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LEGAL PRIORITY OF PUBLIC WATER SUPPLY AND ELECTRICITY GENERATION

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ABSTRACT

The article approaches the coexistence of two types of administrative authorizations. The first one concerns the use of water for electricity generation purposes and its expedition involves multiple federal entities. The second one grants to its beneficiary the right to explore water supply services and its expedition might also involve states and counties. In the case studied, the authorization for electricity generation preceded the authorization for water supply, causing a problem of legal transition for constituted rights due to new regulatory demands. These demands raise doubts about the stability and revocability of rights previously constituted by administrative acts or contracts. Brazil´s legal order sets water supply as a priority and allows an indemnification for losses endured by the beneficiary of the older authorization. Nevertheless, the article concludes that a norm that ensures a general obligation of establishing a proper transition regime in cases of new regulatory demands would be convenient.

Keywords: Regulation; Hydraulic Resources National Statute.

PRIORIDADE LEGAL DO ABASTECIMENTO PÚBLICO E GERAÇÃO HIDRELÉTRICA

RESUMO

O artigo trata da convivência entre as outorgas de direito ao uso da água para a geração de energia hidrelétrica, que envolve competências de mais de uma autoridade federal, e as outorgas posteriores para o abastecimento público, que podem envolver também competências estaduais e municipais. O tema se insere na discussão sobre qual deve ser a transição jurídica adequada quando de novas demandas regulatórias. Elas geram dúvidas quanto à estabilidade ou revogabilidade dos direitos anteriormente constituídos por atos ou contratos administrativos e quanto ao dever de indenizar os prejuízos sofridos pelos titulares dos direitos restringidos. A solução da legislação brasileira vigente foi, por um lado, garantir prioridade ao abastecimento público e, por outro, permitir a indenização dos prejuízos do titular da outorga mais antiga. Como conclusão, o artigo cogita da conveniência de editar norma nacional impondo o dever geral de, quando de novas demandas regulatórias, ser definido de modo mais específico o regime jurídico adequado para a transição.

***Palavras-chave**: Regulação; Lei Nacional de Recursos Hídricos.*

INTRODUCTION

One of the most complex legal challenges derived from regulations is that, after the constitution of active legal situations through administrative acts or contracts (concessions, authorizations and licenses, for instance), to make them compatible with other sectorial regulations incident on the same activity or with programs arising from posterior acts or norms. How to make the already constituted rights coexist with the constant regulatory demands?

Given the variety of the legal solutions created by the Law to enable the regulation, obviously there is no general or principiological answer for this question. Specific constitutional and legal norms, on constant construction and mutation, seek to correct the situations, by means of arrangements which not always are complete or clear.

The *expropriation*, with previous indemnity, Just and in cash, and the due legal process (CF, art. 5th, XXIV), is one of these arrangements, which applicability is consolidated in relation to property The *expropriation* of public service concessions, also with previous indemnity, federal law 8.987/1995, art. 37, is another well-known arrangement. A more specific arrangement is the *decay* of telecommunications authorizations, with the right of the authorized person to maintain its activities for five years else, federal law 9.472/1997, art. 141.

These are examples of explicit arrangements relatively well designed. But it is common that the legislation is more fluid concerning the incidence of new regulatory demands on active legal situations already set, generating discussions about these situations stability or not, about the revocability of administrative acts that have set them, about the limits of the incidence of new regulatory demands and about the damages indemnity.[1]

One of the less dense fields of the legal discipline is the granting of rights to use water, a matter of increasing importance and in relation to which conflicts tend to become more and more frequent. The current study, in this field, deals with a specially challenging issue: the water use for electricity generation, which gives rise to the competence of the sectorial federal authorities, and the possible conflict with the water use regime for the public supply, which can involve the state and even municipal

1 About this debate in the Brazilian Law, v. SUNDFELD, 1993, pp. 38-52 and pp. 86-118, specially the Chapters IV – Constitution of private acts by administrative act and VII – Sacrifices of Rights. For the European debate, v. ENTERRÍA and FERNÁNDEZ, 2015, pp. 129-186, specially Chapter XVII – Tem Incidence of the Administrative Action in the Administration Legal Situations.

competences.

