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CONSENSUAL JURISDICTION: ORGANIZATION AND INSTRUMENTS OF THE NEW PROCEDURAL SYSTEM

JURISDIÇÃO CONSENSUAL: ORGANIZAÇÃO E INTRUMENTOS DO NOVO SISTEMA PROCESSUAL

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ABSTRACT

The conflicts are the inborn of life in society. As a demonstration of strength, power or dominion over another person, it has been that as human relations are not immune to the discord and tensions of daily life. However, solve all human questions through confrontation is inconceivable, thinking of all the expense (financial, emotional, and vitality) one has in everyday matters. Thus, consensus emerges as a solution to be persecuted in society as a more practical form of solution as tensions. This consensual vision within the public administration, including the Judiciary, on the rise in the 21st century, should be increasingly accepted as a way of listening society's decision-making, such as measure of efficiency of decisions taken, observed the legality. Jurisdiction and public administration must increase the use of this important part of democracy: the dialogue.

KEYWORDS: jurisdiction; consensus; democracy; conflict resolution.

RESUMO

O conflito é inerente da vida em sociedade. Como demonstração de força, poder ou domínio sobre o outro, tem-se que as relações humanas não são imunes à discórdia e às tensões do cotidiano. Entretanto, resolver todas as questões humanas através de confronto é inconcebível, pensando em todo o gasto (financeiro, emocional e vital) que se tem nas questões diárias. Assim, o consenso surge como solução a ser perseguida na sociedade, como forma mais prática de solucionar essas tensões. Esta visão consensual dentro da administração pública, incluindo o Poder Judiciário, em franco crescimento no século XXI, deve ser cada vez mais acatada como forma, inclusive, de se fazer ouvir a sociedade para a tomada de decisões, como medida de eficiência das decisões tomadas, observada a legalidade. Jurisdição e administração

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pública devem, cada vez mais, lançar mão desta importante ferramenta da democracia: o diálogo.

PALAVRAS-CHAVE: jurisdição; consenso; democracia; resolução de conflitos.

INTRODUCTION

Life in society demands the observation of conduct standards. Written or customary, regulated or not, the social coexistence is only possible with the distribution of rights and duties, freedoms and restrictions.

Observing the phrase (QUOTE INVESTIGADOR, 2011):

> One person's freedom ends where another's begins", assigned to the English philosopher Herbert Spencer (FERRARI, 2008), and the words of Oliver Wendel Jr, a former Minister of Supreme Court of the United States, "Your right to throw a punch stops where my nose begins.

it's concluded that the human relations do not dispense systems of control, checks and balances, allowing to provide the minimum harmony to a minimum of survival in society.

Clashes always start within this dynamic. From frivolous and ephemeral matters that do not surpass the mental vexations, to questions in which the self-protection do not solve and demand the participation of a non-interested third party in convergence of solutions, the human relations are very complex and broad.

Throughout history, the urgency of regulating these human relations emerges, sometimes superimposed. The emerging of the Sovereign State brings with it the idea of distribution of functions, of which stands out the judicial function. This idea assumes great relevance to the humans' relations.

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2 THE DISPUTE AND JURISDICTION: REFLEXES OF A FIERCE LEGAL CULTURE.

The Sovereign State, in order to establish itself as the sole owner of power, limited the use of self-protection for specific individual cases (like the legitimate defense, the state of need, the immediate self-protection of ownership, among others), and begun to solve those issues that go beyond the common understanding of the parties, holding the monopoly of jurisdiction[1].

Chiovenda defined the jurisdiction as function of State, which reveals itself by the actuation of law's concrete willingness, through the replacement by public organs of private parties or others public bodies (MACEDO; BRAUN, 2014, p.7).

However, it's in Carnelutti that we find the most emblematic idea of Jurisdiction, which is "the function of State that seeks the fair composition of litigation" (SANTOS, 2005, p.51), defining litigation as "the conflict of interests qualified by the pretension of one of the parties and by the resistance of another party" (BRAZIL, 1973), or "the inter-subjective conflict of interests qualified by a resisted or dissatisfied pretension" (SANTOS, 2005, p.51).

In this Italian Master's idea, the State performs its judicial function only when dwells on the conflicts of interests, with the existence of resisted pretension, making it clear that in order to exist jurisdiction there should be *litigation*[2e3].

It is noteworthy that *litigation*, in this conception, transcends the mere notion of legal-procedural relation, adding the idea of litigation[4].

