InDret

Vicarious Liability and Liability for the Actions of Others

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Abstract

Individuals are liable for their own negligent and harmful behavior. However, usually individuals and organizations are liable for the actions of others, in other words, for the negligent or harmful behavior of a third party linked to the person liable through an agency relationship, dependence or other similarities determined by law or by *case law*. We then talk about vicarious liability or liability for the action of others (*Respondeat Superior*). The greatest solvency and capacity to face the transaction costs of who has to respond for an action done by another, justifies that he responds in front of the plaintiff alongside the tortfeasor or instead of him.

In Spanish law, three systems of liability for the acts of others coexist with certain difficulty. One, administrative, for damages caused by civil servants and public employees (sections 145 and 146 of Ley 30/1992, de 26 de Noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común); another, civil, for damages caused by individuals to other individuals (Spanish Civil Code of 1889 (CC), most recently modified in 1991); and a third one - also civil - but applied by the criminal courts, for damages caused by facts described as crimes or misdemeanors by the Spanish Criminal Code of 1995 and other criminal laws (section 120 Criminal Code (Cr. C)).

In the first part, InDret briefly analyzes the legal regulation of liability of Public Administration, the paradigm of vicarious liability in Spanish law. However, it is not a self-contained system, its well functioning depends on the good practice of the ordinary administrative management, on the application of the general regime of the public function - and in particular, on its disciplinary regime - and on the political responsibility of the elected positions and public managers.

In the second part, we will analyze vicarious liability in the Civil and Criminal Codes, as well as by the Organic Law of Criminal Liability of Minors.

Summary

1. Vicarious liability or liability for the actions of others and its legal grounds: solvency, information costs and risk-aversion

1.1. The concept of vicarious liability. Vicarious liability as a basic model

In Spain there are three different general systems of civil liability, and hence, of vicarious liability:

a) Strict Liability Rule for Public Administration, regulated by sections 139 and following of the Ley 30/1992, that formally imposes strict liability to the Public Administration due to the harm caused by its civil servants and public employees, even in the case if they have not been negligent.
b) General Negligence Rule for the actions of others (private individuals and business), governed by section 1903 of the Spanish Civil Code of 1889 that, at least originally, was a negligence rule - or, more correctly, with reversal of the burden of proof of fault – due to damages caused by a dependent fault.
c) Civil liability attached to Criminal Liability, regulated by section 120 of the Spanish Criminal Code, which combines cases of presumed negligence with strict liability cases for actions committed by others that can be qualified as crimes or misdemeanors.

In vicarious liability governed by *Common Law*, according to John Fleming, a person is liable to the damage caused by another, although he has not incurred in any kind of fault:

> "We speak of vicarious liability when the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault" (FLEMING (1998), Ch. 19, page 409).

Similarly, Dan B. Dobbs writes:

> "Vicarious liability is liability for the tort of another person. (...) The most common kind of vicarious liability is based upon the principle of Respondeat Superior. Under that principle, private and public employers are generally jointly and severally liable along with the tortfeasor employee for the torts of employee committed within the scope of employment. (...) But Respondeat Superior may apply to impose liability upon the principal for contracts made by an agent within his authority and also for many kinds of torts, including fraud and other torts that do not entail physical harms" (DOBBS (2000), Ch. 22, § 333, page 905).

The traditional view of Tort Law in Civil Law countries is usually based on the model of liability for one's own actions, and in *Civil Law*, based in negligence. This is incorrect, at least

from a statistical point of view: liability for the actions of others should be the starting point of the analysis of the modern tort law, because it is common to all contemporary legal systems (See WICKE (2000) and BARCELÓ (1995)) and, in the legal practice of all of them, there are many more cases of vicarious liability than of liability for one's own actions.

> Thus, among the 101 cases resolved by Spanish Supreme Court (1st Chamber) in 2000 about tort law, 61 are cases of vicarious liability. In 2001, among the 64 cases resolved by the same Court, up to 30th September, 41 are.

The rule of vicarious liability, historically associated in *Common Law* and in *Civil Law* with the relationships between master and servants and with those of family dependence, currently deal with problems derived from the function and management of much more complex organizations than the home and the family, in an economy characterized by the progressive development of the division of labor.