To treat this matter, the study discusses, in the item 2, the legal configuration of the service of hydroelectric power generation, especially concerning related goods and rights, such as the reservoir and the corresponding right of use. In item 3, exposes the general regime of water use and capitation for public supply.

In the items 4 and 5, the debate is about the ways of compatibilization of the multiple uses of water with the former rights of use, as well as about what are, in relation with the federal public service of power generation, the effects of the posterior authorization of water use, issued by the state authority. The relevant doubt is whether, giving priority to the supply service for the water use, the legislation also would have granted the gratuity of this use.

In the conclusion, the study defends the need for the Brazilian Law to face comprehensively the issues such as the analyzed one, by means of the affirmation of a general right to the adequate transition in face of the new regulatory demands.

1. THE ELECTRIC POWER GENERATION SERVICE, INTALLATONS AND ASSOCIATE RIGHTS: HISTORIC CONFIGURATION

At the beginning of the XXth century, the hydroelectric energy generation service was legally understood in Brazil as a private activity developed from the public good.

This was common in the international experience in the period: the beginning of the electric power production as private activity sometimes linked to the concession of the right of use granted on public assets (as in the case of hydroelectric energy), to which followed increasing public interventions, though varied ways (GARCÍA; MARTÍNEZ, 1997, p. 17 e ss). In some cases, this intervention would mean only the creation of intense administrative regulation by autonomous authorities (in the United States of America, for instance). In others, it would lead to the sector submission to public ownership and the private action, by In many countries, too, with the extended statization of the exploitation by state companies action; in Brazil, the statization would start at the end of the 1940´s decade, with this mark in the creation of the great federal state company Eletrobrás in 1962, and undergoing partial withdrawal with the privatizations from the half of

the 1990´s decade.

The electrical services that were private at the beginning and could involve assets and competences from various Federation organs, become publicized in Brazil with the 1934 Constitution, which also stated the federation process, attributing competence to the Federative Union both to legislate about "waters and hydroelectric power" as to authorize and grant the "industrial use […] of waters and electric power" (art. 5º, XIX, j, e arts. 119 and 137). The federalization process of the sector would be concluded with the 1967 Constitution, which in the art. 8º, XV, would give to the Federative Union the entitlement for the operation of "services and installations of electric power from any origin or nature".[2]

The 1988 Federal Constitution, in addition to keep the federal entitlement on "the services and installations of electric Power" (art. 21, XII, b), and give express constitutional *status* to the provision that "hydropower potentials" are Union goods (art. 20, VIII), included among de federal assets also "the waters in deposit", when "arising from the Union works" (art. 26, I).

Therefore, currently it is established, in the Constitution, that not only the hydroelectric potentials are public assets, but also the reservoirs for water deposit that have been built, directly or by concessionaires, for the activities now defined as Union public services (such as "hydroelectric power generation"), as they are installations functionally linked to them[3]. Therefore, they are federal goods.[4] On the other hand, the water existing in

2 To understand the succesion of constitutional and legal norms, v. OLIVEIRA, 1973, pp. 40-60.

3 About the concept of "installations", in the art. 21, XII, b of CF 88, explains LOUREIRO, 2009, p. 98: "set of material goods that acquire individuality due to their suitability to the realization of a given *purpose*. Tem goods that compose an installation are *functionally* ordered". Regarding the inclusion of the reservoirs among the installations of the generation service, it is worth the note by ÁLVARES, 1978, p. 172: the "reservoirs... are linked to the public service", and "the reservoirs waters [have] public waters character".

