Lex Humana, v. 15, n.1, 2023, ISSN 2175-0947

RESPONSABILIDADE CIVIL DO ESTADO PELA ADMINISTRAÇÃO DA JUSTIÇA EM ANGOLA: "THE KING CAN DO WRONG"?

STATE LIABILITY FOR ADMINISTRATION OF JUSTICE IN ANGOLA: "THE KING CAN DO WRONG"?

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Received: 05 Nov 2022
Accepted: 12 Jan 2023
Published: 30 Jan 2023

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Abstract: This study addresses the new civil liability regime of the State for damages caused by the administration of justice recently approved in the Angolan legal system. The provision of this civil liability regime reveals, on the one hand, the importance that the principle of effective judicial protection has assumed in this country and, on the other hand, the duty to compensate whenever that principle is violated, thus materializing, at the level of the administration of justice, a constitutional principle of civil liability of the State. While in terms of principles it can be stated that the old maxim "The King can do no wrong" has been set aside, a more detailed analysis of the regime allows us to understand, on the one hand, that not all solutions are aligned with the basic premises of the theory of civil liability of the State and, on the other hand, that certain legislative solutions may create areas of irresponsibility, putting the principle of civil liability affirmed at constitutional level into crisis.

Keywords: Rule of Law. Effective Jurisdictional Protection. Administration of Justice. Damages. State Liability.

Resumo: Este estudo aborda o novo regime de responsabilidade civil do Estado por danos causados pela administração da justiça recentemente aprovada no sistema jurídico angolano. A previsão deste regime de responsabilidade civil revela, por um lado, a importância que o princípio da proteção judicial efetiva tem assumido neste país e, por outro lado, o dever de compensar sempre que este princípio for violado, materializando, assim, no nível da administração da justiça, um princípio constitucional de responsabilidade civil do Estado. Embora em termos de princípios se possa afirmar que a velha máxima "O Rei não pode fazer mal" foi posta de lado, uma análise mais detalhada do regime nos permite compreender, por um lado, que nem todas as soluções estão alinhadas com as premissas básicas da teoria da responsabilidade civil do Estado e, por outro, que certas soluções legislativas podem criar áreas de irresponsabilidade, colocando em crise o princípio da responsabilidade civil afirmado em nível constitucional.

Palavras-chave: Estado de Direito. Proteção Jurisdicional Efetiva. Administração da Justiça. Danos. Responsabilidade do Estado.

1. Introduction

The civil liability of the State for the administration of justice emerges as a relevant dimension in the context of the rule of law - a concretization of the rule of law principle[1], since, as will be seen, the regime of civil liability of the State for damages unlawfully caused by the administration of justice emerges from the intersection of two fundamental pillars of the rule of law (Article 2 of the Constitution of the Republic of Angola - hereinafter CRA or Constitution) that is, the right to effective jurisdictional protection (Article 29 of the CRA) and the right to reparation of damages (Article 75(1) of the CRA).

It is not surprising that the administration of justice is a topic that, not for the best of reasons, is frequently the subject of commentary, whether from the media, the citizen or the jurist. Such comments often reflect the apparent paradox of the phenomenon of *harmful* (administration of) *Justice*[2].

The rule of law and the jurisdictional protection of fundamental rights[3] - as the ultimate guarantees of individuals before the public powers[4] - claim that the institute of civil liability of the State - as a secondary protection - allows to restore the value of *Justice* threatened, from the outset, by the administration of justice (malfunctioning and judicial error). Thus, it is in the institute of civil liability of the State that one should seek the value for the restoration of the balance put at risk by a damaging administration of justice.

Considering the aforementioned, it is easy to understand the importance of the Angolan public extra-contractual civil liability regime recently approved by Law no. 30/22, of 29 August (hereinafter the Regime).

The Regime dedicates several rules - residing in Articles 12, 13 and 14, which compose Chapter III of the referred Law and which appears under the title of "*Public Liability for Damages Resulting from the Malfunctioning of the Administration of Justice*" - to the State's civil liability for the administration of justice, be it regarding damages caused by the malfunctioning of the administration of justice, be it regarding civil liability for judicial error, be it regarding the civil liability of magistrates.

[1] Philip Kunig, *Das Rechtsstaatsprinzip. Überlegungen zu seiner Bedeutung für das Verfassungsrecht der Bundesrepublik Deutschland*, Mohr Siebeck, Tübingen, 1986, p. 191-192.

[2] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça,* Almedina, Lisbon, 2016, p. 17ff.

[3] Jorge Reis Novais, *Contributo para uma teoria do Estado de direito: do Estado de direito liberal ao Estado de direito social e democrático de Direito*, Almedina, Coimbra, 2006, p. 201.

[4] José Joaquim Gomes Canotilho, *O problema da responsabilidade do Estado por actos lícitos*, Almedina, Coimbra, 1974, p. 132.

This study starts by framing the civil liability of the State for the administration of justice in its relationship with the right to effective judicial protection **(2)**, moving on to an analysis of the civil liability of the State for the administration of justice provided for by the Regime **(3)**. Subsequently, the topic of civil liability for the malfunctioning of the administration of justice **(4)**, the topic of civil liability for judicial error **(5)** and the treatment of the civil liability of magistrates **(6)** are dealt with. It ends with some brief conclusions (**7**).

2. Right to effective judicial protection

The rule of law can hardly be realized if the right to effective judicial protection is not guaranteed[5], which imposes the fulfilment of the constitutional obligation to guarantee the right to judicial protection without gaps (*lückenlos*).[6]

The right to effective judicial protection arises as a means of guaranteeing not only legal peace but also the protection of fundamental rights[7] and, in short, the dignity of the human person[8]. It is a right which is fulfilled with the dynamics of the administration of justice, that is, it is a right which is gradually fulfilled[9], not only in the functioning of the procedure aiming at a decision, but also in all the preparatory and executory activity of the decision and above all in the judicial decision itself.

What definitely matters is that the structures for the administration of justice that the State makes available to *all* are capable of guaranteeing the enjoyment of the general legal good of *legal and judicial protection.*[10] In other words, what is at stake is a right to the guarantee

[5] Lars Niesler, *Angemessene Verfahrensdauer im Verwaltungsprozeß*, Verlag Dr. Kovac, Hamburg, 2005, p. 15.

[6] Appealing to the right to judicial protection without lacunae, see Carlos Lopes do Rego, *Acesso ao direito e aos tribunais, Estudos sobre a jurisprudência,* Aequitas, Lisboa 1993, p. 46; Klaus Stern/Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland. Allgemeine Lehren der Grundrechte: Grundrechtstatbestand, Band III/2*, 1994, C. H. Beck, München, p. 962; and José Joaquim Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, Almedina, Coimbra, 2013, p. 273ff.

[7] Drawing attention to the fact that fundamental rights should guide "*organisation and process.*" Klaus Stern/Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland...*, p. 970-971.

[8] In the sense that the right of access to the courts is presented as the means of defence par excellence of the rights, freedoms and guarantees, see José Carlos Vieira de Andrade, *Os direitos fundamentais na Constituição de 1976*, Almedina, Coimbra, 2012, p. 342.

