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THE IMPACT OF THE THEORY OF PUNITIVE DAMAGES ON THE STATE'S OMISSION LIABILITY

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Abstract: Overcoming the classic division between public law and private law, especially through the conception of a civil-constitutional law, aligned with the systematic interpretation of the legal system, makes up the theoretical basis for the inclusion of the punitive-pedagogical purpose, also understood as a social, preventive purpose or dissuasive within the State's institute of non-contractual omissive liability. Born in countries of the common law system, the doctrine of punitive damages exasperates the traditionalism of restorative, "compensatory" and satisfactory functions to include a social purpose to extracontractual civil liability. The sedimentary basis of incidence of the Theory of the Value of Discouragement in the State's omissive responsibility is linked to the legal and social relevance of the context of the injury in opposition to the criticisms concerning the absence of legal provision and the inexistence of minimum and maximum parameters for the increase of the indemnity quantum, in addition to the criticisms arising from the administrative doctrine, highlighting the arguments related to the non-observance of the postulate of the supremacy of the public interest over the private and the transfer of increased responsibility to the community itself. The adoption of the Discouragement Value Theory as an instrument of reprimand for situations of ineffectiveness, absence or delay in the provision of public services and the realization of fundamental rights faces the criticism of the imputation of the figure of the State as a universal indemnifier. However, the relevance, the immediate applicability and the binding nature of the fundamental rights on the State's behavior allow the theoretical approach of the application of the theory of exemplary damages as an instrument of censorship to the illicit materialized in an omissive way in the scope of the State's non-contractual liability.

Keywords: State responsibility. omission. damage. pedagogical function.

INTRODUCTION

The creation of an institute in the legal field obeys generic and specific purposes, related to the promotion of the abstract idea of justice. Civil liability, commonly called compensation, is classically aimed at repairing the unjust injury caused, linked to the idea of returning to the status quo ante.

The punitive character or the punitive function, remotely conceived by the "Law of the XII Tables", is also pointed out as an element of non-contractual civil liability, however its admission, as an autonomous component, is object of resistance by the Brazilian doctrine and jurisprudence.

This opposition to the punitive functionality of non-contractual civil liability, born in the legal community of Anglo-Saxon countries and the common law system, called in foreign law as the theory of punitive damages, called "Theory of the Value of Discouragement" in Brazilian law, earns greater refusal with regard to its impact on the State's accountability, especially in the materialized damages in the wake of the omission of basic public services.

HISTORICAL CONNECTION OF STATE CIVIL LIABILITY

The non-contractual civil liability imputed to the State has gone through different conceptions in the course of political-global history, from the imperative civil irresponsibility present in absolutist and authoritarian States, translated in the maxim of the King can do no wrong, until the advent of theories of administrative guilt (also called service fault), risk theory and publicist theories resulting from the incidence of the principles of public law in the context of extra-contractual liability of the State.

The admission of the State's non-contractual liability implied a clash between two theories, the subjective, making the fault element, proven or presumed, an inseparable requirement of the duty of reparation, and the objective one, designated liability for risk, applied regardless of the existence of the fault element.[1] The theories of administrative fault, administrative risk and integral risk mentioned above represent the historical stages of the theory of objective responsibility of Public Administration. In summary, the theory of administrative guilt enshrines the binomial "lack of service-administration fault"[2], while the theory of administrative risk disregards the idea of absence of service or the agent's fault, requiring only the victim's harmless injury. The third theory, the integral risk, rejected by the majority doctrine, rejects any cause to exclude state responsibility, even in situations of fault or exclusive intent of the injured party or of third parties and force majeure.

The objective methodology of making the Public Administration responsible, without fault, was only expressly introduced in the national legislation by the Constitution of the United States of Brazil of 1946, however, in the first decades of the 20th century it already had illustrious defenders, such as Ruy Barbosa, Pedro Lessa and Amaro Cavalcanti.[3]

The then objective theory of State accountability, with its birth expressed in the aforementioned Constitution of the United States of Brazil of 1946, was reproduced by the Constitution of the Federative Republic of Brazil of 1967, by Constitutional Amendment No. by the 1988 Constitution of the Federative Republic of Brazil, all with the explicit insertion of the right of return.