4 In case of grants formerly to the *Código de Águas* and the 1934 Constitution, when the services were not public, the goods acquired by the concessionaires would be private. But, with the publicization operated that year, such goods became subject to the reversion to the federal public assets, at the endo f the concession, with indemnity of the unamortized investments (for example, TRF 1ª. Ac. 010455176, in CAMPOS, 2001, p. 560-2).
In the case of the enterprises set before the *Código de Águas* (such as the famous Power plant Henry Borden, in Cubatão, SP, to which are linked the dams Guarapiranga and Billings, a plant which originates from a federal concession f or hydraulic potential exploitation on behalf of the company Light in the first years od the XXth century), the formal incorporation to the Union legal person assets has not been performed yet, as the concession relation has never been extinguished, and is continually in force. This continuity has to do, on the one hand, with the enlargements of the enterprises, which often occurred, especially in the first decades, increasing the investments. On the other hand, it has to do with the electrical sector regulatory own history, which involved several transitions of economic model, some very long and radical, which occurred at the same time when the system as a whole expanded extraordinarily and integrated in the national range (for the period up to 1983, consult TÁCITO, 1984, pp. 40-50; for the posterior, WALTENBERG, 2000, pp. 352-377.

these deposits belong also to the Federative Union.[5] This regime justification is to grant to the federal public service the indispensable means for its permanent functioning.

Since the beginning, the public power have transferred to the private companies, by means of concession of exploitation of hydraulic potential, three basic categories of rights: the right to use the public good, the hydroelectric potential, that is, a given volume of water geographically located, in enough quantity to generate electric power which production were admitted; the right of use, for its activity, of all the installations obtained with their own investments and work, in which are included not only the industrial installations (turbines and buildings where it is set), but also the reservoirs built for deposit of the water that makes the turbines spin; and, still, the right to trade the energy produced according the sector rules.[6]

By nature, all the concession of hydroelectric generation is a grant of rights on the water. There is no the first without the second: hydraulic power potentials cannot, of course, be dissociated from the use of water. Water is of the essence of the hydroelectric generation concession, which aim is nothing else than transform the water Power in electric power

Thus, due tom the imbalance caused by the regulations transition, in general it was not possible to apply to each electric concession the mechanism of natural, extinction, at the end of the expiration date previously stipulated, and the concessions had to be extended and renewed in sequence. Therefore, when it is said that the reservoirs, as installations of electric service, are federal goods, this statement does not intend to enter into the merit on the occurrence or not of the amortization of investments, but only to point out that the aforementioned assets are federal public service assets and are linked to it, in which condition they enjoy the legal regime of public goods, accompanying the service independently of who manages it.

5 There are authors that, contesting the Constitution terminological option, defend that water is not a "public good", but a "social good" (AYALA, 2007, p. 291) or "environmental good" (FIORILLO; FERREIRA, 2009, p. 64). But this debate has no direct impact on this study, as the authors purpose is not to contest the competence of the public entity defined as entitled to Grant concessions of use, but just the contrary: to defend the "waters public management", with fiduciary character, which is the correct one (AYALA, 2007, p. 295). Anyway, they are actually important, the norms on public entitlement (which may be federal os state, depending on the case), as it is from these norms that come the criterion to identify the federal or state authority competent for the water public management, included the Grant for rights of use.

6 An exemple. The decree of the President of the Republic n. 16.844, of 27 March 1925, approved de implementation of the Light work for the municipalities Salesópolis, Santos, Mogi das Cruzes, São Bernardo, Santo Amaro and Itapecerica, in the State of São for "exploitation of the hydraulic power of Tietê river and some of its affluents", of which it was already "concessionaire in the terms of the decree n. 6.192, of 23 October 1906, of the favors contained in the decree n. 5.646, of 22 August 1905, for the exploitation of the hydraulic power." From the combination of these federal decrees, arise the definite form of the federal grant in favor of Light concerning the hydroelectric potential that resulted in the building of the reservoirs Guarapiranga and Billings and the plant Henry Borden. For the Project execution, other approvals were necessary later on, as the Law of the State of São Paulo n. 2.249, of 27 November 1927, which authorized the company to channel, extend, rectify and deepen the bed of the Pinheiros River and some of its tributaries. About the company's history in the period and the grants, v. SANCHES, 2011, pp. 88-107.

(LIMA, 2015, p.145).

