THE UNAVAILABILITY OF PUBLIC INTEREST: CONTENT, LEGAL NATURE, NORMATIVE FOUNDATION AND IMPACTS ON BRAZILIAN ADMINISTRATIVE LAW

A INDISPONIBILIDADE DO INTERESSE PÚBLICO: CONTEÚDO, NATUREZA JURÍDICA, FUNDAMENTOS NORMATIVOS E IMPACTOS NO DIREITO ADMINISTRATIVO BRASILEIRO

LUZARDO FARIA[1]

ABSTRACT

The purpose of this article is to conduct a vertical analysis of the principle of unavailability of the public interest. Therefore, it starts analyzing the legal content of this principle, in order to identify what it really means. In the sequence, the legal nature of the unavailability will be examined (that is, if it is in fact constituted as a principle or if it should be seen as a rule). Once there is a relevant criticism regarding the alleged lack of support for this principle in Brazilian law, the article demonstrates its normative foundations at the constitutional and infraconstitutional level. In the end, considering that this is one of the key norms of the legal-administrative regime, the main impacts of the unavailability of the public interest for Brazilian Administrative Law are analyzed. The article uses national and foreign bibliographic research, supported by the hypothetical-deductive method.

KEY-WORDS: Public interest. Unavaliability. Legal content. Legal nature. Normative Foundation.

RESUMO

O objetivo do presente artigo é realizar uma análise verticalizada do princípio da indisponibilidade do interesse público. Para tanto, inicialmente será explorado o conteúdo jurídico desse princípio, a fim de identificar do que trata a indisponibilidade do interesse público. Na sequência, será examinada a natureza jurídica da indisponibilidade (isto é, se ela de fato se constitui como um princípio ou se deve ser encarada como uma regra). Diante das críticas quanto à suposta ausência de amparo a este princípio no Direito brasileiro, demonstra-se os seus fundamentos normativos em nível constitucional e infraconstitucional. Ao final, por se tratar de uma das normas-chave do regime jurídico-administrativo, analisa-se os principais impactos

1 Master and Bachelor of State Law from the Federal University of Paraná. Professor of the Specialization Course in Administrative Law at the Romeu Felipe Bacellar Law Institute. Deputy Editor of the Journal of Constitutional Investigations. Deputy Administrative Director of the Brazilian Sanctioning Administrative Law Institute. Member of the Paranaense Institute of Administrative Law. Lawyer. ORCID: http://orcid.org/0000-0001-7330-2649. farialuzardo@hotmail.com

Como citar esse artigo/How to cite this article:
FARIA, Luzardo. *The unavailability of public interest: content, legal nature, normative foundation and impacts on brazilian administrative law*. Revista Meritum, Belo Horizonte, vol. 15, n. 1, p. 9-29, jan./apr. 2020. DOI: https://doi.org/10.46560/meritum.v15i1.7459. Access on: day month. year

da indisponibilidade do interesse público para o Direito Administrativo brasileiro. O artigo utiliza-se de pesquisa bibliográfica nacional e estrangeira, amparado no método hipotético-dedutivo.

PALAVRAS-CHAVE: *Interesse público. Indisponibilidade. Conteúdo jurídico. Natureza jurídica. Fundamentos normativos.*

1 INTRODUCTION

The principle of unavailability of the public interest is seen, alongside the notion of supremacy of the public interest, as one of the fundamental and structuring norms of the entire legal-administrative regime. According to Celso Antônio Bandeira de Mello, this is not because they have virtues in themselves that impose them as such, but because it is possible to verify that Administrative Law, as a whole, took these principles as it's legal north and, from there, was validated as a "source-matrix of the system" (MELLO, 2015, p. 57). After all, it is easily noticeable that the two norms - which reflect, in Brazil, the classic binomial of prerogatives and subjections that bypasses Administrative Law throughout the world - is what gives a uniform logical consistency to the legal-administrative regime.

However, despite the fact that, at least in theory, the importance of the principle of unavailability has been relegated, in practice very little has been written about it, still remaining as a topic practically untouched by the science of Administrative Law in Brazil.

