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THE PUBLIC COMPANY IN THE CURRENTLY SOCIAL ECONOMIC CONTEXT AND ITS PERSPECTIVES

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ABSTRACT

For sometime now, the rigor that separates public companies that provide public services from the ones that explore economic activities in the strict sense is being mitigated. Probably because in the very nature of the company activity there is a certain hybrid character that brings complex elements to the topic. If that wasn´t enough, there are current cases that the degree of separation between the public service and the economic activity has been damaged due to their own operations, what brings more uncertainty to the institutes that surrounds this companies. Therefore, the current public companys become an entity that demands a detailed analysis, starting with the "Empresa Brasileira de Correios e Telégrafos", that requires leaving behind strict standards of classification, especially if compared with the joint capital company or considering the activity they perform.

KEYWORDS: Hybrid public company. Public service. Economic ativity in the strict sense.

A EMPRESA PÚBLICA NO CONTEXTO SÓCIO-ECONÔMICO ATUAL E SUAS PERSPECTIVAS

RESUMO

Não é de hoje que as empresas públicas têm sofrido uma certa atenuação do rigor que as dividia entre aquelas que prestam serviços públicos e as que exercem atividade econômica em sentido estrito. Aliás, na própria natureza da empresa estatal já há um certo caráter híbrido que traz elementos tão complexos ao tema. Não bastasse isso, há casos atuais em que o grau de separação entre o serviço público e a atividade econômica resta prejudicado em face das operações exercidas, o que traz ainda mais dubiedade quanto aos institutos que cercam tais empresas. Assim, a empresa pública atual passa a ser um ente que merece análise detida e casuística e, a começar pelos Correios, deve abandonar padrões rígidos de classificação, especialmente se comparada com a sociedade de economia mista ou tendo por conta a atividade exercida.

PALAVRAS-CHAVE: Empresa pública híbrida. Serviço público. Atividade econômica em sentido estrito.

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INTRODUCTION

The exercise of activities by means of private entities by the Public Administration may initially lead to the idea that the state, when does it, takes on a negotiating character, competing with the market in the activities it performs.

It is necessary to separate, however, two situations. Within a concept of economic activity in a broad sense, one must recognize both the public service - out of the hypotheses in which there is no effective exercise of state power, that is, those in which even the public service has economic robes - as well as the economic activity in strict sense, that means, those typical situations of the business market.

When it comes to the second case, one must emphasize, still, the presence of certain constitucional reliefs about the monopoly of certain activities, although, as we will see, this field today is quite restricted, especially after the enactment of the Constitutional Amendment 19.

And, in relation to public services, despite it's not technically correct to talk about monopolies, there are activities regarded as exclusive to the state, described throughout the constitutional text, with emphasis on the duties of state entities - Title III of our Charter.

This is nothing new.

The problematic we launched, however, relates to situations we consider hybrid because, although the exercise of the activity of the State is given to a private entity - state enterprise - there is no way to precise how much such activity is economically strict or clear public service. Or, then, the company appeals to both paths, performing activities that sometimes fit into a concept, other times into another.

As it will be possible to notice, the post office is the company that planted the seed of this problematic, but it is not possible to say that it is the only one in wich such a situation arises, reason why, although we inevitably connect to examples of the ECT, we prefer to discuss the issue more generally.

The conclusion about the hybrid character of such function brings a series of consequences that, as we shall see, lead to a new conception of the public company in the current socio-economic context, which becomes even more compounded by antagonistic positions between left and neoliberalism about the utility and necessity of the presence of such entity today.

DEVELOPMENT

The Public Administration, longing for the attendance of relevant functions to society, divides its tasks between entities of the Indirect Administration, characterized as greater or lesser degree of public or private influence in its performance.

The Decree-Law 200//67, attending to such lineation, subdivides the Indirect Administration in four species of entities: autarchies, public foundations, public companies and mixed economy companies (Article 4th).

It is not intended, at this time, to draw the characters of each one and neither to demonstrate that, sometimes, this classification may be insufficient, as occurs, for example, in what the doctrine often calls a public foundation of public or private law.

Our primary objective is to focus the studies around the public company.