[9] See Francisco Chamorro Bernal, *La tutela judicial efectiva: derechos y garantías procesales derivados del artículo 24.1 de la Constitución*, Bosch, Barcelona, 1994, p. 358ff. For this author, it is also an open right because it includes protection against all violations that have been detected and against all those that, in some way, may occur in the future and attack the same guarantees.

[10] In the sense that in the right to effective judicial protection the legal good at stake is the guardianship, see Rui Pinto, *A questão de merérito na tutela cautelar: a obrigação genérica de não interferência e os limites da responsabilidade civil*, Coimbra Editora, sl, 2009. What definitely reveals the dimension of the right to effective judicial protection. Highlighting this dimension, Klaus Stern/Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland. Allgemeine Lehren der Grundrechte: Grundlagen und Geschichte, III/1,* C. H. Beck, München, 1988, p. 706-707.

of rights (guarantee-right)[11] that must support all subjective rights or legally protected interests (right-rights), that is, it must ensure legal-judicial protection without gaps of the specific legal goods protected by these, and may cover other "normative contents [...] to which individual rights cannot correspond"[12] that bind the different powers of the State.

This right imposes a primary function of guaranteeing rights - the objective of the right to effective judicial protection - and which is reviewed in the teleology of the administration of justice. In other words, the function of guaranteeing rights has to irradiate on the whole administration of Justice, namely, on the activity of administration of Justice in a broad sense and that has to express itself qualitatively[13] and quantitatively[14] in the jurisdictional provision of the concrete case.

It is a *super-right* or a *complex right* whose content unfolds into sub-principles, sub-guarantees or fundamental procedural rights and with a residual guarantee value[15] which must, in short, allow the material realisation of legally protected rights and interests (in conflict) by means of a means of dispute resolution guaranteed by the State.

The close connection between the right to be compensated for damages caused by the administration of justice and the fundamental right to effective judicial protection leads to the consideration that this right to compensation can be invoked directly and by itself as soon as fundamental rights are violated due to lack of effectiveness - which is recognised in the preamble of Law no. 30/22 of 29 August which approves the Regime: "[t]he fact that, as a fundamental right, it benefits from the regime of direct applicability does not prejudice, but rather imposes on the legislator the duty to legislate on the matter, both for imperative reasons of legal security and equality and to avoid possible violations of the principle of separation of powers and interdependence of functions".

Given the breadth, outlined in Article 29 of the CRA, of the right to effective judicial protection, it is not enough to guarantee everyone access to justice by proposing to the judge the demand for protection, but it will be necessary to guarantee each citizen the possibility of obtaining protection in a concrete case because otherwise the guarantee would be reduced

[11] Qualifying that right as a guarantee right, José Carlos Vieira de Andrade, *Os direitos fundamentais...*, p. 114.
[12] See José Carlos Vieira de Andrade, *Os direitos fundamentais...*, p. 110.
[13] In turn, the quality of the administration of justice should manifest itself not only at the level of the functioning of the administration of justice, but also of the organisation and decisions themselves. On the subject, at length, see Laurent Berthier, *La qualité de la justice*, sl, 2011Internet, comfortable search from the title, consulted on 2023-01-01, p. 41-127 and 195-459.
[14] Fabienne Quilleré-Majzoub, *La défense du droit à un procès équitable*, Bruylant, Bruxelles, 1999, p. 16.
[15] Some authors attribute to it, by reference to its residual value, an absorption function "*Auffangfuncktion",* Klaus Stern/Michael Sachs, *Das Staatsrecht der Bundesrepublik Deutschland...*, p. 1471-1472.

to a mere statement of principle, evading any intention of concretization.[16] It is about the defense instruments that the State makes available to the person, as a means that replaces the self-tutorship; which makes this means appear configured in a way that the maximum of guarantees foreseen in the Constitution are recognized in his/her favor.[17]

The obligation to compensate for damages caused by the administration of justice appears as the last guarantee of the right to effective judicial protection, and can be understood as a manifestation/concretization of the right to effective judicial protection of *ultima ratio*, i.e., when the primary guarantee of protection of rights that manifests itself in the administration of justice has failed, it only remains for the injured party to trigger the secondary guarantee of effective judicial protection, i.e., the repair of the damage caused in the administration of justice.[18]

The right to effective or efficient jurisdictional protection, considered here as a *counterface* to the duty to repair damages caused in the context of the administration of justice, is provided for in Article 29 of the Constitution. It is the main formal guarantee that the Constitution presents[19], especially in the light of a *real* democratic rule of law.[20] This is mainly because it is a guarantee that aims to *realize* the remaining rights subject to the court's decision, whereby the violation of this guarantee produces the ineffectiveness of the remaining rights, offending not only the procedural rights, but also the substantive rights in conflict.

The right to effective judicial protection appears with the following formulation in the Angolan legal-constitutional order: "[a]ll are guaranteed access to the law and to the courts to defend their legally protected rights and interests, and justice cannot be denied to them due to insufficient economic means". This right has a dual dimension: subjective and objective.[21] From a subjective point of view, it has been understood as an individual right to

[16] In a close sense, Ángela Figueruelo Burrieza, *El derecho a la tutela judicial efectiva*, Tecnos, Madrid, 1990, p. 44.

[17] Ángela Figueruelo Burrieza, *El derecho a la tutela judicial efectiva*, p. 55.

[18] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 46ff.

[19] This reasoning is made by German doctrine regarding the provisions of Article 19(4) of the *Grundgesetz*. This is a rule whose content is very similar to that foreseen in Article 29(1) of the CRA and therefore the reasoning is also acceptable in the light of our legal system. On this reasoning, among others, G. Durig, *in* Maunz, Durig (eds), Grundgesetz für die Bundesrepublik Deutschland, (cit. No. 3), Article 19/4 (1958), *apud* AA.VV., *Manual de derecho constitucional*, Instituto Vasco de Administración Pública: Marcial Pons, Madrid, 1996, p. 788.

[20] Note that effectiveness is something consubstantial to the right to judicial protection, because a protection that is not effective, by definition, will not be protection. See Francisco Chamorro Bernal, *La tutela judicial efectiva*..., p. 276.

[21] Sobre a dimensão dupla dos direitos fundamentais, por todos, José Carlos Vieira de Andrade, *Os direitos fundamentais*...p. 107ff.

defend legally relevant situations before the courts. From an objective point of view, it presents an organisational and procedural dimension, as a rule destined to guarantee certain rights, being legally valid also from the point of view of the community, as a value or end that the State intends to pursue, i.e., as an institutional guarantee.[22] From this objective perspective, it is nothing more than a fundamental right to a certain organisation (or institution) and a procedure, presenting specific normative requirements (*e.g.* impartiality, independence and due process[23]) that define this procedure and the institution capable of taking it on.

The right to effective judicial protection or access to justice is one of the dimensions - perhaps the most important - but not the only one of the right to access to the law[24].

