will have well-protected or injured and threatened rights.

5 REGARDING THE MANAGER'S CIVIL RESPONSIBILITY IN A PANDEMIC ERA

According to authors, like Alexandre Pereira Bonna (2020, p. 424), the expression “civil liability” should be changed to “damage right” to combat both the violation of duties in the legal order and the material consequences arising from certain conducts.

Along this path, with public policies being the affirmation (transformation into laws) of useful measures to face public problems, located both in the field of prevention and repair, it is a government action, whose scope is the right concretization.

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The aforementioned author points out that, if, in one aspect, in the pandemic, there is a need to preserve existential rights. In another, the protection of heritage assets is also important for the preservation of human dignity. The concern with the different types of damage and the desire to avoid them arises as a consequence of the *Neminem laedere* principle, the general duty of care (BONNA, 2020, p 426).

If, in a traditional perspective, it is not possible to talk about civil liability without harm, since your duty would be to repair and nothing else (FARIAS, BRAGA NETTO et ROSENVALD, 2015, p.57); in a *Rule of Law* where, constitutionally, the State assumes the function of protecting fundamental rights and guarantees, visions of commutative and distributive justice begin to emerge.

> [...] the damages right is not only an instrument of commutative justice - with the object of replacing unjustly caused losses - but also of distributive justice, understood as the set of collaboration requirements that enhance well-being and opportunities of human flourishing ... This scheme seeks to guarantee distributive justice to compensate everyone who suffers damage in the course of life while commutative justice aims only to repair/compensate someone who has suffered harm-damage from others, behold it accentuated in bias eminently reparatory [...] (BONNA, 2020, p. 428-429, free translation)

Considering that civil liability has gained new forms, even with the advent of Law nº 13.655, of April 15, 2018, which included in Decree-Law nº 4.657, of September 4, 1942, the Law of Introduction to the Norms of Brazilian Law (LINDB), provisions on legal security and efficiency in the creation and application of public law, from articles 20 to 30, it is necessary to rethink today's responsibility of judges and managers.

A novelty is the concern of public agents to assess the consequences of their decisions. It is now required - in the administrative, controllership, and judicial spheres - not to decide based solely on abstract values (such as, for example, principles). The focus becomes the practical analysis of what is done.

At the heart of decision-making motivation, need and adequacy must be included - as well as legal and administrative consequences. Another advance is to consider the possibilities of the manager and what the public policies under his responsibility require.

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Regulatory Decree No. 9,830, of June 10, 2019, came in complement to art. 20 to art. 30 from LINDB. Here, as for the decisions of public agents, it is required that they are well contextualized and based on jurisprudence and doctrines.

It is explained that decisions based on abstract legal values are decisions related to norms with a high degree of indeterminacy. In this case, the reasoning will take into account the jurisprudence and doctrine applied to the specific case. Robert Alexy's (1993) idea, when deciding, to consider adequacy, necessity, and proportionality in the strict sense is present in this decree, but, it does not supply all the reasoning that involves the delimitation of the responsibility of the public agent in the pandemic.

Along this path, Provisional Measure No. 966, of May 13, 2020, dealt well with the accountability of public agents for actions and omissions in acts related to the COVID-19 pandemic.

The liability of the agent, civilly and administratively, in the face of commissive or omissive conduct, with intent or gross error, was foreseen - when facing a public health emergency or economic and social effects arising from the pandemic of COVID-19.

Regarding technical opinion, when adopting it as a basis for deciding, the public manager will only be responsible if there is sufficient evidence to allow intent or gross error in the technical opinion - as well as if there is collusion between the agents to practice the illegal civil or administrative action. The aforementioned provisional measure also makes it clear that the agent's accountability requires intent or guilt.

A gross error was considered to be a mistake laden with obviousness and irreversibility, resulting from an action or omission laden with guilt (imprudence, negligence, or malpractice). However, it will be observed: the real public agents' obstacles and difficulties; subject's complexity and the actions that are professionally performed; the circumstances of informational incompleteness; the practical circumstances that have been imposed, limited, or conditioned, the action or inaction of the public agent; as well the context of uncertainty about the most appropriate measures to face the pandemic and its results, especially the economic ones.