Tem public service of generation has linked to it the right of use of the necessary water resources, on which the project was implemented.[7] This right is constituted "automatically" on behalf of the "institution or company that receives the concession or grant of the use of the hydraulic power potential" (*Lei Nacional de Recursos Hídricos*, nº 9.433 /1997, art. 7th, § 3rd).[8]

In view of this legal regime, the reservoirs built and maintained to make feasible what is currently the federal public service of electric power generation - and the associated water, from which hydroelectric generation cannot do without - are part of the set of assets and Rights of the Union and, in this condition, its use and exploitation are delegated to the concessionaires (private sector companies or state companies).

7 In the initial years, when the hydroelectric generation was a private activity, the public concession had the character of dominical concession, of the use of the public good (the water and its energetical potential) for the industrial activity. When the generation became a public service, the concession became broader, including the right and duty to provide the service itself, under the regulation of the grantor, and the natural right to use the indispensable public good. About this: MACHADO, 1998, p. 15 e ss. In the generation of hydroelectric power by concession of service, "naturally... the use of these public assets constitutes for the concessionaire a right, of which the concession contract regulates the enjoyment" (AUBY; BOM; AUBY; and TERNEYRE, 2016, p. 115). POMPEU, 1972, p. 172-173, Analyzing the situation of granting the use of water, a public good, for the concession of public service, explains: "the use of the public good would be included in the object of the concession of service, because it is its very essence." In view of the author, it would be inaccurate to speak of a water use concession, since it would not have any autonomy, and could not be separated from the concession of the service itself.

8 MACHADO, 2013, p. 531, speaking of "automatic consequence," explains: "whoever receives the concession or authorization to use hydraulic energy potential will receive the right to use water resources." Nowadays, this operation involves the operation, at the federal level, of two different authorities: ANA - National Water Agency, which will make a prior reservation of water availability, and ANEEL - National Electricity Agency, which will bid and the granting of the hydroelectric potential and the public generation service, in which the right to use the water resource reserved for this purpose will be automatically embedded. In the past, until 1997, there was no distinction of competences, which were concentrated in the same authority. In the federal sphere, for example, in 1939, to implement the Water Code, the National Water and Electric Energy Council (CNAEE) was created, which would be extinguished in 1969 and would have its competencies passed on to the National Department of Water and Electric Energy (DNAEE), which would be extinguished when ANEEL in 1996 and the National Council of Water Resources in 1997 and ANA in 2000. In fact, art. 17 of the National Water Resources Law project, approved by the National Congress, sought to make clear the aforementioned separation of competencies. But it ended up vetoed when the law was published in 1997, because it had confusing writing, generating insecurity, as explained by GRANZIERA, 2001, p. 191. The legal silence came to be resolved with art. 7 of the creation law of ANA, No. 9.984, of 2000, which regulated the articulation of the competencies of the different agencies (this article would have a new wording with law 13.081, of 2015).

2 THE MULTIPLE USE OF THE WATER AND THE RESPECT FOR THE POSTERIOR DERIVED AUTHORIZATIONS OF THE RIGHTS FORMERLY CONSTITUTED

However, the federal or state ownership of these goods and services is not the most important. The ownership, whatever the public organ, does not exclude, and has never excluded, the articulation and coexistence, regarding the water, between the several use and services, as well as between the competences of the several organs. In other words, although the waters, that in the current regime are always public, can be owned sometimes by the federal organ, sometimes by the state organs, this does not mean that the corresponding use is exclusively up to its owner.

These public goods rights of use can be granted to third persons for private or public purposes, profitable or not. And it is natural that so they are. And this is even recognized by the 1988 Constitution that, after attributing to the Union the legislative competence to "institute a national system of water resources management", included in its scope the definition of the "criteria for granting the rights of its use" (art. 21, XIX).