1.2. Conditions for vicarious liability

The conditions of vicarious liability are similar in the different legal codes. We can explain them based on the usual presentations of the old *Master-servant's rule* (*Restatement of the Law Second, Agency, § 219*; PROSSER / KEETON (1984), § 70, page 501 and following and § 123, page 912 and following; FLEMING (1998), Ch. 19, pages. 409-438; and DOBBS (2000), Ch. 22, pages. 905-940).

By this rule, a person, the principal, responds for the damage caused by another, the agent, if between them there is a relationship that legitimates the former to control the acts of the latter and of the tort occurred in the carrying out or development of the activity entrusted by the first to the second or on occasion of it.

a) There is control when the principal has the last word in everything relating to the way of carrying out the activity.

b) To determine whether the misconduct has been caused during the performance of the service for which the dependants were employed (*scope of employment*), the following are taken into consideration:

   - The nature of the misconduct, in other words, the degree of coincidence or similarity to the nature and characteristics of the activity entrusted.
   - In case of intentional harm, how foreseeable it was.
   - Its occurrence in spatial-time co-ordinates more or less close to those of the entrusted activity.

The first condition (control) allows to distinguish vicarious liability cases from those in which the tortfeasor responds because he acted in his own account and interest. The second (*scope of employment*) leads to imposing liability on the principal for damages caused by activities entrusted to the agent, but not for any tort in which the agent was involved.

The rule of liability for the misconduct of others can be very well explained when the link joining the person liable with the tortfeasor can be characterized as an agency relationship, in other words, when the principal is liable for torts committed by his agent. So, a principal for the torts of his employees or a Public Administration for those caused by its civil servants, may obey to the need of offering potential victims an efficient protection when the insolvency of the tortfeasor could put endanger both the deterrence and compensation. It is also a question of making liable the party of the relationship, normally the principal, who can handle relevant information at a lower cost.

1.3. Grounds for vicarious liability

In the best-known doctrinal analyses (see for all of them DOBBS (2000) § 334, page 908), vicarious liability has been justified when:

- It allows someone solvent to be found as being responsible (*deep pocket approach*).
- Given the alternative that an innocent person -the principal or the victim - has to be burdened with the cost, the first alternative, the principal, seems preferable.
- The principal benefits from the work of his agent.
- Enterprise liability is efficient.
- This leads to insurance policies taken by whoever is best placed to do it.
- The employees are often insolvent.
- The typical risks of a firm must translate into its costs, as this is the best way of internalizing them, by carrying out an action in an organized and systematic way; unlike risks generated at random by occasional acts of individuals, in which liability is based on negligence.

In *Law & Economics*, the classic analytical development of *Respondeat Superior* can be found in several papers by Alan O. SYKES (1984, 1988, 1998) and Richard A. EPSTEIN (2000) herein summarized.

Let us visualize an imaginary world, u_0 in which, as in our real world, u_1, the employees of private companies and civil servants in public administration can cause harm while carrying out their professional activities, but in which, in addition, and unlike what usually occurs in u_1

1. The victim of the harm can very easily identify the employee or civil servant - who caused it.

2. Transaction costs between the employer and the worker are low and, in particular, the Law allows both of them to freely negotiate and contract on the issue of who takes over and who is exonerated - of one or the other of them - of all possible liabilities for harm caused to third parties.

3. The employee is risk-neutral - that is, the expected utility of his wealth is exactly its expected monetary value - and unlimitedly solvent - in other words, he can afford to compensate any victim of any tort that he may have caused whilst carrying out his professional activity.

Under these admittedly counter-factual circumstances, the rule of liability of the principal for harm caused by employees would be absolutely unnecessary, as it would be enough with the general rule of personal liability and the contractual freedom to assume liability for the torts of others; then, in the absence of transaction costs, the legal allocation of resources and liability for its use is irrelevant, according to Ronald Coase: if the principal and the agent agreed that the latter would have to respond, the agent would ask for a higher wage to cover this, but, , if the agreement is that the principal will assume liability, the agent will get a lower wage. In both cases, the difference will more or less be equal to the costs of the insurance policy for damages that either the principal or the agent would contract.

