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DEVELOPMENTS ON ADMINISTRATIVE EXTRA-CONTRACTUAL CIVIL LIABILITY: THE NEW REGIME IN ANGOLA

DESENVOLVIMENTOS SOBRE A RESPONSABILIDADE CIVIL EXTRACONTRATUAL ADMINISTRATIVA: O NOVO REGIME EM ANGOLA*

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Abstract: This article addresses the new regime of administrative extra-contractual civil liability recently provided by the Angolan legislature. By providing for several modalities of administrative civil liability: for unlawful acts, in the context of the formation of public contracts and for risk, a fairly solid regime of reparation of damages caused by the State and other public legal persons was created. However, some of the legislative options deserve a critical theoretical treatment, in particular the legislative option that civil liability for administrative activity with light fault only covers special and abnormal damages and not all kinds of damages, thus leaving the injured party unprotected.

Keywords: Administrative civil liability. Civil liability for unlawful acts. Civil liability in the context of public procurement. Civil liability for risk.

Resumo: O presente artigo trata do novo regime de responsabilidade civil extracontratual administrativa previsto recentemente pelo legislador angolano. Por via da previsão de várias modalidades de responsabilidade civil administrativa: por factos ilícitos, no âmbito da formação dos contratos públicos e pelo risco, criou-se um regime bastante sólido de reparação de danos causados pelo Estado e outras pessoas coletivas públicas. No entanto, algumas das opções legislativas merecem um tratamento teórico crítico, com destaque para a opção legislativa de a responsabilidade civil pela atividade administrativa com culpa leve apenas cobrir os danos especiais e anormais e não todo o tipo de danos, ficando, assim, desprotegido o lesado.

Palavras-chave: Responsabilidade civil administrativa. Responsabilidade civil por facto ilícito. Responsabilidade civil no âmbito da formação de contratos públicos. Responsabilidade civil pelo risco.

1. Introduction

State extra-contractual civil liability is an institute that, on the one hand, represents a good indication of the rule of law - as its fundamental pillar - and, on the other, reveals a certain maturity of public law, since primary protection is not always sufficient to restore legality - requiring secondary protection, by way of reparation. Based on the idea of public civil liability, many legal systems - which now includes the Angolan legal system - have advanced with the provision of a regime that seeks to repair the damage caused by public authorities, on the one hand seeking to ensure that the injured party does not bear damages that, ultimately, for reasons of justice, he should not bear, and on the other hand seeking to promote better functioning of services and public activities. The provision of a regime of public civil liability is undoubtedly a good starting point for abandoning a past sustained by the (mistaken) idea that "*The King can do no wrong*".

It is in this brief context that the regime of civil liability of the State and other public legal persons, approved by Law No. 30/22, of 29 August (hereinafter the Regime), which regulates administrative civil liability, among other matters, must be understood. For a better understanding of this area of public activity, the legislator, in Article 1(2) of the Regime, offers a legal notion of administrative function, as corresponding to the exercise of the administrative function the actions and omissions that, regardless of the nature of the subject to whom they are imputed, have occurred under the rules of administrative law. Therefore, an administrative function is any activity regulated by administrative law, and the qualification of such public activity depends on the notion of administrative law[1].

The Regime provides for the civil liability of the State and other public legal persons, as well as for the civil liability of public servants and the civil liability of private persons performing administrative functions **(2)**; also provides for various forms of administrative civil liability: for unlawful acts **(3)**; in the context of the public procurement procedure **(4)**; and for risk **(5)**. In this study we will deal with the above regimes from a critical perspective, ending with the presentation of some brief conclusions **(6)**.

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[1] Diogo Freitas do Amaral/Carlos Feijó, *Direito administrativo angolano*, Almedina, Coimbra, 2016, p. 49ff; Pedro Costa Gonçalves, *Manual de direito administrativo,* I, Almedina, Coimbra, 2019, pp. 80ff; Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa: questões essenciais,* AAFDL, Lisboa, 2022, p. 31ff.

2. Civil liability of public entities, public servants and private persons performing administrative functions

The Regime, in accordance with the provisions of Article 1(5), first part, is applicable to the State and other public legal persons. Since the Regime does not distinguish, the Angolan administrative organisation must be considered, in addition to the State. Thus, within this scope, direct administration, indirect administration, autonomous administration (independent, local, traditional power institutions and public associations)[2].

