Essential Nature of Mixed Societies and Public Enterprises

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Essential Nature of Mixed Economy Societies and Public Enterprises

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resume

1. Companies controlled wholly or mainly by the State and the foundations established by it, whether or not they have the form and labeling of persons under private law, are *essentially personalized instruments of action by the Government*. In this respect, public companies, typical mixed-capital companies, those whose control the State holds through its indirect administration (mixed 2nd and 3rd generation companies) and the subjects of law instituted with the *nomen iuris*of private law foundations. All of these figures, without exception, essentially consist of personalized vehicles for their performance. If they were not, the State or the person of its indirect administration would not have to create them or, then, assume the voting shareholding prevalence and use them for the realization of its scopes.

1. Thus, the basic and peculiar mark of such subjects resides in the fact that they are supporting actors in state affairs; to become *auxiliary* entities of the Administration. Nothing can undo this sign sculpted in its natures, from the moment when the Public Power creates them or takes control of them. This *legal* reality represents the most certain north for the intellection of these people. Consequently, there is the right criterion for the interpretation of the legal principles that are *mandatory to you* aplicáveis, pena de converter-se o acidental – suas personalidades de direito privado – em essencial e o essencial – seu caráter de sujeitos auxiliares de Estado – em acidental. Como os objetivos estatais são profundamente distintos dos escopos privados, próprio dos particulares, já que almejam o bem-estar coletivo e não o proveito individual, singular (que é perseguido pelos particulares), compreende-se que exista um abismo profundo entre tais entidades e as demais pessoas jurídicas de direito privado.

1. Segue-se que a personalidade jurídica de direito privado conferida a estes sujeitos auxiliares do Estado não significa que se parifiquem ou que se devam parificar à generalidade das sociedades privadas. Se assim fosse, haveria comprometimento tanto de seus objetivos e funções essenciais quanto da lisura no manejo de recursos hauridos, total ou parcialmente, nos cofres públicos, como ainda das garantias dos administrados, descendentes da própria índole do Estado de Direito ou das disposições constitucionais que as explicitam. Recorde-se que, no Estado de Direito, os preceitos conformadores da sua atuação pública não visam tão-só curar o interesse coletivo, mas propõem-se, declaradamente, a resguardar os indivíduos e grupos sociais contra a ação desatada ou descometida do Poder Público. Esta é, aliás, a razão política inspiradora do Estado de Direito. Desconhecer ou menoscabar estes dados nucleares implicaria ofensa às diretrizes fundamentais do Texto Constitucional. Assim, não é prestante interpretação que os postergue.

1. Entities constituted in the shadow of the State to produce collective utility and which manage resources raised wholly or mostly from public sources must be subject to precautionary rules, defensive both of the fairness and property in the expenditure of these resources, or of their correction in the pursuit of state objectives . Thus, although endowed with legal personality under private law, it is natural that they suffer the influx of armed principles and norms in order to protect certain interests and values that the State cannot evade, whether it acts directly or acts by interposed persons. Requirements arising, explicitly or implicitly, from the very notion of the rule of law, as well as those arising from the nature of state charges, impose the influx of canons specifically adapted to state missions. Regardless of this, whether the Public Power is operating by itself or through people who assist it in its affairs. The entities referred to are, as has been said, above all, mere instruments of State action; simple technical-legal figures, designed to better develop objectives that transcend private interests. Hence its profound differences in relation to other subjects under private law. The private-law personality that is infused into them is only a means that cannot be deified to the point of compromising their ends. Hence its profound differences in relation to other subjects under private law. The private-law personality that is infused into them is only a means that cannot be deified to the point of compromising their ends. Hence its profound differences in relation to other subjects under private law. The private-law personality that is infused into them is only a means that cannot be deified to the point of compromising their ends.

