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COVID-19'S FACING POLICIES AS PUBLIC CALAMITY AND THE RESPECTIVE LEGAL RESPONSIBILITIES OF THE PUBLIC AGENT

POLÍTICAS DE ENFRENTAMENTO DA COVID-19 ENQUANTO CALAMIDADE PÚBLICA E AS CONSECTÁRIAS RESPONPONSABILIZAÇÕES JURÍDICAS DO AGENTE PÚBLICO

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Abstract: In these pandemic times caused by the Covid-19 virus, many government actions by the Federal Union, States and Municipalities, which demand urgency and are costly, are and will need to be developed overcoming certain formal requirements of traditional procedures, which presents risks of abuse of authority and deviations of power. In view of this, we intend in the present text to evaluate some risks and dangers of these scenarios, posing as a problem to be faced if it is possible and necessary to have preventive and curative controls, in real time, of the management of this public calamity that configures Covid-19, having as a neural hypothesis that it is possible to combine emergency measures in states of emergency and public calamity with systems of internal and external controls of the instituted powers. As specific objectives, we will try to conceptually demarcate some of the constitutive elements of the social and administrative disorder that characterize the Risk Society that we live in, especially those brought about by the referred pandemic, identifying the importance of establishing limits of restraint to its causes and consequences; finally, we want to maintain that disregarding the Brazilian legal system in these situations, deserves effective control, avoidance and reprimand through normative mechanisms that we already have.

Keywords: COVID-19. State Of Public Calamity. Responsibility Of The Governments

Resumo: Nestes tempos de pandemia causada pelo vírus da Covid-19, muitas ações governamentais da União Federal, Estados e Municípios, que reclamam urgência e são onerosas, estão e vão precisar se desenvolver superando determinados requisitos formais de procedimentos tradicionais, o que apresenta riscos de abusos de autoridade e desvio de poder/finalidades. Em face disto, pretendemos no presente texto avaliar alguns riscos e perigos destes cenários, colocando como problema a ser enfrentado o de sabermos se é possível e necessário existir controles preventivos e curativos, em tempo real, da gestão desta calamidade pública que configura a Covid-19, tendo como hipótese neural a de que é possível compatibilizar medidas de urgências em estados de emergências e calamidade pública com sistemas de controles internos e externos dos poderes instituídos. Enquanto objetivos específicos, vamos tratar de demarcar conceitualmente alguns dos elementos constitutivos da desordem social e administrativa que caracterizam a Sociedade de Riscos que vivemos, em especial os trazidos pela pandemia referida, identificando a importância de constituirmos limites de contenção as suas causas e consequências; por fim, queremos sustentar que desconsiderar o sistema jurídico brasileiro nestas situações, merece controle eficaz, evitação e reprimenda através de mecanismos normativos que já dispomos.

Palavras-chave: COVID-19. Estado De Calamidade Pública. Responsabilidade Dos Governantes.

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1. INTRODUCTORY NOTES

Public Administration in general has been called upon to respond, increasingly, to diverse and complex demands of the Market and Society, often tense, leading to disjunctive choices, which imply choosing some priorities in detriment of others. Certainly, these choices (in some cases tragic) demand broad, legitimate and democratic reasons for justification, subject to all preventive and curative types of control.

In these pandemic times caused by the Covid-19 virus, many government actions by the Federal Union, States and Municipalities, which claim urgency and are costly, are and will need to be developed overcoming certain formal requirements of traditional procedures (such as waiving or unenforceable biddings), flexibility of administrative contracts, breaking of fiscal and budgetary barriers), which presents risks of abuse of authority and misuse of power / purposes.

Because of this, we intend in the present text to assess some risks and dangers of these scenarios, posing as a problem to know whether it is possible and necessary to have preventive and curative controls, in real time, of the management of this public calamity that configures Covid- 19, having as a neural hypothesis that it is possible to combine emergency measures in States of Emergency and public calamity with systems of internal and external controls of the instituted powers.

As specific objectives, we will try (i) to conceptually demarcate some of the constituent elements of the social and administrative disorder that characterize the Risk Society in which we live, especially those brought by the aforementioned pandemic, (ii) identifying the importance of establishing limits to contain its causes and consequences; (iii) to verify which normative aspects should inform the Public Administration's performance in face of these occurrences; finally, (iv) we want to sustain, as a conclusion, that disregarding the Brazilian legal system in these situations, especially with the exemption from public bidding, deserves effective control, avoidance and reprimand of possible abuses by authorities and deviations of purposes, through normative mechanisms that have already we have.