The public company, along with the mixed economy company, is a species in wich there is juridical personality of private law, even tough the entity belongs to the Public Administration. This comes, however, from a public need for government action in certain segments of society, considered strategic. As pointed out by Carlos Ari Sundfeld: "The state does not create them to invest, seeking simple profits, but always to implement *public policies* (regional development, the construction of affordable housing, farm loan, etc)" [†]. Still, Mario Engler clarifies: "Every state enterprise is inspired by some strategic objective that transcends mere funds obtaining to the exchequer"[‡].

And this strategy can be either in the public service as well as in the exercise of economic activity.

Regarding to public services, their very nature already justifies state action. But with regard to the economic activity, our Constitution avers in its article 173, that the the state will only directly explore such activity "when necessary to the imperatives of national security or the relevant collective interest"[§].

[†] SUNDFELD, Carlos Ari. A participação privadas nas empresas estatais. p. 265.

[‡] PINTO JUNIOR, Mario Engler. *Empresa estatal*. p. 222. Continua: "A atuação empresarial pública nunca será economicamente neutra ou vazia de conteúdo axiológico. No modelo constitucional brasileiro, não existe hipótese jurídica de a companhia controlada pelo Estado guiar-se exclusivamente pelos impulsos de mercado e de forma desvinculada do interesse público que lhe é peculiar". p. 224-225.

[§] "Consoante o preceito, a atividade econômica (processos de produção, circulação e consumo de riquezas) cabe, em princípio, à iniciativa privada, competindo ao Estado atuar diretamente no setor econômico nos casos apontados na própria Constituição, como os monopólios, quando necessário aos imperativos da segurança nacional e ao

Of course the terms, by having sometimes an open sense[**], do not always show themselves so cleary and end up leading, not rarely, to hybrid situations where the collective interest that justifies the economic activity can also be classified as a clearly public[††] service. More: there are situations where, despite the appearance of the activity, one operates under a true exclusivity regime.

About the nicknamed "monopoly", we could understand that the article 177 of the Constitution contains a numerus clausus and that, outside of the hypotheses described, there wouldn't be an exclusivity regime. The understanding, although accepted by most of the doctrine, must be carefully analyzed[‡‡].

First, it should be stressed that the article itself has exceptions as in reference to items I to IV (research and production of oil and natural gas and other fluid hydrocarbons; domestic or foreign petroleum refining; importing and exporting of products and basic oil derivatives produced in the country, as well as the transportation, through pipelines, of crude oil, its derivatives and natural gas from any source), for which the Union can hire the execution even with private companies. Now, if these companies can accomplish that, even if in conjunction with the State, so it is not exactly a monopoly.

As for item V, it remains as the only hypothesis of the refered article in which there is a monopoly itself: research, mining, enrichment, reprocessing, industrialization and trade of ores and nuclear minerals and their derivatives, with the exception of radioisotopes whose production, comercialization and use may be allowed under permission regime, in accordance with subparagraphs *b* and *c* of the item XXIII of the *caput* of the Article 21 of the Constitution.

Note that even in this case, the Charter itself brings exceptions again and allows, in some cases, that the private initiative operates under permission regime, and this, of course, removes the

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atendimento de interesse público relevante, definido em lei". MEDAUAR, Odete. *Direito administrativo moderno*. p. 87.

** "A constatação sobre a relevância do interesse coletivo ou a presença do motivo de segurança nacional, autorizadores do ingresso do Estado no domínio econômico, não é exclusiva do Poder Executivo, mas deve ser compartilhada com o Poder Legislativo, na medida em que envolve um juízo eminentemente político, sendo descabida a tentativa de sua delimitação com base em critérios meramente técnicos". PINTO JUNIOR, Mario Engler. *Empresa estatal*. p. 219.

†† Should be noted the problematic in the conceptualization of José Afonso da Silva, for whom there are clear differences of juridical regimes between the state-owned public service provider and the exploitative of economic activity. We will see that this is not exactly like that. *Curso de direito constitucional positivo*. p. 801-802.