In this sense, Mariana de Siqueira notes that in the study of the category of public interest in Brazilian Administrative Law "the works destined to rethink the supremacy of the public interest over the private one prevailed, being too few those destined to reflect specifically on the unavailability of the public interest". The unavailability, reinforces the author, "usually appears in the works about the supremacy as a 'ride' in the theoretical arguments built there, not as the main object to appear in the title, but as a theoretical element analyzed internally throughout the writings, punctual and as an accessory" (SIQUEIRA, 2016, p. 202). There are even those who maintain that the unavailability is a mere consequence of the principle of supremacy.[2]

This circumstance often ends up generating misapplications of the referred principle. In any case, knowing what is the real legal content of a particular principle that is intended to be used, knowing the rules of the system that support its existence and the elements that compose it are essential and inexcusable steps for its proper interpretation and application in concrete cases. The lack of knowledge of these factors by the legal doctrine and operators, then, is the problem that justifies the present research.

These findings - it is important to be clear - do not apply only to the principle of unavailability of the public interest. However, in spite of the honorable recognition with which it mentions the principle of unavailability, it is at least curious that the doctrine has not so far devoted itself in depth to identifying each of these peculiarities in its legal regime.

2 In this sense it is the positioning of MEIRELLES, Hely Lopes. Brazilian Administrative Law (Direito Administrativo Brasileiro). 38. ed. São Paulo: Malheiros, 2012. p. 108; and MARTINS JÚNIOR, Wallace Paiva. Principle of public interest (Princípio do interesse público). In: DI PIETRO, Maria Sylvia Zanella; and MARTINS JÚNIOR, Wallace Paiva. Administrative Law Treaty: general theory and principles of administrative law (Tratado de direito administrativo: teoria geral e princípios do direito administrativo). vol. 1. São Paulo: Review of the Courts (Revista dos Tribunais), 2014. p. 511.

By relegating the principle of unavailability to an almost "obvious" tone, the academic community made room for little or almost nothing to be known about this principle. And, ultimately, the academy authorized the Public Administration and the Judiciary to use the notion of unavailability of the public interest as a 'buzzword concept' that serves as a tie to the Administration '*when they want*'.

Seeking to combat this scenario, the objective of this article is to carry out a vertical analysis of the principle of unavailability of the public interest. To this end, initially the legal content of this principle will be explored, in order to identify what the public interest unavailability is about. In the sequence, the legal nature of the unavailability will be examined (that is, if it really constitutes a principle or should be seen as a rule). In view of the criticisms regarding the alleged lack of support for this principle in Brazilian law, its normative foundations at the constitutional and infraconstitutional level are demonstrated. In the end, as it's one of the key norms of the legal-administrative regime, the main impacts of the unavailability of the public interest for Brazilian Administrative Law are analyzed. The article uses national and foreign bibliographic research, supported by the hypothetical-deductive method.

2 THE LEGAL CONTENT OF THE INDISPONIBILITY OF THE PUBLIC INTEREST

As with the principle of the supremacy and the notion of public interest, the almost honorific recognition of the principle of unavailability in Brazilian Administrative Law is achieved mainly through the dissemination of the teachings of Celso Antônio Bandeira de Mello. Since the author chooses these concepts as the structural basis of the entire legal-administrative regime in Brazil and his work was, without a doubt, the one that most impacted academia and jurisprudence on Administrative Law in recent decades, there would be no way the principle of unavailability would not receive such importance.

As a starting point for the analysis of the legal content of the unavailability of the public interest, therefore, the lesson of Bandeira de Mello is borrowed. According to this author, the meaning of the unavailability lies in the fact that "being interests qualified as belonging to the collectivity - internal to the public sector -, they are not freely available to anyone, as they are inappropriate". According to him, "the administrative body that represents them has no availability over them, in the sense that it is only incumbent on them to cure them - which is also a duty - in strict compliance with what predisposes to *intentio legis*" (MELLO, 2015, p. 76).

Despite the profusion of the definition made by Celso Antônio and the influence that he had on the work of several other authors who took up the theme, the fact is that there is no consensus in the Brazilian doctrine regarding the content of the principle of unavailability of the public interest - and this maybe exactly because the writings on the subject, as a rule, never faced it with the specificity necessary to understand it properly.

In precious research, Natalia Pasquini Moretti (2012, p. 460) identifies that unavailability is treated from at least four facets by national doctrine: **(i)** unavailability of legal purpose; **(ii)**

unavailability of the duty to act; **(iii)** unavailability of public goods and services; **(iv)** unavailability of administrative skills.

