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The Possibilities of Consensual Resolution of Judicial Conflicts with the Public Administration*

As possibilidades de solução consensual de conflitos judiciais com a Administração Pública

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Abstract: This text endeavors to define the theoretical limits of the capacities of the public administrative authorities to reach consensual solutions to disputes within the framework of judicial review. It is motivated by the lack of a clear understanding in Brazilian law of the border area between the legal relations of public and private law involving the public authorities, and the expressions "inalienable right" (or "inalienable interest") and "public interest" as shown by the inexplicable asymmetry between what the public administrative authorities can do within a judicial proceeding and outside one. Based on a comparative study of common law versus civil law legal systems and an examination of the treatment of the subject in Brazilian statutes, case law and legal studies, this article reviews the relationship between the public interest and inalienability, demonstrating, in conclusion, that the possibility of the administrative authorities to enter into settlements or follow similar practices should not be rejected *a priori*, even in cases of public law. According to the author, there are three possible scenarios in which public administrative authorities may resort to consensual dispute resolution in the context of the judicial review: in private-law relationships, in public-law relationships with respect to the exercise of administrative actions prescribed by law and public-law relationships with respect to the exercise of discretionary powers.

Keywords: Fair trial. Judicial review. Public interest. Consensual dispute resolution. Administrative authority.

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Resumo: O texto procura fixar dogmaticamente os limites da possibilidade de a Administração Pública empreender soluções consensuais de conflitos no bojo do processo judicial. Inspira-se na falta de uma compreensão clara acerca da zona fronteiriça entre as relações jurídicas de direito público e de direito privado envolvendo as autoridades públicas e das expressões "direito indisponível" (ou "interesse indisponível") e "interesse público" evidenciada em uma inexplicável assimetria entre o que a Administração pode fazer fora e dentro do processo. Para tanto, a partir de uma pesquisa primordialmente doutrinária, revisita a relação entre interesse público e indisponibilidade, demonstrando, ao fim, que a possibilidade de a Fazenda realizar transação ou praticar condutas determinantes no processo judicial não deve ser aprioristicamente rechaçada, nem mesmo nas relações de direito público. Segundo o autor, são três os possíveis cenários de solução consensual por parte da Fazenda Pública no bojo do processo judicial: diante de relações de direito privado, diante de relações de direito público no que toca ao exercício do poder vinculado e diante de relações de direito público no que toca ao exercício do poder discricionário.

Palavras-chave: Acesso à Justiça. Controle judicial. Interesse público. Autocomposição. Fazenda Pública.

Summary: **1** Introduction – **2** Consensual resolution of judicial disputes – **3** Relationships between private law and public law – **4** Public interest – **5** Consensual dispute resolution by the administrative authorities in matters of private law – **6** Consensual dispute resolution by the administrative authorities in matters of public law – **7** Conclusion – References

1 Introduction

The lack of clear understanding of the relationships among private law, public law, public interest and inalienability, as expressed by legal doctrine and case law, is reflected in the inconsistencies that appear in Brazilian law. Many court precedents deny that the public administrative authorities have the power to enter into judicial settlements, to waive the right to prosecution or to acknowledge claims, based on the argument that the public authority represents inalienable rights affecting the public interest.[1] Judges continue to deny the right of administrative authorities to resort to consensual solutions [i.e., settlement, negotiation and mediated solutions] in court but consider such administrative practices viable or even obligatory in an extrajudicial context. This results in an unjustifiable asymmetry between the administrative powers in court vs. out of court.

This subject is surrounded by many doubts, especially in the case of public-law relationships under the management of the administrative authorities. Some scholars argue that administrative decisions should be non-negotiable and not subject to settlement because the authority defends values that are not open to

[1] BRASIL. Supremo Tribunal de Justiça. AgRg no REsp 634.971 / DF. Brasília, 05 de outubro de 2004; BRASIL. Supremo Tribunal de Justiça. REsp 1198424 PR 2010/0108482-2. Brasília, 12 de abril de 2012. Ver PERLINGEIRO, Ricardo. Desafios contemporâneos da justiça administrativa na América Latina. *Revista de Investigações Constitucionais*, Curitiba, v. 4, n. 1, p. 167-205, jan./abr. 2017.

negotiation. Others maintain such methods should be permitted, given the benefits of the consensual approach for relations between citizens and the State.[2]

The powers of the public authorities to apply consensual dispute resolution methods in the context of judicial review are enshrined in certain Brazilian statutes (e.g. Law No. 9.469 of 10 July 1997[3] and Law No. 13.140, of 16 June 2015[4]), and the laws of certain other Latin American countries such as Peru,[5] Guatemala,[6] Argentina, Colombia, Mexico, Nicaragua and Panama,[7] and anchored in the Model Code of Judicial and Extrajudicial Administrative Proceedings for Ibero-America[8]

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2 KINCHIN, Niamh H. Mediation and Administrative Merits Review: An Impossible Goal? *Australasian Dispute Resolution Journal*, Riverwood, v. 18, n. 4, p. 227-233, 2007. Disponível em: <http://bit.ly/2f4PSlf>. Acesso em: 17 nov. 2016.

3 Notably articles 1º and 4º of Law No. 9.469 of 10 July 1997, which governs in-court settlements by the federal administrative authorities.

4 Article 35 of Law No. 13.140 of 16 June 2015 should also be noted, which is also limited to the federal administrative authorities.

5 Law regulating the administrative justice of Peru (Law No. 27.584, of 29 August 2008): "Art. 43. Settlement or conciliation. Claims involving alienable rights may be settled or conciliated by the parties at any time during the proceeding. If the agreement that is approved or accepted is total, then the proceeding will end. If it is partial, then the proceeding will continue with respect to the issues not covered. Before proposing or agreeing to such a consensual solution, the authority must objectively analyze the likelihood of success of its legal position in the proceeding."