The idea that jurisdiction only occurs when there is a settlement of conflicts

1 Carnelutti informs that the 'jurisdiction', manifestation of the 'imperium', power of mandate attributed to the Roman superior magistrate, historically ended up designating the procedural function, rather than the juridical function proper (Sistemas, 2000)

2 The Explanatory Memorandum of the CPC of 1973 goes on to state: "The litigation is therefore the main object of the legal process and it expresses the conflicting aspirations of both litigants." (emphasis added)

3 Carnelutti considers foreign judgment, self-composing (simple or compound act, unilateral or bilateral), conciliation and arbitration as "jurisdictional equivalents" (DUTRA, 2014, pp. 38 and 39)

4 The concept of "lide" does not have a precise translation into English. Therefore, in this paper, it's used the term "litigation" as the most similar to its original sense. The Code of Civil Procedure seems to use the word "lide/litigation" in both senses: sometimes as a synonym of procedural relation (Article 509, § 4. In the liquidation it is forbidden to discuss the matter again or modify the sentence that judged it.), sometimes in the definition of litigation (Article 113. Two or more persons may litigate, in the same proceedings, jointly, actively or passively, when: I - there is a communion of rights or obligations between them, related to the dispute. (emphasis added)

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pervaded and remains in the core of legal community. Law education entities, class agencies and public institutions, still use the concept that the good legal practice do not dispense heated, rhetorical and far-fetched debates, full of high complex theses with low effectiveness.

The damages are latent as example the increase of legal disputes and the devaluing of administrative and non-judicial resources, worsened by factors such as globalization and development in technology. These occurrences increased the access to social media and, consequently, increased the conflicts as well.

Although new conceptions are rising and abandoning litigation as part of jurisdiction[5], it is certain that the idea of jurisdiction as an instrument of "fight" still influences and is influenced by a certain kind of litigation culture, especially among Brazilian society.

If life in society demands the compliance with the conduct standards as a way to avoid conflicts, it is assumed that, the more multi-faceted society is, the greater is the tendency of violating those conduct standards, written or customary, that regulate the coexistence between the individuals and, therefore, the number of litigations and disputes for the goods of life resulting from economic, political, ethic, ethnic and cultural shocks.

These tensions often originate from conflicts of power, which are regular processes in cultural history of any society. In this dynamism, there are basically two types: the cooperation and the antagonism. The cooperation coordinates the powers towards a common goal, resulting in development of tolerance and trust as factors to consensus (MOREIRA NETO, 2003, p.132).

In contrast, the antagonism stimulates competition, conflicts and war, revealing the phenomenon of low ethic density, for the fact that demands lives and human values as the price to be paid (MOREIRA NETO, 2003, p.132). This is because the antagonism is a product of distrustfulness, a primordial element of survival instinct that leads to divergence.

Based on a heterogeneous society, the antagonism emerges as currency to

5 The are several examples of the absence of litigation, as an element of jurisdiction, such as: abstract control of laws and administrative acts, preventive actions, necessary constitutive actions, voluntary jurisdiction, among others. If the litigation was an indispensable element, there would be no exercise of jurisdiction in these actions.

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conflicts solutions, enhancing the positions of the parties that, many times are more concerned with the form and side issues than the contents of the conflict itself.

Thus, arise class-based, political, economics, socials and other types of conflicts, that the other party is not merely an adversary, but also a way or a “ladder”, in order to achieve goals non-contentious, causing further problems when those tensions occurs inside the judicial system, which contributes to the unbridled increase of demands.

3 THE DEMAND FOR THE JUDICIAL SYSTEM: BREAKDOWN AND RAISE

The recent history reveals that the Judiciary was certainly the element of Modern State has changed the most. Since 19th century, when a new world political order emerges, called “The Liberal State” (SANTOS, 1995, p.7) by some authors, then emerging the “Welfare State” (SANTOS, 1995, p.11), and nowadays culminating in the crisis of this Welfare State (SANTOS, 1995, p.16), according to Boaventura de Sousa Santos.

In the period of Liberal State, the Judiciary was a part of the State politically neutral, unquestioningly bounded to the principles of legality and legal certainly, as well as the principles of dispositive and inquisitive[6]. From the changeover to Welfare State, the separation of powers implodes, especially by the protagonism intended by the Executive Power, which led it to a new judicial instrumentalism, caused by a legislative inflation willing to declare rights and to promote the social welfare. Thus, the State becomes a provider of rights, bounded to those, against the idea from the previous period, which bound was merely of abstention. If the rights were previously exercised against the State, after the changeover, the rights are exercised by the State (SANTOS, 1995, p.11-13).