(i) The *unavailability of the legal purpose* is the facet to which the principle in question is most commonly related. As seen, from the classic lessons of the more traditional authors listed above, it is understood that in public administrative activity "the good is not understood to be linked to the administrator's will or personality, but to the impersonal purpose that this will should serve" (LIMA, 2007, p. 37), which is found exactly in the legislation.

From this perspective, the Public Administration is prohibited from taking any decision that is not intended to meet the objectives imposed on the State by legislation. That is, the Administration cannot detach itself from the commands and directions imposed by the Constitution and the infraconstitutional rules. After all, the public interest, in legal terms, is that defined by the legislator as such.

It is interesting to note that, even in cases of conflicts of public interest, the Administration may not have the legal purpose. At first, this might seem impossible in cases where two norms with opposite purposes collide in a specific case. However, it should be remembered that the maximum purpose protected by the unavailability of the public interest is that of constitutional norms, interpreted and applied systematically, as a homogeneous body of guidelines to be followed by the Public Administration. Thus, when, faced with a specific situation, the Administration is obliged to fail to achieve the purpose intended by a certain legal rule, it is essential that this be done only to the extent that it is appropriate, necessary and proportional. This will ensure that the public interest is realized in a broader view.

(ii) *The unavailability of the act of duty* is what makes the public administration must be incessantly making all its efforts towards the achievement of the public interest. The State cannot deliberately fail to act when it sees, in this specific case, the presence of a public interest,[3] even though there is no specific normative provision requiring that specific conduct by the Administration. If this occurs, judicial measures of a mandatory nature are applicable, imposing on the Administration an obligation to do to satisfy the public interest. It is from this notion that the principle of the continuity of public services is developed, for example.

It is important to emphasize that the unavailability of the duty to act must also be seen in an inverse prism, in relation to the omission duties of the Public Administration. In these situations, this commandment has the purpose of preventing the State from taking a certain action when it is envisaged that this act will result in the violation of a public interest.[4] Thus, the State is required to adopt an omissive position. This is what happens when the Administration is required to respect the function of defending fundamental rights, which guarantees individuals a space of freedom preserved from arbitrary state interference.

(iii) *The unavailability of public goods and services* is related to the idea that the administrator, because he is not the owner of the public property, cannot have it, except in the

3 In this sense, Edmir Netto de Araújo points out that "administrative activity is compulsory for the Administration and required by the administrator, if the exercise of competence is mandatory, because in the public interest the agent cannot dispose of his or her duty, but fulfill his duty, using of the power that the law has assigned him/her" ARAÚJO, Edmir Netto de. Administrative Law Course (*Curso de Direito Administrativo)*. 5. ed. São Paulo: Saraiva, 2010. p. 74-76.

4 As remembers Luis de la Morena y de la Morena, "en ausencia de ese interés público, la Administración no podría actuar por cese o desaparición de su único (pero suficiente) soporte justificativo". MORENA, Luis de la Morena y de la. Derecho Administrativo e interés público: correlaciones básicas. *Revista de Administración Pública*, Madrid, n. 100-102, p. 847-880, ene./dic. 1983. p. 847.

strict circumstances provided for in the legislation and provided that following the procedures established there.[5] It is the logic that prevents the Public Administration, for example, from freely selling its properties or from relegating to the private sector the provision of a certain public service without prior bidding process.

(iv) *The unavailability of administrative competences*, in turn, is what prevents the Public Administration from failing to comply with the duties imposed on it by the ordinance and from using the prerogatives that the legal-administrative regime endorses in order to instrumentalize the pursuit of the public interest. According to Maria Sylvia Zanella Di Pietro, "precisely because it'is unable to have public interests whose custody is assigned to them by law, the powers attributed to the Administration have the character of power-duty; are powers that it cannot fail to exercise, under penalty of responding by default".[6]

It is expressly stated in art. 2, sole paragraph, item II of Law 9.784/99, which provides that the Public Administration must observe the criteria for "service for purposes of general interest, total or partial waiver of powers or competences is prohibited, unless authorized by law". This is the basis, for example, of the classic positions that the Administration cannot dispose of the application of administrative sanctions or the enjoyment of procedural prerogatives conferred on the Public Finance (*Fazenda Pública*).

