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THE CIVIL LIABILITY OF THE STATE FOR OMISSION OF FUNDAMENTAL HEALTH RIGHTS IN TIMES OF THE NEW CORONAVIRUS PANDEMIC

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Abstract: The COVID-19 pandemic, caused by the new coronavirus (SARS-CoV-2), has shaken the Brazilian health systems, causing high mortality rates, in addition to having social, economic and political impacts. Thus, the main objective of this work is to identify the limits of civil liability of the state in the face of omissions to the fundamental right to health. The secondary objectives deal with the historical context of the civil liability of the state, its requirements in the legal scope, as well as omitted conducts to the fundamental right to health of the state in the face of the COVID-19 pandemic. The methodology consists of a bibliographical research, with an approach qualitative, marked by the authors BARBOSA (2020); OAK (2021); DIAS (2001); MEIRELLES (2007); MELLO (2003); RIVERO (1981); STOCO (1997); VENOSA (2013), considering the interpretation of the legal phenomena of civil liability for enabling a better investigation of the research problem. It is concluded that investment in public policies is essential to qualify health professionals to work more effectively to prevent the contagion of the new coronavirus and in cases where there is an omission of the state in which it must have done something that it did not do, it must indemnify the victim or his family to compensate for the damage.
Keywords: Fundamental rights. New coronavirus. Pandemic. Health.

INTRODUCTION

The COVID-19 pandemic, caused by the new coronavirus (SARS-CoV-2) is an infectious disease that has had global repercussions due to catastrophic consequences in health systems, causing high mortality rates, in addition to having social impacts., economic and political.

A disastrous health situation of this level has repercussions in several areas, mainly in the legal field, causing disputes in all areas of law, in the administrative, labor, social security, criminal, civil, aspects of family law, contractual, civil liability and fundamental rights to health. The State is responsible for guaranteeing the fundamental rights to health. The Federal Constitution of Brazil of 1988 expressly provides for the right to health as being unavailable and guaranteed to all through public policies aimed at provide universal access.

Civil liability is the application of imposed measures that oblige someone to repair to another, in the form of pecuniary or not, the damage caused by an action or omission.

However, the spread of COVID-19 being a natural phenomenon with unpredictability and the impossibility of measuring its implications, one cannot blame for this disaster of global proportions. In view of this, it refers to the question of what are the limits of responsibility of the state in the face of the consequences caused by its omission in the measures to face the pandemic of the new coronavirus, given its power/duty to ensure the health of its citizens.

The main objective of this work is to identify the limits of civil liability of the state in the face of omissions to the fundamental right to health. The secondary objectives deal with the historical context of the civil liability of the state, its requirements in the legal scope, as well as omitted conducts to the fundamental right to health of the state in the face of the COVID-19 pandemic.

With high death rates caused by the coronavirus, it is the duty of the State to promote effective public policies to face the pandemic in relation to the safety and protection of the population and professionals who are on the front line, therefore, as a guaranteeing entity, it is fully responsible for the damage caused and for their failures, thus having the duty to indemnify, given the ineffectiveness of public policies.

On the other hand, it is worth mentioning that the population neglected the issue of social distancing and other rules indicated to minimize the effects of the pandemic, partly to blame for the alarming death data in Brazil.

The methodology consists of a bibliographical research using articles, magazines, publications in periodicals, with a qualitative approach, marked by the authors BARBOSA (2020); OAK (2021); DIAS (2001); MEIRELLES (2007); MELLO (2003); RIVERO (1981); STOCO (1997); VENOSA (2013) among others, considering the interpretation of legal phenomena of civil liability.

On this approach, the authors and scholars listed above dedicated themselves to explaining civil liability in its historical aspects, the peculiarities of this institute and its relations with the pandemic of the new coronavirus and the state.

Thus, scientific research is based on the premise of recognized concepts based on data collection without the author's intervention, seeking only to offer the reader the elements existing in the research, without the use of statistical elements, as there is no concern in this method. to prove the hypotheses as true. For Prodanov and Freitas (2013, p. 70) qualitative research is:

> [...] there is a dynamic relationship between the real world and the subject, that is, an inseparable link between the objective world and the subject's subjectivity that cannot be translated into numbers. The interpretation of phenomena and the attribution of meanings are basic in the qualitative research process. This does not require the use of statistical methods and techniques.