In turn, to the precept provided in article 29(1) of the Constitution is added, for our purposes, the provisions of article 29(4), of the same diploma, which not only imposes the right to a judicial process within a reasonable time, but also the right to a fair process.

It is therefore of interest to the right to effective judicial protection - effective and complete judicial protection - (*effektiven Rechtsschutz*)[25], where the whole problem of the necessary coincidence between the formal (Law) and the real[26], that is, that such a right has effect, that it exists, that it is realised, that it produces effects. In short, that it is not merely platonic, but that it results in an administration of justice of adequate results.

In light of all the above, it can be summarised that the right to effective judicial protection reveals its importance in the constitutional imposition of the proper functioning of the administration of justice and without judicial errors.

In addition to the duty to ensure a malfunctioning and error-free administration of justice, the State must have the means to remove it from the legal order when it occurs, primarily by providing for an adequate system of judicial remedies.

Whenever the judicial error goes beyond the error tolerable by the legal system and damages are caused to the persons administering justice, the injured party must be compensated by means of reparation for the damages suffered. This is because the institute of civil liability of the administration of justice should be understood as a structural element of the rule of law.

[22] José Joaquim Gomes Canotilho, *Direito Constitucional*, p. 496ff.

[23] See on *giusto processo*, among others, Paolo Ferrua, *Il 'giusto processo'*, Zanichelli, Bologna, 2012, *passim*.

[24] José Joaquim Gomes Canotilho/Vital Moreira, *Constituição da República Portuguesa Anotada,* I, Coimbra Editora, Coimbra, 2007, p. 410.

[25] Volker Schlette, *Der Anspruch auf gerichtliche Entscheidung in angemessener Frist. Verfassungsrechtliche Grundlagen und praktische*, Duncker & Humblot GmbH, Berlin, 1999, p. 24.

[26] Thus, Adélio Pereira André, *Defesa dos direitos e acesso aos tribunais*, Livros Horizonte, Lisboa, 1980, p. 123.

The civil liability of the State for the administration of justice emerges as a *fundamental right* and *guarantee of compensation*. On the one hand, as a dimension of the principle of effective jurisdictional protection that is essential in a Democratic State based on the rule of law, which aims to provide access to justice in the dimension of secondary protection, that is, reparation of damages. On the other hand, it is the last guarantee that assists to the administrators of justice, that is, once this guarantee is exhausted, those injured by the administration of justice do not have, in the context of the rule of law, any other judicial mechanism to guarantee Justice.

3. Civil liability of the State for the administration of justice

In addition to the aforementioned, it is our opinion that - in order to properly understand the reality underlying Article 12 of the Regime - we should take into account, on the one hand, an operative concept of *administration of justice* that is broad enough to capture the reality of the administration of justice that is incumbent upon the State and, on the other hand, a concept of *malfunctioning of the administration of justice,* as an indeterminate concept capable of capturing the pathologies of the activity of the administration of justice.

A concept of administration of justice for the purposes of State civil liability should consider that such activity is always guided by the idea of effective jurisdictional protection, that is, by the prevalence of the legal good "protection of rights". The teleology of action will always be that of guaranteeing all legally relevant situations.[27] All the administration of justice essentially aims at the extinction of the conflict, providing tutelage for such. In other words, the constitutional commandment of the right to effective jurisdictional protection, to which every person is entitled, must be the *guide* for judges and courts in their activity.[28] Moreover, the effectiveness of judicial protection is a constitutional duty that affects the judiciary, the legislative and the executive.[29]

This purpose of the function of administration of justice is distinct from the purpose of the administrative function which must be reviewed in the pursuit of other public interests. This different end cannot but be reflected in the regime of civil liability of the State.

[27] Criterion already mobilised by other authors, see Maria da Assunção A. Esteves, *Estudos de direito constitucional*, Coimbra Editora, Coimbra, 2001. This author, to ascertain the nature of the act, mobilises the criterion of the guarantee of rights, that is, a mixed criterion that emphasises the conflict of interests and the aptitude of subjectivation of those interests.

[28] See Francisco Chamorro Bernal, *La tutela judicial efectiva...*, p. 328.

[29] Francisco Chamorro Bernal, *La tutela judicial efectiva...*, p. 331. Thus, the subject of civil liability for the malfunctioning of the administration of justice is the State in the broad sense and not the State-judge.

The *differentia specifica* of the regime of civil liability of the State for malfunctioning results from the fact that it is the legal good (of rights) that is at stake and not any other public interest.[30]

The aforementioned concept of administration of justice for the purposes of the State's civil liability cannot ignore the results of the various reforms that have taken place in the administration of justice, namely by making it necessary to consider the activity of private parties that participate in the administration of justice (if and when they exist) and the various alternative and complementary means of the administration of justice already implemented in the legal system.

This broad concept of administration of justice, for purposes of State civil liability, includes the jurisdictional function, i.e., the essential core of the administration of justice and the complex of activities that directly participate in the intentionality of the realization of the law, with its full submission to the purposes and values of justice and truth, without, however, being translated into decisions of concrete legal conflicts, and thus, without declaring the right of the case, in the manner proper of the jurisprudence.[31] It is a varied activity that presents a *strict sense* that is identified with the *jurisdictio* and a *broad sense* that includes all the activities necessary for the preparation and execution of the jurisdictional decisions.[32]

On the other hand, it is revealed in the activity under the responsibility of the State (of enforcement or guarantee) that *functionally* aims to realize the principle of effective judicial protection through processes or procedures for resolving disputes with the guarantees inherent in this and that *organically* is in charge of structures, organs and subjects collaborators or auxiliaries (even if by individuals).[33]

These different meanings of the administration of justice, which highlight the diverse nature of the activities of the administration of justice, require a dynamic relationship with

[30] On the public interest (in the improper sense) of the administration of justice, see Ricardo Pedro, Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 210ff.

[31] In a close sense, by reference to the function of administration of justice, Jorge de Figueiredo Dias, *Direito Processual Penal, I,* Coimbra Editora, Coimbra 1974, p. 367 and 368. However, this author presents a broader notion, on one hand, and, on the other, a more restricted one. Broader, because it includes other subjects such as notaries and lawyers. More restricted, because it does not meet the new reality revealed by the alternative means of administration of justice.

[32] See Laurent Berthier, *La qualité de la justice*, p. 512, who clarifies "*Cette manière de percevoir la fonction juridictionnelle non comme un bloc homogène mais plutôt comme un agrégat d'actes de nature juridique différente permet l'émancipation de la responsabilité de l'Etat (...)*".

[33] In a close sense, already extending this activity to the performance of auxiliary organs of the judge, see M. J. Velu, "Elements essentiels d`un regime de responsabilité publique pour les actes juridictionnels" *in Pouvoir judiciaire et responsabilité publique pour les actes juridictionnels: actes du quinzième colloque de droit européen*, , Conseil de l'Europe, Strasbourg, 1986, p. 85. Drawing attention to the fact that the essential elements of the administration of justice are found in the *functional* and *organic* dimension, see Laurent Berthier, *La qualité de la justice,* p. 39ff.

the notion of *public service,* so that the necessary *independence* for the proper *protection of rights* is ensured.