6 The Guatemala Administrative Justice Law [Ley de lo contencioso administrativo] (Decree No. 119/96 of 21 November 1996): "Art. 36. Preliminary defenses. With five days after being summoned, the summoned parties may submit the following preliminary defenses: [...] j) Settlement."

7 In Latin America, the following provisions on the subject may also be cited: articles 29, 67, 144, 258, 259, 282, 289 and 393 of the Administrative Justice and Tax Code of the City of Buenos Aires [Código Contencioso Administrativo y Tributario] (Law No. 189 of 13 May 1999); articles 104, 161, 164, 176, 180, 192, 195, 243, 251 and 303 of the Colombian Code of Administrative Justice and Administrative Procedure [Código de Procedimiento Administrativo y de lo Contencioso Administrativo] (Law No. 1.437 of 18 January 2011); articles 59, 66, 67, 69, 70, 72, 73 and 117 of the Costa Rican Code of Administrative Justice and Procedure [Código Procesal Contencioso-Administrativo] (Law No. 8.508 of 28 April 2006); art. 57 of the Mexican Federal Administrative Procedure Act [Ley Federal de Procedimiento Administrativo] (Lei de 4 August 1994); articles 55, 56, 97 and 98 of the Nicaraguan Law regulating Administrative Justice and Jurisdiction [Ley de regulación de la jurisdicción de lo contencioso-administrativo] (Law No. 350 of 18 May 2000); articles 110, 153 and 201 of the Panamanian Organizational Statute of the Administrative Prosecutor's Office regulating the General Administrative Procedure and establishing special provisions [Estatuto Orgánico de la Procuraduría de la Administración, regula el Procedimiento Administrativo General y dicta disposiciones especiales do Panamá] (Law No. 38 of 31 July 2000).

8 Articles 71-73 of the Model Code of Judicial and Non-Judicial Administrative Proceedings for Ibero-America (GRINOVER, Ada Pellegrini *et al*. Código Modelo de Processos Administrativos – Judicial e Extrajudicial – para Ibero-América (Model Code of Judicial and Extrajudicial Administrative Procedures for Ibero-America). *Revista Eletrônica de Direito Processual*, Rio de Janeiro, v. X, p. 360-383, 2012. Disponível em: <https://ssrn.com/abstract=2250818>. Acesso em: 4 jul. 2017): Art. 71. Alternative means. Except for cases of annulment of administrative acts, the parties may resort to other appropriate means of dispute resolution, such as arbitration, conciliation, mediation, settlement or amicable composition. Art. 72. Principles. The use of alternative means of dispute resolution with the administrative authorities shall comply with the following principles: I - Legality. Arbitration and agreements with the administrative authorities intended to prevent or terminate a dispute must be supported by the principle of legality so as to safeguard public assets and compliance with the legal system; II – Equality. Agreements involving administrative norms or situations and acts having a widespread impact must extend to all those who are in the same factual situation even if they did participate in such agreements; III – Eligibility for settlement. Alternative means of dispute-resolution may only be used if the terms and conditions of the solution ae eligible for settlement. Art. 73. Scope of application. Other appropriate means of dispute reslution may also be applied whenever the dispute, although of a private nature, results from administrative acts.

and in the *Euro-American Model Code of Administrative Jurisdiction.*[9] Nevertheless, the situations in which such consensual methods are applicable have not been sufficiently clarified by any of those norms.

Against this backdrop, our study endeavors to define the theoretical limits of the powers of the public administrative authorities to reach consensual solutions to disputes within the framework of judicial review. The text analyzes the question from two different perspectives: private law relations and public law relations. Please note that this essay is not concerned with the limits of positive law but rather offers an analysis based on legal theory.

Thus, first of all, we shall examine the application of consensual dispute resolution mechanisms in judicial proceedings. Secondly, we shall define the boundaries between private law and public law, and then re-examine the relationship between the public interest and inalienability. Finally, we'll will mark out the boundaries of use of consensual solutions by the administrative authorities in the course of judicial proceedings involving private-law and public-law participants, respectively.

2 Consensual resolution of judicial disputes

Consensual solutions are reached when one of the parties spontaneously consents to sacrifice his own interests in favor of the interests of the opposing party, with the aim of putting an end to the dispute. This may occur either or before after the initiation of a judicial dispute.[10] As an alternative to judicial dispute resolution, such methods are referred to as *Alternative Dispute Resolution*.[11]

During judicial proceedings, consensual dispute resolution may be achieved in three different ways: a) settlement, which involves mutual concessions

[9] Articles 35-37 of Euro-American Model Code of Administrative Jurisdiction (PERLINGEIRO, Ricardo; SOMMERMANN, Karl-Peter. *Euro-American Model Code of Administrative Jurisdiction:* English, French, German, Italian, Portuguese and Spanish Versions. Niterói: Editora da UFF, 2014): Art. 35 (Principle) The court, *ex officio* or at a party's request, may ask the parties to consider reaching an amicable settlement to the dispute, provided that the parties are empowered to exercise control over the subject matter of the settlement. Art. 36 (Procedures) After an action has been formulated that is not prima facie inadmissible, the president of the judicial body or the designated magistrate thereof may, subject to complying with the principle of adversary proceedings, perform any formality that enables the parties to reach an agreement. Art. 37 (Approval of the agreement and procedures for appeal) (1) Provided that the agreement is not *prima facie* contrary to the legal system or to third-party or public interests, the court shall approve the agreement and issue an order declaring that the trial is closed with respect to the issues in the agreement. (2) The decision of approval mentioned in the foregoing paragraph shall have the same authority as the judgments of the court. Any third parties who are harmed by the agreement and were not a party to the proceedings may appeal the decision of approval to the same court within two months thereafter.

