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REFLECTIONS ON RISK MITIGATION IN ADMINISTRATIVE CONTRACTSTO THEPUBLIC CALAMITY SITUATIONS AND THE INSTITUTE FOR JUDICIAL RECOVERY

REFLECTIONS ON MITIGATION OF RISKS IN ADMINISTRATIVE CONTRACTS IN THE FACE OF PU-BLIC CALAMITY SITUATIONS AND THE INSTITUTE OF LEGAL RECOVERY

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SUMMARY
This article aims to reflect on the impact of the COVID-19 pandemic on Brazilian public contractual relations, focusing on the following aspects: i) the institute of judicial recovery, as a legal instrument to assist institutions that were unable to recover the financial crisis; ii) government risk management mechanisms that mitigate the impact of such events on the management of public accounts. In this sense, at the same time, it points out the business difficulties left by the pandemic and their relationship with the legislation currently in force, with the main focus being the Judicial Recovery and Bankruptcy law and the Strategic Management of Government Risks. Qualitative research methods were used, based on the documentary data collection instrument and data processing, content analysis. The research results indicate the need to change the legislation in question, in order to enable the judicial recovery mechanism to be improved and integrity and risk management practices to be better developed in the strategic management of the public sector.
Key words:judicial recovery; public integrity; risk management; COVID-19.

ABSTRACT
This article aims to reflect on the impact of the COVID-19 pandemic on Brazilian public contractual relations, focusing on the following aspects: i) the institute of judicial recovery, as a legal instrument to assist institutions that were unable to recover the financial crisis; ii) government risk management mechanisms that mitigate the impact of such events on the management of public accounts. In this sense, at the same time, it points out the business difficulties left by the pandemic and their relationship with the legislation currently in force, with the main focus being the Judicial Recovery and Bankruptcy law and the Strategic Management of Government Risks. Qualitative research methods were used, based on the documentary data collection instrument and data processing: content analysis. The research results indicate the need to change the legislation in question, in order to enable the judicial recovery mechanism to be improved and integrity and risk management practices to be better developed in the strategic management of the public sector.
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1. INTRODUCTION

We have recently been living through a very delicate moment within postmodern history, given that we are facing a major health crisis (COVID-19), which has changed the way of living and relating to almost everyone living in society. Faced with the series of changes and adaptations that the pandemic has forced upon us, there are the challenges of new legal relationships that we are presented with daily, since the *modus operandi*of social relations are not the same, the actors of these relations are not in the same positions as they were before the beginning of social isolation, they are imbued now facing several disadvantages and new challenges.

The legal system, despite having its rules and stability, is not static, it is always adapting to new realities and the new needs of its social actors. Generally, the law, based on its laws, jurisprudence and regulations, changes gradually, as social changes occur over time. However, the current situation imposed by COVID-19 happened very quickly, which did not allow the legal system to adapt in order to meet this new and complex reality.

This research, from a qualitative approach, with the aid of the document analysis technique, aims to discuss the institute regarding judicial recovery, given the new social dynamics de-

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currents of the COVOD-19 pandemic, together with the government sector.

This article is of great relevance today, due to the existing bibliographic gap regarding the topic. Therefore, it is necessary for more authors to discuss the problem so that in the medium term proposals and steps can be created to tackle the problems generated by the issue.

2. MATERIAL AND METHOD

This research uses a qualitative approach, in which it was based on the technique of document analysis, for data collection, as well as literature review. In this way, documentary research was understood here as a method used to understand a phenomenon, as well as a means of communication prepared with a purpose and purpose, while Flick's (2009) understanding was adopted, which highlights the importance of understanding the intentionality in the preparation of the documents analyzed and not just using them as 'information containers', that is, information closed in itself.

In this sense, legal documents were analyzed: Law 11,101/2005, Federal Constitution of 1988 and Brazilian Civil Code of 2002 in the light of various scientific articles that deal with the topic.

Still according to Flick (2009), in document analysis, the researcher must seek to identify the practical objectives of the institutions or people who produced them. To this end, the following questions were used as a basis for analyzing the documents:

I) How can companies damaged by the health crisis recover financially?
mind?

II) Are the current judicial recovery instruments sufficient?