Its content is very similar to the meaning attributed to the *unavailability of the duty to act*, with the only difference that when referring to the *unavailability of administrative powers* there is some normative provision (constitutional, legal or even administrative) imbuing the Administration with a prerogative to be used in hypotheses objectively described by the legislation for the pursuit of the public interest. In the first case, the unavailability acts in a more general way - that is, although there is no specific competence forecast -, as a way of directing the *praeter legem* activity of the Administration towards the realization of the public interest.

Altogether, it is a purely didactic division, which fulfills its function by systematizing the different areas of incidence of the principle of unavailability of the public interest in Brazilian Administrative Law. The problem, however, lies in the fact that often, faced with concrete situations, public administrators make their decisions driven by only one of the facets mentioned above, forgetting, intentionally or not, the other angles of this principle.

And, in doing so, they distort the real concept of the unavailability of the public interest, giving rise to conservative and uncompromising positions, which in practice are not able to protect the public interest in a truly adequate way. After all, since the public interest is a changing content category (according not only to the legislation, but even to the factual context of each specific case), stagnant views of the principle of unavailability will never be able to correspond to the complexity of this notion.

This is the case, for example, when public authorities, allegedly in the name of the unavailability of the public interest, are obliged to contest actions or to appeal against judicial

5 It is the definition of the principle of unavailability that is extracted from the doctrine of Diógenes Gasparini, since the initial editions of his Course. For him, "according to this principle, public goods, interests and services are not freely available to the bodies of the Public Administration, who are responsible for curing them, or the administrator, who represents them". GASPARINI, Diógenes. Administrative law. (*Direito Administrativo)*. São Paulo: Saraiva, 1989. p. 10.

6 It is the historical position displayed by the author, from the early editions of her work: DI PIETRO, Maria Sylvia Zanella. Administrative law. (*Direito Administrativo)*. 2. ed. São Paulo: Atlas, 1991. p. 67.

decisions that are unfavorable to them, even if it is identified that the applicant, in accordance with current rules and with the prevailing jurisprudential understanding, be right. In this case, the unavailability of administrative powers is used, without duly worrying about the unavailability of legal purposes, since, clearly, it's not for this purpose that the legal system provides the Public Finance with procedural defense instruments.

Thus, an adequate understanding of the legal content of the principle of unavailability of the public interest must take into account all the multiple consequences that involve the scope of protection of this rule.

In addition, it is essential to emphasize the "counterweight" function exercised by the unavailability in relation to the supremacy of the public interest, as a way of conditioning administrative action in the pursuit of a determined public purpose, not allowing administrative prerogatives to be used for any purpose other than that of public interest. At this point, it appears that the principles of supremacy and unavailability of the public interest are, in Brazilian Administrative Law, condensations of what the administrative doctrine traditionally puts as being the opposition between, respectively, the prerogatives and the subjects of the Public Administration (MELLO, 2015, p. 57), the most striking feature of this branch of law.

Thus, the complementary relationship between the principles of supremacy and the unavailability of the public interest is latent. While the first gives the Administration the prerogatives considered necessary for the Public Power to carry out the complex activities that are its responsibility, the second acts as a limitation to these same prerogatives, conditioning administrative activity to the achievement of legal purposes, which is done through the imposition of a series of subjections that, as with the prerogatives, are also not seen in private relations (HACHEM, 2011, p. 106).

And it is exactly the principle of unavailability that makes this second angle of looking at the role of public interest in Administrative Law possible, making "the common good, at the same time, a foundation and a limit for state action" (HAEBERLIN, 2017, p. 65).

The unavailability, therefore, much more than simply saying the obvious (as some authors criticize), has an important function of directing the legal-administrative activity. It must be understood that the unavailability of the public interest is the answer, existing in the legal-administrative regime itself, to curb the undesirable excesses that the Administration could come to commit if it were granted only prerogatives (ESCOLA, 1989, p. 13). After all, this principle, "by accentuating the state's duty to serve the desires of the community, aimed to print a democratic guise to the country's Administrative Law" (HACHEM, 2011, p. 29) serving as a legal guideline for the path that Public Administration, under the aegis of the of the Federal Constitution of 1988, must pursue in order to achieve the objectives outlined by this.