[10] DIDIER JÚNIOR, Fredie. *Curso de Direito Processual Civil.* 17. ed. rev. atual. e ampl. Salvador: JusPodivm, 2015. v. 1, p. 165.

[11] GELLHORN, Ernest; LEVIN, Ronald M. *Administrative Law and Process in a Nutshell.* 5. ed. St. Paul: Thomson/West, 2006, p. 169.

(Civil Procedure Code ["CPC"] art. 487(III)(*b*)); b) a waiver, in which the plaintiff withdraws his claim (CPC art. 487(III)(*c*)); c) acknowledgement of the claim, where the defendant voluntarily accepts the plaintiff's claim (CPC art. 487, III, *a*).[12] Consensual solutions may be either spontaneous (i.e., at the initiative of the parties) or assisted, (i.e., the result of mediation or conciliation process).[13]

Consensual dispute resolution mechanisms are being increasingly encouraged by Brazilian legislators. This trend has been corroborated by the new Civil Procedure Code ("CPC"), which: a) anchors attempts at consensual resolution among its fundamental provisions (CPC art. 3 (2) and (3)); b) establishes an attempt at consensual resolution as an obligatory step of civil procedure before the plaintiff bring an action in court (CPC articles 334 and 695); c) regulates mediation and conciliation proceedings (CPC articles 165 to 175); d) permits entering into litigation settlements, even concerning matters outside the scope of the proceeding, as well as agreements that involve third parties who are not parties to the proceeding, (CPC art. 515 (§2)); e) or agreements exclusively concerning procedural issues (CPC art. 190).[14]

Nicola Picardi argued that resorting to consensual dispute resolution presupposes three factors: compliance with public order and good moral conduct, the agreement of the parties and the alienability of the right sacrificed.[15]

The first requirement includes compliance with the mandatory norms and fundamental principles of the legal system. For example, it is unacceptable for the public administrative authorities to take part in confidential conciliation proceedings, since its actions are always supposed to comply with the principle of publicness (Brazilian Constitution art. 37).

The second requirement follows from the right to a fair trial (Brazilian Constitution XXXV (5)). Once the trial is pending, the parties should not be forced to enter into a settlement. A decision to close the case without obtaining a court ruling on the merits is exclusively up to the parties to the dispute.

In the latter case, Picardi explains the requirements for alternative dispute resolution, as follows:

> Alternative proceedings presuppose that the right at issue is alienable. As we know, one function of the civil courts is to protect

[12] The validity of a claim may be acknowledged either explicitly or implicitly. The latter includes default judgments (Civil Procedure Code art. 344) and the absence of a specific challenge of the facts alleged in the initial proceeding (art. 341, CPC).

[13] MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. *Curso de Processo Civil*: Teoria do Processo Civil. São Paulo: Revista dos Tribunais, 2015. v. 1, p. 180.

[14] DIDIER JÚNIOR, Fredie. *Curso de Direito Processual Civil.* 17. ed. rev. atual. e ampl. Salvador: JusPodivm, 2015. v. 1, p. 166.

[15] PICARDI, Nicola. *Manuale del Processo Civile.* 2. ed. Milano: Giuffrè, 2010, p. 657.

> substantive legal positions, which may consist of either alienable or inalienable rights. In the latter case, conciliatory proceedings are not permitted. [...] In the case of alienable rights, however, there are various possibilities. The parties may waive their rights or else enter into a settlement under which they make concessions to one another in order to settle or prevent the dispute between them.[16]

Thus, [it should be noted that] consensual solutions presuppose that it is possible for a party to waive his right. An administrative authority in charge of an inalienable interest cannot waive its defense rights, whether in whole (by acknowledging the opposing party's claim) or in part (through settlement). As a logical corollary of this rule, the legal system must protect such interests as it considers to be of more importance than the parties freedom of contract.

Subject to the three above-mentioned provisos, it is unanimously agreed that a consensual solution is always preferable to prolonging the dispute. There are countless advantages to consensual dispute resolution: it shortens the length of the proceeding, achieves social peace in a constructive manner,[17] is dialectical, ensures long-term harmony, reduces costs etc.

Accustomed to a legal culture of settlements, Kevin Browne and John O'Hare discuss their benefits to the parties:

> Successful negotiations are more desirable than successful litigation. A reasonable compromise saves the client the expense and worry of a trial yet he has still won. The psychological pressure of litigation on a client must never be underestimated. If the case proceeds to trial, usually one party wins, which necessarily means that the other loses. How much better if both win![18]

Neil Andrews has demonstrated the importance of settlements for a healthy legal system:

> In general, settlement is better than judgment. Furthermore, if the high level of settlement of civil disputes were to fall even by one or two per cent, the English civil courts would need to try many more cases. This would place the whole system under great pressure, would increase delay in the resolution of cases, and render the civil process more expensive for some litigants.[19]

16 *Ibid.*, p. 657.

17 DEUTSCH, Morton. *The Resolution of Conflict*: Constructive and Destructive Processes. New Haven: Yale University Press, 1973, p. 360.

18 O'HARE, John; BROWNE, Kevin. *Civil Litigation.* 14. ed. London: Thomson Reuters, 2009, p. 88.

19 ANDREWS, Neil. *English Civil Procedure:* Fundamentals of the New Civil Justice System. New York: Oxford University Press, 2003, p. 539.