Currently, with the advent of the crisis of the Welfare State (SANTOS, 1995, p.16), characterized by the impossibility of the State to support the increasing social

6 Article 2, Code of Civil Procedure (CPC): "The process begins on the initiative of the party and is developed by official impulse, except for the exceptions provided by law."

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spending plus the decline of tax revenues[7] and by its own paralysis, which does not follow the economic and social dynamic, raising the inefficiency of the public services, the participation of the Judiciary grows exponentially to reverse the most noticeable phenomenon in this crisis: the social inequalities.

Combining to this, it also appears a serious crisis in political representation causing the increase of social issues, which changes from the political control to the judicial control, in so far as the political class is losing its legitimacy, mainly for corruption and inefficiency.

All these factors contribute to increase demand on the Judiciary to solve the issues that other sectors of State or the society cannot solve. From trivial discussions between neighbors to challenging claims which involves a complex and deep knowledge of health field, these demands arise to the Judiciary in a daily basis because the sectors in charge did not solve.

In the perspective of these conflicts and antagonisms, it is noticed the emerging of a “litigation culture”, causing a seek for “rights” from the individuals and groups of people, to the detriment of third parties’ interest and causing increase of courts’ structure by a torrent of demands, sometimes odd, as a result of a fierce mentality.

According to data from the National Council of Justice (CNJ), 102 million of legal cases were submitted in 2015 and 100 million in 2014, remaining almost 74 million for 2016, increasing the surplus legal cases around 2 million compared with 2014, even though the Judiciary had judged 1,2 million cases more than the numbers of submitted ones.

This fact partly explains the Brazilian Society’s necessity for having its demands submitted to Judiciary, as well as these following phenomena: the enhancement of implementation of social rights[8]; the demand of more effective judgments (even though within the limits of reasonableness) (OLSEN, 2006, p.346); population growth; the increase in the number of colleges, lawyers and courts; economic, social and cultural development; better access to information and

7 If unemployment increases, the amount of people and financial resources to be provided by the State increases as well, reducing the necessary contribution of workers to finance these resources. (SANTOS, 1995, p.16).

8 "It has become a commonplace to observe that the positive performance of the State is necessary to ensure the enjoyment of all these basic social rights" (CAPPELLETTI; GARTH, 1988, 10-12)

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awareness on the guaranteed rights and how to get hold of those rights; repetitive legal demands and collective defense of rights, among others (BOCHENEK, 2008, p.2).

Therefore, there is a crisis of Welfare State and its consequences, a disappointment about political representatives and increasing litigation culture. All of these facts lead a breakdown of state system, especially in Judiciary.

4 DEVELOPMENT OF SOCIETIES: THE CONFLICT BETWEEN CONSENSUS AND MONOPOLY ON COERCION.

After this brief narrative about litigiousness increase in social relations and the consequences for the State, especially in Judiciary, it is questionable whether there is space to develop the dialogue as an indispensable instrument to social pacification.

If, on the one hand, the conflicts increase and rapidly emerge, on the other hand, it reveals that litigations are not the best options to solve them, for several reasons. Thus, as the Democratic State emerges, many libertarian ploys combine to the plural participation processes, promoting peoples' freedom more and more. With the implementation of this libertarian spirit, the dialogue has a fundamental role, allowing the emerging of a consensus principle among social life participants.

If, on the one hand, the crisis of Welfare State causes an implementation of rights to the detriment of a contraction of state cash flow, on the other hand, the participants of social life must provide, progressively, the implementation of libertarian ideas and the equality recognizance, in its three specters, of people[9].

Within this dynamic, the speech acquires fundamental role, as far as the intention of dialogue and listening to each other appears as crucial action to providing collective solutions and implementation of public policies. Even in a context of a imperative State, the path aims at the direction of dialogue as a way to implement the efficiency without abandoning the primacy of legality.

9 According to Minister Luis Roberto Barroso, it would be formal equality (protection against privileges and discrimination), material equality (redistribution of wealth, power and social welfare) and equality as recognition (respect for minorities). (ADC 41 / DF)

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The public administration is always in compliance of legality, as a beacon of morality and supporter of a model that always prevail: the static bureaucracy. With the dynamism of socials relations (and also the dynamism of capital, that enters and leaves widely, lightly and fluidly in the national market), keeping a static structure with no legal space to maneuver of good practice by its agents, the only solution to maintain the bureaucracy is coercion.

The coercion, in this regard, traps and annihilate the good public agent, which realize itself having the obligation to just compliance with the regulations, more concerned to maintain the current regime than providing a decent quality services. Thus, agents and State establish a “pact of mediocrity”, insofar as the State pretends to demand efficiency from its agents, the agents, in turn, pretends to provide a good service.

