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PANDEMIC–RELATED CIVIL LIABILITY in BRAZIL: Examining Financial Compensation for Health Professionals

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ABSTRACT: *The Covid-19 pandemic brought a series of challenges to all countries, and, therefore, different efforts were required from the various sectors of society. It is undeniable that the health care sector was the most in demand, since its role was crucial for patients to have any chance of surviving the virus. Even so, many lives were lost, especially those of health professionals. The present work aimed to perform a critical analysis of the socio-legal nature of Law 14.128/2021, which establishes monetary compensation to health professionals who suffered some permanent disability or, in case of death, to their dependents. It was concluded that the provision of compensation specifically for health professionals is a recognition of the efforts and dedication of those who were constantly exposed to the risks of contamination, which increased with Covid-19..*

KEYWORDS *- COVID-19; Direct action unconstitutionality nº 6970; health professionals; Law 14.128/2021; pandemic.*

I. INTRODUCTION

The complexity imposed by the pandemic for the various institutions of society have further aggravated the feeling of insecurity about the future. If diseases such as cancer, diabetes, Alzheimer's, anxiety, and others still challenge science, the emergence and expansion of a previously unknown virus has only increased the fear and highlighted the risk in which contemporaneity is immersed.

Covid-19 is a disease caused by the SARS-CoV-2 virus, which was transmitted to humans by bats, initially at a local live animal market in Wuhan, China in late 2019 (WHO, 2020). It turned out that little was known about the treatment that should be given to patients to control the disease. Such knowledge was only acquired after many trials and with many lives lost. Old, young, children, men, women, black and white, the disease affected everyone.

Among the sanitary measures suggested by the World Health Organization (WHO) was the isolation in case of suspected contagion, the use of masks in closed places, the restriction of movement, among others. In Brazil, the Federal Supreme Court (STF) has authorized the federal, state, and municipal governments to impose measures to fight Covid- 19 within their respective constitutional powers.

In this sense, government agencies were required to work together to formulate and manage resources that could cope with the growing spread of the virus and its social and economic consequences. Since, for the

most vulnerable people, isolation was not an option, the closing of commercial establishments resulted in layoffs and shrinking of the economy, and the consequent worsening of the financial situation of many families.

Amidst the growing number of infected people, hospitals received many patients who required intensive treatment to survive. Thus, hospital overcrowding was the standard in every country in the world. Health professionals were subjected to long work schedules, under great stress, and unable to leave their jobs. Doctors, nurses, anesthesiologists, administrative support, cleaning personnel, all these professionals were engaged in the war against Covid-19.

The result was the recovery of the patients and the gradual reduction in the number of hospitalizations. However, several professionals died because they were directly exposed to the virus or became disabled as a result of their contamination. Considering the unique context in which the country finds itself, parliamentarians of the House of Representatives proposed the Bill of Law No. 1826/2020, which aimed to institute the payment of monetary compensation in favor of health professionals who were affected by the disease. It is important to note that this proposal was converted into Law 14.128/2021.

Thus, the objective of this article is to perform a critical analysis of the socio-legal nature of Law No. 14,128 of 2021, in order to understand its operation and particularities. To do so, the inductive approach method was adopted, together with a bibliographical andjurisprudential review.

This article is divided into five sections: initially, the introduction to the subject was prepared, in which the object and the research problems were presented. Next, the Brazilian civil contract was discussed in order to understand its conceptual and legal basis. The third topic discussed the institutes of civil liability, the fortuitous case and force majeure. The fourth chapter dealt with the civil liability of the State and compensation with a new approach from the context of the health crisis. In the fifth item, Law 14.128/2021 was objectively approached, in order to understand the justification and the discussions around its constitutionality. And finally, the final considerations, in which the conclusions of this research are discussed, demonstrating the importance of Law 14.128/2021 as an instrument for valuing health professionals.

II. THE PILLARS OF THE BRAZILIAN CIVILIAN LEGAL ORDINANCE: ANALYSIS OF THE CIVIL CONTRACT AND IT'S IMPLICATIONS IN THE SPHERE OF PROPERTY RELATIONS

Conceptually, the civil contract is a legal instrument that seeks to ensure a balance of interests between the subjects, i.e., contracting party and contracted party, i.e., it is a legal act that requires the human will with the purpose of ensuring an economic benefit. For Tartuce (2023, p. 1) "The contract is a bilateral legal act, dependent on at least two declarations of will, whose purpose is the creation, alteration or even the extinction of rights and duties of patrimonial content".