The idea of state civil irresponsibility never constituted a reality in the Brazilian legal scenario, not even in the Political Constitution of the Empire of Brazil of 1824, it only faced a significant evolution from civil guilt to objective responsibility and right of return. Nowadays, enshrined in the text of article 37, paragraph 6 of the Constitution of the Federative Republic of Brazil of 1988 and reproduced by article 43 of the Civil Code, the discussion on the applicability of objective liability of the State remains pacified, however, on the other hand, the debates concerning the restriction of civil liability of the State to uti universi services, the scope or exclusion of State liability in the objective kind on damages caused to third parties who are not users in the event of uti singuli services, and also on the possibility and methodology of omissive liability of the State find space in the Brazilian doctrinal and jurisprudential bosom.

STATE LIABILITY FOR COMMISSION AND OMISSION ACTS

The State's extra-contractual liability system is analyzed in the light of two distinct approaches, related to the form of materialization of the indemnifiable illicit damage, designated as commissive acts and omissive acts. The former, by their very essence, are self-explanatory, resulting from the behavior of the intentional or culpable public agent, who, with that prerogative, practices harmful action. On the other hand, the omissive liability of the State exacerbates the simple improper omissive act, also called commission by omission, resulting from an express option of inertia in the face of a legal duty to act to prevent or minimize the

1. Cf. CAVALIERI FILHO, Sergio. **Programa de responsabilidade civil**. 10. ed. rev. e ampl. São Paulo: Atlas, 2012, p. 150.
2. MEIRELLES, Hely Lopes. **Direito administrativo brasileiro**. Atualizada por Eurico de Andrade Azevedo, Délcio Balestero Aleixo e José Emmanuel Burle Filho. 23. ed. São Paulo: Malheiros, 1998, p. 533.
3. Cf. BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**. 30. ed. rev. e atual. São Paulo: Malheiros, 2013, p. 1044.

harmful event, remaining also present in the designated omission itself.

State responsibility for its own omission, like improper omission, also requires the express provision of a legal duty of the state, but its materialization only calls for inertia, dispensing with the final purpose of omissiveness. This type of responsibility is characterized by the "negligence" of the public administration in fulfilling a legal duty imposed by law or arising directly from the constitutional text. According to administrator Celso Antônio Bandeira de Mello, "[...] it is necessary for the State to have committed an unlawful act, either because it did not act to prevent the damage or because it was insufficient in this matter, due to behavior below the legally required standard.[4]

Accountability in situations of omission faces some resistance and obstacles within Brazilian law, especially in the case of omission itself. The first complication lies in the interpretation concerning the impossibility of applying the objective methodology of accountability of the Public Administration as a result of inefficiency, absence or delay in the provision of a public service, that is, the conception of omissive non-contractual liability of the State is admitted restrictively in the species subjective, transmitting to the injured party the burden of proving the omission, the damage, the causal relationship, and also the legal state duty to act to prevent or minimize the harmful event.

This rule of interpretation of subjective state liability for indemnifiable damage resulting from an omission has been the object of divergence in the doctrinal and jurisprudential spheres. The ultimate interpreter and Guardian of the Constitution, the Federal Supreme Court, in matters of civil liability of the State arising from damage caused by omissive conduct, has a divergent position on the interpretation of article 37, paragraph 6 of the Constitution of the Federative Republic of Brazil, now corroborating the objective methodology of accountability, sometimes refuting it, but apparently preferring to dedicate the interpretative attention to the requirement of the causal link between the indemnifiable illicit damage and the state's omission.

