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The Tort Liability of the State in the Portuguese Administrative Courts

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***Abstract*—**The Portuguese Constitution, in article 22, instituted the general principle of tort liability of the State and other public law entities.

Consequently, ordinary legislation established the tort liability of the State into the Portuguese Legal Order, by means of Decree-Law 48051, of 1967.

This decree, which was criticised extensively, was amended by virtue of Law 67/2007, of 31st December, establishing the regime for tort liability arising from losses caused by third parties, due to the acts of public management in relation to all the functions of the State, i.e. i) administrative, ii) legislative, and iii) jurisdictional.

***Keywords*—**Portuguese courts, tort liability of the state.

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I. Introduction

THE Portuguese Constitution, in article 22, instituted the general principle of tort liability of the State and other public law entities.

Consequently, ordinary legislation established the tort liability of the State into the Portuguese Legal Order, by means of Decree-Law 48051, of 1967.

This decree, which was criticised extensively, was amended by virtue of Law 67/2007, of 31st December, establishing the regime for tort liability arising from losses caused by third parties, due to the acts of public management in relation to all the functions of the State, i.e. i) administrative, ii) legislative, and iii) jurisdictional.

That decree was influenced by EU Law in the context of the framework applicable to tort liability arising from losses caused by administrative functions, as can be seen from its article 7, no. 2, which determines that in addition to the conditions established by domestic law, the *"conditions for tort liability defined by EU law"*. This influence resulted in particular by Directive 89/665/EEC.

II. The Law 67/2007, of 31st December

The Law 67/2007 of 31st December (LRCEE) has brought profound changes to the system of tort liability among us. The explanatory memorandum of the project that gave rise to the current law - published in the Journal of the National Assembly, II Series- A n.76/VIII/2 Supl.2001.07.18 - sets out the main changes in the field of non-contractual liability of the state, in its administrative role, the extension of the rules of solidarity, the legal consecration of strict liability management by abnormal functioning of the service contract of the state, the administrative function, as well as the introduction of a presumption of guilt.

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A. The Scope Application

1. Material Scope

The new system applies not only to administrative but also the legislative and judicial liability, which differs from the previous regime. Headquarters in contractual liability exists on the part of the state where the event giving rise to the damage results from damage from the breach of a contract, for late or defective performance of contractual obligations, in accordance with Article 325. º f. the CCP. Will apply the rules set out in Articles 798. º f. CC[1].

2. Subjective Scope

Under Article 1., n. 2, the current law will govern the "tort of State and other legal persons governed by public law for damages resulting from the exercise of the legislative function, judicial and administrative", and under n. 2 of the said process, the law states that correspond to the exercise of administrative function "actions and omissions taken in the exercise of public powers or regulated by provisions of administrative law."

Article 1., n. 2 set in this context, extend the regime of civil liability to private law persons, but working with prerogatives of public authority [2], or under the auspices of principles and rules of administrative law.

In addition, the LRCEE still applies to the liability of officers of a corporation, employees, agents, servants, employees, company officers and legal representatives or auxiliary [3].

B. Subjective Responsibility

The Article 7. º establish the system of exclusive responsibility of the State and other legal persons governed by public law within the liability for fault - refer to the existence of grounds for exclusion of unlawfulness or also called liberatory causes, namely: i) the absence of grounds for exclusion of unlawfulness ii) the absence of grounds for exclusion of guilt, iii) the absence of irrelevance injury and iv) the absence of causes of interruption of causation [4].

It instituted the sole responsibility of the state and other public legal persons for damages arising from unlawful acts or omissions committed with light trespass, by the holders of its bodies, employees and agents, in the exercise of administrative function and because of this exercise [5].

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It also established a designated faute du service, or administrative liability arising from abnormal functioning of its services, always "given the circumstances and patterns average result was reasonably required to serve a performance likely to prevent the damage caused[6]".

The new system, contrary to previous, provides for joint and several liability where the acts are committed with gross negligence. So that it becomes, like the previous regime, it is required to verify the above assumptions, which are listed: i) tort ii) the agent's fault; iii) the loss v) the causal link between the unlawful act and injury, so that it can be concluded that the fact was adequate cause of injury[7].