III) Given the experience, how can public management create mechanisms to mitigate the impact
major catastrophe pact regarding non-compliance with agreed administrative contracts, in order to mitigate risks to its integrity?

As an analysis strategy, content analysis was used, based on the understanding of Bardin (2011), who defines it as a set of communication analysis techniques that handle the processing of data contained in a given message.

As it is a work that uses documents, this technique is the one that contributes most to describing and interpreting the content obtained through data collection. In this sense, this type of analysis allows us to achieve a better understanding and reflection of the problem.

3. RESULTS AND DISCUSSION

3.1 SOCIAL AND ECONOMIC CONTEXT: COVID-19

Chinese scientists began reporting on the existence of COVID-19 at the end of December 2019, while on January 11, 2020, it was officially confirmed by the Chinese government itself about the existence of people infected by the virus. In Brazil, the first case was diagnosed on February 26, 2020.

Given the great power of COVID-19 to spread, in January 2020, the World Health Organization (WHO) decreed a State of Public Health Emergency, so that the organization's signatory countries would be attentive to the recommendations and action plan for containment of the virus.

Due to the high mortality rate from the disease, national and international security protocols began to recommend flight cancellations, as well as forcing businesses to close their doors until the situation returned to normal. In this process, the recommendation was that people not leave their homes and that they wear masks if they needed to leave.

Such health restrictions ended up having a major impact on the economy, mainly affecting small and medium-sized companies, which, due to the halt in their activities, ended up being forced to permanently close their doors and declare a state of bankruptcy.

3.2 JUDICIAL RECOVERY

The Institute of Judicial Recovery is governed by Law 11,101/2005 and aims to assist businesspeople with the economic, administrative and financial reorganization of their company, so that it does not enter into a state of bankruptcy. It is used, therefore, when the company is in debt and does not have credit

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enough to pay your creditors.

In this sense, Coelho (2011) teaches us that:

> Judicial recovery is a peculiar process, in which the objective sought — the reorganization of the company operated by the debtor business company, for the benefit of it, its creditors and employees and the economy (local, regional or national) — presupposes the practice of judicial acts not only by the judge, Public Prosecutor's Office and parties, but also by some specific bodies provided for by law (COELHO, 2011, p.415).

With this, the author highlights the need for assistance from other social actors within this judicial recovery relationship, such as the judge and the public prosecutor. Both must guide and supervise the company so that it complies with the requirements of the aforementioned institute. This is because, to be entitled to the benefit of judicial recovery, the company in question must meet a series of requirements regulated by law 11,101/2005, among which we can mention:

> 1) Carry out your activity for at least two years; 2) Not be bankrupt or, if you have already been declared bankrupt at some point, your responsibilities must be extinguished by a final and unappealable ruling; 3) Not have gone through another judicial recovery process in the last five years; 4) Not having obtained, in the last eight years, the granting of a special judicial recovery plan; 5) Not having been convicted of any crime provided for in bankruptcy law (Brazil, 2005)

In addition to these requirements, to be entitled to judicial recovery, the process unfolds, according to Coelho (2011), into three main phases, namely:

> The judicial recovery process is divided into three very distinct phases. In the first, which can be called the postulatory phase, the business company in crisis presents its application for the benefit. It begins with the initial petition for judicial recovery and ends with the court order ordering the request to be processed. In the second phase, which can be referred to as deliberative, after the credit check, a reorganization plan is discussed and approved. It begins with the order ordering the judicial recovery to be processed and ends with the decision granting the benefit. The final stage of the process, called the execution phase, involves monitoring compliance with the approved plan. It begins with the decision granting judicial recovery and ends with the sentence closing the process (Coelho, 2011).