> Regimental grievance in the extraordinary appeal with grievance. Administrative. Public educational establishment. Accident involving students. Omission of the Public Power. Strict liability. Elements of state civil liability demonstrated at the origin. Review of facts and evidence. Impossibility. Precedent. 1. The Court's jurisprudence has established itself in the sense that legal entities governed by public law are objectively liable for the damage they cause to third parties, based on art. 37, § 6, of the Federal Constitution, both by commissive and omissive acts, provided that the causal link between the damage and the omission of the Public Power is demonstrated. 2. The Court of origin concluded, based on the facts and evidence in the file, that the assumptions necessary for the configuration of the State's non-contractual liability were duly demonstrated. 3. Inadmissible, in an extraordinary appeal, the re-examination of facts and evidence in the file. Incidence of Precedent No. 279/STF. 4. Regimental grievance not granted.[5]

State responsibility for omissive acts, in addition to the positive or negative aspects of the behavior that caused the unlawful offense, is also differentiated with regard

4. BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**. 30. ed. rev. e atual. São Paulo: Malheiros, 2013, p. 1030.

5. BRAZIL. Federal Court of Justice. Regimental grievance in the Extraordinary Appeal with grievance n.º 754,778 / RS. First Class. Appellant: State of Rio Grande do Sul. Appellee: F.G.S. Rapporteur: Minister Dias Toffoli. Electronic Justice Gazette, Brasília, DF, 19 Dec. 2013. Available at: < http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=5068277>. Access em: 19 mar. 2015.

to the specialization of omission, that is, classified as generic omission and specific omission. This classification, based on the aforementioned professor and former judge Sérgio Cavalieri Filho in contemporary national civil law, conceptualizes the "specific omission" as a direct and immediate cause for the occurrence of indemnifiable damage, with the State acting as guardian, its necessary action to obstruct the materialization of the harmful event. On the other hand, the "generic omission" is not defined as a direct, preponderant and immediate cause for the indemnifiable damage, but it is a concurrent cause for the wrongdoing. According to Sérgio Cavalieri Filho, in practical terms, the rules of strict liability are applied in specific omissive liability, as opposed to generic omission, which apply the disciplines of subjective liability.[6]

The generic omission, arising from the faute du servisse, is also criticized as a cause of state responsibility, even with the admission of the subjective methodology of accountability, as it would lead to the characterization of the State as a "universal indemnifier", especially due to the administration's inaction in implementing public policies and social demands. The disapproval of state accountability derived from generic omissions in the implementation of public policies and social demands is advocated in the absence of a direct causal link between the omission and the harmful result, but only a possible, remote and abstract link. These censures regarding the imputation of the State as a "universal indemnifier" are reproduced by Professor José dos Santos Carvalho Filho:

> Such omissions, generic as they are, do not give rise to civil liability of the State, but rather to the eventual political accountability of its leaders. It's just that so many tricks the Public Power commits in the administration of the public interest, that society begins to be indignant and impatient with the mentioned gaps. Therefore, the indignation is understandable, but the fact does not lead to the State having to indemnify the whole of society for the shortcomings to which it is subject. Therefore, the emotional feeling must be separated from the legal solutions: these are the ones that the Law contemplates.[7]

The doctrinal and jurisprudential divergences present in the institute of the State's extra-contractual liability as a result of omissions that cause indemnifiable damages exist and are the object of forceful debates between civilists and administrators. However, the issues involving the possibility of incidence of the objective methodology of state accountability for the faute du servisse and the illicit arising from generic omissions in the context of the realization of fundamental rights and the application of reparatory and punitive indemnities will be discussed in the instant of systematic analysis between the institutes of omissive and non-contractual liability of the State and the theory of punitive damages or exemplary damages within the constitutional protection commandments.

THEORY OF PUNITIVE DAMAGES OR EXEMPLARY DAMAGES

Extra-contractual civil liability is conceived in the shadow of the conception of equity, with the premise of compounding a previously consummated injury. With this proposition, the institute is examined in aspects designated as functions of civil responsibility, varying classifications between the classic functions of compensation and discouragement widespread within

6. Cf. CAVALIERI FILHO, Sérgio. **Programa de responsabilidade civil**. 10. ed. rev. e ampl. São Paulo: Atlas, 2012, p. 268-269.
7. CARVALHO FILHO, José dos Santos. **Manual de direito administrativo**. 27. ed. rev., ampl. e atual. São Paulo: Atlas, 2014, p. 573.

