Scientific Research Publishing

Beijing Law Review, 2024, 15, 516-551
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

# Renewal on Public Service Theory on Brazilian Law

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**How to cite this paper:** Santos, L. A. B. (2024). Renewal on Public Service Theory on Brazilian Law. *Beijing Law Review, 15,* 516-551.
https://doi.org/10.4236/blr.2024.152033

**Received:** March 7, 2024
**Accepted:** April 27, 2024
**Published:** April 30, 2024



## Abstract

A significant segment of Brazilian administrative law scholarship considers that the economic order entails a dichotomy between public services and economic activities. The firsts would be activities entitled by the government, carried out exclusively by it and under public law, while economic activities would be private and carried out under free enterprise. This theorisation has been strongly criticised since the 1990s, given its inability to explain statutory law after several regulatory reforms. However, there is still a gap in the replacement of this theory, especially when it comes to suggesting new theoretical foundations for understanding the economic order. The study evaluates this longstanding theory and concludes that this supposed dichotomy does not exist in contemporary law. In response, it proposes new theoretical bases considering the broad application of free enterprise and the existence of multiple regulatory regimes, tailored to the technical and economic conditions of each sector.

## Keywords

Public Service, Regulation, Economic Order, Public Utilities, Brazilian Administrative Law

## 1. Introduction

For almost 200 years, public service has been a fundamental concept for the development of administrative (and economic) law and it also has been in crisis. To this day, it is debated in several jurisdictions what would be its real concept and its application. For our part, we understand that much of this impasse resides precisely in the political and historical relevance of the issue.

This importance is also found in Brazilian law, since constitutional and legal provisions that expressly refer to the public service as a legal institute. Since the

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second half of the 20th century, Brazilian courts and scholars have mainly adopted one theory to understand and explain public service in the face of the constitutional economic order. We shall call it "dual theory".

The dual theory was elaborated mainly by two authors, Eros Roberto Grau and Celso Antônio Bandeira de Mello, both greatly respected legal scholars. As we will detail in the following section, this theory proposes in synthesis that the economic order is divided into two major poles: public service and economic activity. The first category would have as key features government entitlement to the services, exclusivity in the provision, and the application of the public regime, and shall be further detailed at item 2.1. On the other hand, economic activity is exploited by society, under free initiative, and a private law regime.

There is a dichotomy. These two poles are considered opposite and with different public purposes and legal characteristics, in such a way that it would be possible to separate each economic sector and assign it to its respective categorization.

Since the 1990s, this theory has been criticized by politicians and scholars, and has been disregarded in some court decisions (Grotti, 2003; Marques Neto, 2014; Menegat, 2014; Sundfeld, 2000b). Likewise, from this decade onwards, the Brazilian legislation and Constitution have been amended to adopt regulatory reforms that were not covered in theory and that, to a certain extent, contradict its foundations.

From an academic point of view, the opinions of legal scholars have made explicit the flaws and incompleteness of this theory and contrasted it with the regulatory reforms. Issues related to the opening of public services to free competition, attenuation of the public regime or the incidence of public interests on the private regime and the intense existing regulation are pointed out.

However, the legal scholars' opinions have mainly been applied to evaluate sectoral regulatory frameworks or to study specific legal and constitutional provisions (Grotti, 2001; Moreira, 2015; Stein, 2018). An effort has not yet been made to completely revise the dual theory, either to confirm it in this new context, or to propose a new theorization more suited to statutory law. Despite these criticisms, textbooks and many practitioners continue to apply the dual theory, albeit with caveats. It is necessary, therefore, to definitively review this theory and propose new theoretical foundations for the practice of administrative and economic law.

This article aims to explore codified law and evaluate whether the dual theory works as it proposes. It will also be necessary to evaluate the current constitution and understand whether the dichotomy between public services and economic activities is adopted.

Our thesis is that the economic order created by the Brazilian Constitution and reflected in legislation is not composed of a dichotomous categorization. As we will demonstrate, it is possible to verify the establishment of multiple and variable regulations that are not divided into watertight categorizations.

Argumentation will focus on two aspects of the dual theory that underlie its propositions.

First, in item 3, we will address the precept of state exclusivity in the provision of public services. This would be a consequence of government entitlement, that is, of the state's ownership of these services, in such a way that only the state or its contractors could exploit these services. For the dual theory, entitlement is provided for in the Constitution and that separates public services from any other activities, with exclusivity on the exploitation being an imperative rule and applied to all cases.

Secondly, we will discuss the allegedly opposition between legal regimes, being the public regime pertinent only to public services, and the private regime being pertinent to economic activities. This public regime would be characterized by the existence of special privileges, obligations and powers related to the state nature of the public service, while the private regime would be a common regime characterized by economic freedoms.

In both cases, we shall demonstrate that these precepts have no basis in the Constitution or in ordinary legislation, on the contrary, they can be considered violations of constitutional fundamental principles. We also found that this dichotomy is not sufficient to explain the behavior of regulation in Brazilian law, when analyzing the regulation of economic sectors.

For each of these aspects, we propose a new theorization that is more in tune with the legal and constitutional provisions and that allows us to understand statutory law, without the constraints of the dual theory.

## 2. Dual Theory: The Dichotomy between Public Service and Economic activities

### 2.1. Main Theoretical Propositions and Their Influence

The main concern of Brazilian doctrine at the beginning of the 20th century was to understand and justify state intervention in the economy, especially when industrialisation emerged and urban infrastructures such as electricity distribution were implemented. At first, authors such as Andrade (1937) and Pinto (1941) affiliated themselves with the North American theory of public utilities (Baldwin et al., 2012; Wade & Forsyth, 2014) and argued for public regulation of activities offered to the general public and exploited under certain conditions (for example, natural monopolies) (Marques Neto, 2014).

This approach, however, was quickly replaced and nowadays has no significant influence. The context changed in the 1930s, when increased economic intervention by governments called for a legal doctrine to support it. To this end, Themistocles Cavalcanti (Cavalcanti, 1964), Ruy Cirne Lima (Lima, 1939) and other authors presented new conceptions based on the notion of public service originally developed in France, which favoured this new interventionist face of the Brazilian state (Schirato, 2012).

Still under French influence, from the 1970s onwards, authors led by Eros

Roberto Grau (Grau, 1981, 2018) and Celso Antônio Bandeira de Mello (Bandeira de Mello, 1979, 2014: p. 19) worked to describe public service in Brazilian law. This theorisation was and still is very influential in Brazilian law, which is why we will focus our research on it.

The definition of public service would essentially pass through three criteria (inherited from French doctrine): substantive, organic, and formal (Braconnier, 2007; Chevallier, 2015). Those criteria represent public service's key features. Thus, activities that aim to meet the public interest (substantive) conducted by the Government, directly or indirectly (organic), through a public law regime (formal), would receive the label of public service. As a result, entire economic sectors were subjected to the public service regime, such as the electricity, airport, rail, road, sanitation, telecommunications, and postal services sectors.

Despite occasional divergences, opinions of legal scholars were marked by the distinction of public service from others economic activities. In unison, the scholars created a dichotomy in the constitutional economic order by arguing that public services would be a separate and exceptional category, apart from other economic activities.

On the one hand, in the public service, there would be a specific field of State action, with activities exploited by the Government in an exclusive manner (a priori forbidden to private entities) and governed by public law. On the other hand, the other economic activities would belong to society, freely exploited by private entities through competition, under private law. In this second category, there would also be a subcategory that contained the exception related to constitutional monopolies, that is, certain industries listed directly in the Constitution that would be exploited privately, but exclusively by the State for reasons of national security and collective interest.[1]

Underneath the legal concept, the true meaning of the theory of public service was the proposition of state entitlement on the provision of public services: the idea that a set of productive activities belong to the Government. In other words, it would be to say that if any given activity is in the public interest, then it must be carried out by the State and only by the State, according to the legal regime of the State (Chevallier, 2015; Koubi, 2014).

We will describe each of these key features and, in the following chapters, we will present criticism to them and demonstrate the evolution in the theory of public service in Brazilian law.

**Entitlement over public services: public interest and Government field of action**

At this point, the French influence was decisive on the philosophy of Brazilian administrative law. France has a mentality that positively cultivates the figure of

[1]Eros Grau describes the economic order as containing "economic activities lato sensu", which is subdivided into "economic activities stricto sensu" and "public services". For ease of reading, whenever the text uses "economic activities" we are referring to "economic activities stricto sensu". When it is necessary to refer to the whole economic order, we will use "productive activities". Although the Grau recognises that public services are "economic activities lato sensu", the dichotomy appears in the opposition between these and "economic activities stricto sensu".

the state and state intervention in the economic and social domains[2] (Giacomuzzi, 2011). The service public à la française, therefore, carries the image of a strong state and provider since the lessons of Léon Duguit (Chevallier, 1976; Duguit, 1923b, 1923a).

