Synesis, v. 15, n.3, 2023, ISSN 1984-6754

STATE OF ADMINISTRATIVE NECESSITY AND PUBLIC COMPENSATION: LIABILITY FOR LAWFUL ACTS AND COMPENSATION FOR SACRIFICE IN ANGOLA

ESTADO DE NECESSIDADE ADMINISTRATIVA E INDEMNIZAÇÃO PÚBLICA: A RESPONSABILIDADE POR ACTOS LÍCITOS E A INDEMNIZAÇÃO PELO SACRIFÍCIO EM ANGOLA

RICARDO PEDRO
Centro de Investigação de Direito Público (CIDP) - Faculdade de Direito da Universidade de Lisboa, Portugal
r.lopesdinis@gmail.com

Received: 11 Jan 2023
Accepted: 30 Apr 2023
Published: 13 May 2023

Abstract: This article analyses the new Angolan legal framework regarding the state of administrative necessity with emphasis on the regime of public compensation that should be invoked in these situations of legal exceptionality. This framework includes a legal notion of a state of administrative necessity and a regime of public compensation for damages caused by public actions in a state of necessity. The regime of civil liability for lawful acts and the obligation to compensate for the sacrifice imposed on individuals are explored, as well as the causes of exclusion of extra-contractual public civil compensation, particularly in a state of administrative need, making a critical analysis of the recent solutions adopted by the legislature.

Keywords: State of administrative necessity. Public compensation. Civil liability for lawful acts. Compensation for sacrifice. Grounds for excluding public compensation.

Resumo: O presente artigo analisa o novo quadro jurídico angolano referente ao estado de necessidade administrativa com destaque para o regime de indemnização publica que deve ser convocado nestas situações de excecionalidade jurídica. Este quadro inclui uma noção legal de estado de necessidade administrativa e um regime de indemnização pública pelos danos causados por atuações públicas em estado de necessidade. Explora-se o regime da responsabilidade civil por atos lícitos e da obrigação de indemnizar pelo sacrifício imposto aos particulares, assim como as causas de exclusão da indemnização civil pública extracontratual, em particular, em estado de necessidade administrativa, fazendo-se uma análise crítica das recentes soluções adotadas pelo legislador.

Palavras-chave: Estado de necessidade administrativa. Indemnização pública. Responsabilidade civil por atos lícitos. Indemnização pelo sacrifício. Causas de exclusão da indemnização pública.

1. Introduction

The state of administrative necessity has gained great notoriety with the pandemic caused by COVID-19, triggering a series of challenges for States around the world and requiring rapid and energetic responses to protect the health and life of the population. Therefore, the state of administrative necessity has been invoked by several administrative authorities as a justification for the adoption of restrictive measures, such as mandatory confinement, prohibition of crowds, closure of commercial establishments and the mandatory wearing of masks.

In this context, issues regarding the possible compensation for damages caused in this state of need scenario assume special importance, particularly considering that in Angola a legal notion of administrative state of need and a new public compensation regime with specific references to compensation for damages caused by public actions in a state of need have recently been approved.

Thus, it becomes essential to analyse this new legal framework in particular with regard to civil liability for lawful acts and the possible obligation to compensate for the sacrifice imposed on individuals. For this purpose, the state of administrative necessity is framed in the broader context of public legal regimes of exceptionality (2); the regimes of extra-contractual public civil indemnity, in particular, liability for lawful acts and compensation for sacrifice provided for by the Angolan legislator are analysed (3); the regime of compensation for sacrifice in the context of a state of necessity is critically discussed (4); the causes of exclusion of non-contractual public civil indemnity are also addressed, with emphasis on the administrative state of necessity (5) and, finally, some brief conclusions are presented (6).

2. State of administrative necessity

The state of administrative necessity is part of the broader context of public legal regimes of exceptionality (alongside the regimes of normality)[1]. It should be noted that the

[1] It follows the line of research advanced in: Ricardo Pedro, "Traços gerais da indemnização civil extracontratual pública em contextos de excecionalidade", *in Impactos da Pandemia da Covid-19 nas Estruturas do Direito Público,* Carlos Blanco de Morais, Miguel Nogueira de Brito, Miguel Assis Raimundo (Eds), São Paulo: Almedina, 2022, pp. 379-413.

admission of these regimes is not a novelty - before all times[2] -, just looking at the Latin brocardo "*Necessitas non habet legem, sed ipsa sibi facit legem*". It was this brocardo that justified extraordinary powers in Roman law, exercisable in cases where it was necessary to address an unforeseeable situation that required an immediate action decision, without the possibility of postponement.

The need for exceptional legality and, therefore, its mobilisation, has become more evident in recent times. The configuration of the current *risk society*[3] and the fact that we live in a *globalised world* (economically and socially[4]) in which, despite the physical distance, everything seems to be close by, as shown by the health crisis caused by the outbreak of COVID-19 - which within a few months spread from its place of origin (China - city of Wuhan) to the whole world.

In the face of calamities of this type, public law *could not* and *cannot* remain indifferent. In other words, in view of the damaging effects that public calamities represent for the "*salus populi",* it is easily understandable that the public entities have to use all the means at their disposal to restore normality[5]. Therefore, in order to guarantee the *rule of law,* it is essential to foresee regimes that have the *necessary flexibility to meet the public interests that are threatened* -

2 Among many, see Carlos Blanco de Morais, *O estado de excepção,* Lisboa: Cognitio, 1984, *passim*; Vittorio Angiolini, *Necessita ed emergenza nel diritto pubblico,* Padova, CEDAM, 1986, *passim*; Pietro Pinna, *L'emergenza nell'ordinamento costituzionale italiano,* Milano: Giuffre, 1988, *passim*; António Damasceno Correia, *Estado de sítio e de emergência em democracia,* Lisboa: Vega, 1989, *passim*; Fernando Paulo da Silva Suordem, "Os estados de excepção constitucional: problemática e regime jurídico", *Scientia iuridica,* Braga, t.44n.256-258(Jul.-Dez.1995), pp. 246ff; Vicente Alvarez Garcia, *El concepto de necesidad en derecho publico*, Madrid: Civitas, 1996, pp. 31ff; Jorge Bacelar Gouveia, *O Estado de excepção no direito constitucional: entre a eficiência* e a *normalidade das estruturas de defesa extraordinária da Constituição*, Coimbra: Almedina, 1998, 2 volumes, *passim*; José Manuel Sérvulo Correia, "Revisitando o estado de necessidade", *in Estudos de Direito Público,* I, Francisco Paes Marques, José Duarte Coimbra, Tiago Fidalgo de Freitas (Eds), Coimbra: Almedina, 2019, pp. 135-162; AA. VV., *Direito administrativo de necessidade e de excepção,* Carla Amado Gomes, Ricardo Pedro (Eds), Lisboa: AAFDL, 2020, *passim*; Jorge Bacelar Gouveia, *O estado de exceção na constituição da República de Angola de 2010*, CEDIS, 2020. Accessible at: https://research.unl.pt/ws/portalfiles/portal/17978918/CEDIS_working_papers_DSD_JBG1.pdf consulted on 2 March 2023.