continental European law and the punitive purpose adopted within the scope of the law of Anglo-Saxon countries and the common law system. Other functions are also recognized in the area of civil liability, such as demarcation, linked to the scope and limits of the agent's freedom of action, and the function of mediation, related to the balance of conflicting interests.[8] However, the classic compensatory, compensatory and punitive purposes reign in doctrine and jurisprudence, as they encompass the compensation of the victim, the punishment of the agent aligned with the idea of indirect revenge on the injured party, in addition to the restoration of social order and the prevention of new antisocial behaviors.[9]

The functions of contractual liability, under penalty of transgressing the rule enshrined in the principle of relativity of contractual effects, presuppose a coercive provision to guarantee the preservation of the agreed agreement, and later, being transformed into a penalty measure to sanction the contractor responsible for the violation of the contractual disciplines, that is, the object and the specific recipient of the functions are known from the moment the agreement is established. In contrast, the functions of non-contractual civil liability are built in the shadow of generic recipients, implying, consequently, the impossibility of checking, previously the occurrence or non-occurrence of the concrete situation, the effectiveness of the function.

The punitive, sanctioning, preventive and repressive aspects of extracontractual civil liability are related to a pedagogical idea directed at the offender himself and at society, aiming at intimidation to prevent the occurrence of future damages. For the person of the agent responsible for the damage, the sanctioning and preventive functions are applied jointly and dependently, that is, the first to penalize the offender for the behavior that provokes the indemnifiable damage, and the second with the purpose of grading the degree from accountability to the level of inhibiting the agenda or motivating a reflection on the adopted conduct. With regard to society, the penalizing characteristic remains compromised, standing out only the pedagogical function, aimed at prevention, the demotivation of new harmful behaviors that can be compensated through an abstract threat of sanction.

But the joint application of all the functions of non-contractual civil liability does not find perfect symmetry, since one can compromise or even annihilate the effectiveness of the other, as in the application of the exclusively patrimonial compensatory function in millimeter measure to the damages of the injured party and in return the insignificant loss or write-off in the offender's equity or assets. Second lesson from Professor Carlos Roberto Gonçalves, critic of the application of the pedagogical function in Brazilian law as a result of the lack of express provision: "Basically, the circumstances of the case, the seriousness of the damage, the situation of the offender, the condition of the injured party, prevailing, at a central orientation level, the idea of sanctioning the injured party ('punitive damages')"[10].

The combination of reparatory and punitive aspects of civil liability is conceived in the theory of punitive damages or exemplary damages from common law countries, known in Brazil as the "Disincentive Value" Theory.

8. Cf. ROSENVALD, Nelson. **As funções da responsabilidade civil**: a reparação e a pena civil. 1. ed. São Paulo: Atlas, 2013, p. 66, 64.

9. Cf. TUNC, André, **La responsabilité civile**. 2. ed. Paris: Economica, 1981, p. 133.

10. GONÇALVES, Carlos Roberto. **Direito civil brasileiro**: responsabilidade civil. 4. ed. rev. São Paulo: Saraiva, v. IV, 2009, p. 380-381.

The acceptability of the punitive aspect of civil liability is analyzed as a social purpose, from reprimanding the offender to promoting preventive behaviors aimed at preventing or reducing the risks of the occurrence of further injuries.

The application of the punitive function of non-contractual civil liability, linked to a pedagogical conception, faces reputable resistance in Brazilian law, especially criticism related to the mentioned lack of express legal provision and the unjustified enrichment of the injured agent.

However, as well as notable critics, the acceptability and applicability of the "Theory of the Value of Discouragement" or the "inhibitory guardianship" finds defenders in the national law, since, as a result of the fundamental provision enshrined in article 5, item XXXV of the Constitution of the Federative Republic of Brazil, its express infraconstitutional regulation would be dispensable. With this idea teaches Sérgio Cavalieri Filho:

> The main reason alleged by those who do not accept the punitive nature of compensation for moral damage is the fact that we do not have a written rule that expressly provides for this type of sanction; on the contrary, those that exist point in the opposite direction. But the aforementioned author [André Gustavo Corrêa de Andrade - Moral Damage and Punitive Indemnity], after extensive research on foreign doctrine, mainly from the United States and England, finds the solution in constitutional principles, mainly in the one that guarantees judicial protection against any and all any injury or threat of injury to right.
>
> Punitive compensation for moral damages arises as a reflection of the paradigm shift in civil liability and serves two well-defined objectives: prevention (through 'dissuasion') and punishment (in the sense of 'redistribution').
>
> [...]
>
> Punitive compensation for moral damages must also be adopted when the offender's behavior proves to be particularly reprehensible - willful misconduct or serious fault - and also in cases where, regardless of fault, the agent obtains profit from the unlawful act or incurs in reiteration of unlawful conduct.[11]