Following this tradition, Brazilian theory maintained that the State could and should exploit virtually any economic activity whenever the public interest is deemed to be present in such activities (publicatio). In doing so, the State would make the economic activity part of its domain, of its property, and would be the only one competent to exploit it. It is the "publicatio" that separates the field of public services from the field of private activities.

For Bandeira de Mello, the public service would be "an activity assumed by the State as its own, as its holder, that is, considered by it as internal to its typical field of action, that is, to the public sphere" (Bandeira de Mello, 2017, p. 78). Eros Grau, on the other hand, endorses the dichotomy when he says that "public service is to the public sector, just as economic activity is to the private sector" (Grau, 2001, p. 250).

Even before these scholars, other authors supported the idea of State (Government) entitlement regarding public services. Themistocles Cavalcanti indicates that public service is the "activity declared public" that is part of the purposes of the State and that is an activity dependent on the Government (Cavalcanti, 1964). For his part, Caio Tácito says that "public service […] it is an activity that only acquires this character when the State becomes the owner" (Tácito, 1975: p. 209). In the same way, Campos (1949) points out that the public service is not an activity like any other, but of a particularly public character and that it is primarily the responsibility of the State.

During much of the twentieth century, because of dual theory, a positive view of economic intervention developed in Brazilian law. There was an understanding that it would be up to the State to provide, through public service, the activities that were indispensable to the achievement of social cohesion and that served the social interest in that economic and political context (Grau, 2018: p. 124). Specifically, that the State could not relegate such important activities to the private market, nor would it be socially desirable for the government to only supervise their exploitation, as of any other private activity (Bandeira de Mello, 2017: p. 67).

The attribution of Government entitlement over public services portrays an ideological stance that supports economic intervention in the face of the public interest. As was characteristic of the Welfare State, it was up to governments to directly provide the services that were relevant to collective needs, while private individuals were responsible for carrying out other activities. The State, then, emerges with the image of being responsible for public interests, while private society would concern itself only with its own economic interests.

[2]In fact, as José Guilherme Giacomuzzi argues, this conception is in line with a culture favorable to state institutions historically rooted in the French collective imagination (state society), at least since the Middle Ages.

In this way, the entitlement over public service and its theory were instrumentalized by political interests as a method and justification of the State's intervention in the economic and social order, through the creation of state-owned companies or the nationalization of private companies. When the public service is identified, a new field for economic exploitation by the State is also indicated, a field that is entitled to it by right.

**The Government as the exclusive provider of public services**

According to the dual theory, the natural consequence of the entitlement of a public service is the government exclusivity regarding its provision (Grau, 2018; Schirato, 2012). In comparison, in a diametrically opposite way, economic activities would be open to free enterprise and competition, with the exception of constitutional monopolies. The basis for exclusivity in public services is precisely the fact that the public service is the responsibility of the Government and not of civil society, in such a way that the participation of private entities would only be possible through delegation, and competition with the public power is not allowed.

Exclusivity would be provided for in article 175 of the Brazilian Constitution, which establishes that the provision of public service is the responsibility of the Government and, contrario sensu, if it is the responsibility of the State, it is not that of civil society. This article only provides for the participation of private individuals in the public service in cases where there is delegation by the State, by concession or permission.

These would be exclusive public services, notably public services of an economic nature, such as energy distribution, telecommunications, sanitation etc. For Grau, "the legal regime under which public services are provided require that their provision be developed under privileges, including, as a rule, that of exclusivity in exploitation" (Grau, 2018: p. 91).

There would also be non-exclusive public services, such as health and education. In these cases, Articles 199 and 209 of the Federal Constitution expressly provided for private participation in the execution of services. But these cases would be exceptions and, thus, all other cases would be subject to exclusivity since the text of the Constitution did not provide for freedom of enterprise.

Considering that public services are part of the domain of the State, they would be exempt from the application of the principles of freedom of enterprise and free competition. The dual theory clarifies those public services "do not belong to the sphere of free enterprise" and, therefore, there would be no right for individuals to claim the provision of these activities.

The government exclusivity in the provision was made even more evident by the Supreme Federal Court in 2009 in a lawsuit who questioned the constitutionality of a federal law[3]. This law provided for the exercise of a state monopoly in

[3]We are referring to action against the violation of a constitutional fundamental right (*Arguição de Descumprimento de Preceito Fundamental*) no. 46, judged by the Supreme Federal Court. The purpose of this type of action is to question the constitutionality of a law, regulation or any government act. This action is also used to question the constitutionality of laws that predate the 1988 Brazilian constitution.

the postal services sector, exercised by the Brazilian Post and Telegraph Company (ECT). The claimants argued that the Constitution had exhaustively provided for public monopolies and the postal services were not included, so it would not be possible to create new ones by infra-constitutional legislation.

It was decided that the postal services would be public services, and not constitutional monopolies, according to the leading opinion of the then minister Eros Grau. As public services, the exclusive exploitation of postal services by ECT would be constitutionally allowed. This is what was consolidated in the summary of the Decision:

> Economic activity in the broad sense is a genus that comprises two species, public service, and economic activity in the strict sense. Monopoly is economic activity in the strict sense, undertaken by private economic agents. The exclusivity of the provision of public services is an expression of a situation of privilege. […] The Brazilian Post and Telegraph Company shall act on an exclusive basis in the provision of the services that are incumbent upon it in a situation of privilege, the postal privilege. The legal regimes under which public services are generally provided mean that this activity is carried out under privilege, including, as a rule, that of exclusivity. (Grau & Mello, 2009)

Justice Eros Grau's opinion only reiterates his own theory regarding the dichotomy between public services and economic activities. In addition, this theory is based on a political position which advocated a strong and vigorous Government to comply with its obligations under the Constitution. This would lead to State primacy in the provision of several public services. (Grau & Mello, 2009)

Therefore, government exclusivity is considered a natural consequence of the categorisation as a public service, since it is under state entitlement. This is an essential characteristic of the dual theory and we will analyse and counter-argue it in the next section.

There is also a sort of government exclusivity in the exploitation of constitutional monopolies, as expressly indicated by the Constitution for the mining, oil and gas and nuclear materials sectors. In these cases, monopolies are not public services and therefore exclusivity does not derive from state entitlement, but from an imperative of national security. They represent the withdrawal of these economic sectors from free enterprise and are thus comparable to the exclusivity that exists in public services.

Below we present **Table 1** summarising the propositions of the dual theory with regard to exclusivity versus free enterprise.

**Exorbitant regime of public law**

The last characteristic refers to the formal criterion, i.e. the legal regime of public law applicable to the performance of the activity, regardless of who carries it out. Still following the French tradition of Jèze (1950), Bandeira de Mello states that only those activities subjected to public law would be said to be

**Table 1.** Market access rules according to dual theory.

| Categorization according to dual theory | Market Access Rule | Example |
|---|---|---|
| Economic Activity | Free enterprise | All the activities not considered as "public service" |
| Economic Activity (Constitutional Monopolies) | Exclusivity based on national security | Mining, oil and gas and nuclear materials sectors |
| Public service | Government exclusivity | Airports, ports, highways, power generation, transmission, and distribution, sanitation, gas distribution, telecommunications |

a public service, with the formal criterion being the true determinant of the concept (Bandeira de Mello, 2017).

The public law regime would be identical or very similar to that applicable to other state functions (i.e., other activities without the character of economic exploitation, such as justice, diplomacy, issuance of currency). As in all Administrative Law, this regime is based on the idea of the supremacy of the public interest over the private interest and on the unwaivable of the public interest, which entails the provision of attributions, privileges, and burdens for public action (Bandeira de Mello, 2014).

Therefore, it is the granting of the powers for the satisfactory execution of the service (and of the underlying general interest), which it is believed could only be guaranteed by the public authorities. For example, the power to order expropriation, to levy taxes, and to use public property. Legislation and jurisprudence also reiterate the attribution of benefits and advantages that are distinctive of public service, not available to other economic agents, such as extrovert powers (expropriation, exercise of police powers etc.), tax benefits or unseizability of assets. On the other hand, the activity would be constrained to the fulfilment of the principles of continuity, equality, mutability, low tariffs, transparency, impersonality, and universality (Grotti, 2003).

The public service, then, carries exorbitant and derogatory provisions from the common law, in the form of privileges or burdens typical of State powers, including coercive techniques (puissance publique (Hauriou, 1927)), to guarantee the provision of the service.