The Regime, by imposition of Article 1(3), also regulates the civil liability of the holders of administrative bodies, officials, and agents and of all those who exercise subordinate functions in the context of public legal persons for damages arising from actions or omissions adopted in the exercise of administrative functions and because of such exercise.

Bearing in mind that the Regime regulates the civil liability of public authorities and public servants, with emphasis here on those who exercise administrative functions, it subsequently provides for the apportioning of liability between the State or other public legal persons and their servants.

Thus, civil liability is provided for (i) *exclusively* of the State, in the case of slight fault on the part of public servants (Article 7(1)) and in cases of abnormal service functioning (Article 7(3) and (4)), (ii) *directly* of the holders of organs, employees and agents in the scope of their functional performance, in the case of intentional misconduct or serious fault (Article 8(1)) and (iii) *jointly and severally* between the State and public servants, in the case of intentional misconduct or serious fault (Article 8(2)). This regime of solidarity of public entities is also, in accordance with the provisions of Article 8(3), applicable to public servants that exercise functions within the scope of public procurement procedures[3].

The distribution of roles between State and Society[4] has allowed, namely, the exercise of administrative functions by private parties. In this way, the latter emerge as responsible for the realisation of the common good. It is in this context of sharing responsibilities between public and

[2] Diogo Freitas do Amaral/Carlos Feijó, *Direito administrativo angolano...*, pp. 227ff.
[3] See point 4 *below*.
[4] Although they may be confronted as two ideal types - state action and (private) social activity - this is only useful insofar as they comply with functionally specific principles of action. The distinction thus remains rational as long as the distinction of their respective functions and roles is discovered. In this sense, Reinhold Zippelius, *Teoria geral do Estado*, Fundação Calouste Gulbenkian, Lisboa, 1997, p. 334. Insisting on the distinction, Michael Taggart, "The province of Administrative Law determined?" *in The Province of Administrative Law*, UK: Hart, Oxford, 1997, p. 4.

private that we can see the emergence of the distribution of tasks that were once identified with the State[5].

In this context, the provisions of Article 1(5), second part of the Regime extends the subjective scope of public extra-contractual civil liability, also applying to *private legal persons* that (and only when) perform public functions (and their employees, holders of corporate bodies, legal representatives, or assistants), i.e., in activities arising from the exercise of prerogatives that are regulated by provisions and principles of administrative law.

Associations, foundations, or other legal persons governed by private law, public limited companies and concessionaires may be covered on a case-by-case basis[6].

These legal persons governed by private law, acting in the exercise of a public function, are *directly* liable for damages caused by their functional performance.

However, and despite the lack of a literal element in this sense, the State cannot be completely exempt from responsibility, that is, if there is no patrimony capable of covering the damages caused it must operate, as a rule, a subsidiary civil responsibility with a subsequent right of return[7].

This should be the case because the replacement of the State in the tasks now given to the private sector is accompanied by a new guarantee of proper performance of those tasks, valuing the control activity of the private sector, which must comply with rules that do not jeopardise the public interest of good administration. On the one hand, one cannot in any way consider that this is an area abandoned by the State, since the admission of the exercise of public activities by private parties is not synonymous with the reduction of public law regulation.

On the other hand, to guarantee the fulfilment of public tasks, it is necessary to reinforce the activity of the *vigilant State*[8] with a view to an effective control of the private parties' activity. At this point, it should be established that the civil liability that may be incurred by the State results from the duty of guarantee imposed on the State due to the constitutional incumbency of a public task.

[5] Of course, this distribution of tasks does not, as a rule, eliminate the State's responsibility for the results, only reducing the responsibility for execution, requiring, on the other hand, the supervision of the tasks now handed over to the private sector.

[6] For further developments, see Miguel Assis Raimundo, "Responsabilidade de entidades privadas submetidas ao regime da responsabilidade pública", *Cadernos de Justiça Administrativa,* no. 88, July-August 2011, pp. 23-36. More recently, see Miguel Assis Raimundo, "Anotação ao artigo 1.º", *in O regime de responsabilidade civil extracontratual do Estado e demais entidades públicas: comentários à luz da jurisprudência,* Carla Amado Gomes, Ricardo Pedro, Tiago Serrão (Coord.), AAFDL, Lisboa, 2022, pp. 325ff.