Unfortunately, the administrative coercion, as result of a blind imperative state, neuter the entire system, blocking the good agent from produce more and better, and to demonstrate the quality of your services, suppressing the dream of an efficient and high performance public administration.

In this standard, the participation of society is crucial, as far as it is the real “boss” and prime receiver of all public activities, improving the services performance through forms that simplify the communication and the social engagement in decision-making processes focused on a high-quality government services.

5 NEW PROCEDURAL TECHNIQUES OF “DISCUSSED LAW”: NEGOCIATION, MEDIATION, CONCILIATION, ARBITRATION, CONDUCT ADJUSTMENT AND ALIKE.

In this context of discussion, the state is in charge of implement appropriated techniques in order to stablish communication between the social participants, as well as provide effective methods for conflicts solution. From self-protection up to the definitive statement by the state organ disinterested in the clarification of the demand, the State must assist any parties from a dispute to solve the issue, using a less costly and more satisfactory system.

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In this context, emerges the entitled “Appropriated Disputes Resolution” composed by many proper techniques for conflicts solution. Thus, the choice of the best method to conduct the disputes will be set by particular dynamics each one, in order to have an inexpensive process, safeguarding emotional ties between parties, proceeding at a good pace, being in compliance of stablished obligations, and among others (BRAZIL, 2016, p.17).

Considering the traditional techniques of solving disputes, modernly, the dialogue between the parties is always pursued in order to solve the issues, optimizing the costs, saving time and maximizing efficiency, as far as the parties themselves are persuaded to solve their own demands.

Thus, analyzing the traditional and modern methods of conflicts resolution, they could be split in two large groups: in one side, the non-binding lawsuits in which parties are responsible for its control, decisions and appropriated solution; on the other side, the binding lawsuits, in which thirds parties are requested to control the demand (BRAZIL, 2016, p.17).

Within the non-binding lawsuits are: negotiation, mediation and conciliation, while in the biding lawsuits are: administrative decision, arbitration and judicial decision.

The negotiation is the most usual form of solving eventual conflicts, characterized by its communication oriented on persuasion, in which its parties have total control of the case and the result[10]. In negotiation, the parties choose from the moment and place of process, to the kind of solution: total, partial, definitive, temporary, etc (BRAZIL, 2016, p.20).

The mediation reveals itself as a qualified negotiation by the presence of a facilitator third party unrelated to the dispute. It is a method composed by several steps, driven to better understanding of the dispute and aimed to find the more appropriated solutions. It is a denser auto-composition technique and mainly used in situations in which the parties want the maintaining the relationships (BRAZIL, 2016, p.20).

The conciliation also reveals itself as an auto-composition process, which

10 It is important to point out that the new Code of Civil Procedure (Law no. 13.105 / 2015), expressly provides for the possibility of the parties to establish changes in the procedural process, in order to take account of the particularities of the case, as provided in art. 190.

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also has the presence of a facilitator third party unrelated to the dispute, seeking the best solution for the dispute. Although, it distinguishes from the mediation in many aspects. The mediation is based on a methodology oriented to multi-disciplinarity, and to solve the issues, pursuing the maintenance of human relations, while the conciliation pursues solving the problems through law (mono-disciplinarity), focused on the past and attributing blame (BRAZIL, 2016, p.21).

However, the conciliation shows itself as a valuable instrument in conflicts resolution, insofar as stimulates the parties themselves to solve their own litigations, contributing for the social pacification through persuasion, not by an imposition of a legal decision, pursuing to keep the good coexistence between the parties, as far as possible.

It must be observed that the Annex III of Resolution nr. 125/2010 of National Council of Justice (CNJ), which implemented the Legal Conciliators and Mediators Code of Ethics, establishes the principles addressed to a properly resolution of disputes, reinforcing the confidentiality, impartiality and empowerment of parties, stimulating them to learn how to better solve their own conflicts in the future.

The arbitration, defined as an ordinary private procedure, which in parties get assistance from a third party(ies) unrelated to the dispute, who will decide an arbitral decision at the end of procedure, previously stipulated by him, and assisted by the parties involved. It is a method equipped with coercivity and definitivity, as it is able to put an end to the conflict.

Thus, the unforgotten professor Diogo de Figueiredo Moreira Neto (2008, p.15) brings the conduct adjustment as an autonomous instrument able to settle disputes, laid down in Article 5th, § 6th of the Law 7347/85, as an element of negotiation in the administrative sphere, with proper reservation, that it is not about negotiating the public interest, but negotiating the “ways to achieve it efficiently”.