However, the previous model is, as we said, counter-factual, as it denies the economic realities of u_1, a world characterized by the division of labor, rational ignorance and reliance or, which is the same, by the continuous development of scientific and technological knowledge and the resulting specialization:

1. The victim will not easily identify the employee who was the direct tortfeasor, or rather, it will be easier for the victim to identify the company whose agent was the direct tortfeasor. In the absence of a rule of liability for the misconduct of others, the principal may hide behind his anonymous agents.

2. Transaction costs between employers and employees in companies are not usually low, nor are those of contracting an insurance policy. The first hardly ever are, as the parties do not usually share the same information and each one is exposed to the opportunist behavior of the other. The informational asymmetry and the demand for safeguards to assure the compliment makes the contractual process more expensive.

3. Usually, the agent will not be solvent or will not be insured and will not be able to pay compensation for the all harm caused. However, if the agents do not have sufficient

resources to pay compensation equivalent to harm, they will not have enough incentives to adopt an optimal level of care, but lower ones precisely corresponding to their degree of solvency. Then because as the employees will not be liable - by hypothesis they do not have enough resources to do it - their salary demands will not reflect the actual amount of expected harm, therefore the employers will not be rationally motivated to adopt the optimal control measures. Finally, the principal will not assume liabilities of their agents, and will tend to hire highly insolvent employees, and what is even worse - with a high degree of risk-preference - for carrying out the most dangerous tasks. The absence of a rule of vicarious liability would mean the exclusion of the social costs of activities carried out by delegation. In effect, the rule of vicarious liability imposes control costs, co-ordination costs and insurance on whoever receives benefits of the activity, instead of doing it on the third parties, the victims. In the absence of a rule of vicarious liability, the victim would be under compensated and the price of potentially harmful activities would not reflect all their costs and, naturally, as the principal would not be liable for the damages caused by his agents, he would then not contract the insurance policies that could cover these contingencies.

Vicarious liability is a legally efficient response to the problems raised by situations in which the potential tortfeasor acts for his principal, who will be declared directly liable. The employer, given the liability for the harm caused by his employees, will take the control measures over their work with a reasonable degree of precaution, and will use its professional experience in order to do so. Vicarious liability is thus built upon the need to induce investments by the principal and the agent and forces both of them to co-ordinate their activities and observe the respective duties of care.

Observe that the correct performance of the rule of vicarious liability requires that the principal is, effectively, in a better situation than his agent to bear and manage the risks associated with the activity of the latter- or, definitively and as we will later see, that he is in better conditions to monitor the operation of the company. This requires the principal, as the *superior risk bearer* to effectively *observe the precautions* adopted by his agents in the development of their activity and, at the same time, to take the measures of control -*ex ante* or *ex post* - leading to their agents acting with due care.

In particular, the principal must be able to:

a) Agree with his agents on a salary that takes into account the historic or foreseeable risk associated with the development of the activity of each group of agents or even, in each individual case considered. Along these same lines, there are contractual clauses that associate *increases or reductions in salary* with the professional record of the employee, or in limit cases, the *termination of the employment relationship*. Finally, the availability of a *reimbursement action* against the employee for the sum of the compensations paid by the

principal works in the same way. In the internal relationship between the principal and the agent, both measures seem interchangeable, but, in practice, we are looking at instruments, whose use will be depending on the real cost of their effective application and, often, the salary measures or those that influence the employment relationship will be cheaper to foresee and to apply than the individual reimbursement action, which necessary must be treated in the judicial process, case by case. In addition, it is not very feasible to believe that a principal will continue the relationship, whilst, at the same time, calmly claiming reimbursement from his agent for actions that occurred precisely in the framework of the work relationship or on account of it.

b) Invest in equipment and human capital in such a way that the conditions for the agent's activity reasonably minimize the risk of harm to a third party. In the same way in which the principal can make salary dependent on the record of each agent the workers, he can also provide his vehicles with the security devices that are most reasonable to prevent or minimize any accident they could produce. Observe that this implies that a great part of vicarious liability cases are *joint care* cases.

c) Adopt the organizational rules and monitoring strategies that contribute more reasonably to the reduction of the costs of accidents. The employer must give to his employees the instructions that pursue, at the same time, the maximization of long-term profits and internalization of the external costs of the activity. Once again, it is clear that vicarious liability implies, in practice, joint care, in other words, liability for one's own actions. We will return to this.