2. TIMES OF (DIS) ORDER: LIMITS OF CONTENTION.

Times of institutional, political, economic and public health crises (such as the Covid-19 pandemic), place on the agenda of international and national debates great and serious dangers to certain constitutional conquests, principles and freedoms to Democracy. Here, the temptation to disrespect rights and guarantees is at its apogee.[2]

Amidst such turbulence constitutional guarantees are put to the test, reason why permanent commitments to preserve and maintain rights and freedoms must be constantly equalized/convergent with care not to transmute the Constitution into a *suicidal pact*, in the expression of the North American Supreme Court Judge Robert H. Jackson, in 1949, in the case Terminiello v. Chicago, in which the majority of magistrates decided that Chicago laws that prohibited speech from provoking

[2] Ver o texto de GROOM, 2000.

public anger, inviting disputes, causing or creating social agitation, would be violating the First and Fourteenth Amendments to the US Constitution, dissented under the argument that:

> This Court has gone far towards accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[3]

The scenarios of emergencies, crises, risks and dangers in which we find ourselves, in many cases, involuntary, are increasingly recurrent, resulting in multi-level sequels, increasing the costs of maintaining public freedoms, rights and traditional political guarantees; likewise, they generate tensions of tragic dimensions between democratic values and responses to political, social and institutional emergencies. Just analyze - using a radical didactic example - some situations involving democratic nations in the face of serious terrorist threats that undermine the exercise of public freedoms by their citizens.[4]

At the same time, acute demands and crises have challenged several central concepts of constitutional democracy, and even traditional legal systems, arisen from there concerns about the which extent violations of fundamental values can be justified in the name of the survival of democracy itself, and sometimes human lives - as in the case of tragedies caused by the Covid-19 pandemic worldwide.[5] In other words, to what extent can republican and democratic governments justify actions in these directions without becoming authoritarian regimes?

When extreme demands appear, almost invariably, the political and economic, institutional and social forces, often and even because of the speed of urgencies and responses to them, leave the immediate responsibility of their confrontations to the Executive Power, taking to its strengthening as a state power, and this not only in the face of other state powers, but also in light of individual rights and public freedoms.[6]

On the other hand, if the Executive Power has assumed a leading role in the confrontation of social crisis scenarios involving mainly tragic and imminent risks and dangers, despite the will or even reaction of the other powers, this is also occurs because the time and the traditional way of making decisions in ordinary representative democracy, sometimes, does not at all meet - because they are more time consuming - the expectations and needs of certain community demands marked by levels of complexity and immediate emergencies. As Daron Acemoglu and James Robinson tell us:

> While such expansions and concentrations of powers are not unique to times of crisis, but rather are part of the modernization of society and the need for governmental involvement in an ever-growing number of areas of human activity, it can hardly be denied that such phenomena have been accelerated tremendously (and, at times, initiated) during emergencies. Our acceptance of the growing role of

[3] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), p.24. Ver na mesma linha o texto de BELLESILES, 2019.
[4] Ver o texto de ARREGUIN-TOFT, 2005. Também ver o texto de WOLIN, 2008.
[5] No mundo mais de dois milhões e duzentas mil pessoas já morreram por conta deste vírus, conforme https://coronavirus.jhu.edu/map.html, acesso em 01/02/2021.
[6] Ver o texto de ROSENTHAL, 2020.

> the executive branch as natural may be attributed, in part, to our conditioning during times of emergency.[7]

In view of this, two apparently antithetical vectors are in constant tension: the existence of necessary restrictions and limitations on governmental powers are fundamental attributes of modern democratic regimes; on the other hand, the ideals of this model of representative democracy, such as individual rights, the legitimacy of instituted powers, social accountability, systems of power controls, suggest that, in difficult times of economic, political and social instability, such as generated by this Covid-19 pandemic, opportunities may arise in which this same State needs to use urgent / adequate measures - from the point of view of its effectiveness - to deal with serious problems, and from there threatening situations may arise of the very elements that compose the Democracy that we want to protected.

Unusual emergencies in terms of public demands tend to provoke containment initiatives or solutions to them with differing speed from the legislative one and, sometimes, from assumptions that are often hurried and divorced from civilizing conquests of rights and guarantees, making public authorities available greater powers to resolve urgent problems - such as those that restrict people's right to come and go in the face of the risks of contagion by the corona virus.

It is easy to understand this insofar as, in such scenarios of social fear, it seems more comfortable to have measures of exception approved than to question why they are necessary, in addition this guarantees special protagonism to the institutional powers to act and react, which without a doubt it is not enough, as it only shows what public authorities can do (attacking the consequences and setting aside the causes) instead of being inert.

Thus, we sustain that the concept of emergency powers refers to short-lived situations and transitional measures that are constituted to respond to particular situations, so that they can be removed as soon as possible, as long as they are sufficient to successfully end the reasons why have been instituted. In other words, the feeling that emergency measures, which may deviate from what is normally acceptable within the confines and boundaries of the legal system in ordinary times, cannot affect legal and political fields for long, making with what the draconian nature of the actions be more easily accepted, naturalizing authoritarian powers.