3 Cf., among many others, Ulrich Beck, *Risikogesellschaft: Auf dem Weg in eine andere Modern*, Suhrkamp Verlag KG, 1986, *passim*; Z. Bauman, *La società dell'incertezza,* Bologna: Il Mulino, 1999, *passim*; Carla Amado Gomes, *A prevenção à prova no Direito do Ambiente,* Coimbra: Coimbra Editora, 2000, pp. 15ff; S. Cassese, *La crisi dello Stato,* Roma - Bari: Laterza, 2001, *passim*; A. G. Freitas Martins, *O Princípio da Precaução no Direito do Ambiente*, Lisbon: AAFDL, 2002, pp. 12ff.; Z. Bauman, *Modernità liquida,* Rome-Bari: Laterza, 2002, *passim*; Carla Amado Gomes, «Dar o duvidoso pelo (in)certo? Reflexões sobre o "princípio da precaução"», *in textos Dispersos de Direito do Ambiente*, Lisboa: AAFDL, 2005, pp. 147ff; S. Cassese, *Oltre lo Stato,* Rome-Bari: Laterza, 2006, *passim*; W. Sofsky, *Rischio e sicurezza,* Torino: Einaudi, 2005, pp. 16ff.

4 We can also think of the risk of terrorist attacks, aggravated by the great mobility of people and the enormous communication possibilities offered by telematics, which force contemporary States to seek a difficult balance between security and freedom, between the protection of acquired rights and the emergence of new rights and social demands, keeping firm the constitutional principles and guarantees. On globalization in general, see Serge Latouche, *L'occidentalizzazione del mondo,* Turin: Bollati Boringhieri, 1992, *passim*; Jeremy Brecher/Tim Costello, *Contro il capitale globale,* Milano: Feltrinelli, 1996, *passim.*

5 Vicente Alvarez Garcia, *El concepto de necesidad*..., pp. 49ff.

regimes that enable the response to states of public need, or in other words, public law regimes of exceptionality.

In a framework of *real normality*, public law is governed by the principle of legality (juridicity) of public action - to which corresponds, therefore, a framework of *legal normality*. The problem arises whenever reality temporarily changes radically, creating situations of imminent or real danger to the community and in which the public law of normality does not offer an adequate response. By imposing the idea of *maintaining* the democratic rule of law, the need arises *for exceptional legality regimes to* come into play - "*jus extremae necessitatis*" - so that in the short term normality is restored and the legality regimes of normality reappear.

These exceptional legality regimes, which reveal *exceptional public powers*[6], on the one hand, *make certain public actions lawful which,* in normal legality contexts, would be unlawful. On the other hand, in order to face situations of states of exceptionality, they may create situations of inequality between citizens and, in particular, by imposing, for example, *special burdens on the agents of certain sectors of private economic or social activity* which are better placed to assist in the response to the elimination of the temporary context of exceptionality. Finally, it is not uncommon to add that in these exceptional contexts, the public entities are obliged to support the populations and companies most affected by the public calamity, granting support of various kinds (financial, fiscal, etc.)[7], either for reasons of solidarity or for reasons of economic promotion. This support should be considered when awarding any compensation for the sacrifice suffered.

The pandemic situation caused by COVID-19 represents one of these situations of "public need"[8] or "state", which emerges as a source of law[9] in the sense that the public powers must act under a normativity that is appropriate to the exceptional situation, under penalty of the delay in public action revealing the inability of the public powers to respond adequately to the protection of public interests in crisis[10].

That is, situations of exceptionality dictate their own legality, requiring the competent public powers to respond appropriately, replacing the "legality of normality" by a "legality of exceptionality". The state of public necessity is covered by the idea of law, by a

6 Among many, see José Manuel Sérvulo Correia, "Revisitando o estado de necessidade...", pp. 135-162.
7 On some of these types of support, see Ricardo Pedro, *Fundos Europeus Estruturais e de Investimento e Auxílios Públicos: Estudos de Direito Administrativo Nacional e Europeu,* Lisboa: Almedina, 2020, *passim.*
8 Vicente Alvarez Garcia, *El concepto de necesidad...*, pp. 31 and following.
9 Vittorio Angiolini, *Necessita ed emergenza nel diritto pubblico...*, pp. 86ff.
10 Underlying it is the idea that public authorities must ensure the functions for which they were created, even if this is not covered by a positive law. In this sense, see Vicente Alvarez Garcia, *El concepto de necesidad...*, p. 299.

principle of legality[11], from the outset, by the provisions of Article 198(1) of the Constitution of the Republic of Angola (hereinafter CRA or Constitution), which often enables action to be taken without the mediation of the law.

What is at stake is an alternative legality[12], an exceptional legality[13], *rectius, a juridicity* of exceptionality[14] - a *substitutive and temporary juridicity* - to which the Administration (and remaining public powers) "are subjected, in a state of necessity, to a broader, but paradoxically more rigorous, form of legal action - obedience to the Law or to the idea of Law emanating from the legal system as a whole"[15].

This substitute juridicity may result from the application of some general principles of public action foreseen in the Constitution, through immediate obedience to the Constitution without the need for legislative mediation or in compliance with the state of administrative necessity foreseen in Article 15 of the Administrative Procedure Code (CPA)[16]-[17] and when the state situation of necessity has been formally declared, it will result from the regimes created for this purpose, as happens in cases of states of emergency or siege or public calamity.