Once again, the dichotomy between public services and economic activities is repeated by establishing a duality of legal regimes: public versus private regime. The first was marked by a set of prerogatives, privileges and burdens that would be proper to the Government. The second, applicable to other activities, would be based on equality and economic freedoms.

This duality is also evident in the differentiation of the regimes of state-owned

companies, seen as exploiters of economic activity (private regime) or as providers of public service (public regime). In case law, some of the differences in the regimes stand out: 1) immunity from seizure of assets, 2) tax immunity and tax privileges, 3) labor relations, 4) requirement of public tender for personnel and 5) requirement of bidding, among others.

Duality is an essential characteristic. Accordingly, the public regime is strictly different from the private regime and should not be combined. We will analyse and counter-argue it in the next section.

Below we present Table 2 summarising the propositions of the dual theory with regard to public versus private regimes.

## 2.2. Economic and Political Foundations for Renewal

The dual theory was standard for legal scholars and for legal interpretation by the Courts during the second half of the twentieth century. In this period, the State expanded its economic intervention through state-owned companies and public agencies designed to meet all the tasks placed under the government entitlement over public services. The theory of public service, therefore, maintained an intimate relationship with the Welfare State (Chevallier, 2013; Couto e Silva, 1997).

However, the Welfare State was depleted due to the deterioration of macroeconomic and fiscal conditions in the country in the 1980s and 1990s, causing economic and political crises (Bresser-Pereira, 1996). The inability of governments to finance their economic intervention became evident and it would no longer be possible for the State to maintain its status as universal provider of goods and services to society.

It became essential to find new ways to provide those services that were then provided by the State. The solution adopted in Brazil and globally was to privatize government activities, in addition to allowing the collaboration of private

Table 2. Legal regimes according to dual theory.

| Categorization according to dual theory | Legal regime | Example |
|---|---|---|
| Economic Activity | Private Law (contractual autonomy, equality, supervision by the police power) | All activities not considered as "public service" |
| Public service | Public Law (privileges and burdens, exorbitant powers/puissance publique, supremacy of the public interest) | Airports, ports, highways, power generation, transmission, and distribution, sanitation, gas distribution, telecommunications |

agents and other forms of financing. Thus, the divestiture of state-owned companies, the flexibilization of monopolies, the concession of public projects and services, and the opening of markets to private agents, both national and foreign, were used. Room was opened for private, mixed, or cross-sectoral solutions between the public (government) and the private sector to provide these activities (Cassese, 2010).

This has impacted the structure of economic sectors that have long been considered public services, such as the electricity and telecommunications sectors. We saw greater private participation, competition, the application of private law and regulation. As a result, the dual theory of public service itself has shown to be less and less appropriate to the reality of statutory law.

There has also been a paradigm shift regarding the political and institutional foundations of state economic intervention. Criticism arose in the political scene regarding the size of the State and its assumption of entire economic sectors to the exclusion of private companies, an ideological stance considered undemocratic and cooperative.

In this context, new ideologies and theorizations emerge about the role of the State in relation to the economy and services of high relevance to society, in such a way that the constitutional objective of national development, poverty eradication and reduction of inequalities is still fulfilled.

Among several possible positions, this study is based on the theory of the Ensuring State to reanalyse and propose renewals in the theory of public service in Brazilian law.

The concept of the Ensuring State proposes, in short, that it is up to public institutions to ensure the satisfaction of public interests and fundamental rights even in activities operated by private entities, which has become known as the "public duty of guarantee". This concept has been advocated since the 1990s by scholars such as Anthony Giddens, Eurico Bitencourt Neto, Folke Schuppert, Jacques Chevallier, Pedro Costa Gonçalves, Schmidt-Assmann, and others (Bitencourt Neto, 2017; Chevallier, 2009; Giddens, 1999; Gonçalves, 2010; Schmidt-Assmann, 2003; Shcuppert, 2003).

The axiological centrality that fundamental rights exert on the State is not altered, including regarding the duty to ensure the provision of certain goods and services in view of their importance for the realization of these rights, notably social rights.

In economic matters, the main aspect of the public duty of guarantee will be: 1) guarantee of the provision of essential services; 2) guarantee and protection of the rights of users of these services; 3) guarantee, protection, and promotion of competition and 4) guarantee of other legal values (health, employment, environment, etc.) (Gonçalves, 2008).

Unlike the Welfare State, it is proposed that, in order to fulfill this duty, governments may act in different ways, according to the nature of the responsibility that statutory law has placed on the state. It will be able to act either by only or-

ganizing the minimum conditions for the exercise of less sensitive productive activities (framing responsibility), or by supervising and ensuring that the private sector adequately explores productive activities of high relevance to fundamental rights (guarantee responsibility), or by directly executing the activity through state-owned agencies and companies (performance responsibility) (Gonçalves, 2010).

There is no prejudice to the social purpose of the State, which continues to be inscribed in Article 3 of the Constitution. But the premise that the State should monopolize the service to the public interest is undone, in favor of considering private action with the due public regulation also appropriate.

It is a fact that private individuals are increasingly in charge of typically state activities. This new reality causes the externalization of state purposes (Gonçalves, 2010), with a certain "replacement of the state" by private entities in the production of the public interest, such as in public services, self-regulation, product certification. Not only in relevant productive activities, but also in terms of social assistance, security, currency, and international relations.

In the end, the constitutional commitment to fundamental rights, social development or the reduction of inequalities is not altered (Bitencourt Neto, 2017). What strongly changes are the means by which governments act to achieve these objectives. From a position of universal provider of goods and services, with a strong prevalence of direct and exclusive state intervention, one moves to the position of guarantor and supervisor of economic activity.

As a result, the theory of public service itself needs to be reviewed and reframed in this new political and economic scenario. There is no longer the same financial willingness on the part of governments to finance and exploit various economic sectors, nor is there the same political support for programs that overvalue economic intervention. Practices have been changed, as well as the constitution and legislation have been amended. Legal theory must also change.

## 3. Free Enterprise on the Economic Order

### 3.1. Counter-Argument on Government Exclusivity over Public Services

In item 2.a, we described that the dual theory establishes a relation between the Government and the public service based on the idea of the Government as being the sole entitled party to provide them, as if public services were reserved to the Government and part of its exclusive domain. For this very reason, public services would be exempt from freedom of enterprise and only the Government could conduct those activities, except when governments delegated the exploitation to a private entity as a part of the exclusivity privilege.

The question is whether this interpretation is consistent with the Brazilian Constitution and is supported as an explanatory theory of statutory law. Our conclusion is that government exclusivity over public services is not a valid legal rule, and the application of the right to free enterprise for all economic produc-

tive is mandatory (Schirato, 2012). Any restriction on free enterprise must be reasonable and proportionate in view of the pursuit of public interests (Marques Neto, 2006).

The first ground for this argument is the realisation that the mere existence of public interests and fundamental rights in each economic sector does not lead to necessary government direct intervention (Marques Neto & Garofano, 2014). Certainly, the public interest creates duties for the State, but this does not mean the total exclusion, a priori, of the private participation in the achievement of those interests.

There is no express or tacit rule in the Constitution that allows the assumption of government exclusivity, in fact, as will be shown, such a premise violates the Constitution. The dual theory was based on the text of Article 175, which establishes that "it is incumbent upon the Government […] the provision of public services." An interpretation is then made a contrario sensu to argue that "if it is the responsibility of the Government, it is not the responsibility of civil society". But this interpretation is not valid. The Brazilian Constitution is pluralistic and democratic and does not create a hierarchical relationship between government and society, therefore, this premise of opposition between one and the other violates constitutional values.

In view of the lack of an express provision in the Constitution, it cannot be interpreted that Government exclusivity is implicit, as if it were a natural consequence of the public service. This leaves the application of the principle of free enterprise completely suspended, without the necessary constitutional justification. In short, this interpretation adopts (for historical and ideological reasons) an interpretation that prevents the full and systematic application of constitutional principles.

There is no doubt, the Constitution must be interpreted in a consistent and systematic manner, without excluding from the analysis some of its provisions. Thus, we do not believe that it is possible to sustain that such an important part of the economic order, that is, the public services provided for in Article 175, is exempt from the application of freedom of enterprise, which is a foundation of the Brazilian Republic itself.

In this sense, restrictions on freedom of enterprise cannot be presumed (as well as on any fundamental principle or right). They must be based on the pursuit of other principles and rights and are only justifiable to the extent that they are proportionate to the satisfaction of another public interest, as constitutional theory already applies widely to other issues in Brazilian law and around the globe.