The reservoir water linked to a federal public service of generation — and to which use the provider has the rights constituted due to the enterprise implementation — can be object of other uses. This regime arises from more general norms. The 1988 Constitution, for example, provides that the Union Will carry out its exploitation "in articulation with the other States where the energetic potentials are settled" (art. 21, XII, b, *in fine*).[9] The current National Water Resources Law ensures the "multiple use of the waters" (art. 1º, IV), and the "rational and integrated use of water resources" (art. 2º, II).

Already in the old *Código de Águas* (federal decree 24.643, edited with force of law), which in 1934 organized the water and hydraulic energy regime in Brazil, was said to be "all are allowed to use any public waters", but this, obviously, observing "the administrative regulations" (art. 36, *caput*). The *Código de Águas* itself foreseen the possibility of making use of public waters for public services (arts. 43 and 44), ensure, included, the preference for the population´s supply service (art. 36, § 1º).

9 Until the 1988 Constitution attributed to the Union only the ownership of hydroelectric power potentials, the states also had such ownership in certain cases. The norm of the final part of art. 21, XII, b, was therefore a compromise solution, seeking to maintain for the States some space of influence in the exercise of the federal competences deriving from that ownership. V. LOUREIRO, 2009, p. 160, nota 265.

In any case it would be necessary an administrative act authorizing the derivation (the name at the time, in case of utility public service, was "derivation grant" — art. 43, *caput*), with this relevant condition of public order: "Art. 45. In all the concession [of water derivation] it shall, always, be stipulated the third parties rights clause."[10]

Thus, although it is possible that the reservoir water that integrates the generation service is also used for other purposes – in concurrence, therefore, with the plant — the generation service former economic rights must be respected by those who are given posterior grants.

This national norm, existing since 1934, has not been revoked or surpassed. To the contrary, it has been reinforced by the current *Lei Nacional de Recursos Hídricos*. This maintained the requirement of public grant for the water derivation, by authorization act, included when made for supply (art. 12, I), conditioning as follows: "The grant of use of the water resources shall preserve its multiple use" (art. 13, sole paragraph).

The legal system is clear. The grant to third parties, of the rights to use the reservoir water from the public service of generation installed and in operation, although it may be done, it cannot prejudice the multiple use of these waters. Nor may it automatically prejudice or expropriate the rights already constituted in favor of the older service, which are also not revocable at the discretion.[11]

This also conditions the use of the water from this reservoir for public supply. It is true that, in "situations of scarcity", this use, due to its designing for "human consumption", has priority over other uses of water, including on power generation (*Lei Nacional de Recursos Hídricos*, art. 1º, III, in similar provision that was already in the *Código de Águas*).

But the law only guaranteed priority in the use, without imposing the extinction of the previous authorizations of use. These shall remain in

10 Commenting the disposition, NUNES, 1980, p. 167, clarifies it treats of "rights of third parties resulting from former concession".

11 Although, in some administrative laws the term "authorization" is used to impress a regime of relative precariousness for the grants, in sense of discretionary revocability, this is not the case of the *Lei Nacional de Recursos Hídricos*, which regime is diverse, given the constitution of subjective rights, reason inclusive of the inconvenience of the terminological option, as observes GRANZIERA, 2009, p. 203. Regarding the impossibility of purely discretionary revocation of the authorization of the water derivation, it is worthy the precise lesson by TÁCITO, 1997, pp. 737-8, formulated in general character: "The constitutive effect of the authorization is configured both in the explicitation of the virtual power of the individual right, and in the imposition of duties and obligations to third persons and the administration. "Result, from this circumstance, a limit to the revocability of the authorizations, which cannot undo discretionarily, once consolidated the individual right. (...)
"It is not other the tradition of our administrative Law. The discretionary acts are, by principle, freely revocable, by another appreciation of the merit. The rule, however, gives way to the consummate effects that affect the creation of subjective rights protected by the general principle of legality."

force, except when, and if, they are formally extinguished, by a motivated act of the competent authority, in an adequate process - and with the due indemnities. The same posterior grant for water supply does not extinguish the former right of use for power generation, if this service grant is still in force. In order the right of use linked to the plant were extinguished, or had its extension reduced, the service grant should be previously assumed by the Union, also with the previous indemnity (National concession Law/*Lei Nacional de Concessão*, nº 8.987/ 1995, art. 37).