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The State's civil liability for damages is based on art. 37, paragraph 6, of the Brazilian Federal Constitution of 1988 and is objective by commissive acts (administrative risk theory) and subjective by damages caused by state omission, based on the theory of lack of service (MELO, 2011, p.1019).

In this perspective, through the analysis of the PL nº 217/2020, it brings within it several taxes, commercial, labor, temporary and economic measures (or economic reactivation itself). Without focusing on the minutiae of these measures, it is observed that the State of São Paulo, within the scope of this specific bill, initiated a promotion activity prioritizing economic development, the non-approval of which could be the subject of a discussion due to a state omission, as well as its eventual implementation could also be, depending on the criteria used in both options.

It is noteworthy that, for obvious reasons, the mere fact that a matter has not been dealt with in the bill in question does not mean that there was a state omission, as there are other measures and even bills that address intrinsically sanitary issues.

How, even in the theoretical field and based on existing guidelines, would it be possible to state, categorically and with the necessary certainty, that certain conduct is adequate or inadequate, or even omissive in the face of something relatively new for the medical community? would it be scientific? The volatility of information regarding the appropriate treatments, lethality, and other characteristics inherent to the pandemic caused by COVID-19 is enormous. This circumstance must be an extremely important factor in the qualification of the state civil liability in question. Only the time and the unfolding of the facts will show what needs to be shown.

Finally, it is important to emphasize the possibility of state accountability, if it turns out, later, that acting in disagreement with the expected guidelines will have greater proportions than that of mere individual accountability. It is feasible that it can fit in the collective moral damage case, as the health and life (collective goods par excellence) of an entire community may have been harmed or at least placed at risk (LORENZETTI, 2002, p 139-149).

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6 FINAL CONCLUSION

Concerning the methodology developed in this scientific paper, when promoting administrative measures or perhaps regarding public policies, such as the measures provided for in the Emergency Plan for Economic Activation in the City of São Paulo - PL nº 217/2020, for instance, public agents must be attentive to the reasoning of decisions, as well as to existential guarantees - in addition to economic aspects.

Regarding the duty of decisional consequentialism, it is necessary to rationally evaluate, based on solid scientific arguments, the consequences of the jurisdictional and administrative measures that are taken. Furthermore, being the motivation, even if aliunde, a determining element for the validity of the administrative act, the failure in any of them would result in the accountability of the public manager.

Such accountability would also be linked to the idea of authors such as Juarez Freitas (2015), who refers to the fundamental right to good public administration, corresponding to the responsibility to observe, in administrative relations, compliance with constitutional principles and their respective priorities.

In PL nº 217/2020, the tax aspect, the reduction of bureaucratization, urbanism fosters civil construction and the attempt to relocate citizens in the labor market would activate an investment potential. It is noteworthy that, in fostering the economy, one cannot overlook health aspects and the fundamental right to health that surrounds the context. All these statements and ideas, necessarily, have a duty to be based on technical scientific studies.

And if the public policy fails as a result of poor performance or statement of grounds by the public agent, should it be held responsible at the time or close to the action or *a posteriori,* in the future? Undoubtedly at a later time. First, because Law No. 9,784, of January 29, 1999, requires due administrative process with the right to contradiction and evidence collection. Second, the accountability of administrators/public officials during the term of office or during the exercise of functions in the current state of public calamity would not be an astute idea.

Therefore, the hypothesis is confirmed that the public manager may be held responsible for his actions or omissions, by promoting a commercial incentive in a pandemic state - mainly in a circumstance in which there is no decision-making basis based on scientifically proven data.

This is because principles such as legal certainty and the legitimate expectation of the jurisdiction must always be observed. Besides, the assessment of public officials' foundations takes time - both to find out if they were the most coherent and correct, also for their assessment.

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