Discussions and disagreements about the possibility of applying the punitive function of non-contractual civil liability in Brazilian law exacerbate the doctrinal clash and also enters the jurisprudential scope, with favorable and contrary precedents to the theory of the value of disincentive. The Guardian of the Constitution has no precedent analyzing the matter, but the interpreter of Brazilian federal legislation has repeated judgments implicitly admitting, but with restrictions, the theory of punitive damages. The position of the Citizenship Court aims to reconcile the theory of disincentive applied to the offending agent in a parameter that does not promote the unjustified enrichment of the injured party.

> It must also be noted that the unrestricted application of 'punitive damages' finds a regulatory obstacle in the national legal system which, prior to the entry into force of the Civil Code of 2002, prohibited unjust enrichment as a principle informing the law and after the new codification civil law, began to expressly prescribe it, more specifically, in art. 884 of the Civil Code of 2002.
>
> Thus, the criterion that has been used by this Court in setting the amount of compensation for pain and suffering, considers the personal and economic conditions of the parties, and the arbitration must operate with moderation and reasonableness, attentive to the reality of life and the peculiarities of each case, so as not to

11. CAVALIERI FILHO, Sergio. **Programa de responsabilidade civil**. 10. ed. rev. e ampl. São Paulo: Atlas, 2012, p. 106, 107.

> undue enrichment of the offended party and, also, in a way that serves to discourage the offender from repeating the illicit act.[12]

Adopting the possibility of incidence of the Theory of the Value of Discouragement, or punitive damages in the Brazilian legal system, based on the fundamental precept inscribed in article 5, item XXXV of the Constitution of the Federative Republic of Brazil, we proceed to the analysis of the application of the punitive purpose in the harvest from public law, in particular, to the State's accountability in situations of ineffectiveness, absence or delay in providing services to enforce fundamental rights as an instrument of censorship and reprimand in contrast to the rejection of the idea of the State as a "universal indemnifier".

APPLICATION OF THE DISARMING VALUE THEORY IN PUBLIC LAW

In the context of non-contractual civil liability, the pro-public administration positions are translated into the aforementioned obstacles related to the theses of inapplicability of the objective methodology of accountability of the Public Administration due to the ineffectiveness, absence or delay in the provision of a public service, with the imposition of the burden of proof of omission and other elements of accountability to the injured party, and also directed at the impossibility of attributing civil liability to the State for the so-called "generic omission", justifying obstructing the propagation of the idea of the State as "universal indemnifier".

However, the minority arguments of making the State responsible for the faute du servisse and the possibility of applying the theory of punitive damages or exemplary damages are relevant, especially within the framework of the realization of fundamental rights and respect for constitutional protection commandments, that is, the The binding character that fundamental rights have on state behavior open, a priori, the theoretical approach of applying the theory of the Disincentive Value in the repression of illicit materialized "omissively" in the circle of responsibility of the State.

The doctrine contrary to the application of pedagogical compensation advocates the idea of the presence of the punitive or repressive aspect as a reflection of the loss of assets arising from the compensation of the injury, but it would not exist as an autonomous function[13], and also justifies the inappropriateness of the incidence of this functionality due to the absence of minimum and maximum parameters for setting the deterrent function.