There is still registers about the junction of two or more of these mentioned procedurals, which the most common is the junction between the mediation and arbitration, giving rise to the term “Med-Arb”(BRAZIL, 2016, p.24-25), and to others innominate compositional practices, always orientated to bring conflicts to a good end.

It reinforces that the public entities of 21st century must, within the context of increasing conflicts on one side, but in search for the best way to resolute them, on

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the other side, dell on the instruments capable of give raise the best way to interact with the citizens, aiming to reduce the problems on communication with them and fall upon innovative, practical, economic and efficient methods to solve the disputes.

6 THE ASCENSION OF CONSENSUS IN PUBLIC LAW: CASES IND ADMINISTRATIVE LAW AND CRIMINAL LAW.

As a corollary of Democratic State of Law, shown in Article 1st of Brazilian Constitution, the public space depends on participation of all of its agents, establishing an open dialogue between government and citizens, addressed to society's permanent needs.

For this purpose, the judicial process driven by dialogue is continuous, dynamic and oriented to democratic legitimacy[11]. This judicial process is focused on the people, who are consignees and legitimizers of State, and reveals itself indispensable, and also recovering the principle of popular sovereignty, combining democratic representation with instruments of direct democracy (MAIA, 2014, p.73).

In this new perspective of democracy, the public administration must look to a model more adequate to this new reality, which allows not only the consensus focused on the choice of public agents through vote, but also inspires the engagement of socials participants in the formation of a new administration driven to efficiency and effectiveness of public actions[12].

Thus, the relation of supremacy of public interest would not be mistaken with supremacy of public power, which is not justified in a Democratic State of Law, because the public interest does not exist to sacrifice the substance of citizens' fundamental rights. Therefore, a virtuous relation of weighting between the motivations of State and the interests originated from the citizens' rights takes place

11 We use here the substantial meaning given to the word "democracy", in the expression of Norberto BOBBIO. For him, while formal democracy reveals itself as the Government of the people, substantial democracy is a Government for the people (BOBBIO et, 1998: 328)

12 There is a significant difference between efficiency and effectiveness that deserves to be highlighted. While efficiency, in the context of public administration, is the final assessment of an expected and achieved result, demonstrating the satisfactory performance of public administration, effectiveness is established through the global reach of public interest satisfaction with the outcome of what has been decided. (MOREIRA NETO, 2003, p. 141).

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(MOREIRA NETO, 2003, p.142).

The judicial process becomes a way to achieve an objective oriented to efficiency, whilst respecting the relevant primacy of legality. It is crucial to emphasize that efficiency can only be obtained in compliance with the parameters set by the legislator, while the law must be guided to obtain efficiency that maximize the results in order to fulfill the willing of society.

Therefore, this seeking for efficiency does not reveal as an end in itself, while the legality must always be observed, avoiding the "escape to the private law" (BATISTA JUNIOR; CAMPOS, 2014, p.35). The parameter is a less authoritarian stand by the government, however, without abandons the bureaucratic regime.

In this context, emerges the negotiated administrative actuation model, as it follows the legality and public legal system established by the Law, assists the resolution of especial circumstances, fostering the advent of an administrative consensus, which lighten the costs and the strict form that hinder the satisfactory progress of traditional procedurals.

In this new mentality, the law arises as essential element to allow the administrator to make use of weighting as a prerogative, oriented to its obligation of analyze which resolution is the best to be decided in a real case, moving away of any illegal action. In this way emerges a "power-duty" [13] to transact[14], possessing the control as the element driven to this "responsible flexibilization" (BATISTA JUNIOR; CAMPOS, 2014, p.35).

In this context of flexibilization, it is urgent to emphasize that discretion, as a traditional element which composed by administrative acts, must bring the idea of control. That is to say, the more freedom the administrator has to establish the dialogue focused on the consensus in order to achieve a public purpose, the more the control to verify if, indeed, the resolution meets the social purposes, including the efficiency and effectiveness plans.

It must be abandoned the idea which this control suffocating any action that considers the efficiency as primordial vector to achievement of genuine public interest, abandoning the idea of a "sterile legalism", driven to sabotage any action

13 Maybe a "duty-power".
14 Maybe a "duty-power".

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that guarantees high performance to the public administration.

Thus, what is sought is rid the public administration of futile bureaucratic ties, which leads the public agent to establish a “mediocrity pact”, inside a bureaucratic model that is made by rigid procedures, based on suffocating legal sets which impart fear in the public administrator. Since the fear of punishment has set, the public administrator abandons any momentum of creativity and embraces a lethargic methodology, focused on the preservation of his stability as primary purpose.

