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UNCONSTITUTIONAL LAWS AND STATE LIABILITY

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Abstract: This article aims to investigate the civil liability of the State for acts of the Legislative Power, building a theoretical apparatus that makes it possible to reveal the foundation of a state responsibility for enacting unconstitutional laws, considering that this is the element not yet fully situated., hence the difficulties encountered in dealing with the topic. Thus, with a view to achieving a logical development, the study unfolds in three stages of approach: The first stage focuses on the civil liability of the State, researching its concept as a legal category; in the second stage, the theme becomes specific, based on the analysis of the Legislative Power's accountability: regarding the legislative function; the legislative structure; the legislative agent; it's the law. In the last step, the theoretical foundations of state accountability for unconstitutional laws will be sought, in the doctrinal and jurisprudential field. For this purpose, the work under study is supported by placing the foundation of the responsibility of the Legislative State, whose analysis unfolds in the hypotheses of the unconstitutional act, and the respective assumptions of the duty to indemnify. The research method is inductive, based on a literature review on the subject.

Keywords: Preventive control of constitutionality; laws; Legislative power; State Civil Liability; Civil liability of the State for unconstitutional laws.

INTRODUCTION

It is intended to investigate the civil liability of the State for acts of the Legislative Power, building a theoretical apparatus that makes it possible to reveal the foundation of a state responsibility for enacting unconstitutional laws, considering that this is the element not yet fully situated, hence the difficulties in dealing with the topic.

The interest in the subject arose from the "disagreement" and non-conformity with

the dominant thesis, the irresponsibility of the State for acts emanating from the Legislative Power, convinced that the Rule of Law and the values of modern democracy are not compatible with this posture of state submission.

Thus, the arguments conventionally used as an obstacle to the acceptance of the state's duty to repair damages caused by the legislative act are contrasted. For this purpose, the work under study is supported by placing the foundation of the responsibility of the Legislative State, whose analysis unfolds in the hypotheses of the unconstitutional act, and the respective assumptions of the duty to indemnify. It is clear that one could enter into a different field, regarding other attributions constitutionally assigned to parliamentarians, as has been routinely witnessed with regard to Parliamentary Inquiry Commissions. However, the topic addressed will be limited to the primary question: verifying whether an unconstitutional law can effectively cause harm to someone and, if applicable, whether such an act may result in the State's duty to recover the damage caused.

In this context, the present study was divided into three stages of approach: The first stage focuses on the civil liability of the State, researching its concept as a legal category; in the second stage, the theme becomes specific, based on the analysis of the Legislative Power's accountability: regarding the legislative function; the legislative structure; the legislative agent; it's the law. In the last step, the theoretical foundations of state accountability for unconstitutional laws will be sought, in the doctrinal and jurisprudential field.

The research method is inductive, based on a literature review on the subject.

STATE CIVIL LIABILITY

The State, in the exercise of its functions, may cause damage to someone's property,

either through commissive or omissive behavior, or through legitimate or illegitimate behavior. In the obligation or not to restore the injured property, lies the problem of State responsibility.

Thus, every manifestation of state activity brings with it the question of responsibility. The obligation to respond when, by its acts, it causes damage to the property of others.

The State is subject to a legal sanction, whose nature, is essentially patrimonial, consists of repairing the damage.

The Civil Liability of the State is conceptualized by Gasparani (2003, p. 838) as being “the obligation attributed to it to repair the damage caused to a third party due to commissive or omissive unilateral behavior, legitimate or illegitimate, material or legal, which be attributable to him”.

In this approach, the aforementioned liability corresponds to the obligation imposed on it to repair the damage caused by its agents, in the exercise of their functions.

Despite this, the Federal Constitution expressly provides for the objective responsibility of the State and the subjective responsibility of the public agent, as follows:

Art. 37, [...]

§ 6º – Legal entities governed by public law and those governed by private law that provide public services will be liable for damages that their agents, in this capacity, cause to third parties, ensuring the right of recourse against the person responsible in cases of intent or fault. (BRAZIL. Constitution, 1988)

The constitutional norm is applicable to the direct and indirect Public Administration, as well as to the providers of public services, even if constituted under the aegis of private law.