Any restriction on freedom of enterprise in public services, therefore, must start from a specific and concrete demonstration that the proper provision of services (i.e. the satisfaction of the fundamental right involved) requires such a restriction. According to the doctrine already consolidated on the subject, this demonstration must be made based on proportionality tests involving necessity,

adequacy, and proportionality stricto sensu (Aragão, 2001; Ávila, 2005; Canotilho, 1993).

In addition to being a misinterpretation of the Constitution, the premise of Government exclusivity also does not work as an explanatory theory of reality. The regulation of various economic sectors, once considered exclusive public services, has undergone reforms and now allows the entry of private entities and competition, regardless of delegation by the government.

The clearest examples are from the telecommunications, energy, and port sectors. From the 1990s onwards, changes in the Constitution and infra-constitutional legislation created instruments (such as unbundling, third-party access and authorizations) to enable private participation in these sectors, in competition with public entities (Casagrande, 2010). Currently, parts of these economic sectors are exploited by both the public and private sectors, which compete directly in said markets.

The Supreme Federal Court has already ruled on the constitutionality of the exploitation of telecommunication services by means of authorization and under private law, confirming the possibility of opening to competition sectors traditionally considered exclusive public services (Direct Action for the Declaration of Inconstitutionality - ADI 1668).

In addition, legislation specifically applicable to public service concessions (Federal Law No. 8978/1995) expressly indicates that there is no guarantee of exclusivity for the exploitation of the activity, except in cases duly justified by technical and economic conditions, which directly contradicts the proposal of the dual theory.

If we analyze only public services in which there is some kind of exclusivity, even in these cases we will see that there is still competition between the different providers, whether they are delegatees or the Public Administration itself. This is visible in the Brazilian airport market, in which each airport is granted to the private individual exclusively (since it would not be possible to have two managers of the same infrastructure), but this private party ends up competing with concessionaires of other airports or other modes of transport. This type of competition between public service providers has been more recurrent in the face of federal and local policies for the concession of their infrastructures. In other words, there is competition even within the public service.

As a result of all the above, government exclusivity over public services, which was a pillar of dual theory, is being overcome. With it, the dichotomy made between public services and other economic activities is also overcome, based on the criterion of exclusivity versus competition.

Perhaps the most striking consequence of this change in the conception of public service is the opening to competition of sectors previously considered exclusive (opening to competition) which, added to the other consequences discussed above, leads to the loss of usefulness of the classic theoretical economy between public service and economic activities (Marques Neto & Garofano,

2014: pp. 68-69).

The position we hold in this study is that exclusivity is not a characteristic of public services (Menegat, 2012; Schirato, 2012). Free enterprise applies without distinction to all productive activities and any restriction must be proportionate to the satisfaction of another fundamental right. This restriction shall be applied only when necessary for the quality of the services provided, in accordance with the technical and economic needs of the market. Therefore, instead of exclusivity as a premise, there will be the regulation of access to the market, with greater or lesser restriction of free enterprise, as we will explore hereinafter.

### 3.2. Free Enterprise and Levels of Access Regulation

We argue that there are not two categories of productive activities, such as the exclusivity of public services versus the free enterprise initiative of other economic activities. In the item above, we demonstrate that the principle of free enterprise applies to all productive activities and that any restriction must be justified.

Developing this demonstration, we propose that different access regulations exist, with greater or lesser applicability of free enterprise. The choice of level and instrument for regulating access is directly correlated to whether competition can exist between economic agents in that specific sector, as well as ensuring the technical capacity of each operating company (Lodge & Wegrich, 2012). It is up to the legislator and the regulatory agency to choose and apply the different techniques, with due regard for the principle of free enterprise and the proportionality required in its restriction (Aragão, 2001; Marques Neto, 2006).

At the beginning of this gradual scale, level of null or low restriction, there are cases in which there is wide freedom of initiative by any economic agent, for example, the cases of sale of office supplies, furniture, or other low-risk activities[4]. In these cases, the existing regulation does not provide for any control of access and permanence in the market or provides for generic and quite simple requirements. If they exist, requirements such as permits, sanitary or urban licensing could be applied, according to the specific regulation of that activity and the location of the enterprise.

We can refer to a police power with the objective of conforming the exercise of economic freedoms with the fulfilment of public order requirements, such as the protection of relevant legal values (safety, hygiene, environment) and the safeguarding of public goods (Binenbojm, 2016).

At the second level, medium restriction level, some degree of restriction for the exercise of the activity is found for the exercise of the activity, in which there is a more expressive barrier to entry into the market, through the provision of

[4]The Economic Freedom Law, Federal Law No. 13,874/2019, even provides for the right to access low-risk economic activity, regardless of any act of release: "Art. 3 The rights of every person, individual or legal entity, essential for the economic development and growth of the country, subject to the provisions of the sole paragraph of article 170 of the Federal Constitution, are: I - develop low-risk economic activity, for which it uses exclusively its own private property or that of consensual third parties, without the need for any public acts of release of the economic activity."

two main instruments: regulatory authorizations and concession contracts.

The authorizations regulate access to economic activities, since they require minimum conditions of technical, economic, and legal qualification necessary for the exercise of the activity by the interested party (Aragão, 2002; Torres, 2015). Through this procedure, the regulatory body seeks to ensure that the interested individual has the technical and economic capacity to explore that economic activity in a manner compatible with the parameters provided for in the sectoral regulation[5].

Currently, it is possible to find the use of regulatory authorizations in activities previously considered as public services and that have now been opened to competition (telecommunications and electricity generation), as well as in economic activities of social relevance that were never considered as public services (banks and payment institutions) or even in activities under a constitutional monopoly of the Federal Government (oil and gas).

Going beyond the categories of dual theory, authorizations are adequate to regulate access to economic activities relevant to the satisfaction of public interests, whose technical and economic characteristics are favorable to the plurality of operators and competition among them. Without unnecessarily harming free enterprise, the regulator's option is to associate broad access to the activity with the fulfilment of requirements for the benefit of the public interest, through the quantitative and qualitative control of the agents operating in this market.

The authorizations receive a specific legal regime for each economic sector, which is more or less intense in terms of the procedure for obtaining them, the requirements and/or the conditions for permanence in the market. For example, with higher levels of restriction, the regulation of the telecommunications sector provides that the granting of authorizations may be limited and preceded by bidding when the excess of competitors is detrimental to the provision of services in each location.[6]

The second instruments used by Brazilian law to regulate access to productive activities are concessions (Garcia, 2019; Marques Neto, 2016). As with authorizations, there is no single legal regime for concessions, and they can be governed by public law (sanitation sectors, airports) or private law (mining and oil and gas sectors).

The use of the concession may present more or less restrictive levels of freedom of enterprise, depending on the context of its use. Concessions are often used side by side with authorizations to control access to the same economic ac-

[5]It is interesting to note, however, that the increase in the relevance of the activity will not always result in the tightening of access regulation, and it is always possible that the regulatory response is the control of the activity by other means or in other aspects, such as its price, quality, quantity, among others.

[6]According to the Telecommunications Law: "Art. 136. There shall be no limit on the number of service authorisations, except in the event of technical impossibility or, exceptionally, when an excess of competitors may compromise the provision of a type of service of collective interest. Paragraph 1 - The Agency shall determine the regions, localities or areas covered by the limitation and provide for the possibility of the provider operating in more than one of them."

tivities (e.g., telecommunications and ports), so that both instruments represent similar restrictions (and not diametrically opposed as the dual theory would state).

The control of access to the activity occurs through the requirement that the granting of concession contracts be preceded by bidding procedure (except in some cases admitted by law). In this bidding procedure, the government can establish quantitative criteria (number of operators) and qualitative criteria (technical and economic qualification) for the selection of the economic agent that will be the concessionaire. As we have mentioned, according to Law No. 8987/1995, the rule is that the concession is granted on a non-without exclusivity basis, so in such a way that there can be only one, two or multiple more concessionaire companies of the same service, if this is technically and economically possible.

In other words, exclusivity is the exception, even in cases where the provision of services is preceded by bidding. Exclusivity can only be granted if there are technical and economic reasons that justify it, to favour the quality of the services provided.

It is in only the third degree of our scale, the level of intense restraint, that exclusivity is effectively found and is justifiable. This grade is reserved for activities in which competition is technically impossible or inconvenient to the proper provision of services and the satisfaction of present fundamental rights. In such cases, the regulatory body establishes exclusivity and intensively controls access to the activity, allowing it to a single or a few operators as a way of ensuring the quality of the services provided.