In Brazil, several types of contracts coexist, for example, the contract of purchase and sale, lease and employment, making it a difficult task for the legislator of the Civil Code of 2002 to explicitly conceptualize this institute4.

Civil scholars such as Maria Helena Diniz (2023) and Flávio Tartuce (2023) inform that the civil contract is considered a source of the law of obligations. In a classical approach, it is defined as the "(...) maximum point of individualism. The contract is valid and binding because it was so intended by the parties. In this sense, Article 1.134 of the French Code [1808] states: "The conventions made in contracts form for the parties a rule to which they must submit as the law itself" (VENOSA, 2023, p. 23). However, in a more current conception, the civil contract is understood as a "the contract deviated from its social role will not be free from a legal sanction, because its practice incurs into the land of illegality" (THEODORO JR, 2014, p. 23).

The effects of the civil contract are analyzed after its conclusion, since the legalconsequences are applied in a future moment after the acceptance between the individuals.This scenario highlights the relativization of pacta sunt servanda, stating that a valid and effective contract must be strictly complied with by the parties, that is, what was established by the parties has the same legal force as a law.

With the contractual obligation signed by pacta sunt servanda, the contracting parties cannot avoid the stipulated clauses, i.e., the obligations signed between the parties are binding and must be complied with,

regardless of the circumstances. In summary, once rights and obligations are established, what has been agreed upon is irrevocable and cannot be terminated or rescinded.

In contemporary times, the contract's binding force is mitigated by the principles of good faith and the social function, especially in light of the appreciation of human dignity. Thus, "the mandatory force constitutes an exception to the general rule of sociality, secondary to the social function of the contract, a principle that prevails within the new reality of contemporary private law" (TARTUCE, 2023, p. 106).

To ensure the incidence of good faith and the social function, it is necessary that the civil contract be formed in an isonomic manner by both parties, that is, that it not be harmful or excessively burdensome to one of the parties to the point of unbalancing the contractual relationship. If this relationship is broken due to damages caused to one of the individuals, it is possible to review some of the clauses or the entire contractual instrument based on the principles of good faith and the social function of the contract4.

Enunciation No. 23 of the CJF/STJ, approved in the I Journey of Civil Law, states that: "The social function of the contract, provided for in art. 421 of the new Civil Code, does not eliminate the principle of contractual autonomy, but attenuates or reduces the reach of such principle, when metaindividual interests or individual interest related to the dignity of the human person are present."

The civil contract institute in Brazil has been conquering new contours and going against the classical theory of contractual obligation. This phenomenon is noticeable by the incidence of the relativity of the contract, which indicates that the contract may change its clauses and objects according to the economic and social context in which it is inserted.

For this reason, the contract is constituted by a sum of factors, and no longer by the pure will of the contracting parties, further reducing the application of the pacta de sunt servanda, since other axiological elements will influence the content of the legal business, for example, the dignity of the human person, the principles of good faith and the social function of the contract. Tartuce (2023, p. 63) defines the principle of social function as(...) a basic regulation, of particular order - but influenced by norms of public order -, by which in the formation of the contract, in addition to the will of the parties, other factorscome into play: psychological, political, economic and social. It is the undeniable right of the parties to self-regulate their interests, arising from human dignity, but which is limited by public order rules, particularly in the social contractual principles.

The civil contract aims to meet individual interests, but is influenced by the circumstances of space and time in which it is drawn up, finalized and executed. This is due to the fact that the contract does not exist isolated from the social context that gives it meaning and defines its rules, being inseparable from the economic order and the society that supports it.

The mandatory force or pacta sunt servada is seen with relativity, not meaning that it has been removed from the Brazilian legal system, but reducing or mitigating its applicability (DINIZ, 2023). It is in this context that the principle of contract preservation is inserted, which when verifying injury, the magistrate should lead, whenever possible, to the judicial review of the legal transaction and not its annulment.

Following the ideas exposed above, it can be stated that the civil contract has a cycle of existence and validity (TARTUCE, 2023), which begins with the mutual consent between the contracting party and the contracted party, goes through execution, ends with the performance of the obligation and may still be modified by the parties or by court decision.

However, there are situations in which the fulfillment of the contractual obligation becomes unfeasible due to factors that are external to the contract or due to the parties' fault. In these circumstances, the institute of contractual civil liability is triggered to solve the legal effects arising from this situation.