It is very easy to say that in certain situations, when panic, fear, hatred, and similar emotions prevail, rational speeches and analyzes are set aside in the formulation of responses to public demands. The problem is that when faced with serious threats or extreme emergencies, the general public - and its leaders - tend to have difficulties in assessing with rational precision the effective risks and dangers posed to the Society, especially because speeches, practices and strategies ideological gains force in search of the conjunctural hegemonies.[8]

Any balancing act that takes into account the threats - real and fictitious - that need to be addressed, and the costs for the Society and its members, for the purpose of facing all this in different ways, must always be very well grounded and controlled, even when applied with the best of intentions.

[7] ACEMOGLU and ROBINSON, 2019, p.12.
[8] Ver o excelente texto de FENTON, 2012.

For some authors of this problem, people behave based on sets of cognitive limitations and prejudices that can prevent them from capturing the real probabilities of certain types of risks and uncertainties. Accurate assessments of these claim related, reliable information about the magnitude of what is involved, and the possibilities for it to materialize.[9]

The concept of limited rationality here relates to our insufficient knowledge about the states of affairs related in those scenarios, and the imperfections of the technologies that should assist us in facing the most varied social and individual emergencies, which, in part, explain the failures to deal with inedited information and data, because important elements of cognitive processes and analyzes need to be investigated in order to determine - even if approximately - consequences and alternatives to those contexts.

We cannot forget that emergencies, characterized as sudden and generally unpredictable; situations that require immediate actions / responses, often without time for preliminary reflections and considerations - such as those of Covid-19v -, accentuate problems related to skills to process information and evaluate complex scenarios.[10]

The assessment of deficient rationalities, therefore, shows that individuals tend to connect the probabilities of particular events based on their ability to imagine similar occurrences in the past, not realizing spatial and temporal differences (ideological, political, economic, cultural) in which forged the elected standards like guidelines for their understanding. In this sense, prospective theories suggest that people tend to give excessive weight to low probability results when the risks are high enough and the results are particularly bad. Thus, our perception of risks arising in emergency situations can be distorted.[11]

Cass Sunstein recently suggested that the predictions of prospective theories are especially valid where bad results affect the rich, particularly when they involve not only serious losses, but where strong emotions are produced.[12] The author focuses on what he calls negligent probabilities, those that do not take into account, because they fail to access/evaluate, the factors and variables that make up the environments in which the probabilities are demarcated, choosing only the worst possible results, which they invoke overly fundamentalist emotions and feelings such as fear, demanding equally radical responses (to mistaken demands), thus fostering the arbitrary exercise of instituted powers.[13]

When hard governmental measures/responses in the face of delicate situations that represent dangers are perceived by society as socially beneficial, the long-term costs for the rule of law and even for individual fundamental rights tend to be tolerated.

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[9] Ver os textos de CASTELLS, 2013; 2012; 2007.
[10] Conforme LUECKE, 2010, e o texto de ADELANTADO, 2005.
[11] Ver o texto de KAPLAN and SCHWARTZ, 2008.
[12] SUNSTEIN, 2019. Says the author: *For those who study the topic of risk regulation, there are many things to say about this state of affairs. First, safety is a matter of degree; it is foolish to worry, as people seemed to be doing, about whether they are "safe" or "not safe." As a statistical matter, most people, in most places (not excluding airports), were not at significantly more risk after the attacks than they were before*. (p.03). See also SCHREUER, 1982.
[13] Reminds Sustein that: *When a bad outcome is highly salient and triggers strong emotions, government will be asked to do something about it, even if the probability that the bad outcome will occur is low*. Op.cit., p.05.

The fact that the costs of the future are seen in a very intangible and abstract way in emergency contexts, especially when compared to those tangible feelings of expressive fears, associated with increased security as a result of government actions - whatever they be - only amplify the misunderstandings of assessments of real emergencies and public policies. In other words, the cycles of ideological radicalization or rhetoric of the discourses of fear (together with the misperceptions due to negligent and imperfect analysis), against of what public managers do not know very well (nor do they wish to know), generate tragic feelings of dread, immediate and violent, of the possibility of events and phenomena that put the normality of public and private spaces in check, feeding the institutionalization of measures of force and violence in the name of a certain social order.

We have, however, that in the current Democratic Rule of Law, political and social emergencies must be faced based on actions and reactions guided by prudence and reasonableness appropriate to the urgencies presented, reasons why governments should have wide responsibility when determining what measures are necessary and must be taken to deal with crises effectively and efficiently.

Maxims as *needs do not know the law* (*salus populа suprema lex ext; inter arma silente leges*), or state reasons, are more associated with authoritarian ways of dealing with those scenarios than democratic, including and fundamentally with regard to public spending that pretend uncontrollable.