It can no longer be doubted that consensual mechanisms now play a key role in conflict mechanism. Their growing importance is commensurate with the benefits that they provide to the parties and to the judicial system as a whole. It would be a big mistake to deny *a priori* the usefulness of such mechanisms in the administrative law proceedings, and it would entail a real loss of the benefits of such that consensual solutions for the public interests. In the following sections, we shall endeavor to justify and systematize the possibilities for the public administrative authorities to make use of such alternatives.

3 Private-law and public-law relationships

To determine whether or not a consensual solution is viable for the administrative authorities, it is first necessary to analyze whether the relationship between the authority and the individual in question is of the nature of private law or public law. These categories are of fundamental importance for classification of the subject matter of this study.

There is no consensus, however, on the definitional boundaries between private law and public law relationships. There are multiple theories addressing this subject.

The subjective theory is based on the classification of the parties to the relationship. Any relationship involving the State is considered to be of the public law type. All the other relationships are classified as private law.[20] As will be seen below, this trend is not supported by legal theory, since there are numerous cases in which the administrative authorities settle disputes under private law.

At the other extreme, the objective theory focuses on the interests pursued by the laws that support the specific case. Public-law norms serve collective interests, just as private law norms serve individual interests.[21] It is said that this theory does not allow a precise distinction because many laws take both public and private interests into account.[22]

The theory of subordination refers to the nature of the relationship between the parties: public law is said to be characterized by a relationship of subordination, private law by a relationship of equality. Some legal scholars reject that theory, arguing that relationships of subordination and of equality exist in both private law and public law, as in the case of administrative contracts, for example.[23]

[20] CASSAGNE, Juan Carlos. *Derecho Administrativo.* 8. ed. Buenos Aires: LexisNexis, 2006. v. 1, p. 52.
[21] *Ibid.*, p. 51.
[22] MAURER, Harmut. *Derecho administrativo alemán.* Tradução de José Bobes Sánchez *et al*. México: Universidad Nacional Autónoma de México, 2012, p. 50.
[23] *Ibid.*, p. 51.

This essay, in any case, is premised on the classification system designed by Harmut Maurer, according to which the nature of the relationship is identified according to the norm applied to the case. Public-law norms are norms that can only be applied to the State or other authorities. Norms applicable to everyone are considered private-law norms. As he puts it: "Public law is the law applicable to the State, and private law is the law of all individuals (where such "individuals" include the State)".[24]

According to this theory, the difficulty almost never lies in the characterization of the applicable norm but rather in identifying the norm that should govern the specific case. It is essentially a problem of allocation.[25]

Against this backdrop, there is nothing to prevent public administrative authorities from being subject to private-law norms. Maurer divides the cases in which this may occur into three groups: public administrative procurement activities, public administrative business activities, and the the provision of public services under civil law contracts.[26]

The first case refers to the State's procurement of goods and services as a means of satisfying its basis needs. To that purpose, it resorts to the market, entering into agreements with private companies in the guise of civil law. In this case, the administrative authority acts like a private individual.

In the second case, the State plays the role of an entrepreneur, either through its own business activities or through state-owned enterprises. Incidentally, in Brazil, pursuant to Art. 173 §1 II the Federal Constitution, any economic [business/for-profit] activities of public administrative authorities must be governed by private law, since it is unlawful to exercise governmental authority in a contractual relationship.

In the third case, the administrative authorities may provide public services using their own resources, in accordance with the rules of public law or private law, without necessarily resorting to private entities in this last case. Activities inseparably linked with the use of means of coercion, such as tax or police functions, should not be provided in this manner, since administrative authorities cannot relinquish their own public-law prerogatives. On the other hand, in the case of administrative service activities, Maurer believes that the State may choose to offer its services either in the form of a public-law entity or in the form of a private-law entity. He adds that the freedom of choice extends to both the form of organization of the service and the relationship of performance/utilization.[27]

[24] *Ibid.*, p. 51.
[25] *Ibid.*, p. 53.
[26] *Ibid.*, p. 41-48.
[27] *Ibid.*, p. 45.

Thus, for example, a Member State may choose between supplying gas through its own state-owned resources or else hiring a private gas utility to that purpose. The relationships created between the concessionaire and the users must necessarily be governed by private law. If, on the contrary, the State decides to supply gas directly, the relationships between itself and consumers may be classifiable as either a public-law or private-law relationship, as stipulated by the governing law.

In the Judgement ADI 447-DF, reported by Judge Octavio Gallotti, Judge Carlos Velloso argued, in his opinion, that the State's choice of the applicable system is limited as far as public services are concerned, proposing the following classification:

> 1) Public services that are governmental in the strict sense of the term, which are provided by the State in the exercise of its sovereignty, must not be delegated, whether considered from the internal or and external points of view, because they can be provided by the State. That is they are funded by tax money (e.g., the issuing of passports or judicial services). (...) 2) Services essential to the public interest are services provided in the interest of the community and funded by tax money. And because the funded activities are essential to the public interest, community or the collectivity, the tax is charged on actual or potential use of the service. Examples: services of garbage collection and burial. (...) 3) Non-essential public services are those who do not cause loss or damage to the community or public interest if not used. Such services may generally be delegated, meaning that they can be subcontracted to a private enterprise and charged to individual consumers. Examples: the postal service, telephone or telegraph communications services, electrical power or gas, supply etc.[28]

We should make one proviso, however. Whenever the State acts in the private-law sphere, it still is subject to the restrictions of public law, especially with respect to binding fundamental rights and general principles of public law. This is what is conventionally called private administrative law:[29] private law permeated by a set of public law norms. From this perspective, concludes Maurer, even though private law forms are available to public administrative authorities, they enjoy neither the same degree of freedom nor the all the possibilities afforded by freedom to contract.[30]

[28] BRASIL. Supremo Tribunal Federal. ADI 447 /DF. Brasília, 5 June 1991. p. 80-81.

