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State Property Liability

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Abstract

In this paper, the authors investigated the liability of the state in the Brazilian legal system. To do so, it addresses the different meanings which the word "liability" is used in the Brazilian Federal Constitution of 1988. Moreover, it seeks to grant the State's Property Liability the logical status of a legal rule. Based on this conception, several consequences were analyzed, especially regarding the provisions of article 37, paragraph 6, of the Brazilian Federal Constitution of 1988 and its sanctioning nature in the system, for the purpose of redressing the violated property.

Keywords

State Liability, Legal Rule, Damage, Unlawful Damage, Sanction, Redressing of Violated Property

1. Introduction

There are many studies about the historical evolution of State Property Liability: from its lack of liability, passing through its subjective liability, and, lastly, its strict liability[1]. This is true both in national law and in foreign law.

However, the historical development of a legal doctrine does not imply that its content and scope are currently fixed at a supposedly more advanced stage in relation to the one that preceded it.

Therefore, even if the need to use the so-called historical interpretation[2] of normative texts is claimed, we believe that the factual, social, political, and even

[1]Among so many who discussed the subject, we selected a few authors: Carolina Zancaner Zockun ["Da Responsabilidade do Estado na Omissão da Fiscalização Ambiental" in *Responsabilidade Civil do Estado* (Org. Juarez Freitas). São Paulo: Malheiros, 2006, pp. 70 to 76]; Celso Antônio Bandeira de Mello (*Curso de Direito Administrativo*. São Paulo: Malheiros, 28ª ed., 2008, pp. 984 to 990); José dos Santos Carvalho Filho (*Manual de Direito Administrativo*. Rio de Janeiro: Lumen Juris, 13ª ed., 2005, pp. 422 to 423); and Edmir Netto de Araújo (*Curso de Direito Administrativo*. São Paulo: Saraiva, 2005, p. 716).

legal frameworks that inspired the innovation of positive law do not have the ability to establish their limits in a modern fashion.

Therefore, only what is enshrined in the legal system is subject to interpretation, with no reason to use previous texts.

Thus, it is not the will of the lawmaker that guides the interpretation of the legal rule but what is conveyed in it. So, knowing the lawmaker's intention at the time of the creation of the law is unimportant. What matters is what the law actually established.

Nonetheless, this understanding of the limited reach of the historical interpretation is not settled. For instance, it suffices to note that, in past judgments, some Justices of the Federal Supreme Court used this type of interpretation as a reason for deciding[3].

However, this does not undermine the chosen premise. In this point, we are supported by distinguished jurists such as, for example, Carlos Maximiliano, for whom the reasons that led the lawmaker to decide in one sense or another do not have the power to transform them into legislated matter[4], and, in a similar sense, Celso Antonio Bandeira de Mello[5].

For the above reasons, the historical evolution of the State's Property Liability will not be analyzed herein to, taking this as a premise, proceed with the examination of the subject.

As previously mentioned, we aim to know how positive law has established this doctrine and not what, in another moment of time and space, it predicted.

In view of this scenario, we began the study of the State's Property Liability seeking to identify the nature of the subject matter that underlies this label.

[2]Maria Helena Diniz considers that this interpretation technique "…is based on the investigation of the precedents of the rule. It refers to the history of the legislative process, from the bill, its justification or statement of reasons, amendments, approval, and enactment, or to the factual circumstances that preceded it and that gave rise to it, to the causes or necessity that induced the entity to create it, that is, the cultural or psychological conditions under which the normative precept arose (*occasio legis*)". (*Compêndio de Introdução à Ciência do Direito*. São Paulo: Saraiva, s/d, p. 391).

[3]Federal Supreme Court - Full Bench - Appeal to the Federal Supreme Court No. 379.572 - Justice reporting on the case: Gilmar Mendes, published in the Court Gazette (DJ) of 01/31/2008. In this case, the majority of Justices of the Federal Supreme Court understood that the fact of owning a motor vessel does not authorize the taxation of its owner with the IPVA (tax on the ownership of a motor vehicles). This is because, in the concept of motor vehicles, neither aircraft nor vessels are included, as this state tax succeeds the TRU (single road tax), which, originally, excluded vessels and aircraft from its scope of levy. Justices Marco Aurélio and Joaquim Barbosa disagreed with this *historical interpretation*. The first argued that "As the Federal Constitution, as I see it, does not make a distinction, does not restrict the levy of the Tax on the Ownership of Motor Vehicles, considering land motor vehicles, it is not up to me to make this distinction". The second argued that "…the expression 'motor vehicles' is broad enough to include vessels, that is, water transport vehicles. I do not see in the relevant constitutional provision the limitation that was seen in it, on the occasion of the precedent of RE No. 134509".

[4]"From the primitive will, apparently the creator of the rule, one would deduce, at most, its *meaning*, but not its *scope*, never pre-established and difficult to predict" (*Hermenêutica e Aplicação do Direito*. Rio de Janeiro: Forense, 9ª ed., 1979, p. 44).

[5]In the words of the author: "The occurrence of the substratum that served as a reference point for the lawmaker for the construction of a given normative situation does not have the power of entailing, by itself, any legal effects" (*Natureza e Regime Jurídico das Autarquias*. São Paulo: RT, 1968, p. 10, footnote 10).

Once the legal essence of this doctrine is defined, we will be able to analyze its legal regime.

2. Concept of Liability

The Brazilian Constitutional Text uses the word liability and the respective situations that typify its occurrence in eight different senses.

Articles 5, XXXIII[6], 21, XIII, "d"[7], 37, paragraph 8, II[8], 58, paragraph 3[9], and 171[10], all of the Constitution, use the word liability to designate the legal consequence resulting from the practice of an offense (in other words, liability as the object of a legal relationship of a sanctioning nature).

Article 29-A, paragraphs 2[11] and 3[12] uses the word to indicate the practice of an unlawful act.

Article 5, LXIX[13] uses a derivative word to indicate the individual who practices an unlawful act.

Article 5, LXVII[14] uses the expression "**party responsible**" to indicate the recipient of the sanction (that is, the word "responsible" is used to designate the subject of a legal relationship of a sanctioning nature).

The above hypothesis is different from the previous one because, in the former, the person who commits the offense is pointed out, and in the latter, the person who suffers the sanction for the offense is pointed out.

Articles 39, paragraph 1, I[15], and 43, paragraph 2, I[16] use the expression to indicate a set of prerogatives (liability as a right or power[17]).

[6]"Everyone has the right to receive from government agencies information of their private interest, or of collective or general interest, which shall be provided within the statutory period, **under penalty of liability**, except for information whose secrecy is indispensable for the security of society and of the State".

[7]"Civil **liability** for nuclear damage does not depend on the existence of fault".

[8]"Controls and criteria for the assessment of performance, rights, obligations, and **liability** of managing officers".

[9]"Parliamentary committees of investigation, which shall have the powers of investigation inherent to the judicial authorities, in addition to other powers set forth in the regulations of the respective Houses, shall be created by the Chamber of Deputies and by the Federal Senate, jointly or separately, upon the request of one-third of its members, to investigate a given fact and for a certain period, and their conclusions shall, if the case may be, be forwarded to the Public Prosecution Office to determine the civil or criminal **liability** of the offenders."

[10]"Article 141. Once the state of defense or the state of siege ceases, its effects shall also cease, without prejudice to **liability** for unlawful acts performed by the executors or agents thereof."

[11]"The following acts of the Municipal Mayor are crimes of malversation (**liability**)."

[12]"It shall be a crime of malversation (**liability**) of the President of the Town Council to disobey paragraph 1 of this article".