Thus, the derivation authorization that, after the implementation of the hydroelectric power generation, is granted to a public water supply company, must necessarily respect the right of use of the water availability associated with the federal generation service, which results in at least the duty indemnity.[12] The most recent supply right (rights in nature to the priority in the water derivation) does not exclude the older electricity service economic rights.

The case, by virtue of the legislation, in favor of the oldest public service, a *principle of protection in the priority in the use of waters*, which, when supervening conflicting rights, preserves at least the economic effects of the precedent administrative grant and still in force.[13] This protection means the limit, the right of the initial grant demanding from the most recent the indemnity for damages.

3. THE RIGHT TO THE WATER ECONOMIC USE ALREADY INTEGRATED TO THE FEDERAL PUBLIC SERVICE CANNOT BE DISOWNED BY POSTERIOR STATE ACT

As showed above, it is possible an administrative grant, issued in favor of a public service supplier, to authorize the derivation of the water from reservoirs previously built for power generation. But in any case the third party´s previous rights will be preserved, and very specially the Union rights, as the owner of the installations and electric power services that made possible the availability of the water to be derived and of the

12 This precept, relative to the protection of a public service (energy), is further strengthened by the fact that consistent jurisprudence has recognized the right of compensation by state enterprises to exploit purely private activities, such as irrigation, even when in favor of human consumption. In this regard, TRF-5, Required Appeal /Review 14560, 14567 and 14855.

13 This is not a peculiarity of Brazilian law. In the North American experience, for example, while there is great diversity among the water rights of the various States, the prevailing rule is also that of protecting the former, with its economic consequences. About this, v. LAITOS; TOMAIN, 1992, p. 363 f.

public service concessionaires.

Due to the regime expressed in the applicable norms, the authorization obtained by the service supplier for the derivation of the water from the power generation reservoir, cannot legally immunize it against the respect to the previous economic rights of the concessionaire of the power generation federal service.[14]

To legally take out water from the reservoir it is necessary that the service supplier, besides the derivation administrative authorization, respect the economic rights associated to the installations and the power generation federal public service, which are prior and still exist.

These power generation rights, especially when the new authorization is from hydraulic regulation state organ, as it is the most common, are not expropriated by the act of the latter. This is so because the States do not expropriate federal services goods and rights, although the contrary is possible (art. 2nd § 2nd *Lei de Desapropriação*/Law of Expropriation, decree-law 3.365 / 1941).

A state organ would never be competent to unilaterally impose the extinction of the right of use for power generation, a grant originally from the Union, as it is linked to the federal public service, that use federal good; the State will cannot prevail on the Union, at least in this case.[15] In addition, in more general terms, it is up to the national authorities in articulation with the States, and not to the state authorities in isolation, create the National Policy of Hydraulic Resource, that will make compatible the grants of use of water (arts. 4th and 7th, VIII) and will observed for the state grants (art. 30, I).

If it is so, how to make effective the public competence to authorize the use of water for the supply, in these cases of previous grant in favor of the hydroelectric power generation?

14 About the "use of the electric power potential", MARQUES, 2010, p. 475, is right to highlight the presence and protection of "the entrepreneur economic interest", which "is accompanied by the collective interest of the electric power generation".

15 This is the opinion by MACEDO, 2010: "For the purpose of energy utilization, the national will must predominate whenever it is confronted with the principle of State autonomy, this is because it is faced with a regional situation whose demarcation meets the question of strategy and national security in the entrepreneur's economic".

4 THE ECONOMIC COMPENSATION THROUGH THE EXPROPRIATORY REGULATION AS THE MEANS OF RESPECTING THE PREVIOUS RIGHTS OF THE FEDERAL SERVICE FOR POWER GENERATION

There will be no incompatibility problems between the concessions of use if the federal concessionaire does not oppose to the water capitation for supply. But there will be conflict if the supply company refuses the compensation for the financial losses caused to the power generation company.

