

Can the state be convicted for damages caused by parliamentary discourse?

Pode o estado ser condenado por danos provocado pelo discurso parlamentar?

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Abstract

This article aims to analyze, from the constitutional, theoretical-doctrinal and jurisprudential points of view, the possibility of objectively holding the State accountable for damages caused by means of speeches given by Members of Congress, considering the perspective offered by the theory of democracy and representation. The research concludes that the State is not responsible for damages caused by congressional speeches.

Keywords: Parliamentary action. Speeches. Parliamentary term. Political representation. State civil liability. Political responsibility.

Resumo

Este artigo pretende analisar, sob a perspectiva constitucional, pelos pontos de vista teórico e jurisprudencial, a possibilidade real de o Estado responder por danos causados por discursos proferidos por membros do Congresso Nacional, considerando a perspectiva oferecida pela teoria da democracia e da representação. Conclui-se que o Estado não é responsável por danos causados por discursos parlamentares.

Palavras-chave: Ação parlamentar. Discursos. Período parlamentar. Representação política. Confiabilidade estatal. Responsabilidade política.

1 Introduction

In June 2017, the Federal Supreme Court recognized the general repercussion of the constitutional issue in Extraordinary Appeal No. 632.115/CE, in order to “determine whether the civil and criminal sanctions granted to parliamentarians by their opinions, words and votes (Article 53 of the Constitution) removes the objective civil responsibility of the State, foreseen in art. 37, §6, of the Constitution”.

The Rapporteur of RE 632.115, Min. Roberto Barroso, pointed out that the discussion highlights the tension between equality in the distribution of social charges and the constraint of political action and of the democratic principle itself, understood, in its manifestation regarding the general repercussion, that it would be up to the Federal Supreme Court to “harmonize the State’s obligation to provide civilian reparation and guarantee material immunity for the exercise of parliamentary mandate.”¹ This appeal is pending judgment.

Although there is no definition in the Supreme Court’s case law, it is possible to identify a decision in which the Court faced the stormy discussion on the State’s civil liability for an act protected by parliamentary immunity. This is a monocratic decision handed down by Min. Joaquim Barbosa, in RE 232,057 / DF, in October 2009, which dismissed the legitimacy of the public entity and also of the public agent to respond for alleged moral damages resulting from the parliamentary discourse. The extraordinary appeal was filed against the judgment of the Court of Federal District and Territories, which understood that the district deputy and the Federal District (TJDFT) would be legitimate parties to respond for the reparation of moral damages resulting from the publication of journalistic articles on the works of the Parliamentary Commission of Inquiry established by the Legislative Chamber of the Federal District. The TJDFT ruling stated that “legal entities governed by public law, in accordance with article 37, § 6, of the Federal Constitution, shall be liable for damages caused by their agents, as

1 “5. [...] A questão constitucional em exame consiste em definir se a inviolabilidade civil e penal assegurada aos parlamentares, por suas opiniões, palavras e votos (art. 53, da Constituição), afasta a responsabilidade civil objetiva do Estado, prevista no art. 37, § 6º, da Constituição. 6. De um lado, a imputação de responsabilidade civil objetiva ao Estado por opiniões, palavras e votos de parlamentares parece reforçar a ideia de igualdade na repartição de encargos sociais. Por outro lado, o reconhecimento desse dever estatal de indenizar por conduta protegida por imunidade material pode constringer a atuação política e o próprio princípio democrático. 7. Dessa forma, a harmonização entre o dever de reparação civil objetiva do Estado e a garantia de imunidade material para o exercício de mandato parlamentar é matéria de evidente repercussão geral, sob todos os pontos de vista (econômico, político, social e jurídico), tendo em vista a relevância e a transcendência dos direitos envolvidos num Estado Democrático de Direito. 8. Diante do exposto, manifesto-me no sentido de reconhecer a repercussão geral da seguinte questão constitucional: saber se há responsabilidade civil do Estado por ato protegido por imunidade parlamentar.” Repercussão Geral no Recurso Extraordinário – RE 632.115/CE. Relator: Min. ROBERTO BARROSO. Data de publicação DJE 29/06/2017 - DJE nº 142, divulgado em 28/06/2017.

such, to third parties, with the right to return in case of fault or deceit, “and also stated that” [...] the political agents of the State do not have *carte blanche* to inflict offense as they wish. If they do, the State responds first, with a right of return against the agent who has, culpably or intentionally, caused the damage.” Recognizing violation of arts. 37, §6, and 53, of the Federal Constitution, Minister Joaquim Barbosa considered that the parliamentary immunity conferred on the members of the Legislative Power functions as an exclusion of the unlawfulness of conduct that, consequently, would remove the objective responsibility of the State. In the words of the Rapporteur:

The constitutional guarantee of parliamentary immunity (article 53, caput) exempts deputies and senators from civil and criminal sanctions for their opinions, words and votes in the exercise of their parliamentary mandate or because of it (see Inq 1.775-AgR, rel. min. Nelson Jobim, DJ 21.06.2002). If the alleged acts that violated the defendant’s morals were given in a legislative session of the Legislative Chamber of the Federal District and through publications that recounted events that occurred during the same session, they are covered by material immunity because they derive from the deputy’s own parliamentary activity district. In the same sense, it is the decisions given in Inq 1958 (red for the judgment of Carlos Britto), in Inq 1,381-QO (report by Ilmar Galvão, DJ 17.12.1999) and in Inq 655 Corrêa, DJ 01/07/2001).

Evidenced the inexistence of an unlawful act to be repaired, it proves impracticable to impute to the Federal District, based on art. 37, paragraph 6, of the Federal Constitution, responsibility for redressing the alleged damages.

In a first approach, it can be assumed that any attempt to exclude the responsibility of elected representatives, or not to repair damages caused by the State, sounds like an anti-republican conduct, which degrades equality between citizens and isonomy before the law, confronting the Republic, a fundamental principle of our constitutional order, which is always associated with the ideas of electivity and responsibility.

There will be those, still, who will see, in art. 37, § 6, of the Constitution, which provides for the State’s strict liability in the reparation of damages caused by public agents, the possibility of objective civil liability of the State to achieve parliamentary proceeding, even if parliamentary immunity is guaranteed exclusively for the political agent.

The subject deserves careful dogmatic confrontation, to deal with the allocation of responsibility in the republican regime, as well as demand to address other

biases of material immunity, which does not understand it exclusively as a clause of irresponsibility.

The present article proposes to examine whether there is civil responsibility of the State for the parliamentary discourse. To do so, the regime of responsibility of the parliamentarian will be studied, assuming the premise that the regimes of responsibility in the Republic are multiple and must take into account the function performed by the public agent. It is also pointed out that the distinct characteristics observed in the comparison between the mandate of the political agent and the mandate of the public agent offer elements to justify the incidence or not of the objective civil responsibility of the State in the field of parliamentary activity.²

2 The scope of civil liability of the state foreseen in art. 37, § 6, of the constitution and its inability to regulate parliamentary discourse

There is no irresponsibility in a Republic. But that does not mean that there will always be civil liability of the State, aimed at repairing damages.

The Constitution of 1988 prescribes the objective civil responsibility of the State when establishing, in its art. 37, § 6, that “legal entities governed by public law and those of private law that provide public services shall be liable for damages caused by their agents, as such, to third parties, assured the right of return against the responsible in cases of fraud or guilt”.

This provision is provided for in Chapter VII, which deals with the “Public Administration, Title III, which deals with the” State Organization”.