[13]"A writ of mandamus shall be granted to protect a liquidated and certain right, not covered by *habeas corpus* or *habeas data*, whenever the **party responsible** for the illegal act or abuse of power is a public official or an agent of a legal entity exercising duties of the Government."

[14]"There shall be no civil imprisonment for indebtedness except in the case of a **person responsible** for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee".

[15]"Article 39. The Union, the States, the Federal District, and the Municipalities shall establish a board of administration and personnel remuneration policy, composed of public employees appointed by the respective Branches.

Paragraph 1. The setting of pay levels and other components of the remuneration system shall comply with: I - the nature, the level of **responsibility,** and the complexity of the positions comprising each career".

Articles 71, II[18], and 72[19] use the expression to point to a burden (in other words, liability as a duty or an obligation).

Article 150, paragraph 7[20] also establishes the possibility of using this expression to indicate the subject of a legal relationship of a non-sanctioning nature.

Lastly, article 222, paragraph 2[21] provides liability as an attribute of the agent of a legal relationship of a non-sanctioning nature.

In light of the foregoing, we ask the following question: in which of the senses above should we include the liability referred to in article 37, paragraph 6 of the Federal Constitution? The answer is in none of them but rather in a ninth and underlying sense.

Article 37, paragraph 6 of the Brazilian Federal Constitution, the legal source of the State's Property Liability, establishes that "Legal entities governed by public law and those governed by private law providing public services shall be liable for the damage that any of their agents, in that capacity, cause to third parties…".

Thus, if the State or whoever acts as its substitute, causes damage to third parties during the performance of its activities, this constitutional provision establishes that the violated right must be redressed in the property sense. As a rule, this violation takes place to the detriment of a subjective right[22], but not exclusively[23].

[16]"Paragraph 2 - The regional incentives will include, in addition to others, pursuant to the law: I – equality of tariffs, freight rates, insurance, and other cost and price items under the **responsibility** of the Government".

[17]We use the expression right, power, obligation, and duty in the same sense as SANTI ROMANO (*Fragmentos de un Diccionario Jurídico*. Translated by SANTIAGO SENTIS MELENDO and MARINO AYERRA REDÍN. Buenos Aires: Ediciones Jurídicas Europa-América, 1964). We have already analyzed the subject more deeply, explaining the differences between these doctrines, in our work *Regime Jurídico da Obrigação Tributária Acessória* (ZOCKUN, Maurício. *Regime Jurídico da Obrigação Tributária Acessória*. São Paulo: Malheiros, 2005 x', pp. 73 *et seq.*).

[18]"Article 71. External control, under the responsibility of the National Congress, will be exercised with the assistance of the Federal Accounting Court, which is responsible for:
(…)
II - examining the accounts of administrators and other persons **responsible** for public money, assets, and values of the direct and indirect administration, including foundations and companies organized and maintained by the federal Government, and the accounts of those who cause the loss, misplacement, or other irregularity resulting in damage to the public treasury".

[19]"Article 72. Faced with indications of unauthorized expenditure, even if in the form of unscheduled investments or non-approved subsidies, the permanent joint Committee referred to in article 166, paragraph 1, may request the **responsible** Government authority to provide the necessary explanation within five days."

[20]"The law can impose on the **taxpayer** the **responsibility** for the payment of a tax or contribution whose taxable event should occur subsequently, ensuring the immediate, preferred refund of the amount paid, if the presumed taxable event is not materialized."

[21]"The editorial **responsibility** and the activities of selection and management of the programming to be disseminated **shall be carried out exclusively by native Brazilians or those naturalized** for more than ten years, in any means of social communication."

[22]The conceptualization of subjective rights, especially for purposes of judicial protection, was cited brilliantly by CELSO ANTÔNIO BANDEIRA DE MELLO [*Eficácia das Normas Constitucionais e Direitos Sociais*. São Paulo: Malheiros, 2009, (Chapter IV, item 3) p. 43]. From this perspective, it is possible to understand that legal position that guarantees the individual special protection in the face of 1) injuries resulting from the rupture of the legal system; and 3) the undermining of the advantage that could be enjoyed if the legal system were not breached. That is why the existing segregation between subjective right and legitimate interest is not helpful, at least among us.

[23]See note 33 in this Chapter.

It should be noted that, in this case, the occurrence of damage is a prerequisite for the establishment of liability. There is no State Property Liability without, pursuant to article 37, paragraph 6 of the Federal Constitution, damage to the legally protected sphere of others.

In view of this perspective, two characteristics are essential for the recognition of this liability: 1) the factual situation that gives rise to the intersubjective link between the subjects of right (that is, the "factual support"[24]); and 2) the bond that, born from this fact, unites two or more people, causing some to economically redress the legally protected sphere of others, which can be called a legal obligation to redress.

Therefore, the State Property Liability, as envisaged among us, aims to economically restore the legal assets of the one who was injured by conduct practiced by a person who has the duty of exercising a public prerogative.

Therefore, its purpose is that of redress, as Seabra Fagundes (2006: pp. 217-218) properly asserted when emphasizing that "However, in one way or another, civil liability is, today, a principle definitely integrated into the State's legal system. The current State is characterized by the limitation of all its activities by means of positive Law. When, in exercising them, the legal property of the individual is destroyed or disturbed, civil liability appears as the means of effectively restoring the violated right".[25]

Well, if this constitutional provision mentions the factual situation that gives rise to the duty of others to implement a measure for economic redress, then this dynamic evidences, in terms of the General Theory of Law, the existence of a legal rule.

Thus, this constitutional commandment establishes that the occurrence of a fact (commitment of damage) triggers a consequence (emergence of a legal bond that requires economic redress for the damage caused). And it is precisely this duty (from a fact to a consequence) that characterizes the existence of a legal rule[26].

This is why, within the scope of this line of thought, article 37, paragraph 6, of the Federal Constitution gives the State Property Liability the logical status of a

[24]We use this expression in the PONTES DE MIRANDA style, for whom "The factual support (*Tatbestand*) of the legal rule, that is, that fact, or group of facts that compose it, and on which the legal rule applies…" (*Tratado de Direito Privado - Tomo I.* Campinas: Editora Bookseller, 2001, p. 66).

[25]In the same sense, CELSO ANTÔNIO BANDEIRA DE MELLO points out that "1. The State's non-contractual property liability is understood to be the obligation incumbent upon it to economically repair damage that is harmful to the legally guaranteed right of others…" (*BANDEIRA DE MELLO, Celso Antônio. Curso de Direito Administrativo. São Paulo: Malheiros, 2008, 28ªed., p. 977*) (emphasis added).

[26]It could be argued, in contrast, that the legal system provides, strictly speaking, for the attribution of a consequence to a fact. This consideration is correct, but it does not undermine the statement according to which the consequence is triggered by the occurrence of a legally relevant fact. In other words, these two statements coexist harmoniously as they are stated by law professionals who observe the same phenomenon from different perspectives.

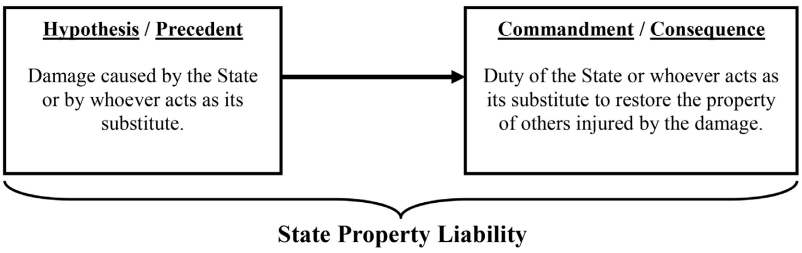
If this phenomenon is observed from the perspective of the creation of law, then a consequence is attributed to a fact. Taking into account the already created law, it is understood that the occurrence of a legally relevant fact gives rise to a consequence.