‡‡ It should be stressed that here there is a division between those who understand that new Amendments could bring new monopolies and others, such as José Afonso da Silva, who claim that in any way could be instituted new monopolies, under penalty of affront to principle of free enterprise. *Curso de direito constitucional positivo*. p. 805-806.

feature of monopoly from the handling of some nuclear minerals, although the rule is the exclusivity of the Union for such an operation.

However, practice has taught that not only the Article 177 brings hypotheses of "exclusivity in the broad sense", but such a conclusion must be exceedingly grounded in reading the article 21 itself abovementioned[§§].

That was what the Supreme Court did in the "Arguição de Descumprimento de Preceito Fundamental (ADPF)" (Arguing of Noncompliance of Fundamental Precept) 46[***], proposed by the *Associação Brasileira das Empresas de Distribuição* (ABRAED) (Brazilian Association of Distribution Companies) in which figured as defendant the *Empresa Brasileira de Correios e Telégrafos* (Brazilian Post and Telegraph Company). Such action had the incumbency to address two issues of bulky relevance. On the one hand, it established that the Union's exclusivity in the broad sense can operate in other situations outside those provided by the Article 177. On the other hand, it worked with a subject in which, although the discussion took place on the economic activity, even if used as presupposed by examiners, it had the strong roots of public service.

Through this instrument, the ABRAED used to question the postal "monopoly" given to Post Office, under the argument of free enterprise, free competition and the absence of such a monopoly, according to article 177 of the Constitution.

In order to receive the 9th Article of Law 6.538/78, which inserts some postal activities within the scope of Post Office's exclusivity, the Supreme Court interpreted primordially the items X of the Article 21 and V of the Article 22, for which competes to the Union to maintain the postal service and legislate on it.

The rapporteur, Minister Marco Aurélio, who ended up won, highlighted important topics regarding the monopolistic intervention. Seeking a historical in economic liberalism of Adam Smith, the Minister builds an argumentation in the sense that the current model of the economy no longer holds the nationalization and the state's role would be restricted to the regulation of the sector:

> Based on this discredit on the business potential of the state as a way to effectively achieve progress and social transformation, the roles that were before given to it went through a redistribution, in order to reduce the size of the bureaucratic machine, returning to the private initiative activities that were being provided. The

§§ É que, a bem da verdade, o termo "monopólio" deve ser utilizado para designar atividades econômicas em sentido estrito, ao passo que para o serviço público o que se tem é "exclusividade" ou "privilégio" – Minister Eros Grau in the rapporteurship on ADPF 46.

*** Rapporteurship for the judgment: Minister Eros Grau.

> pendulum returns to the private sector, so as to ensure to it the starring role in society.

The position taken by the reported Minister, indeed, was what boosted privatization promoted , mainly in the 90s in Brazil and in the 80 overseas:

> Since the 80s, came, then, a backward movement, both in developed and in less developed countries, in the sense of transfering to the private sector state entities or areas absorbed by the state. Before the table above, this movement had pragmatic reasons for releasing the Statefrom the cost of state enterprises and raise funds; and it had political motives to create new economic dynamics, inspired by English (privatizations of the Thatcher Era) and American examples. This movement receives different names: State reform, reduction of the public sector, destatization, deregulation, privatization. Several formulas are then applied, especially: breaking of state monopolies, increasing of the number of concessions and permissions of public service, sale of state enterprises to the private sector[†††].

In this line, indeed, Carlos Ari Sundfeld highlights the need for balance between control and autonomy to a restructuration of state enterprise:

> Inside the new reality created by the reform of the State, several mechanisms were conceived for, according to the hypothesis, make feasible the intended balance between control and autonomy in the relationship between the state and its businesses: the celebration of "management contracts" with the leaders chosen to companies, the "outsourcing" in block of the management state entity, by hiring a specialized company and giving it the task of managing the entity by technical and professional criteria, the choice of a strategic partner, joining with his capital and his expertise to help in the restructuring and management of the company[‡‡‡].

In spite of such positionings, however, it is noted , principally in left-wing governments, a tendency to the maintenance of the state companies and to the assumption of a more participative attitude from the state.

The Supreme Court, however, by 6 votes to 4, refuted the allegation that the Postal Service configures economic activity in strict sense, dropping the assumption of the Association and leading the trial to an idea of public service. If it is a public service[§§§], obviously, there would be no how to

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[†††] MEDAUAR, Odete. *Direito administrativo moderno*. p. 93.