3. Public civil compensation, in particular liability for lawful acts and compensation for sacrifice

3.1 Public civil compensation

The legal regime of liability of the State and other public legal persons (hereinafter the Regime)[18] provides for several regimes of public compensation. Focusing attention only on the administrative function, the regime of liability for tort (Articles 7 to 10), liability for risk (Article 11) and, although applicable to all public functions and therefore also to the administrative one, the regime of liability for lawful acts and compensation for sacrifice

11 Diogo Freitas do Amaral/Maria da Glória F. P. D. Garcia, "O estado de necessidade e a urgência em direito administrativo", *Revista da Ordem dos Advogados,* Lisbon, a.59 n.2 (Apr. 1999), p. 482.
12 Paulo Otero, *Legalidade e Administração Pública: o sentido da vinculação administrativa à juridicidade*, Coimbra: Almedina, 2003, p. 998; Juliana Gomes Miranda, *Teoria da excepcionalidade administrativa: a juridicização do estado de necessidade,* Belo Horizonte: Fórum, 2010, p. 116.
13 José Manuel Sérvulo Correia, "Revisitando o estado de necessidade...", p. 139.
14 José Manuel Sérvulo Correia, *Legalidade e autonomia contratual nos contratos administrativos*, Lisboa: Almedina, 1987, pp. 283 and 768.
15 Diogo Freitas do Amaral/Maria da Glória F. P. D. Garcia, "O estado de necessidade...", p. 462.
16 Approved by Law no. 31/22 of 30 August.
17 Or through other regimes, such as those provided for in Law 17/91 of 11 March (Law on the State of Siege and State of Emergency).
18 Approved by Law 30/22, of 29 August. On this regime in general, see Ricardo Pedro, *Introdução à responsabilidade civil extracontratual pública angolana e à sua efetivação*, Lisboa: AAFDL, 2023, and as regards civil liability for the administration of justice, see Ricardo Pedro, State liability for administration of justice in Angola: "the King can do wrong"?, *Lex Humana,* v. 15, n. 1, 2023, pp. 90-117.

(Article 16) is regulated. Without prejudice to what will be referred to below, if public actions violate the limits of the state of exception/necessity, there may be civil liability for violation of the legality of exceptionality. That is, *the regime of civil liability for unlawful acts may come into play*, since the exceptionality legality only has the power to "*legalize*" the illegalities directly caused by the actual exceptionality and not the culpable illegalities[19] or, if you prefer, the *subjective exceptional situations,* i.e. created by the public servant by his fault or by the fault of the service.

Situations which, in the correct framing of the administrative state of necessity, lead to the state of necessity being ruled out if it is created by the Administration - constituting a negative requirement of the administrative state of necessity*: that the occurrence was not caused by the public official*[20]. In other words, in the distinction between an *objective state of necessity* and a *subjective state of necessity,* only the former is a cause of exclusion of illegality and justification of fault[21].

The assessment of the *unlawfulness* requirement should deserve special care in situations of legal exceptionality, which consequently imposes a special attention to jurisprudence. Moreover, in the context of the pandemic crisis created by COVID-19, the judge must take special care in assessing this requirement for compensation, whether *for an administrative action or omission,* and it may prove necessary to consider the state of scientific or technical development at the time the damage was caused, as well as any precautionary duties required by the public action in question.

Unlawfulness may arise in various ways, whether as a result of a formal state of exception, a state of administrative necessity or even under a general principle of public necessity/exceptionality, as a result of a (direct or indirect) violation of the principle of proportionality in the adoption of administrative measures, and may occur in all state functions.

In addition to the possible usefulness of civil liability for unlawful acts, it should be noted that the figure of public compensation is very often associated with the states of legal exceptionality as a regulatory mechanism of justice that a justice system of a Rule of Law cannot forget. This happens since the idea underlying the public right of exceptionality is to

19 The verification of a resulting culpable unlawfulness, even if in the context of an exceptional situation, is also relevant - besides the civil liability of public entities - for the purposes of determining the *civil liability of the public servant and the right of recourse.*

20 Cf. Manuel Sérvulo Correia, "Revisitando o estado de necessidade...", pp. 150ff.

21 In the scope of private law, see Fernando de Sandy Lopes Pessoa Jorge, *Ensaio sobre os pressupostos da responsabilidade civil*, Reimpr., Coimbra: Almedina, 1995, p. 252.

convoke above all a *logic of material justice*, since the exception is ill-timed with the (normal) legal response that requires the (normal) form and procedure. Moreover, for no other reason, the principle of legality in the strict sense is often set aside to make way for a right of exception driven by a principle of public necessity with severe consequences on public action.

In this context, two figures of public compensation should be highlighted, provided in Chapter V of the Regime under the title "Liability for Lawful Acts or Compensation for Sacrifice" provided in Article 16, which is entitled "Liability for Lawful Acts and Compensation for Sacrifice" and which provides for, on the one hand, liability for lawful acts and, on the other hand, compensation for sacrifice[22]. As will be seen below, these are categories of public compensation that are controversial and often substitutive. Perhaps for this reason the legislator was careless in providing in the heading of Chapter V an alternating relationship ("or") and in the heading of Article 16 a cumulative relationship ("and") between liability for lawful acts and compensation for sacrifice.

In a first analysis, it should be taken into account that Article 16(1) of the Regime refers to civil liability for lawful acts and Article 16(2) to compensation for sacrifice.

In this study, the figure of the compensation for sacrifice is of particular interest. However, for a better understanding of the regime in crisis, it is also important to note the figure of civil liability for lawful acts.

3.2 Liability for lawful acts

3.2.1 Introduction

Article 16(1) of the Regime provides for a regime of public civil liability for lawful acts, by determining that "[w]ithout prejudice to the provisions of special legislation, the State and other public legal persons shall be liable to individuals on whom, in the general interest, by means of legal administrative acts or lawful material acts they have imposed burdens or caused special and abnormal damages, and for the calculation of the compensation, the degree of affecting the substantial content of the right or interest violated or sacrificed shall be taken into consideration, namely, the degree of affecting the substantial content of the right or interest violated or sacrificed"

22 In the context of comparative law, see Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa...,* pp. 97ff.

The first idea to retain is that we are dealing with a regime of public civil liability alien to the aquilian model - in which no blame is sought[23], an objective liability[24] in which attention is focused on the damage suffered by the injured party. Therefore, the assumptions for compensation to be taken into account are: the damage, the public action and the causal link between those two elements.