Topologically, therefore, it can already be seen that this rule does not have the capacity to justify, per se, the civil responsibility of the State, in its multiple dimensions, by any kind of act practiced by public agent.

It is also true that this constitutional provision does not exhaust legal discipline regarding State responsibility. Indeed, as highlighted by Ana Cláudia Nascimento Gomes, the constitutional provision deals with “a specific category of legal and constitutional responsibility: the responsibility of the State to indemnify or compensate for the private individual (s) who were harmed (s) by its public activity”. It proceeds: “This specific category of State responsibility, however, only proves the existence of the generic responsibility of the State, which is independent of its ownership of property”, which also goes through the constitutional plan, for example, “the political

2 Na doutrina, a responsabilidade objetiva do Estado por atos do Poder Legislativo é abordada, ainda que com bastante controvérsia, em relação à edição de leis constitucionais e inconstitucionais. O objeto do presente artigo se circunscreve ao exame da responsabilidade civil nos discursos parlamentares, que expressam a atuação individual no Parlamento, antes de transformada em vontade do Estado.

accountability of mayors (art. 29-A, § 2) and the President of the Republic (article 85; criminal liability of the authorities (articles 100, §6, and 102, I, b) and disciplinary responsibility of authorities (art. 103-B, § 4 and subsection III)” (GOMES, 2013, p. 906).

The applicability of this mechanism, aimed at acts carried out by public agents linked to Public Administration, in other spheres of State action, therefore, requires attention.

As regards the civil liability of the State for judicial error, for example, the STF understands that “the theory of objective State responsibility, as a rule, is not applicable to jurisdictional acts, except in cases expressly declared by law” (STF, ARE 828027, Rel. Roberto Barroso, 2017), notwithstanding the provisions of art. 5, item LXXV, of the Constitution, in the sense that “the State shall indemnify the convicted person for a judicial error, as well as that which is imprisoned beyond the time fixed in the sentence.”

It is insufficient, therefore, to withdraw from the rule inscribed in art. 37, § 6, of the Constitution a command that directly and literally guarantees the possibility of civilly holding the State accountable for the parliamentary discourse.

In fact, due to the characteristics of political representation and considering the nature of the act practiced by the parliamentarian (discourse), this automatic extension of the regime of responsibility provided in art. 37, § 6, of the Constitution for the act of the parliamentarian, linked to the Legislative Branch, requiring a more accurate examination of the accountability regime of this political agent.

In view of the inappropriateness of art. 37, § 6, of the Constitution to regulate, by itself, the question of civil liability of the State for the speech of the parliamentarian, attention must be paid to the broader field regarding the regime of accountability of political agents holding office in the light of the nature of the public investiture that these agents possess.

3 The foundation of political power in a representative democracy

As Celso Antônio Bandeira de Mello warned, there is a need to “revisit frequently certain themes that are underlying the constitution of political mandates”³ and, therefore, interconnected to the other institutes informing the Republic and facilitators of democracy. This is what is being done to confront the issue of civil liability of the State in the light of parliamentary discourse.

In the Republic and the Constitution, Geraldo Ataliba, presenting the elements that characterize the republican regime, emphasizes the centrality of the representative mandate in this system. According to the publicist, “Republic is the political regime in

3 BANDEIRA DE MELLO, Celso Antônio. Representatividade e Democracia. In: ROCHA, Cámen Lúcia Antunes et al (Org.). *Direito Eleitoral*. Belo Horizonte: Del Rey, 1996. Cap. 3. p. 41-54.

which the political Funcionários (executive and legislative) represent the people and decide on their behalf, doing it with responsibility, electively and through renewable mandates periodically.”⁴ The characteristics of the republican regime are associated with electivity, periodicity and responsibility, and electivity is the instrument of representation. The mandate occupies a central place in the republished regime, or, in the words of the Author, “System touchstone, the mandate is set as a point of reference for other institutes informing the Republic”⁵

The representative mandate constitutes a foundation of State Power. According to Carlos Blanco de Moraes,⁶ the notion of a political regime is based on the idea that the sovereign power, in order to exercise its powers and enforce them, must base its authority on an ontologically indisputable form, so that citizens to make their decisions as real obligations.

Political regime in this sense is conceptualized as “[...] doctrinal or ideological model where the foundations of the legitimacy of the sovereign power of a State lie as well as the definition of the type of juridical-political bond that is established between the people and the organs that exercise the same power”.⁷ Regarding the elements of the concept, the doctrinal or ideological model refers to the “set of values or principles that underlie a political, ethical, philosophical or even religious conception of the state structure and relations between the State, society and political power”.⁸ The doctrinal or ideological model that lends itself politically to the state must describe at least two aspects of the regime, namely, the source of legitimation of power and the role of citizens in the structure and access to that power.

The type of legitimacy of power, in its own terms, is the foundation on which it relies, that is, it is the values and principles accepted expressly or tacitly by the governed that make them subordinate to the state domain. Max Weber conceived the classic paradigm of the foundations of legitimizing power (not only political power), when he presented them in ideal types⁹: traditional power, founded on tradition and the custom of society and embodied in the figure of a leader; charismatic power, founded on devotion to magical personal qualities; and legal-rational power, based on impersonal rules, elaborated according to the rational presuppositions of the system, guided by the criterion of professionalism.

Political power in modern regimes is based in a legal-rational way, which is premised on a State of Law. For Blanco de Moraes, however, the simple passive

4 ATALIBA, Geraldo. *República e Constituição*. 2. ed. Atualizada por Rosolea Miranda Folgosi. São Paulo: Malheiros, 2011. p. 13.

5 Idem, p. 89.

6 MORAIS, Carlos Blanco de. Os regimes políticos. In: MORAIS, Carlos Blanco de. *O Sistema Político no contexto da erosão da democracia representativa*. Coimbra: Almedina, 2017. Cap. 2. p. 55-92.

7 Idem, p. 55.

8 Idem, ibidem, p. 57.

9 WEBER, Max. *Economia e Sociedade*. Vol.1. 4. ed. São Paulo: UnB, 2004.

adherence of citizens to the constitutional legal-rational order does not explain the essence and characteristics of political power. The author argues that this type of legitimacy lacks an axiological content, as it does little to inform about the values that justify the political regime. This content, he says, can be found in analyzing how the relationship between rulers and governed persons is established. This relationship between rulers and governed, in political regimes based on rational-legal power, can be with or without the participation of the people, the governed. If the exercise of power takes place in the name of the people and is authorized by it in a free, plural and recurrent way, there is a democracy. Otherwise, if the rulers disregard this consent, what will be observed is an autocratic regime.

Democracy, therefore, can be defined as the kind of relationship that is established between rulers and governed as a condition to base the doctrinal-ideological model on which the legitimacy of the state dominates. It remains to be seen, finally, how it is instrumentalized, how democracy is put into practice.