Thus, it is clear that the first position takes into account the process of creation of law. The second considers the law already created and in force. Both are equally accurate views of the same phenomenon.

Besides, metaphorically, these considerations are comparable to the situation in which two people, located in different points of the Earth, see, at the same time, one of them the sunset and the other the sunrise. The phenomenon seen is the same, however, seen from different angles.

legal rule that imposes a consequence due to the fact that someone else's property has been damaged by the State or by anyone who acts on its behalf.

See the graphic representation of this thought:



The legal nature[27] of State Property Liability is not usually addressed by scholars of administrative law.

Perhaps this is due to the fact that, presumably, its morphology has not resulted in relevant practical results such as those obtained in other fields of Law[28].

However, the well-known assumptions of the State Property Liability (damage caused by the State or whoever acts as its substitute, duty to repair, and causal link) derive precisely from a legal rule (Pastor, 1972).

Indeed, the action of the State that is harmful to the legal property of others characterizes the *precedent* or *hypothesis* of a legal rule. The result, the State's duty to adopt a measure for economic redress, is the *consequence* or *commandment* of this same legal rule. Lastly, the causal link[29] is the *interpropositional link* that unites the *precedent* with the *consequence*.

It is for no other reason that Maria Helena Diniz (2003: p. 58), when dealing with the subject of civil liability, asserted, based on the opinion of Giorgio Giorgi (1930: p. 137), that there is no discussion of liability without the existence of damage caused to a legally protected interest.

From this *normative* notion of State Property Liability derives many consequences that, in most cases, are achieved without revealing their logical origin to the reader. It is not that its authors are unaware of this. They simply perform this logical *iter* mentally.

To corroborate what was said above, let us see some examples. It is said that, in the case of strict liability, the State or whoever acts as its substitute will not be liable if there is no causal link between its commissive behavior and the damage, as occurs, for example, in the case of exclusive fault of the injured person or the victim (Cavalieri Filho, 1996: pp. 63-65).

[27]Further on (Chap. I - item I.3.2) we will demonstrate that this damage is a damage not wanted by the legal system. That is, an unlawful damage. However, as logically and chronologically the subject has not yet been addressed, the expression damage is used for the time being, even though the correct nomenclature is unlawful damage.

[28]This is what happened, for example, in the field of tax law due to the genius of Geraldo Ataliba (*Hipótese de Incidência Tributária*. São Paulo: Malheiros, 5ª ed., 4ª tiragem, 1995, pp. 21 to 430).

[29]The legal issues underlying the topic of the causal link deserve to be examined in a specific work due to their extremely high complexity and unusual relevance, as incidentally noted by Ricardo Marcondes Martins (*Efeitos dos Vícios dos Atos Administrativos*. São Paulo: Malheiros, 2008, pp. 562 to 568). Regarding this subject, in note 59 contained in Chap. III, a very brief annotation was made of some thoughts from jurists on the matter.

Well, in these cases, these conclusions derive from the normative analysis of the State Property Liability. Indeed, if the damage is the sole fault of the victim, the normative *precedent* (economically relevant property or non-property damage) does not result from the State's behavior. In this case, the hypothesis that will give rise to the State property liability is not met.

Therefore, in this situation, the legal rule that characterizes the emergence of State Property Liability was not materialized since its "factual support" did not occur in the real world.

This is just one of the practical consequences of the *normative* notion of State Property Liability.

Thus, State Property Liability arises as a result of the disobedience of a normative command that, as a rule, protects a subjective right[30] from the practice of State acts that are harmful to it.

Without reaching the same conclusion, but following the same premises, José dos Santos Carvalho Filho (2007: p. 471) ponders: "…when the Law deals with liability, it immediately induces the circumstance that someone, the person responsible, must be held liable before the legal system due to some preceding fact. These two points—the fact and its attribution to someone—constitute inescapable assumptions of the doctrine of liability".

Edmir Netto de Araújo also reveals that the notion of State Property Liability is deeply associated with the idea of cause and effect that guides the deontic logic[31] applicable to legal rules[32].

[30]The injury to a subjective right is not the only circumstance that gives rise to the State Property Liability. The Public-Interest Civil Action Law and the Consumer Protection Code reveal the existence of other categories of rights that, despite not fitting the definition of subjective right, once violated by the State or by whoever acts as its substitute, give rise to the State Property Liability.

This is what happens in relation to the so-called diffuse interests. The damage caused to diffuse interests unites indeterminable interested parties by the same factual situation, even if its consequences are individually indivisible. That is, the damage affects indeterminable people (HUGO NIGRO MAZZILLI. *A Defesa dos Interesses Difusos em Juízo*. São Paulo: Saraiva, 17ª ed., 2004, p. 49). For this very reason, the judgment in any action filed to protect these rights will produce *erga omnes* (binding upon everyone) effects (in this sense: SILVIO LUÍS FERREIRA DA ROCHA. *Responsabilidade Civil do Fornecedor pelo Fato do Produto no Direito Brasileiro*. São Paulo: RT, 2ª ed., 2000, p. 119). An example of this occurs in cases where misleading advertising is broadcast on television, radio, or the Internet. What subjective right is injured in the hypothesis? Based on the definition adopted herein, there will be no damage to a subjective right, but damage to a diffuse interest or right.

This is also true for collective interests, identified by HUGO NIGRO MAZZILLI as indivisible interests of a determined or determinable group of people, united by a common legal bond (*A Defesa dos Interesses Difusos em Juízo*. São Paulo: Saraiva, 17ª ed., 2004, p. 49). For this very reason, the judgment in any action filed to protect these rights will be *res judicata ultra partes* (beyond the parties) (in this sense: SILVIO LUÍS FERREIRA DA ROCHA. *Responsabilidade Civil do Fornecedor pelo Fato do Produto no Direito Brasileiro*. São Paulo: RT, 2ª ed., 2000, p. 119).

Even if in these hypotheses mentioned above the existence of a subjective right is not discussed – as adopted herein –, the State may be required to redress the damage caused to these legal guarantees (diffuse and collective rights), in addition to the specific allocation of the economic product resulting from any pecuniary adverse judgment: the Fund for the Defense of Diffuse Rights (*Fundo de Defesa dos Direitos Difusos*), provided for in articles 13 and 20 of Federal Law No. 7347/85 and in articles 57, 99, and 100, sole paragraph, of the Consumer Protection Code.

Thus, from now on, to avoid talking about damage to a subjective, diffuse, and collective right, the expression is reduced to damage to a **subjective right** or **legally protected interest**.

[31]Deontic logic is understood as the logic of the *ought-to-be*.

If we understand that State Property Liability qualifies as a legal rule, we must identify the hypotheses in which positive law authorizes its emergence.

And this is in a way that, when trying to define a given hypothesis as authorizing the emergence of the State Property Liability, a fact that gives rise to a legal relationship that does not correspond to the one examined is not described.

3. Conceptual Basis of the State Property Liability

The identification of the legal nature of State Property Liability among us was just the beginning of the development of the subject.

However, precisely because of the legal nature of this doctrine, it will become clear why, below, we will partially opt for the theoretical construction advocated by Eduardo García de Enterría and Renato Alessi to the detriment of those proposed by Guido Zanobini and others.

Indeed, as the grounds of the State Property Liability are based on the most elementary notions of Law, only by examining the operating logic of the legal system we will be able to unveil its reason for existing.

And once its purpose is revealed, it will be possible to dwell on its special form of existence in our legal system.