In turn, it must be based on the idea of fair distribution of public burdens - in breach of the principle of equality provided for in Article 23 and based on the idea of the Rule of Law, provided for in Article 2, both of the CRA.

3.2.1 Requirements

Approaching the literal content of the rule under appraisal, it can be seen that civil liability is towards (i) "individuals", ruling out compensation for lawful acts caused to other public entities (even if they are in a situation of damage caused by the Central Power to the Local Power and vice-versa).

It follows that (ii) public action must result in the "general interest"; however, it does not cover all public action, namely administrative action, since it is limited to action through "legal administrative acts" or "lawful material acts" and (iii) this act-centric (legal and material) administrative action has imposed "burdens or caused special and abnormal damages". In other words, on the one hand, the requirement of a causal link is removed from this expression and, on the other hand, the damages that may be compensated are qualified - not being all damages compensable - which imposes the consideration of the legal notion of such damages - special and abnormal - as foreseen in Article 2 of the Regime. This requires consideration of the legal notion of such damage - special and abnormal - as provided for in Article 2 of the Regime.

Finally, the wording of the rule also imposes that (iv) for the calculation of the compensation the degree of impairment of the substantial content of the right or interest violated or sacrificed must be taken into account, thus presenting an open clause - 'namely' - with the list of two situations that the judge must take into account - although it should be noted that the last part of the rule is closer to the theory of compensation for sacrifice than to civil liability for lawful acts.

23 In the context of comparative law, see António Dias Garcia, "Da responsabilidade civil objectiva do Estado e demais entidades públicas", *in Responsabilidade civil extracontratual da Administração Pública*, Fausto de Quadros (Eds), 2ª ed., Coimbra, Almedina, 2004, p. 199.
24 Carla Amado Gomes, *Contributo para o estudo das operações materiais da administração pública e do seu controlo jurisdictional*, Coimbra, Coimbra Editora, 1999, pp. 415ff.

Although the Regime does not expressly provide for it, it should not be disregarded that, in case the typical hypotheses[25] provided in Article 16(1) - "legal administrative acts" or "licit material acts" - do not cover all life situations in which the assumption of public civil liability is justified, the application of the regime of compensation for sacrifice - which will be dealt with next - should be considered, insofar as the assumptions are met.

3.3 Compensation for sacrifice

3.3.1 Introduction

The compensation for sacrifice provided for in Article 16(2) of the Regime assumes a different terminology (and figure?), referring to *compensation for sacrifice*. However, this different terminology, if it has some dogmatic relevance, calls into question the denomination offered by the *Civil Liability Regime,* which seems to regard *civil liability* as a genus capable of including different species (tort, delict, risk and compensation for sacrifice).

The diversity of terminology used by the Regime does not fail to reflect the variety of doctrinal positions. On the one hand, there are those who consider that the figure of liability is a *super-concept* capable of encompassing different regimes, namely the compensation for sacrifice[26] and, on the other hand, those who distinguish *liability* from the figure of *compensation for sacrifice*[27].

Despite all the disagreements - which may be overcome through the *umbrella* figure of the *general right to* compensation for damages - the understanding of compensation for sacrifice should be guided by the rationality that underlies it. In other words, by imposing the principle of the Rule of Law and equal treatment it should be considered that in the event of conflict between public and private interests and in the event that the former should prevail, legitimately sacrificing the latter, the private individuals should be compensated. This is a figure provided for in other legal systems[28].

In several legal systems, compensation for sacrifice has its main scope of application in administrative activity, and some of the typical situations that call for the application of the regime provided for in Article 16(2) may be listed, namely those resulting from: (i) acts imposing sacrifice, (ii) the revocation of acts constituting rights for reasons of public interest,

25 Diogo Freitas do Amaral, *A responsabilidade da administração no direito português,* Lisbon, [s.n.], p. 41.
26 Marcelo Rebelo de Sousa/André Salgado de Matos, *Responsabilidade civil administrativa*, Lisboa: Dom Quixote, 2008, p. 42.
27 José Carlos Vieira de Andrade, "A responsabilidade indemnizatória dos poderes públicos em 3D: Estado de direito, Estado fiscal, Estado social", *Revista de Legislação e de Jurisprudência*, n.º 3969, julho-agosto de 2011, pp. 345ff.
28 Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa...,* pp. 97ff.

(iii) the state of necessity. In the economy of Article 16(2) of the Regime, the compensation for sacrifice focuses on the duty to compensate on grounds of public interest or in a state of necessity.

3.3.2 Requirements

According to the provisions of Article 16(2) of the Regime, the doubt remains as to which damages are compensable, first of all because the wording of the Regime does not establish any limitation regarding the compensable damages - all ? or as it is common in the general theory of compensation for sacrifice, only the special and abnormal damages ?[29]

In other words, taking into account the essential requirements of compensation for sacrifice: (i) lawfulness; (ii) damages; (iii) causal link[30], it is clear that the imposition of sacrifice must result from reasons of public interest or a state of administrative necessity. However, the doubt remains about the legal configuration of the damages and the causal link.

As far as the damage is concerned, the question arises because the letter of the law offers nothing in its favour and in terms of general theory it would be necessary to consider the notion of *special and abnormal* damage - which, bearing in mind the legal notion offered by the provisions of Article 2 of the Regime, is special damage when it affects a person or a group of people without affecting everyone, and abnormal damage when it exceeds the costs of living in society and, due to its gravity, merits the protection of the law. Despite the doubt that the letter of the law may cause, it seems to us that the requirements of specialty and abnormality should be required, so that ordinary and normal damages will not be compensable.

As regards the causal link, the doubt arises due to the lack of legal reference of the Regime, and the regime foreseen in Article 563 of the Civil Code may be considered for subsidiary application or if the option of applying the theory of adequate causality proves to be unsatisfactory as a general theory a case-by-case judgement should be made in the light of the concrete circumstances[31].