3 THE LEGAL NATURE OF THE INDISPONIBILITY OF PUBLIC INTEREST: PRINCIPLE OR RULE?

Having explained the factors that make up the legal concept of the principle of unavailability of the public interest, it is now necessary to analyze the nature of the referred rule for

the Law. That is, what form it appears in the Brazilian legal system. After all, this also has a strong impact on the way in which it will be applied in practice by legal operators.

The term "principle" is one of the most polysemic in all legal science.[7] Two of these meanings, however, are used more frequently to designate a certain legal norm as a principle and, for this reason, deserve greater attention. It is the extractable meanings of the theories that classify a rule as a principle due to the *function it performed in the legal system* and the *form of its application*.

The first understanding, considered the most traditional[8], considers the principles the fundamental norms of the system, those that give rationality to the entire legal system, the one on which the entire legal system is structured and based.[9]

Celso Antônio Bandeira de Mello, main developer, as seen, of the thesis that the supremacy and unavailability of the public interest bear the character of *true legal principles*, follows this line. In this author's definition, the principles represent the *core commandments of the legal system*. In a passage that has become quite well-known, the author refers to legal principles as a "fundamental disposition that radiates over different norms, composing their spirit and serving as a criterion for their exact understanding and intelligence, exactly because it defines the logic and rationality of the normative system, giving it the tonic that gives it harmonic meaning". And, for these reasons, concludes that "violating a principle is much more serious than breaking a rule" (MELLO, 2015, p. 54).

The other very common model of differentiating principles from legal rules is based from its *application form*. This trend, which has gained great attention from Brazilian doctrine in recent decades, is led by the lessons of Ronald Dworkin and Robert Alexy. It is important to note that, although they are almost always cited together, as if they were the same line of thought, the theories constructed by Dworkin and Alexy have some points of divergence between them[10]. However, as stated, both adopt the logical-normative structure of the legal command in question as a criterion for defining it as a rule or as a legal principle.

7 Just to get a sense of the diversity of meanings attributed to the expression "legal principles", it is worth noting that Ana Paula de Barcellos, in a specific work on the legal effectiveness of constitutional principles, identified the existence of at least seven different understandings for this term. Such disagreement stems from the ifference in the criteria used by the authors to classify a certain legal norm as a principle. And just in Barcellos research the following criteria were identified: **(i)** the content of the standard; **(ii)** the origin and validity of the standard; **(iii)** the historical commitment involved around the standard; **(iv)** the function performed by the standard in the planning; **(v)** the linguistic structure of the standard; **(vi)** the interpretative effort required to understand the scope and application of the standard; **(vii)** how to apply the standard. BARCELLOS, Ana Paula de. The legal effectiveness of constitutional principles: the principle of human dignity. (*A eficácia jurídica dos princípios constitucionais*: o princípio da dignidade da pessoa humana). 3. ed. rev. e atual. Rio de Janeiro: Renovar, 2011. p. 53-56.

8 The finding is made by Virgílio Afonso da Silva in: SILVA, Virgílio Afonso da. Principles and rules: myths and misconceptions about a distinction. (Princípios e regras: mitos e equívocos acerca de uma distinção). *Revista Latino-Americana de Estudos Constitucionais*, Belo Horizonte, n. 1, p. 607-630, Jan./Jun. 2003. p. 612. It is important to note that, in addition to the authors cited here, several other scholars are affiliated with this trend, such as, for example, José Joaquim Gomes Canotilho and Vital Moreira (CANOTILHO, J. J. Gomes; MOREIRA, Vital. Fundamentals of the constitution. (*Fundamentos da constituição)*. Coimbra: Coimbra Editora, 1991. p. 49), Cármen Lúcia Antunes Rocha (ROCHA, Cármen Lúcia Antunes. Constitutional principles of Public Administration. (*Princípios constitucionais da Administração Pública)*. Belo Horizonte: Del Rey, 1994. p. 23-25), José Afonso da Silva (SILVA, José Afonso da. Course of Positive Constitutional Law. (*Curso de Direito Constitucional Positivo)*. 32. ed. São Paulo: Malheiros, 2009. p. 91), among others. Hence the reason why this is considered the "traditional" model in Brazilian law.