1. Through these auxiliary subjects, the State carries out dual commitments: a) It explores *economic activities* that, in principle, are the responsibility of private companies (art. 170, caput, of the Constitutional Text) and is only supplementary to it (§ 1 of art. 170) and b) it provides *public services* , charges that are typically yours. There are, therefore, two fundamental types of public companies and mixed-capital companies: operators of economic activity and providers of public services. Their legal regimes are not and cannot be identical, as we tried to show in another opportunity (*Provision of Public Services and Indirect Administration*, Ed. RT, 2nd ed., 1979, especially pp. 101 et seq., 119, 122, 124, 135, 141 and 143). Eros Roberto Grau also strongly emphasizes this distinction (*Elements of Economic Law*, Ed. RT, 1981, especially p. 103). In the first case, it is understandable that the legal regime of such persons is as close as possible to that applicable to the generality of persons under private law. Whether due to the nature of the object of its action, or to prevent them from enjoying an advantageous situation in relation to private companies, - who are the preferred landlords in the economic field - it is understood that they are subject to the legal discipline equivalent to that of private individuals. Hence there is the Constitutional Text established that in such cases they will be subject to the same rules applicable to private companies (art. 170, §2 °). In the second case, when designed to provide public services or develop any public activities, properly speaking, which are the realization of public works,

1. In any case, one and the other - explorers of economic activity and providers of public services - by virtue of *the Constitutional Text itself* , are caught up in rules, resident there, that prevent the perfect symmetry of the legal regime between them and the generality of the subjects under private law. The arts. 34, 35, 45, 62 and §1 °, 99, §2 °, 110 and 125, I (the latter two only concern public companies) 151, III, “c”, n. 3, 156, §2 °, “g” and 205. It is clear, therefore, that the mentioned precepts reduce the scope of art. 170, §2 ° and show the true dimension of his command. It is noted, therefore, that *in some case*their regime will be identical to that of private companies. As such, it reinforces the idea that they cannot avoid certain provisions that constitute minimum guarantees for the defense of certain public interests when it comes to entities that are *prepared to perform public services or specifically public activities* . Among these minimum guarantees is certainly the obligation to comply with the principles on bidding and administrative contracts, as well as with a discipline that imposes certain restrictions on its agents.

1. Se é compreensível que estes sujeitos auxiliares do Estado não se assujeitem ao regime cautelar inerente à licitação e aos contratos administrativos, *quando forem exploradores de atividade econômica*, não se compreende permaneçam esquivos a tal esquema quando exercitam *atividade eminentemente estatal e tipicamente de alçado do Poder Público*. Indeed, in the latter case they will not be covered by the provisions of art. 170, §2 °, of the Country Charter, since the verse in question only refers to public companies and mixed economy companies that explore economic activity (see Eros Roberto Grau, ob. And loc. Cits.). In addition, there is no provisioning reason to prevent the canons related to the bidding from being irrigated or to prevent their contracts from being governed as administrative contracts, as they actually are, by the scope that animates them. The type of activity carried out is not incompatible with the bidding process, since the same requirements for an unbounded agility in the purchase and sale of goods do not apply there, nor do they pose as unavoidable market practices obstacles, before which the bidding would be a serious hindrance, impediment of effective action in the economic area. Therefore, there is nothing to disprove the adoption of the state bidding regime in the case of auxiliary subjects of the State that act in the provision of services and works that are characteristically public. Even less would there be reasons that would advise against the regime inherent in administrative contracts.

1. Conversely, countless reasons postulate the acceptance of the aforementioned precepts, as shown below. The rules on bidding mean and represent the means of ensuring an equal treatment for the administrators, insofar as they are ensnared, to all, equal opportunities to dispute, among themselves, the business that government entities intend to do with third parties. The bidding is concrete application, in a specific sector, of the constitutional principle of equality, provided for in art. 153, §1 °. Without offending the law, it is impossible to ignore it. Bidding is, moreover, a skillful formula for finding the most convenient deals for the Government; a duty from which the latter cannot dismiss, since it is concerned with the weaving of resources, wholly or partially, originating from public coffers directly or indirectly. Finally, through bidding, attempts are made to prevent collusion between government agents and third parties, which would result in an offense against the interests of the community and damage to the "probity of the administration". This, about being a moral value, is also configured as a legal value, since art. 82, V, of the Charter of the Country, includes among the crimes of responsibility "attempting against the probity of the administration".

1. From the outside, all of these aspects are underlined, it is essential to remember that, today, most or at least a large part of the most significant acquisitions and contracts made by the Government are carried out precisely by these entities. Admitting that they can wash away from the duty to bid, the entire precautionary mechanism provided for in contracts of this kind would lose its main object. In the meshes of this regime, the minority of contracts and those of lesser economic expression would be captured, while the majority and those of greater patrimonial significance would escape from it. It is this folly, certainly neither wanted nor tolerated by the Constitutional Text, that leads to the freedom now enjoyed by the subjects in question. As much has been said in terms of bids, it also extends in terms of contracts.