Blanco de Morais recalls that in spite of the fact that democracy has received several labels throughout its history - direct, organic, proletarian, participatory and deliberative democracy - democracy is the representative type that “constitutes the backbone of the structure of a material State of law and the legal-procedural criterion of legitimation of the power of the rulers”.¹⁰ The inexistence of direct democracy, evidenced by the institutional experience of several countries in the Western world, has made the representative form gain the body and political dynamics to legitimize and structure the power of the constitutional State of Law. In addressing the place of the representative mandate in the Rule of Law, the author warns that:

Democracy as a political regime presupposes that the legitimacy of the model of state organization and the exercise of political power lies in the free, plural and sovereign will of the people manifested through the criterion of the majority, expressed in the election of their representatives and, extraordinarily, in referendum or plebiscitary acts. It is a form of power in which, according to Schmitt, there is “identity between governors and governed” since those who exercise the power of domination do not do it based on “qualities inaccessible to the people, but on the basis of will, mandate and trust of the dominated or ruled that in this way govern themselves”, so democracy, in theory, would consist in “a domination of the people about itself “centered on respect for the principles of freedom and equality.”¹¹

Blanco de Morais, recalling Stuart Mill’s defense of the advantages of

10 Idem, *ibidem*, p. 68.

11 SCHMITT, Carl. *Teoría de La Constitución*. Madrid, 1982. p. 230ss e 222.

representative democracy (“Representative government is democracy made practicable for long periods and over large territorial extensions”¹²), asserts that representation is therefore a constitutive element of democracy that is designed to allow the designation of governors by the governed.

Representation, however, is not an end in itself. It is, in fact, an instrument designed “to make institutionally the application of the democratic principle in the State”¹³. In its precise words, representative democracy:

It is a system, composed of a method (democratic representation), a process (translation of electoral results into mandates) and a decision-making criterion (the majority criterion), which is designed to ensure at all times that the political institutions of a State express a collective and unitary will.¹⁴

The legitimacy of power therefore lies in the temporary mandate, direct or indirect, but granted in a free and plural form. It is in these terms that political power has sought (at least in the West) to legitimize itself through representation (even in undemocratic regimes).

4 The nature of political representation in modern representative democracies

Understanding the nature of political mandates, and in particular parliamentary mandates, can not be undertaken without recourse to the theme of political representation in the theory of democracy. Manoel Gonçalves Ferreira Filho considers this one of the most complex problems for political science and, consequently, for public law.

It is true that the problem of political representation predates modern democracy (in the medieval assemblies, for example, representatives were spokesmen for the communities that designated them). But modern representative democracies present relevant innovation about the nature of the political mandate, distinguishing it from the mandate of private law, through which the representatives transmitted the will of the represented in the predetermined subjects.

In fact, the modern representation whose lines were already delineated in the work Montesquieu, has a different scope: representation is seen as a form of

12 MILL, John Stuart. *Considerações sobre o Governo Representativo*. São Paulo: IBRASA, 1964.

13 MORAIS, Carlos Blanco de. *O Sistema Político no contexto da erosão da democracia representativa*. Coimbra: Almedina, 2017. Cap. 2. p. 71.

14 MORAIS, Carlos Blanco de. *O Sistema Político no contexto da erosão da democracia representativa*. Coimbra: Almedina, 2017. Cap. 2. p. 71.

government, which gives the elect the discretion to decide on the realization of the general interest. Ferreira Filho does not fail to emphasize the political and aristocratic character of this formulation, which was intended to neutralize the prevalence of the interests of the large populace in public affairs by stating that the representative acts on behalf of the nation, not the people.

It is not clear when this new conception of representation prevails historically, but it is possible to identify in the eighteenth century the idea of representation as we see today, from what is taken from Edmund Burke's famous speech on the occasion of his In 1774 Burke rejected the imperative mandate, understood as the one in which the representative is committed to follow the directives emanating from his represented, and professed the autonomy of the representative before its represented, being together with the objective of pursuing the public interest, as can be seen from the historical pronouncement:

Certainly, gentlemen, it should be the happiness and glory of a representative to live in the closest union, the closest correspondence, and the least reserved communication with his representatives. His desires should have great weight for him; your opinions, great respect; business, tireless attention. It is their duty to sacrifice their rest, their pleasure, their satisfactions, for their benefit - and, above all, always, and in all cases, prefer their interests to their own. But your disenchanted opinion, your mature judgment, your enlightened conscience, he should not sacrifice for you, for any man, or any set of living men. [...] Their representative owes them not only their diligence, but their judgment; he betrays them, instead of serving them, should he sacrifice his judgment in favor of your opinion. My valiant colleague says he should be subservient to you. If that were all, the thing would be innocent. If government were a matter of will, anywhere, yours would undoubtedly be superior. But government and legislation are subjects of reason and judgment and not of inclination; what sort of reason is this in which determination precedes discussion, in which one group of men deliberates and another decides, and in which those who form the conclusion perhaps displace 300 miles from those who hear the arguments? Exposing an opinion is the right of all men; the representatives are a significant and respectable opinion, which a representative should always rejoice to hear and which he should always consider very seriously. But tax instructions, erroneous matters, to which the Member of Parliament is blindly and implicitly destined to obey, to vote and to argue in his favor - these are things wholly unknown by the laws of this land and which arise from a fundamental error about the order and the full spirit of our Constitution. Parliament is not

a congress of ambassadors of different and hostile interests, whose interests each one must assure, as an agent and defender, against other agents and defenders; but Parliament is a deliberative assembly of a nation with an interest in wholeness - in which no local purpose, no local prejudice, should guide, except for the common good, resulting from the general reason of wholeness.¹⁵

From the liberal Constitutions, the representative is no longer confused with the agent of private law. He no longer acts on behalf of his constituents, but represents the entire nation, including those who did not participate in his election or who opposed it. Modern representation, therefore, has a general character. In addition, it is free and autonomous in relation to the will of the represented, at least during the exercise of the mandate, having a proper and distinct accountability regime, which provides for the revocation of the mandate in certain situations.

In other words, the nature of the parliamentary mandate is representative of the general interest, characterized by its autonomy vis-à-vis the voters, functioning as an instrument for the implementation of democracy and a way of justifying and justifying state power.

These characteristics of political representation made Hans Kelsen, with his analytical rigor, understand the institute as a political fiction, as evidenced by the following fragment:

The formula according to which the member of parliament is not the representative of his constituents, but of the entire people, or, as some authors say, of the entire State, and that therefore he is not bound by any instructions from his constituents and can be deprived by them, is a political fiction. The legal independence of the electors before the voters is incompatible with the legal representation. The assertion that the people are represented by parliament means that although the people can not exercise legislative power directly and immediately, they exercise it by proxy. But if there is no legal guarantee that the will of the electors will be executed by the elected, if the elect are legally independent of the voters, there is no legal relationship of power of attorney or representation. The fact that an elected body has no chance, or has only a reduced chance, of being re-elected if its activity is not considered satisfactory by its constituents is, indeed, a kind of political responsibility; but this political responsibility is entirely different from a legal responsibility and does not justify the assumption that the elected body is a legal

15 BURKE, Edmund. *Discurso aos eleitores de Bristol*. Bristol, nov. de 1774. Disponível em: http://www.scielo.br/scielo.php?pid=S0104-44782012000400008&script=sci_abstract&tlng=pt. Acesso em: 7 jun. 2018.

representative of its electorate, much less the assumption that a body elected by only a part of the people is the legal representative of the electorate. Whole state.¹⁶

For Kelsen, Geraldo Ataliba notes, there is no strict mandate in political representation: “Cold and olympic, Kelsen does not allow himself to be embroiled by any emotional subjectivism: he analyzes his object with scientific criteria, and expands his conclusions, without giving in to the whims of censure, or approve.”¹⁷ And it goes on: “It simply analyzes and concludes: there is, legally, no true mandate; the representative only by fiction represents all the people, understanding such representation as political, not legal. Their arguments are unanswerable and they put the subject with rigorous precision”¹⁸.