Under this mark of political realism, democracies do not represent real enigmas in the face of emergencies, because there are restrictions that limit governments in dealing with them, arising both from limited institutional and budgetary frameworks, as well as through democratic processes and procedures to be adopted and guided by terms of the law, because these tend to avoid (or decrease) the levels of democratic illegitimacy, abuse of power and deviation from purposes.[14]

In a diametrically opposed position to the political realism that we are talking about there is a claim that the legal system should not, under any conditions and independent of circumstances, recognize emergencies as deserving special treatment divorced from the constitutional and infra-constitutional principles and rules that ensure the democratic regime. According realism abandons these premises, Democracy is exposed to the most diverse instabilities.[15]

Despite these positions, we understand that it is the current legal provisions that should guide governmental responses to social emergencies, and the neural premise that underlies these arguments is the primacy of the fundamental rule, determining that whatever the responses given to the challenges of urgent public demands, must be sustained within the confines of constitutional commands.[16]

In other words, only under the argument of *managerialism* as a paradigm and model of emergency powers, the State of Emergency cannot justify deviations eventually committed against ordinary legal systems. No special emergency power is introduced on a permanent basis, because these systems usually provide necessary responses to eventual crisis situations, without relying too much on unprecedented legislative or executive assertoric formulations, or additives of occasion,

[14] See the work of BALDWIN, 2014.

[15] According to the text of MURRAY, 2007.

[16] As the remember VASQUEZ, 2009, p.61: *While terrorists are lawless and operate outside the sphere of legal principles, democratic governments must be careful not to fight terrorism with lawless means. Otherwise, these governments may succeed in defeating terrorism at the expense of losing the democratic nature of the society they are defending. The assumption is, therefore, that the exception is governed and controlled by legal norms*.

reason why the occurrence of any particular emergency cannot justify or explain the suspension, in whole or in part, of the current normative standards.[17]

The firm argument about the applicability of ordinary norms in institutional and social emergency scenarios reinforces the thesis that any government operations should only take place within the limits of the law, putting public officials on alert to be more responsible in their management, avoiding defrauding the normative systems to which they are linked. In view of this perspective, the permanent need for accountability and transparency of such acts justifies public exposure as a tool for greater control of their actions.

Let us remember that, if the power is already installed in governmental instances and with protagonists with scopes and projects more private than public, this makes illegal actions easier in the face of those political situations in which relations are not yet consolidated. For this reason, the lack of normative limits on governance - even in emergency scenarios - can encourage unscrupulous political leaders to foster atmospheres of fear, invoking extraordinary powers of management.

In the case of the Brazilian Public Administration, it is possible that the manager uses urgent measures to deal with calamitous or tragic situations that, suddenly, arise in his daily life, such as the cases of the Covid-19 pandemic, and this is minimally regulated, but, even so, it can give rise to the commission of many irregularities and illicit acts of different orders, a matter that we will address next.

3. THE PERFORMANCE OF PUBLIC ADMINISTRATION IN FRONTO OF STATES OF PUBLIC DISASTER: PRELIMINARY NORMATIVE AND CONCEPTUAL ASPECTS AND THE CASE OF COVID-19.

It is necessary that we understand how the Brazilian normative frameworks establish, in general lines, the conditions and possibilities for the administrative confrontation of situations that involves emergencies called public calamities, because they should serve as parameters of foundation and application to events of this nature.

In this sense, it is important to take as a reference the terms of Federal Law nº 12.340/2010, and of Federal Decree nº 7.527/2010, which demarcate in which situations, and by which procedures, states of public calamities can be instituted/declared in the other federal entities of the Union.

It is article 2 of that Decree, which presents such concepts, starting with civil defense, to be provided by States and Municipalities, through preventive, relief, assistance and recovery actions, intended at preventing disasters and minimize their impacts for the population, as well as restoring social normality.

Here we can already see the set of indeterminate categories that the regulation uses to deal with hypotheses, risks and dangers that present themselves as force majeure, involving fortuitous cases not subject to prediction and previous caution - without a doubt that Covid-19 fits here. Such categories, however, do not authorize permanents of meaning based solely on the absolute discretion of the Administrator, but are obligatorily linked to the dictates of public management and the constitutional and infraconstitutional principles and rules applicable in these cases.

[17] In this sense see the text of DERSHOWITZ, 1989, and KITTRIE, 2019.

And why do we say this? Because what is expected from the Public Administration to be virtuous and efficient is that it permanently develops policies and government actions that prevent disasters and public calamities, and will only be able to do this with planning, programming, investment, diagnostics and prognoses requested of demands and responses management, at the most diverse levels of seriousness and urgency. Even by adopting avoidance measures, if these occur due to actually fourtuitous phenomena or force majeure, then the administrator must promote relief, assistance and recovery measures, destinated to minimize the impacts to the population, as well as reestablish a social normality.