III. THE RIGHT TO COMPENSATION FOR DAMAGES RESULTING FROM THE COVID-19 PANDEMIC IN BRAZIL

Technology and science favor the formation of a "risk society", as pointed out by Beck (2010), because they require a high degree of testing and investment whose results are not always under the control of researchers. In this scenario it is understandable that civil liability also receives new contours, since the progress of world economies is intrinsically related to the production of wealth, and this to the risk of the enterprise.

Examining the Civil Code of 2002 one can see that the term liability is understood as the duty to indemnify, whether by fault or by legal provision. This is what an examination of the heading and sole paragraph of article 927 of the aforementioned code shows. For, in a plural society it is necessary that the law is open to a new conception of responsibility, as pointed out by Rosenvald (2017) when registering that:

Rethinking civil liability today means understanding the economic and social demands of a given environment. To "hold responsible" has already meant to punish, repress, blame; with the advent of the risk theory, "to hold responsible" has become damage repair. In contemporary times, the idea of liability as prevention of wrongdoing is added to the compensatory purpose (ROSENVALD, 2017, p. 34).

Thus, the right to compensation provided for in Law 14.128/2021 does notnecessarily arise from the State's duty to indemnify arising from objective or subjective civil liability. On the contrary, it is the result of the understanding that risk is impregnated in the activities of contemporary society. Therefore, if the situation is exceptional, special legislative and legal measures must also be taken to cope with the new requirements.

In the words of Rosenvald (2017), "the system of civil liability cannot maintain a neutrality before legally relevant values in a given historical and social moment". In this weaving, we realize that in the health area, risk is an element that is always present for health professionals. All those involved in the provision of health services are subject to risk, to a lesser or greater extent. And in times of pandemics this risk is exponentially increased, in view of the number of people affected.

The liability for risk is present in the legal system of several sovereign states, such as Portugal, as pointed out by Fonseca and Câmara (2013) when they note that public liability is regulated by Law No. 67/2007, which contains in its articles 11 and 16 the provision for liability for the risk of administration and for the lawful fact (or sacrifice) respectively.

Liability for risk is related to situations in which the activity, good or service developed within the scope of the administration are potentially harmful and damaging to legal goods protected by law. That is, these are activities that can generate abnormal damage to social life. Therefore, the duty to indemnify is inherent to them.

Likewise, the authors point out that the liability for sacrifice is characterized when the State is assigned the duty to indemnify as a result of special and abnormal damages or for charges caused on behalf of the public interest. This responsibility is based on the principles of the rule of law and equality. Since public burdens must be fairly distributed to all social actors. Thus, those who have had their rights violated in the name of the common good may seek redress from the state.

Thus, the State's responsibility towards its citizens is a form of constitutional protection and an institutional guarantee for the protection of fundamental rights. It reveals itself as a mechanism for demanding the realization of rights.

According to Araújo (2010), the first laws aimed at protecting the physical health of workers are from the early twentieth century, because the diseases were substantially perceived through the degradation of the human body, caused by lack of protective equipment, excessive work hours and lack of safety. The norms sought to hold the employer responsible in the event of a work-related accident by finding malice and guilt. Later on, mental health was also included in the list of protections that the State must ensure.

Furthermore, the Federal Constitution of 1988 foresees, in its 6th article, the right to life and the protection of physical integrity. These are first generation fundamental rights,which should enjoy ample realization. In addition, article 7, XXII, of the aforementioned normative provision, guarantees the worker protection against the damages inherent in the work activity. In this sense, Araújo (2010, p. 89) points out that

the system of worker health protection "is formed by a mixture of public obligation norms and private obligation norms, which provide reasonable protection with regard to benefits of a social security nature and civil indemnities for the loss of working capacity".

Thus, the Covid-19 workplace injuries that have affected health care workers and left them disabled or caused their deaths are damages that fall under state liability, even if the state has not necessarily acted with malice or fault. According to the World Health Organization, between January 2020 and May 2021, 80,000 to 180,000 health care professionals died, and it is estimated that this number is 60% less than the actual number of deaths (WHO, 2021).

These professionals, performing essential services in hospitals, were daily exposed to the risks arising from the virus, subjecting themselves to financial, social, emotional and mental losses resulting from such exposure. Thus, the provision for compensation contained in Law No. 14.128 of 2021 is only an acknowledgment of the relevance of the services provided on behalf of society and the government during the pandemic period.