29 Marcello Caetano, *Manual de direito administrativo,* II, 10th ed., Lisbon, Almedina, 1990, p. 1241.
30 Carla Amado Gomes/Ricardo Pedro, *Direito da responsabilidade civil extracontratual administrativa...,* pp. 101ff.
31 Ricardo Pedro, *Estudos sobre administração da justiça e responsabilidade civil do Estado*, Lisboa: AAFDL, 2016 p. 30.

4. Compensation for sacrifice: state of necessity

4.1 Introduction

Compensation for sacrifice is also called for in order to repair the damage caused in situations of state of necessity. In the event of a state of necessity and in order to overcome this real situation of administrative need, exceptional measures must be taken in order to restore administrative normality as soon as possible.

Thus, administrative acts may be performed in breach of the rules set out in the CPA, and are valid, provided that their results could not have been achieved otherwise. Therefore, an exceptional or extraordinary legality comes into play - an administrative law of necessity, which aims to combat the actual situation of non-normality and the return to normality.

4.2 State of necessity and compensation

The principle of administrative necessity appears as a *general principle of administrative law* - for some Authors "*principle of the state of administrative necessity*" - a "*counter-principle*", which justifies the exemption of the application of legal provisions, especially formal ones, in situations of exception[32]. A principle umbilically linked to the principle of legality of the Administration[33] and that integrates the state juridicality[34]. Some more modern doctrine understands that the state of necessity can and should be treated not as an exception to the legality principle, but rather as an exception legality - "exceptional legality"[35].

In the Angolan legal system, administrative action in a state of administrative necessity benefits from a prior legal qualification - set out in Article 15 of the CPA - which legitimises any administrative action in a state of necessity.

The state of necessity may be understood as a *general principle of administrative law*[36] , which is useful as a "rule of jurisdiction" - expressing an idea of material justice over formal justice - for the purposes of "waiving formal or procedural requirements"[37] or content[38] and

32 José Carlos Vieira de Andrade, *Lições de direito administrativo*..., p. 54.
33 Pedro Costa Gonçalves, *Manual de direito administrativo*..., p. 388.
34 Or for some, principle of legality in a broad sense, see Vicente Alvarez Garcia, *El concepto de necesidad en derecho publico,* p. 303.
35 Paulo Otero, *Legalidade e Administração Pública: o sentido da vinculação administrativa à juridicidade*, Coimbra: Almedina, 2003, p. 999; José Manuel Sérvulo Correia, "Revisitando o estado de necessidade", p. 139; Paulo Otero, *Direito do procedimento administrativo,* Coimbra, Almedina, 2016, pp. 127ff.
36 A. Gonçalves Pereira, *Erro e ilegalidade do acto administrativo*, Lisbon, Ática,1962, p. 75; José Manuel Sérvulo Correia, "Revisitando o estado de necessidade", p. 139; Paulo Otero, *Direito do procedimento administrativo,* p. 277ff; Pedro Costa Gonçalves, *Manual de direito administrativo*..., pp. 388ff.
37 Pedro Costa Gonçalves, *Manual de direito administrativo*..., p. 388.
38 Paulo Otero, *Legalidade e Administração Pública*..., p. 999.

revealing the entry into play of a new and distinct legality - other than the legality of normality administrative states, that is, an exceptional or extraordinary legality - an administrative law of exceptionality, which aims to combat the real situation of non-normality and which in a certain sense legalises what would be illegal in a situation of normality.

The understanding of what constitutes a state of necessity has benefited from a vast body of doctrine and presents some dogmatic variations[39]. The doctrinal work has focused - for what matters here - on the definition of the assumptions of the state of administrative necessity[40], that is, on the characterisation of the administrative exceptionality. Such assumptions are limited to:

(i) Occurrence of a real circumstance of exceptionality;

(ii) Leading to a situation of serious, current and imminent danger of threat or damage to property protected by the legal order;

(iii) Which requires appropriate administrative action to safeguard the assets or interests referred to in (ii) arising from the one referred to in (i);

(iv) As a result, it departs from the administrative rules of normality;

(v) The event was not caused by the public official[41].

In addition, from a legal point of view, it is important to bear in mind the provisions of the CPA, which, in Article 15, under the heading "Principle of the state of administrative necessity", provides in paragraph 1 that "[i]n situations of imminent and present danger to the public interest caused by exceptional circumstances not caused by the agent, the Public Administration is empowered to perform the necessary and urgent acts to restore the situation and avoid greater damage".

39 Diogo Freitas do Amaral/Maria da Glória F. P. D. Garcia, "O estado de necessidade e a urgência em direito administrativo", page 447ff; José Manuel Sérvulo Correia, "Revisitando o estado de necessidade", page 135-162; Carla Amado Gomes, "O estado de necessidade administrativo", *in* AA. VV., *Direito administrativo de necessidade e de excepção,* Carla Amado Gomes, Ricardo Pedro (Eds), Lisboa: AAFDL, 2020, pp. 23-46.

40 On the subject and for further developments, see Diogo Freitas do Amaral/Maria da Glória F. P. D. Garcia, "O estado de necessidade...", pp. 473ff; Pedro Costa Gonçalves, *Manual de direito administrativo...*, pp. 388ff.

41 José Manuel Sérvulo Correia, "Revisitando o estado de necessidade...", pp. 150ff. In the sense that this requirement is not autonomous, see Pedro Costa Gonçalves, *Manual de direito administrativo...*, pp. 395ff. The relevance of this requirement leads to a distinction between the *objective state of necessity* and the *subjective state of necessity*. This distinction in the context of private law means that only the former is a cause of exclusion of illegality and a cause of justification of fault. See Fernando de Sandy Lopes Pessoa Jorge, *Ensaio sobre os pressupostos da responsabilidade civil*, Reimpr., Coimbra, Almedina, 1995, p. 252. As a matter of fact, the element of fault in the scope of private law is also relevant in what concerns the indemnity criterion, see Diogo Freitas do Amaral/Maria da Glória F. P. D. Garcia, "O estado de necessidade...", p. 459. In the scope of public law its relevance is revealed, from the outset, for the purposes of determining the civil liability of the public agent, but also for determining the regime of public compensation that should take place.

In turn, paragraph 2 provides that "[o]n administrative acts and material operations practiced or executed in a state of necessity, in breach of the rules established in this Code, are valid provided that their results could not have been achieved in any other way, and the injured parties shall be entitled to compensation under the general terms of the civil liability of the State and other public entities".