C. Requirements

1. The Wrongfulness

Wrongfulness as enshrined in LRCEE at art. 9. Thereof, encompassing both objective illegality, unlawfulness or subjective [8], and will also enable the protection of individual interests that result from violation of procedural norms. The illegality consist of an act or omission violating i) principles and constitutional, statutory or regulatory ii) technical rules iii) duties of care goals iv) or resulting from abnormal functioning of service [9].

The illegality may also result from the breach of Community rules, in particular where they are committed administrative acts or regulations developed in direct violation of regulations or EU directives.

2. Fault

Article 10º of LRCEE consecrating the guilt regimes. It will be appreciated "by the diligence and skill that can reasonably be expected, depending on the circumstances of each case of a holder body, employee or agent and zealous doer". This is an innovation in our legal system, because the Decree Law 48051 referred, in relation to this requirement, for civil law, i.e., it applied Article 487º Civil Code. The new system makes a distinction between various forms of guilt, namely: Blame severe whenever the author of the offending conduct there acted intentionally or with diligence and zeal manifestly inferior to that to which it was forced from office because, pursuant Article 8., no. 1.

Light trespass, takes place, in the words of JOÃO CAUPERS [10] when the author of the offending conduct there acted with diligence and zeal lower, but not manifestly inferior to those he met thanks. The law itself establishes a presumption, establishing the regime of guilt whenever light is omitted a duty of vigilance, or has committed a legal act illegal.

The contribution of the victim for the production of the harmful event occurred or may cause a worsening of this situation contributory negligence of the victim and may have the effect of reducing or excluding the right to compensation. There will be, in accordance with Article 4. º, blame the victim when it has not used procedural means in their power to eliminate the legal act generator losses. As advocates TIAGO VIANA BARRA [11], responsibility of the state or other public entity is unique:

- when the author of the offending conduct there acted in the exercise of administrative function and because of this exercise with light trespass, pursuant to Article 7., no. 1;
- when the damage is attributable to the abnormal operation of the service, but does not result in a behavior concretely determined whether or not it is possible to determine the respective authors, pursuant to Article 7., no. 3.

On the other hand, there is joint liability when the author of the offending conduct there acted with gross negligence in the performance of their duties and for the sake of this exercise, as stated in Article 8., No. 2 [12].

In this regard, CARLA AMADO GOMES [13], speaks about the type of damage caused by intentional fouls.

See that article 8., n. 3 determines the state college bring action claim against the officers of agencies, employees or agents responsible, competing holders of powers of direction, supervision, oversight or guardianship adopt the measures necessary to give effect to that right. that Article provides that if it is not possible to determine the degree of guilt of the holder of organs as well as in all the circumstances of light trespass, "(...) the respective lawsuit proceed its terms, this time between the legal person of public law and the holder body, employee or agent, for determination of the degree of guilt of this and due to this, the possible exercise of the right of return for part of that". FAUSTO QUADROS argues that the legislature should have enshrined a duty return, except for the situations of absence of guilt, or light trespass, and this is because on the one hand, the administration never intended, at least there has been knowledge, no action right of return, moreover, should not be the taxpayers to cover losses resulting from gross negligence or willful misconduct of employees or agents administrative [14].

Service Fault

This concept results enforcement community, particularly following the judgment of the Court of Justice of 14.10.2004 "(...) it is true that Portuguese legislation provides for the possibility of obtaining damages in case of breach of Community law in matters of contracts public law or national rules transposing that one can't but consider that it constitutes a system of judicial protection appropriate as it requires proof of fault or negligence on the part of agents of certain administrative entity. Thus, the competitor injured by an illegal decision of the contracting authority runs the risk of being deprived of the right to demand payment of compensation due to the damage that has been caused by this decision, or at least to get late, as unable to prove the existence of fraud or negligence" [15].

D. The Risk Liability

The liability risk, also called strict liability, or casual facts [16] requires the compensation of damage caused by others, regardless of the commission of a tort or fault. As advocates MENEZES CORDEIRO, this type of responsibility "(...) is a delicate figure, once you waive the requirement of fault, either as an individualization of the person who will be obliged to compensate, either as a significant ideological-justifying one's own position of responsibility" [17].

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This institute is justified, in particular, in the theory of risk, ie, if someone exerts a potentially dangerous activity, there are to respond, to third parties if this activity will cause damage [18], or as a result of old brocade Latin "ubi emolumentum, ibi ónus; ubi commodum, ibi incommodum"[19]-[20].