In addition to these parameters, the Decree above mentioned also presents more specific rules to authorize the recognition of the calamitous state, such as: (i) in the face of disasters, understood as a result of adverse, natural or man-made events on a vulnerable ecosystem, causing damage human, material or environmental and consequent economic and social losses. And again, we have to ask ourselves: (i) what are adverse events and how are they characterized? (ii) how to identify vulnerable ecosystems? (iii) are there exhaustive normative provisions that qualify them? (iv) can any human, material or environmental damage that generates any type of economic and social damage, authorize the occurrence to be classified as a disaster and for the purposes of institutionalizing the state of public calamity? (v) who answers all these questions?

The same spheres of uncertainty are present in the concepts of emergency situation and state of public calamity, which the Federal Decree takes synonymously, when exposing them as an abnormal situation, caused by disasters - that is, by contexts of available and conditioned meanings-, causing damages and losses that imply the partial commitment of the responsiveness of the public power of the affected entity. How can we know what response capacity the government has to have for certain emergency scenarios and, based on this, delimit the partial commitment of this capacity? Certainly, as lethal consequences for thousands of lives around the world that the corona virus has caused fits within this concept of emergency that authorizing emergency measures.

Added to such hermeneutical difficulties, there are several problems related to the actions and policies that the Public Administration can/must carry out to account for the installed and imminent risks, dangers and damages that result from the urgent conditions, described in the art.2º, V, of Decree (relief actions, assistance for victims, reestablishment of essential services, reconstruction and prevention), and all demands deep and efficient preventive and curative control mechanisms, because there may arise misuse of resources and public property, and even due to negligence, imprudence or malpractice, the commission of the most diverse crimes or improbities against the Public Administration, among which, later, we will give little emphasis to the bidding waiver.

We are trying to say that: (i) the emergency situation and the state of public calamity to configure itself must, historically and contextually, be out of the ordinary Government's ability to achieve predictability, avoidance and response; (ii) this reach measure has to be gauged from objective and public indicators, efficiency and probity of public management policies, as well as cognitive, structural and conjunctural capacities (spatial and temporal) of preventive and curative

responses of public power, because the absence of this may eventually constitute responsibilities for omissions or negligence, malpractice or imprudence.[18]

In view of this, the public manager will have to provide, at all times, the elements for delimiting, as objectively as possible, the normative requirements pursued, which will also serve to establish the controls of legitimacy and legality carried out for their regular confrontation, as well as the resulting responsibilities, this is because the distinctive particularities of calamities and disasters are many, requiring specific assessments - with clear criteria - their delimitations and confrontations.[19]

Without a doubt that this involves - directly and indirectly - the capacity of public management to be efficient (responsible) in terms of diagnosing the demands (ordinary and emergency) of its community, and in the adequate generation of preventive and curative policies for them, because those managers who are not concerned with constituting government plans and programs based on reliable scenarios of the present and future agendas, will certainly be more exposed to surprises and unexpected events due to the inability/incompetence to have planned them, despite their indicators are present in the daily life of the Community.

If, on the one hand, national legislation created these possibilities for crisis management involving the public administrator, on the other hand it brought a related duty on the part of them to justify their acts in this regard in a very well-articulated and convincing way, at all times, always linked to the special normative hypotheses, in terms of legal principles and rules, under the risk of committing civil, administrative and criminal offenses.

For the purposes of this work, we want to highlight the exemption from bidding as a type of illegal (criminal and civil), in the face of so-called public calamity situations, especially in these pandemic times, mainly because each factual emergency situation objectively demands specific management measures, and the demands provoked by Covid-19, worldwide - and especially in Brazil -, in such a short time, are bringing institutional and social challenges never before experienced, involving immediate life saving measures in accelerated time, both by the speed of contagion and its lethality in certain more vulnerable segments of the population.

Not only that, there are also structural demands to face the pandemic, such as basic hospital equipment, ventilators for lethal breathing problems, personal protective equipment, drug reagents for the production of tests for infected people, among others, all of this combined with economic problems directly derived from the social isolation policies needed in contexts like these (companies are breaking down, laying off thousands of employees, destroying the informal economy), which involves

[18] For these reasons, the Auditors Brazilian Federal Court has already had the opportunity to edit the statement saying the following: *It is a prerequisite for the application of exemption from bidding due to emergency or public calamity that the adverse situation cannot, to some extent, be attributed to fault or fraud of the public agent who had a duty to act to prevent the occurrence of such a situation*. Judgment nº 224/2007, Plenary, date of the session 28/02/2007, Min. Marcos Vinicius Vilaça. Site: https://pesquisa.apps.tcu.gov.br/, access in 19/07/2019.