[7] Walter Frenz, *Die Staatshaftung in den Beleihungstatbestaenden*, Duncker & Humblot, Berlin, 1992, p. 229; Munoz Machado, *La responsabilidad civil concurrente de las administraciones públicas,* Civitas, Madrid, 1992, p. 135; Ricardo Pedro, *Estudos sobre administração da justiça e responsabilidade civil do Estado,* AAFDL, Lisboa, 2016, p. 15.

[8] Terminology used, among others, by Ricardo Rivera Ortega, *El Estado vigilante*, Tecnos, Madrid, 2000, *passim.*

3. Liability for unlawful acts

Administrative extra-contractual civil liability for unlawful acts is understood by analysing the various assumptions for compensation that make it up. Let us look at each of these assumptions.

3.1 Illegality

Article 9(1) of the Regime presents a legal notion of *illegality*, broken down into two dimensions, one relating to *conduct* and the other to the *result*. Thus, the first dimension will be verified if the actions or omissions of the holders of bodies, officials, and agents: (i) violate constitutional, legal or regulatory provisions or principles, or (ii) breach technical rules or objective duties of care. Cumulatively, there must be unlawfulness of result, which is embodied in the offense of legally protected rights or interests[9].

According to the provisions of Article 9(2) of the Regime, the *unlawfulness* requirement is also fulfilled as soon as there is an offence to legally protected rights or interests resulting from the abnormal functioning of the service. According to the latter innovation, the public entity is also liable when the damage has not (i) resulted from the concrete conduct of a specific body, official or agent, or (ii) the personal authorship of the action or omission cannot be proven but must be attributed to *the abnormal functioning of the service* (Article 7(3) of the Regime).

An abnormal performance of the service occurs when, considering the circumstances and the average standards of result, the service could reasonably be required to act in such a way as to avoid the damage caused (article 7(4) of the Regime), i.e., when the service performed badly as a whole, due to anonymous or collective fault (*faute du service*[10]), generating direct liability of the public body.

This requirement, which is outside the concept of fault and shifts the centre of imputation to the operation of the service, has not been unanimously understood. For some authors, it is an

[9] Margarida Cortez, *Responsabilidade civil da Administração por actos administrativos ilegais e concurso de omissão culposa do lesado*, Stvdia Iuridica n.º 52, Coimbra Editora, Coimbra, 2000, pp. 50ff.
[10] Maria José Rangel de Mesquita, *O Regime da Responsabilidade Civil Extracontratual do Estado e Demais Entidades Públicas e o Direito da União Europeia,* Almedina, sl, 2009, p. 21.

unlawful result[11], while for others, it is an *anonymous, collective, or internal organizational fault*[12] and for still others, it is an *unlawful service*[13].

The characterisations of objectivisation of this regime call into question the assertion that we are facing a civil liability for unlawful and culpable act, with some doctrine considering that we are facing *a practically objective liability*[14].

The State and other legal persons shall cease to be liable whenever a *cause for exclusion of liability is found*. The reasons for exclusion of liability may result from the interruption of one of the two links of imputation: imputation of the fact to the agent and imputation of the damage to the fact. We will only highlight the first hypothesis because it is the most common in our doctrine and because the second may, in many situations, be resolved through the figure of the guilt of the injured party.

Although these causes do not expressly (and generally) result from the Regime, they emerge from the harmonious treatment of liability in the context of the unity of the entire legal system. These causes may affect the *unlawfulness*[15], in particular, when:

(i) the public servant is in the performance of a duty;

(ii) the public servant is in a state of need;

(iii) there is the consent of the injured party;

(iv) the public servant is acting in self-defence.

That said, and even though the illicitness requirement is not met, liability for a lawful act can occur[16].

3.2 Fault

The requirement of *fault* emerges as one of the most difficult elements to ascertain. The legislator, in Article 10(1) of the Regime, presents an anthropomorphic concept of justice

[11] Mário Aroso de Almeida, "Anotação ao artigo 7.º", *in Comentário ao Regime da Responsabilidade Civil do Estado e Demais Entidades Públicas,* Universidade Católica Editora, Lisboa, 2013, pp. 223ff, although this Author understands that we are facing an illicit and culpable responsibility.