[29] WOLFF, Hans J.; BACHOF, Otto; STOBER, Rolf. *Direito Administrativo*. Tradução de António F. de Sousa. Lisboa: Fundação Calouste Gulbenkian, 2006. v. 1, p. 314.

[30] MAURER, Harmut. *Derecho administrativo alemán.* Tradução de José Bobes Sánchez *et al*. México: Universidad Nacional Autónoma de México, 2012, p. 46.

4 Public interest

The administrative activity must always be guided by the public interest. The notion of public interest and the weight that it carries in cases of conflict with other interests of the community results from the Constitution and the law.[31] Thus, public interests may coincide in whole or in part with the private interests of the community, or it may be conflict with them, depending on the provisions of the legal system.[32] Celso Antônio Bandeira de Mello explains the connection between public and private interests as follows:

> In fact, to the extent that one maintains the somewhat obscure idea that it [the public interest?] transcends the private interests of each individual, without more detailed analysis of the composition of such a broad interest, it accentuates a false antagonism between the interest of the parts versus the interest of the whole, which tends to lead to a mistaken assumption that the public interest is self-standing and autonomous, disconnected from the interests of each of the parts that make up the whole. (...) Although it is clear that there may be a public interest contrary to a given individual interest, nevertheless, it is quite obvious that there cannot be a public interest that conflicts with the interests of each member of society. This simple and intuitive insight suffices to show that there is an indissoluble, intimate relationship between the so-called public interest and the "individual" interests.[33]

The traditional doctrine,[34] based on the teachings of Renato Alessi, divides public interest into primary and secondary. The first involves the satisfaction of the main collective needs through the performance of basic functions of the State. The second, in turn, alludes to the interests of an administrative authority itself, in the capacity of a juridical person with rights and obligations; such secondary public interests are pursued through instrumental administrative activities. Celso Antônio Bandeira de Mello explains the distinction in detail, and defends the existence of the secondary interest of the State:

> The State not only has its own subjective such interests, like other individuals but is also a juridical person that co-exists in the legal universe in competition with all other individual and entities with rights of their own. Thus, apart from the fact that it is, by definition, in charge of public interests, the State, just like other persons, may have

[31] *Ibid.*, p. 5.
[32] *Ibid.*, p. 6.
[33] MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*. 21. ed. rev. São Paulo: Malheiros, 2006, p. 56-57.
[34] *Ibid.*, 2006. p. 62-66; OLIVEIRA, Rafael Carvalho Rezende. *Curso de Direito Administrativo*. 5.ed. São Paulo: Método, 2017, p. 45.

> individual interests of its own which, like the interests of such persons, when viewed as mere individual units, are embodied in the State as a person. These last are not public interests, but individual interests of the State, which are similar (from the extra-legal standpoint), to the interests of any other person having rights of its own.[35]

The same doctrine maintains that the inalienability of the public interest is inseparably tied to the type of public interest. While the primary public interest can never be waived, since it concerns the entire collectivity, the secondary public interest, subject to the principle of legality, is alienable to that extent that it is purely related to matters of property.[36]

Although the present study does not adopt his position, we should mention the opposite doctrine advocated by Ricardo Marcondes Martins, according to which "the presupposition of an alienable public interest is the result of a methodological flaw, a faulty theoretical premise, the mistake assumption that the administrative authorities may adopt the legal position of n individual and exempt themselves from the system of public law", to the extent that " the secondary public interest is recognized by the Law only if coincides with the primary public interest".[37]

To that argument, it may be replied that "there is no absolute inalienability but rather a special public system of contracting, payment and supervision, so that the administrative authorities may undeniably enter into typical and even atypical contracts governed by private law".[38] Moreover, Law 13.129/2015 put an end to the debate by authorizing public administrative authorities to use arbitration, expressly referring to the alienable property rights (art. 1º, §1º, Law No. 9.307/1996).

It should be pointed out that the public interest cannot be categorized *a priori* but only after examining the particularities of the specific case. This is explained as follows by Marco Antônio Rodrigues:

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[35] MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*. 21. ed. rev. São Paulo: Malheiros, 2006, p. 62-63.

[36] MEIRELLES, Hely Lopes. *Direito Administrativo Brasileiro*. 34. ed. São Paulo: Malheiros, 2008, p. 252; GRAU, Eros Roberto. Arbitragem e contrato administrativo. *Revista Trimestral de Direito Público.* n. 32, p. 14-20, 2000; MOREIRA NETO, Diogo de Figueiredo. Arbitragem nos contratos administrativos. *Revista de Direito Administrativo,* São Paulo, n. 209, p. 89, jul./set. 1997. For a proposed classification of the alienability of material public interests (absolute inalienability, relative inalienability and limited alienability), see MEIRELLES, Delton Ricardo Soares; MIRANDA NETTO, Fernando Gama de. Meios alternativos de Resolução de Conflitos envolvendo a Administração Pública. In: ENCONTRO NACIONAL DO CONPEDI, XVIII., 2009, Maringá. *Anais do XVIII Encontro Nacional do CONPEDI*. Santa Catarina: Fundação Boiteux, 2009, p. 6395-6396.

[37] MARTINS, Ricardo Marcondes. Arbitragem e administração pública: contribuição para o sepultamento do tema. *Revista Trimestral de Direito Público*. v. 54, p. 194-209, 2011, p. 200.

[38] SOUZA, Rafael Soares. Arbitragem e Administração Pública: comentários ao Projeto de Lei 406/2013. *Revista dos Tribunais Nordeste*, São Paulo, v. 3, p. 105-127, jan./fev. 2014, p. 107.