In making a strictly legal analysis of the nature of the representative mandate, Kelsen reveals that the relationship established between voters and elected representatives, since it is not characterized as a legal relationship (whether it is called a term or not), it is a question of political rather than legal responsibility. In other words, from the distinct nature of the mandate comes a distinct regime of accountability.

The parliamentarian invested in a representative mandate by the free will of the people is, before the State and the people, a political agent that acts in the formation of the state will. As defenders of the general public interest, the representatives act on behalf of the whole people, not only those who elected them, since making the mandate depend on the constituency that elected him would limit him to private interests, repelled by republican and democratic ideals.

The comprehensive character of the representation gives rise to the self-determination of the elect: from its possession, it becomes independent of its electors and begins to act by a proper judgment in the exercise of its functions. The autonomy of the political agent invested in representative parliamentary mandate exonerates the representative of individualized accountability. By expressing the will of a community of citizens, it is submitted to specific types of accountability, adequate to the performance of its functions and focused on the protection of the mandate, which we will now analyze.

It is true that this vision contains a simplification, since in modern representative democracies there is between the representative and the represented an important element of connection, the political party, which constitutes an element of cohesion in the political action and establishes a regime of responsibility representative of

16 KELSEN, Hans. *Teoria Geral do Direito e do Estado*. Tradução de Luís Carlos Borges. 4 ed. São Paulo: Martins Fontes, 2005. p. 416.

17 ATALIBA, Geraldo. *República e Constituição*. Edição 2. ed. Atualizada por Rosolea Miranda Folgosi. São Paulo: Malheiros, 2011. p. 97.

18 Idem, *ibidem*.

the representative before him. In this regard, considering the contours given by the Federal Supreme Court to the institute of party loyalty for the positions elected by the proportional system, it can be said that the parliamentary mandate is subject to a sort of imperative partisan mandate.¹⁹

In this way, the political agent, as a representative representative in the democratic regime, thus performs a function that is linked to the foundation of legitimacy of state power. Its responsibility lies in the relationship established with its constituents (voters) with the party to which it is affiliated²⁰. The self-determination that characterizes the exercise of representation does not, however, result in an exemption from accountability of the political agent. The representative mandate holder responds by his performance within the limits of the role that he plays. For example, the parliamentarian responds politically to his constituents (what is called electoral responsibility), disciplinarily before the House to which he belongs or to the party to which he is affiliated (disciplinary responsibility).

Thus, the legal nature of representation - general and autonomous, but not unlimited - lends these characteristics to the parliamentary mandate as it is ordinarily exercised today in representative democracies.

It is not forgotten that this view of political representation has been subjected to intense criticism, suggesting some the reduction of political delegation, as Jane Mansbridge reports²¹. It is even possible today to identify, among innovative institutional practices, the attempt to establish imperative mandate for the

19 O diploma constitucional não trata diretamente da responsabilidade do parlamentar em relação ao partido ao qual pertence, tema associado às regras de fidelidade partidária. Em 2007, o STF decidiu, no julgamento dos Mandados de Segurança n^{os} 26.602, 26.603 e 26.604, que o mandato de deputado pertence ao partido e que a desfiliação partidária, em regra, implica a perda do mandato. Acolhendo essa orientação, a Lei 9.096, de 1995 (Lei dos Partidos Políticos), incorporou em 2015 o art. 22-A, segundo o qual perderá o mandato o detentor de cargo eletivo que se desfiliar, sem justa causa, do partido pelo qual foi eleito (como situações de “justa causa” podemos citar: a mudança substancial ou desvio reiterado do programa partidário e a grave discriminação política pessoal). Excetuando essas situações de justa causa, o partido poderá impugnar o exercício do mandato pelo parlamentar que se desfilou e reaver o cargo representativo. Em 2015, o STF julgou a ADI 5081 (Rel. Min. Luís Roberto Barroso), e decidiu que a regra de fidelidade partidária prevista pela RES 22.610/2007 do TSE (perda do mandato em favor do partido) não se aplica aos cargos do sistema majoritário de eleição (prefeito, governador, senador e presidente da República). Sobre o assunto, sob a égide da Constituição de 1967, com a redação que lhe deu a EC 1, de de 1969, confira-se: BRITTO, Luis Navarro de. O mandato imperativo partidário. *Revista de informação legislativa*, v. 20, n. 77, p. 253-258, jan./mar. 1983 | *Revista brasileira de estudos políticos*, n. 56, p. 147-153, jan. 1983, disponível em <http://www2.senado.leg.br/bdsf/handle/id/181395>. Acesso em: 3 nov. 2018.

20 MORAIS, Carlos Blanco de. *O Sistema Político no contexto da erosão da democracia representativa*. Coimbra: Almedina, 2017. Cap. 2. p. 73.

21 É o que nos relata Jane Mansbridge, Professora da Universidade de Harvard (MANSBRIDGE, Jane. A representação revisitada: introdução contra a responsividade eleitoral. *Estudos Eleitorais*, Vol. 11, n^o 3, p. 307-315, set./dez. 2016, Brasília, Tribunal Superior Eleitoral).

representatives, from the use of technological tools, that would allow the voters to be consulted about the guidelines submitted to the political representatives, to define the posture by him to be followed²².

In spite of the criticisms and alternatives that are presented today to deal with the democratic deficit, it is certain, however, that the characterization of political representation as a representative mandate remains valid, indicating the commitment of the political agent to the public interest, without forgetting the necessity to strengthen mechanisms that reinforce the legitimacy of the exercise of political power beyond the moment of voting²³.

It is within this tradition that the regime of parliamentary responsibility and its immunities is inserted in the 1988 Constitution, a prerogative that is, according to case law based on the Federal Supreme Court, inherent in the position and not the person of the parliamentarian. This is what will be developed in the next topic.

5 The regime of parliamentary responsibility and its immunities in the Constitution of 1988

As Alexandre de Moraes points out, the Federal Constitution “establishes rules for immunity and parliamentary prohibitions, so that the legislative branch as a whole and its members individually act with broad independence and freedom in the exercise

22 Essa é a proposta, por exemplo, do partido político australiano FLUX, que propõe a adoção da chamada “Democracia Direta Baseada em Assuntos”, como instrumento para se atingir a plena representação política. Confirma-se, a respeito, o artigo de KAYE, Max; SPATARO, Nathan. Redefinindo a democracia: sobre um sistema democrático concebido para o século XXI e sobre como mudar permanentemente a democracia. *Estudos Eleitorais*, Vol. 11, nº 3, p. 317-332, set./dez. 2016, Brasília, Tribunal Superior Eleitoral.

23 No referido artigo, Jane Mansbridge, tem buscado identificar alternativas que não sejam rígidas à escassa responsividade eleitoral que o modelo de representação política traz, de modo a garantir que o sistema político seja apto a alcançar consentimento público autêntico. Nas palavras da Professora de Harvard: “Muitos desconfiam da delegação pelos mesmos motivos que desconfiam de portas fechadas. Mas a delegação é normativamente justificável e uma ferramenta de governo altamente prática em qualquer sociedade caracterizada pela divisão do trabalho, contanto que certas condições estejam presentes tanto no início quanto na continuidade dessa delegação. Assim, o déficit democrático, incluindo os efeitos controladores do poder econômico, frequentemente é mais bem resolvido pela revisão dos incentivos dados aos representantes e pela concepção de novos veículos de consentimento do que pela redução da delegação e pela ampliação da democracia eleitoral, da responsividade clássica e da transparência. Para reduzir o deficit democrático, deve-se aproximar as ações dos representantes das preferências esclarecidas de seus constituintes e aproximar estes das próprias preferências esclarecidas e de um estado de conforto responsável (e consentido) quanto a desvios em relação a essas preferências.” (p. 311). Conclui a autora que, para “suprir os desafios atuais da legitimidade política, em resumo, não devemos retroceder para ‘mais do mesmo, mas com mais força’. Em vez disso, precisamos de formas mais diversificadas de responsividade e novas maneiras de gerar consentimento público autêntico” (p. 313).

of their constitutional functions,” (Article 53, caput) and formal immunities (article 53, §§ 1, 2 and 3), to the prerogatives of (article 53, § 4, CF / 1988), military service (articles 53, § 6 and 143), salaries (article 49, VII) and exemption from the obligation to testify (art. 53, § 5) and incompatibilities (article 54, CF / 1988)²⁴.