According to Rosa (2001, p.159), state responsibility will be

a) for administrative acts and facts practiced

by any of the legal entities governed by public law (Union, States, Federal District, Municipalities, autarchies and most foundations) and by legal entities governed by private law (public companies, mixed capital companies and foundations governed by the civil law) that provide public service;

b) in cases where there is a causal link between the administrative act or fact performed and the resulting damage;

c) when the damage has been committed by a public agent (in the broad sense), in the exercise of their functions.

d) the constitutional norm ensures, finally, the subjective responsibility of the public agent, dictating the possibility of regressive action.

On the other hand, there is no need to speak of strict liability of the State for: damages caused by third parties, damages caused by nature and damages caused by the activity carried out by legal entities governed by private law that exploit economic activity.

It is interesting to note that part of the doctrine uses the expression “civil responsibility of the Administration”, as a synonym for “civil responsibility of the State”. It is important to note that the Administration does not have legal personality; who owns it is the State, or a legal entity governed by Public Law (Union, States, Federal District and Municipalities). Therefore, the correct designation is civil liability of the State.

The art. 43 of the Civil Code (BRAZIL. Civil Code, 2002) dealt with the verbis matter: “Legal entities governed by domestic public law are civilly liable for acts of their agents that, in that capacity, cause damage to third parties, except for regressive rights against those responsible for damage, if there is any fault or intent on their part.”

Therefore, currently, the matter is regulated in art. 37, § 6 of the Federal Constitution (BRAZIL. Constitution, 1988).

It is worth mentioning the two innovations inserted in that article in relation to the previous Constitutions: the replacement of the expression “employees” by “agents”, considered broader, and the innovation that extended strict liability to legal entities governed by private law, service providers public (concessionaires, permissionaires).

THE ACCOUNTABILITY OF THE LEGISLATURE

The Legislative Branch is the body responsible for making laws. It is the Power that legally binds the obligations, the penalties, that regulates the other powers and the citizens, that decrees the norms that must govern society, in short: it is the Power that makes and unmakes the law.

Saldanha (1992, p.20-21) describes:

The power that the “Legislative Power” possesses, which is to make laws, corresponds to the power of discussion and voting that voters place in the hands of representatives. As the people are the source of power (and this has been said since at least the Middle Ages), the power of the people cannot, at the institutional level, be expressed except through deliberative bodies organized to represent the different currents of public opinion and will. popular. The sovereignty of the people, if the people are considered holders or holders of sovereignty, thus passes to the Legislature: it is in the Legislative Power that, par excellence, are the resonances of the popular will.

Thus, it is the Legislative Power in charge of exercising the legislative function of the State, which consists of regulating the relations of individuals among themselves and with the State itself through the elaboration of laws.

In addition, it is of fundamental importance to focus on the responsibility of the legislator State through the prism of the legislative agent, since state accountability focuses on the State's obligation to recover the patrimonial damage caused to the individual.

Legislative agents, as political agents that make up the category of public agents, exercise a public function consisting in the elaboration of legal norms. Taken as representatives or representatives of the people, these agents, selected by vote, are subject to a different legal regime, not being subject to hierarchy or statutory provisions.

A controversial point to justify the irresponsibility of the legislator State is that the damage resulting from the legislative act is caused by the legislator himself, being a member of the society that elected him as a representative. It considers the creation of norms as a function of society, not allowing the imputation to the State of damages that were not caused by its powers.

Freitas (2001, p.65) emphasizes when discussing the responsibility of legislating agents that: “the treatment of the issue must be based on the analysis of the legal nature between the legislative agents, the body to which they are connected, the administered and the State”, relationship traditionally presented in the doctrine as representation”.

Silva (1985, p.300) addresses the issue:

[...] focuses on the political representative mandate, generated by the election in favor of the elected, constitutes a basic element of representative democracy, embodied in the principles of representation and legitimate authority. However, a lot of fiction, and it can even be said that there is no representation and that the appointment of a representative cannot be a simple technique for the formation of government bodies.