The reality of companies in our culture reflects these conditions quite faithfully: in u_1 principals are more solvent and prone to risk than their employees and are in better conditions to organize and control their companies and the people who work in them. In fact, when this does not occur, either the company ends up closing down and the employer retires or he becomes self-employed, or the worker becomes the employer. If this were not the case, it would be difficult to explain why there are employers and employees.

2. Vicarious liability and agency costs

Conditions a), b) and c) a to which we have just referred to clearly show that, from the company's point of view, vicarious liability is a tool, but only another tool of those that can be used to check and manage *agency costs*. In an agency relationship, the principal benefits from the activity that another person, his agent, develops (see generally, Eric A. POSNER (2000). Also Bernard SALANIÉ (1997)). The basic economic problem of agency relations consist of aligning in the best possible way the interests of the principal - that aim to maximize his profits resulting from the activity of his agent - with those of the agent - who wishes to maximize his own utility, not that of the principal.

Therefore, the main legal problem with agency relationships consists of designing the contractual and legal rules of the relationship between the principal and the agent that offers greatest incentives to both of them to efficiently align their respective interests.

In u_1, the legal and contractual rules in question cover several problems or agency costs simultaneously and are aimed at reducing the deviations of the behavior of the agent with regard to the behavior that best serves the interests of the principal:

- The costs of **monitoring**, that fall on the principal, whose mission is to ensure that the agent acts in accordance with what was agreed. The principal may observe and control the agent's behavior, but he may only do so within certain limits and not, obviously, to the point that it would be more sensible for him to personally carry out the activity entrusted to his agent.

- The costs of **guarantee,** required by the principal, which goal is to defray the costs of the reliance that the employer has placed in the employee. The agent may invest more or less effort in carrying out his activity, in other words, he can work more or less hard, that is, his activity is subject to a greater or lesser degree of *moral hazard*).

- A certain **residual loss**, a result of what, even at optimal levels of monitoring and guarantee, is usually preferable that certain deviation exists in the behavior of the agent with respect to what would be the optimal behavior. Full control supposes infinite costs.

In addition, the result of the activity of the agent does not depend exclusively on the quantity and quality of the effort involved in its development. The activity of third parties or random activity plays a role and the agent is more averse to the risk than his principal.

Thus, the agent tends to want a contract in which his wage will be independent of the results of his performance - e.g. one in which the retribution will be established in function of the hours worked-, whilst the principal will want an agency contract in which the agent will only be paid in function of the results obtained. Neither of these solutions are usually reasonable: the first one because it involves an highly degree of *moral hazard* for the agent, potentially lethal for the principal, and the second one because it punishes the diligent agent in the cases in which the pay-off from the effort comes to nothing for external reasons, and in addition because it favors very aggressive short-term behavior by the agent himself in detriment of the long-term profit of the principal. Therefore, in real practice, agency contracts, mandatory and default rules applicable to them are usually set somewhere between the two extremes, these

are *mixed contracts*: they motivate the agent to make an effort and they partially ensure against the risk of bad results of his management despite the care taken over it.

In this frame, there are two types of rules of vicarious liability relevant to the agency costs problems: some -the ones that govern the *external relationship* between the principal and the agent, on the one hand, and the victim of the tort on the other - can establish that the victim directly claims against the principal or against the principal and the agent jointly and severally liable, etc. others -the ones that regulate the *internal relationship* between the principal and the agent - directly deal with the problem of agency costs: the difficulties of the principal's control, the moral hazard and the risk-aversion of the agent, the way in which salary is paid and the job conditions, etc. According to what we have said so far, the basic rule of the external relation must envisage the possibility that the victim may claim directly against the principal for the damages caused by the negligent behavior of the agent. We will return to this in the following part of this paper. Here, it's enough to point out that the legal regulation of vicarious liability cannot be analyzed independently of the general framework of the contractual regulations, and in its case, the legal regulations applicable to the agency relationship.