IV. CRITICAL ANALYSIS OF LAW Nº 14.128/2921: THE RIGHT MONETARY COMPENSATION FOR HEALTH PROFESSIONALS AFFECTED BY COVID-19

In the current global pandemic scenario caused by the new coronavirus, Brazil has faced major challenges in several areas, especially in health. In this context, the House of Representatives presented Bill no. 1,826/2020, aiming to ensure the payment of financial compensation to health professionals who were affected by the disease, as well as to their families in case of death resulting from Covid-19. Importantly, this proposal was converted into Law n. 14,128/2021, which recognizes the occupational nature of Covid-19 for labor and social security purposes and provides measures to protect health professionals who are on the front line in fighting the pandemic.

Law 14.128/2021 is a nationwide law, issued by the National Congress on the grounds that healthcare professionals were considerably more exposed to the covid-19 virus, so they deserved to be supported by the state and society, not only with palms, but with the offer of a certain degree of financial security (BRASIL, 2020).

The law affects all professionals and health workers who, during the public health emergency period of worldwide scope resulting from the spread of the new coronavirus (SARS-Cov-2), worked in the direct care of patients affected by Covid-19, including those professionals who made home visits during this period, as is clear from art. 1, sole paragraph.

Thus, professionals who worked in public institutions belonging to the Union, states and municipalities, as well as in the private network, are eligible for financial compensation. The Union is responsible for paying the compensation4.

Professionals who worked directly or indirectly in the care of patients contaminated by covid-19 and who, as a result of this, were also affected by covid-19, dying or becoming permanently incapable of performing their work activities, will be entitled to compensation. The law protects cases diagnosed on or after February 3, 2020, in view of Administrative Rule

188 of the Ministry of Health, which declared a Public Health Emergency of National Importance (ESPIN) due to Human Infection by the new Coronavirus. In addition, cases of pre-existing diseases aggravated by the covid are also included among the hypotheses foreseen in the mentioned normative instrument (BRASIL, 2021).

The compensation should be paid preferably in a single installment up to the limit of R$ 50,000.00 (fifty thousand reais) to the victims or their heirs, dependents and successors. In the case of children under 21 years of age, there will be a payment of R$ 10,000.00 (ten thousand reais) per year until they reach the age of 21, also limited to R$ 50,000.00. At this point, it should be pointed out that fixing a single indemnity amount is not reasonable, since it should be calculated according to the specific case. One cannot attribute the same indemnity value for completely different situations. One must consider the levels of exposure to risk to which

each professional was subjected, as well as the consequences resulting therefrom (MOREIRA, DE LUCA, 2021).

The rule was strongly resisted by the executive power that filed with the SupremeCourt a Direct Unconstitutionality Action - ADI 6970, in which the President of the Republic alleged i) violation of art. 8 of Complementary Law No. 173 of 2020, as it provided for an indemnity benefit for public agents and created ongoing expenses in a period of calamity in which such measures are prohibited; ii) lack of an estimate of budgetary and financial impact;iii) formal unconstitutionality, as it created a benefit intended for other federal public agents and public agents of other federal entities through a rule of initiative of a federal congressman, pursuant to art. 1 and art. 61 § 1 of the Constitution.

All these allegations were dismissed by the Federal Supreme Court, which on 08/16/2022 ruled law 14.128 constitutional. Justice Carmem Lúcia, who reported the action, ruled as follows. It is the state's duty to promote policies and programs of health protection and defense, in the pandemic context experienced with Covid-19, seeking to mitigate thelosses of health professionals disabled for work or compensate the dependents of those who, in direct action in combating the pandemic in Brazil, died because of the disease. (STF, 2022, p.33).

However, some other arguments could be raised against the law. The first concerns the fact that the principle of isonomy is not considered when providing compensation only for health professionals and other professionals who were on the front line of fighting the Covid- 19 pandemic. In this sense, such contestation can be refuted when it is observed that it is not new that laws and administrative acts treat individuals and legal entities differently, as in the case of the compensation provided in Law No. 12,663/2012 for soccer players of the 1958, 1962 and 1970 selection or the Supplementary Law No. 123/2006 (Simples Nacional). Thus, there is nothing new in the fact that the National Congress drafts a law that benefits a specific group of society, since in the pandemic scenario they were overly demanded.

In this vein, Justice Ricardo Lewandowski, in the judgment of ADI 6970, points out that in certain situations there is a need not only to protect, but also to provide financial compensation. Such is the case of the grave period of the Covid-19 pandemic, in which health professionals and workers worked hard and with great dedication to save other people's lives.