It can be concluded that the administration of justice should be understood as all state activity (even if exercised by private parties) functionally aimed at the realization of the right to effective jurisdictional protection, and of which currently participate entities such as courts, justice of the peace, public arbitration centres and public mediation system.[34]

The concept of "administration of justice" should include the *classical* activity of courts, namely the conduct of judges, public prosecutors, court and prosecutor offices, criminal police bodies and forensic doctors; the conduct of *private persons who participate in the administration of justice* (jurors and social judges, enforcement agents and court administrators) and *private persons who assist the administration of justice* (court-appointed experts, court-appointed custodians and interpreters) and also the harmful conduct resulting from the Courts of Peace, public arbitration tribunals and public mediation systems.[35] It should be noted that this concept of the administration of justice should be assessed in the light of the different options that the legislator makes in terms of justice reforms.

Article 12(3) of the Regime provided a concept very close to the one we defend. It states that "[for the purposes of the previous paragraphs, Administration of Justice includes the activity of the courts, namely the conduct of Judicial Magistrates and of the Public Prosecution Service, of the Judicial and Public Prosecution Secretariats, of the Criminal Police Bodies, of forensic doctors, of private persons who assist the Administration of Justice as experts appointed by the Court, court appointed bailiffs and interpreters and, also, the harmful conduct resulting from justice of the peace, public arbitration courts and public mediation systems".

Focusing on the heading of Chapter III of the Regime, we understand that the expression *civil liability of the State for the administration of justice* should be preferred to public liability for damages resulting from malfunctioning of the administration of justice, since the former is a broader concept than public liability for damages resulting from malfunctioning of the administration of justice. Moreover, Article 12(2), which refers to civil liability for "damage caused by the Administration of Justice", was a better wording.

[34] For further developments, see Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 276ff.

[35] For further developments, see Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 491ff.

The public tort title 'malfunctioning in the administration of justice' is only a title of imputation alongside the title of imputation 'judicial error'. Both imputation titles referred to make up the State's civil liability for the administration of justice.

To explain, the civil responsibility of the State for the administration of justice comprises the titles of *malfunctioning of the administration of justice* and *judicial error*. Given the extreme proximity between the title *malfunctioning of the administration of justice and* the title *judicial error*, the problem of the relationship between these two concepts always arises. Assuming, as we have already done elsewhere[36], that these are independent concepts[37], but close, and that, therefore, there are differences between the concepts of judicial error and judicial error, it is a common understanding in legal theory that they have a great deal of affinity[38] and, therefore, a concept of judicial error that enables us to distinguish it from judicial error is not an easy task.[39]

It seems to us to be accepted that there should be a *reciprocal delimitation* of these two concepts, on the one hand, and, on the other, that malfunctioning presents a *complementary relationship* with the imputation title judicial error. Since one of the criteria for distinction is based on the formal dimension of the judicial error in relation to malfunctioning and the exceptional regime associated with the title of imputation, it can be said that a relationship of reciprocal delimitation is established[40] in relation to the binomial judicial error/malfunctioning of the administration of justice.

If, on the one hand, the judicial error helps to delimit the concept of the malfunctioning of the administration of justice, defining it in the negative, on the other hand, all errors *in procedendo* end up delimiting, also in the negative, the scope of application of the judicial error. Any damage resulting from a judicial resolution will fall within the scope of the judicial error and all other cases of damaging actions will fall within the scope of the malfunctioning of justice, provided that they still arise within the scope of the administration of justice in a broad sense.

[36] We follow closely what is advocated in: Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 295ff.

[37] In this exact sense, Paula Costa e Silva, "A ideia de Estado de Direito e a responsabilidade do Estado por erro judiciário: The King can do no wrong", *O Direito*, A. 142, n.º 1 (2010), p. 53.

[38] Thus, Pablo Acosta Gallo, *La Responsabilidad del estado-juez: error judicial y funcionamiento anormal de la administración de justicia*, Editorial Montecorvo, S.A., Madrid, 2005, p. 186.

[39] See Manuel Goded Miranda, "La responsabilidad del Estado por el funcionamiento de la Administración de Justicia", *in El Poder Judicial,* I, Instituto de Estudios Fiscales, Madrid, 1983, p. 330.

[40] See also, Edota Cobreros Mendazona, *La responsabilidad del Estado derivada del funcionamiento anormal de la Administración de Justicia,* , Cuadernos Civitas, Madrid, 1998, p. 23-24.

In this relationship of mutual differentiation, the malfunctioning of the administration of justice appears as a *rule,* covering all cases of errors committed in the activity of the administration of justice that are not judicial errors, that is, that do not result from a manifestly unconstitutional or illegal judicial decision or that are unjustified by a gross error in the assessment of the respective factual assumptions.[41]

Malfunctioning is presented as a form of residual imputation[42] or complementarity, comprising all situations, other than judicial error, that can generate damage, in aspects that are not strictly jurisdictional, but are attributable to judges or other servants of the administration of justice. In other words, judicial error will cover all cases of damage caused within the scope of the activity of the administration of justice that is not jurisdictional but is included in the jurisdictional turn or traffic.

The title of imputation *malfunctioning* should be understood as an indeterminate concept that includes procedural actions or omissions, duties of an administrative or constitutional nature occurring within the scope of the administration of justice, attributable or not to the concrete behaviour of a particular organ holder, official or agent, which are at variance with the adequate *standard* of guarantee of effective judicial protection, which is revealed in the provision of the service of justice at each moment and in each jurisdictional order and which are not covered by the concept of judicial error.[43]

Thus, it should be made clear that the regime of civil liability of the State for the malfunctioning of the administration of justice covers the *omissions of the judge* of the proceedings, as well as all the actions and omissions of the other public actors of the administration of justice other than the judge. Therefore, this regime covers the omissions of the judge and the actions and omissions of all staff in the service of the administration of justice, provided that the respective indemnity requirements are met.

With regard to *omissions of the judge*, as it becomes easy to understand, these are not covered by the regime of civil liability of the State for judicial error, since this only takes place by action (positive action) of the judge and not by omission. This is so because there is a difference in degree between an express jurisdictional resolution constituting a judicial error and an omission, in which, by definition, there is no jurisdictional activity as such.

[41] This has been the criterion used by the Spanish Supreme Court, see among others *Sentencia del Tribunal Supremo (Sala de lo social) of 5 February 1992, which is* close to the concept provided for in Article 13 of the Scheme.

[42] Thus, Luís Esteban Delgado Del Rincón, *Constitución, Poder Judicial y Responsabilidad*, Centro de Estudios Políticos y Constitucionales, Madrid, 2002, p. 446.

[43] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 317.

Therefore, situations of omission of the judge, of a jurisdictional or other nature, do not fall under the regime of civil liability of the State for judicial error, but rather under the regime of *civil liability of the State for the malfunctioning of the administration of justice,* that is, under the regime provided for in article 12 of the Regime, which refers to the application of the indemnity requirements provided for in Articles 7 to 10 of that diploma.