Will the supply legal priority for water capitation include the gratuity right?

Logically, financial compensations are compatible with the exercise of the right *in natura* to derive water, by the water supply company, which is included in the authorization, therefore, there is no sense in supposing that this authorization would exclude all the rights of the power generation company and, very especially, that it would prevent or dispense the indemnity for the incidental damages. The disbursement of money is not an obstacle, nor obstructs the prioritary use of water, only conditions it financially.

In addition, the water supply service for the population is not for free. The services provider receives tariffs from the users to cover all costs. In general, it is a company, which distributes profit to its shareholders, so as the water from the power reservoir will be used for a profitable economic exploitation.

The concessionaire of the federal public service of power generation has the right to the use of water from the corresponding reservoir, whose economic enjoyment is indispensable to the feasibility of the services rendered and is granted by the concession.

The correct way to turn compatible the concurrent rights on the water from the same reservoir, is: on one hand, regarding the capitation itself, ensure the priority to the supply service; and, regarding economic issues, compensation to the benefited service (the supply) for the financial losses caused by the water capitation to the oldest and onerous service (the power generation, which entitle and maintains the installations, having paid and still paying with the respective investments and costs).

It is possible here to think about the application of the regulation

idea with expropriatory effects *ope legis*. It is the national Law itself the responsible for imposing the priority of the supply over the other uses of water, which includes the hypothesis of, if the resources are not sufficient for the concomitant capitation, the former owner of the previous rights is not allowed or is limited in its exercise *in natura*. Therefore, it results from the law a regulation potentially expropriatory. But expropriation is not confused with confiscation, nor with administrative revocations for convenience or opportunity. Summarizing: expropriatory regulations give right to compensation, in an adequate form.[16]

In case, as the specific Law remained silent about the duty to compensate, its legal basis can be sought in more general norms. In the first place, the norm that prevents unjust enrichment, at the other´s expense (Civil Code, art. 884). And this enrichment would occur if, in order to exploit the economic services for which it is remunerated by means of tariffs, the supplier company could use with no costs at all, the federal assets whether granted or not. On the other hand, the same norm that imposes to whom, by voluntary action, causes damage to the other, the duty to indemnify (Civil Code, art. 186). The withdrawal of water by the supplier company deprives the power company of the indispensable input to power generation, affecting its capacity of rendering the granted public service and from de revenue linked to it, that are rights constituted on its behalf, causing to it the corresponding prejudice.

The remaining question is: is there legal importance if the act that grants the right to the use of water does not expressly say that the supply company must pay compensation to third persons? It gives right to free capitation?

The answer is negative. The administrative authorization for the supply has no paralyzing effect on the competence and rights of third parties, and very especially for the Union and for its concessionaires, regarding the power generation reservoir and the water deposited in it. There is no express provision, in constitutional norm, legal or regulation of any kind, that the authorizations issued by state organs, for water derivation from reservoir previously built for the federal service of power generation, would give the authorized persons the right to do it with no other requirement or condition.

If there is no express norm in this sense, would the immunity be a

16 About exproprietory regulations in the North-American experience v. MERCURO, 1992; e FISCHEL, 1995. No Brasil, v. BINENBOJM, 2010; CYRINO, 2014, p. 199-235; e KALAOUN, 2016.

necessary legal consequence of the authorization of the derivation?

No administrative authorization of any kind has such immunizing effects. The municipal license for an individual to build at the sea board, or maintain commercial establishment on there, does not mean an exemption from observing the conditions imposed by the Union for the private use of it which is the Union property, neither is it also exempt from the annual forum payment. Municipal licenses are necessary conditions for the legal building and the commercial use, but are far from being sufficient conditions.

Another example: no annual vehicle license nor the license to drive it, issued by the state transit authority, exempt the drivers from paying tolls when transiting a granted federal highway. Such licenses are necessary conditions, but are not enough, for the legal transit along the highway. Therefore, the Power concessionaire has the right to the economic compensation. It remains to know if the compensation for the losses could be compulsorily transferred to the Union which granted the service, arguing that the Power concessionaire would be under imbalance in the economic-financial equation of the concession agreement.