[‡‡‡] SUNDFELD, Carlos Ari. A participação privada nas empresas estatais. p. 271-272. Analyzing such a crisis in the European state enterprises: UREBA, Alberto Alonso. *La empresa pública*. p. 450-452.

[§§§] We anticipate that, since it is a present theme throughout the text, the materialistic idea of public service is quite seductive, according to which there would be the need to meet the values hat have shelter in the Constitutional Charter, such as the dignity of the human person, for its characterization, which leads to a sociological relief. On the other tip, renowned authors such as Celso Antonio Bandeira de Mello (*Curso de direito administrativo,* p. 642), Maria Sylvia Zanella di Pietro (*Direito administrativo*, p. 98) and Ruy Cirne Lima (*Pareceres*, p. 122) seem to

talk about a monopoly regime, but about an activity that can only be provided by the State, because of its very nature.

It is interesting however, the vote of Minister Carlos Ayres Britto, for whom public service would be contained only in activities that involve private communication and telegraphic communication, while the the others have mercantile in nature[****], denoting the problematic of the distinction between what would be public service and what would be economic activity in strict sense. Still, the Minister Gilmar Mendes understood that the exclusivity of the Union would happen only with regard to the concept of letter, postcard, grouped correspondence and manufacturing of stamps, not including bills, newspapers and periodicals[††††]. Finally, it was considered that the exclusivity would fall upon the activities described in Article 9th of Law 6538, considered as activities of "postal service".

This problematic brings another controversy: if part of the activity of a public company until then considered public service provider has clearly mercantile character, such a function would be satisfying the relevant collective interest or the requirements of national security, in accordance with Article 173 of the Constitution?

Furthermore, it must be stressed that the public service provided by the public company can not be in the hall of those exclusive of the State, in which there is exercise of its power of empire, but it should be restricted to the concept of economic activity in a broad sense, i.e., utilities that can

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defend a formal concept, according to which public service would be that one expressly related by the Federal Constitution. Seems to us, however, that, although one can defend the need for legal provision for the characterization of the public service, the least we expect is that it is in tune with the sociological dimension of the Constitution. But warns Mario Engler: "O conceito de interesse público aplicado às empresas estatais deve priorizar a dimensão institucional, sem se confundir com o interesse do Estado definido em função de linha política adotada por determinado governo, ainda que eleito de forma democrática. O interesse público empresarial exige maior estabilidade, não podendo ficar ao sabor de conveniências político-partidárias de caráter sectário e transitório. Em princípio, cabe ao Estado, por intermédio de seus representantes, zelar pela preservação do interesse público primário. Isso é particularmente verdadeiro no chamado Estado democrático de direito, mas não necessariamente em conjunturas históricas em que ocorre o divórcio entre governo e sociedade civil. Daí a conveniência de submeter ao escrutínio da sociedade civil as principais decisões sobre a forma de atuação das empresas estatais, incluindo os objetivos a serem priorizados". *Empresa estatal*. p. 230. Anyway, it is interesting the conclusion of Eros Grau: "Serviço público, assim, na noção que dele podemos enunciar, é a atividade explícita ou supostamente definida pela Constituição como indispensável, em determinado momento histórico, à realização e ao desenvolvimento da coesão e da interdependência social (Duguit) – ou, em outros termos, atividade explícita ou supostamente definida pela Constituição como serviço existencial relativamente à sociedade em um determinado momento histórico (Cirne Lima)". *A ordem econômica na Constituição de 1988*. p. 135.

[****] "Então, julgo procedente em parte, para dizer – nesse ponto talvez eu me aproxime muito do voto do Ministro Joaquim Barbosa – que a recepção da Lei nº 6.538/78 pela Carta Magna de 88 se restringe às atividades relacionadas com entrega e envio de cartas, o que se chama tecnicamente de correspondência agrupada, e atividades correlatas, como fabricação e distribuição de selos (...) o que tiver caráter nitidamente mercantil eu excluiria". Vote of the Minister Carlos Ayres Britto.

[††††] MENDES, Gilmar Ferreira. *Estado de direito e jurisdição constitucional*. p. 729.

aspire profit.