1. The managers and staff of public companies, companies controlled by the State or their indirect administration and foundations established by the Public Power, whatever their purposes (exploitation of economic activity or provision of public services), mobilize an important sector of activity governmental. Similarly to civil servants, they also operate a segment of the administrative machine. The fact that this part of the state apparatus is structured by the private law model does not mean, in law, or in fact, that the apparatus in question strays from the orbit of the Public Power. Nor does it mean that the interests questioned lose, by the subjective (private) qualification of the person who performs them, the character of interests transcending private concerns.

1. Thus, it is incomprehensible that public servants are contained, as they are, by multiple prohibitions and impediments (considered to be part of the nature of their charges) while the agents of the other auxiliary subjects of the State are freed from equivalent restraints. Some, as well as others, can aggravate collective interests and compromise the correct performance of their functions if they are not detained by the restrictions mentioned. The private nature of certain types of supporting subjects of the State does nothing and by no means de-characterizes or eliminates the risk that their agents will incur the same bankruptcies feared in relation to public officials. Hence the need to consider extensions to agents of public companies, companies whose majority shareholding is held by the State or a person of its indirect administration and foundations created by the Government, corresponding limitations imposed on civil servants, such as those of art. 195 of the Statute of the Union and 242 and 243 of the State of São Paulo (subject to part VII of the latter).

1. The focused aspects concern only some aspects of the legal regime of auxiliary persons of the State constituted under private law and which are in urgent need of doctrinal and jurisprudential review. Many others exist and say both with the necessary distinction of regime between them and the generality of people under private law and with the essential disquisition of legal regime between the supporting subjects of the State who explore economic activity and those who provide public services. The truth is that these auxiliary subjects of the State, who emerged under the pressure of needs specific to a given historical period, are born innocently refractory or rebellious to the traditional framework in the mental bins prepared to receive them, as conceived in another historical period, in which the classic dichotomy was articulated: a person under public law and a person under private law. Although such a distinction has never been peaceful and extreme with serious difficulties, the problems today are heightened.

1. At the very least, it is important to recognize that there are different levels of operation in the distinction between legal entities under public law and persons under private law. Its level of lowest functionality lies precisely at the point of confluence where certain people composed or assumed by the Public Power are based to assist them in their commitments and to which the *nomen iuris* of persons of private law irrogated . Lúcia Valle Figueiredo, in a very timely monograph on *Public Companies and Mixed Economy Societies* , had already questioned, among us, the adjustment of these figures to the paradigmatic model of a person under private law. Jean Denis Bredin, in France, maintained, in a doctoral thesis, the hybridism of these creatures (*L´Entrepise Semi-Publique et Publique et le Droit Privé* , Paris, 1957).

1. It should be noted, then, that the normative assertion that such entities are persons under private law cannot be made “fetishistically”, much less in the case that they are constituted for the provision of public services or conduct of characteristically public activities. In these hypotheses, the degree of functionality of the distinction between a person under public law and a person under private law - an issue that boils down to discrimination of regimes - falls to its minimum level. Although not erasing the existing distinction, it is reduced to modest levels, given the vigorous competition of advertising principles and norms inevitably affluent for the protection of the activity performed, control of the action of its agents and defense of those administered. Thus, the personality of private law that is infused, it is tinted by lively tones of public law, in order to adjust to its functions. In such a situation, a typically administrative activity will be on the agenda, which makes the relationship of management emerge, which, as Cirne Lima points out brightly: “We are only faced, in terms of legal relations, when the purpose, that the activity of administration proposed, it seems to be defended against the agent itself and against third parties ”(*Princípios de Direito Administrativo*, RT, 5ª ed., 1982, p. 53). Destarte, é preciso admitir sem rebuços que os sujeitos de direito ancilares do Estado, conquanto venham a receber rótulos de pessoas de direito privado, não podem eludir suas naturezas essenciais de coadjuvantes do Poder Público. Disto resultará, inexoravelmente, uma força imantadora que faz atrair sobre elas e sobre suas missões a incidência de preceitos publicísticos.