[19] Of course, sometimes, in the face of the seriousness of the calamities that are occurring, as they have not concluded their effectiveness and damage cycles, it remains difficult to define, with mathematical precision, what these elements are, but at least information related to the already consolidated occurrences and the measures demanded of them is possible and necessary to constitute. It should be noted that Brazilian states usually legislate supplementarily on these matters.

billionaire public budgets that need to be immediately available without even the most appropriate formal procedures - such as those for bidding.[20]

To account for all this, in Brazil, the federal government needed to create normative conditions for public reaction and action, such as the Federal Public Disaster Decree, which allows the Executive to spend more than expected in its budget, including disobeying the tax goals targets and traditional bidding rules. This Decree created a mixed commission composed of six deputies and six senators, with an equal number of alternates, to monitor the expenditures and the measures taken by the federal government to face the problem, which in a way constitutes an instance of external real-time control such activities, and there will be monthly meetings with technicians from the Ministry of Economy and a bimonthly hearing with the Minister of Economy himself, to address these issues.

Another important document to these issues is the proposal for Amendment to Constitution nº10/2020, called the *PEC of the War Budget*, which allows, among other measures, the separation of expenditures made to combat Covid-19 from the General Budget of the Union, with faster processes for purchases and hiring temporary staff and services, authorizing the Union to break the so-called *golden rule* (constitutional mechanism that prohibit the government from getting into debt to pay current expenses, such as salaries and costs), requiring the Ministry of Economy to publish monthly reports on such operations. The problem is that this proposal establishes an extraordinary regime for hiring and spending on government personnel, works, services and purchases, without bidding, during the state of public calamity - in theory, until December 2020.

Still, the federal government announced, on April 22, 2020, the creation of an investment program past the pandemic, called Pro-Brazil, initially called the *Brazilian Marshall Plan*, predicting an increase of R$300 billion - R$250 billion in concessions and public-private partnership, and another R$50 billion in public investments.[21] In other words, the President of the Republic, divorcing his liberal ministry of the economy, abruptly changes the direction of the economy and suggests a return to the resumption of public investment for job creation, further expanding the need for internal and external controls, which in the country are fragile.[22]

IV - EXEMPTION FROM PUBLIC BIDDING IN THE FACE OF PUBLIC CALAMITIES SUCH AS COVID-19: POSSIBILITIES OF ILLEGALITY.

As we have seen so far, there are many chances of framing risks and dangers - imminent and consolidated - as public calamities that are demanding policies for the prevention or management of social damages by Brazilian public administrators.

[20] Until December 2020, the Brazilian federal government has spent more than R $ 500 billion for coping with the Covid-19, as reported by the national Senate on the website: https://www12.senado.leg.br/noticias/materias/2020/12/22/governo-federal-ja-gastou-r-509-bilhoes-no-enfrentamento-a-pandemia, access in 08/02/2021.

[21] According the site: https://noticias.uol.com.br/colunas/reinaldo-azevedo/2020/04/23/plano-marshall-braga-netto-lanca-o-pac-de-bolsonaro-guedes-nao-aparece.htm, acesso em 23/04/2020.

[22] According the site: https://www1.folha.uol.com.br/mercado/2020/04/governo-resgata-papel-do-estado-na-retomada-e-poe-em-xeque-agenda-liberal-de-guedes.shtml, acesso em 23/04/2020.

The aforementioned regulations, purposefully, deal with these issues in a conceptually precise way, identifying which objective elements characterize situations of public calamities; sometimes they do so in a more general way, with more open categories in terms of meanings, showing plural meanings in face of the nature of force majeure events or fortuitous cases of difficult immediate and definitive delimitation, as is the case of the corona virus pandemic.

In spite of this, the current national legal system has different regulatory frameworks that deal with the regulation and accountability of public administrators when they deviate from legal purposes (by means and results), providing for different - and cumulative - sanctions for them, since: (a) suspension of political rights, loss of office and public function, under the terms of article 37, paragraph 4, of the Constitution, and article 12, I, of the Administrative Improbity Law (nº 8.429/92); (b) compensation for damages and civil fines, art.12, I, of the Administrative Improbity Law (nº 8.429/92); (c) fine applicable by the Court of Auditors to chiefs of Powers and to the people that are in management positions in public institutions, pursuant to article 5, of Federal Law nº10.028/2000; (d) imprisonment, fines and penalties restricting rights, pursuant to the same Federal Law nº10.028/2000, which created a specific chapter in the Penal Code for crimes against public finances; (e) the penalties for crimes committed by mayors under the terms of Decree nº201/67; (f) imprisonment from 3 to 5 years, plus a fine, for the crime of dismissal or unenforceable unlawful bidding, under the terms of art.89, of the Bidding Law nº 8.666/93.