3. The paradigm of vicarious liability in Spanish law: Liability of Public Administration.

Under Spanish law, the paradigm of vicarious liability is the strict liability of Public Administration for the normal or abnormal functioning of public services, in other words, for the actions and omissions of civil servants and employees of the Administration in the provision of public services. Thus, according to section 139 of Ley 30/1992, de 26 de Noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, modified by Ley 4/1999, de 13 de Enero (LRJPAC):

> *Individuals will have the right to be compensated by the corresponding Public Administration for all damage they suffer to any of their goods and rights, except in the case of force majeure, as long as the damage is the result of the normal or abnormal functioning of the public services.*
>
> Mere causation is enough.

In the **external relationship**, the liability of the principal, in other words, of the Administration, is defined as being:

a) **Direct**: the Administration is liable in the first place. This is how it is envisaged in section 145 of the LRJPAC:

> *1. To make liability effective, as referred to in Chapter I of this Title* (that of section 139) *the individuals will directly require the corresponding Public Administration to compensate for the damage caused by the authorities and agents at their service.*

2. The corresponding Administration, when it has compensated the injured party, will require ex officio of its authorities and other staff at its service the responsibility for the fraud, blame of serious negligence, having instructed the procedures that have been established by regulation.
To require this liability, amongst others, the following criteria will be considered: the result of the damage produced, the intentionality, the professional liability of the staff at the service of the Public Administration and their relationship with the occurrence of the tort. (...)

However, section 121 Cr. C. established the joint and several liability of the Administration in cases of crimes committed by civil servants:

The State, the Autonomous Community, the province, the island, the municipality and other public entities, depending on the case, are vicariously liable for the damage caused by those criminally responsible for the crimes, when they are an authority, agents or contractors carrying out their jobs or functions, as long as the tort is a direct result of the public service entrusted to them, without prejudice of direct liability from the normal or abnormal function of the service as required in accordance with the rules of administrative procedure, and without, in any case, there being a possibility of a duplicate compensation.

b) Strict Liable: the liability of the Administration is independent of the precautions taken by it in the organization and the provision of the service in which the damage occurred.

Since 1954, with the promulgation of the *Ley de Expropiación Forzosa*, the administrative doctrine and the Spanish case law have sustained that strict liability is only so for simple cause in fact of damage, and at least formally, it has not taken into account imputation and proximate causation. For some years, this formulation of the rule of strict liability has been in crisis and today it is common to admit that negligence and causation in law clearly contribute to define the liability of the Public Administration (SALVADOR CODERCH / RUIZ GARCÍA (1999), SALVADOR CODERCH (2000), MIR PUIGPELAT (2002), SALVADOR CODERCH / RUIZ GARCÍA (2002)).

c) **Exclusive**: the victim, or, on the whole, the plaintiff must direct his or her claim against the Administration, however, since 1999, they may no longer do so against the civil servant who directly caused the damage. This can be found in section 145 LRJPAC and, in the cases in which the damage is not the result of an event defined as a crime or misdemeanor, section 146.2 LRJPAC, both modified by the Law 4 / 1999:

The requirement of criminal liability for civil servants will not suspend the proceeding of recognition of civil liability that is being instructed, unless the determination of the events in the criminal jurisdiction order will be necessary for fixing civil liability.

As an exception, as recently mentioned by ESPINOSA DE LOS MONTEROS AND HERRERO DE EGAÑA (2002), page 1394, "the direct action of the injured party is maintained ... in the case of civil liability derived from crime", section 146.1 LRJPAC. However, the

above mentioned authors continue, the Law does not encourage the exercise of civil actions: art. 146.2 "... *will not suspend....*"; art. 121 CC: "*without prejudicing the civil liability derived from the normal or abnormal function of public services...*" Obviously this is trying to prevent the civil servant who directly caused the damage from being affected by incentives that do not come from the Administration itself.

The liability of Public Administration is also exclusive in the United States of America. Since the *Federal Employees Liability Reform and Tort Compensation Act* of 18th November 1988 (Public Law 100-694), the victims of tort caused by federal civil servants whilst carrying out their functions can only be directed against the State (28 USC Sec. 2679 b), and may only be directed at its employees in cases that violate the Constitution or a Law that specifically envisages this remedy. Therefore, federal employees do not respond personally to the tort caused while carrying out their functions and the State does not have a return action against them.