1. Para recursar esta conclusão, ter-se-ia de sufragar uma tese incompatível com os postulados do Estado de Direito; a saber: que é dado ao Poder estatal, eximir-se de todo o aparato jurídico montado em prol da defesa dos interesses e valores que nele se consagram. Ficar-lhe-ia facultado ladear o modelo defensivo dos administrados, o esquema avalizador de seu ajustamento às regras protetoras do interesse público e do cauteloso meneio de recursos provenientes dos cofres governamentais. Para obter este salvo-conduto, esta carta de isenção a uma ordem normativa que foi estatuída em favor de interesses superiores, nada mais lhe seria necessário senão que se "travestisse", adotando, para fins esconsos, a roupagem, adereços e ademanes de pessoa de direito privado. Hely Lopes Meirelles (*Estudos e Pareceres de Direito Público*, Ed. RT, vol. II, pp. 148 a 152) teceu oportunas considerações sobre a originalidade do regime das sociedades mistas, trazendo à colação subsídios doutrinários e jurisprudenciais. Quadra reproduzir a seguinte passagem ilustrativa: "A consulente é uma sociedade de economia mista. É, portanto, pessoa jurídica de direito privado (cf. nosso *Direito Administrativo Brasileiro*, S. Paulo, 1966, p. 303; Dec-lei 200/67, art. 5°, III). Reveste-se de forma de sociedade anônima, nem por isso se insere na exclusiva disciplina jurídica elaborada para as sociedades mercantis da fins puramente lucrativos (cf. Rubens Nogueira, "Função da Lei na vida dos entes paraestatais". RDA 99/37). Essa é a posição dominante na doutrina de hoje, que repele o "privatismo" exagerado, relativo às sociedades de economia mista. A essa doutrina aderimos há muito...". É preciso, portanto, coerentemente, concluir que a primeira das originalidades do regime específico dos sujeitos coadjuvantes do Estado, ainda quando estruturados pela forma de direito privado, é a que resulta das imposições constitucionais alusivas à igualde dos administrados ante o Poder Público — o que impõe o dever de licitar — ou alusivas à defesa do serviço público — o que impõe o regime do contrato administrativo ou ainda alusivas à probidade na Administração — o que impõe cerceios aos seus agentes.

1. Tal como estas, muitas outras imposições existirão no respeitante à conduta e ao controle destes sujeitos ancilares do Estado. Representam, todas elas, atenuações sensíveis no regime de direito privado e interferências ineludíveis do direito público. Servem para comprovar que assim como o direito juridiciza tudo o que toca (como disse Kelsen, comparando-o ao rei Midas, que transformava em ouro o que tangia — *Theórie Pure du Droit*, Dalloz, 1962, p. 369), the State also has the gift of transforming everything that it touches. That's why it publishes everything it touches. This transformation, if it is fearful, in the feelings of some, it will only be truly, if we refuse to see it in its irrefragable reality, refusing to treat it with the restrictions that are inherent to it, by force of the own positive law and its informing principles. In order to understand the mandatory application of advertising precepts to the supporting creatures of the State or that were assumed by it, it is not demanded much. It is enough to refuse to be attached to pedestrian interpretations that cling to the mere literality of certain devices whose intellection requires airing. Because embedded in partial segments of the normative system have to be understood in view of the whole in which they are inserted, articulated with the other rules and, above all, with attention to the hierarchy of norms and principles. It is sufficient, therefore, to look at them from the highlands of constitutional law and with a systematic exegetical perspective. Otherwise, unscientific and therefore chaotic, conflicting, inarticulate interpretations will be incurred, which, in the end, will even be of no practical use, disregarding the already centennial warning of Councilor Ribas, in the Preface to his*Brazilian Administrative Law* : "There is no science without fundamental syntheses; once these are removed, all that remains is a collection of ideas, in whose labyrinth the intelligence could not fail to wander. "On the contrary, check if these syntheses are available, cahos is dissipated, light and order are made in thought; science appears. "Nor is it possible to make the right application of knowledge, without connection and without systhema; in the absence of scientific merit, they don't even have any real practical use "(Antonio Joaquim Ribas, *Brazilian Administrative Law* , Typography by Pinheiro e Cia., Rio, 1866, p. IX).

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