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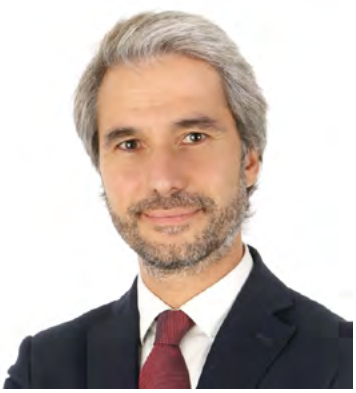

THE EXTRA-CONTRACTUAL CIVIL LIABILITY OF THE STATE FOR LAWFUL ACTS SEEKING A NEW PARADIGM

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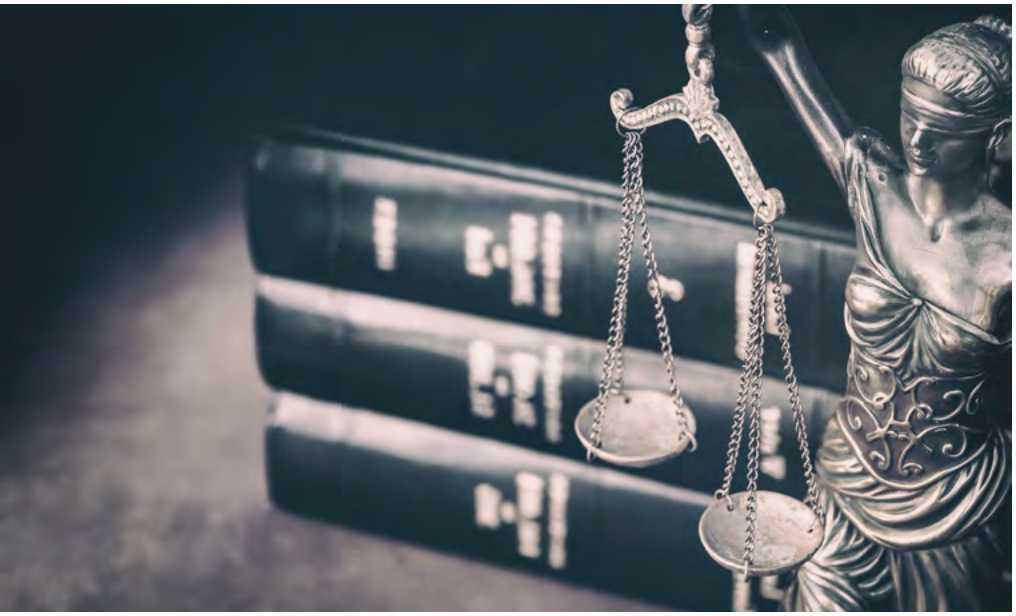
Whenever a private individual, whether a citizen or a legal person, suffers damages or losses caused by a lawful action or an illegal action or omission of the Administration, the practice has taught that litigation is settled in the administrative courts. This means that the private individual must wait patiently for a judicial decision condemning the public authority to pay the value of the damages caused.

This reality results from a stubbornly conservative and reserved position of the Administration and its leaders, who, frenzied and frightened by the reports of the usual administrative inspections (and even by the increasingly frequent criminal investigations), opt for a passive attitude, instead of facing the concrete case in obedience to the principles by which the administrative activity should be guided. It is within this framework that recourse to the judicial route - and the consequent delivery of a judicial decision - brings with it the comfort and security that the Administration appreciates and that it is not customary to dispense with, notwithstanding the awareness of the actual damages caused to the private sector individuals.

It is in this context that we have seen, namely in what civil extra-contractual liability for lawful acts is concerned, a timide but at the same time audacious and courageous position of some (few) political leaders, who, recognizing the damages that a certain decision may generate in the legal sphere of individuals,



seek a safe, reasoned and fair way to compensate individuals, avoiding recourse to the judicial means .
But a long road has been travelled until we reach this point.
First of all, and on a brief historical note, it is important to mention that only from the mid-thirties of the 20th century that Portuguese law began to contemplate the civil liability of the State and other public entities for damages caused to individuals in the exercise of administrative functions, if and when they resulted from unlawful or culpable conduct.
With the entry into force of Decree-Law No. 48 051 of November 21, 1967, the Portuguese legal system established a specific law that regulated not only the civil liability for unlawful acts but also for lawful acts of the State and other public entities, when such acts, even if legally and legitimately practiced ,offended the content of the rights of individuals, causing special and abnormal charges or damages. .
Then, with the approval of Law no. 67/2007, of 31 December, the current *Regime of Extra-Contractual Civil Liability of the State and Other Public Entities* was implemented which, besides having introduced important reforms regarding civil liability for illicit facts arising from the exercise of the legislative and judicial function of the Public Administration, created the so-called "compensation for sacrifice".
However, the "compensation for sacrifice" institute is concerned with the liability of the State and other public entities for damages and special and abnormal charges inflicted on private individuals as a result of lawful acts aimed at pursuing the public interest.
And in these cases, should public entities not understand whether their actions will cause special and abnormal damages that deserve protection of the law? The answer, in view of the administrative action required in modern times is, from our perspective, hopelessly positive.
A paradigmatic and public case of this innovative action is, for example, the compensation that a public entity can (and should) attribute to traders in virtues of the damages caused by public works contracts that prevent or significantly limit access to commercial establishments. In fact, in this case, the sacrifice, damages and expenses of the merchants are caused as a result of a lawful act (construction or requalification works), voluntary (for having been determined by decision of the public authority), and in the pursuit and satisfaction of the public interest (construction or requalification of a public space), being also verified the required causal link.
The generalization of this new way of relationship between the Administration and private individuals, in the field of civil liability for lawful facts, may enshrine a new paradigm of public management, in which the budgetary provision for a public works contract contemplates from the outset - if justified - the amount necessary to compensate individuals who will suffer special and abnormal damages. On the other hand, it also embodies a conduct of responsibility and sense of justice on the part of the Administration, to the extent that it compensates private individuals in advance for the losses and damages that will be caused either by the decrease in revenue or by the decrease in operating profit (EBIT).
Obviously, a decision of this nature, namely regarding the amounts to be spent by the public authority, cannot be purely discretionary, but must, on a case-by-case basis, be taken in line with the criteria established by the case law of the higher courts and by other information to be provided by the individuals affected, in order to build a model of fair compensation that avoids recourse to the courts.

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