The 1988 Constitution, as we can see, deals with parliamentary immunities in art. 53, both in their material aspects (opinions, words and votes cast on the basis of their mandate), and in relation to procedural matters (prohibition of arrest of a Member of Parliament, except in flagrante delicto), by applying to parliamentarians when legislative mandate (practice in officio) or when acting on the basis of the mandate (practice propter officium)²⁵. In the words of Luís Roberto Barroso, immunities (or inviolability) “aim to protect the parliamentarians from political persecution, arbitrariness and undue interference in their performance by agents of other Powers”²⁶.

In this sense, the Federal Supreme Court has already had the opportunity to state that immunities should be seen not as privileges but as prerogatives. “These institutes do not configure the very personal right of the parliamentarian, but prerogative that comes from the nature of the position exercised. When the position is not exercised according to the constitutionally defined purposes, to apply blindly the rule that enshrines it is not compliance with the prerogative, it is the creation of privilege” (HC 89.417, DJ of 15-12-2006, Min. Carmen Lúcia).

With regard specifically to material immunities, art. 53 of the Constitution that “Members and Senators are inviolable, civil and criminal, for any of their opinions, words and votes,” and that, as stated in paragraph 8, “immunities of Members or Senators shall survive during the state of siege, and may only be suspended by the vote of two-thirds of the members of the respective House, in cases of acts committed outside the premises of the National Congress, which are incompatible with the execution of the measure”. These rules also apply to state and district parliamentarians, pursuant to arts. 27, § 1, and 32, paragraph 3, of the Constitution.

In accordance with the jurisprudence of the Federal Supreme Court (Investigação nº 2273, DJ of May 15, 2008, Rapporteur Minister Ellen Gracie), Roberto Dias and Lucas De Laurentiis note that, notwithstanding the constitutional provision refers only to civil and criminal spheres, the scope of such immunity is broader because “such immunity is not merely a normative provision which excludes the liability of members of parliament. It is more than that: it is a constitutional norm that excludes the very

24 MORAES, Alexandre. *Imunidades Parlamentares*. In: *Revista dos Tribunais*, vol. 742, São Paulo, agosto 1997, p. 81. 82.

25 STRECK, Lenio L.; OLIVEIRA, Marcelo Andrade Cattoni de; NUNES, Dierle. Comentário ao art. 53 da Constituição. In: CANOTILHO, J. J. Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; STRECK, Lenio L. (Coords). *Comentários à Constituição do Brasil*. São Paulo: Saraiva/Almedina, 2013, p. 1.073.

26 BARROSO, Luís Roberto. *Imunidades Parlamentares*. Proposta de sua Supressão pelo Conselho de Defesa dos Direitos da Pessoa Humana. In: *Temas de Direito Constitucional – Tomo III*. Rio de Janeiro: Renovar, 2003. p. 334.

typical framework of the conduct covered by it, with a view to ensuring the free exercise of parliamentary activity, one of the bases of the democratic regime”²⁷.

For Luís Roberto Barroso, the material immunity of the parliamentarian (for his opinions, words and votes) is an essential element of the Democratic Rule of Law. Even if statements by offensive and unjust parliamentarians are socially condemned, “it would be worse for parliamentarians to be easily targeted by conflicting interests,” which is why the Constitutionalist rightly understood the 1988 Constitution’s option of not reproducing “the previous constitutional system, which excluded the crime against the honor of the rule of inviolability”²⁸.

In addressing the extension of parliamentary material immunity, Alexandre de Moraes stresses that it is “(i)” absolute and perpetual, and the parliamentarian can not be held responsible for his vows and opinions exercised in the exercise of his mandate, even after his term has ceased” (ii) “public order, which is why the congressman can not renounce it,” and (iii) “still covers the publicity of parliamentary debates, making it irresponsible for the journalist to have reproduced them in his newspaper, reproduce in full or in a true statement what happened in Congress”²⁹.

Raul Machado Horta exemplifies:

In the gallery, a deputy accuses a concussion official, supplier of the state, of theft; states that a particular person is a foreign power agent. Finally, it puts forward words which, pronounced by others, would expose its author to criminal action or civil liability. But in the case of the member of the Legislative Power, he is protected by ample irresponsibility, which involves the speeches, the words, the votes and the opinions expressed in the exercise of the mandate It is absolute, permanent, of public order. The inviolability is total. The words and opinions based on the exercise of the mandate are excluded from repressive or condemnatory action, even after the term has expired. It is the insindicability of opinions and votes, in the exercise of the mandate, that immunizes the parliamentarian in the face of any responsibility: criminal, civil, or administrative, and that lasts after the end of the mandate itself.³⁰

27 DIAS, Roberto; LAURENTIIS, Lucas De. Imunidades parlamentares e abusos de direitos: uma análise da jurisprudência do Supremo Tribunal Federal. In *Revista de Informação Legislativa*, Brasília, a. 49, n. 195, jul/set 2012, p. 13.

28 BARROSO, Luís Roberto. Imunidades Parlamentares. Proposta de sua Supressão pelo Conselho de Defesa dos Direitos da Pessoa Humana. In: *Temas de Direito Constitucional – Tomo III*. Rio de Janeiro: Renovar, 2003. p. 337.

29 MORAES, Alexandre de. Imunidades Parlamentares. In: *Revista dos Tribunais*, vol. 742, São Paulo, agosto 1997, item 5.2.

30 HORTA, Raul Machado. *Estudos de Direito Constitucional*. Belo Horizonte: Del Rey, 1995. p. 597.

The parliamentary immunity institute, however, is not a general irresponsibility clause. Article 55 of the Statute of Congressmen states that the deputy or senator will lose his mandate in a number of cases, for example, the need to observe parliamentary decorum³¹.

Raul Machado Horta, in view of the extent of the inviolability rule, concedes that the parliamentarian “will only be subject, subject to disciplinary power provided for by Internal Rules, to correction of excesses or abuses”³².

According to the understanding of the Federal Supreme Court, the material immunity of the parliamentarian does not apply to the use of the word outside the exercise of parliamentary duties. In the judgment of the Question of Order in Inq. 1024 (Report by Celso de Mello, DJ, 4-3-2005), for example, the Court ruled that “the unavailable prerogative of material immunity - which constitutes a guarantee inherent in the performance of the parliamentary function, any personal privilege) - does not extend to words, nor to the manifestations of the congressman, that are unfamiliar to the exercise, by him, of the legislative mandate. “In spite of the wide application of the institute, which has been consolidated by the Supreme Court, the Court has disregarded the guarantee of parliamentary immunity in many cases.”³³

31 Conforme dispõe o art. 55, § 1º, da CF, “É incompatível com o decoro parlamentar, além dos casos definidos no regimento interno, o abuso das prerrogativas asseguradas a membro do Congresso Nacional ou a percepção de vantagens indevidas”. A perda do mandato deve ser decidida pela Casa Legislativa a que pertence o parlamentar, “por voto secreto e maioria absoluta, mediante provocação da respectiva Mesa ou de partido político representado no Congresso Nacional” (art. 55, § 2º, da Constituição).