This way, the aim is to observe, record and analyze facts or variables collected in reality, thus seeking to explain how the phenomena occur in Brazilian reality and the legal criteria used to apply the phenomenon of civil liability, demonstrating the cases of causality and culpability.

HISTORICAL CONTEXT OF CIVIL LIABILITY

The current state model, born at the apex of the changes that culminated with the French Revolution, is based on two basic principles that were the basis for this revolution, namely, principles of freedom and equality. (MEIRELLES, 1982). It is in this context that the notion of Public Administration is understood, as an organ that performs state functions autonomously in relation to political power. This way, it is also in this environment that the responsibility of the State and its entities is analyzed, since it has legal personality, not to be confused, therefore, with its rulers and administrators.

For Hely Lopes Meirelles and Di Pietro (2007), the civil liability of the State can be understood as an obligation that determines that the public power repairs damages caused to third parties by actions or omissions of its agents.

However, this obligation of the state to indemnify third parties was not always the content of peaceful understanding between doctrine and jurisprudence, making a fine line between state irresponsibility and objective responsibility for entities. Thus, Cavalcanti (1956, p. 272) is quoted:

> The theory of absolute irresponsibility refers to the idea of supremacy of the State over its subjects, in an attempt to bring to the modern State some remnant of pre-modern absolutism. According to this theory, the State has no ends of its own, but always acts for the benefit of its subjects. It is up to the sovereign State to organize the law, not admitting that it violates its own law. Administrative officials are not representatives of the State, and must act in accordance with the law laid down by the State. Acts contrary to the law cannot be considered acts of the State, but acts against the State, which are the personal responsibility of the employee. In this conception, the State figures as the source

> of the right and also as guardian of the law, not admitting that he may practice injustice or acts contrary to the law. The theory of absolute irresponsibility lost strength over time until it was completely abandoned. The last nations to adopt it were England and the United States, which abolished it in 1946 and 1947.

Thus, according to the words of the renowned doctrinator, the theory of objective irresponsibility must not be in force in current times, as in a way it is a form of state supremacy and even absolutism over its governed.

In Portuguese Law, within the scope of the historical context dealt with in this chapter, it can be seen that there is a Law that deals with the subject. Namely, Barbosa (2020, p.388):

> In Portuguese law, state civil liability was enshrined in Decree Law No. 48051, of November 21, 1967. This normative instrument ended up being revoked only in 2007, with the enactment of Law 67/2007, which currently governs non-contractual civil liability of State and legal persons governed by public law. With regard to responsibility for the exercise of the administrative function, the aforementioned normative body establishes various regimes. Article 7º/1 deals with the State's responsibility for illicit and culpable acts, in the case of slight negligence, while Article 7º/3 deals with the issue of State responsibility for the abnormal functioning of the service. In turn, the art. 11/1 discusses the civil liability of the State for damages resulting from especially dangerous activities, things or administrative services.

In Brazilian Law, the issue of civil liability of the state arises with the Civil Code of 1916, still supported by the theory of guilt, existing at the time. However, before the creation of the code cited in past lines, the Constitutions of 1824 and 1891, spoke briefly about the responsibility of public employees for abuses and omissions. But it was the 1934 Constitution that openly explained the civil liability of the state, however, such liability was subjective and joint in nature for the officials who practiced them (DEUTSCH, 2014).

It was then in the 1946 Constitution that state civil liability became objective in fact, where there was the adoption of the theory of administrative risk, which was repeated in later constitutions. (MELLO, 2013).

Nowadays, objective state civil liability is provided for in article 37, paragraph 6, of the 1988 Constitution:

> **Art. 37**. The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency, as well as the following: § 6 Legal entities governed by public law and private law providers of public services will be liable for damages that their agents, in that capacity, cause to third parties, ensuring the right of recourse against the person responsible in cases of malice or negligence.

It is also provided for in article 43 of the Civil Code of 2002, Let's see:

> **Art. 43**. Legal entities governed by internal public law are civilly liable for acts of their agents that, in that capacity, cause damage to third parties, with the exception of regressive rights against those causing the damage, if there is, on their part, fault or willful misconduct.

Thus, it can be observed that today it is more than certain that the state has strict responsibility for its actions and omissions, as demonstrated in the historical context and in the regulation cited above.

That said, currently in Brazil, as already explained above, liability is in fact objective, having as its scope the theory of administrative risk, where only the causal link between the conduct and the damage is required.