Thus, a complete assessment of the regime of civil liability of the State for the administration of justice implies that, in concrete terms, it is also necessary to determine the eventual omission *of the judge's behaviour, whose omission was legally required.* The most radical hypothesis is found in the *pure omission of the duty to decide,* which will arise in pure violation of the principle of the obligation to judge (article 8(1) of the Civil Code) and will always consubstantiate an absolute violation of the principle of access to the law and effective judicial protection.

Civil liability for damage caused in the administration of justice is mainly provided for in Articles 12 to 14 of the Regime.

According to the provisions of Article 12(1), the civil liability of the State is admitted for damages unlawfully caused within the scope of the administration of justice, namely for violation of the right to a decision within a reasonable time.

This norm naturally includes a myriad of factual situations that go beyond the typical situation of the slowness of the administration of justice - by way of example, we should consider the damages caused by violation of the secrecy of justice, uncoordinated police action, loss of objects entrusted to the State, etc.[44]

Article 12(2) of the Regime provides that the regime of liability for risk and for licit acts provided for in the present diploma is also applicable to damages caused by the administration of justice. That is, in addition to the regime of civil liability for unlawful acts provided in Articles 7 to 10 of the Regime, the civil liability for risk (Article 11 of the Regime) and civil liability for lawful acts (Article 16(1) of the Regime) must also be considered.

In an uncritical analysis of the Regime, it seems that it is up to the interpreter to ascertain, on the one hand, which situations generate unlawfulness, on the other hand, which situations, despite being lawful, generate damages worthy of compensation and, on the other hand, which harmful dangerous activities may occur in the field of the administration of justice.

[44] For further developments, see Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça*...p. 459ff.

Despite the provisions of Article 12(2), it seems to us, on the one hand, that the risk theory is not the most appropriate for understanding the activity of the administration of justice and, on the other hand, the illicit/lawful categories should be abandoned, and the Regime based on the concept of malfunctioning of the administration of justice.

Thus, it seems to us that the option provided in Article 12(2), by determining the application of the regime of civil liability for risk to civil liability for damage caused by the administration of justice, disregards that the activity of the administration of justice is not very permeable to the theory of risk and danger - as a rule, the administration of justice does not reveal "especially dangerous activities, things or administrative services".

Regarding the application of the regime of civil liability for lawful acts to civil liability for damage caused by the administration of justice, the legislator seems to be concerned with possible situations in which lawful actions cause damage. In this regard, it is understood that it would be, rather, to consider a regime based on the concept of malfunctioning of the administration of justice that absorbs the situations of unlawfulness and lawfulness causing damage in this activity that aims at effective jurisdictional protection.

4. State liability for the malfunctioning of the administration of justice

4.1 Introduction

As we have previously argued, *de iure condendo* the title of imputation of malfunctioning should be understood as an indeterminate concept that includes procedural actions or omissions, duties of an administrative or constitutional nature occurring within the scope of the administration of justice, imputable or not to the concrete behaviour of a particular body holder, official or agent, which are at odds with the appropriate *standard* of guaranteeing effective judicial protection, which is revealed in the provision of the service of justice at each moment and in each jurisdictional order and which are not covered by the concept of judicial error.

This concept is relevant for the purposes of civil liability of the State provided that the following assumptions are verified: (i) malfunctioning, (ii) damage and (iii) causal link.[45]

Finally, it should be noted that the concept of malfunctioning of the administration of justice is distinct from the concept of abnormal functioning of the service provided for in

[45] For further developments, see Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 375ff.

Article 7(4) of the Regime and is presented as a concept designed for the administration of justice (an activity that is distinct from the administrative function).

This is a concept that is independent from judicial error, covering all damages that are not covered by judicial error, and is based on operating standards that are capable of capturing the lack of effective judicial protection. We are thus faced with a concept that, as a rule, should be determined in concrete terms by the administrative judge, considering, in particular, the most common situations of malfunctioning, including breach of judicial secrecy, uncoordinated police action, loss of objects entrusted to the State, prescription of legal and criminal proceedings imputable to the State, error in the identification of the accused and the delayed administration of justice. It should be considered as a concept that is adapted to each era and each jurisdictional order.

4.2 State liability for delayed administration of justice

Particular attention should be paid to the civil liability of the State for damages caused by delayed administration of justice. This is also imposed by Articles 29 and 72, respectively, of the CRA, by providing for the right to a judicial decision within a reasonable time and the right to a speedy trial.

Although the Regime does not reveal any particularities in this matter, the truth is that the doctrine has insisted on the need to comply with the guidelines offered by the European Court of Human Rights (ECtHR), developed in concretion of the right of access to the court foreseen in article 6(1) of the European Convention on Human Rights. The case-law of the ECtHR has extra-legal value here .[46]

As we have already mentioned elsewhere[47], the judge in the interpretation/application of the regime provided in Articles 7 to 10 and 12 of the Regime cannot disregard the following topics:

(i) the concept of *reasonable time* must be understood as an autonomous concept wholly independent of the concept of *disciplinary time*. What matters is the period that has

[46] Whereas the case-law of the ECtHR, in particular the criteria for objectifying the concept of reasonable time, may function as an extra-legal source, see Gomes Canotilho/Vital Moreira, *Fundamentos da Constituição,* Coimbra, Coimbra Editora, 1991, p. 57.

[47] Ricardo Pedro*, Contributo para o estudo da responsabilidade civil do Estado...*, p. 98-157; Ricardo Pedro, "Administração da justiça morosa: *la storia continua*...Anotação aoórdão do STA, de 15.05.2013, proc. no. 0144/13*", in* Carla Amado Gomes, Tiago Serrão (Org.), *Direito da responsabilidade civil extracontratual das entidades públicas - Anotações de jurisprudência,* Lisbon, ICJP, 2013, p. 209-229.

elapsed and it is irrelevant whether the period is imputed to the judge or to any other public entity that contributes to the undue delay;

(ii) the concept of reasonable time is not to be determined in the abstract but, in practice, by reference to the following criteria: *complexity of the case, conduct of the authorities, conduct of the parties and importance of the dispute for the person concerned*.

(iii) the assessment or computation of the reasonable period of time may take place on a *one-off basis* or on an *overall basis*.

(iv) the doctrine that imposes special attention about *non-pecuniary damages* arising from the administration of sluggish justice, highlighting the following:

(a) there must be a *presumption of non-material damage for the* benefit of the administered person as a result of justice being prolonged, that is to say, it must be presumed that the excessive length of proceedings causes the parties non-material damage which they are not required to prove;

(b) only *general damage* is to be considered, i.e., not any damage, but damage to property which presumably is suffered by all those who go to court and do not have their claims settled within a reasonable period of time;

(c) the damage caused by the State's infringement of the right to a decision within a reasonable time, for the purposes of assessing the *seriousness* of the non-material damage required by Article 496(1) of the Civil Code, must be considered sufficiently serious so as to merit, as a rule, compensation;

(d) Attention should be paid in the doctrine that refers to the *compensability of non-material damages to legal persons* (in order to overcome one of the weaknesses that has been pointed out to the figure of collective personality, it should be decided to disregard it, opting for a *substantialist concept* of collective personality) and awarding compensation that takes into account the non-material damages suffered by the partners or shareholders.