> The public interest is multiple and must be assessed on a case-by-case basis, in a given situation that occurred in the real world, if it can then be said to be inalienable, based on its definition, in the sense that the State should make every effort to realize it.[39]

To summarize, we repeat that this article adopts the trend according to which the primary public interest is inalienable, while the secondary interest, if authorized by law, is alienable. This affirmation will serve as the premises of the following conclusions of this essay.

5 Consensual dispute resolution by the administrative authorities in matters of private law

In private-law relationships, the administrative authorities are on the same level as the individual, acting without any expression of authority. In this sector, consensual conflict resolution is much more justifiable. Ludo Veny et al. confirm this idea: "The increasingly horizontal nature of the relationship between citizen and administration is therefore one of the main reasons for the rise of administrative mediation".[40]

When participating in legal relationships under private law, public administrative authorities, in principle, deal with public interests which are secondary and therefore alienable, insofar as they concern the authority's own financial interests.

For that reason, subject to complying with the fundamental rights and general principles of administrative conduct, such as the principle of equality (an authority should offer everyone the possibility of entering into agreements on the same terms in a given factual situation) and the principle of legality (supremacy of the law), apart from prior legislative authorization (respect of legislative prerogative), there can be no impediment to the relinquishment of such interests in a consensual dispute resolution process directed by an authority that is acting as though it were an individual in the particular case.[41]

The requirement of prior legislative authorization would be a burden on the administrative authorities and, above all, would completely denature private-law

[39] RODRIGUES, Marco Antônio dos Santos. Arbitragem e Fazenda Pública. *Revista Eletrônica de Direito Processual – REDP*, Rio de Janeiro, v. XIV, n. 1, p. 338-410, 2014. Disponível em: <http://bit.ly/2g2if47>. Acesso em: 17 nov. 2016, p. 400.

[40] VENY, Ludo; CARLENS, Ivo; VERBEECK, Bengt; WARNEZ, Brecht. Mediation in Belgian Administrative Practice, with Special Focus on Municipal Administrative Sanctions and Urban Planning. *Mednarodna revija za javno upravo* [*International Public Administration Review*], Ljubljana, v. XII, n. 2-3, p. 163-181, February 9, 2015. Disponível em: <https://ssrn.com/abstract=2562297>. Acesso em: 17 nov. 2016.

[41] See article 71 I and II of the Model Code of Judicial and Non-Judicial Administrative Proceedings for Ibero-America (cf. note 10 *supra*), which stipulates the consensual dispute resolution in judicial disputes must comply with the limiting principles of legality and equality.

relationships, whose key characteristic is that the relationship is regulated by the parties themselves.[42] Incidentally, it should be remembered that a general delegation of powers by the legislators to the administrative authorities (as provided by article 1º of the Law No. 9.469/97) would not comply with the basic democratic principle of the legislative prerogative.[43]

Marco Antônio Rodrigues uses the same argument to justify the use of arbitration by administrative authorities:

> Disputes regarding economic-financial clauses, or other purely business-related aspects of the relationship underlying an administrative contract, may be referred to an arbitral tribunal without thereby violating the principle of the inalienability of the public interest. This is so because, strictly speaking, such aspects could even be negotiated by the contracting parties out of court or implemented spontaneously by the parties, which signifies that they are alienable and thus subject to arbitration. Finally, as it is summed up by Caio Tácito, 'not all administrative contracts necessarily involve inalienable rights of the administrative authorities'.[44]

Heitor Vitor Mendonça Sica likewise supports the notion the some of the administrative authorities' rights are alienable. He therefore approves of settlement by administrative authorities but only in those cases specifically provided by law:

> It seems reasonable to argue that the economic/financial rights of the administrative authorities are alienable *within the limits defined by the legal system*, based on the simple idea of the *principle of legality.* In other words, it is necessary for an express statute to define which rights may be relinquished by the public authorities or civil servants who represent them, and the limits and conditions under which they may do so without being considered to violate the inalienability of the *public interest*. This is precisely the reason why the alienation of public goods is possible so long as it is authorized by law. In the same way, tax liabilities may be amnestied subject

[42] For example, in the field of private law, it would be unconscionable to make the State's civil liability for wrongful acts conditional on legislative prerogative: "[…] Debts arising from the State's civil liability must be settled without question and payment must not be denied on the grounds of legislative prerogative […]" (GAIER, 2011).

[43] Regarding the principle of legislative prerogative and the democratic principle, see MAURER, Harmut. *Derecho administrativo alemán.* Tradução de José Bobes Sánchez *et al*. México: Universidad Nacional Autónoma de México, 2012, p. 115. The principle of legislative prerogative no longer applies to the general delegation of powers to the authority to issue its own (infra-legal) norms as a basis for intervention to safeguard fundamental rights (STERN, Klaus. *Das Staatsrecht der Bundesrepublik Deutschland. Band II*: Staatsorgane, Staatsfunktionen, Finanz- und Haushaltsverfassung, Notstandsverfassung. München: C.H.BECK, 1980. §37, I, 4).

[44] RODRIGUES, Marco Antônio dos Santos. Arbitragem e Fazenda Pública. *Revista Eletrônica de Direito Processual – REDP*, Rio de Janeiro, v. XIV, n. 1, p. 338-410, 2014. Disponível em: <http://bit.ly/2g2if47>. Acesso em: 17 nov. 2016.