[12] Ana Pereira de Sousa,"A culpa do serviço no exercício da função administrativa", *Revista da Ordem dos Advogados*, n.º 1, 2012, pp. 335ff.

[13] Margarida Cortez, *Responsabilidade civil da Administração*…, p. 94.

[14] Carla Amado Gomes, "Nota breve sobre a tendência de objectivização da responsabilidade civil extracontratual das entidades públicas no regime aprovado pela Lei 67/2007, de 31 de Dezembro", *in* CEJ, Responsabilidade Civil do Estado, *e-book,* 2014, p. 89.

[15] Michel Paillet, *La responsabilité administrative,* Dalloz, Paris, 1996, pp. 47-54.

[16] Paulo Otero, "Causas de exclusão da responsabilidade civil extracontratual da administração pública por facto ilícito", *in* Jorge Miranda (Eds), *Estudos em Homenagem ao Prof. Doutor Sérvulo Correia*, Coimbra Editora, Lisboa, 2010, pp. 965ff.

personified in the exerciser of public functions, clarifying that the guilt of the holders of bodies, employees and agents should be assessed by the diligence and aptitude that can reasonably be required, according to the circumstances of each case, of a zealous and compliant holder of a body, employee or agent.

The configuration of the guilt requirement - imported from the general theory of civil law liability and modeled for administrative law - reveals some notes of objectivation of that concept. These notes, which the legislator of the Regime has come to formalize either by admitting a presumption of slight fault in the practice of unlawful acts (Article 10(2) of the Regime), or by providing for a presumption of fault whenever there has been a breach of supervisory duties (Article 10(3) of the Regime) or by the admission of *abnormal functioning of the service* (Article 7(3)(4) of the Regime)[17].

Still in the context of the fault requirement, or rather, of the effects of this requirement in the regime of public non-contractual civil liability, it is important to bear in mind the provisions of Article 10(4), which provides that "[w]hen there is more than one person liable, the provisions of Article 497 of the Civil Code shall apply". For these purposes, Article 497 of the Civil Code, under the heading "Joint and several liability", provides that "1. If several persons are responsible for the damage, they shall be jointly and severally liable. 2. The right of return between those responsible shall exist to the extent of their respective faults and the consequences resulting therefrom, the fault of the persons responsible being presumed equal".

In other words, all persons (natural and legal) who have contributed to the emergence of the damage are jointly and severally liable - within the scope of external relations. The plurality of responsible persons includes - as already stated in Article 7(1)(2) of the Regime - the various public servants, and all the public entities involved or third parties[18].

Within the scope of internal relations, the right of recourse[19] is dependent on the degree of fault of each of the persons responsible.

The discharging causes of liability may also focus on the *fault* requirement, such as:

(i) excusable error or

(ii) excusable state of necessity.

However, in the light of the increasingly less-impressive character of the fault requirement, these last two causes of exclusion become less relevant, and may imply, in some

[17] On the context of administration of justice, see Ricardo Pedro, State liability for administration of justice in Angola: "the King can do wrong"?, *Lex Humana (ISSN 2175-0947)*, 2023, *15*(1), pp. 90-117.

[18] Rui Medeiros, "Anotação ao artigo 10.º", *in Comentário ao Regime da Responsabilidade Civil do Estado e Demais Entidades Públicas,* Universidade Católica Portuguesa, Lisboa, 2013, p. 291 and 292.

[19] On the right of recourse, see Ricardo Pedro, *Introdução à responsabilidade civil extracontratual pública angolana e à sua efetivação,* Lisboa, AAFDL, 2023, pp. 83ff.

situations, to be determined on a case-by-case basis, the irresponsibility of the public servant, but not that of the State[20].

3.3 Damage

The Regime further clarifies, as a rule, in Article 3(3), that the damages to be considered are property damages and non-material damages, emergent damages and ceasing profits, as well as present and future damages, in the general terms of the Law. In referring to the "general terms of the law", two models of compensation are adopted, the *reparation in integrum of* property damages (Articles 562 and following of the Civil Code) and the compensation of non-property damages (Articles 494 and 496 of the Civil Code).