5. State liability for judicial error

Another axis of civil liability of the State for the administration of justice, according to the provisions of Article 13, first part of the Regime, refers to the damage caused by the rendering of an unjust condemnatory criminal sentence and unjustified deprivation of liberty. This liability is provided for in the Angolan Code of Criminal Procedure, in particular Articles

296 to 298 and 529. Therefore, it may be said that there is nothing new in this area; the legislator of the Regime was only careful to clarify that it has its own presuppositions.

Other axis of liability, provided for in the second part of Article 13, focuses on civil liability for damages caused by the delivery of an unconstitutional or illegal decision or by a gross error in the assessment of facts. Liability for a jurisdictional fact in the *strict sense* or for a judicial error is thus established.

This liability regime is extended to all branches of procedure and is not confined to criminal procedure as was the case prior to this regime.

This liability covers *error of law*, and the legislator requires a special qualification of the error and is not satisfied with the mere illegality or unconstitutionality of the legal solution adopted in the judicial decision, when it is revoked by a higher court decision. This is a gross error that vitiates jurisdictional decisions that are manifestly unconstitutional or illegal or unjustified.

It also covers the error in the assessment of assumptions of fact, commonly known as error of *fact,* which may relate either to an error on the admissibility and assessment of the means of proof, or an error on the determination of the material facts of the case.

This liability, whenever it originates from a *judicial decision,* only concerns the State and the judges.

As a first approach, it can be said that judicial error is a human misjudgement. If this misjudgement occurs in the exercise of the judicial function, then we are faced with a judicial error[48]: a decision that does not coincide with the *ratio decidendi* of the judicial decision[49]; the judicial error occurs in the "cognitive operation of the judge".[50] Thus, the judicial error is an undetermined concept, which reveals, as differentiating elements, to originate from a body endowed with jurisdictional power, to have to result from a certain process (precisely at the time of dictating any resolution).[51] It is a concept consubstantial to the activity of judging, derived from the fallibility of the judge. Given the permeability of the jurisdictional function to judicial error and the gravity that this represents for the administration of justice and the rule of law, most legal systems are equipped with a system

[48] Vicente Carlos Guzmán Fluja, *El derecho de indemnización por el funcionamiento de la administración de justicia,* Tirant lo Blanch, Valencia, 1994. In this sense, p. 152, and doctrine quoted therein.

[49] González Alonso, *Responsabilidad patrimonial del Estado en la Administración de Justicia. Funcionamiento anormal, error judicial, prisión preventiva*, Tirant lo Blanch, Valencia, 2008, p. 163.

[50] Jean-Marc Varaut, "Erreur judiciaire" *in Dictionnaire de la justice*, PUF, Paris, 2004, p. 432.

[51] In a close sense, Perfecto Andrés Ibáñez/Claudio Movilla Álvarez, *El Poder Judicial*, Tecnos, Madrid, 1986, p. 355.

of appeals which aims to eliminate it through the re-examination of the *case* by a higher court. It is this system of remedies which aims to prevent fallibility from becoming habitual.[52]

For now we can fix the notion of judicial error as meaning the error occurred in a jurisdictional resolution, i.e. in a conduct (action) of the judge, in fulfilment of the obligation to judge to which he is legally bound. The specificity of the judicial error is revealed in the seriousness that must be required for it to generate State liability. It is to this requirement that we will pay attention immediately.

The regime set out in Article 13 of the Regime does not contain a legal concept of judicial error, but rather configures two hypotheses of judicial error: the error resulting from "manifestly unconstitutional or illegal judicial decisions" and decisions "unjustified by a gross error in the assessment of the respective factual assumptions", i.e., hypotheses of error of *law* and error *of fact*. An error of law may occur in the application of substantive or adjective rules and an error of fact may occur in the assessment and evaluation of the evidence and in establishing the facts.[53]

Although the law does not make a distinction, factual errors can also be analysed as internal or external errors. The former results from a comparison of the data in the case file, where it is found that the judgement adopted does not follow the logic of the proven data. The second arises from a lack of correspondence between the evidential material brought into the process and the external material reality, that is, the procedural reality does not coincide with the material reality. A judicial error is not produced by simply revoking a decision because, if this were the case, any successful appeal would give rise to compensation; therefore, not every error contained in a decision should be understood as a judicial error (although we are dealing with an error that occurred in the context of the administration of justice).

The filters for the non-existence of a judicial error are the principle of the hearing of the parties and the system of appeals. However, if these filters are not sufficient and the judicial error occurs, the State may be obliged to pay compensation. This means that the concept of judicial error is not only the sum of the event of an error and its occurrence in the administration of justice. Furthermore, the error does not occur at all times, but only with a judicial decision (e.g. judgements, sentences and orders), if erroneous. Rather, it is a

[52] Ricardo Pedro, «Responsabilidade civil do Estado por erro judiciário: da "law in books" à "law in action": *mind the gap*», Revista do Ministério Público, a.42 n.166, abr.-jun. 2021, p. 159-199.

[53] Carlos Alberto Fernandes Cadilha, *Regime da responsabilidade extracontratual do Estado e demais entidades públicas – Anotado*, Coimbra Editora, sl, 2008, p. 269.

concept with autonomy that can only take place once all possible remedies to remedy the error have been exhausted. The appeals system functions as a way of avoiding judicial error and the State's civil liability for judicial error as a means of repairing the damage caused by the error.[54]

5.1 Error of law

As regards the *error of law*, with reference to *manifestly unlawful judicial decisions,* various situations may be envisaged. It must be said that these are only some of the hypotheses that the practice of comparative law has made it possible to identify, although others may occur.

The simplest refers to the "application of a law that has been expressly repealed, without there being any question of succession of laws over time". However, less simple situations can also be envisaged, such as "the application of a rule or legal regime with a given interpretative sense, but contrary to a doctrinal and jurisprudential current that is unanimously followed and consolidated, and which everyone would hope to see chosen; the acknowledgement in the decision of questions not raised by the parties and which are not of their own motion".

In other words, the judicial error arises whenever the solution reached is not reasonably defensible because it is not based on any technical criterion recognised in the community by legal operators.[55]

As regards the *error of law*, with reference to *manifestly unconstitutional judicial decisions,* "decisions that directly contravene fundamental law, particularly with regard to fundamental rights".[56]

An error of law may first result from the determination of the rule called upon to regulate the legal situation or when facts are incorporated by the Court which are not contained in the rule and may concern a rule of substantive law or a rule of procedural law which has negative consequences for the parties, "so that the unlawfulness requirement may be deemed to have been met where the decision represents a legal solution that is not in accordance with the law".[57]

[54] Vicente Carlos Guzmán Fluja, *El derecho de indemnización*..., p. 155.