According to article 52 of the aforementioned Bankruptcy Law, the granting of the judicial recovery process causes the following effects: a) Appointment of a judicial administrator; b) Suspension of all actions, executions and prescriptions against the debtor298 for a maximum of 180 days299; c) Subpoena from the Public Prosecutor's Office; d) Communication to the Federal, State and Municipal Public Treasury, where the debtor has an establishment;
e) Notice from creditors to enable their credits within 15 days and f) Beginning of the deadline for presenting the plan within 60 days (Brasil, 2005).,

After presenting the recovery plan, creditors will decide whether or not to approve the proposal, if they do not approve, it will result in bankruptcy. If they agree, the judge will issue a sentence granting judicial recovery. And, from that moment on, the company must comply with all the requirements of art. 61 of the bankruptcy law, if you do not comply, the bankruptcy recovery will be validated. In this sense, it is worth highlighting that the processing of the recovery plan does not prevent creditors not subject to the recovery process from requesting the company's bankruptcy.

It is worth noting that the procedure can also take place extrajudicially. In this case, the procedure will take place in a private area, outside the sphere of the judiciary. To this end, the company must also prepare a recovery plan, which creditors must approve. If 100% of creditors do not approve the plan, the company will be able to continue with the plan if at least 3/5 of the class adheres to it. The extrajudicial approval will not include credits of a labor or tax nature.

Extrajudicial recovery can be more advantageous as it is less bureaucratic, faster and more economical than judicial recovery. This makes it more accessible for small businesses.

Finally, according to Santos (2018) and Coelho (2011), it is worth highlighting that for a company to start

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recovery process, you must be aware of whether it is in fact capable of recovering, since the reorganization of activities is a costly task, the actors involved in the relationship end up suffering losses and investing resources. Furthermore, every society ends up bearing its costs, so the company must be in a real position to recover.

3.3 ECONOMIC CRISIS AND THE ROLE OF BANKRUPTCY LAW

With the advent of the spread of COVID-19 and social isolation, world economies, especially in developing countries, such as Brazil, entered into crisis. Many companies, similar institutions and independent professionals were forced to interrupt their economic activities, as they could not (due to the prohibition decrees) or were unable to continue their activities remotely. Many market axes had to suffer unemployment and lack of capital.

According to the national survey carried out by Instituição Boa Vista, a company specialized in market and credit research, compared to the year 2019, in June 2020, requests for judicial recovery increased by another 82%, while bankruptcies declared and recoveries Court grants increased by 93% and 103.3%, respectively. In this sense, small companies are responsible for 94.2% of requests for judicial recovery, that is, they are the size of business that suffered most from the crisis. Still

according to the institution, the main reason for this is due to the difficulty that companies had in keeping their activities running during the first half of 2020, due to the crisis caused by the pandemic. Therefore, the tendency is for companies to continue increasing their insolvency indicators.

Therefore, as we can see, the main economic actors affected by the crisis are small companies and those institutions that are not considered companies, such as independent professionals, non-profit associations and cooperatives. Although these actors not classified as companies are heavily affected, they do not have, as stipulated by bankruptcy law, the right to request judicial recovery.

Therefore, for the judicial recovery plan to be approved, the institution needs to be considered as a company. Law 11,101/2005 is exhaustive when it conditions the benefit to companies and entrepreneurs. In this sense, according to the Civil Code of 2002, in its articles 966, 967, 968 and 983, “An entrepreneur is considered to be anyone who professionally carries out organized economic activity for the production or circulation of goods or services”. Therefore: “it is mandatory for the entrepreneur to register in the Public Registry of Commercial Companies of the respective headquarters, before starting his activity” (BRASIL, 2002).

As a rule, other institutions that do not fit into the aforementioned concept of company cannot enjoy the judicial recovery institute, even though in practice, they perform the same social function as a company. We are therefore entering into a discussion that has generated many discussions in the field of business law, since it does not make sense that, due to a classification previously established by the legislator, certain segments of enterprises cannot obtain judicial support to recover. financially.

According to Gonçalves (2020), this choice established by the legislator is more than outdated today, as it contributes even more to the economic crisis we are going through, since several economic agents are prevented from resorting to the Institute.

In the same sense, the teachings of Ayoub and Cavalli (2017) contribute to understanding:

> Currently, the system of competition law is reserved for agents qualified as entrepreneurs, while non-entrepreneurs are excluded, simply because at a given moment in the past this division was affirmed. However, if the current economic context is observed, there is no reason to justify the option of excluding anyone who is not an entrepreneur from the LRF's competitive system (Ayoub; Cavalli, 2017, p.03).