4. Legal Harmony and Disharmony: Forms of Occurrence and Forms of Redressing

As Law is the result of human creation, it aims to provide (legal) certainty to intersubjective relationships, and, consequently, to individuals[33].

In order to achieve its purpose, Law seeks a plexus of logical instruments that, in our view, are the legal rules, the rules, and principles[34] that, as a whole, are called legal rules *lato sensu*[35]. So, lato sensu legal rules correspond to the set of

[32]He says that the connotation of the word liability is always established with the idea of attribution to someone, related to the imbalance that this person caused in the regular or natural order of things (Netto de Araújo, *Curso de Direito Administrativo*. São Paulo: Saraiva, 2005: p. 712).

[33]To support this thought, it is necessary to partially reproduce the lesson of MÁRCIO CAMMAROSANO, for whom "…the principle of legal certainty is fundamental, constituting the very reason for the existence of Law…" (*O princípio constitucional da moralidade e o exercício da função administrativa*. Belo Horizonte: Fórum, 2006, pp. 36 and 37).

[34]In a proper moment, we will approach the theory of ROBERT ALEXY (*Teoria dos Direitos Fundamentais*. 5ª edição alemã. São Paulo: Malheiros, 2008) and his excellent demonstration that, among us, was carried out by VIRGÍLIO AFONSO DA SILVA (*A Constitucionalização do Direito*. São Paulo: Malheiros, 1ª ed., 2ª tiragem, 2008).

[35]Regarding the distinction between rule, principle, and legal rule, we point out that "In the legal system, we differentiate the *simple rules* (which are mere elements within the system perspective) from the *principles* (which are the main lines that give harmony and coherence to the legal system due to their unifying purpose), and the principles from the *stricto sensu legal rules* (which are the meanings that are drawn from the analysis of the text of positive law, with the purpose of governing intersubjective behavior). Let us explain.

(…)

Thus, a distinction is made between the *rule* (formulated in a categoric proposition without an important function for the Law), the *principle* (formulated in a categoric proposition with an important function for the Law), and the *stricto sensu legal rule* (formulated in a hypothetical-conditional scenario according to which, in view of a fact, any ought-to-be is a consequence) even though they are all *lato sensu legal rules* since they are instruments used by the Law to govern intersubjective behavior" (*Regime Jurídico da Obrigação Tributária Acessória*. São Paulo: Malheiros, 2005, p. 39 and 41) (emphasis in the original).

rules that include the rules and the principles.

When a *lato sensu* legal rule is violated, the purpose of the Law is frustrated. Therefore, the predictability of compliance with the behaviors established by positive law is frustrated.

For the Law to remain in harmony with its reason for existing in these cases, the question asked is: Is it indispensable that the legal system regulates the imposition of sanctions on those who disobey one of its commandments?

For Norberto Bobbio (2003: pp. 166-167), the legal system maintains its coherence even if there is no sanction for disobeying its commandments. In his thinking, "the presence of rules without sanctions in a legal system is an indisputable fact. The solution to this difficulty, on the part of those who consider sanctions as a constitutive element of the law, is certainly not to deny the fact... One way out would be to deny the character of legal rules to non-sanctioned rules. But this is a radical and unnecessary solution. The difficulty can be resolved in another way, that is, by noting that when we speak of an organized sanction as a constitutive element of the law, we are not referring to individual rules but to the *normative system taken as a whole*, which is why saying that organized sanction distinguishes the legal system from all other types of systems does not imply that *all* rules of that system are sanctioned, but only that **most** of them are".

However, we dare to disagree with this opinion because we do not share the same premises.

We understand that every legal system must provide for the imposition of a sanction in case one of its commands is violated[36].

Well, if the Law only exists to provide certainty to people, then through it, one seeks to pacify and harmonize social relations. Given this premise, it is concluded that non-compliance with a normative order violates this assumption, causing social disharmony and a profound lack of certainty.

Thus, if we admit that positive law recognizes a social imbalance without, however, contemplating a legal mechanism tending to restore it, then we will be forced to conclude that there will be no need to discuss the existence of Law as we conceive it. There will be no legal system in the way we see it.

As we do not imagine the legal system differently, a different solution—other than that of Norberto Bobbio—must be adopted.

That is why, confident in this premise, it seems necessary that the legal system always contemplates in its scope provisions intended to restore the imbalance caused by non-compliance with one of its normative commands.

It is clear that this position is different from that defended by Norberto Bobbio because, as he himself points out, what matters to qualify a legal system is that most of its rules contain sanctions, but not necessarily all of them. That is why, for Bobbio, the legal system accepts in its scope a legal rule without a sanction.

The difference between the proposed interpretations is easily identified as they are based on different assumptions.

[36]This means, in other words, that every legal rule that is part of a system must provide for the imposition of a sanction in case one of its commandments is not complied with.

In fact, this philosopher cites some rules that, in the Italian legal system, are not sanctioned. Among them is the children's duty to respect their parents and the qualification, under article 139 of the Italian Constitution, that their Nation is a Republic. If these provisions are not complied with, according to Norberto Bobbio, there is no rule establishing any kind of sanction.[37] Despite this, according to the Italian professor, these rules are part of that legal system.

This thought is opposed by the idea that rules devoid of sanctions are not characterized as legal rules, with which Bobbio (2003: p. 167) evidently disagrees. For him, removing the quality of legality from these rules is a radical and unnecessary solution.

Nonetheless, it should be noted that the attribute of a solution being necessary or unnecessary sounds like a true criterion of utility to be adopted by the interpreter.

From this perspective, the use of a criterion for utility purposes leads to the elaboration of more or less useful classifications. For Bobbio, there is usefulness in classifying a legal system that embraces rules without sanctions, which, according to the theory we adopt, is useless.

After all, if this were not the case, positive law would become a handful of mere recommendations incapable of logically satisfying its coercive purpose since they would lack sanction.

In view of these considerations, it is assumed that the imbalance caused by non-compliance with a legal command can be restored if positive law establishes 1) the imposition of sanctions on the agent who committed the offense; and 2) the forfeiture of the right to demand the performance of obligations and rights after the lapse of a certain time, to be defined in each legal system.

Evidently, the imposition of sanctions will not have the capacity to ensure that the command established by the violated rule is invariably implemented. That is, in certain situations, the provision originally established can no longer be materially or legally satisfied.

Given this perspective, social stability will only be recomposed by a legal assumption. In other words, by a measure that, although it does not result in the originally desired effects, will serve as a substitute measure[38].

Moreover, if this sanctioning measure is not implemented, then another legal assumption is created: that the lapse of time restores social harmony. And this occurs by means of forfeiture[39].

[37]Norbeto Bobbio's thinking in this regard is curious, as article 139 of the Constitution of the Italian Republic provides that "*La forma repubblicana non può essere oggetto di revisione costituzionale*". Furthermore, article 134 of the same Constitution grants the Italian Constitutional Court jurisdiction to decide any offenses against the Constitution of that Nation.

[38]That is why Vicente de Paulo Vicente de Azevedo advocated that indemnification was classified as *restitution*, *redress*, *and compensation*. The first entails restoring the situation to the *status quo ante*. The second restitutes the amount or equivalent obligation to the injured party. The last one entails financial compensation for the damage suffered (Vicente de Paulo *Crime*, *dano*, *reparação*. São Paulo: Saraiva, 1934, pp. 72-73).

[39]Forfeiture is used to include the loss of a right due to its non-exercise, although, in some cases, the expression is used to identify the loss of a right as a sanction (for instance, *forfeiture of the concession*).

5. The State Property Liability as a Way of Restoring the Harmony of a Violated Legal System

After demonstrating that, in the event of a violation, the legal system must contemplate a provision that aims at restoring it; then positive law must provide for the existence of a legal rule of a sanctioning nature.