9 Geraldo Ataliba, for example, one of the most acclaimed names in Brazilian Tax Law in the second half of the 20th century, manifests himself in the following sense: "principles are the key and essence of all law. There is no right without principles. Simple legal rules are worthless if they are not supported by sound principles". ATALIBA, Geraldo. Constitution change. (Mudança da Constituição). *Revista de Direito Público*, São Paulo, n. 86, p. 181- 186, Apr./Jun. 1988. p. 181.

10 In this regard, we refer again to the article by Virgílio Afonso da Silva, which brings an in-depth and detailed analysis of these differences: SILVA, Virgílio Afonso da. Principles and rules: myths and misconceptions about a distinction. (Princípios e regras: mitos e equívocos acerca de uma distinção). *Revista Latino-Americana de Estudos Constitucionais*, Belo Horizonte, n. 1, p. 607-630, Jan./Jun. 2003.

For Dworkin, rules that apply to the "all-or-nothing" logic will be considered rules. That is, once provided for in the order, if the standard is valid and the requirements for its application are met, it will inevitably affect the specific case. On the other hand, if it is, for some reason, invalid (unconstitutional, for example) or if, in the specific case, the necessary requirements for its incidence have not been met, it will not be applied. N There is no gradation or *half-term*. The rule *applies or does not apply*. The principles, in turn, would be characterized by having a weighted dimension in their structure, which does not allow its application in the logic of "all-or-nothing". The application of a certain principle, therefore, must take into account its importance in that specific case. The more important that principle is in the specific case (in relation to others that are colliding with it), the more intense its incidence (also in relation to these other colliding principles). There is, therefore, an inevitable gradation, which can only be identified according to the peculiarities of each specific case (DWORKIN, 2010, p. 39-44).

Alexy's view, as said, is very similar to Dworkin's, but they are distant on some specific issues. Regarding the rules, Alexy's definition practically coincides with Dworkin's, stating that "rules are rules that can only be fulfilled or not. If a rule is valid, then exactly what it requires must be done, neither more nor less". One of the punctual differences referred to earlier is felt in the definition of principles, which are seen as "optimization mandates", "rules that order something to be carried out to the greatest extent possible, within the factual and legal possibilities existing in the concrete case". Unlike what happens in the case of a conflict of rules - when an exception clause is sought or one of them is invalid and only the other is applied - in the event of a collision of principles the solution will be the restriction of one of the fundamental rights in favor of the other, and this restriction must be adequate, necessary and proportional to be considered valid (ALEXY, 2012, p. 64-71).

That said, one must try to understand, now, from which of these two main forms the principle of unavailability presents itself. That is, is the unavailability of the public interest a legal principle because of its *degree of fundamentality* or because of its *form of application*? Or would it meet both criteria?

Regarding its degree of fundamentality, no further discussion is warranted. Not only because this is the criterion used to support the notion of legal principle by the author who pioneered the idea of unavailability of the public interest, but also - and mainly - because: **(i)** it is one of the norms that brings the axiological foundation of the entire legal-administrative regime, pointing, as a general directive, the republican and solidary path that must be followed by the Public Administration according to the Federal Constitution of 1988; **(ii)** provides the constitutional support required to legally legitimize the subjections to which the Public Administration is subjected in Brazil; **(iii)** it serves as a hermeneutic-interpretative canon of the other rules of Administrative Law, giving a tone of homogeneity to this entire legal system.[11]

The doubt, however, can arise when trying to ascertain whether the unavailability of the public interest could also be embedded as a legal principle in terms of Robert Alexy and Ronald Dworkin. Doctrine has not yet carried out any analysis in this sense, covering unavailability.

11 Daniel Wunder Hachem also uses these criteria to identify the supremacy of the public interest as a legal principle in the sense of a fundamental norm of the system. Cf. HACHEM, Daniel Wunder. Constitutional principle of the supremacy of the public interest. (*Princípio constitucional da supremacia do interesse público*.) Belo Horizonte: Fórum, 2011. p. 147.

From the point of view of the legal nature of the rule, it is not possible to state that the unavailability of the public interest can be seen as a principle, which can be applied to a greater or lesser degree, depending on the specific case. After all, this could lead to the conclusion that, depending on the factual and legal situations of the specific case, the Public Administration could be more or less linked to the realization of the public interest. In this sense, it would be admitted that in some cases the Administration deliberately failed to serve the public interest.