If the nature of the damaged patrimonial assets allows an easier evaluation, by means of pecuniary equivalence, the nature of the damaged non-material assets brings the difficulties inherent to the lack of this equivalence in money. This lack of equivalence means that the non-material damage cannot be compensated, much less *in integrum,* but can be compensated. The aim with the compensation of non-pecuniary damages is "*to attenuate a consummated evil, knowing that the pecuniary composition may serve to satisfy the most varied needs*"[21]. This bifurcation of compensation models, despite benefiting from common principles, is materialized in the legal system under analysis with distinct regimes, namely in the quantification of the measure of damage.

As regards the latter - non-pecuniary damage - and as already analysed, the criteria that guide the judge's equity should suffer the necessary adaptations that the civil liability of the State and other public entities requires.

Article 7(2) of the Regime provides that "[w]ithout prejudice to the provisions in the preceding paragraph, compensation based on minor fault shall be provided where 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".

[20] Marcelo Rebelo de Sousa/André Salgado de Matos, *Responsabilidade civil administrativa*, Lisboa, Dom Quixote, 2008, pp. 21ff.
[21] Antunes Varela, *Das Obrigações em Geral,* Vol. I, 10.ª Ed., Almedina, Coimbra, 2000, p. 604.

With this option, the legislator invests in a distinct solution from the comparative law[22] 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 10(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 10(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: 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[23] 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 Constitution of the Republic of Angola is avoided.

De *iure condendo* and contrary to the solution provided in article 7(2) of the Regime, the slight fault must have relevance in the civil liability of the public servant and not in the civil liability of the State. The concern should focus on the injured party and not the injured party, under penalty of reducing the guarantee of indemnity for the injured party, since the institute of public civil liability aims above all to repair the damage suffered by the injured party and not (so much) to sanction the injured party (as in fact is understood, to the extent that for light fault only the State and not the civil servant is liable, under the terms of Article 7(1) of the Regime).

[22] Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa: questões essenciais,* Lisboa, AAFDL, 2022, pp. 74ff.
[23] Ricardo Pedro, *Responsabilidade civil do Estado pelo mau funcionamento da administração da justiça: fundamento, conceito e âmbito,* Lisboa, Almedina, 2016, pp. 354ff.

3.4 Causal link

Regarding the assumption of *causality*, the Regime has no provision, it may be understood that it is implicit in Articles 7(1) and 8(1) of the Regime when it refers to damages arising from culpable unlawful acts. From a positive law point of view, the wording of Article 563 of the Civil Code elects the *theory of adequate causation*, according to which a condition of the damage will no longer be considered a cause of the damage whenever it is completely indifferent to the production of the damage and has only become a condition of the damage by virtue of other extraordinary circumstances.

For damage to be considered as an appropriate effect of a certain fact, it is not necessary that it be foreseeable by the perpetrator of that fact in view of the circumstances known or recognizable by him. Naturally, if liability depends on the tortfeasor's fault, the foreseeability of the event giving rise to liability is indispensable, but it is not required that subsequent damage be foreseeable[24]. The assessment of this foreseeability, which does not dispense with the notion of ontological causality, is made by means of a virtual prognosis judgment formulated after the occurrence of the voluntary fact and the result (posthumous prognosis)[25].

4. Civil liability within the framework of public procurement procedures

The Regime also provides, in Article 8(3), that the actions or omissions that result from the violation of a rule occurred in the scope of the contract formation procedure referred to in pre-contract litigation, provided in articles 121 to 124 of the Administrative Litigation Procedure Code[26], the rule of joint and several liability of the public entity with the public servant is applied; of course, whenever a functional performance is at stake.

The referred rule considers that in the scope of the administrative function, the regime provided for the compensation of damages caused in the scope of the formation of public contracts assumes particular importance. This is a matter which benefits from a diversified dogmatic treatment[27] and which raises some doubts. We highlight one of them.

[24] Antunes Varela, *Das Obrigações em Geral,* Vol. I, 8.ª Ed., Almedina, Coimbra, 1994, p. 908ff.
[25] See Marcelo Rebelo de Sousa/André Salgado de Matos, *Responsabilidade civil administrativa…,* p. 31.
[26] Approved by Law No. 33/22, of September.
[27] Ricardo Pedro, *Estudos sobre administração da justiça...,* pp. 18ff.