Indeed, it is by means of this sanctioning rule that the social balance can be legally restored, even if this restoration is only a legal assumption[40].

In view of this context, the question is: Is the State Property Liability a way of redressing the violated legal system? It is worth saying, is State Property Liability a type of sanction?[41]

Now, if the occurrence of damage is necessary for the rising of the State Property Liability, then could the legal rule that establishes this liability have a sanctioning nature?

In this case, however, it is imperative that the damage referred to in article 37, paragraph 6, of the Federal Constitution be contrary to the legal system, in which case, the State Property Liability would be qualified as a sanction.

If this assumption is confirmed and the resulting damage is unlawful, the State Property Liability would rectify the legal disharmony caused by the exercise of a state function in disagreement with the commandments established by positive law. Therefore, its "factual support" would be an unlawful legal fact, in which case the damage referred to in this constitutional provision would be a synonymous expression of unlawful damage.

In the opposite sense of this thought, it could be pointed out that the damage does not always result from the practice of an unlawful act. It is worth mentioning that lawful acts can also give rise to the damage. To clarify, the damage referred to in article 37, paragraph 6, of the Federal Constitution is not synonymous with unlawful damage[42].

An example that would theoretically support the appropriateness of this thought would be stamped in article 21, XXIII, "d", of the Federal Constitution, according to which "Civil liability for nuclear damage does not depend on the existence of fault".

After all, according to this constitutional provision, it does not matter whether the harmful property consequences resulting from nuclear damage originated from the lawful or unlawful act of the State or its agents. And that is because

[40]On several occasions it is not possible to restore the factual situation that existed before the perpetrated injury. In these cases, as the Law builds its own realities, it is assumed that a violated right will be redressed by means of the adoption of a sanctioning measure, even if it is not possible to return to the *status quo ante* in the specific case.

[41]If it is confirmed that the State Property Liability is a sanction aimed at repairing the violated legal system, this does not mean that it is the only way to restore the harmony of the legal system.
Along with it, there would be other sanctions that could be imposed on the State in order to restore the legal imbalance caused by the practice of an act contrary to the Law, such as criminal liability (for example, environmental crime), administrative liability, fine, limitation of the exercise of political rights, late payment interest, etc.

[42]This is, in fact, a current view in the opinion of Brazilian and foreign legal scholars (for all: Oscar Álvaro Cuadros. *Responsabilidad del Estado*. Buenos Aires: Abeledo-Perrot, 2008, p. 170).

once the harmful event has occurred, it will result in the State's duty to repair it.

That is why, for the purposes of holding the State liable, it does not matter whether the damage resulted from a lawful or unlawful act by the State.

For this reason, Weida Zancaner (1981: p. 47) considers that, in these cases, the lawfulness or unlawfulness of the agent's act is relevant only so that the State can determine the emergence of the duty-power to file a possible action for recourse against the agent.

In fact, this idea is common in the opinion of jurists. Sérgio Cavalieri Filho (1996: p. 38), for example, observes that, in the sphere of private law, there are those who, in cases of strict liability, defend that the obligation to compensate stems from the principle of commutative justice. This is what is called liability without fault.

Precisely for this reason, Marcel Waline (1959: p. 276) inserts the liability for lawful acts in the liability without fault or in the theory of liability due to risk.

In this regard, it could be argued that article 37, paragraph 6 of the Federal Constitution, is applicable both to cases in which the agent's act is lawful and to those in which his act is unlawful. By virtue of this, it would be demonstrated that the thesis according to which the State Property Liability is characterized as a sanction would be wrong.

The statements above, however, do not have the power to undermine the validity of the statement according to which the State Property Liability is a form of sanction.

This is due to the fact that these interpretations by jurists are built on classification criteria different from the State Property Liability. That is, the assumptions chosen by one and another current of thought are different.

The theory that unravels this range of opinions on the subject can be extracted from the lessons of Eduardo García de Enterría, first used in this work when trying to demonstrate the normative nature of State Property Liability.

Indeed, the traditional theory examines the State Property Liability taking into account the agent's conduct. However, Enterría (2006: pp. 382-390) shifts the examination axis of the matter: from the agent's conduct to the outcome arising from that conduct.

In other words, he displaces the initial focus of the State Property Liability from the conduct that gives rise to the damage to the damage itself. This is because, based on this understanding, it does not matter whether or not the agent's conduct was contrary to the legal system. What is important to know, in fact, is whether the consequence of this conduct is contrary to positive law.

It is true that Eduardo García de Enterría's considerations derive, in large part, from the special legislative characterization of the State Property Liability in Spain[43].

However, as will be revealed below, the Brazilian normative model is, in this

[43]In that country, the State Property Liability for lawful legislative acts is a form of expropriation. Therefore, it is a legislative hypothesis of expropriation.

part, quite similar to the Spanish one, which results in the partial use of these ideas.

In any case, the analysis of the opinion of Brazilian jurists reveals this radical change in the form of observation of this doctrine among us.

Maria Helena Diniz (2003: pp. 50-52) with her recognized vast knowledge of civil law, asserts that Civil Liability arises, as a rule, from the agent's conduct that is incompatible with the law. However, she considers that there are hypotheses of liability without fault when the activity carried out creates a special risk and from the exercise of a prerogative arises the duty to repair the damage caused.

From this lesson, it is clear that this legal phenomenon (Liability) is, let us repeat, recurrently observed from the bias of the agent's conduct. According to Eduardo García de Enterría's proposal, this is not the central point to be observed in the liability subject.

Check these divergences with **Figure 1**.

Thus, if one adopts the traditional view of the topic of State Property Liability, it will necessarily be said that lawful or unlawful acts performed by the Government will give rise to the State's duty to restore the property of the individual. According to Enterría's proposal, this statement cannot be made since only conducts that produce unlawful results give rise to this property liability.

However, criticism deserves to be made in relation to the thinking of Eduardo García de Enterría. He does not clarify why, under the operating logic of legal rules, the State Property Liability should be investigated, taking into account the consequence generated by the agent's conduct and not the agent's conduct itself.

This gap is filled by the idea that the occurrence of the damage (and not the agent's conduct) is what gives rise to the duty of the State or whoever acts as its substitute to restore the property of others.

Thus, the damage is placed as "factual support" of the rule of State Property Liability. Without it, there is no need to discuss liability.

Therefore, the starting point for the emergence of State Property Liability, its true legal trigger, will always be the damage caused to other people's property and not the conduct of the agent that caused this damage.

After all, it is the damage (and not the conduct of the State's agent or whoever acts as its substitute) that is characterized as a "triggering event" for the State Property Liability[44].

That is why, under this bias, the examination of the State Property Liability must be changed from the way defended by Eduardo García de Enterría.

If these observations are recognized, how would the statement according to which the State Property Liability is a form of sanction be justified? The answer is quite simple, even if the same cannot be said about its evidencing: if the conduct of the State or of whoever acts as its substitute caused damage to the legal

[44]In this regard, it is important to remember that, as shown in item 6, the State Property Liability is a legal rule that has, as a precedent, damage caused by the State or by whoever acts as its substitute and, as a consequence, the duty to restore the property of others injured by the conduct described in the precedent.