> On the other hand, admitting 'punitive damages' by means of legal provisions is, in a way, paradoxical. The advantage of 'punitive damages' and the cause of their success in our legal experience is precisely due to the fact that they have been – illegally – adopted without prior legal provision, so that the Judiciary, faced with flagrant injustices, does not feel forced to wait for the Legislative Power. This is also the reason behind the tortuous construction of the punitive character as an element of reparation for moral damage, and not as an additional portion of compensation. Supporting, therefore, the applicability of 'punitive

12. BRAZIL. Superior Justice Tribunal. Special Appeal No. 913.131 / BA. Fourth Class. Appellant: Universal Church of the Kingdom of God and Other. Defendant: Gildásia dos Santos e Santos – Estate. Rapporteur: Carlos Fernando Mathias (Federal Judge summoned from the TRF 1st Region). Electronic Justice Gazette, Brasília, DF, 06 Oct. 2008. Available at: <https://ww2.stj.jus.br/processo/revista/document/mediado/?componente=ATC&sequencial=4185477&num_registro=200602674372&data=20081006&tipo=91&formato=PDF>. Accessed on: 19 Mar. 2015.

13. Cf. GONÇALVES, Carlos Roberto. **Direito civil brasileiro**: responsabilidade civil. 4. ed. rev. São Paulo: Saraiva, v. IV, 2009, p. 381.

> damages' through legal provision is to remove its main attraction and make it, for that very reason, dispensable in competing with other alternatives, such as the system of administrative sanctions or the simple expansion of compensatory amounts in the field off-balance sheet.[14]

The perspective of applying the pedagogical function within the non-contractual liability of the State emanates primarily from overcoming the classic division between public law and private law, especially through the conception of civil-constitutional law aligned with the systematic interpretation of the legal system. The punitive-pedagogical purpose, also understood as the social purpose of the indemnity institute, surpasses the traditionalism of restorative, "compensatory" and satisfactory purposes[15] of non-contractual civil liability, and although it lacks express provision, finds simultaneous basis in the constitutional text and in the relevance of the realization of fundamental rights. The late Professor Orlando Gomes, almost three decades ago, in a work dedicated to Professor Sílvio Rodrigues, discussing "modern trends in the theory of civil liability", commented:

> Reimbursement, reparation, indemnity, restitution, replacement have lost, in everyday practice, the character of exclusive instruments of protection for the individual. The illicit behavior of a person also started to be repressed by express order of the judge, as happens mainly in the field of labor law, increasing the number of repressive norms that dispense with 'guilt' and 'damage'.[16]

The damages arising from the state's own omission in the observance of legal or constitutional burdens are relevant due to the production by the one with an incumbency in the opposite direction. The national legal system was built to attribute prerogatives to the State for the observance of public interests, that is, it creates privileges over the individual based on the premise of serving the supremacy of the interests of the community. However, just as in the abusive use of powers, state activity is also liable to be held responsible for the lack of effectiveness in legal and/or constitutional charges, especially those relating to fundamental rights enshrined in the larger text. The predictions concerning health, freedom, education and security were not inscribed as fundamental rights just to formally explain the relevance of legal interests, but also to demand from the State and individuals respect for the protective essence instilled in these types of rights, standing out from the eternal perspective or programmatic nature of the norms in compliance with the immediate applicability expressly proclaimed by article 5, paragraph 1 of the Constitution of the Federative Republic of Brazil.

The inefficacy, absence or delay in providing the service by the State and the incidence of the theory of punitive damages concerning the public services provided uti universi, uti singuli and the damage caused to third parties that are not users of the service do not require a detailed analysis, since the main difference lies in in the kind of State accountability methodology, that is, objective or subjective, but none, by itself, removes the possibility of applying the Discouragement Value Theory.

14. SCHREIBER, Anderson. **Novos paradigmas da responsabilidade civil**: da erosão à diluição dos danos. 2. ed. São Paulo: Atlas, 2009, p. 208.

15. Cf. ROSENVALD, Nelson. **As funções da responsabilidade civil**: a reparação e a pena civil. 1. ed. São Paulo: Atlas, 2013, p. 66-67.

16. DI FRANCESCO, José Roberto Pacheco (Org.). **Estudos em homenagem ao Professor Sílvio Rodrigues**. São Paulo: Saraiva, 1989, p. 295.

> In fact, in cases of 'lack of service', a presumption of guilt by the Public Power must be admitted, without which the administrator would be in an extremely fragile position or even unprotected in the face of the difficulty or even impossibility of demonstrating that the service did not perform as it must. The administrator cannot know all the intimacy of the state apparatus, its resources, its internal orders of service, the financial and technical means that it has or needs to have in order to be adjusted to the economic-administrative possibilities of the State. Now, whoever wants the ends cannot deny the necessary means.