In fact, parliamentarians, legislative agents that make up the state bodies responsible for the function of legislating, when exercising their activity, can entail the legal responsibility of the State, forcing it to answer for the illegal or unfair damages that were caused by the laws. By acting, invested by the popular election of functional powers, they reveal the state will, in the quality of its holders.

The fact is that many legal systems, such as our constitution, in art. 37, § 6th Federal Constitution (BRASIL. Constitution, 1988), affirmed the rule by which the legal entity governed by public law is always responsible for the acts of its agents or employees, when exercising their powers.

For Araújo (2005, p.813), focusing on the relationship of political legislators with the State and with voters and the collectivity itself, the need to distinguish that the legal period in which parliamentarians exercise these functions has been called mandate, differently, elective mandate, in which they are invested and not hired. This type of mandate is certainly under Public Law, just as the relationship between employee and State is statutory and not contractual.

In this sense, the relationship between the State and parliamentarians is organic, the fact that the investiture results, in most cases, in appointment (except Chief Executives) instead of election. Civil liability can entail it for the Public Power, as public agents who are for these purposes. (Araújo, 2005, p.813).

In spite of the legislating State, the modern Legislative Powers are, therefore, representative institutions, in the sense that they are composed of “representatives” of the people. The power that the “Legislative” possesses, which is to make laws, corresponds to the power of discussion and voting that voters place in the hands of representatives. As the people are the source of power, the power of the people cannot, at the institutional level, be expressed except through deliberative bodies organized to represent the different currents of public opinion and popular will. The sovereignty of the people, if the people are considered holders or holders of sovereignty, thus passes to the Legislature: it is in the Legislative Power that, par excellence, the resonances of the popular will are found. Discussing what “popular will” is, and how

it can be assessed, is a complex issue, which has a philosophical as well as a sociological dimension, and does not allow for further development in this topic.

CIVIL LIABILITY OF THE STATE FOR ACTS OF THE LEGISLATIVE POWER

There are several understandings about the non-contractual liability of the contemporary legislating State.

In the early 1980s, a defender of the state responsibility thesis, Professor Cretela Júnior (1980, p.180) addressed not only situations of unconstitutionality, but also cases of “pseudo-laws” in theory. Therefore, it is worth noting:

[...] laws devoid of impersonality and generality, such as the one referring to the protection of the dairy industry in France, would have to be recognized as true administrative acts and treated accordingly. In another approach, formal laws, “in theory”, if constitutional, would not commit the State’s responsibility, even if causing damage, because the damage would not be concentrated in just one, but would be distributed, when the text was edited, by all those which it would focus.

This understanding is supported by Silva (1985, p.111) in the monograph entitled “The State’s Responsibility for Judicial and Legislative Acts”, in which he highlights “only damages resulting from laws declared unconstitutional by the body legitimated to do so are indemnifiable; this, a necessary point for the suitable postulation and based on the supra-legal principle of the Rule of Law”.

However, none other than Meirelles (1992, p.561) still refutes the idea of holding the Public Treasury responsible for damages caused by law, even though it is declared unconstitutional. The author contests, saying that:

[...] the state’s duty to indemnify damages resulting from the law does not come from

a constitutional provision, that is, it does not fall under civil liability of an objective nature, since the constitutional text only refers to administrative agents, or servants without reaching, as a consequence, the acts of the members of power.

It also argues that due to legal sovereignty and the abstract and generic character of the law, it cannot cause indemnifiable damage to the individual. As a result, the elective nature of parliamentary mandates and the inexistence of disciplinary action by the other powers on the member of the legislature determines the irresponsibility of the State in the exercise of the legislative function.

For Di Pietro (2000, p. 172), “the rule that prevails in relation to legislative acts is irresponsibility”. However, he disagrees with the reasons given by Hely Lopes Meirelles in defending state irresponsibility.

Di Pietro (2000, p.172) still argues:

[...] the exercise of a portion of state sovereignty by the Legislative Power does not exempt from the duty to comply with the limits constitutionally placed on its performance, from which the state burden of responsibility for harmful unconstitutional laws would arise. It recognizes the existence of laws devoid of the attributes of generalities and abstraction, which, reaching, with concrete effects on certain people and being harmful to them, generates the right to indemnify. Therefore, there is a parity, in content, with an administrative act that, this way, the same duty to indemnify that is recognized in relation to the exercise of the administrative function.