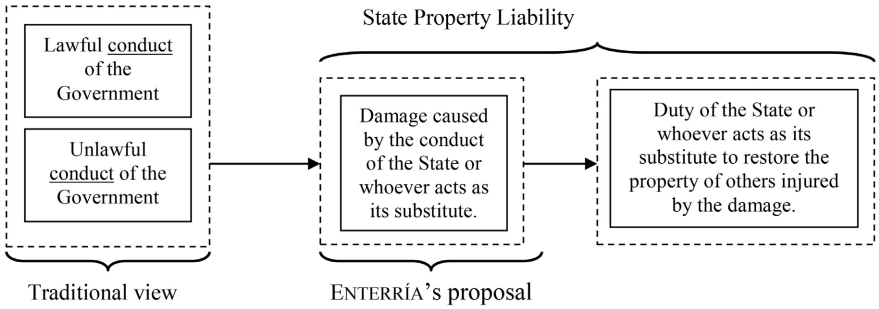


Figure 1. Fact that causes the State Property Liability.

property of others violating the legal system, the duty to repair it stems from the State Property Liability; if, on the contrary, the legal property of others can be lawfully taken by the Government, the hypothesis may[45] be a sacrifice of right (which, as a rule, entails the duty to pay prior indemnification).

Thus, article 37, paragraph 6 of the Federal Constitution uses the expression damage as unlawful damage.

But how to justify this statement? Celso Antônio Bandeira de Mello (2009: p. 97) provides the answer.

According to the lessons of this jurist, the State Property Liability is based on 1) the counterpart to the principle of legality, in the case of unlawful behavior, whether commissive or omissive; 2) the principle of equality, in the case of commissive unlawful acts; and, finally, 3) the principle of equality, in the case of lawful acts and in the event of damage linked to the situation created by the Government since we cannot admit that a few bear the property damage incurred in favor of the whole society.

It should be noted that, in all the hypotheses above, the acts performed by the Government gave rise to the violation of the rights of others.

Indeed, if the State Property Liability is a counterpart of legality—as Celso Antônio Bandeira de Mello says—the result of the State's conduct or of whoever acts on its behalf exceeded the limits established by the legal system. If, on the other hand, the State Property Liability is a counterpart of the principle of equality, then this means that isonomy was harmed by the action of the Government. In both hypotheses, it must be recognized that the Government's action violated the legal system.

If it is not the State's action that, under the provisions of article 37, paragraph 6, of the Federal Constitution, gives rise to the duty to indemnify, but rather the result of its action. In that case, all the hypotheses that justify the State Property Liability have as a "triggering event" an offense (unlawful damage). And, in this case, the duty of the State to economically redress the property unlawfully injured is translated into a sanction.

[45]And here it is said may because, in some circumstances, the State will be invested with the prerogative of legally harming the property of others, even if this circumstance does not give rise to the duty to indemnify. This happens because, in these cases, the damage caused by the state action will have been equitably shared by society.

In fact, this position is the same as that expressed by Weida Zancaner (1981: p. 55) long ago. This jurist, despite making sharp and well-grounded objections, examined later, to García de Enterría's preliminary thinking on the issue, asserts that "On our part, we understand that the cause for the attribution of State liability is the unlawful damage… So, the unlawful damage to which we refer, as a cause of attribution of liability to the State, is any damage originating from an unlawful act or abnormal or special damage, resulting from the lawful activity of the State".

Although rooted in Italian law, which draws the notion of State liability from the Italian Civil Code (Villa, 1970), Giovanni Miele's considerations seem correct and entirely applicable to our reality. In this sense, both there (article 2043 of the Italian Civil Code) and here (article 37, paragraph 6 of the Federal Constitution), the notion of State Property Liability is linked to the occurrence of an unlawful fact.

This is why, for this Italian jurist, liability is the legal consequence that arises from the perpetration of an offense[46], and the applicable sanction may have an economic purpose[47]. And this, it must be stressed, is in accordance with our way of thinking and with the hypotheses that predict the emergence of State Property Liability.

The foreign legal scholarship also has many opinions in the sense that State Property Liability arises from an offense.

Paul Duez (1927: p. 7) could provide support to this understanding. According to him, liability would be united with the idea of moral liability and fine, implying, therefore, censure on those who performed their conduct in non-compliance with the legal system.

Julio R. Comadira's (2003: p. 177) understanding is in the same sense. For him, unlawfulness presupposes the emergence of State Property Liability since damage can only result from an unlawful act, under penalty of not being characterized as damage. Thus, for him, if the damage does not result from unlawful behavior, "damage" is used in a non-technical sense.

For this reason, Julio R. Comadira advocates that in the State Property Liabil-

[46]We do not agree with the terminology used, as we understand that the legal consequence of the perpetration of an offense must be designated as a *sanction*, and liability is one of its species.
Despite this terminological divergence, GIOVANNI MIELE recognizes in this figure the sanctioning nature when he points out that "*Il comportamento illecito è quello che si concreta nella lesione di un altrui diritto o interesse giuridicamente rilevante, allorché siffatta lesione non sia consentita dall'ordinamento giuridico. Due sono, quindi, gli elementi atti a qualificarlo*: 1). *lesione di un altrui diritto o interesse giuridicamente rilevante*; 2) *illegittimità della lesione…Queste conseguenze giuridiche si assommano tutte nel concetto di responsabilità: la quale si può definire come la soggezione dell'autore della lesione, o di chi per esso, a un potere giuridico avente per contenuto l'imposizione di un obbligo a carico del responsabile o la sottrazione di vantaggi preesistenti. In simili circostanze l'imposizione di un obbligo o la perdita di vantaggi assumono il carattere di una sanzione, e si sa che l'ordinamento giuridico la commisura in modo che il male minacciato in intensità ed efficacia di quel che il responsabile proverebbe in seguito all'omissione dell'atto illecito*" (*Principi di Diritto Amministrativo*. Padova: CEDAM, 1966, pp. 177 and 178) (emphasis added)

[47]Hypothesis in which, according to GIOVANNI MIELE, it will have a compensatory purpose (*Principi di Diritto Amministrativo*. Padova: CEDAM, 1966, p. 178).

ity, there is a contradictory relationship between the fact or fact practiced and the Law.

At this point, it is important to say a few words in favor of Maria Helena Diniz's (2003: p. 58, 59, 63, and 98) brilliant understanding of the issue. Indeed, despite perceiving the different means or methods for analyzing the subject, she states that the damage always comes from a violation of a right. And by indicating, she ends up conferring the sanctioning character to the liability[48].

The opinion of José dos Santos Carvalho Filho (2007: p. 53) is in the same sense; without explicitly adhering to the thinking of Eduardo García de Enterría, he recognizes that the liability in question has an evident sanctioning nature, which is why the indemnification provided for in article 37, paragraph 6, of the Federal Constitution is revealed as a type of sanction.

However, this does not reduce the extremely important theoretical construction about the assumptions that give rise to the damage. In fact, the theories of subjective liability and strict liability clarify when and how the "triggering event" of the State Property Liability occurs.

That is why Maria Helena Diniz (2003: p. 63) asserts that, in order to trigger civil liability, the damage must meet the requirement of causality. That is, the damage must be intrinsically associated with the performance of an act by the agent that caused the damage, even if this act has been carried out with or without the fault of the agent, which, according to the conventional opinion of jurists, qualifies, respectively, as subjective and strict liability.

However, it should be noted that this understanding is different from that disseminated by part of the Italian, Spanish, and Argentine jurists.

In this sense, we should recall the lessons of Renato Alessi (1995: pp. 115-121). He mentions the mistake of those who use the expression liability to designate the state duty of repairing damage arising from a lawful or unlawful act. In his opinion, if the Government acts against the rights of others in an unlawful way, there is a liability. If, on the contrary, the Government acts with legal authorization, the hypothesis is a sacrifice of rights[49].