However, the finding of guilt and severity of this will be relevant to determine the amount of compensation to the injured party [21].

The administrative liability for risk requires the expertise and abnormality of harm "(...) In the public see condition the duty of indemnity state two requirements traditionally required for damages resulting from lawful acts specialty abnormality and damage"[22].

Carla Amado Gomes understands that this institute works "(...) as a mechanism for redistributing social risk and not as a way of penalizing, ethics and payment of compensation, a particular person or entity" [23].

To understand the applicability of the decree under examination, it is still necessary to establish the distinction between public management acts and private management acts.

The actions of public management are, as is unanimously agreed in Portuguese legal theory "(...) all the activity of the Administration governed by laws which grant power and authority to pursue the public interest, to regulate its pursuit or organise the means the necessary for that purpose" [24].

Currently, in addition to the notion that the authoritative powers of administration can be executed by private law entities, as long as they are subject to administrative law and, therefore, are vested with the power of "*ius imperium*".

Over the years, jurisprudence has been required to clarify what it considered public management actions and private management actions, firstly, because the Statute of the Administrative and Fiscal Courts, approved by Decree-Law no. 129/84, of 27th April, determines in article 51, no. 1, that the Local Administrative Courts have jurisdiction to hear "*the actions regarding tort liability of the State, of the other public entities and the heads of their governing bodies and agents, resulting from losses due to public management, including rights of recourse;"*.

Therefore, this article stated that acts of public management would be under the jurisdiction of Administrative Courts, while all others would be settled by the general courts [25].

Let us see, for example, the Ruling of the Conflicts Court, of 05-11-1981 [26], which explains that acts of private management are "*those within the scope of activity of a legal entity which, shorn of its public authority, finds itself and acts in a position of equality with the private law persons the acts relate to, and, therefore, under the same conditions and under the same rules as a private person, subject to that private law*". Conversely, it considers acts of public management "*those that reside within the scope of public authority, whether integrating or not performing a public function, whether they involve or not, in themselves, exercising means of coercion and regardless also, of technical or other rules which are to be observed in the performance of the acts"*.

This ruling considers that the work of doctors at a military hospital observing or treating the soldiers hospitalised there corresponds to acts of public management.

Also in this sense, the Ruling of the Court of Conflicts, of 12-05-1999 [27] considered that the demolition of the building belonging to a private law entity, carried out as the enforcement of a town hall decision as an act of public management and that the Local Administrative Courts had jurisdiction over a claim for indemnity arising from losses due to the demolition and the subsequent use of the land by the local authority.

Similarly, the Ruling of the Court of Conflicts, of 02-02-2005 [28], considers that it is an act of public management, under the jurisdiction of the Administrative Courts, when rubbish collection equipment appertaining to the Town Hall is carried, without observing safety conditions, in the back of a municipal vehicle and an accident occurs due to the manifest carelessness of the vehicle's driver.

It should be noted that the Supreme Administrative Court did establish that the jurisdiction of the Administrative Courts was not excluded in the event "*that the claimant petitions the court to hold public entities and private entities jointly liable and despite the fact that the general courts have jurisdiction with regard to the latter."* [29].

However, the new Statute of the Administrative and Fiscal Courts, approved by Law no. 13/2002, of 19th February [30], entitles the Local Administrative Courts, in conformity with article 4, no. 1 h) and i), to hear all tort liability suits regarding heads of governing bodies, employees, agents and other public servants, as well as all tort liability suits regarding private entities, to which the specific regime of liability of the State and other public entities applies.

In view of this provision, the distinction between acts of public management and of private management has become superfluous. It should be noted that the jurisprudence, in the ruling of the Lisbon Appellate Court of 26-05-2011 states that "*the keystone with regard to the subject-matter jurisdiction of the Administrative Courts or the general courts resided in the concepts of public management or private management but, today, in order to avoid this dichotomy and the grey areas in between, the legislator's goal is to employ the concept of the legal administrative relationship to encompass a much wider concept / framework"*.

The legal administrative relationship corresponds to "*the connections that intercede between the Administration or private law entities (or between distinct administrative entities) which grant powers of authority or impose restrictions due to public interest on the Administration vis-à-vis private law entities, or that grant rights or establish public duties on private law entities before the Administration, whose substance corresponds, in general, to performances regarding the operation of public services, exercising public activities, appointment of public agents, the management of public things or the use of public things."* [31]-[32].

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