STATE OMISSION OF FUNDAMENTAL HEALTH RIGHTS IN RELATION TO COVID-19

The Federal Constitution of 1988 contains the fundamental principles responsible for the guarantees of citizens. The principle of human dignity, considered essential for the protection and defense of people's rights. Therefore, considering such a primordial principle, health is indispensable so that human beings can enjoy a dignified, healthy life and deserve the protection of the State.

In this sense, the Magna Carta provides in the title of the social order, in the chapter on social security, in the section dealing with health, article 196 that adds:

> Art. 196. Health is everyone's right and the State's duty, guaranteed through social and economic policies aimed at reducing the risk of disease and other injuries and universal and equal access to actions and services for its promotion, protection and recovery.

With a view to protecting health, Laws No. 8080/1990 and No. 8142/1990 regulate the Unified Health System (SUS) responsible for treating illnesses, curing illnesses, and also working on disease prevention, including the emergency and emergency, workers' health, actions and services of epidemiological and health surveillance and pharmaceutical and comprehensive therapeutic assistance. (BRAZIL, 1990).

However, Brazilian public health is precarious due to the ineffectiveness of SUS management caused by the lack of human resources and tools capable of articulating the work of health professionals for the effectiveness of the objectives of the government program.

For Souza (2017), the problem in the effective provision of health consists in the application of the neoliberal idea in labor organizations whose devastating principle is the downsizing of the public machine, with a shortage of transfers of public funds, restricting and making public tenders unfeasible.

Such an environment of scarce resources has disastrous consequences for Brazilian health, not meeting the demand for full service to users of the Unified Health System, causing more deaths and chaos, a fact proven on.

With the pandemic of the new coronavirus, these problems that were not seen so openly before, have been exposing how flawed the Brazilian health system is. The Public Power uses neoliberal policies to reduce resources directly affects the constitutional principles, mainly, the dignity of the human person with regard to universal access to health.

These policies make it impossible to maintain equipment, pay health professionals and purchase enough resources to support demand. In addition to the omissions regarding the distribution of resources, according to Carvalho (2020, p. 02), the public health problems are:

> In relation to public health, problems involving the precariousness and scrapping of its physical structures were identified; lack of material and human resources; reduction of care units, making it difficult for the population to access diagnostic and therapeutic methods.

With regard to the lack of human resources, the group of health professionals is at risk for COVID-19 because they are frontline professionals working directly with the treatment of infected patients who are exposed to a high viral load.

This disregard for health professionals in the face of defects in the provision of adequate conditions for work causes, in addition to psychological problems, such as depression, anxiety, many contracts the disease due to the lack of a suitable place for cleaning equipment and changing clothes, exponentially increasing contamination by the virus and leading to the removal of these professionals and many of them die.

Another key point to be analyzed in this moment of crisis for health professionals is what leads to psychological problems.

The intense suffering of these professionals is evident, even leading to the dismemberment of work, which further compromises the quality of care provided to the population. It causes other problems, such as the mass hiring of newly graduated professionals without any experience in the demand for the treatment of people affected by the disease, not knowing the appropriate procedures for the urgent and emergency hospital environment.

According to a report by the Federal Nursing Council (COFEN) and the Oswaldo Cruz Foundation, published on April 27, 4,602 nursing professionals had already been removed on suspicion of COVID-19, and 57 had died from the disease or from suspected cases, not yet confirmed.

These factors lead to the practice of erroneously practiced procedures leading to the death of patients. In this case, the responsibility of the state is based on the omission of the preparation of its professionals and using the expense control policies for the contraction of cheap and inexperienced labor and still, despite the lack of preparation, there is no evidence of projects of preparation of servers to meet the demand of users of the health system.

In addition, they are subjected to enormous stress when caring for these patients, many of whom are in serious condition, in working conditions that are often inadequate. The author Teixeira (2020, p. 3470) also adds.

> The risk of contamination due to the lack of personal protective equipment (PPE) as well as the anxiety caused by the use of this equipment, in shifts of up to 6 uninterrupted hours in ICUs, with the use of diapers, in addition to the anxiety experienced at the time of undressing, for example: the removal of this equipment, has caused intense suffering in these professionals, even leading to removal from work, which further compromises the quality of care provided to the population.

Situations such as those listed by the author above explain the disastrous state of health services and lead to total dissatisfaction of the Brazilian people and the exhausted professionals who make up the Unified Health System, directly confronting fundamental health rights, making the COVID-19 pandemic something good more harmful in the Brazilian scenario than in other countries.