In order for liability to exist, it is necessary 1) the occurrence of a harmful event [resulting in relevant property or non-property loss caused by it as a result of a causal link, including in the concept of damage the reduction of property (pecuniary loss) and what it failed to obtain (loss of profits)]; 2) that this fact be unlawful; and 3) that the fact is attributed to the conduct of an agent. According to the understanding of Renato Alessi (1955: p. 7), whenever a fact is unlawful, the damage will also be.

In cases of lawful damage arising from a lawful fact, the sacrifice of right will be characterized, in which case the sacrificed right is *converted* into its equiva-

[48]This is why, when dealing with civil liability for non-pecuniary damage, Maria Helena Diniz notes that "If the civil liability is a sanction, there is no reason not to admit compensation for non-pecuniary damage, a mixture of penalty and redress" (*Curso de Direito Civil Brasileiro*. Vol. 7. São Paulo: Saraiva, 17ª ed., 2003, p. 59).

[49]This thought was also accepted by Fernando Garrido Falla (*Tratado de Derecho Administrativo*. Vol. II. Madrid: Tecnos, 11ª ed., 2002, pp. 298-300).

lent economic amount[50].

It differs from Renato Alessi's thinking due to the premises herein and not the consequences achieved. To separate the hypotheses of State Property Liability and sacrifice of rights, Renato Alessi takes into account not only the damage (whether lawful or unlawful, as advocated by Eduardo García de Enterría) but also the agent's conduct (whether lawful or unlawful)[51].

Nevertheless, what seems relevant to characterize the legal regime of property redressing to be carried out by the State or by whoever acts in its place is precisely the lawful or unlawful nature of the damage.

It can be seen that the divergence with Renato Alessi's thought is minimal because the legal consequences drawn from these two topics, liability and sacrifice, will take into account the outcome of the agent's conduct and not exactly the conduct, with what the Italian author seems to agree implicitly[52].

In Argentina, Juan Carlos Cassagne (2003: p. 489) also recognizes the applicability of the differentiation proposed by Alessi and accepted by Fernando Garrido Falla.

Therefore, for these authors, the analysis of the liability consists of analyzing the agent's conduct and not exactly the damage arising from this conduct.

It is true that highly qualified authors, such as Guido Zanobini, state that the term "liability" encompasses in its content the duty of redressing the property of others resulting both from lawful and unlawful acts. His opinion, truth be told, stems from the fact that Italian law gives the same legal treatment to both hypotheses.

And, even though Renato Alessi has tried to demonstrate a practical consequence of the distinction, we agree that, in the legal system of that country, there

[50]That is why J. J. Gomes Canotilho, with the support of Santi Romano's lessons (*Corso de Diritto Amministrativo*. 1932, p. 307), observes that the so-called liability for lawful acts is an improper form of liability as it imposes a forced conversion of an individual right into another right that represents the economic value (*O problema da responsabilidade do Estado por atos lícitos*. Coimbra: Almedina, 1974, p. 234).

[51]For this reason, Fernando Garrido Falla is explicit when he states that "…*sin duda, ha sido la doctrina italiana la que ha puesto particular énfasis en distinguir los supuestos de indemnización que tienen su origen en actividad lícita o en actividad ilícita del Estado*" (*Tratado de Derecho Administrativo*. Vol. II. Madrid: Tecnos, 11ª ed., 2002, p. 299).

[52]This seems to be true because, when addressing the foundations of the State's duty to indemnify, Renato Alessi alludes to the lawful damage and not to the agent's conduct. This eloquent silence reveals that the consequences of his reasoning are more linked to the outcome of the agent's conduct than to the conduct itself, even though the author has never stated this. It should be noted that, when addressing the hypothesis of compensation, Renato Alessi stated that: "*Si tratta di una forma particolare di indennizzo* (*mal potrebbe chiamarsi risarcimento del danno da risarcire*) *di un danno che non è antigiuridico in quanto cagionato nell'esplicazione di una potestà giuridica*: *indennizzo che la legge concede in base a principi equitativi…per cui va indennizzato il danno conseguente al sacrificio di un diritto disposto dalla legge in vista della realizzazione di un diritto contrapposto dall'ordinamento maggiormente meritevole di realizzazione in confronto a quelli sacrificato*" (*La Responsabilità della Pubblica Amministrazione*. Milan: Giuffrè, 3ª ed., 1955, p. 18) (emphasis added).

In a striking manner, Fernando Garrido Falla observes the importance of segregating lawful damage from unlawful damage for the purposes of the property liability theory; however, without abandoning the thought of Renato Alessi (*Tratado de Derecho Administrativo*. Vol. II. Madrid: Tecnos, 11ª ed., 2002, p. 299).

is, in fact, no distinction. This is why, for Zanobini (1958: pp. 335-340), damage, thus understood as the assumption of liability, can be the result of the State's lawful or unlawful act.

Incidentally, Pietro Virga clarifies that this distinction proposed by Renato Alessi does not bring practical results in Italian law as there are two regimes for property redressing in view of the lawful conduct of the State[53].

Rocco Galli (1996: pp. 866-867) does not even come up against this controversy, he goes straight to trying to clarify that, in the Italian legal system, lawful and unlawful acts are subject to the legal regime of State Property Liability. However, he recognizes the usefulness of the distinction between indemnification and compensation, arguing that it serves as grounds for the payment of pecuniary damages in the first hypothesis.

However, interestingly, it was Celso Antônio Bandeira de Mello who, recognizing the logical applicability of Alessi's understanding, did not accept the proposed distinction for the purpose of holding the State liable.

For this professor, only in cases where the State exercises a prerogative to *specifically* annihilate the rights of others could one not speak of State Property Liability.

That is why, in cases where the exercise of public prerogative causes, as a by-product, the violation of another's right, one speaks of the property liability of the State. In this sense, Celso Antônio Bandeira de Mello (2009: p. 986) ends up "…taking out of the field of liability, only the cases in which the Law grants the Government legal power *directly pre-established to sacrifice the rights of others.* Differently, we consider as included in the subject of liability cases in which a lawful activity of the State, oriented towards a certain end not necessarily clashing with the rights of others, is, nevertheless, part of a situation in which the right is violated, as an indirect consequence of the lawful act of the state".

However, it should be noted that Celso Antônio Bandeira de Mello recognizes that the lawful act carried out by the State can motivate, as a consequence, a violation of the rights of others. However, as this violation is a by-product of the exercise of legal power, the legal regime for the redressing of private property differs from the hypothesis of the sacrifice of rights.

Therefore, it is clear that the focus of analysis of the State Property Liability, having the agent's conduct as a starting point, admits its occurrence due to a lawful or unlawful fact. If, on the contrary, the focus is on the consequence of the conduct of that agent, it always translates into a liability for an unlawful fact.

[53]According to PIETRO VIRGA, the legal regime of indemnification for lawful damage is different from the legal regime applicable to indemnification for other lawful acts of the state such as, for example, expropriation or damage resulting from war (*Diritto Amministrativo*. Vol. I. Milan: Giuffrè, 4ª ed., 1995, p. 421).

Thus, in Italian law, there are different legal regimes under the *indemnification* class. Given this context, it would be advisable to use different classifications for different things.

However, if the unlawful acts and a portion of the lawful acts of the Government are subject to the same legal treatment, which RENATO ALESSI was unable to deny, then there is no point in classifying them differently, even if, from a logical point of view, they are not similar.

Therefore, as clarified, some examine the topic considering the legal fact that gives rise to the damage, while others examine the topic taking into account the legal fact that gives rise to the duty to indemnify.

As García de Enterría's opinion is partially accepted, it is concluded that State Property Liability is a type of sanction, either for violating the principle of equality or for disobeying the principle of legality.

Clearly, it could be suggested that adopting this position will not bring any practical results to the Brazilian legal system.