In this way, many sectors, today, strongly affected by the crisis, are left out of the recovery benefit, among which we can mention: higher education institutions, hospitals, football clubs, cooperatives, among other institutions that were created without the intention of are for-profit.

In this aspect, the cases of higher education institutions (HEIs) and hospitals stand out. According to the MEC, ¼ of Brazilian HEIs are non-profit associations (that is, they were created without the intention of distributing profits), in relation to health institutions, it is estimated, according to the Confederação das Santas Casas de Misericórdia , Hospitals and Philanthropic Entities (CMB), that 2,177 hospitals are in this

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situation.

According to the aforementioned professional entities, respectively, there was a 27% drop in the payment of monthly fees for students at private educational institutions, thus worsening the crisis in educational institutions. There was also a large drop in the use of hospital services: exams, consultations, among others, referring to hospital institutions that do not work on the front line of COVID-19. As a result, we can observe a worsening in two sectors of great importance in our society: education and health.

For Gonçalves (2020), there would be two alternatives so that this problem can be better addressed: the first is to change the current legislation that deals with the matter, so that it can be mirrored in the North American Bankruptcy Code, in which any person physical or legal entity may request judicial recovery. In this way, the Recovery and Bankruptcy Law would be amended to include, in addition to business companies, natural and non-business people, as well as entities established in the form of associations, foundations, religious organizations, municipalities and non-business companies.

In this way, the aforementioned author argues:

> The first possibility consists of a legislative reform along the lines of the North American Bankruptcy Code (*BankruptcyCode*). According to the code, in §109 (a), only a person who resides or has a home, business or property in the United States, together with American municipalities, can have access to the bankruptcy institute in the country. When interpreting this provision in conjunction with §101 (41), which defines “person” for the purposes of said code as any individual, corporate type and corporation, we have that virtually any person, natural or legal, can file for judicial recovery or bankruptcy in the United States (GONÇALVES, 2020).

The other alternative, according to Gonçalves (2020), would be led by the judiciary, based on an inclusive interpretation effort, in order to extend the benefit of recovery to actors considered non-entrepreneurs. However, this is a slightly slower and more costly solution, as it requires interested parties to necessarily go to court to resolve the demand.

In this sense, Faria (2020) highlights the risk of misinterpretation that such legal demands can cause, since applicants can be wrongly interpreted as foolhardy who just want to get along at the expense of the popular economy.

This is, therefore, a delicate matter that requires a greater degree of reflection, as it involves the legal balance of the collective economy, as well as the economic security of commercial actors not included in bankruptcy law and who are currently going through a serious Financial crisis. On the other hand, it also requires a certain speed for there to be a plausible solution to the aforementioned conflict, as it involves the economic subsistence of several institutions and professionals.

According to the analysis of the data collected, it can be inferred that the problem is old within our social and legal reality, however, with the advent of the financial crisis, which hit the Brazilian economic reality hard, it took on greater proportions, leading jurists, legislators, researchers and other legal operators have the obligation to look into the matter so that proposals for its resolution can be raised.

Therefore, in view of the urgency of the demand, it is suggested that the national legislation that deals with the issue be revised so that it can also cover other independent professionals and institutions (considered non-business), in order to offer them the benefit of recovery judicial system, currently only offered to business institutions.

Taking into account the constitutional principles of human dignity, the social values of work and free initiative, national development and mainly, the principle of solidarity, all institutions institutions that lead to the country's social and commercial development must also be seen, while who also deserve opportunities to recover.

Regarding the legal/economic uncertainty that such a legislative change may cause, the legislator must issue a rule that ensures the real possibility of recovery for the applicant. So that the benefit is not granted indistinctly, but only to those who prove the real possibility of honoring their debts.

3.5 GOVERNMENTAL RISK MANAGEMENT IN THE FACE OF NATURAL DISASTERS

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In addition to the recently occurring COVID 19 episode, there are several other occurrences of adverse weather conditions that generate major impacts on social relations, especially commercial and contractual ones. Faced with such unexpected occurrences, both private individuals and public authorities end up making great efforts to contain the damage, as well as continue their activities.