The doubt concerns the question of which regime applies: a regime of objective civil liability or a regime of subjective civil liability? In summary, the distinction between the first and second regime resides in the level of requirement of the attribution of the fact to the awarding entity - while in the first regime it is required that the breached legal rule aims to attribute rights to individuals and its violation is sufficiently characterised, in the second regime (according to some doctrine) mere illegality is sufficient and no culpable conduct is required.

Despite the different dogmatic configurations - with direct reflections on the characterization of some requirements - that can be admitted for the understanding of this type of liability, it is certain that none of them dispenses with the treatment of the classic concepts of liability: *damage* and *causal link* - without prejudice to recognizing their specificities.

The damage requirement can be understood in the logic of classical civil liability, which aims to compensate the damage suffered by the injured party.

The *causal link* requirement, also according to the classical doctrine, follows the theory of appropriate causation. However, it cannot be overlooked that some doctrine tends to autonomize the *loss of opportunity*[28] of the award as the most suitable theory (of objective imputation) - of causation and/or damage - for the compensation of damages caused in the context of the formation of public contracts[29].

Without prejudice to the above, and in the absence of other interpretative elements, the regime of administrative civil liability for unlawful acts should be applied in a subsidiary manner.

5. Civil liability for risk

5.1 Introduction

Liability for risk is understood in a context of created and maintained danger (*ubi emolumentum, ibi onus*) and finds its justification in the social utility of the activity in question[30].

Liability for risk is provided for in Article 11 of the Regime. This type of liability is no longer based on the concept of fault, but on the concept of *risk/danger*. Although the heading of

[28] On loss of opportunity, among others, see Ricardo Pedro, "Nota ao acórdão do Supremo Tribunal Administrativo (formação de apreciação preliminar da secção do contencioso administrativo), de 10 de Julho de 2014, proc. n.º 0783/14: *Novas interrogações! Novas soluções?", Revista do Ministério Público,* n.º 139, julho-setembro de 2014, pp. 267-277.
[29] Rui Cardona Ferreira, *Indemnização do interesse contratual positivo e perda de chance: em especial, na contratação pública*, Coimbra Editora, Lisboa, 2011, pp. 344ff.
[30] Pietro Trimarchi, *Rischio e responsabilità oggetiva,* Giuffrè, Milan, 1961, p. 43.

Article 11 of the Regime refers to liability for risk, the body of the text refers to danger: "*damage arising from particularly dangerous activities, things or administrative services*".

The Regime follows the solution of other legal systems, by providing the adverb *especially* and not *exceptionally* dangerous[31]. On the other hand, the Regime reaffirms that this regime applies not only to public entities but also to private legal persons in the exercise of administrative functions and that the compensation may be reduced or excluded whenever the injured party is at fault.

5.2. Assumptions

It should be noted that the Regime does not presuppose the existence of *special* and *abnormal* damages as a condition for compensability (such requirements qualifying the damage as being based on the sustainability of the public budget, allowing jurisprudence to distinguish between damage worthy of compensation and the rest).

Under the regime, *all* damages are compensable, regardless of their special or abnormal nature.

In addition to the assumption of damage, the causal connection between the activity, thing or especially dangerous administrative service and the damage must be verified, in compliance with the provisions of Article 563 of the Civil Code.

The emphasis should be centred on the assumption of *special dangerousness*. It is important to clarify that the Regime does not present a legal notion for this, so the task of qualifying it should be left to the judge.

Therefore, it will always be a concrete analysis and in the light of the circumstances of the concrete case, even if certain public activities are more permeable to this type of civil liability, as is the case with the military and police.

Despite the relevance that the dangerous *result* may have in the qualification required by Article 11(1), everything seems to concur in the sense that the emphasis should be on the *process*[32].

5.3. Limitation of liability

Although there are no legal restrictions regarding the compensability of damages, in accordance with the provisions of Article 11(1), 2nd part of the Regime, when determining the

[31] Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa...,* pp. 82ff.
[32] Carla Amado Gomes, "Anotação ao artigo 11.º", *in O regime de responsabilidade civil extracontratual do Estado e demais entidades públicas: comentários à luz da jurisprudência,* Carla Amado Gomes, Ricardo Pedro, Tiago Serrão (Eds), AAFDL, Lisboa, 2022, pp. 775ff.

quantum of compensation, there may be a reduction or exclusion of the compensation, if it is proved that there was force majeure or concurrent fault of the injured party[33].