Sec. 2679 (b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government:
(A) which is brought for a violation of the Constitution of the United States, or
(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

In Germany, section 34.2 of the Bonn Fundamental Law legally limits the possibility to establish a reimbursement action in the cases of willful or intentional torts (*Vorsatz*) and gross negligence (*grosser Fahrlässigkeit*) and, for this, see the § 46 of the framework law of the law of civil servants (*Beamtenrechtsrahmengesetz*); see OSSENBÜHL, *Staatshaftunsgrecht* 5.Auflage, München Beck 1998. 2.VIII. page. 118 and following

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(1) Verletzt ein Beamter vorsätzlich oder grob fahrlässig die ihm obliegenden Pflichten, so hat er dem Dienstherrn, dessen Aufgaben er wahrgenommen hat, den daraus entstehenden Schaden zu ersetzen. Haben mehrere Beamte gemeinsam den Schaden verursacht, so haften sie als Gesamtschuldner.

(2) Ansprüche nach Absatz 1 verjähren in drei Jahren von dem Zeitpunkt an, in dem der Dienstherr von dem Schaden und der Person des Ersatzpflichtigen Kenntnis erlangt hat, ohne Rücksicht auf diese Kenntnis in zehn Jahren von der Begehung der Handlung an. Hat der Dienstherr einem Dritten Schadenersatz geleistet, so tritt an die Stelle des Zeitpunktes, in dem der Dienstherr von dem Schaden Kenntnis erlangt, der Zeitpunkt, in dem der Ersatzanspruch des Dritten diesem gegenüber vom Dienstherrn anerkannt oder dem Dienstherrn gegenüber rechtskräftig festgestellt wird.

(3) Leistet der Beamte dem Dienstherrn Ersatz und hat dieser einen Ersatzanspruch gegen einen Dritten, so geht der Ersatzanspruch auf den Beamten über.

In the **internal relationship** between Public Administration and the civil servant who cause the harm, the civil servant will always respond to this if he caused the tort intentionally - with fraud - or gross negligence. The reimbursement action of the Administration is characterized by two unique features:

a) Limitation of liability in the cases of **intentional torts or grossly negligence actions** of the civil servant: simple negligence is excluded.

The rule generally established by the ordinary private law is, on the other hand, that of simple negligence. If, as is common, it is interpreted in economic terms, this rule is infringed if the tortfeasor did not invest in precaution to the point that an additional unit invested in it would have prevented another unit in expected accident costs. If this is the case, it is obvious that the administrative rule infra-deters harm when these are caused by civil servants or public employees. If this were the only regulation applicable, the incentives of the Administration (which are correct) would not be aligned with those of its civil servants (which are insufficient).

b) Requirement **ex officio**: since 1999, the Administration has to claim reimbursement against the civil servant who directly caused the tort.

Before the Law 4/1999, section 145 of the LRJPAC allowed the Administration to opt to claim the reimbursement from the civil servant: "*they may require*", the Law said; now, on the contrary, it states: "*The Administration ... will require ex officio*". The dissociation of the injured party from the civil servant who caused the damage is total. The position of the injured party, as stated by Espinosa de los Monteros y Herrero de Egaña, is that of a "simple third party" who cannot be qualified as part in the process as a party; he may complain about the facts, but he may not take out action against the direct tortfeasor (ESPINOSA DE LOS MONTEROS and HERRERO DE EGAÑA (2002), page 1392), unless through criminal proceedings.

Naturally, the insufficient deterrence due to a regime of personal liability limited to intentional torts and grossly negligent actions and that in addition would eliminate the victim of as a party in a lawsuit against the civil servant that harmed him is compensated - in theory - with other instruments. The Administration has, amongst others, the means to control the behavior of its civil servants offered by the legal regime of the discipline (Real Decreto 33/1986, de 10 de enero, por el que se aprueba el Reglamento de Régimen Disciplinario de los Funcionarios de la Administración del Estado, BOE 17.1.1986).

However, the legal system described generates an obvious agency problem. Nevertheless, this time, not between the Administration, as the principal, and the personnel at its service, as its agents, but between the citizens, as principals of the elected officials and civil servants, who respectively represent and serve them. In effect, the legal system is almost totally hermetic, as the regime for civil liability of civil servants has been progressively isolated from the citizens, who, as we have said, may act as complainants, though they may never sue the direct

tortfeasors. Clearly, there is a safety valve - the possibility to exercise criminal actions and with it the liability derived from the crime, however, whichever way you look at it, criminal liability is extraordinary, it is not -it should not be - the first resource of the system for dealing with deterring and compensating harm.