With regard to the popular elective nature of the parliamentary mandate, recalls Di Pietro (2000, p.173), “the election of the parliamentarian implies delegation to make constitutional laws”.

In brief, Gasparini (2003, p.97) justifies that:

[...] the rule of irresponsibility” would be justified in the face of the sovereignty

of the Legislative Power and the general, impersonal and abstract character of the law. In this context, the damage caused by a legislative act would be “generalized and imposed on the whole society”. However, it emphasizes that the jurisprudential understanding recognizes the State’s patrimonial responsibility for an act based on law whose unconstitutionality has been recognized.

Interesting comment by the renowned Cretella Junior (1980, p183) on the civil liability of the State for legislative acts:

[...] Brazilian justice, in short, distinguishes between constitutional law and unconstitutional law, concluding largely because of the State’s irresponsibility in relation to the first, even though it has caused damage, except when, by exception, it starts to frame special situations. In relation to unconstitutional laws, there is always the commitment of the State’s responsibility, equating this situation, in a way, with the public service that, by accident, malfunctioned.

Highlight goes to Professor Alcântara (1988, p.108) who, in 1988, edits an exceptional work entitled “State Responsibility for Legislative and Jurisdictional Acts”, in which they claim the following damages are indemnifiable:

a) those resulting from a constitutional harmful act that affects, directly and immediately, an individual or a specific group of individuals (either because they are the exclusive addressees of these norms, or because, in relation to them, the apparently general limitations, which in theory would not give rise to reparation, present themselves with the characteristic of special and abnormal sacrifice)

b) derivatives of a harmful act that is formally unconstitutional, even without a declaration of said situation by the competent body, in situations of certainty, especially and abnormality;

c) those originating from a materially

unconstitutional harmful act, regardless of its extension and intensity, provided that it is recognized by the court qualified to do so;

d) damages arising from unconstitutional inaction, for non-compliance determined in the political letter or for the extrapolation of a sufficient period for presentation, being processed by the Commissions, discussion and voting of a bill within the average period recognized in similar cases.

In cases of unconstitutionality, the basis would be the violation of the primacy of legality; in the others, that of equality.

In his work Stoco (2001, p. 631-633) when disagreeing about the responsibility of the legislating State, he opens a topic in which he records the doctrinal tendency to establish the submission of the public power to the legal duty to indemnify the damage caused by the exercise of the legislative function. It establishes this position with the jurisprudential precedent in this sense, following with Cahali (1995, p.126), the understanding according to which the obligation to indemnify presupposes, in addition to proving the damage, the declaration of the law's unconstitutionality by the competent courts.

In the understanding of Gonçalves (2001, p.40-41), when questioning the responsibility of the State in the face of normal legislative activity,

[...] perfect constitutional law can do unjust harm to individuals or to a certain category of individuals. The foundation is the same constitutional principle that proclaims the Administration's objective responsibility for the damage caused, regardless of the determination of the server's fault, which will only be considered for determining the right of return.

Accepting the thesis of State responsibility for legislative activity, there are, among others, the notable jurists Celso Antonio Bandeira de Mello and Lúcia Valle Figueiredo.

The work of UNESP Professor Freitas

(2001, p. 57-60) deserves attention, in which she expresses her position on the possibility of state accountability in the same action that recognizes the unconstitutionality of the law (in a diffuse sense, therefore), as well as of the legislative omission that gives rise to the reparation, provided that the deadline is previously stipulated. It is the same line postulated by reparation in the case of constitutional laws that generate special and abnormal damages, sacrificing rights and having as a background respect for the equality of all in the face of public charges.

The Professor at PUC of Minas Gerais, Esteves (2003, p.209), in his book "Civil Liability of the State by Legislative Act", addresses the subject by portraying the evolution of ideas of civil liability of the State for legislative acts, with its own affirmation of the democratic rule of law.