In the administrative sphere, the public administration has been engaging with consensus in two approaches: considering consensus as an accessory and coadjutant, and considering consensus as main element in the formation of administrative will.

In the first approach, the public administration attempt to listen the individuals, establishing a dialogue and discussion to know the best solutions, however, reserving the decision power for itself, with no bounded remains to the negotiated remains. In the case of the individual’s prevailing action, the public administration likewise negotiates with the individuals focusing on to maximize the efficiency of public interest, which will be bounded to the prevailing decision in this dialogue.

It urges to emphasize that in case of additional action by the individuals, it is unnecessary that the law predicts the decision to be taken will be exclusively by the administrative authority, which is primitively competent to this decision-making process. The democratic bonds are strengthened by listening to the citizens, however, the decision must be as a rule taken by the administrator, which makes any legal provision unnecessary (MOREIRA NETO, 2003, p.147).

However, so that individual participation bounds the public administration, this situation must be expressly listed in the law, because this binding does not need a previous action from the legislator, in order to change the competences of the public administrator (MOREIRA NETO, 2003, p.147-148).

It is evident that the consensus, as the binding element to public administration, must obey both the postulate of efficiency and the primacy of legality, once the administrator is responsible, ordinarily, to taking decisions, and the particular acting is the coadjutant in the action. Conversely, in cases of the participation of civil society reveals so important to the point that the administrative

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decision should bound to the individuals will, this case must rely on the proper insertion in the Law.

As examples of the special acting as determinant element to the formation of administrative will, there are the plebiscite and the referendum, both under the constitutional provision. Moreover, according to the understanding of the Law 9709/1998, those elements have the faculty to approve or deny legislative or administrative act before issued, in case of the plebiscite, or to ratify or reject those acts already issued, in case of the referendum.

In those cases, the popular decision is sovereign, and the administrator does not have another option but to accept and enforce the decision.

There are other cases that bind together the society's will as determinant element in the administrative action. As example, there are: the co-management, in accordance with Article 206, Federal Constitution VI; the atypical delegation, which recognizes the legitimacy of the collaboration acts of the individuals (MOREIRA NETO, 2003, p.149); and the public hearing.

In case of the public hearing, it is worth to emphasize that the participation of civil society can or cannot bind the administrative decision (MOREIRA NETO, 2008, p.12-13). As examples of legal provision of the public hearing in the public administration, are the Law of Bidding (Article 39, *caput* of Law 8666/93) and the procedure of the Environmental Impact Statement and its Report (EIA/RIMA), which trough the Resolution n. 009 of the National Council on the Environment (CONAMA) of December 3rd, 1987 establishes in the Article 2nd, the following:

> Article 2nd - Whenever it deems it necessary, or when it is requested by a civil entity, by the Public Prosecution Service, or by fifty (50) or more citizens, the Environment Agency shall promote the holding of a public hearing.

Such a legal provision is so important that, according to paragraph 2nd of the aforementioned article, there being a request for a public hearing and not being held "the license granted will not be valid".

Thus, it is also clear, in the regulatory field, an approximation with the consensus model of management, revealing a sententious administrative activity, which seeks alternative ways of implementing the public interest related to the

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activities of regulatory agencies, consisting almost of all agencies that are legally regulated, the public consultation as a tool to provide to the public interest the desired efficiency[15].

More recently, a movement to improve judicial services has been gaining ground. Since the beginning of the last decade, the various participants in the judicial system have been creating mechanisms to expand alternative methods of conflict resolution, highlighting the Ordinance nr. 1117/2003, of Office of Judicial Reform (SRJ/MJ), culminating in the creation of the Movement for Conciliation by the National Council of Justice (CNJ) in 2006 (CARDOSO, 2016, p.86).

Subsequently, with the edition of Resolution 125/2010 of the same CNJ, and its amendments, the National Policy for Adequate Treatment of Conflict of Interests was established, structuring the whole system of Adequate Conflict Resolution (RAD) in Brazil.

In this dynamic, the strengthening of consensual methods of dispute resolution has been increasing, with the systematization in the New Code of Civil Procedure (Law nr. 13105/2015) and the advent of the Mediation Law (Law nr. 13140/2015), which expressly stipulates, in Articles 32 to 40, the application of institutes for the self-determination of conflicts that involves a legal public entity, which dispels the idea that the unavailability of the public interest would not allow any form of composition within the public administration.