It is not the case, as it deals not properly of re-imbalance the electric power concession, but of compensation, by the most recent benefit (the water supply), related to the losses of the oldest one. From the norms about the harmonization of the uses of water resources previously seen, results the duty of the posterior authorized to respect the former one´s rights. Thus, there is not a way to impose to the Union, owner of the precedent service grant, the charge to support the losses caused by the posterior supply service, for the concession re-imbalance.[17]

CONCLUSION

Legal security is a fundamental value in the economic life, so as the implantation of new programs, whether relevant, urgent or prioritary,

17 But the supplier company duty to indemnify will not exist if, for autonomous deliberation of the Union, the service owner, the electric Power service has mechanisms for automatic, immediate and integral compensation to the power company for the losses due to the impossibility of power generation. This because, in the hypothesis, there will be no further damages to compensate: for financial purposes, the electric power system will proceed before its concessionaire as if it in fact had generated energy. If this is not the case, the supply company shall be obliged to compensate the losses caused to the generator. This obligation shall persist meanwhile the public enterprise exists directly under the Union or any company to which it transfers this right.

cannot omit the adequate composition between the consolidated past situations and the new regulatory demands.

The example showed in this study is about a conflict, which could not be resolved by the mere extinction of rights already constituted (rights of use of the reservoir and the water by the power generation service, responsible for the corresponding investments), so was conciliated in an indirect way by the sectorial norms about water (which, at the same time, give priority to the public supply in the capitation and impose the respect to the former rights), so as the complete solution should be based on more general norms about indemnity duty and in order to avoid unjust enrichment and compensate the economic losses caused.

Although the duty to indemnify is the legally correct solution for the case, its affirmation – which this study sought to do and base – is far from sufficient for the necessary legal security. There is a clear *deficit* of procedures in the sectorial norms involved, which allow the appearance of new grants, with direct impact on former rights, without the due analysis of the transition vital questions, at the right time and in a complete way.

How to evolve legally regarding this aspect?

An alternative would be the complementation of the sector's legal norms to impose procedures able to adequately equate the transition, for cases such as the one seen in this study. A more comprehensive alternative, so as it could apply to any sector and to all the spheres in the Federation, would be the inclusion in the Brazilian Law, of a general norm setting that all administrative decision that imposes new duty or law conditioning should provide a transition regime and, in case of not providing this, then guaranteeing to the obliged subject the possibility of negotiation of such a regime with the authority, as condition for effectiveness of the new duty or conditioning.

Proposal in this last sense is being examined in the National Congress, in the Senate Project of Law n. 349/2015, submitted by Senator Antônio Anastasia, with the purpose of including, in the Law of Introduction to the Norms of Brazilian Law/*Lei de Introdução às Normas do Direito Brasileiro* (the decree-law 4.657 / 1942, former Law of Introduction to the legal security and efficiency in the creation and application of the public law.[18]

18 The Idea has academic origin, as emphasized by the Senator in the Project justification, that accepted the text proposed by SUNDFELD and MARQUES NETO, 2013, pp. 277-285. In the version approved by the Senado Federal in 29 March 2017, the specific matter was treated in the provision as follows: "Art. 23. The administrative decision, controller or judicial that, with basis on undetermined norm, imposes right or new Law conditioning, or fixing new orientation or interpretation, shall provide

This paper final argument is that the *general right to the adequate transition* (*direito geral à transição adequada*) must be affirmed in the Brazilian administrative regulation, as it is dangerous that new regulatory demands are created without at the appropriate time its effects over the already constitutes situations are duly considered and conciliated.

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a regime of transition, when indispensable for the submission to the requirements, which operates in a proportional way, equanimous and effective, and without prejudice to the general interests. Sole Paragraph. If the transition regime is not previously set, the obliged subject shall have the right to negotiate with the authorities, according the peculiarities of the case, and observed the legal limitations, with the commitment for the adjustment, in the administrative, controller or judicial sphere, as the case may be."

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