It is in this context that - if a state of necessity occurs and damages are caused - the regime of compensation for sacrifice, provided for in Article 16(2) of the Regime, must be taken into account. This article determines the obligation to provide compensation in situations where the State and other public legal persons, in a state of administrative necessity, sacrifice, in whole or in part, something or a right of a third party.

Despite the fact that the legislator of the CPA presents a relatively distinct denomination ("civil liability of the State and other public entities") from that provided by the Regime ("civil liability of the State and other public legal persons") everything converges in the sense that Article 15(2) of the CPA refers to the provisions of Article 16(2) of the Regime.

Finally, it must be taken into account that the allegation and proof of the state of necessity is the responsibility of the public entity, under the penalty - in case there is damage worthy of compensation - of invoking the regime of administrative responsibility, from the outset, for unlawful facts and that this proof may prove to be relatively arduous because the legislator of the CPA, in Article 15(1), final part, requires in the legal definition of state of necessity that, in addition to other elements, the state of necessity aims to "avoid greater damage".

5. Grounds for excluding non-contractual public civil indemnity, in particular in a state of administrative necessity

The State (and other public legal persons) will no longer be liable whenever there is a *cause for exclusion from public compensation*. In other words, causes of exemption from civil liability or negative assumptions of civil compensation may occur[42].

42 Fernando de Sandy Lopes Pessoa Jorge, *Ensaio sobre os pressupostos...*, p. 56.

Although these causes of exclusion do not expressly result from the Regime, they emerge from the harmonious treatment of civil liability in the context of the unity of the entire legal system[43].

These causes may affect the *illegality*, namely, when (i) the public servant is in the performance of a duty, (ii) the public servant is in a state of necessity, (iii) there is consent of the injured party and (iv) the public servant is acting in self-defence[44]. That being said, and despite the non-verification of the unlawfulness requirement, civil liability may occur due to a lawful fact[45].

One of the aspects to which we must pay particular attention is the *objective state of necessity, since* this excludes the illegality of the act[46]. The limits established for the *objective state of necessity* - a public servant acting in a state of necessity is only legitimated to act within the limits of public need - reveal that as soon as this limit is exceeded there is an excess, and the State and the servant may be held liable for this excess.

The civil liability exoneration causes may also focus on the *fault requirement*, such as: (i) excusable error or (ii) excusable state of necessity. However, in view of the increasingly less-impressive nature of the fault requirement, these last two causes of exclusion become less relevant and may imply, in some situations, to be determined on a case-by-case basis, the irresponsibility of the public servant, but not that of the State[47].

Some causes of exclusion of causality may also be found[48]. We begin with the figure of the *fault of the injured party* which, in our opinion, expresses a principle of self-responsibility (procedural, procedural and substantive) and the non-blaming of others for damage caused to oneself - which reveals itself in a principle of competition of damaging behaviours, which the judge will have to take into account for the purposes of identifying the liable estate (public and/or private). In other words, the conduct of the injured party appears as a burden for the injured party and a general escape valve for the system, in order to allow for the consideration of all the behaviours (justifying compensation) in the justice to be arbitrated in the concrete case[49].

43 In the Portuguese context, see 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,* Lisboa: Coimbra Editora, 2010, pp. 965ff.
44 Michel Paillet, *La responsabilité administrative*, Paris: Dalloz, 1996, pp. 47-54.
45 Paulo Otero, "Causas de exclusão da responsabilidade civil extracontratual...", p. 965.
46 Fernando de Sandy Lopes Pessoa Jorge, *Ensaio sobre os pressupostos...*, p. 252; Diogo Freitas do Amaral/Maria da Glória F. P. D. Garcia, "O estado de necessidade...", p. 493.
47 Rebelo de Sousa/Salgado Matos, *Administrative Civil Liability...,* pp. 21ff.
48 Paulo Otero, "Causas de exclusão da responsabilidade civil extracontratual...", pp. 981ff.
49 Previously, see Ricardo Pedro*, Estudos sobre Administração da Justiça...,* pp. 31ff.

The *fault* (harmful conduct) of *the injured party* is provided for in Article 4 of the Regime. The terminology used by the legislator is unfortunate[50] not only given the increasingly less practical usefulness of the concept of fault, but also due to the loss of weight of this concept in public law - which, it seems to us, as well as other doctrine, is more in line, in many situations, with operating *standards*[51]. The Regime includes this figure in the general provisions - so it should apply to all the modalities of public non-contractual liability/indemnification provided for therein. According to some doctrine, this regime finds its *privileged activity* in the administrative function[52].

In this function it would be more frequently applied to liability for unlawful conduct. It may also, in accordance with the provisions of Article 11(1) of the Regime, apply to the liability for risk (although the letter of the precept does not expressly say so, in many situations there may already be a *dangerous* conduct of the injured party). Finally, it may also apply to the compensation for sacrifice[53].

The conduct of the injured party emerges as a very broad concept, which goes beyond the adequate jurisdictional reaction (either precautionary or definitive and urgent or normal), including the adequate reaction for the avoidance of damage, namely through material conduct[54]. This culpable (and dangerous) conduct of the injured party must have contributed to the production or aggravation of the damage caused, that is, it will have to be an adequate cause for the production/aggravation of damage. Faced with the emergence, on the one hand, of damage and, on the other hand, of the *crossroads of culpable conduct,* the judge will have to consider, under the criterion of the gravity of the faults (negligence, serious fault and malice) of both parties and the consequences resulting from them, what compensation is due to the victim, revealing three scenarios: full compensation, partial reduction and exclusion.

Also under the design of exclusion of causality, there is the figure of *force majeure ("damnum fatale")* which, although expressly provided for in Article 11(1) of the Regime, regarding civil liability for danger, should also be extended to civil liability for unlawful acts[55].

50 On the multiplicity of terminologies, see José Carlos Brandão Proença, *A conduta do lesado como pressuposto e critério de imputação do dano extracontratual,* Coimbra: Almedina, 1997, pp. 81ff.

51 José Carlos Vieira de Andrade, "A responsabilidade por danos decorrentes do exercício da função administrativa na nova lei sobre responsabilidade civil extracontratual do Estado e demais entes públicos", *Revista de Legislação e de Jurisprudência,* no. 3951, julho/agosto 2008, p. 366.