The evident hypothesis of this scenario is the natural monopoly, in which the production of goods and services has "sub-additive costs", meaning they are more efficient when produced in large quantities by one enterprise than in smaller quantities by different competitors. Correlatedly, they still have characteristics that hinder competition, such as sunk costs, the unfeasibility of duplicating infrastructures and the need to use public and private goods. In this context, there are barriers to entry for new operators and there is greater efficiency in having the incumbent as the sole provider (Gómez-Ibáñez, 2003; Ogus, 2004).

Many of the main social and urban infrastructures depend on natural monopolies, such as sanitation, transmission and distribution of electricity, railway branches, among others. All these activities provide services that are essential to fundamental rights and would be at risk or downright inefficient if provided by two competing companies. In these exceptional cases, then, there is a proportional and justified derogation from freedom of enterprise and competition, given the specific economic context of those activities. Usually, these services are operated directly by the Government branch to which the service is entitled, through a state-owned company or agency (without a bidding process), or through a concession contract with a single private party.

In addition to these three main levels, we can also demonstrate that there is an interchangeability of the forms adopted for access regulation. The different instruments can be associated and used at different levels, with more or less restriction, in such a way that it contradicts the categorization predicted by the dual theory.

Traditional public services, such as telecommunications, energy, ports, and railways, are now subject to free enterprise and have modes of provision that combine regulation and competition, limiting restrictions on free enterprise only to those cases that are necessary and duly justified (Joaquim Neto, 2015; Marques Neto & Zago, 2018). There may be an asymmetry of regimes, that is, when the activity is simultaneously subject to authorizations (private regime) and concessions (public regime). Recently, it has also been possible to convert public service concessions into authorizations in the telecommunications sector[7]. All of this contradicts the explanations of dual theory.

There is also the insertion of free enterprise in activities considered as constitutional monopolies (now governed by concessions and authorizations) and, in the reverse movement, there is the imposition of restrictive requirements on access to economic activities to be exploited by private agents (authorizations preceded by bidding) (Aragão, 2005).

All these changes in the economic order have maintained their constitutionality, as decided by the Supreme Court at different times.

We present, therefore, that the regulation of access has at least three major levels of restriction to free enterprise (low, medium, and high). Within each of these levels, there will be more specificities, such as the possibility of quantitative limitation of authorized companies or the granting of concessions to different competing companies. In any event, the right to free enterprise may be derogated from only in a specific, justified, and proportionate manner.

The public service, as thought by the dual theory, then has a very specific place, associated with those activities of high social relevance and that cannot be provided in broad competition. That does not mean that, for that reason, these services belong to the State or that it has any discretionary power. But it does mean that the government has a duty to regulate access to this market (as well as other aspects, such as quality and price), with the aim of favoring public interests.

Once again, we see here the failure of the dichotomy in understanding the current formats of the economic order. We disagree with the theory that provides for only two forms of access to economic activities (in competition or in exclusivity). We explain that there are at least three levels with other possible subdivisions, in addition to interchangeability between public and private regimes, which are supposed to be antagonistic, as shown in **Table 3**.

[7]Since 2019, the Telecommunications Law has allowed concession contracts to be converted into authorisations at the request of the concessionaire. To this end, the concessionaire must uphold its investment obligations and ensure that adequate services and prices are maintained in regions without competition.

**Table 3.** Proposed regulation access levels.

| Level of access regulation | Access regulation instrument | Example | Category according to dual theory |
|---|---|---|---|
| Low | Without prior authorization or mere communication | Sale of furniture | Economic Activity |
| | Licences | Pharmacies | Economic Activity |
| Medium | Regulatory authorization | Power Generation, Banking, Energy Trading | Economic Activity |
| | Regulatory authorization through bidding (quantitative limit) | Telecommunications, private railways | Not considered (theory does not provide limitation to authorizations) |
| | Public service concessions and competitive market | Telecommunications, Power Generation, Airports | Civil service |
| | Oil & Gas Concessions | Oil extraction | Economic Activity (Constitutional Monopoly) |
| | Regulatory asymmetry (authorizations and concessions) | Telecommunications, Ports, Power Generation, Energy | Not considered (theory does not predict the existence of asymmetries) |
| | State-owned enterprises in a competitive market | All above | Economic Activity (including constitutional monopoly) and Public Service |
| High | Exclusive public service concessions | power transmission and distribution, sanitation, gas distribution | Civil service |
| | Constitutional monopolies (not granted to private entities) | Nuclear minerals | Economic Activity (constitutional monopoly) |
| | State-owned companies with exclusivity in the service | All above | Economic Activity (including constitutional monopoly) and Public Service |

## 4. Main Changes on Public and Private Regulation

### 4.1. Absence of a Dichotomy of Legal Regimes

The regime of exploitation of productive activities is a theme that has undergone significant changes over the last decades, causing a disruption in the dual theory and its understanding of Brazilian law.

Dual theory has always considered that there was a dichotomy between legal regimes: either the private regime (of economic freedoms) is applicable, or the public regime (characterized by privileges and burdens typical of Public Administration). Throughout this topic, we will explain that this dichotomy should no longer be used to explain and interpret Brazilian law, precisely because it is not found in statutory law.

This hypothesis is supported by three arguments: 1) firstly, there is not one single public service regime, but multiple possible ones, 2) secondly, the regime considered to be public is gradually being combined or partially replaced by private regime, and finally 3) the regime considered private has intensified its regulatory requirements, with the aim of reaching public interests, similar to those of public services. In the end, we hope to have shown this supposed dichotomy is not sustainable in Brazilian law.

For the first argument, the starting premise is that Article 175 of the Constitution does not specify or detail the regime under which public services must be provided (Schirato, 2012). It is only said that the service can be directly provided by the government or it can be delegated to private entities, preceded by public bidding, but nothing more. Essentially, this article provides that the provision of the public service will be determined by ordinary law. For each sector, the legislator is offered broad decision-making freedom to choose the regulation of access, price, quality, among others (Guerra, 2017).

As pointed out by Alexandre de Aragão, "the Constitution sets the ends of public services, but leaves great flexibility in the choice of means (more or less direct provision, more or less competition, etc.)" (Aragão, 2017, p. 128). Accordingly, Carlos Ari Sundfeld states that "there is no single constitutional project in relation to all of them [public services], leading to common objectives to be achieved, uniform exploitation mechanisms or a universal legal regime" (Sundfeld, 2000a: p. 318).

In the same sense, one cannot overestimate the content of the traditional "principles of public service", inherited from the French Louis Rolland and his "lois du service public" (equality, mutability, and continuity) (Braconnier, 2007). These principles exist only in legal scholarship and are mentioned very vaguely in legislation, being no more than indeterminate concepts, since they do not allow an exhaustive knowledge of their content and depend on other norms for their concrete application.

The truth is that the public service regime and the so-called principles of public service will be defined on a case-by-case basis, according to the determina-

tions of the specific regulation of each economic sector. In practice, there are a range of different laws on the regulation of public services, with notable distinctions in the regime applicable to each activity and economic sector, and may exist differences within the same economic sector (regulatory asymmetries). There is no sole content for these principles.

The public service regime shall be defined not only by law, but also in normative acts issued by the Government. Sectoral regulation and regulatory agencies play an essential role in filling these indeterminate concepts and in defining the legal regime effectively applied to public services, insofar as the legislation itself delegates the definition of rules to regulatory agencies (Guerra, 2012). This occurs especially with the objective of attributing greater technical quality to the regulation (which the legislator is not always able to do).

The existence of privileges and burdens typical of the Public Administration are equally variable and are not all applied in a uniform manner. Any exorbitant powers, imposition of burdens or restrictions on economic freedoms (especially on free enterprise) must be evaluated individually and justified in the light of the technical and economic needs of the specific case.

There is, therefore, no general regime applicable to all public services. Lawmakers and regulatory agencies will have to create specific rules for each economic sector, and there are notable differences between them. There is indeed a multiplicity of public service regimes, with specific sectoral and contractual regimes adapted to the fulfillment of the public interests that are present in each of the activities.

The public service should be increasingly identified as an instrument for the fulfillment of public interests, and less so as a justification for a supposedly necessary attribution of exorbitant powers and imposition of government exclusivity.

Our second argument is that the public service regime is gradually being combined or replaced by the private regime (Aragão, 2017; Gonçalves, 2008; Marques Neto, 2009). In other words, there is no dichotomy, and these regimes are not opposite, but coexisting and complementary. This dispels the idea that it would always be necessary to apply the privileges and prerogatives typical of the public law regime over services of high public interest.