[55] Luís Fábrica, "Anotação aos artigos 12, 13 e 14", *in Comentário ao Regime da Responsabilidade Civil do Estado e Demais Entidades Públicas*, *in Universidade Católica Portuguesa*, Lisboa, 2013, p. 354.

[56] Guilherme da Fonseca/Miguel Bettencourt da Câmara, "A responsabilidade civil por danos decorrentes do exercício da função jurisdicional (em especial, o erro judiciário)", *Julgar,* no. 11, 2010, p. 18 and 19.

[57] Carlos Alberto Fernandes Cadilha, *Regime da responsabilidade extracontratual do Estado…,* p. 213.

5.2 Factual error

As regards *factual error*, in practice, what is involved are "hypotheses of gross error in the assessment of the factual assumptions, which amounts to an error on the matter of fact"[58]; which implies that "the judge has decided against the facts established".[59] The error may relate to the assessment of evidence, either in its admissibility or in the evaluation of the means of proof, as well as an error *in* and *on the* determination of the material facts of the case.[60]

It should be noted that, in addition to the disregard for the strength of a certain legal means of proof, a situation in which the determination of gross error is made easier[61], even in the hypotheses of non-priced proof and in which, therefore, the judge is free, when assessing the evidence, such assessment appears "bound to the principles on which evidential law is based and to the rules of common experience, of logic, rules of a scientific nature that should be included in the scope of evidential law". For, "[t]he principle grants the judge a margin of discretion in the formation of his judgment of assessment, but he must be able to justify it in a logical and rational manner". Discretionarity which, from the outset, in criminal proceedings should be subject to control, as defended by the doctrine, when it states that it is a question of "freedom in accordance with a duty - the duty to pursue the so-called material truth - such that the assessment must be, in concrete terms, recondutible to objective criteria susceptible of motivation and control".[62]

5.3 Fault

In the context of understanding the notion of judicial error, the *fault* requirement is sometimes referred to. To avoid further developments on the loss of strength and usefulness of this requirement[63], it is only stressed that, within the scope of the State's civil liability for judicial error, the consideration of this liability is an *objective, direct and exclusive liability of the State.*[64]

[58] Guilherme da Fonseca/Miguel Bettencourt da Câmara, "A responsabilidade civil por danos decorrentes do exercício da função jurisdicional", p. 18 and 19.

[59] Carlos Alberto Fernandes Cadilha, *Regime da responsabilidade extracontratual do Estado*…, p. 211 and 212.

[60] Carlos Alberto Fernandes Cadilha, *Regime da responsabilidade extracontratual do Estado*..., p. 213.

[61] Ana Celeste Carvalho, *Responsabilidade civil por erro judiciário: uma realidade ou um princípio por concretizar?*, Almedina, Sintra, 2012.

[62] Jorge de Figueiredo Dias, *Direito Processual Penal*, p. 202ff.

[63] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 354ff.

[64] Jorge de Abreu, *Responsabilidade civil extracontratual do Estado: a Lei n.º 67/2007, de 31 de Dezembro*, Edição Abreu & Marques, Vinhas e Associados, Lisboa, 2008, p. 81.

There is also the rule that in situations of minor fault the civil liability lies with the State and not with the magistrate. In short, this does not require a special censure of the magistrate to verify the concept of judicial error. If the guilt requirement is to be verified, it will be, first, in what concerns the State and only in the second line, in what concerns the magistrate, i.e., only in the case of action for recourse, does article 14 of the Regime require that the guilt of the magistrate be verified for the purposes of his civil liability.[65]

5.4 Damages and causal link

Finally, with reference to the requirements of *damages* and *causality*, Chapter III of the Regime does not contain special provisions on these indemnity requirements. Thus, regarding *damages*, the general rule provided in Article 3(3) of the Regime applies, which states: "[t]he liability provided for in this Law comprises property damage, non-pecuniary damage, consequential damage and loss of profit, as well as present and future damage, under the general terms of law".

Therefore, the regime in crisis must be found in the Civil Code from the outset. In other words, and in short, no further developments are necessary, due to the lack of specifics that would justify them.

Scarcer is the regime of the *causal link*, which, strictly speaking, does not find express provision in the Regime, although its need should be considered implicit, and should be answered in the general regime, i.e. in the Civil Code, in particular in the provisions of Article 563, which establishes the theory of adequate causality in its negative formulation.

6. State liability and civil liability of judges

Article 14 of the Regime provides for the *direct* civil liability of the State for damages arising from the conduct of the judicial magistrates and the Public Prosecutor's Office (MP)[66] *in* and *for the* exercise of their functions, the *indirect* civil liability of these magistrates and the State's right of recourse against them. This is a functional liability, so if magistrates cause damage outside the performance of their duties, the private civil liability regime applies, and it is a direct liability.

[65] Ricardo Pedro, *Estudos sobre administração da justiça e responsabilidade civil do Estado,* AAFDL, Lisbon, 2016, p. 33ff.

[66] On the nature of the Public Prosecutor*'s* Office in comparative law, see Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 412ff.

This functional liability is based on the most serious forms of guilt, i.e. acting with intent or serious fault. In the face of this type of ethical-legal censure, the State enjoys a right of recourse against magistrates.

In the case of slight fault, the liability will be exclusive of the State, in what concerns acts of administration of justice by imposition of Article 14(2), which refers to Article 7(1), and in what concerns jurisdictional acts by the provisions of Article 13 and the rule of law.

Since the members of the Public Prosecution Service do not exercise a jurisdictional function (constitutionally limited to the judge) and, therefore, the regime of *judicial error* does not refer to the Public Prosecution Service, it seems to us that Article 14(1) of the Regime assumes special importance by *expressly* providing for state liability for the actions of the Public Prosecution Service, which will always be of a nature other than jurisdictional in the strict sense.

It is, rather, in the context of the liability for the administration of justice in the broad sense that the State and the Public Prosecutor's Office magistrates are liable for the damages caused within the scope of their functions, including acts carried out during the investigation and the exercise of any criminal action (as well as in the exercise of all activities attributed to them), being covered by the provision of Article 12 (liability for damages caused within the scope of the administration of justice), although, as referred to above, benefiting from the regime of indirect liability also applicable to judges.[67]

In line with the above, Article 14(2) of the Regime provides that "in administrative and non-judicial acts, Judicial Magistrates and Public Prosecutors shall be subject to the rules imposed by the liability of the administrative function".

This article goes a little further than what we defended above - what we defended there was that the Public Prosecutor's Office judges only perform acts of administration of justice and not judicial acts, and therefore the liability regime for judicial error does not apply to them. On the other hand, judicial magistrates are subject to the liability regime for judicial error whenever jurisdictional acts are involved, on the one hand, and to the regime of administrative liability whenever acts of administration (i.e. the administration of justice, but not jurisdictional acts) are involved, on the other hand.