52 Carla Amado Gomes, "A *culpa* (ou a *conduta*?) do lesado: reflexões sobre um instituto aberto", *Revista do Ministério Público,* n.º 139, julho/setembro de 2014, p. 12.

53 Carla Amado Gomes, "A *culpa* (ou a *conduta*?) do lesado…", pp. 26-28.

54 Filipa Calvão, "Anotação ao artigo 4.º", *in Comentário ao regime da responsabilidade civil extracontratual do Estado e demais entidades públicas*, Lisboa: Universidade Católica Editora, 2013, pp. 107-109.

55 Paulo Otero, "Causas de exclusão da responsabilidade civil extracontratual...", pp. 981ff.

As it will be easy to understand, force majeure is one of the causes of exclusion of compensation that often arises in contexts of exceptionality. Although the Regime does not make general reference to it, the truth is that the figure is not unknown in the Angolan legal system with regard to civil liability, as can be seen from Articles 505 and 509(2)[56] of the Civil Code. Thus, as it is admitted expressly in the seat of public civil liability in other legal systems[57].

In the scope of public civil compensation, 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 existing at the time of their production 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 may be considered that the damage was not actually caused by the performance of public services - which are beyond human control - but by the event constituting force majeure[58].

6. Conclusions

Contexts of factual exceptionality tend to claim a regime of legal exceptionality - a recent example of this can be found in the exceptional legal measures adopted in several countries in the context of COVID-19. If these public measures cause damage, the question of the public duty to compensate arises. Of particular relevance in this regard is the new state of administrative necessity regime provided for by the Angolan legislator, as well as some of the modalities of public compensation also recently provided for.

The legal concept of the state of administrative necessity provided in Article 15(1) of the CPA, besides other elements, imposes that the state of necessity aims at "avoiding greater damage". In the context of the admissibility of the compensation of eventual damage caused in a state of necessity context, as admitted in number 2 of the referred rule, it must be underlined that, in the light of the general rules of distribution of the burden of proof, it is

56 According to this article *"force majeure is considered to be any external cause independent of the operation and use of the thing"*.
57 Daniel Cuadrado Zuloaga, "Fuerza mayor como causa eximente de la responsabilidad patrimonial", *Actualidad administrativa*, no. 19, 2005, pp. 2380-2392; Concepción Barrero Rodríguez, Fuerza mayor y responsabilidad administrativa extracontractual, Navarra: Aranzadi, 2009, *passim*.
58 Cf. Gabriel Domenech pascual, "Responsabilidad patrimonial del Estado por la gestión de la crisis del COVID 19", *El cronista del Estado Social y de Derecho*, nos. 86/87, Marzo/April 2020: Corona vírus y otros problemas..., p. 105, available at: http://www.elcronista.es/El-Cronista-_número-86-87-Coronavirus.pdf, consulted on 1.11.2022.

up to the public body to allege and prove that such damage occurred under the obligation of the state of administrative necessity, which may become difficult in situations where there is no concrete evidence of the major damage to be avoided.

It should also be emphasised that Article 16(2) of the Regime that regulates the public duty to compensate in the context of a state of administrative necessity does not qualify the types of damage that can be compensated, leaving us in doubt as to which damage can be compensated, that is, all damage or only that which affects a person or a group of persons and only that which is of a certain gravity? Despite the lack of a legal distinction, if we take into account the general theory of compensatory sacrifice, it is arguable that only special and abnormal damages should be compensated by means of compensatory sacrifice.

Notwithstanding the above, in the event of unlawfulness, which immediately violates the state of administrative necessity, nothing prevents civil liability for unlawful acts from coming into play, which may cover all types of damage.

Finally, public compensation will only be payable in a state of necessity if there is no cause excluding the duty to compensate.

References

AA. VV., *Direito administrativo de necessidade e de excepção*, Carla Amado Gomes, Ricardo Pedro (Eds), Lisboa: AAFDL, 2020.

Alvarez Garcia, Vicente, *El concepto de necesidad en derecho publico*, Madrid: Civitas, 1996.

Amaral, Diogo Freitas do, *A responsabilidade da administração no direito português*, Lisboa, [s.n.], p. 41.

Amaral, Diogo Freitas do/Garcia, Maria da Glória F. P. D., "O estado de necessidade e a urgência em direito administrativo", *Revista da Ordem dos Advogados*, Lisboa, a.59 n.2 (Abr. 1999), pp. 448-518.

Andrade, José Carlos Vieira de, "A responsabilidade por danos decorrentes do exercício da função administrativa na nova lei sobre responsabilidade civil extracontratual do Estado e demais entes públicos", *Revista de Legislação e de Jurisprudência*, n.º 3951, julho/agosto de 2008, pp. 360-371.

--, "A responsabilidade indemnizatória dos poderes públicos em 3D: Estado de direito, Estado fiscal, Estado social", *Revista de Legislação e de Jurisprudência*, n.º 3969, julho-agosto de 2011, pp. 345-363.

Angiolini, Vittorio, *Necessita ed emergenza nel diritto pubblico*, Padova, CEDAM, 1986.

Barrero Rodríguez, Concepción, *Fuerza mayor y responsabilidad administrativa extracontractual*, Navarra: Aranzadi, 2009.

Bauman, Z., *La società dell'incertezza*, Bologna: Il Mulino, 1999.

--, *Modernità liquida*, Roma-Bari: Laterza, 2002.

Beck, Ulrich, *Risikogesellschaft: Auf dem Weg in eine andere Modern*, Suhrkamp Verlag KG, 1986.

Brecher, Jeremy/Costello, Tim, *Contro il capitale globale*, Milano: Feltrinelli, 1996, *passim*.

Caetano, Marcello, *Manual de direito administrativo*, II, 10th ed., Lisboa, Almedina, 1990.

Calvão, Filipa, "Anotação ao artigo 4.º", *in Comentário ao regime da responsabilidade civil extracontratual do Estado e demais entidades públicas*, Lisboa: Universidade Católica Editora, 2013, pp. 106-111.

Cassese, Sabino, *La crisi dello Stato*, Roma – Bari: Laterza, 2001.