Now, if we imagine a situation in which the object ends up confused between an economic activity in the strict sense and a public service, the question is which right preponderates to his rescue. That's because in the economic activities in the strict sense there is an emphasis on private law, while in the public services there is a high incidence of the rules of public law[‡‡‡‡].

The problem does not stop here.

The article 173, § 2nd of the constitution forbids public enterprises and mixed economy companies to receive tax privileges that are not extended to private sector companies. But it is widely majoritarian the understanding that this prohibition does not reach those who have as their object the execution of public service, even due to the caput of the said Article that relates to those who explore economic activity in the strict sense[§§§§].

In this direction, the Supreme Court considered in the judgment of the RE (Extraordinary Appeal) 407 099, that the Post enjoys reciprocal tax immunity, despite Article 150, VI, "a", of the constitution say nothing about public companies. Marks the decision the fact that one has stoped worrying about the name of the entity and turned essentially concerned for its object. In this sense, the rapporteur Minister Carlos Velloso pointed out:

> Regarding the distinction that must be made in relation to public companies engaged in business activities of public companies that provide public service, I refer to the vote I gave at the time of trial of the RE 230.072/RS (…) "Messrs. Ministers, my understanding, that comes from far, mentioned, by the way, by the eminent Minister Sepúlveda Pertence, is in the sense to distinguish between public company that provides public service and public company that has economic activity, business activity, competing with private companies. The first, as I always argued, has the legal nature of autarchy.(...) Visualizing the question as above done - by making the distinction between public enterprise as an instrument of state involvement in the economy and public company provider of public service - I have no doubt in saying that the ECT is covered by the reciprocal tax immunity (Federal Constituion, article 150, VI, "a"), especially if we consider that it provides public service of compulsory and exclusive to the state provision, which is the postal service, Federal Constituion, article 21, X (Celso Antonio Bandeira de Mello, op. cit., P. 636).

‡‡‡‡ CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. p. 477.

§§§§ "O tratamento diferenciado em função da natureza da atividade exercida tem raízes na interpretação restritiva do artigo 173, §1º, da Constituição Federal (na redação da Emenda nº 19, de 1998), que prevê a edição de lei de alcance nacional para estabelecer o estatuto jurídico das empresas estatais 'que explorem atividade econômica de produção ou comercialização de bens ou de prestação de serviços', as quais ficarão sujeitas ao regime próprio das empresas privadas. O Supremo Tribunal Federal decidiu que o dispositivo não alcança a empresa estatal prestadora de serviço público, o que, na prática, significa equipará-la a uma autarquia". PINTO JUNIOR, Mario Engler. *Empresa estatal*. p. 208. Still: CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. p. 479.

Let it be said, by the way, that last part was eventually endorsed later by the very STF in the judgment of the aforementioned ADPF 46.

Although the Supreme Court has subsequently manifested itself in the same direction in relation to the Post[*****], such understanding has also been extended to a state society of mixed economy (AC 1.550/RO) and to INFRAERO (AgR in RE 363.412/BA), a federal public company. More recently, the STF understood that there is tax immunity in state mixed economy company , provider of health service (RE 580 264)[†††††].

Another dubious issue on the hybrid situation relates to biddings. As for the public service itself it is known the obligation to bid of the public company. However, doubts arise in relation to economic activity, because the Constitution itself provides for the creation of legal status with the possibility of different bidding for public companies and mixed economy companies that explore economic activity. The idea, of course, is linked to the need for a simpler procedure so that these companies can compete in the market. The rigour of the conditions imposed by the General Law of Biddings certainly would make impossible to exercise any activity in the economic market.

It should be emphasized that this situation presents itself even in the absence of the refered Statute[‡‡‡‡‡]. The legislative delay in this case - it's been fourteen years since the EC (Constitutional Amendment) 19 - can not make impossible the exercise of the economic activity, nor condemn such companies to failure because of a bureaucratic obstacle. The palliative rescue usually comes from the possibilities of exclusion from bidding introduced by Law 8.666/93, such as the Article 17, II, "e", that provides exemption for "sale of goods produced or marketed by agencies or entities of the Public Administration, due to its purposes" or the generic prediction of "unfeasibility of competition" in the caput of Article 25, noting that its items are examplificative.