> to the indispensable condition that such an amnesty is provided for by law. Finally, various norms allow government attorneys to enter into a settlement in court. Along the same lines, it may be argued that arbitration was always acceptable to resolve disputes involving administrative authorities whenever permitted by law.[45]

As we have seen above, the conduct of the administrative authorities, when inserted into a private-law relationship, is not unrestricted. The authority must always respect fundamental rights and the other principles inherent in administrative activities. From this perspective, the consensual solution undertaken by the public authorities must comply with those same limits. This is the opinion of Niamh Kinchin, who argues that pleads for respect of basic democratic values, such as the transparency and efficiency of the settlements made:

> All government parties, regardless of their field of expertise, are under an obligation to adhere to the basic values of a democratic government. For mediation to be effective within administrative merits review it is essential that it not be at odds with these values. [...] The public has the right to know that their taxpayers' dollars are being spent cost-effectively as one of the goals of mediation within a court or tribunal has been cited as cost reduction to the parties, government and the taxpayer[46].

Similarly, the study of mediation in Belgian administrative practice by Ludo Veny et al. points out the guidelines to be observed by the administrative authorities in their settlements:

> Government may therefore not relinquish its powers and should exercise these in the public interest. [...] Furthermore, the government must always act within the framework of mandatory public law, and will therefore have to take into account the hierarchy of legal norms, the general principles of good governance, and the principle of open government, among other things.[47]

In sum, whenever the administrative authorities assume a position equivalent to that of an individual, negotiating alienable rights, there is no obstacle to adopting

[45] SICA, Heitor Vitor Mendonça. *Arbitragem e Fazenda Pública*. [S.l.], 2015. Disponível em: <http://bit.ly/2fLZNOe>. Acesso em: 17 nov. 2016, p. 2-3.

[46] KINCHIN, Niamh H. Mediation and Administrative Merits Review: An Impossible Goal? *Australasian Dispute Resolution Journal*, Riverwood, v. 18, n. 4, p. 227-233, 2007. Disponível em: <http://bit.ly/2f4PSlf>. Acesso em: 17 nov. 2016, p. 230-232.

[47] VENY, Ludo; CARLENS, Ivo; VERBEECK, Bengt; WARNEZ, Brecht. Mediation in Belgian Administrative Practice, with Special Focus on Municipal Administrative Sanctions and Urban Planning. *Mednarodna revija za javno upravo* [*International Public Administration Review*], Ljubljana, v. XII, n. 2-3, p. 163-181, February 9, 2015. Disponível em: <https://ssrn.com/abstract=2562297>. Acesso em: 17 nov. 2016.

consensual dispute resolution in the course of judicial proceedings. Nevertheless, it must not be forgotten that the government, in that situation, must respect the constitutional principles and guidelines that constantly orient its actions.

6 Consensual dispute resolution by the administrative authorities in public law

Public-law relationships are governed by norms that place the administrative authorities in a non-private role. In this context, the public servant is an authority figure who pursues the aim of implementation of the so-called public interest.

The public interest, mainly associated with primary public interest, initially appears to be opposed to the possibility of settlement, which the justification that according to the traditional interpretation public interest is synonymous with inalienable rights.

Nevertheless, that narrow view may lead to the wrong conclusions. It should not be taken for granted that it is prohibited for an administrative authority to relinquish its own claims or to acknowledge individual claims against it after examining its own illegal acts, independently from judicial review, because administrative authorities have the power to declare their own decisions null and void (autotutela[48]) and the duty to obey the law (principle of legality[49]) and to serve the public interest.

According to that same logic, all authorities have the duty to adopt decisions based on the predominant public interest in the specific case, through weighing of opposing fundamental rights and discretionary decision-making. It is not unusual for the discretionary margin to be reduced to zero when fundamental rights are involved, so that, even in such cases, the public authorities cannot escape review of their own actions, possibly within the framework of judicial review, even if means

[48] The power of *autotutela* is enshrined in two Federal Supreme Court precedents (*súmulas*): Precedent (*Súmula)* No. 346 ("Public administrative authorities may declare their own decisions null and void") and Precedent (*Súmula*) No. 473 ("Public administrative authorities may declare their own decisions null and void if characterized by defects rendering them unlawful because they do not create rights; or revoke them, for reasons of convenience or appropriateness, subject to respecting acquired rights, and without prejudice to judicial review, in any case"; in addition, *autotutela* is now anchored in article 53 of Law 9.784/99.

[49] Maria Sylvia Zanella di Pietro discusses the effects of this principle: "The 1988 Constitution opted for the principles of Democratic Constitutional State. Two ideas are inherent in such a State: a broader conception of the principle of legality and the idea of citizen participation in the management and supervision of public administrative authorities. Regarding the former, the Democratic Constitutional State tries to make the law dependent on the ideas of justice, i.e., to make the State subject to the law not only in the purely formal sense but also to the Law, encompassing all the values implicitly or explicitly included therein. […] The incorporation of administrative principles into the constitution has made it possible for the Judiciary and other supervisory bodies to examine issues that were previously outside the scope of the Judiciary" (DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo.* 28. ed. São Paulo: Atlas, 2015, p. 37-38).

adopting practices that may be unfavorable to the authority's own position in the proceedings. It is worth repeating that this is not a waiver or concession of "rights" (powers), but simply compliance with the duty to always obey the law (legality), which is a non-negotiable necessity since it is essential to the satisfaction do public interest.

In sum, acting in compliance with the law, even it requires relinquishing or legally acknowledging the claim of the opposing litigant, is a duty of all authorities, which must always strive to satisfy the public interest.

This assessment is inspired by the teachings of Eduardo Talamini:

> The observations concerning the inalienability of the public interest do not affect the fundamental guideline of public action: an administrative authority, once it has found that it is not in the right in a given conflict, has the duty to submit to the parameter of legality. As a rule, such submission does not depend on the initiation of judicial proceedings but rather is imposed by the very nature of the public-law relationship: if the State finds that a private individual has a certain right enforceable against it, then it must grant that right. That is a direct result of the constitutional principle of legality (Fed. Const. art. 37, introductory paragraph). Although every person is required to comply with the duties imposed by law, it is especially true public administrative authorities and civil servants. For them, legality is not just a limit, a guideline but a fundamental axis of conduct.[50]

Moreover, there are certain well-known cases in which the law grants the administrative authorities true discretionary powers in situations in which the public interest may be properly truly served in more than one possible manner. In such cases, an individual and a public authority can settle their dispute by opting for various means of serving the public interest, since as long as the inalienable public interest is safeguarded the options are negotiable, subject to complying with the governing principles of administrative activity.