In situations of public calamity under comment, the person responsible for the expenditure may, under the terms of the Law (all the rules referred to here), among other measures, make use, if applicable, of direct contracting of services, works and products to face the demands that arise due to the tragic situations indicated; and the federal, state and municipal governments in Brazil are doing so to confront the pandemic, in theory, under the provisions of art.24, IV, of the Bidding Law, which regulates:

> IV. in cases of emergency or public calamity, when there is an urgent need to attend to a situation that may cause damage or compromise the safety of people, works, equipment and other goods, public or private, and only for goods necessary to meet the situation emergency or calamitous and for the parcels of works and services that can be completed within a maximum period of 180 (one hundred and eighty) consecutive and uninterrupted days, counted from the occurrence of the emergency or calamity, the extension of the respective contracts is forbidden.

The majority doctrine of Administrative Law in Brazil has sustained that this possibility of exemption from bidding, in the situations under comment, *it refers to the cases in which the time required for the normal bidding procedure would prevent the adoption of indispensable measures to avoid irreparable damage. When the bidding was completed, the damage would already be done. The waiver of bidding and immediate contracting represents a modality of cautionary activity in the public interest.*[23]

We have that this assertion is not sustained a priori, because when the situation of emergency or public calamity arises, totally or partially, from the lack of planning, administrative negligence or poor management of available resources by the Public Administration - whether by guilt or fraud - that

[23] JUSTEN FILHO, 2002, p.240. See to FIGUEIREDO, 2015, Página 307.

had a duty to act to prevent what happened, then we cannot apply the meridian logic of the simple acceptability of the exemption from bidding and direct contracting. So, *if there is bad faith in the sense that no previous action is taken so that the harmful facts do not occur, and only when they are about to occur does the public agent come to hire, it is, then, a "fabricated" or "fictitious" emergency, which, despite the need for hiring, will lead to the responsibility of the public agent.*[24]

And we have many fabricated or fictitious occurrences of public calamities decreed by irresponsible managers - acting with guilt and deceit - because those that should have been resolved immediately, when it was known before their risks and imminence became evident, even, sometimes, in the face of its recurrences in time and space. In this hypothesis, as Gasparin tells us, we are faced with a fictional or fabricated situation. In such cases, there is negligence, not urgency. In spite of this, it is hired, and, through negligence, the omissive authority will respond.[25]

This is the same line of positioning of the Federal Court of Auditors, under the argument that the adverse situation, given as an emergency or public calamity, cannot originate, wholly or partially, from lack of planning, or mismanagement of available resources, because if this occurs, to some extent, it must be attributed to the fault or intent of the public agent who had a duty to act to prevent the occurrence of such a situation, which is why the Court has punished managers who invoke the exemption of bidding for emergency situations manufactured by the managerial ineffectiveness.[26]

Even if such public calamity scenarios do occur - and we are facing them caused by Covid-19 -, public management failures can arise due to the lack of planning and control of the pandemic coping process, and if this occurs due to incompetence , recklessness, negligence or malpractice of the Administrator, but there are risks and dangers to the community, no doubt what measures need to be taken giving adequate responses to such demands, but the public agent must also answer for his inertia causing - in part or totally - the consequences tragic events or deviations from the purposes that have occurred.

In a recent decision, the Superior Court of Justice - STJ had the opportunity to establish that a bidding waiver was based on a fictional and not a real emergency, because there was a direct hiring of a company providing 34 (thirty-four) bus rental services, at least with 40 (forty) places, for transporting students from rural areas of the Municipality, however, in previous academic years, there was due public bidding for the hiring of the same services. Therefore, the Public Administration was fully aware that the procedure should be renewed periodically, and also how much time, approximately, it takes to go through all its phases of bidding. Because of this, he decided:

> In this context, the argument that the emergency was present due to the proximity of the beginning of the school year without the bidding process had ended was not

[24] PEREIRA, 2002, p.118. The author also warns that there are material requirements of the public calamity that need to be observed in these circumstances, namely: (i) that there is a concrete and effective urgency to attend to the situation resulting from the emergency or calamitous state, aiming at removing the risk of damage to property or to people's health or life; (ii) that the risk, that besides to being concrete and effectively probable, proves to be imminent and especially serious; (iii) that the immediate execution, by contracting with a third party, of certain works, services or purchases, according to the technically determined specifications and quantities, is the appropriate, effective and efficient means of removing the imminent risk detected.
[25] GASPARIN, 2015, p. 214.
[26] See the veredict of the Federal Court of Auditors nº347/1994 and 739/2006, access in the website: https://pesquisa.apps.tcu.gov.br/.