In his view, Esteves (2003, p. 210) declares that there is no doubt, in modern law, as to whether the State must be civilly liable for damages arising from the unconstitutionally enacted legislative act, once declared, or even if formal, the addiction is not curable.

Also noteworthy is the bold positioning, due to its innovative character, for expanding, even more, the state responsibility in the exercise of the legislative function, the work of Mota (1999, p.208), who understands:

The damages that give rise to state accountability do not necessarily have to result from sacrifices of rights, and may come, from the outset, as a result of simple sacrifices of any aspect of property law, because, in the form of the current CF, the guarantee of a minimum essential content of the property right results from its Art. 5, XXV, which provides that, even in cases of temporary requisition or use of an asset, if it causes damage to the owner, there will be an obligation to indemnify. Thus, if compensation is applicable only for the use of a particular thing, a fortiori compensation will be applicable in the case of any sacrifice,

as noted. In fact, the property right is unconditionally guaranteed in the Magna Carta, provided that the social function is met.

Another important focus of Mota (1999, p.208) “is the need to declare unconstitutionality as a necessary condition for reparation in the case of non-conforming laws”. He does, however, make one observation in the case of unconstitutional laws:

[...] the duty to repair not only covers the damage caused, but, likewise, the benefits that the injured party would have ceased to enjoy, in addition to the moral damage, if any. On the other hand, in the case of constitutional laws, there is an urgent duty to just recompose the existing material situation, creating a new patrimonial situation corresponding to the previous one and of equal value.

If the current doctrine accepts the responsibility of the State for legislative acts as possible, it is important to stick to the conditions of application of this institute and the limits that must be observed.

For Freitas (2001, p. 87):

[...] In principle, the incidence of the State's obligation to respond for damages, that relating to the original constituent power whose function is the elaboration of the Constitution, is excluded from the legislative activity. Unlimited at the legal level, this power establishes the ex-novo, initiating or constituting the starting point for a positive legal order and, consequently, does not subject the State to the obligation to repair damage that, perhaps, its provisions may cause to the interests of individuals.

The author excepts, however, the derived or reforming constitutional norm.

Therefore, the legislative acts resulting from the derived constituent power, intended to reform the constitutional precepts originally established, may affect the State's obligation to respond for damages, when they harm the interests of individuals.

Freitas (2001, p.88) states that the issue must be considered in the light of the analysis of the constitutional system adopted in each country, as there is a need to establish a control of constitutionality, according to models of rigid or flexible constitution, a distinction made according to the possibility of modifying your devices.

In rigid constitutions, the power to reform is conditioned, limited in its own text, according to the procedure to be followed and subject matter or content subject to modification.

In flexible constitutions, on the other hand, the modification does not require special procedures, and is carried out through a process identical to that foreseen for the elaboration of ordinary laws.

Therefore, it is observed that, depending on the model adopted, the constitutional reform may or may not be subject to constitutionality control, when it is foreseen and, if it is submitted to it, when the non-compliance with the precepts of the original constitution is verified., the new norm must be declared unconstitutional, hence the State's responsibility if, during its validity, it caused damage to the patrimony of individuals. If the rule does not submit to that control, liability may be questioned, in view of grounds other than the unconstitutionality of the harmful law, which will be the object of further analysis.

Several barriers presented themselves, and still present themselves, to the acceptance of the thesis of the responsibility of the State for its Legislative function. Thus, several authors support the thesis of the State's irresponsibility for legislative acts causing unfair damage. It is justified by the sovereignty of the Legislative Power and parliamentary immunity.

REQUIREMENTS OF STATE RESPONSIBILITY FOR LEGISLATIVE ACTS

The legal requirements for civil liability

will comply with the precepts established by the category of non-contractual liability of the State. It therefore presupposes, as an essential requirement, the existence of a causal link between the legislative activity and the harmful event.

However, indemnifiable is the unlawful damage, considered as such when it results from an illicit legislative act or a lawful legislative act, provided that it presents the character of abnormality and specialty.