Among the criticisms instilled in the application of punitive damages in the state's omissive accountability is the punishment of society itself in contrast to the unjustified enrichment of the injured agent. The increase in the quantum of indemnity due to an omissive behavior by the State as a result of the application of punitive damages would rebound on society itself, since public coffers are directly funded by those administered. Furthermore, as a result of the absence of an express legal provision, the amount added as a disincentive would only benefit the individual, as there is no specific rule allocating the added amount "[...] to a fund to be transferred to third parties, with the exception of the State".[17]

> It is not possible to reduce the function of civil liability only to the reparation purpose, especially in light of different criteria for attributing damages. Civil responsibility, comments FACCI, develops a function of instrument of social and diffuse control in the confrontation of potentially harmful activities, either jointly, in substitution or in substitution to the traditional administrative or penal instruments.[18]

Now, with regard to the allocation of the pecuniary amount object of increase within the social function of the Theory of Disincentive Value, it is necessary to differentiate its application as a ricochet of the loss of property or as an autonomous purpose of extracontractual civil liability. As a simple reflection of the loss of assets of the injured party, the allocation of the asset increase does not require analysis, since considering that the objective of the indemnity will continue to be the repair of the damage, the pecuniary increase will not exist as an independent element of punitive damages. However, as an autonomous function, the allocation of the pecuniary obtained with the pedagogical application can trigger two different possibilities, the first destined to the injured agent himself, and the second, aimed at funds directed to indemnify other injured parties.

This second strand, for effectiveness, lacks detailed and specific regulation, as just creating a kind of savings earmarked for the State, to be used immediately after the reiteration of the harmful behavior is, indeed, inappropriate and contrary to the analyzed institute. However, a different situation could arise from specific regulations on the pecuniary increase resulting from the increase in the amount indemnified with the application of punitive damages through the creation of an administrative system of minimum indemnity, as occurs in accidents with a motor vehicle.

The possibility of reversing the increase in the quantum indemnified to the victim of the harmful event appears as the most justified perspective while there is no diverse and specific regulation, since, as stated, just creating a reserve fund for the State itself as an injurious agent is to empty the essence and nature of the institute of punitive damages.

The incidence of the Theory of the Value of Discouragement within the omissive extra-contractual liability of the State will find the following situations of ineffectiveness,

17. GONÇALVES, Vitor Fernandes. **A punição na responsabilidade civil**. Brasília, DF, Editora Brasília Jurídica, 2005, p.30.
18. ROSENVALD, Nelson. **As funções da responsabilidade civil**: a reparação e a pena civil. 1. ed. São Paulo: Atlas, 2013, p. 75.

absence or delay in the provision of the public service cited by the doctrine as examples of specific omission: death of detainee in prison riot, either by act by the prisoner himself (suicide), or by the act of a third party (aggression), suicide by a patient hospitalized in a public hospital, negligence in carrying out medical examinations in a public hospital, an accident with a student on the premises of a public school, "[...] facts of nature not prevented by the Public Administration and behaviors materialized by third parties whose harmful action was not prevented by the Public Power, although it could and must have done so".[19]

> On the other hand, the omission of the State can refer to the non-exercise of the activity, such as, for example, the non-implementation of social programs to supplement income. The damage resulting from the lack of this activity, such as the misery and death of people, can only be attributed to the State upon demonstration of its guilt. It must be noted that, according to art. 37, § 6, of the Constitution, the responsibility of the State is related to the exercise of an activity. Once the activity has been implemented, the State is liable for damages resulting from it, regardless of whether the specific action caused the damage was omissive or commissive. The non-implementation of the activity implies evaluating the State's conduct, that is, inquiring about its guilt, to characterize its responsibility.[20 21].

In this regard, the premise of incidence of the doctrine of punitive damages is viewed as a tool of repression of omissive, reiterated and reprehensible behavior of the State in the observance and enforcement of rights arising from the human condition of the injured agent.