Likewise, the Government is also silent considering the shortage of ICU beds, the lack of implementation of contingency plans to avoid mass contamination and to monitor the measures that must be followed.

Thus, they are subject to legal action so that the rights of users and workers, guaranteed in the Federal Constitution and in complementary laws, are fulfilled.

Law 13,979 was published on February 6, 2020 to deal with the Coronavirus pandemic in Brazil, with the provisions of the measures to be adopted for public health emergencies.

It is noted that social isolation was the most used as the main measure to minimize the effects of the pandemic in the country. However, although the measure was at first, the best alternative is fraught with risks.

However, social isolation causes greater economic impacts than public health benefits. Thus, according to Barroso (2020), an alternative to be followed effectively would be the isolation of people over 60 years of age or those with chronic or immunosuppressed diseases. And, the population that did not have any comorbidity or imminent risk of life must resume social life in order to reduce the economic impacts resulting from total social isolation.

However, even with the risks of the economic crisis, social isolation policies were implemented by the state. As the authors

Bisneto, Santos and Cabet (2020) clearly explain, the population did not follow the recommendations effectively, therefore, it would not be possible to hold the state responsible for non-compliance with medical recommendations, causing the proliferation of the virus, as well as the death of people, had their lives taken because they maintained intense social contact during the viral spread.

The civil liability of the state in this regard cannot be raised, since the prominent role in the face of the population's attitudes cannot be blamed, given that it is not a universal insurer, although it has its duties in public policies for health efficiency.

However, civil liability of the state is not imposed for any act or omission. It is essential that it be an omission capable of causing great damage and arising from something that could have been fulfilled, that is, as a result of a particular legal duty incumbent on the state. (STOCO, 1997).

On the other hand, even the COVID-19 pandemic, intrinsically, does not have the power to exempt the State or public agents, unconditionally, for the decisions and conduct adopted, but establishes a fact that, together with other circumstances, causes indemnifiable damages.

FINAL CONSIDERATIONS

The present research sought to demonstrate the civil liability of the State, in its current evolutionary stage, it follows the objective criterion, this due to the theory of administrative risk already mentioned in the research, both for the acts practiced through the action, as for the omission of the Public administration.

This way, it can be seen during the research that Brazil does not adopt the theory of integral risk, therefore the State cannot be responsible for all possible and universal risks that may occur to individuals, however it will be held responsible objectively for the damages caused resulting from administrative activity that the State develops through its agents, not universally, but on a case-by-case basis.

All the reflections and corresponding effects of the current pandemic caused by COVID-19 cannot, in general, be imputed to state responsibility, as already explained elsewhere, since it is a natural, unpredictable phenomenon and with consequences that are, in a way, inevitable and unknown.

As explained in the research in question, the arrival of the aforementioned pandemic is a scenario that forces state authorities to adopt coping measures, which can thus result in damage to individuals, but it is for a collective reason and not an individual one, which must overlap in this case.

Cases of lack of equipment, insufficient hospital beds, medical materials, as well as lack of efficiency in providing care services to victims affected by the aforementioned virus, may give rise to civil liability of the state by default, depending, therefore, on the concrete case. Thus, because it is about health, the state has a constitutional obligation to provide care equally to all those who need it from the health system.

In a more complex way, the conduct of public agents in the face of this pandemic was also analyzed, where their action depends on guidelines from national and international authorities to contain the virus, which can cause behaviors that will be harmful to the population.

Therefore, it can be concluded that Brazil must invest in public policies in order to increasingly qualify its agents to issue effective ways to prevent the new coronavirus, and the State, when faced with cases in which it must do something and did not, he must indemnify the victim or his family, to compensate for the damage.

REFERENCES

BARBOSA, Mafalda Miranda. A causalidade na responsabilidade civil do Estado. **Revista de Direito da Responsabilidade**, Coimbra, ano 2, p. 388-437, 2020.

BISNETO, Cícero Dantas; SANTOS, Romuado Baptista dos; CAVET, Caroline Amadori.RESPONSABILIDADE CIVIL DO ESTADO POR OMISSÃO E POR INCITAÇÃO NA PANDEMIA DA COVID-19. **Revista IBERC**. 2020. Disponível em: <https://doi.org/10.37963/iberc.v3i2.111> . Acesso em 29 de maio 2023.