Diez (1971 apud Freitas, 2001, p. 107) describes the conditions for compensation for damages, as follows:

[...] three requirements. They are: 1) it must mediate damage; 2) the damage must be caused by formal law, whether constitutional or unconstitutional; 3) there must be a causal relationship between the damage suffered and the legislative act. The author also considers that the damage may be patrimonial, in the sense that it falls within the guarantees of private property, and may also include any injury to the individual, to his ability to work, etc. whenever it is pecuniarily appreciable. The damage must be certain in the sense that it is not hypothetical. It can, however, be future, as a damage that improves with the application of the law. It must be particularized, special and not general. In summary, there must be a special sacrifice that is implied by the one that relates to one or a restricted number of victims, which is not common. Its generality configures an onus of its own in society. Abnormal is damage that exceeds the inconveniences inherent in the operation of a service.

According to Professor Freitas (2001, p.108) the two characteristics described: specialty and abnormality “are conditions for the granting of compensation, highlighted mainly by French doctrine and jurisprudence and accepted in the universality of countries that admit the responsibility of the State for the legislative activity”. Laso (apud Freitas, 2001, p.108) agrees with this understanding,

stating that the condition for the emergence of responsibility for the damage suffered is special, exceeding the normal sacrifices typical of life in society. He also adds to these characteristics the need for the damage to be certain, real and pecuniarily appreciable.

However, Laso (apud Freitas, 2001, p.109) understands that hypothetical, eventual and future damages and purely normal ones are not indemnifiable.

On the other hand, Diez (1971 apud Freitas, 2001, p.109) disagrees with what constitutes the temporality of damage, as he understands that future damage capable of causing state responsibility is not allowed.

Due attention must be given to the characteristic of specialty, as a requirement of particularization of the recoverable damage, according to Freitas (2001, p.110). In this regard, the author agrees with the thinking of Canotilho (1974, p.103), when she considers that “specialty of damage does not mean sacrifice of a single person, but rather unequal and serious incidence of a general and abstract law on a citizen or groups of citizens. To be special doesn’t necessarily have to be individual.

As can be seen, the trend that appears today is for the public responsibility institute to expand its content to cover a greater number of injuries.

Still, it is important to highlight from Freitas (2001, p.109) the following understanding:

[...] damages caused by laws enacted to protect morals, good customs and public health must be excluded from the State’s indemnification obligation. Injuries resulting from laws that prevent or limit situations not legally protected because they are illegal, amoral or contrary to health do not find legal support.

Thus, with regard to the legal requirements of state responsibility regarding legislative matters, for the damage to be indemnifiable, the law must always be its cause. There is a

need to establish a causal link between the damage suffered and the law.

Therefore, delimited in objective theory, one must consider, for the origin of state responsibility in this matter, the existence of a certain, special and abnormal damage, and that this damage results directly from the legislative act.

CIVIL LIABILITY OF THE STATE FOR UNCONSTITUTIONAL LAWS

Considered as an exception to the principle of state irresponsibility, the responsibility originating from unconstitutional legislative acts has great acceptance in universal doctrine.

Unconstitutionality, having as a background aspect of illegality, imposes the need to answer for the damages caused by acts fraught with this vice. However, it depends on the mechanism for controlling the constitutionality of laws in force in the legal system. This is the case in countries that adopt a rigid constitution model, where the validity of the legal norm is determined by the constitutional provisions, as these have the power of supremacy and the regulation of the form of its elaboration.

The unconstitutional law, when it contains prescriptions that are incompatible with the constitution, generating conflicts with its provisions or violating rules of competence or of the process of law formation, has as a consequence, the recognition of the existence of an illegal legislative act, which imposes accountability of the State for damages. Thus, it is not lawful for the legislator to infringe the constitutional order.

With regard to unconstitutionality, the following position is taken from the teachings of Gonçalves (2001, p.40):

The law, under the aspect of a generic, abstract and impersonal norm, in principle a typical legislative act, cannot harm anyone. Any damage to subjective rights

will arise directly from its application and only indirectly from it. Its effects depend, therefore, on the effective incidence on the specific case, not on the law in theory. If the unconstitutional law causes damage to individuals, the State will be responsible, provided that the unconstitutionality has been declared by the Judiciary. What is essential is that there is a causal link between the unconstitutional law and the damage that has occurred.