[*****] Refer to: RE 354.897, RE 398.630, Ag.Rg. in ACO 765, ACO 1.095. Currently, the Supreme Court discusses in the RE 601 392, reported by the Minister Joaquim Barbosa, whether or not immunity reaches all activities performed by the ECT. Most so far have highlighted an essentially commercial role in some activities of the company, that is, those who deviate from the scope of the postal service.

[†††††] Against it: "Todas as empresas públicas e sociedades de economia mista, como entidades paraestatais que são, devem sujeitar-se ao mesmo regime tributário aplicável às empresas privadas, porque, como já visto, todas exercem, em sentido amplo, atividades econômicas. Desse modo, não importará se o objeto é a prestação de serviço público ou o desempenho de atividade econômica ***stricto sensu***. Na medida em que o Estado as institui, cobrindo-lhes com as vestes do direito privado, deve arcar com os efeitos tributários normais incidentes sobre as demais empresas privadas. A imunidade e os privilégios fiscais só se justificam para as pessoas de direito público, estas sim representando o próprio Estado". CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. p. 480. The carioca professor only admits such privileges in cases of monopoly, due to the absence of threat to the market or of abuse of economic power. p. 480-481. Again, we point out, however, that this is about exclusively of public service, and not monopoly.

[‡‡‡‡‡] MEDAUAR, Odete. *Direito administrativo moderno*. p. 90.

It should be noted, still, that the single paragraph of the Article 24 predicts twice the percentage for purposes of exemption for any mixed economy society or public company.

But, anyway, and when we have a hybrid situation? Should we use two measures? One regarding the public essentiality, making use of Law 8.666/93, and another regarding the economic activity, with procedural simplification or even legal excuse? Worse: how to distinguish one situation from the other?

Also calls attention the fact that, although the Post Office has, in ADPF 46, its public service character recognized, the bidding pursuant to Law 8.666/93 would be unfeasible in those activities where it competes with private individuals. What to say for example, about the Postal Bank?

Elsewhere, the Constitution assigns objective civil liability to legal entities of public law and private law ones, if public service providers (Article 37, § 6), excluding those who carry out economic activity[§§§§§]. In hybrid situations, as we see, we would be facing cases in which would matter detailed analysis of the facts to know what kind of liability would be applied. So would'nt matter much the legal denomination of the entity, but rather the activity performed that led to the damage.

Another question relates public tendering. The article 37, II, of the Charter provides the execution of tendering even for ocuppying jobs, and items XVI and XVII prohibit the accumulation of public functions and jobs, although such employees are excluded from the stability provided by Article 41[******]. In this sense, by the way, the Summula 390, II, from TST prdicts: "To the employee of a public company or mixed economy society, even if admittedupon approval by a public tender, it is not guaranteed the stability provided by the article 41 of the FC/1988 ".

Furthermore, the item XI of article 37 extends to such employees the wage cap, unless the entity does not receive funds for payment of staff from the Union, States, Federal District or Municipality (art. 37, § 9). It is noteworthy still, that such employees will have their disputes running on the Labor Court (article 114, I, FC) and are subjected to the General Regime of Social Security (article 40, § 13)[††††††] .

Note that there are substantial differences between public servers and public employees. But,

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§§§§§ "Se o objeto da atividade for a exploração de atividade econômica em sentido estrito (tipicamente mercantil e empresarial), a norma constitucional não incidirá; em consequência, a responsabilidade será subjetiva, regulada pela lei civil. Se, ao contrário, executarem serviços públicos típicos, tais entidades passam a ficar sob a égide da responsabilidade objetiva prevista na Constituição". CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. p. 493.

****** CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. p. 487.

†††††† CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. p. 486-487.

the question is, and in situations in which is clear, at least in part, the character of public service of the state enterprise? The Post Office led the example and the Supreme Court, by declaring their approximation to the Public Treasury[‡‡‡‡‡‡], went against the observation of Odete Medauar: "The investiture in jobs depends on prior approval by public tender, which does not ensure stability, **because it is not a nomination for charge of effective providing created by law**[§§§§§§]"(our emphasis).