The strongest evidence of this combination is the fact that several sectoral regulations provide for the coexistence of public and private regimes in the same economic activity, the so-called regulatory asymmetries. This would be impossible and would violate the foundations of dual theory, but it has been a reality in Brazilian law since the 1990s.

This is the case of telecommunications, in which the legislation provides that the same activity can be carried out under private law, and it is only mandatory for the company to obtain a regulatory authorization (Bandeira de Mello, 2008; Marques Neto & Coscione, 2011). At the same time, another company may carry out the activity through a concession contract, the rules of which impose more

duties on the company (such as universal access to the service). Similar provisions are made in the electricity, port, and rail sectors.

Two other examples also demonstrate the insertion of private law rules into the public service regime: the application of consumer legislation and the hybrid nature of state-owned enterprises (Hachem & Faria, 2016; Pereira, 2008).

In the first case, the innovation lies in mitigating the existing exceptionality in the public regime, in favor of the adoption of civil law. There is an old distinction (inherited from French law) between the rules applicable to the "user" (of public services) and the "consumer" (of private economic activities), which is yet another face of the dichotomy upheld by dual theory. Unlike the consumer, the user would be part of a special relationship under public law with the provider of a given public service. Indirectly, the dual theory tries to show that the relationship between the user and the public service provider should be considered analogous to the relationship between the citizen and the government for the collection of taxes or for the exercise of other public functions.

However, it is increasingly clear that public services involve the provision of economic utilities and not the exercise of a public function based on a hierarchical relationship between citizen and State. Both the user and the consumer are inserted in a commercial relationship, in which they are recipients of a good or service provided by another person in return for payment (tariffs).

In addition to this theoretical context, legislation (Federal Laws No. 8987/1995 and 13,460/2013) is explicit in indicating that the Consumer Protection Code (Federal Law No. 8078/1990) is applicable to public service concessions, in addition to other rights. This code also provides for a definition of consumer relationship that encompasses the public services provided. More specifically, regulatory agencies also enforce consumer legislation.[8]

It is therefore clear that public services are also governed by consumer legislation, i.e. by rules of private law. There are no such striking specificities in public services that justify the total inapplicability of private law (in item 4.b we will return to this point). This was not foreseen by dual theory and, to some extent, invalidates its propositions.

In the second example, we show that the regime applicable to state-owned enterprises does not contemplate a rigid separation between public and private, as the dual theory assumed. We understand a hybrid regime exists (Bedone, 2017; Coutinho et al., 2019; Schirato, 2016).

Reality shows that state-owned companies are embedded in the free market, with several examples of publicly traded companies with minority shareholders demanding profitability. Many of them have several business lines, ranging from public services with exclusivity, to activities with wide competition. In this con-

[8]In the telecommunications sector, Resolution No. 632/2014 of the National Telecommunications Agency (ANATEL) sets out the "General Regulation of Consumer Rights in Telecommunications Services", simultaneously regulating both services provided under the public regime and under the private regime (Article 1 of Annex I of the Resolution). In the electricity sector, Resolution No. 414/2010 of the National Electricity Agency (ANEEL) establishes the rights and duties of consumers.

text, how to choose the applicable legal regime?

The legislation also shows signs of overcoming the dichotomy in the classification of state-owned enterprises. Federal Law No. 13,303/2016 ("State-Owned Companies Law") explicitly states that its rules apply both to companies that explore economic activity (a priori, with a private regime) or public services (a priori with a public regime). Although the law seems to resume that dichotomy, it does so to contradict it and apply the same legal regime to all state-owned companies.

The jurisprudence of the Supreme Federal Court has also been evolving in this regard. Although the court initially adopted the dichotomy, since 2006 it has issued decisions that evaluate the legal regime based on the market context in which the company operates, and not only the supposed legal nature of the activity (public v. private).

The court has already established that the privileges of the public law regime do not extend to state-owned enterprises that provide activities with competition or that have the objective of distributing profit to shareholders, as this could cause an artificial imbalance in the competitive conditions[9]. It has also been held that public law constraints, such as the requirement of bidding, are not applicable in some cases to state-owned companies, because they could harm their competitiveness.

In turn, the Superior Court of Justice has already declared that the immunity from seizure of assets (a privilege granted by the public law regime) should be applied in a very restricted manner, only to assets that are essential to the public service[10]. With this, it removed the extension of this privilege in favor of all the assets of state-owned enterprises, even if they provide some public service. This means that the public regime is not fully applicable.

It is no longer possible or advisable to use dichotomous theorization to understand and determine the regime applicable to state-owned companies in the face of a new scenario of these companies' operations and a new profile of the economic order. It is necessary, therefore, to study new parameters and criteria that deal with this new complexity.

Finally, our third argument states that the regime considered to be governed by private law has had its regulatory requirements intensified to better serve public interests and, in fact, has become similar to public services.

This phenomenon of the "publicization of private law" is a result of the privatization of public companies and the opening to competition of public services (until then exclusive) (Aragão, 2017; Dickinson, 2006; Vincent-Jones, 2007). At this moment, many activities considered relevant to society began to be explored directly by private companies, in such a way that it was necessary to expand and increase regulation over them, to ensure that the service would be provided properly, and public interests would be served. The same movement was noted for activities that, although never considered public services, are highly impor-

[9]Extraordinary Appeal 599,628, ruled by the Supreme Federal Court.

[10]Special Appeal No. 176,078, ruled by the Superior Court of Justice.

tant, such as the banking sector.

The intensification of regulation can be found in different contexts and can affect essential aspects of the provision of the activity, such as market access, price, quantity, quality, etc. The tendency is for regulation to be specifically and substantially different in each economic sector to the detriment of a single regime, as a way of dealing with the increasing complexity of economic relations.

The most notable evidence of this phenomenon is the incorporation of public service obligations[11] for private activities in Brazilian law, as a consequence of privatisation. This means applying to activities of high social relevance shall have some of the same duties that exist for public services, concerning continuity, mutability, universalisation and low prices. All of these characteristics are aimed precisely at satisfying fundamental rights, which are involved in both public services and private activities.

As an example, the telecommunications law provides that services provided under private law must guarantee a series of qualitative requirements, such as an increase in the supply and quality of services, the fulfillment of the social function of these services and the technological development of the sector (Marques Neto & Coscione, 2011). It is also generally foreseen that conditions may be created that are linked to public purposes.

In the road transport sector, the legislation establishes that operations, regardless of their legal regime, are subject to the general principles of protecting users' interests in terms of the quality, supply and affordable and efficient price of the services provided. In the port sector, legislation obliges low prices, quality and protection of users, also regardless of the public or private regime.

The existence of these obligations applicable to the private sector has the effect of bringing the public and private regimes closer together. In both cases, the state is seen, via regulation, to control the provision of the activity in terms of quality and price. In the end, the regulation of these obligations ends up playing the same role as the principles of public service in establishing minimum parameters for the operation of activities with high social relevance.

In many economic sectors, there is also an increase in police power, in which episodic, authorizing or prohibitive action gives way to continuous monitoring and direction of economic processes by the Administration (Binenbojm, 2016). The investigatory and sanctioning powers of regulators are added, which have the duty to punish economic agents with fines and even with the banning of the company from the market.

Naturally, such requirements resulting from the intensification of regulation make it more expensive and difficult to provide the service and this may imply a restriction on freedom of initiative (for example, with the imposition of bur-

[11]Public service obligations were firstly created by the European Law. It refers to "refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level" (European Comission, 2003).

dens), but again the rationale applies that any limitation must be proportionate and justified.

The intensification of regulation also shows the convergence between the public and private regimes (i.e., between economic activities and public services). A regulation focused on the satisfaction of public interests is developed, including the imposition of obligations and burdens on private agents, in a manner not unlike that existing in the public regime.

Therefore, this new profile of regulation demonstrates that there is a shift in the way the Public Administration acts, which now moves to an indirect, regulatory, and supervisory action of economic activity (Schmidt-Assmann, 2003; Braithwaite, 2011; Yeung, 2010). It is up to the government to ensure that the activity is exploited in a manner satisfactory to the public interest, even if the government is not the direct provider of the activity. The search for the provision of fundamental rights through the economy is still maintained, but the change is in the means, in the instrument to be used by the Ensuring State.

In addition, there is the recent possibility of asymmetric legal regimes, i.e. the same activity being simultaneously governed by private law or public law, depending on the operator (as is the case in the telecommunications, energy and port sectors). From a pure and simple dichotomous categorisation, it is not possible to classify the productive activities affected by these phenomena.

With all our last arguments, we have demonstrated that the dichotomy between public services versus economic activities is no longer functional in Brazilian law. As mentioned, the statutory law itself does not replicate this dichotomy and, in several themes, the combination or substitution between public and private regimes is found.