In Weida Zancaner (1981)'s concise and deep study on the subject, the author states that the theory advocated by García de Enterría is not exempt from criticism[54].

And that under the argument that, for that author, the legal damage is not subject to compensation. However, Weida Zancaner ponders, since expropriation is classified as lawful damage that can be compensated, how can this state duty be justified in the light of the thought of García de Enterría, according to which the lawful damage is not subject to compensation? And further, if what matters to classify the damage is its unlawfulness and not the conduct of the Government, then "individuals have the same legal means to defend themselves against damage arising from different causes" (Zancaner, 1981) which would not be an acceptable solution, especially because, faced with unlawful acts perpetrated by the State, the individuals could turn against them and even prevent the occurrence of their effects; in relation to lawful acts, individuals must strictly speaking, bear their effects.

Furthermore, based on the initial idea of Eduardo García de Enterría, if all lawful damage were not subject to indemnification, this would make the principle of solidarity of social burdens less relevant, which cannot be admitted in the face of the principle of equality.

Despite the prestigious and serene statements, publicly recognized even by Oswaldo Aranha Bandeira de Mello (2007: pp. 9-11) we believe that the objections stemmed, in part, from the insufficient reasoning given by García de Enterría when he first presented his idea.

By the way, the author recognized this deficiency, mainly due to the objections made by Jesus Leguina Villa.

In later editions of his main work, Eduardo García de Enterría (2006: pp. 384-385) explains that 1) unlawful damage consists of property damage imposed on the individual without the individual having the legal duty to bear it. In this sense, the author insists on the idea that, for the proposed purposes, it does not matter whether the fact that gave rise to the unlawful damage is the result of lawful or unlawful conduct by the State[55]; and 2) only burdens that are equally imposed on society must be borne individually.

[54]In fact, no other work addressing this position with the author's astuteness has been found.

[55]The author says that "*Un perjuicio se hace antijurídico y se convierte en lesión resarcible siempre que y sólo cuando la persona que lo sufre no tiene el deber jurídico de soportarlo*" (*Curso de Derecho Administrativo*. Tomo II. Madrid: Civitas, 10ª ed., 2006, p. 383).

However, Eduardo García de Enterría advocates that the lawful conduct that leads to the imposition of unequal burdens on a limited and specific portion of citizens[56] becomes unlawful damage and, therefore, subject to indemnification under the doctrine of State Property Liability.

At this point, the criticisms made by Weida Zancaner are valid. After all, how to justify the need for compensation in cases of indemnification by means of expropriation?

For Enterría[57], the regimes of expropriation and State Property Liability are different and, therefore, cannot be confused, with which Weida Zancaner agrees.

It is interesting to note that when addressing the so-called "*potestades ablatorias*", a doctrine that covers expropriations, coercive transfers without expropriation nature, etc., Eduardo García de Enterría (2006: p. 122) mentions that the State's duty to indemnify stems from a burden imposed especially on a group of citizens in favor of the interest of the entire society.

It should be noted that, based on this assessment, the case under discussion would strictly entail the State's duty to indemnify the individual for the violation of the principle of equality. Therefore, if the concept of unlawful damage were maintained in this case, then that hypothesis would give rise to State Property Liability. However, this would result in a strong objection: how would it be possible to admit two regimes for pecuniary compensation for unlawful damage? One preceded by prior indemnification, and the other not?

For this reason, Weida Zancaner's clear objections to García de Enterría's thinking and the contradictions in the theory he created can be equated, even in relation to expropriation.

As for the first criticism[58], the problem would also be resolved by the fact that different expressions are used to refer to the state's duty of protecting the property of others. If this duty arises from a lawful act, it will be called indemnification. If, on the contrary, this duty results from an unlawful act, there will be compensation[59].

Thus, unlawful damage is subject to compensation, and lawful damage is compulsorily compensated by means of indemnification. Therefore, expropria-

[56]Causing special and abnormal damage.

[57]This, by the way, was confirmed in a subsequent work in which he addressed the State Property Liability for legislative acts (*El Principio de* "*La Responsabilidad de los Poderes Públicos*" *según el art. 9.3 de la Constituición y la Responsabilidad del Estado Legislador*" in *Revista Española de Derecho Constitucional*. Madrid: Civitas, nº 67, January-April 2003, pp. 15 to 47.

[58]Chapter I, item 21, paragraph three, first part.

[59]Besides, at this point, the distinction proposed by RENATO ALESSI and accepted by PIETRO VIRGA (*Diritto Amministrativo*. Vol. I. Milan: Giuffrè, 4ª ed., 1995, p. 421) is strictly correct. However, the Federal Constitution uses the expression indemnification to designate the redressing of the assets of others both in the event of lawful damage and in the event of unlawful damage. Articles 5, XXIV, 7, I 57, paragraph 7, 182, paragraph 3, 184, and 231, paragraph 5, use the word indemnification to designate the compensation of private property for the occurrence of lawful damage. Articles 5, V, X, XXV, LXXV, 7, XXVIII, 41, paragraph 2, 100, paragraph 1-A, and 169, paragraph 5, use the word indemnification for the occurrence of lawful damage.

Thus, despite the undeniable validity of RENATO ALESSI's observation, the expression indemnification is used in its traditional sense, in order to designate both hypotheses of economic redressing for lawful damage and for unlawful damage.

tion is not subject to compensation but to indemnification.

As for the second criticism[60], there will always be the possibility for the individual to defend against unlawful damage, preventing it from occurring.

However, we do not agree with the understanding of Eduardo García de Enterría regarding lawful damage. The Spanish author states that lawful damage is not subject to compensation nor indemnification since the damage caused due to the lawful conduct of the Government in violation of equality becomes unlawful damage.

However, when it is known that the by-product of the State's lawful action will unequivocally cause damage to the economically measurable right of a third party in violation of the principle of isonomy, the Government's duty to preserve the legal property of others will result from the legal regime applicable to the sacrifice of rights and not to the State Property Liability.

6. Conclusion

From the considerations presented above, it is concluded that there must be prior indemnification to avoid violating the legal system. That is before the lawful damage turns into unlawful damage, the Government must carry out a prior measure for property redressing. After all, if the State is aware that a violation of the legal system will occur due to its action, whose performance is compulsory for the benefit of society, it has the duty to prevent unlawful damage from occurring.

How can one do this without making the public interest less relevant? Simple, by restoring the public interest! That is, making prior indemnification.

However, this property damage may be verified *after* the State's conduct.

This is what happens, for example, with the construction of a public work (lawful conduct of the Government). It is not known, in advance, whether it will give rise to 1) a benefit (subject to taxation by means of the special assessment, under the terms of article 145, III, of the Federal Constitution), 2) neutrality (that is, nothing changes in the individual's property), or, finally, 3) unlawful reduction of other people's property, for violation of the principle of equality, as a result of the devaluation of the property.

Thus, there is no how to prevent judicially against something whose final outcome is unknown. That is why, in these cases, there will be no threat of damage to be assessed by the Judicial Branch under the terms of article 5, XXV, of the Federal Constitution.

However, if the damage arising from the State's action occurs afterward in the case, the legal system will have been violated, and its redressing will take place by means of State Property Liability.

However, we insist on the point. If it is known in advance that a lawful act by the State, beneficial to the society, will cause a special economic sacrifice for a few, the State must pay the prior indemnification.

[60]Chapter I, item 21, paragraph three, second part.

After all, if it is already known that, in the absence of prior indemnification, an offense will be committed by the State or by whoever acts in its place, first, the legal system prohibits the occurrence of the property or non-property damage, and, then, adopts the necessary measures to carry out the redressing measure.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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