This new construction led to the alteration of the Jurisprudential Orientation 247 from the Seccion of Individual Disputes-I, in which the Superior Labour Court began to understand that:

> The validity of the act of dismissal of the employee of the Empresa Brasileira de Correios e Telégrafos (ECT) is conditioned to a motivation, because the company enjoys the same treatment destined to the Public Treasury in relation to tax immunity and execution by precatory, besides the prerogatives of court , deadlines and court costs.

Furthermore, in another tune, although it is evident the idea that only goods of legal entities of public law are public, such an orientation began to suffer new designs[*******], aggravated with the understanding of the STF that the goods of the Post Office and other private entities are public, and therefore, are not subject to the lien, usucaption or encumbrances of in rem guarantees, besides being necessary legal authorization for disposition[†††††††].

That because, according to the STF the nature of the good is attached to its purpose: in this case, the exercise of a public service. The basis, at this point, would be the fact that public services can not suffer discontinuity[‡‡‡‡‡‡‡] .

Such a conclusion leads to the necessity of the use of the system of precatories, reserved for

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‡‡‡‡‡‡ In the already mentioned RE 220.906, in which was recognized the reciprocal tax immunity.

§§§§§§ MEDAUAR, Odete. *Direito administrativo moderno.* p. 90.

******* Already used to advocate in the understanding that such goods would be public goods of **special use**: MEIRELLES, Hely Lopes. *Direito Administrativo Brasileiro*. p. 321; FÉRES, Marcelo Andrade. O Estado empresário. p. 284. Against it: CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. p. 485.

††††††† RE 220.906/DF, rel. Min. Maurício Corrêa, e RE 229.696/PE, rapporteurship of Min. Ilmar Galvão. The same understanding reached Companhia Docas do Rio de Janeiro (Docks Company of Rio de Janeiro) (RE 172.816, rel. Min. Paulo Brossard) and the Companhia do Metropolitano de São Paulo (São Paulo's Company of Metropolitan) (AC 669, rel. Min. Carlos Britto). In the case of the Post Office, it should be noted that it is about a reception of Article 12 of Decree-Law 509/59 which guaranteed unseizability of such goods. Against it: CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. p. 486. The carioca teacher also mentions sumular note of the TJ-RJ (Justice Court of the State of Rio de Janeiro) and the Supreme Court decision in the sense that the goods mixed economy society can suffer usucapion. (REsp 647.357/MG).

‡‡‡‡‡‡‡ Alexandre Aragão reminds that the public service is based on the postulates of the Laws of Rolland: **continuidade**, igualdade e mutabilidade ou atualização constante às ondas evolutivas, sobretudo tecnológicas. *Direito dos serviços públicos*. p. 90. Mario Engler also talks about: "regularidade, qualidade, adaptabilidade constante, modicidade tarifária e universalidade". *Empresa estatal*. p. 216.

the debts of judicial condemnations of the Public Treasury, pursuant to Article 100 of the Constitution.

In procedural terms, the problematic also spreads itself. That because our Code of Civil Procedure provides certain privileges to the State, understood as a legal entity of public law[§§§§§§§]. And, although the anachronic Decree-Law 509/69 equates the Post to the Public Treasury, it is certain that this new understanding does not follow simply from the reading of such an instrument, but from all the jurisprudential construction that has been made regarding this public company.

In this understanding, one can not forget some especific items of the Public Treasury when it is in court, such as the time limit for appealing, quadruple term for challenging, execution pursuant to Article 730 of the CPC, the executed's defense by stays of execution, limitations regarding the preliminary injunction, limitations period, defeat fees etc[********].

The problem that we propose, however, concerns how to differentiate the times when such prerogatives, in addition to other issues, should be applied. As mentioned above, it would not have suitability to talk about payment through precatory due to debt contracted in court for the unlawful act committed in the exercise of the Postal Bank.

It is evident that Brazilian Post and Telegraphs Company brought us these questionings and certain doubt about the perspectives of public enterprises of hybrid in nature. But can not be forgotten that other state companies can operate the same way, reigniting the discussion so far designed and its application in other cases.