In this sense, instead of disputing between public service and economic activity, it will be necessary to verify all the regulation in order to understand the regime, far beyond a mere public-private dichotomy: "from now on, either we dive into the particularities, not only normative but also technical and economic, of each sector of the economy, or we will have nothing to say about the law" (Sundfeld, 2000b: p. 34).

### 4.2. Demonstration of Multiple Legal Regimes

The main take-away from item above of this study is that the economic order is not a dichotomization between economic activities and public services. The sectorization of regulation and the complexification of the applicable regimes, especially due to privatizations and the incentives to competition in the former exclusive public services, have made this categorization insufficient to interpret statutory law.

The public law regime is increasingly permeated by private law institutes and public services are increasingly introduced in the competitive dynamics of the market. On the other hand, private law regimes are gradually determined by public regulation, aiming at the fulfillment of public interest purposes and with

significant restrictions on economic freedoms.

Our proposition, thus, is to consider the existence of a multiplicity of legal regimes, which evidences the complementarity between the characteristics of private and public regimes. The specific legal regime of each economic activity will be determined by ordinary legislation and independent regulatory agencies.

We consider that the main regulatory instruments and strategies are chosen according to the characteristics of each activity, with the aim of promoting the public interest and fundamental rights. There is not, therefore, a predetermination of the legal regime based on static categories.

For each context, regulatory policies must assess the real technical and economic conditions, to determine the regulation to be applied. The existence of market failures, the feasibility of efficient competition and negative externalities in such activity must be considered and the legal regime must bring the relevant regulatory inputs to meet the best satisfaction of the public interest in each context (Ogus, 2004). In addition, other public objectives can be considered as reasons for the application of regulation, such as the reduction of regional and social inequalities and sustainable development (social regulation).

In doing so, economic sectors which are notoriously important to society and, at the same time, suffer from some kind of market failure are more likely to be heavily regulated. On the other hand, cases in which the normal functioning of the market is efficient and meets fundamental rights receive a more generic regulation. In both scenarios we will find several productive activities, each with its own specificity (i.e., different market failures or social and political needs), which implies an equally wide diversity of regulatory instruments, each with a specific application.

Regulation may adopt different instruments to intervene on access, price, quality, quantity (among other characteristics), as appropriate for the case, but without reflecting a pre-shaped dichotomy. Regulatory law, therefore, assumes the role of being a means for the promotion of public interests, in both public and private sectors (Bitencourt Neto, 2017).

Considering the legal regime as a means to achieve objectives, any exorbitant powers, restrictions on economic freedoms, imposition of burdens, charges, or attribution of exclusivity, may be applied in such a way as to favor the achievement of these objectives. The attribution of exorbitant powers or duties is just another tool at the disposal of regulatory bodies.

However, regardless of the label that is given to the activity, it is certain that any powers, obligations, and restrictions must ensure the proportionality between these and the desired objectives. Likewise, these powers, obligations and restrictions must be justified directly from the technical and economic context of that activity, and not in a generic way based on a supposed supremacy of the public interest or on the puissance publique.

Based on these premises, we will describe below a proposal for interpreting the economic order in the form of a graded scale (gradient), instead of a di-

chotomy. This scale contains as many points as there are different regulations for different productive activities. However, at least three main instances stand out, characterized by the economic conditions of these markets and the main elements of the applicable regulation.

In the first instance, economic activities are under generic regulation, i.e., activities of low economic complexity, low risks and that provide goods and services that are not essential to fundamental rights. We could list pharmacies and furniture sales as examples. Regulation is above all simple and has the sole function of protecting public order and public goods (health, safety, the environment, and the economic order itself) against potentially harmful private behaviour. The public interest lies in promoting the autonomous development of private relations, with public interventions only punctual to prevent this development in ways that are detrimental to public interests. It is similar to what we pointed out in item 3.b for the low level of access restriction.

At the second level of this graded scale, there are activities in which there is a strong public interest (i.e., they satisfy fundamental rights and have relevant social impact) and which stand out for their high technical and economic complexity. While this complexity may represent some barrier to entry, competition is viable and efficient in these markets. The most notable examples are ports, telecommunications, banking, electricity generation, among others.

At this level, regulation intervenes substantially on essential aspects of economic activity, such as quality and price. The objective is for economic activity to develop in a manner that is favorable to the public interest and fundamental rights, which goes far beyond just ensuring that it does not harm public goods.

It is common to be very specific and demanding regulations regarding the quality of the services once their provision is essential to the public interest. As described in item 4.a, the imposition of public service obligations for these companies is highlighted, such as obligations of continuity, equality among users, and minimum services to be offered.

On the other hand, price regulation is not common, and the principle of freedom of price is adopted, since there is competition between agents, and it is expected that it will reduce prices (Sundfeld, 2000a). In any case, the regulation states that abusive prices or prices that represent a competitive violation are prohibited. Likewise, it is possible that the regulatory body will adopt specific sectoral policies to favor the reduction of prices and expand access to the service.

Although some of the economic activities at this second level continue to be governed by private law, much of the content of the regime is predetermined and imposed by regulation. The private legal regime, then, conveys rules of public interest, seeking that private exploitation carry out public purposes (Aragão, 2017), beyond those selfish interests intended by economic agents.

This level also includes public services concessions subject to competition. We are referring to those services under public law, operated by state-owned companies or delegatee, in which competition between economic agents is possible.

Here, the public regime is attenuated and partially replaced by provisions of private law, with the special objective of enabling competition in the market and equal powers between agents.

Regulation at this level may also provide for some kind of exorbitant power or duty, such as the power to carry out expropriations or the obligation to ensure the universality of services. However, such provisions must be limited to what is necessary for the performance of the service and must be neutral as regards the conditions of competition[12]. The existence of exorbitant powers is only justifiable when they are necessary for the execution of services, which will vary according to the economic sector and its specificities.

On the third level of the graded scale are located exceptional cases in which competition is technically impossible and/or economically inefficient. In addition, these are activities in which there is notable public interest, due to the impact of the provision of these services on society and fundamental rights (Wade & Forsyth, 2014). The main examples are natural monopolies, for the reasons described in item 3.b, which represent important infrastructures, such as sanitation, distribution of water and electricity (Bakovic et al., 2003). In Common Law system it is similar to franchising.

Considering these economic conditions, the regulation adopts instruments that aim to simulate the effects of competition on the monopoly provider (decreasing prices and costs, new investments etc), to control the negative consequences caused by market failure and revert them into gains for the final consumer (Guasch, 2004).

The most current regulatory strategy in this scenario is the adoption of concession contracts with economic agents, through public bidding processes. Public bidding prior to the selection of the concessionaire allows the regulatory body to create a competition "for the market", aiming to bring the gains of the competition from the beginning of the contract.

Franchising is a system of control that can be employed in naturally monopolistic sectors to replace competition in the market with competition for the market. […] The underlying idea is that if applicants for franchises make competitive bids for an exclusive (or at least protected) right to serve a market for a given period and under conditions, they will bid on assumptions of efficient operation and, as a result, consumers will benefit—they will be served by operators who are not under immediate competitive pressure but who will be have in many ways as if they are (Baldwin et al., 2012: p. 116).

The contract also allows the regulator to control the most diverse aspects of the provision of services (Marques Neto, 2016; Marques, 2018). As for prices, the regulation will establish methodologies and limits that prevent the practice of monopolistic prices (above equilibrium prices) (Wade & Forsyth, 2014). As for

[12]Article 80, paragraph 1, of the Telecommunications Law: "A plan shall detail the sources of funding for universalisation obligations, which shall be neutral in relation to competition in the national market between providers."

quality and quantity, the contractual regulation will provide for investment obligations and continuous improvement of levels of services, ensuring the regulator's supervision throughout the contractual term.

The contract will guarantee that the set of principles of the public service applicable is made concrete and will represent obligations to the economic agents, in view of the social importance of the service. For example, legal goals of universalization, continuity, as well as t low tariffs may be imposed.

In here are also located the cases in which the execution of the service is strongly dependent on the existence of exorbitant powers, mainly due to the economic unfeasibility of competition and the effects of this activity on the public interest. Therefore, these are cases in which there is justification for imposing such exorbitances in a broad way. These powers may be necessary to carry out expropriations, collect mandatory tariffs, and supervise third parties.

The conditions of these markets justify the application of public law in certain respects, rather than private law. As described in item 4.a, consumer rights are used in public services and there is an express legal provision for this. However, this application is partially mitigated when it is contrary to the purposes of regulation, notably when it affects the functioning of public policies.