Given this context, Galera (2017) observes that the National Policy for Risk Management and Response to Natural Disasters (PNGRD) leads us to the need to articulate actions in the three spheres of government, in order to formulate instruments focused on restructuring the public efforts towards the creation of preventive and risk mitigation mechanisms. Within this political-institutional situation, the challenge becomes the development and implementation of permanent planning and management mechanisms based on the creation of new institutional arrangements that create and strengthen cooperation networks in the creation of policies at different levels of public administration.

In this sense, the construction of a regional and intersectoral risk reduction policy, through which it would enable public policy actors (state, federal and municipal) to create a support network, through in which public entities, in collaboration with private actors, would support each other in creating partnerships to execute public services and policies.

Turning to the issue of public contracting, the construction of support and cooperation networks needs to be aligned with public strategic management, so that it is possible, repeatedly, to create mechanisms for monitoring social, natural and epidemiological risks, through investigation networks, identification and assessment of threats, susceptibilities and vulnerabilities. The subsidies resulting from such preliminary and systematically ordered studies should support the execution of strategic public policies and enable the construction of public contracts that foresee critical situations, in order to also create control mechanisms.

In this context, the role of universities, federal institutes and research bodies stands out as a technical arm that can assist partnership networks in identifying risks. Such entities already carry out various research, in different fields of knowledge, which can provide greater practical applicability for the benefit of society. Therefore, your presence in collaboration networks is extremely necessary.

Furthermore, it is worth highlighting the role of municipalities within such partnerships, since they are the governmental entity with the greatest capillarity within the current government model, becoming the entities that are closest to existing social problems. Likewise, they are also the ones who carry out most public contracts, to perform public services.

Furthermore, according to Braga (2017), although they recognize themselves as part of the control bodies, such as the TCU, initiatives to incorporate risk management, our country is still at an initial stage of implementation, with regard to public strategic management. Not only because it is a particularly new movement on the planet, but also due to several other circumstances, such as the limited discussion of this subject in courses focused on Administration and Accounting, as well as a lack of research focused on the topic.

For Braga (2017), given the still slow process of implementing risk management in Brazilian governance, our reality indicates the lack of an implementation process that is guided by the perspective *Bottom Up* (from bottom to top), in other words, that this does not occur only through imposition of top management, but that it is built through the base sectors, so that the risk is a value in the administration due to its instrumental character, and that it has the perspective and wisdom of those who deal daily with the execution of public policies.

Regarding the moral aspects of Brazilian public management in facing the new coronavirus pandemic, Santos (2020) draws attention to the dilemmas of decision makers in response to the countless problems caused by the pandemic, such as the social isolation policy, in which brought the challenge thread of reconciling the individual freedom of citizens with the need to reduce the spread of the virus. For the author, faced with contexts like this, individuals and public administrators are displaced from their *status quo*, from their usual areas, and led to the development of new forms of understanding and moral reasoning for existing public problems, but which the pandemic intensified, as well as new challenges that public management now has to deal with.

Considering this issue, it is necessary to reconcile these three points: the undesirable context of crisis that is taking place in society, the private actors who act in collaboration with the government, through companies that are contracted to offer products and services, such as governments, which through public managers, need to mediate the conflicts that end up being present.

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FINAL CONSIDERATIONS

This article brought to light two main issues: i) the failures of the judicial recovery institute, which, after the financial crisis arising from COVID-19, gained greater proportions. In this sense, it discussed the exclusion of entities considered non-business and independent professionals from the judicial recovery system; ii) as well as bringing the discussion about the role of the State as an agent responsible for managing social risks, which, through networks of partnerships, need to be aware of possible risks arising from calamities, in order to mitigate or even avoid the event of catastrophes.

According to the reflections carried out, the need to rethink our main crisis management instruments becomes evident. The first one discussed concerns the Judicial Recovery instrument, which, in the face of calamity situations, it is possible to verify that it does not effectively enable protection and assistance to those who need it, therefore it is a legal mechanism that needs to be reviewed and improved, especially when we are dealing with companies/individuals that collaborate with the government.

On the other hand, there was also a need for the effective construction of a government risk management system that includes the main entities involved in crisis management, highlighting the presence of municipalities, responsible for the direct management of social problems, as which are located at the forefront of public policies and because they have more social reach.

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