This subsystem of adequate disputes resolutions emerges to powerfully assists the judicial system: in solving pre-judicial demands, it avoids the beginning of an unnecessary judicial process; if the way is trough judicialization of the question, by the failure to reach the desired composition, the negotiations and elements brought to the discussion in the preliminary phase will bring to the Judge more information and certainty for the delivery of the appropriate sentence (CARDOSO, 2016, p.89-90).

It urges to emphasize that the New Code of Civil Procedure produced an important impact on the subject, bringing basically three important institutes (CARDOSO, 2016, p.108): the integrated system of adequate resolution of demands;

15 The laws that regulate ANATEL, ANEEL, ANP, and which regulate Port Exploration, the restructuring of waterways and land transportation are examples that provide for public hearings as a tool to achieve a better attainment of the public interest. Also, Law 9784 / 99, which establishes the Federal Administrative Proceedings, in its articles 32 and 34, provides for the holding of the public hearing as an element of legitimation of administrative decisions.

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the objectification of legal processes; and the system of precedents.

The Proper Dispute Resolution System (RAD) is revealed by the set of techniques in the multiport standard[16], available to the parties to produce a better decision without dependence on a pronouncement by the Judiciary.

The objectification of legal processes leads to "*standard-decisions"* to be prolonged to *"*standard-situations*"*, which grants to the Courts a regulatory power, to establish rules that clearly determine what is right and what is not, to be granted to citizens.

The system of precedents, notoriously inspired by *Common Law*, aims to provide a pattern of decisions to repetitive demands, with broad participation and investigation of the parties, using instructional instruments adapted to the demand, allowing the clarification of the question by multidisciplinary methods.

CARDOSO (2016, p.111), in making use of these three instruments, elaborates the following weighting:

> The structure of the traditional legal process, between parties, even in the context of collective action, in disregarding what is in the world, narrows the view of the judge to the procedural field, to the litigation, often moving the judge away from the ideal of distributive justice - of equal justice and boon for all.

If on the one side, these institutes have the power to make the decisions of the Courts into true general rules of law, producing the risk of the hyper integration of the Law, a fact that has been causing a lot of criticism in the doctrinal field, on the other side, it must consider that this centralization of decisions cannot and must not mean a restriction of fundamental rights.

That is, what should be obtained, only with changes, is the certainty and predictability of decisions, without materially restricting any rights or interests of individuals[17].

In addition, in the field of public law, criminal law has undergone a series of

16 This is the Multidoor Courthouse, created by Frank Sander in the late 1970s (CARDOSO, 2016, p. 87).

17 It is also appropriate to observe Resolution No. 179/2017 of the National Council of the Public Prosecutor's Office, which regulated article 5, paragraph 6 of Law nr. 7.347/1985, which disciplined the commitment to conduct adjustment, another important extrajudicial tool for the consensus aimed at satisfying the public interest.

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transformations in order to provide the individual, who receives a criminal prosecution, with mechanisms capable of eliminating a slow and painful process, with the possibility of immediate application of conditions that, properly fulfilled, lead to the extinction of the criminal action.

In this sense, the Federal Constitution, in its original text of 1988 (article 98, I), established the initial mark to provide, within the criminal system, the negotiation between the parties, when creates the special courts with competence for the "conciliation, judgment and execution of (...) criminal offenses of less offensive potential, by means of oral and summary procedures, permitted, in the hypotheses provided by law, the transaction (...)".

Already in 1988, the constituent established consensus as an integral element of the manifestation of the public interest, even in a procedure marked by an adversarial characteristic [18], moving towards the increase of agreements and understandings to the detriment of the traditional conflict established between accusation and defense (DIAS, 2011, p.16).

With the implementation of the special courts, which occurred with the advent of Law 9099, September 26th, 1995, crimes with maximum penalty commenced by the law not exceeding two years, a criterion used by law to define the criminal offense of "lower offensive potential", begun to have self-determination methods to be used by the parties to resolute the process.

This new microsystem was aimed at implementing speed and efficiency in criminal actions of low complexity, and for that purpose the consensus was basically tooled by three institutes: civil composition (Article 74), criminal transaction (Article 76) and conditional suspension of the legal process (Article 89).

If, in the past, the public interest in these less complex crimes was attended by the initiation of a criminal action, which was previously unavailable, this new procedural conception removed an unproductive practice that forces the prosecution body to file accusation about facts that had no practical and social relevance.

Thus, the law began to admit the civil composition of the damages as a form

18 By adversarial, there is a procedure in which the accusation is formulated by an organic entity and functionally distinct from the court, which removes the inquisitorial characteristic of the process, and that accusation and defense constitutively participate in the declaration of the right (DIAS, 2011, p. 16).