> supported. If this, in fact, happened, that is, if the contract had not yet been signed even on the eve of the beginning of classes, the omission was due solely and exclusively to the public agent's disdain. Thus, the continuity of the public school transport service for students was a measure of rigor. However, such continuity should take place through regular procedures and not with the irregular dispensation from the bidding process.[27]

The STJ has used, for these cases, the concept of damage *in re ipsa*, a hypothesis of presumed damage, which ends up shaping the typification of the act of improbity described in article 10, of Law nº8.429/92, in especially in cases of undue waiver of bidding (item VIII), showing that the concept of guilt used by the Law of Improbity is broad for the purposes to blaming the acts related to it.

Finally, the fundamentals of the STJ's decisions that led to the edition of Repetitive theme nº701, in particular of Special Appeal nº1,366,721-BA (2013/0029548-3), deepened those fundamentals:

> The light of art.7 of Law 8.429/1992, it is verified that the unavailability of assets is appropriate when the judge understands present strong indications of responsibility in the practice of an act of improbity that causes damage to the treasury, the periculum in mora being implicit in the referred device, in compliance with the determination contained in art. 37, § 4, of the Constitution, according to which 'acts of administrative improbity will result in the suspension of political rights, the loss of public function, the unavailability of assets and reimbursement to the treasury, in the form and gradation provided for by law, without prejudice appropriate criminal action '. The periculum in mora, in fact, militates in favor of society, represented by the claimant of the asset blocking measure, since this Superior Court has already pointed out by the understanding that, in cases of patrimonial unavailability due to imputed conduct that is harmful to the treasury, this requirement is implicit in the normative command of art. 7 of Law no. 8.429/92. Thus, the Administrative Improbity Law, in view of the fast traffic, concealment or dilapidation of assets, made possible by technological instruments of data communication that would make the reimbursement to the treasury and the return of the product of the illicit enrichment by the practice of an unlawful act irreversible, sought to give effectiveness to the rule removing the requirement for the demonstration of the periculum in mora (art. 823 of the CPC), this, intrinsic to any summary precautionary measure (art. 789 of the CPC), assuming that such a requirement is presumed in the preamble guarantee of recovery of the public assets, collectivity, as well as the illegally earned equity increase.

But in the case of the pandemic caused by Covid-19, we cannot talk about predictability and previous organizational capacity, however, even in the face of the volume of public resources that are - unexpectedly - being allocated to cope with it, including putting the country in a situation of budgetary weakness for the whole of 2020 (perhaps more), it is reasonable that at least measures to control and monitor public expenditures are established and work effectively, under the risk to give opportunity of billionaire deviations from public coffers.

And this is already happening, just look at the Folha de São Paulo journal that inform that the states most affected by the new corona virus are little or not transparent in disclosing emergency purchases to combat the pandemic: (i) Amazonas, a of the states most affected by Covid-19, and which is already receiving federal funds and spending theirs, had not even created, until 4/19/2020, a

[27] Special Appeal nº1,760.128-SP, Minister Herman Benjamin, tried on 2/8/2019, by the Second Circuit of the STJ, https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201801851749&dt_publicacao = 02/02/2019, accessed 07/19/2019. In the same sense, see the Internal Appeal in the Appeal in Special Appeal nº2015/0243380-3, Min. Assusete Magalhães, Second Circuit, tried on 06/09/2018, https://ww2.stj.jus.br/processo / magazine / inteiroteor /? num_registro = 201801851749 & dt_publicacao = 02/02/2019, accessed 07/19/2019.

specific page to list the acquisitions without bidding for such purposes, as required by the federal law of emergency, which only occurred after a court order; (ii) São Paulo and Rio de Janeiro, which lead in absolute number of deaths, provide information on contracts in a discreet and difficult to access way, besides, São Paulo did not create its own website on the corona virus expenses, as requested the law, until 4/17/2020, despite the expenses made so far without bidding; (iii) Bahia purchased a load of 300 respirators from China, at a cost of R $ 48 million, without bidding, and this is not listed on the website; (iv) of the 27 Federation units, 10 have a specific website for spending on the corona virus, 9 have links on the respective transparency portals, and 8 do not make the information available, or do so in an obscure way.

Perhaps even some public spending - in the name of coping with the pandemic - is occurring from the fictitious creation of emergency scenarios, strengthen by manipulation of data and demands involving the quantitative and its overpriced values of goods, services and works, precisely for the purposes to justify the immediate availability of resources with no bidding. These eventual artificialities produced can and should be avoided, controlled and held accountable by the internal and external control bodies, under the terms we have mentioned so far.

Thus, in order to make combating the abuse of power and misuse of purpose committed by public managers in the name of declared public calamities - and sometimes fictitious - more effective, it is necessary and urgent to have this expanded understanding of responsibility for administrative impropriety or even crime against Public Administration and, when applicable, apply all preventive measures and sanctions/penalties that the legal system indicates, segregative, reimbursement and suspension of political rights, otherwise we will be emptying public interests and assets protected by constitutional and infraconstitutional civilizing conquests.

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