BRASIL. Constituição (1988). **Constituição da República Federativa do Brasil.** Brasília,DF: Senado Federal: Centro Gráfico, 1988.

_____. Lei nº 10.406, de 10 de janeiro de 2002. **Institui o Código Civil.** Diário Oficial daUnião: seção 1, Brasília, DF, ano 139, n. 8, p. 1-74, 11 jan. 2002.

_____. **Lei Orgânica da Saúde.** Lei nº 8.080 de 19 de setembro de 1990.

_____. **Lei que dispõe sobre as medidas para enfrentamento da emergência de saúdepública de importância internacional decorrente do coronavírus responsável pelo surto de 2019.** Lei 13.979 de 06 de Fevereiro de 2020. Disponível em:<https://www.in.gov.br/en/web/dou/-/lei-n-13.979-de-6-de-fevereiro- de-2020-242078735> . Acesso em 25 de Maio 2023.

_____. **Ministério da Saúde. Saúde mental e atenção psicossocial na pandemia Covid.** Disponível em: <http://www.fiocruzbrasilia.fiocruz.br/wp- content/uploads/2020/04/ Sa%C3%BAde-Menta>. Acesso em 05 de Jun. 2023.

CARVALHO; SOUZA; VARELLA; SOUZA; FARIAS; SOARES. COVID-19 pandemic and the judicialization of health care: an explanatory case study. **Revista Latino- Americana**. Enfermagem. Disponível em: <https://www.revistas.usp.br/rlae/article/view/183262/169941. DOI: http://dx.doi.org/10.1590/1518-8345.4584.3354>. Acesso em 22 de maio 2023.

CAVALCANTI, Amaro. **Responsabilidade civil do Estado**. Rio de Janeiro: Borsoi, 1956.DEUTSCH, Erwin; AHRENS, Hans-Jürgen. **Deliksrecht.** Franz Vahlen, 2014. DIAS, José de Aguiar. **Da responsabilidade civil.** 2. ed. Rio de Janeiro: Forense, 2001.

MEIRELLES, Hely Lopes. **Direito administrativo brasileiro.** 8. ed. São Paulo: Revista dosTribunais, 1982.

_____, Hely Lopes; DI PIETRO, Maria Sylvia Zanella. **Direito administrativo**. 20.ed. Rio de Janeiro: São Paulo: Atlas, 2007.

MELLO, Celso Antônio Bandeira de. **Curso de direito administrativo**. 31. ed. rev. e atual.São Paulo: Malheiros, 2013.

_____, Marcos Bernardes de. **Teoria do fato jurídico**: plano de existência. 13. ed. SãoPaulo: Saraiva, 2007.

PRODANOV, Cleber Cristiano; FREITAS, Ernani Cesar de. **METODOLOGIA DO TRABALHO CIENTÍFICO:** Métodos e Técnicas da Pesquisa e do Trabalho Acadêmico. 2.ed. – Novo Hamburgo: Feevale, 2013.

RIVERO, Jean. **Direito Administrativo.** Trad. de Rogério Ehrhardt Soares. Coimbra: Almedina, 1981.

SILVA, L.C.A; FONTOURA, LB; HENDGES, M; EICKHOFF, BC; KoLankiewicz, B.C.A; anice de Fatima Pavan Zanella, A.F.P. **Impacto psicológico nos profissionais de saúde napandemia por COVID-19:Abordagem através da metodologia problematizadora.** Disponível em: <http://dx.doi.org/10.33448/rsd- v10i6.154133>. Acesso em 25 de maio 2023.

SOUZA; GONÇALVES; PIRES; **Neoliberalist influences on nursing hospital work process and organization.** Rev. Bras. Enferm. 2017;70(5):912-9. Disponível em:<https://doi.org/10.1590/0034-7167-2016-0092>. Acesso em 23 de maio 2023.

STOCO, Rui. **Responsabilidade civil**. 3. ed. rev. ampl. São Paulo: Revista dos Tribunais,1997. p. 624.

TEIXEIRA; SOARES; SOUZA; LISBOA; PINTO; ANDRADE; ESPERIDIÃO. **A saúde dos profissionais de saúde no enfrentamento da pandemia de Covid- 19.** Disponível em: <https://www.scielosp.org/article/csc/2020.v25n9/3465-3474/#>. Acesso em 15 de maio 2023.

VENOSA, Sílvio de Salvo. **Código Civil Interpretado.** 3. ed. São Paulo: Atlas, 2013.