32 HORTA, Raul Machado. *Estudos de Direito Constitucional*. Belo Horizonte: Del Rey, 1995. p. 597.

33 *Entrevista concedida a veículo de imprensa: [...]* In casu, (i) a entrevista concedida a veículo de imprensa não atrai a imunidade parlamentar, porquanto as manifestações se revelam estranhas ao exercício do mandato legislativo, ao afirmar que “não estupraria” deputada federal porque ela “não merece”; (ii) o fato de o parlamentar estar em seu gabinete no momento em que concedeu a entrevista é fato meramente acidental, já que não foi ali que se tornaram públicas as ofensas, mas sim através da imprensa e da internet; [...] (Inq 3.814, Primeira Turma, rel. min. Rosa Weber, unânime, j. 7-10-2014, DJE de 21-10-2014). [Inq 3.932 e Pet 5.243, rel. min. Luiz Fux, j. 21-6-2016, 1ª T, DJE de 9-9-2016.]. *Crime contra a honra praticado por parlamentar que exerce atividade jornalística: [...]* A verbalização da representação parlamentar não contempla ofensas pessoais, via achincalhamentos ou licenciosidade da fala. Placita, contudo, modelo de expressão não protocolar, ou mesmo desabrido, em manifestações muitas vezes ácidas, jocosas, mordazes, ou até impiedosas, em que o vernáculo contundente, ainda que acaso deplorável no patamar de respeito mútuo a que se aspira em uma sociedade civilizada, embala a exposição do ponto de vista do orador. [Pet 5.714 AgR, rel. min. Rosa Weber, j. 28-11-2017, 1ª T, DJE de 13-12-2017.] Embora a atividade jornalística exercida pelo querelado não seja incompatível com atividade política, há indícios suficientemente robustos de que as declarações do querelado, além de exorbitarem o limite da simples opinião, foram por ele proferidas na condição exclusiva de jornalista. [Inq 2.134, rel. min. Joaquim Barbosa, j. 23-3-2006, P, DJ de 2-2-2007.] *Parlamentar candidato a cargo eletivo: A garantia constitucional da imunidade parlamentar em sentido material* (CF, art. 53, caput) não se estende ao congressista, quando, na condição de candidato a qualquer cargo eletivo, vem a ofender, moralmente, a honra de terceira pessoa, inclusive a de outros candidatos, em pronunciamento

In a similar sense, Lenio Streck, Marcelo Cattoni de Oliveira and Dierle Nunes point out that:

Regarding the expression any of his opinions, words and votes, reinforces the understanding that material immunity covers the criminal, civil and administrative / political spheres. But that does not mean that he can invoke the prerogative of the parliamentarian who has made a statement - in or out of parliament - in disconnection from the exercise of the legislative mandate. That is, the immunity only comes from acts practiced as a result of the parliamentary function. Immunity is not shielding. It would be a contradiction that, in the name of democracy and the guarantee of the freedom of the exercise of the mandate, we would understand that the parliamentarian is a person above the law, being able to 'say anything' and invoke the protection of the semantic expression 'any of his opinions, words and votes'. Nor will it suffice to simply invoke the utterance of certain opinions 'in the exercise of the mandate'. This connection must be demonstrated to the satiety, in the smallest detail, to avoid abuses and impunity.³⁴

With this design, it is sought to confer on the immunities a teleological reading, aimed at guaranteeing the good performance of the political representation by the parliamentarians, independently of the other Powers.

motivado por finalidade exclusivamente eleitoral, que não guarda qualquer conexão com o exercício das funções congressuais. [Inq 1.400 QO, rel. min. Celso de Mello, j. 4-12-2002, P, DJ de 10-10-2003.] *Execução de pena privativa de liberdade e imunidade parlamentar formal*: “[...] Dentro do contexto normativo delineado pela Constituição, a garantia jurídico-institucional da imunidade parlamentar formal não obsta, observado o *due process of law*, a execução de penas privativas da liberdade definitivamente impostas ao membro do Congresso Nacional. Precedente: RTJ 70/607.” (Inq 510, Relator Ministro Celso de Mello, Tribunal Pleno, julgamento em 1.2.1991, DJ de 19.4.1991). *Hipótese de afastamento da imunidade parlamentar formal de deputados estaduais*: Os elementos contidos nos autos impõem interpretação que considere mais que a regra proibitiva da prisão de parlamentar, isoladamente, como previsto no art. 53, §2º, da Constituição da República. Há de se buscar interpretação que conduza à aplicação efetiva e eficaz do sistema constitucional como um todo. [...]. A Assembléia Legislativa do Estado de Rondônia, composta de vinte e quatro deputados, dos quais, vinte e três estão indiciados em diversos inquéritos, afirma situação excepcional e, por isso, não se há de aplicar a regra constitucional do art. 53, §2º, da Constituição da República, de forma isolada e insujeita aos princípios fundamentais do sistema jurídico vigente.” (HC 89417, Relatora Ministra Cármen Lúcia, Primeira Turma, julgamento em 22.8.2006, DJ de 15.12.2006)

34 STRECK, Lenio L.; OLIVEIRA, Marcelo Andrade Cattoni de; NUNES, Dierle. Comentário ao art. 53 da Constituição. In: CANOTILHO, J. J. Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; STRECK, Lenio L. (Coords). *Comentários à Constituição do Brasil*. São Paulo: Saraiva/Almedina, 2013, p. 1.074.

6 Is parliamentary immunity in the Constitution of 1988 sufficient to exclude the objective responsibility of the state?

At that moment, it is questioned whether the State could be liable for such damage, in view of the provisions of art. 37, §6, of the Constitution, since, it is observed, immunity applies to the agent of the State, and not necessarily to the State itself. What would be the justification for the State not to bear the burden of redressing the damage?

Min. Joaquim Barbosa, when dealing with the subject in the judgment of the aforementioned RE 232.057 / DF, understood that the institute of parliamentary immunity functioned as an exclusion of illegality, and therefore, of the responsibility of the State.

In this judgment, immunity served as an instrument of exclusion from state responsibility, without adequately explaining how this conclusion can be drawn from the fact that the political agent is excluded from responsibility.

In fact, the answer given in the decision is not sufficient to remove civil liability from the State. Immunity, as conceived in our legal system, is not an exclusion of absolute illegality, but an exclusion of responsibility in the civil and criminal spheres of the parliamentarian. If it could be understood as an exclusion of illegality, the parliamentarian could not be held accountable disciplinarily, which may occur if it is understood that parliamentary decorum has been injured. In addition, there is the electoral responsibility to citizens

That is to say: immunity is not a clause that removes unlawfulness, but rather the incidence of civil, criminal liability under certain conditions. The parliamentarian can respond politically and disciplinarily. In the latter case, before the House to which he belongs and before the political party to which he is affiliated.

Moreover, the lawfulness of the act is not an impediment to the incidence of State responsibility, as clarified by the doctrine of administrative law³⁵. The art. 37, paragraph 6, of CF / 88 demands, for its incidence, only the occurrence of damage and causal link, regardless of whether the conduct of the agent is lawful, unlawful, commissive or omissive.