According to this understanding, the jurisprudence has decided (BRAZIL. Federal Supreme Court, Extraordinary Appeal No. 153.464, 1992): “The State is civilly liable for damages caused to individuals by the unconstitutional performance of the function of legislating”.

Consensus among scholars who support this thesis is that the unconstitutionality of the harmful law has to be declared by the competent power, that is, by the Judiciary. If this power does not declare its validity, the legal precept will have the character of veracity, supported by the presumption that they enjoy constitutional laws, the State being exempt from liability, unless the damages caused are special and abnormal.

However, once declared unconstitutional, the legislative act becomes illicit, causing the State to be liable for the damages arising from it.

Our Country’s STF has the understanding that the State must be civilly liable for the damage caused by virtue of an act performed on the basis of a law declared unconstitutional (BRAZIL. Federal Supreme Court. Extraordinary Appeal No. 158.962,1992)

Professor Freitas (2001, p.102) thus comments in relation to the requirement of a prior declaration of unconstitutionality of the law by the Courts, unanimously accepted by the doctrine for the recognition of state responsibility: “it must be noted that, although the situation of illegality of the act is guarantor

of the reparation of the damages, the injured party has, in this situation, a less effective protection than that given to the individual, when injured by laws in accordance with the constitutional precepts”.

Freitas (2001, p.102) adds the following words:

[...] in the case of damages derived from lawful acts, state responsibility stems from the establishment of the causal link between the act and the damage and from certain characteristics of the damage. With regard, however, to the hypothesis discussed, in addition to complying with the aforementioned requirements, the individual must also support his request in a prior declaration of invalidity of the harmful act issued by the highest court or special body, in an action in which he does not appear as a legitimate part of the proposal.

In this sense, Freitas (2001, p.103) goes further, pointing out that the bases of recognition of this right must be expanded, accepting the direct indemnity action with incident declaration of unconstitutionality of the law to repair the consequent damages of the allegedly unconstitutional law”. I conclude by saying:

[...] that the procedure provided for in the national legal system that adopts, in addition to concentrated jurisdictional control, the diffuse control of constitutionality by way of exception or incidental, through which any interested party may raise the question of unconstitutionality in any process, whatever the judgment. The protection of the right and unquestionable of the individual to be compensated for damages that were unlawfully imposed on him would remain a guarantee in a more effective way, allowing the current constitutional order.

For Mota (1999, p.146), “if the invalidation of a formally unconstitutional law is fully justified, the question remains about the state’s duty to reimburse in the event of a law whose constitutionality defect only ends in formal

aspects”.

The author proposes a solution that uses, in the wake of Rui Medeiros’ lesson, the so-called virtual cause of damage. That is to say: “the fact that it would produce, if it were not produced by another”.

The questioning, according to Mota (1999, p.147), consists of “determining whether the State must repair damages caused by the law that is formally invalid (actual cause), even when it is possible to demonstrate that it would achieve the same result, if it had been enacted by law. valid legislative process”.

The formula proposed by Mota (1999, p. 148),

[...] which is considered to be fully correct, takes into account the possibility of retroaction of the norm. There would be no duty to indemnify, in the event that the State had the power to print, through the new law, and now formally valid, the same effects sought with the invalid law.

To illustrate the reasoning, MOTA (1999, p.148) cites, as an example, the following case:

[...] the State would not be obliged to indemnify the slaughter of cattle contaminated by foot-and-mouth disease, determined by a law later considered formally unconstitutional, since, considering in casu the anti-social nature of the property, the new law would have the power to legitimize the requirement of animal sacrifice. Ultimately, it is a matter of admitting that, in certain cases, the formal failure of legislative drafting proves to be surmountable, which is not in conflict with the guarantee of the democratic principle protected by the formal control of the constitutionality of laws.

It is worth highlighting the position of José dos Santos Carvalho Filho, who says that the concrete and individualized incidences of the effects of the law make “the responsibility of the federative legal entity from which the law emanated, assuring the injured party the right to compensation for damages”. (2004, p.132).