Thus, despite the resistance offered by the Union when the law was enacted, it must be said that the compensation provided therein is in line with the fundamental values of the Brazilian Constitution, in particular with the dignity of the human person, as well as with the Brazilian Civil Code, which also provides for compensation in the event of damage.

A second argument against the law is that the State has no responsibility with respect to the deaths caused by Covid-19, in view of the fact that containment measures were taken at the federal, state, and municipal levels and that in the absence of guilt or causal link between the deaths and state action it would not be up to the Union to indemnify the subjects listed in Law 14.128/2021.

However, in this case, attention should be drawn to the provision of the sole paragraph of Article 927 of the Brazilian Civil Code, which assures that compensation will be due in the cases provided by law. Therefore, once the mentioned law was formally enacted by the National Congress, despite the resistance offered by the executive branch, but rejected by the judiciary when it declared its constitutionality, there is no reason to talk about the absence of the duty to indemnify. This understanding is corroborated by Diniz, who assures that:

The obligation to compensate damage caused to others may arise from a legal determination, without the person obliged to repair it having committed any unlawful act. The action takes the form of a human act of the defendant himself or of a third party, or a fact of an animal or inanimate thing. (DINIZ, 2013 p.53).

Because, as Ramos, Rosário and Vale (2020) point out, the Judiciary, whenprovoked, could not remain apathetic to the high complexity of the context brought about by the pandemic. Thus, in a balanced way and

within constitutional limits, it dismissed the request of the Union, which sought a declaration of unconstitutionality of the law through ADI No. 6970.

The Federal Supreme Court acted in the sense of concretizing article 196 of the Constitution, which ensures that health is a right of all and a duty of the State. Therefore, even if it has not directly contributed to the contamination of the professionals by the virus, the State cannot deny that the activity has risks and that these are subject to objective liability. In this context, the compensation to be paid to health professionals seeks only to minimize the negative impacts caused by Covid-19, in order to restore the balance violated by the damage. It is a compensation mechanism. It is important to say that the aforementionedlaw does not exclude the payment of other amounts arising from duly proven damages.

V. CONCLUSION

In summary, it is possible to state that contractual termination is not the only option to solve the civil liability in cases of default. The contract may be suspended or renegotiated, depending on the circumstances of the case. In this sense, we highlight the relevance of Law 14.128/2021, which recognized the occupational nature of Covid-19 for labor and social security purposes and established measures to protect health professionals who are on the front line in fighting the pandemic. Such a norm represents an advance in the protection of these workers and demonstrates the legislator's concern in guaranteeing decent working and health conditions in times of crisis.

Moreover, it was possible to notice that the measures to face Covid-19 are the Union's responsibility with regard to the organization and administration of actions of national scope, while the member states were concerned with the development of measures of regional scope and the municipalities, in turn, with local control measures. All institutions had to work cooperatively to increase the effectiveness of control measures and minimize the negative impacts of the pandemic.

In this scenario, the enactment of Law 14.128/2021 by the National Congress is an important mechanism to recognize the efforts of health professionals who were permanently disabled or who died during the most severe period of the pandemic, although the establishment of a single amount for compensation does not take into account the particularities of each case. Even so, the receipt of these compensations, to a certain extent, can reduce the social and economic consequences that affected the lives of these professionals since they offer them financial security.

Corroborating, in this way, the core values of the Brazilian Federal Constitution and the dignity of the human person, which presupposes that, as far as possible, people will enjoy a healthy and balanced life, with income to acquire the resources necessary to maintain their well-being. Thus, compensation allows families to restructure, since in many cases, the professional who died or became unable to work was the breadwinner of the family, so his absence fundamentally represents fewer resources.

Furthermore, it can be seen that the Federal Government, despite all resistance, must accept the claims for compensation pleaded in court, since it is undeniable the great sacrifice that these professionals made in conducting their work. Furthermore, when analyzed from the point of view of income concentration, the Union is privileged in relation to the other federative entities. The concentration of public resources is also accompanied by greater responsibilities.

Thus, Law 14.128, of 2021, is fully in line with the constitutional values, since it seeks the recognition and protection of citizens through indemnity in cases of permanent disability and death as a way to ensure citizenship and inclusion of these professionals who faced the challenges arising from the COVID-19 pandemic head-on. Health workers must continue to enjoy their right to dignified, healthy, and safe working conditions.

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