Marco Antônio Rodrigues adopts the same basis for advocating participation by the public authorities in arbitral proceedings:

> The inalienability of the public interest should not be confused with the negotiability of the means of serving that interest, since the most suitable mechanism of doing so, in light of an analysis of the specific circumstances, may be arbitration; it is therefore unacceptable to invoke the principle of the inalienability of the public interest in order to prohibit public entities from resorting to arbitration.[51]

[50] TALAMINI, Eduardo. *A (in)disponibilidade do interesse público:* consequências processuais. [S.l.], 2005. Disponível em: <http://bit.ly/2fbqY6H>. Acesso em: 17 nov. 2016, p. 3.

[51] RODRIGUES, Marco Antônio dos Santos. Arbitragem e Fazenda Pública. *Revista Eletrônica de Direito Processual - REDP*, Rio de Janeiro, v. XIV, n.1, p. 400, 2014.

The fact is that there should at least be a symmetry between the cases involving discretionary administrative powers and the cases in which the administrative authorities may submit to a consensual solution in the framework of judicial review. Otherwise, it could be concluded that the administrative authorities have greater powers outside of judicial proceedings. If the discretionary power is guided by the public community interest, a consensual solution may be a useful, and even more effective instrument to the same purpose, since it creates a status of *res judicata*.

In light of the clear benefits of consensual solutions for the administrative authorities, Niamh Kinchin affirms: "Strong arguments also exist for the benefits of mandatory mediation. Better case-management and cost saving are evident but even more importantly, so is the encouragement of the propagation of an ADR culture over the traditional adversarial one".[52]

Ludo Veny et al. conclude that the government resorting to consensual dispute resolution may even be an effective means of safeguarding the public interest:

> When applied in administrative law, mediation offers possibilities in examining a dispute beyond the boundaries of a specific administrative action, and in its full complexity. Resolving disputes through mutual agreement and dialogue will result in a more stable relationship between government and citizens in the future, which will have positive spill-over effects in society as a whole. [...] For these reasons, we argue in favor of a global mediation regulation that is applicable to public law as well as to other branches of law.[53]

Unilateral administrative decisions typical of in public-law relations of subordination no longer seem satisfactory. Consensual mechanisms provide a way of spreading out the powers of decision-making by requiring increasing participation by the individuals affected by such decisions.[54] Refusing that alternative in the course of judicial review is an enormous contradiction within the judicial system.

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[52] KINCHIN, Niamh H. Mediation and Administrative Merits Review: An Impossible Goal? *Australasian Dispute Resolution Journal*, Riverwood, v. 18, n. 4, p. 227-233, 2007. Disponível em: <http://bit.ly/2f4PSlf>. Acesso em: 17 nov. 2016.

[53] VENY, Ludo; CARLENS, Ivo; VERBEECK, Bengt; WARNEZ, Brecht. Mediation in Belgian Administrative Practice, with Special Focus on Municipal Administrative Sanctions and Urban Planning. *Mednarodna revija za javno upravo* [*International Public Administration Review*], Ljubljana, v. XII, n. 2-3, p. 163-181, February 9, 2015. Disponível em: <https://ssrn.com/abstract=2562297>. Acesso em: 17 nov. 2016. Regarding the applicability of ADR to administrative adjudication in the UK, US and Australia, see CANE, Peter. Por que ter tribunais administrativos? Tradução de Juliana Perlingeiro. *A&C – Revista de Direito Administrativo e Constitucional,* Belo Horizonte, 2017, prelo.

[54] GORDILLO, Agustín. *Tratado de Derecho Administrativo.* 9. ed. México: Porrúa, 2004. v. 1, p. 60.

7 Conclusion

We may therefore conclude that the possibility of public authorities entering into settlements or following similar practices in judicial proceedings should not be rejected *a priori* because not all the legal positions defended by the public authorities are non-negotiable. It must not be forgotten that only the direct public interest (primary public interest) is inalienable, not the financial interests of the administrative authorities (secondary public interest).

Based on the foregoing premises, there are three scenarios describing a public authority's possible use of consensual dispute resolution mechanisms in judicial proceedings.

Firstly, when the authority participates as a quasi-private entity in private law relationships, even in the absence of prior legislative authorization, there should be no obstacle to consensual dispute resolution by the administrative authorities, so long as only the negotiable (financial/economic) interests of the administrative authorities are at issue.

Secondly, when the authority participates as a public entity in public-law relations, if it finds that it has committed an illegal act then it has not only the option but the constitutional obligation to resort to alternative dispute resolution practices such as acknowledging the citizen's claim against it or abandoning the administrative action, pursuant to its duties to obey the law (principle of legality) and its administrative powers to declare its own administrative decisions null and void ("*autotutela*").

Finally, in public-law situations in which the administrative authorities have a certain margin of discretion, it should be expressed accordingly in the context of judicial proceedings. In such cases, the authority is granted true discretionary powers in the pursuit of the public interest, and can opt between more than one possible means of safeguarding the interest in question. In such situations, there is no reason to deny the public authorities the possibility of searching for a decision that serves the public interest based on an agreement with the opposing party.

To hold otherwise would mean that the administrative authorities have less power in court than out of court.

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