For this reason, for example, despite the generic application of consumer law, the "tie-in sale" of two public services (water distribution and sewage collection and treatment) is allowed, since the public policy of the sector requires the full adherence of the population to the services. Consumer law also does not apply to regulate the user's participation rights with public service providers.

However, it should be noted that the existing regimes within this level are also not uniform and there are a multitude of public service regimes. It is not a single or symmetrical regime, but a regime that allows for internal variation, with sectoral and contractual regimes specifically adapted to the technical and economic context. In the basic sanitation market, universalization and price regulation is one of the main aspects of the sector, while in the electricity sector aspects such as third-party access emerge.

Our proposal, therefore, is that the economic order be considered in all its complexity. We do not verify the existence of a dichotomy between public and private regime (as the dual theory proposed), but rather the existence of mixed regimes, either due to the incidence of public rules on originally private regimes, as well as the substitution of public law by private law in cases originally considered as a public service regime.

After demonstrating the different existing regulations, we conclude that there are multiple legal regimes for the exercise of productive activities. Each economic sector will have a regulation appropriate to its technical and economic specificities, and the instruments and strategies will be applied as necessary to achieve public objectives and protect fundamental rights. Below, we present **Table 4** summarising our propositions.

**Table 4.** Proposed legal regimes (regulation levels).

| Level of regulation | Technical and economic context | Main objects of regulation | Operation regime | Example | Category according to dual theory |
|---|---|---|---|---|---|
| Low | Competition is viable. Low risk of externalities. Low technical or economic complexity. | Generic regulation or Police Power Protection of public order and public good (environment, health, safety, urban planning) Generic Prescriptions | Private law | Sale of furniture, pharmacies | Economic Activity |
| Medium | Relevant to society. Competition is viable. Pro-competition regulatory measures apply. High technical or economic complexity. | Regulation by agency and/or contract Quality regulation (public service obligations) Pricing Freedom Possible conferral of exorbitant powers | Mixed Private Law with intense regulation of public interest or Public law with mitigations Private law Asymmetry of Regimes | Power generation and trading, Banking, Telecommunications, Private Railways, Airports Telecommunications, Ports | Economic Activity or Economic Activity (constitutional monopoly) or Not considered (theory does not predict competition in public services) Not considered (theory does not predict regime asymmetries) |
| High | Relevant to society Competition is undesirable (i.e., natural monopolies). Regulatory measures aim to mimic competition. High technical or economic complexity. | Contractual regulation Quality regulation (public service principles) Price regulation (tariffs) Allocation of exorbitant powers | Mixed Private Law with intense regulation of public interest or Public law with mitigations Private law | Power transmission and distribution, sanitation, gas distribution | Economic Activity (constitutional monopoly) and Public Service |

## 5. Conclusion

The aim of this study was to evaluate the relevance and applicability of the dual theory as an explanatory theory of Brazilian statutory law, as it is currently in force.

As explained, the dual theory essentially proposes that the economic order is divided into a dichotomy: on the one hand, the public service (based on state entitlement, on an exceptional regime of public law and on the government exclusivity) and on the other hand, economic activity (pertinent to civil society, ex-

ploited under private law and with the right to free enterprise).

This theory was formulated and had a great impact on Brazilian law during the second half of the twentieth century, but it has been harshly criticized since the 1990s. The main criticisms that we have already pointed out refer to the association of this theory with the economic model of the Welfare State, as well as its inapplicability in the face of the changes in positive law that occurred in this decade onwards. However, these criticisms did not go so far as to a complete revision of the theory, but merely to criticize it on a one-off basis.

Thus, the study sought to evaluate the theory, based on two of its main aspects: the existence or not of free enterprise and the opposition between public and private regimes. In both, we demonstrate that the dual theory is not functional and is not capable of explaining Brazilian law.

In the first case, regarding free enterprise, we demonstrate that the precept of government exclusivity in the provision of public services violates the constitution, once it creates an unreasonable and unjustified limit to the fundamental principle of free enterprise.

Likewise, this precept does not find support in the legislation, since we have verified the existence of legal provisions that explicitly limit this exclusivity to exceptional cases and do not apply it.

We proposed a theoretical renewal based on the existence of different degrees of access regulation for each economic sector according to the viability of competition. Thus, the rule is the application of free enterprise throughout the economic order, precisely because this is a constitutional principle and can only be set aside in a justified manner and by means of a proportional restriction. What justifies any exclusivity in the provision of a service is the technical or economic impossibility of competition (notably in natural monopolies), in such a way that this measure seeks to satisfy other public interests, such as fundamental rights.

The second aspect relates to the legal regime applied to regulate economic activities and public services. We demonstrate that there is no such dichotomy between public and private, as if they were two opposite and mutually exclusive poles. The legislation shows that the regulation is mixed, sometimes adopting the public regime with mitigations of private law, sometimes adopting the private regime with intense application of public interests.

Our theoretical position is that the existence of a multiplicity of regulations is observed, the legal regime applied is not determined categorically but specifically defined to meet the technical and economic conditions of that economic sector. There are sectors in which the context requires a higher level of impositions, obligations and restrictions on economic agents, as well as there are sectors in which these same requirements are attenuated or non-existent. Between the two possible extremes there is a regulation tailored to each sector, with its own characteristics that cannot be immediately associated with the public or private regime.

In the Welfare State model, where the dual theory was widely applied, public

service provision was predominantly carried out and financed by the State. During the period from 1950 to 1970, this model seemed to function effectively, enabling the implementation of numerous public policies aimed at expanding access to services at low costs. However, from the 1970s onwards, the financial crisis affected the Brazilian State, leading to reduced funding and service quality. In the current economic model (termed the Ensuring State), public services are provided competitively, with collaboration from private agents under stringent public regulation. Consequently, we have observed an enhancement in service quality delivered by private entities, notably through expanded funding.

We hope to have proved that there is no such dichotomy proposed by the dual theory and that the activities categorized as public service do not enjoy a supposed exceptionality that immediately justifies the application of privileges or government exclusivity, or in which the existence of a public interest is identified. This public interest can exist in virtually any economic activity, whether it is a public service or not, which may require a regime with a greater or lesser degree of powers and duties or even possibly some limitation on competition.

Thus, what is left for the public service? What is its definition and purpose in Brazilian law? Public service is a fundamental and historically very important concept for Brazilian law and for several countries in the adopt civil law, so there must be a theoretical effort in its conceptualization.

In this study, we are pointing out another of the crises of public service that have been repeated throughout history since the beginning of the use of the concept (Bandeira de Mello, 2017; Chevallier, 2015). Once again, the public service is criticized for its practical inapplicability, difficulty of definition, and for its political and economic foundations. Certainly, public service cannot be defined as something that belongs to the State as something exceptional, because this would violate free enterprise and is no longer part of the economic and regulatory model currently applied by Brazilian law.

In fact, the public service remains as a specific regulation for economic activities in which there is no possibility of competition and therefore it is necessary to impose duties to imitate competition and force the economic agent to act in a way that is contradictory to his monopolistic interest. This regulation aims to ensure the benefits of competition (such as price reduction, decreasing costs, new investments, improved services) for the benefit of users and the entire population.

Finally, the public service is also a form of state intervention in markets where competition is possible, in which the regulator considers its interference to be beneficial. It then chooses to delegate the exploitation of the activities, or its infrastructures owned by it (airports, ports, hydroelectric plants), consequently obliging the concessionaires to adopt duties and obligations defined by the regulator in favor of the public interest.

It should be said that, in principle, these public services on a competitive basis could be undone (by the sale of infrastructures) and regulated by an agency, just

like other private activities of social relevance (banks, production of medicines, telecommunications, energy). Just as it would be possible to stop intervening through the public service and seek the satisfaction of the public interest by other means.

In our proposal, the public service is above all an instrument of regulatory intervention whose purpose is to provide fundamental rights, through the legislative or regulatory choice to hold the State responsible for the direct or indirect provision of economic activity (Gonçalves, 2010). The legal regime must be adapted for this purpose, and this characterizes the regime more than the attribution of exorbitant powers, by the imposition of state exclusivity or by one or another special rule.

We hope to have elucidated the real conditions under which regulation operates in Brazilian law, beyond what was proposed by dual theory. The economic order is complex and cannot be dealt with in a simplistic way, simply by labelling it public or private. Social and economic development, as well as the development of regulatory institutions, depends on collaboration between public and private entities.

This research focused on the conceptual aspects of the theories presented here. Future research could test these theories on a macro level in various economic sectors, in order to verify in practice whether the proposed theory is also capable of explaining all this complexity.

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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