In summary, the State's civil liability for the functional performance of MP magistrates is the one provided in Article 12 while the State's civil liability for the functional performance of judicial magistrates is the one provided in article 12 whenever they perform

[67] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 354ff.

acts of administration of justice - as is the case, namely, with cases in which there is no litigation (e.g. cases of voluntary jurisdiction), situations of omission to decide and situations of delay and the one provided in Article 13 whenever they act in the exercise of the jurisdictional function.

However, the legislator does not carry its reasoning to its full extent, failing to provide that in situations where magistrates perform acts of administration of justice, they can be held directly liable[68], as Article 14(1) establishes their indirect liability.

Nevertheless, it is important to note, on the one hand, that Article 14(2) of the Regime subjects administrative and non-jurisdictional acts of the Judicial Magistrates and of the Public Prosecutor's Office to the rules imposed by the liability of the administrative function and, on the other hand, that Article 7(2) of the Regime provides that "[s]ave prejudice to the provisions of the preceding paragraph, the compensation based on minor fault will take place when there are special and abnormal damages". That is, according to the legislator, in situations of minor fault only special and abnormal damages are compensable. In turn, the legal concept of special and abnormal damages is found in Article 2 of the Regime, which provides that special damages are "those that affect a person or a group of people, without affecting the generality of people" and abnormal damages are "those that, going beyond the costs of life in society, merit, due to their gravity, the protection of the law".

With this option, the legislator invests in a distinct solution from the comparative law[69] giving relevance to the ethical-legal censure of the actions of the public servant, while it reduces the indemnity guarantee of the injured party and, therefore, disregards the reparatory dimension of the institute of civil liability of public entities.

A consequence to be drawn from this is - considering that, pursuant to Article 7(2) of the Regime, light negligence is presumed in the practice of unlawful legal acts (rebuttable presumption) - that civil liability for unlawful acts due to light negligence will only arise in the case of unlawful acts. One consequence of this is - bearing in mind that under the terms of Article 7(2) of the Regime, slight fault in the practice of unlawful legal acts is presumed (rebuttable presumption) - that civil liability for unlawful acts due to slight fault will only arise in the event of special and abnormal damages, which, in addition to, in practical terms, removing the value of this presumption, also raises some doubts about the requirement of

[68] Ricardo Pedro, *Contributo para o estudo da responsabilidade civil do Estado...,* p. 89ff.
[69] Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa: questões essenciais,* AAFDL, Lisboa, 2022, p. 74ff.

the requirement of damages, in particular the specialty test: that is to say, on the one hand, the discretion attributed to the judge in weighing up this requirement and, on the other hand, the requirement of proof incumbent upon the injured party with regard to the damage requirement may make the institute of civil liability under consideration here unbalanced - creating several escapes for the irresponsibility of the public body.

Furthermore, for those who, like us, insist on the loss of validity of the assumption of compensatory fault[70] and also the fact that the history of the Angolan legal system reveals a past of irresponsibility by public entities, one cannot fail to stress the need for prudence, so that the civil liability of public entities - as a pillar of the rule of law - is taken seriously and the violation of the provisions of Article 75(1) of the CRA is avoided.

Finally, Article 14(3) provides a special rule on the right of recourse. Thus, "[t]he right of recourse against magistrates is exercised in accordance with Article 6 of this Law and is incumbent upon the body competent for the exercise of disciplinary power, *ex officio* or on the initiative of the Public Prosecutor's Office or the Government body responsible for Justice".

This is a rule that applies to judicial magistrates and public prosecutors, clarifying that the decision to exercise the right of recourse against magistrates' rests with the competent body for the exercise of disciplinary power, *ex officio* or at the initiative of the Public Prosecutor's Office or the Government Body responsible for Justice. The letter of the law is controversial as to whether this right of recourse is mandatory or optional. Thus, on the one hand, it should be considered the reference to Article 6 of the Regime, which imposes a mandatory duty of return and, on the other hand, in the opposite direction, Article 14(3) of the Regime provides that "it is up to the competent body to exercise disciplinary power, ex officio or on its own initiative" seeming to inculcate the idea of optionality.

We tend towards the option that the right of compulsory return, either because of its relevance to the proper functioning of the administration of justice, or because of the burden on the public purse that its non-exercise represents, or because no practical reasons can be found for its non-exercise.

Finally, it should be stressed that the right of recourse plays an essential role here, insofar as, according to Article 14(1), direct civil liability of magistrates is not permitted.

[70] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça...,* p. 354ff.

7. Conclusions

The legal provision of a regime of civil liability of the State for damages caused by the administration of justice is the revelation of the concretion of another pillar of the rule of law, that is, the duty to compensate damages caused by violation of the right to effective jurisdictional protection.

Although the Regime dedicates a Chapter to this type of civil liability, the truth is that from its analysis it reveals some solutions that sometimes clash with the theoretical frameworks of the State's civil liability for the administration of justice and at other times may generate scenarios of irresponsibility - "The king can do no wrong".

Regarding the first scenario - *mismatch between the theory of civil liability of the State and the options of the legislator of the Regime* - the hypothesis provided for in Article 12(2) of the Regime stands out, which states that the regime of civil liability of the State for risk and for lawful acts provided for in the present diploma is still applicable to the damages caused by the administration of justice. The issue to be underlined here is that the risk theory is not the most appropriate for understanding the activity of the administration of justice, disregarding that the activity of the administration of justice is not very permeable to the risk and danger theory - as a rule, the administration of justice does not reveal "especially dangerous activities, things or administrative services". In addition, the illicit/lawful categories should be abandoned, and the Regime based on the concept of malfunctioning of the administration of justice, which absorbs the situations of illicitness and lawfulness that cause damage in this activity that aims to provide effective judicial protection.

Regarding the second scenario - *hypotheses of irresponsibility* - it should be noted that article 14(2) of the Regime subjects administrative and non-judicial acts of the Judicial Magistrates and of the Public Prosecutor's Office to the rules imposed by the liability of the administrative function and, on the other hand, that article 7(2) of the Regime provides that "[s]ave prejudice to the provisions of the previous number, compensation based on light blame will take place when there are special and abnormal damages". In short, according to the legislator, in situations of minor fault only special and abnormal damages can be compensated, that is, damages that affect a person or a group of people, without affecting the generality of people and damages that, exceeding the costs of life in society, merit, due to their gravity, the protection of the law. A consequence to be drawn from this legislative option is - considering that, under the terms of article 7(2) of the Regime, it is presumed that

the damage caused to a person or to a group of persons, without affecting the generality of persons and damages that exceed the costs of life in society, deserve the protection of the law. One consequence of this legislative option is - taking into account that, under the terms of article 7(2) of the Regime, slight negligence is presumed in the practice of unlawful legal acts (rebuttable presumption) - that civil liability for unlawful acts due to slight negligence will only arise in the event of special and abnormal damages, which, in addition to, in practical terms, removing the value of this presumption, raises doubts on the requirement of damages, in particular, the specialty test: that is, on the one hand, the discretion attributed to the judge in weighing up this requirement and, on the other, the requirement of proof incumbent on the injured party with regard to the damage requirement may make the institute of civil liability under consideration here unbalanced - creating several escapes for the irresponsibility of the State.

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