On the other hand, the author rejects

the hypothesis of patrimonial liability by constitutional law, since he does not envisage the possibility that, in this case, the legislative act causes damage, “knowing that acquired rights already incorporated into the legal heritage are insusceptible to be molested by the new law, ex vi of art. 5, XXXVI, of the Federal Constitution” (2004, p.132).

FINAL CONSIDERATIONS

What draws attention is that the intense recognition and declaration of unconstitutionality of laws, in particular, through concentrated control, does not correspond to the proportional initiative of calling the State to respond for the damages caused.

For the first time, the Federal Supreme Court ruled on the matter of state responsibility for a legislative act, when examining the well-known case “Empresa Revista do STF”, as reported by Master Cretela Junior (1980, p102):

The contract maintained between the aforementioned company and the Federal Supreme Court, for the publication of judgments, was annulled by the Legislative Power, as a result of what was found in the inquiry that the Chamber of Deputies will order to be investigated.

In 1925, by enactment of Law No. 2,981, of December 18, the incorporation of the company's assets was determined, recognizing the obligation to reimburse creditors, according to the examination of the company's books, which must reveal which the credits covered by the benefit.

The Supreme Court later recognized the right to compensation for the material seized and intended for the purposes of executing the publication contract, without admitting compensation for losses and damages resulting from the annulment of the contract, thus rejecting the thesis of State responsibility. Legislator.

In mid-1944, the São Paulo Court of Justice recognized, in a judgment reported by Judge FREDERICO ROBERTO, the possibility that unconstitutional laws gave rise to a claim for damages. The court denied, however, the compensation claimed, based on the lack of a declaration of unconstitutionality of the legislative act from which the damage would result.

The conception of the supremacy of the law, justifying state irresponsibility, does not find support in the current system of legislative production, in which the law results as an instrument of a particularized political will, an expression of predominant and transitory wills. In the current context of the pluralist and interventionist State, the law is no longer a perfect and uncontested act.

The generality and abstraction characteristics of the law are not impediments to the recognition of state responsibility, because, although they constitute directives for its elaboration, it lacks consistency as a technical requirement, not implying their non-compliance, a priori, in the invalidity of the legal precept.

As for the allegation of the sovereignty of Parliament, exempting the State from the obligation to answer for the damages caused by the legislative activity, it is also devoid of legal value, because sovereignty belongs to the State Power, one in its essence, and not to an organ in charge of the exercise of its functions. Furthermore, sovereignty must not imply irresponsibility, currently subject to the limits imposed by law, both in the internal and external order.

The legislative agent, as a political agent that makes up the category of public agents in the exercise of their own public function, commits the State, imposing on it the obligation to answer for its acts, once the State entity is directly responsible for the activity of its agents, except when they act with intent,

abuse of power in the case of functional and responsibility crimes.

Thus, the responsibility of the legislator State arises as an obligation to answer for the damage caused by the legislative activity, proper to the Legislative Power, when illegal or unconstitutional, when its effects are particularized or when it is unlawful.

With the exception of the constitutional norm, which originally created the law of a State, all other forms of legislative manifestation are able to commit the responsibility of the State, including the reform of the original Constitution and the constitutional and unconstitutional ordinary laws.

The unconstitutional law, in the legal systems that admit control of the constitutionality of laws, constitutes a hypothesis of illicit causation of damages and imposes, as a consequence, the responsibility of the State. The foundation is the principle of legality. As proof of illegality, a prior declaration of

unconstitutionality of the harmful precept by the highest court or special body is required.

The truth is that the practice of this requirement by the national Courts excessively burdens the injured party, who does not have legal authority to exercise the direct action of unconstitutionality of the laws.

The courts must expand the protection of the rights of those administered, recognizing the state's responsibility in a direct indemnity action, with an incident declaration of the unconstitutionality of the harmful law, an expedient of the diffuse control of constitutionality, adopted by the national legal system.

Therefore, Brazilian jurisprudence has been timid in the face of accepting the responsibility of the State for the unconstitutional performance of the function of legislating, maintaining the understanding regarding the requirement of a prior judicial declaration of the unconstitutionality of the legislative act.

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