Our intent is to plant the seed of the discussion about the new role of the public company and the exercise of both economic and public service activities, and what this represents for its own configuration and in its legal perspective. Ready and finished models from an anachronic administrative law do not lend themselves to present solutions out of a posture that is almost maniqueist: either good or evil. In other words, or public or private. What is sought is how to balance what already exists in practice and how to offer a practical response to such balance in the

§§§§§§§ "A expressão *Fazebda Pública* é utilizada para designar as pessoas jurídicas de direito público que figurem em ações judiciais, mesmo que a demanda não verse sobre matéria estritamente fiscal ou financeira (...) A par de tais pessoas e dos órgãos que as integram, permite-se o surgimento de outras entidades administrativas, que compõem a Administração Indireta: são as autarquias, as fundações públicas, as empresas públicas e as sociedades de economia mista. Estas 2 (duas) últimas – empresas públicas e sociedades de economia mista – revestem-se da natureza de pessoas jurídicas de direito privado, não integrando o conceito de Fazenda Pública. Já a autarquia constitui uma pessoa jurídica de direito público, com personalidade jurídica própria e atribuições específicas da Administração Pública". CUNHA, Leonardo José Carneiro da. *A Fazenda Pública em juízo*. p. 15-16.

******** On the subject, by the way, the excellent work of Leonardo José Carneiro da Cunha, *A Fazenda Pública em Juízo*.

legal sphere.

FINAL CONSIDERATIONS

It remains for us to question if our constitutional model would be ready for hybrid situations like these in which there is dubiety or duplicity of applicable regimes, depending on the concret case or if, then, we surround ourselves with only one model, depending on the preponderant element of each entity: economic activity in the strict sense or public service.

It seems that the ideal is really separation between the concepts, so that a state company does not labore with both under the same regime and nomenclature. But this would be an ideal state of things, perhaps feasible in the world of fiction.

Practice has shown that the expansion of the lines of the administrative entity and discussions such as those relating to the public strategic power, even when there is clear economic activity in the strict sense, starts to require the pursuit of a more viable solution.

If our Constitution would be ready, answers us Eros Grau:

> The economic order and the 1988 Constitution, in its entirety, are pregnant of transformative clauses. Its dynamic interpretation imposes itself on all who are not possessed by a static view of reality. More than divided, men, between those that conform with the world as it is, and those who take as their project to transform it, separates them the fact that the latter ones are aware that history - as life - is movement. And that history is not over, illusion that can only be fueled by those who have not the slightest idea of man's life conditions in underdeveloped societies.
> For granted that the economic order in the 1988 Constitution can instrument changing and transformation of reality, to the point, perhaps, to redesign the constitutional ideology and even, perhaps, in its proper place replace the methodological individualism.
> Everything depends on who is the State representing, on which are the interests that motivate it, group interests or social interest - and due to which interest the institutional representatives of society are exercising the power (…)
> For sure the economic order in the 1988 Constitution - Constitution leader, dynamism - can instrument the pursuit of the achievement, in its fullness of the social interest.
> Men, of course, do not make history as they want, but under circumstances that they face.[††††††††]

Therefore, is urgently necessary to propose a "model" that can respond to the reality of the

[††††††††] GRAU, Eros Roberto. *A ordem econômica na Constituição de 1988*. p. 350-351.

state in the execution of its venture. We know well that the use of the exclusively private model would mislead the purpose of the own public service provider company, as well as the use of the exclusively public model would make the state company lose its reason for being.

That is why the construction of the hybrid model is nothing more than a legal response to something real, and not the creation of a new institution. The Brazilian state model ended up forcing on both sides and counterbalancing the attempt of exclusive privatization, due to a strong position on the left. This eventually leading the Higher Court to identify some important points in public enterprises that could not simply be applied to the same extent as the law is applied to the private investor.

The fact is that Constitution puts such limits to the economic activity of the state that, even in cases in which it is exercised, there is no how to detach it from some public provision of strategic nature.

But our goal was to focus on the environments in which one identifies more clearly the public service itself and when it is exercised concomitantly with the economic activity in the strict sense. Different from what theory can assume, however, not always the line that divides both is so clear and not always the same company operates only in one of the two fields.

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