In this context, the cause of exclusion of *force majeure* deserves an additional note. Under the design of exclusion of causality there emerges the figure of force majeure *("damnum fatale")* which, although expressly provided for in Article 11(1), 2nd part, regarding civil liability for danger, should also be extended to civil liability for unlawful acts[34].

In the context of public tort, the effect of force majeure is that damages arising from events or circumstances that could not have been foreseen or avoided according to the state of science or technology at the time of their occurrence are not compensable.

In short, this *would be an unforeseeable and inevitable event caused by a cause beyond the control of the agent in question*. This exclusion of compensation would be justified by the fact that in such contexts it could be considered that the damage was not really caused by the actions of public services - which are beyond human control - but by the event constituting force majeure[35].

In addition, Article 11(2) provides that "[w]hen the number of injured parties is such that a limitation of the obligation to compensate is justified for reasons of special public interest, the obligation to compensate may be limited to an amount equitably lower than that corresponding to full compensation for the damage caused".

In other words, the legislator provides for three requirements - based on indeterminate concepts - for the limitation of the scope of the obligation to compensate: (i) a considerable number of injured parties; (ii) reasons of public interest of special relevance; (iii) justification for the limitation of the obligation to compensate.

Finally, in accordance with the provisions of Article 11(3) of the Regime, the State's civil liability for risk may be shared if a third party has been at fault. In this case, the State is jointly and severally liable with the third party, without prejudice to the right of recourse.

Insofar as it is assumed that the legislator has been able to express it, this joint and several liability, *de iure condito,* should only arise in the event of the *fault of a* third party and not in the case of an alternative concept such as *risk* or *danger* caused by a third party[36].

[33] On the figure of the fault of the injured party, see Ricardo Pedro, *Introdução à responsabilidade civil*..., pp. 79ff.
[34] Paulo Otero, "Causas de exclusão da responsabilidade civil extracontratual...", pp. 981ff.
[35] Gabriel Domenech Pascual, "Responsabilidad patrimonial del Estado por la gestión de la crisis del COVID 19", *El cronista del Estado Social y de Derecho*, no. 86/87, Marzo/April 2020: Corona virus y otros problemas..., p. 105, available at: http://www.elcronista.es/El-Cronista- número-86-87-Coronavirus.pdf, consulted on 1 October 2022.
[36] Carlos Alberto Fernandes Cadilha, *Regime da responsabilidade extracontratual do Estado e demais entidades públicas: anotado*, Lisbon, Coimbra Editora, 2008, p. 180; in a different sense, Marcelo Rebelo de Sousa/André Salgado de Matos, *Responsabilidade civil administrativa*..., p. 40.

6. Conclusions

The new regime of administrative non-contractual civil liability represents a very relevant step in the realisation of the rule of law in Angola, to the extent that the rule that damages caused by public entities would never merit public compensation is set aside.

In general, and in line with the options of comparative law, the Angolan legislator provides several modalities for administrative civil liability that are virtually capable of ensuring the reparatory guarantee imposed by Article 75 of the Constitution of the Republic of Angola.

Notwithstanding the above, the solution provided in Article 7(2) of the Regime reveals to be a matter of concern, by providing that the compensation based on light fault will take place when there are special and abnormal damages. Due to this option, in situations of light fault, only special and abnormal damages can be compensated, that is, those that affect a person or a group, without affecting the generality of people and damages that, exceeding the costs of life in society, deserve, due to their gravity, the protection of the law. Thus, the legislator with this option invests in a distinct solution of the comparative law giving relevance to the ethical-legal censure of the performance of the public servant, while reduces the guarantee of compensation of the injured and, with this, disregards the reparatory dimension of the institute of civil liability of public entities.

This is a legal solution which, in our opinion, deserves greater *de iure condendo* attention. This is because slight fault should, on the one hand, have relevance in the civil liability of the public servant and not in the civil liability of the State and, on the other hand, should not be limited to the scope of special and abnormal damages, but should cover all types of damages. Attention must focus on the injured party and not on the injured party, failing which the guarantee of compensation for the injured party will be reduced, since the institute of public civil liability aims above all to repair the damage suffered by the injured party and not (so much) to sanction the injured party.

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