35 *Maria Sylvia Zanella Di Pietro* informa que “segundo alguns autores, o Estado só responde se o dano decorrer de ato antijurídico, o que deve ser entendido em seus devidos termos. Ato antijurídico não pode ser entendido, para esse fim, como ato ilícito, pois é evidente que a licitude ou ilicitude do ato é irrelevante para fins de responsabilidade objetiva; caso contrário, danos decorrentes de obra pública, por exemplo, ainda que lícitamente realizada, não seriam indenizados pelo Estado. Somente se pode aceitar como pressuposto da responsabilidade objetiva a prática de ato antijurídico e este, mesmo sendo lícito, for entendido como ato causador de dano anormal e específico a determinadas pessoas, rompendo o princípio da igualdade de todos perante os encargos sociais. Por outras palavras, ato antijurídico, para fins de responsabilidade objetiva do Estado, é o ato ilícito e o ato lícito que cause dano anormal e específico” (DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 21ª ed., São Paulo, Atlas, 2008. P. 614.). Veja, ainda, MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional*. 13. Ed. São Paulo: Saraiva, 2018. p. 892-893.

In the case of RE 632.115 / EC, with the statement of the STF in favor of the existence of general repercussions, the Office of the Attorney General of the Republic offered an opinion on the knowledge and appeal, arguing that immunity of the parliament acts as a cause of exclusion of civil liability of the State and highlighting the inability of the state to become an indemnity source for all the thousands of citizens who feel affected by acts of parliamentarians. In recognizing the general repercussion, the STF, in the terms of the statement of the Rapporteur, Min. Roberto Barroso, established the following framework of the problem:

De um lado, a imputação de responsabilidade civil objetiva ao Estado por opiniões, palavras e votos de parlamentares parece reforçar a ideia de igualdade na repartição de encargos sociais. Por outro lado, o reconhecimento desse dever estatal de indenizar por conduta protegida por imunidade material pode constringer a atuação política e o próprio princípio democrático.

Dessa forma, a harmonização entre o dever de reparação civil objetiva do Estado e a garantia de imunidade material para o exercício de mandato parlamentar é matéria de evidente repercussão geral, sob todos os pontos de vista (econômico, político, social e jurídico), tendo em vista a relevância e a transcendência dos direitos envolvidos num Estado Democrático de Direito.

Diante do exposto, manifesto-me no sentido de reconhecer a repercussão geral da seguinte questão constitucional: saber se há responsabilidade civil do Estado por ato protegido por imunidade parlamentar.

Recourse to the weighting of his turn may be hasty, since it must first be asked whether the State's objective liability is in theory admissible in the hypothesis.

It is understood that not.

The (supposed) damage derived from the parliamentary discourse is the result of a political activity: the planning, by immunizing the parliamentarian of patrimonial accountability, is already signaling that political activity does not submit to this type of response, either by the parliamentarian, or by the State.

This understanding corroborates the finding that there is no public agent acting on behalf of the State. What there is a political agent³⁶, still acting in the formation of the state will.

36 Celso Antônio Bandeira de Mello caracteriza os agentes políticos como “*titulares dos cargos estruturais à organização política do País, ou seja, os ocupantes dos cargos que compõem o arcabouço constitucional do Estado, o esquema fundamental do poder*”. E prossegue o autor: “*São os que se constituem nos formadores da vontade superior do Estado*” (MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*, 2007, p. 199).

While the public agent only reproduces the will of the State, the political agent with a representative mandate acts in the formation of that will. The political agent is to be seen as a distinct species of public agent, which is that which expresses the will of the state, acting in the field of legality, which presupposes an already formed and positive state will.

In situations where the parliamentarian is not covered by immunity, strictly speaking, he ceases to be treated as a political agent, equaling other citizens.

In one and another situation, there is no mention of civil liability of the State for damages caused by parliamentary discourse. In summary, we must: (i) when the parliamentary discourse is protected by parliamentary immunity, the civil responsibility of the State should be removed, not properly in view of the unlawfulness of the conduct (since licit acts can also generate responsibility for the State), but because there is no conduct imputable to the State, since the political agent does not externalize the will of the State, acting in its formation; and (ii) outside the scope of parliamentary immunities, the speech made by the parliamentarian may be the object of civil responsibility of the parliamentarian himself, but not of the State, since it is not an act of State, since there was no conduct performed by the parliamentarian in the mandate or on the basis of the mandate.

As conclusion, we have that in no scenario will be possible the patrimonial responsibility of the State in function of speech made by the political agent.

7 Conclusion

At some point, the Federal Supreme Court will face another relevant issue associated with civil liability of the State, regarding the possibility of charging the State with the payment of compensation due to excesses committed by parliamentarians in their speeches.

So far, the Supreme Court has given two small indications on the path it intends to take: in a monocratic decision handed down in the records of RE 232,057 / DF, judged in 2009, in the manifestation of the existence of repercussion of the constitutional issue in RE632.115 / EC, in 2017. In both cases, the Supreme Court has settled the legal solution to the problem in the dilemma between the guarantee of parliamentary immunity and the obligation to repair damages by the State.

It should be noted, however, that the introduction of civil liability, of the political agent or of the State, in the political activities of its agents can lead to problems for the performance of democracy.

Hence the importance of understanding the role played by parliamentary immunities in the exercise of parliamentary mandate. As Luís Roberto Barroso put it, in a quotation already reproduced in this article, granting immunity to offensive and

unjust parliamentary pronouncements, even if they are socially condemnable, proves to be a better solution than to become “an easy target for conflicting interests”³⁷.

The immunity conferred on parliamentarians in the use of words is not unlimited, either because it operates only in relation to the exercise of the legislative mandate (practice in officio or propter officium), or because the parliamentarian may be subject to disciplinary responsibility, to correct excesses or of abuses, due to the breach of parliamentary decorum.

That is to say, parliamentary immunity can not be seen as an absolute clause of irresponsibility, but, according to the Constitution, it can be understood as an exclusion of illegality, in the light of art. 53 of the constitutional text.

Notwithstanding the need to understand the scope of protection conferred by parliamentary immunity and the nature of the parliamentary mandate, this understanding does not exhaust the problem of State accountability.

This provision, however, does not resolve the issue of civil liability of the State through parliamentary discourse. Even if understood as excluding illicitness in relation to the parliamentarian, it could be objected that it would affect the objective responsibility of the State, even for the exercise of a lawful act of the agent of the State. It could be claimed, in this reading, by the application of the objective responsibility of the State, disposed in art. 37, paragraph 6, of the Constitution.

This conclusion deserves also to be viewed with reserve, given that, as seen, art. 37, § 6, of the Constitution was not foreseen for the political system, but for the administrative action.

It is therefore relevant to qualify the type of public agent being treated. The parliamentarian, as a political agent, does not respond patrimonially or criminally for the exercise of his function because this is, frize-se, politics, as highlighted above.

In short, the non-application of art. 37, paragraph 6, in the reparation of damages caused by parliamentary speeches does not imply irresponsibility. What this understanding entails is the targeting of the problem to the type of accountability appropriate to the function. Hence the impossibility of addressing the State to civil liability for damages, patrimonial or moral, caused by parliamentary political activity through speeches.

37 BARROSO, Luís Roberto. Imunidades Parlamentares. Proposta de sua Supressão pelo Conselho de Defesa dos Direitos da Pessoa Humana. In: *Temas de Direito Constitucional* – Tomo III. Rio de Janeiro: Renovar, 2003. p. 337.