Correia, António Damasceno, *Estado de sítio e de emergência em democracia*, Lisboa: Vega, 1989.

Correia, José Manuel Sérvulo *Legalidade e autonomia contratual nos contratos administrativos*, Lisboa: Almedina, 1987.

-- "Revisitando o estado de necessidade", *in Estudos de Direito Público,* I, Francisco Paes Marques, José Duarte Coimbra, Tiago Fidalgo de Freitas (Eds), Coimbra: Almedina, 2019, pp. 135-162.

Domenech Pascual, Gabriel, "Responsabilidad patrimonial del Estado por la gestión de la crisis del COVID 19", *El cronista del Estado Social y de Derecho*, n.ºs 86/87, Marzo/Abril 2020: Corona vírus y otros problemas..., p. 105. Accessible at: http://www.elcronista.es/El-Cronista- número-86-87-Coronavirus.pdf, consulted on 2 March 2023.

Garcia, António Dias, "Da responsabilidade civil objectiva do Estado e demais entidades públicas", *in Responsabilidade civil extracontratual da Administração Pública*, coordenação de Fausto de Quadros, 2ª ed., Coimbra, Almedina, 2004, pp. 189-219.

Gomes, Carla Amado, *Contributo para o estudo das operações materiais da administração pública e do seu controlo jurisdicional*, Coimbra, Coimbra Editora, 1999.

--, *A prevenção à prova no Direito do Ambiente*, Coimbra: Coimbra Editora, 2000.

--, «Dar o duvidoso pelo (in)certo? Reflexões sobre o "princípio da precaução"», *in textos Dispersos de Direito do Ambiente*, Lisboa: AAFDL, 2005.

--, "A *culpa* (ou a *conduta*?) do lesado: reflexões sobre um instituto aberto", *Revista do Ministério Público,* n.º 139, julho/setembro de 2014, pp. 9-28.

--, "O estado de necessidade administrativo", *in* AA. VV., *Direito administrativo de necessidade e de excepção*, Carla Amado Gomes, Ricardo Pedro (Eds), Lisboa, AAFDL, 2020, pp. 23-46.

Gomes, Carla Amado/Pedro, Ricardo, *Direito da responsabilidade civil contratual administrativa: questões essenciais,* Lisboa: AAFDL Editora, 2022.

Gonçalves, Pedro, Manual de Direito Administrativo, Lisboa: Almedina, 2019.

Gouveia, Jorge Bacelar, *O Estado de excepção no direito constitucional: entre a eficiência e a normalidade das estruturas de defesa extraordinária da Constituição*, Coimbra: Almedina, 1998, 2 volumes.

--, *O estado de exceção na constituição da República de Angola de 2010*, CEDIS, 2020. Accessible at: https://research.unl.pt/ws/portalfiles/portal/17978918/CEDIS_working_papers_DSD_JBG1.pdf, consulted on 2 March 2023.

Jorge, Fernando de Sandy Lopes Pessoa, *Ensaio sobre os pressupostos da responsabilidade civil*, Reimpr., Coimbra, Almedina, 1995.

Latouche, Serge, *L'occidentalizzazione del mondo*, Torino: Bollati Boringhieri, 1992.

Martins, A. G. Freitas, *O Princípio da Precaução no Direito do Ambiente*, Lisboa: AAFDL, 2002.

Matos, André Salgado/Sousa, Marcelo Rebelo de, *Responsabilidade civil administrativa*, Lisboa: Dom Quixote, 2008.

Morais, Carlos Blanco de, *O estado de excepção*, Lisboa: Cognitio, 1984.

Miranda, Juliana Gomes, *Teoria da excepcionalidade administrativa: a juridicização do estado de necessidade*, Belo Horizonte: Fórum, 2010.

Otero, Paulo, *Legalidade e Administração Pública: o sentido da vinculação administrativa à juridicidade*, Coimbra: Almedina, 2003.

--, "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*, Lisboa: Coimbra Editora, 2010, pp. 965-985.

--, *Direito do procedimento administrativo*, Coimbra, Almedina, 2016.

Paillet, Michel, *La responsabilité administrative*, Paris: Dalloz, 1996.

Pedro, Ricardo, *Estudos sobre administração da justiça e responsabilidade civil do Estado*, Lisboa: AAFDL, 2016.

--, Fundos Europeus Estruturais e de Investimento e Auxílios Públicos: Estudos de Direito Administrativo Nacional e Europeu, Lisboa: Almedina, 2020.

--"Traços gerais da indemnização civil extracontratual pública em contextos de excecionalidade", *in Impactos da Pandemia da Covid-19 nas Estruturas do Direito Público*, Carlos Blanco de Morais, Miguel Nogueira de Brito, Miguel Assis Raimundo (Coord.), São Paulo: Almedina, 2022, pp. 379-413.

--, State liability for administration of justice in Angola: "the King can do wrong"?, *Lex Humana*, v. 15, n.1, 2023, pp. 90-117.

--, Introdução à responsabilidade civil extracontratual pública angolana e à sua efectivação, Lisboa: AAFDL, 2023.

Pereira, André Gonçalves, *Erro e ilegalidade do acto administrativo*, Lisboa, Ática,1962.

Pinna, Pietro, *L'emergenza nell'ordinamento costituzionale italiano*, Milano: Giuffre, 1988.

Proença, José Carlos Brandão, *A conduta do lesado como pressuposto e critério de imputação do dano extracontratual,* Coimbra: Almedina, 1997.

Sofsky, W., *Rischio e sicurezza*, Torino: Einaudi, 2005.

Suordem, Fernando Paulo da Silva, "Os estados de excepção constitucional: problemática e regime jurídico", *Scientia iuridica*, Braga, t.44n.256-258(Jul.-Dez.1995), pp. 245-261.

Zuloaga, Daniel Cuadrado, "Fuerza mayor como causa eximente de la responsabilidad patrimonial", *Actualidad administrativa*, n.º 19, 2005, pp. 2380-2392.

Acknowledgment and conflicts of interest

The authors declare that they have no conflicts of interest with respect to the research, authorship, and/or publication of this article.

This paper is part of a project wich is funded (or partially funded) by FCT – Fundação para a Ciência e a Tecnologia, I.P. through national funds under UIDP/04310/2020.

Any errors or omissions are our own.