CONCLUSION

The institute of non-contractual civil liability in the Brazilian legal system presents peculiarities that adapt to the concrete situation of the injury and the partialities – or impartialities – of the interpreter. In the scope of public law, specifically in state responsibility, doctrinal positions and jurisprudence are also controversial, sometimes discussing the methodology of accountability, with or without the need for proof of guilt, sometimes fighting over the very possibility of holding the State accountable. In this vein, the attribution of responsibility to the State for the faute du service public is differentiated into specific omissions and generic omissions, but again, the perspective and method of accountability is the subject of worrying divergences. The civil-constitutional and systematized interpretation, valuing the prevalence of individual rights, advocates the State's responsibility for damages arising from the ineffectiveness, absence or delay in the provision of the state generic service, a possibility that is refuted by the positivist doctrine, focused on the abstract conception of the primacy of the public interest over the individual and the rebuke to the idea of the universal insurer or indemnity State.

The social purpose of non-contractual civil liability, designated as preventive, punitive or pedagogical, known in countries of the common law system as the theory of punitive damages or exemplary damages and referred to in Brazil as the Theory of "Disincentive Value" also finds resistance in Brazilian law. The main critical exponents consider the lack of legal provision, the lack of minimum and maximum parameters of increase and the unjust enrichment of the injured party as

19. BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**. 30. ed. rev. e atual. São Paulo: Malheiros, 2013, p. 1033-1034.

20. ARAÚJO, Vaneska Donato de (Coord.); HIRONAKA, Giselda M. F. Novaes (Orien.). **Responsabilidade civil**. São Paulo: Editora Revista dos Tribunais, v. 5, 2008, p. 190.

21. ROSENVALD, Nelson. **As funções da responsabilidade civil**: a reparação e a pena civil. 1. ed. São Paulo: Atlas, 2013, p. 75.

the protagonist arguments of rejection to the application of this contemporary function of extracontractual civil liability. In the area of public law, another added criticism is related to the transfer of increased responsibility to the community itself, which is directly responsible for the solvency of public coffers.

However, despite the premise of applying the punitive/pedagogical purpose within the state's omissive accountability facing a plurality of notable criticisms, it also finds positive aspects. The essence of the Disincentive Value Theory has the purpose of reprimanding the offender to save potential victims from the materialization of future damages. Issues encompassing repeated damage to fundamental rights related to the human condition of the injured agent constitute the angle of incidence of punitive damages in the non-contractual civil liability of the State.

The imposition of the burden of proof of omission and other elements of accountability to the injured agent as a condition for the admission of non-contractual civil liability for state inertia or apathy, although not pacified, does not interfere or prevent the pecuniary increase arising from the application of the punitive function of liability civilian as an autonomous element. On the other hand, the cries of censorship of the application of punitive damages due to the lack of legal provision are enshrined in the scope of a positivist interpretation, out of line with the idea of the systematic study of the legal system and the primacy of the analysis of the other legal ramifications under the shadow of shelter of constitutional law.

The relevance and immediate applicability of fundamental rights, especially those linked to health, freedom, education, security and the observance of constitutional protection commandments, translate the essence of the arguments in opposition to the criticisms of the incidence of the Disincentive Value Theory in the circle of omissive responsibility non-contractual state. The plots of transmission of the charge to the community and the unjustified enrichment of the injured agent succumb to the essential objectives of punitive damages, aimed at standing out from the classic and traditional restorative, "compensatory" and satisfactory functions to promote the social, preventive and pedagogical purpose of civil liability. The social advantages provided by the incidence of the Disincentive Value Theory are prospective and supervening, directed not at the production of immediate effects, but future ones, through coercive decisions aimed at the non-occurrence of new harmful events similar to the indemnified offense.

The detachment from the pecuniary increase of the victim and its respective targeting to funds to support future victims, without, however, creating savings for the benefit of the offender himself, appears as a considerable aspect for the application of the social purpose of civil liability, but its incidence is not attached to this regulation, since the constitutional normative source of support to the punitive-pedagogical function of extra-contractual liability supports the use of the preventive institute of inhibition against transgressions of fundamental rights by the faute du service public in the postulates of reasonableness and proportionality.

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