References

- AGUIAR DIAS, José de. *Cláusula de não indenizar*. Rio de Janeiro: Forense, 1995.
- AGUIAR DIAS, José de. *Da responsabilidade civil*. 10ª ed. Rio de Janeiro: Forense, 1997.
- ATALIBA, Geraldo. *República e Constituição*. 3. ed. Atualizada por: Rosolea Miranda Folgosi. São Paulo: Malheiros, 2011.
- BANDEIRA DE MELLO, Celso Antônio. *Curso de Direito Administrativo*. 33 ed. São Paulo: Malheiros, 2016.
- BANDEIRA DE MELLO, Celso Antônio. Representatividade e Democracia. In: ROCHA, Cármen Lúcia Antunes et al (Org.). *Direito Eleitoral*. Belo Horizonte: Del Rey, 1996. Cap. 3. p. 41-54.
- BARROSO, Luís Roberto. Imunidades Parlamentares. Proposta de sua Supressão pelo Conselho de Defesa dos Direitos da Pessoa Humana. In: *Temas de Direito Constitucional – Tomo III*. Rio de Janeiro: Renovar, 2003. p. 333/339.
- BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário nº 232.057/DF*. Relator: Ministro Joaquim Barbosa. Brasília, DF, 14 de outubro de 2009.
- BRASIL. Supremo Tribunal Federal. *Repercussão Geral no Recurso Extraordinário nº 632.115/CE*. Relator: Ministro Roberto Barroso. Brasília, DF, 29 de junho de 2017.
- BRASIL. Supremo Tribunal Federal. *ARE 828027 AgR-segundo*, Rel. Min. Roberto Barroso, Primeira Turma, julgado em 27/10/2017, DJe 23/11/2017.
- BRITTO, Luis Navarro de. O mandato imperativo partidário. *Revista de informação legislativa*, v. 20, n. 77, p. 253-258, jan./mar. 1983.
- BURKE, Edmund. *Discurso aos eleitores de Bristol*. Bristol, nov. de 1774. Disponível em: http://www.scielo.br/scielo.php?pid=S0104-44782012000400008&script=sci_abstract&tlng=pt. Acesso em: 7 jun. 2018.
- CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. 30 ed. São Paulo: Atlas, 2016.
- CRETELLA JR., J. *Curso de Direito Romano*. Rio de Janeiro: Forense, 2001.
- CRETELLA JÚNIOR, José. *O Estado e a obrigação de indenizar*. 2. ed. Rio de Janeiro: Forense, 2002.
- DAHL, Robert. *Sobre a Democracia*. Tradução de Beatriz Sidou. Brasília: Ed. UnB, 2001.
- DIAS, Roberto; LAURENTIIS, Lucas De. Imunidades parlamentares e abusos de direitos: uma análise da jurisprudência do Supremo Tribunal Federal. In *Revista de Informação Legislativa*, Brasília, a. 49, n. 195, jul/set 2012, p. 7-24.
- DI PIETRO, Maria Sylvania Zanella. *Direito administrativo*. 21ª ed., São Paulo: Atlas, 2008.
- ESTEVES, Júlio César dos Santos. *Responsabilidade Civil do Estado por Ato Legislativo*. Belo Horizonte: Del Rey, 2003.

- FERREIRA FILHO, Manoel Gonçalves. *Aspectos do Direito Constitucional Contemporâneo*. 3. ed. São Paulo: Saraiva, 2011.
- FERREIRA FILHO, Manoel Gonçalves. *Curso de Direito Constitucional*. 39. ed. São Paulo: Saraiva, 2013.
- FERREIRA FILHO, Manoel Gonçalves. *Do Processo Legislativo*. 7. ed. São Paulo: Saraiva, 2012.
- FERREIRA, Eduardo O. *Imunidade Parlamentar*. Visão Jurídica. nº 40, São Paulo, Ed. Escala, 2010.
- FLEINER-GERSTER, Thomas. *Teoria geral do Estado*. Tradução de: Marlene Holzhausen. São Paulo: Martins Fontes, 2006.
- GOMES, Ana Claudia Nascimento. Comentário ao art. 37, § 6º, da Constituição. In: CANOTILHO, J. J. Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; STRECK, Lenio L. (Coords). *Comentários à Constituição do Brasil*. São Paulo: Saraiva/Almedina, 2013, p. 904-917.
- HORTA, Raul Machado. *Estudos de Direito Constitucional*. Belo Horizonte: Del Rey, 1995.
- KAYE, Max; SPATARO, Nathan. Redefinindo a democracia: sobre um sistema democrático concebido para o século XXI e sobre como mudar permanentemente a democracia. In: *Estudos Eleitorais*, Vol. 11, nº 3, p. 317-332, set./dez. 2016, Brasília, Tribunal Superior Eleitoral.
- KELSEN, Hans. *Teoria Geral do Direito e do Estado*. São Paulo: Martins Fontes, 2005.
- MANSBRIDGE, Jane. A representação revisitada: introdução contra a responsividade eleitoral. *Estudos Eleitorais*, Vol. 11, nº 3, p. 307-315, set./dez. 2016, Brasília, Tribunal Superior Eleitoral. Disponível em: http://bibliotecadigital.tse.jus.br/xmlui/bitstream/handle/bdtse/3025/2016_mansbridge_introducao_responsividade_eleitoral.pdf?sequence=3&isAllowed=y. Acesso em: 3 nov. 2018.
- MEIRELLES, Hely Lopes. *Direito Administrativo Brasileiro*. 42 ed. São Paulo: Malheiros, 2016. p. 98.
- MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de direito constitucional*. 13. Ed. São Paulo: Saraiva, 2018.
- MILL, John Stuart. *Considerações sobre o Governo Representativo*. São Paulo: IBRASA, 1964.
- MONTEIRO, Washington de Barros et al. *Curso de Direito Civil*. 41. ed. São Paulo: Saraiva, 2014. (Vol. 5).
- MONTESQUIEU. *O espírito das leis: as formas de governo, a federação, a divisão dos poderes*. Introdução, tradução e notas de Pedro Vieira Mota. 9. ed. São Paulo: Saraiva, 2010.
- MORAES, Alexandre de. *Imunidades Parlamentares*. In: *Revista dos Tribunais*, vol. 742, São Paulo, agosto 1997, p. 81-101.
- MORAIS, Carlos Blanco de. *O Sistema Político no contexto da erosão da democracia representativa*. Coimbra: Almedina, 2017.
- RIPERT, Georges. *O regime democrático e o direito civil moderno*. Tradução de J. Cortezão. São Paulo: Saraiva, 1937.

ROUSSEAU, Jean-Jacques. *O contrato social*. São Paulo: Martins Fontes, 1996.

SCHMITT, Carl. *Teoría de La Constitución*. Madrid: Alianza, 1982.

STRECK, Lenio L.; OLIVEIRA, Marcelo Andrade Cattoni de; NUNES, Dierle. Comentário ao art. 53 da Constituição. In: CANOTILHO, J. J. Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; STRECK, Lenio L. (Coords). *Comentários à Constituição do Brasil*. São Paulo: Saraiva/Almedina, 2013, p. 1.070-1.077.

WEBER, Max. *Economia e Sociedade*. Vol.1. 4. ed. São Paulo: UnB, 2004.

ZOCKUN, Mauricio. *Responsabilidade Patrimonial do Estado: matriz constitucional, a responsabilidade do Estado por atos legislativos, a obrigatoriedade da prévia indenização e a responsabilidade pessoal do parlamentar*. São Paulo: Malheiros, 2010.