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able to prevent the outbreak of criminal action. It can be implemented by a conciliator, a lay judge or a judge of law, and has the power to extinguish the criminal action, having the nature of a judicial executive title (article 74). If there is no civil composition, the law still presents another consensual institute: the transaction, which able the Public Prosecutor to present a proposal to the accused, who complying with legal requirements and having no impediment to the proposal, can immediately serve the restrictive of rights sentence or make payment of a fine (article 76, § 2).

The conditional suspension of the legal process, in turn, constitutes another method of conflict resolution in the criminal sphere in which the suspension of the progress and the limitation of the legal process for a period of two to four years, meeting other requirements.

With the implementation of these consensual methods of resolving criminal conflicts, the process of seeking consensual elements to resolve criminal cases started.

In this context, for example, the Law 12.850, August 2nd, 2013, now foresees, in its art. 4th, the award-winning collaboration institute, which enables the accused to be able to assist the public power, achieving one or more of the results defined in the aforementioned articles, with the granting of judicial pardon, reduction of sentence or substitution of custodial sentence by a restriction of rights, which clearly demonstrates the option of public power to increasingly adopt consensus as a wholesome mechanism for resolving conflicts, including procedures that are traditionally mandatory and irrecusable.

It is crucial to emphasize that the award-winning collaboration is very close to the Leniency Agreement, initially envisaged in Law 8884/1994, currently regulated by Law 12.846/2013, the named Anti-Corruption Law[19]. The change of understanding comes in appropriate time and needs to seize more situations, both in the field of administrative law and criminal law.

Most recently, the National Council of the Public Prosecutor's Office (CNMP)

19 For the purpose of this article, we did not establish the differences between institutes, emphasizing, in a general way, that the leniency agreement turns to particular legal entities, as can be seen from the reading of article 16, caput of the Anti-Corruption Law, in administrative proceedings. The award-winning collaboration, however, turns to the accused in criminal proceedings (article 4th, Law 12.850/2013).

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has issued the Resolution 181/2017, which established the Criminal Non-Pursuit Agreement. By this measure, the member of the Public Prosecutor's Office may institute Criminal Investigation Procedure (PIC), as an instrument to ascertain public criminal infractions for preparation and basis for the proposition, or not, of future criminal action.

Laid down in the Article 18 of the aforementioned Resolution, in compliance with certain requirements set forth in the clauses of the caput, the member of the Public Prosecutor's Office may propose to the defendant a Criminal Non-Persecution Agreement in which, in compliance with all elements of what has been established, that will file the proceedings, without entering the corresponding criminal action, protecting the rights and guarantees of the defendant at all stages.

As a new instrument, it will still require many debates on its constitutionality and legality. The truth is that this Resolution follows the trend of projecting to the substantive and procedural criminal law the model of consensual justice, respecting the fundamental rights of the defendant, allowing him to have one more pre-procedural form in order to choose the best option, also generating procedural economy and celerity, all in harmony with the interest of the parties.

CONCLUSION

The dialogue is an indispensable instrument for the full realization of the Democratic State of Law and is a valuable instrument for resolving conflicts. The narrow view that the law does not dispense litigation must be gradually replaced by a judicial policy of consensus.

Many instruments of resolution of these conflicts have been implemented throughout history. From the use of brute force, to methods of conflict resolution based on understanding, the culture of litigation must be replaced by a democratic space which allows the debate of ideas, reinforcing the idea that consensus must increasingly be implemented to solve the demands.

In this standard, the public power must increasingly pursuit the implementation of instruments that allow citizens to participate in government

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decisions, bringing together the participatory democracy with democratic representation, as systems that complement each other in order to provide efficient public service

Thus, respect for legality arises as the first instrument of control so that an "escape to private law" does not occur, but the efficiency is achieved within the respective respectability required by the legal system.

Appropriate methods of dispute resolution are increasingly being used as a means of reaching administrative decisions, and their prediction is always welcome, as civil society has much to contribute as solutions belonging to the public sector. That is why the legislator must increase as hypothesis of its incidence on the one hand, and also enable the improvement of mechanisms aimed at the correct implementation, that starts to be "power-duty to transact."

In the end, we have already possessed examples in the so-called public law that show that consensus is a path to be followed and a purpose to be pursued, as a necessary element for the realization of democracy, not only in its deliberative aspect, but especially its participatory bias. Government, society and citizens must, harmonically, make their desires viable, seeking efficiency of their actions, within the constitutional and legal limits.

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