We can observe that, between the citizens and civil servants or elected officials that serve them, there is the Public Administration, which is directly and strictly liable and which is legally obliged to act against the civil servant who acted willfully or with gross negligence, as well as to disciplinarily correct him, even for minor fault.

The tort system is legendarily expensive. From this point of view, taking the incentive system away from courts and giving it to administrative organizations of the work is meaningful. More so if, assuming that civil servants are risk-averse and limitedly solvent, one assumes also that they would prefer ways of controlling dysfunctions of the service that distribute its costs over time. In other words, that allow charge the more or less accidental achievement of the daily work of the civil servant in the vicissitudes of their professional career and their level of retribution. In the same way as in the world of private business, the internal control mechanisms, salary and, as a limit, discipline that the principal has at disposal allows him to manage his company better than he would if he had to recur to a legal actions for each accident caused or co-caused by one of his agents, the administrative system saves tertiary costs if it use to the instruments that civil service gives to public managers.

However, private companies generate the resources they spend, but the Public Administration do neither as it manages resources generated by third parties, the tax-payers, and although materially they can file for bankruptcy protection, they can never go bankrupt - unlike companies, countries never close down (although cultures die out). The idea, then, that the Administration always and automatically looks after the interest of the public, of the citizens in general and, especially, secures an efficient level of precautions in the acts of its civil servants, incurs the fallacy of Nirvana, according to which one would have to suppose, always and in all cases, the benign and selfless nature of any actions of managers, civil servants and public employees. However, InDret does not discriminate between people, whether they are individuals or civil servants.

In addition, as Guillermo de Ockham (1285-1347/49) showed, *pluralitas non est ponenda sine necessitate (Plurality should not be assumed without necessity*) and, from an analytical point of view, there is scope for making concessions to nominalists and to methodological individualists and to ask: What is the Administration, if not an organized set of its managers, elected officials, civil servants and employees, as well as the material means placed at their disposition? Who ensures that the public agents manage the service in the benefit of the collective? (*Quis custodiet ipsos Custodes*), in other words, what incentives does the public

official have to prevent misconduct linked to the service he manages if the consequences of his action do not fall on him but on the public funds?

If, for one moment, we leave the legal device of the Administration, that places itself between the citizenry and the public servants, it is quite clear that current legislation has shielded civil servants and public employees against all kinds of legal, non-criminal action that the citizen could wish to take: he only has the action for political accountability, through exercising his right to vote, as well as other means of political participation, and also the extreme solution of criminal proceeding. In the middle ground, the broad territory of civil liability and liability of public administration can only be directed against the Administration, against an entity that covers up the prosaic reality that the citizens-victims of the damage can claim compensation from the public funds, in other words, from the citizens-tax payers. In the middle, again, the elected politicians and the civil servants internally manage the rules of the reimbursement action and the legal discipline, while, in external relations, the injured party, the citizen, is not allowed to say anything, unless he presents a complaint about a civil servant. From an exclusively legal point of view, the conclusion is obvious: the custodians do not keep a watch over themselves.

Apart from the exception of criminal suit, the generic remedy against possible malfunctions of the liability system are mainly found in political action, that can compensate the insufficiencies of legal protection. Political responsibility of elected officials allows to circumvent moral hazard originated by the possible collusion between managers and servers of the public, amongst politicians and civil servants.

Empirical research will show whether, given compensation that the set of internal administrative controls and the external political responsibility implies, the current system of liability of Public Administration under-deters accidents or not, that's to say, if the specific public service given *en masse* generates the same accidents rate of comparable private service. The experience in public services provided both by public bodies and private entities (schools, hospitals, transport services) does not seem to show significant differences in levels of harmfulness.

Finally, the analysis of the system of vicarious liability of Public Administration shows how liability systems, whether civil or criminal, are not self contained nor can they need be analyzed fruitfully without taking into account that they are part of a broader system that recurs to legal instruments, such as the disciplinary regime of public servants, but also extra legal ones, such as notably, political responsibility.

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