However, this is obviously not the extractable legal content of the principle of unavailability, which by logical deduction would make it impossible for its legal form to be presented in this way. Thus, *the unavailability of the public interest has the logical-normative structure of rule in Brazilian Administrative Law*.

This, however, does not prevent individual or collective interests in the strict sense are pursued by Administration, as long as they are supported by the legal system and provided that its implementation corresponds, albeit indirectly, to the satisfaction of the public interest of the community itself considered. The state development activity, very consolidated in administrative practice, presents itself as a good example of this, since, in general, its validity in relation to the unavailability of the public interest is accepted without impugnment.

This finding is relevant when, for example, it examines agreements signed by the Public Administration with private individuals based on the principle of unavailability of the public interest. This is very clear in cases where the validity of agreements is discussed, recognizing the right of individuals who are litigating against the Public Treasury (*Fazenda Pública*) in the judicial sphere. *A priori*, the interest of the collectivity would be in the sense that public advocacy would make all necessary efforts so that the public entity participating in the conflict would win. However, in specific situations the agreement with the individual litigator is authorized. Once again: not only to serve your individual interest, but mainly because, in certain cases (and it is only in these cases that agreements will be allowed) there will no longer be the collective interest in adversity from the Public Finance (*Fazenda Pública*).

4 THE NORMATIVE FOUNDATIONS THAT JUSTIFY THE EXISTENCE OF THE PRINCIPLE OF INDISPONIBILITY OF PUBLIC INTEREST IN BRAZILIAN ADMINISTRATIVE LAW

Once exposed what is understood by the content and the legal nature of the principle of unavailability of the public interest, it must now be demonstrated that the referred rule does in fact exist in the legal system, not being a mere doctrinal creation. After all, it is evident that for a given concept or value to be accepted as a legal norm it must have, explicitly or implicitly, an identifiable basis in the legal system.[12] Thus, one must seek in which legal-normative provisions of Brazilian Law the principle of unavailability can support its existence as a legal norm.

12 Humberto Ávila, in this sense, says that there must be a "basis of validity in positive law, expressly or implicitly", for a given provision to be considered as a "norm-principle". Cf. ÁVILA, Humberto. Rethinking the "principle of the supremacy of the public interest over the particular". In: SARMENTO, Daniel (Org.). Public versus private interests: deconstructing the principle

In this sense, it is very common to find texts that, in an attempt to demonstrate the constitutional protection of the principle of unavailability of the public interest, point out the devices that impose restrictions on administrators regarding the sale of public goods, the holding of public tenders, bidding requirements, reforms in public assets, among others, as proof of the legal existence of this principle. However, the methodology undertaken seems to be mistaken for inverting the poles of the equation: these institutes are not the demonstration of the existence of the principle of unavailability, but at most its consequences (this, if it is in fact extractable from the Constitution). In other words, even if the final conclusion reached is the same, disagrees is the path taken by this line of argument.

Furthermore, it is also recognized that many of the “subprinciples” arising from the unavailability of the public interest were constitutionalized in the 1988 Charter, which offers a large complex of guarantees to citizens against the State (HACHEM, 2011, p. 166). This is the case, for example, with the principles of impersonality and publicity. The identification of these reflections of the principle of unavailability is quite easy.

What little is said, however, it is which are the foundations of this principle. That is, in addition to what are considered to be the fruits of unavailability, what in fact can be taken as the basis that supports the existence of this principle in Brazilian Law?

In an attempt to identify an answer to this question, the first and easiest way to be pursued is to seek in the constitutional text itself some explicit mention of the principle of unavailability of the public interest. The effort, however, would be harmless. There is no constitutional provision that expressly links the Public Administration to a “principle of unavailability of the public interest” or any other with similar wording.

The fact, however, that there is no constitutional provision expressed in this sense can in any way be seen as a definitive obstacle to the defense of the legal existence of the principle of unavailability of the public interest in Brazilian Law. In this line, the Spanish administrativist Alejandro Nieto (1991, p. 2225) points out that if - unlike what happens in his country - there is no express provision that the Administration must follow the public interest in all Constitutions, this is simply due to fact that such a link is an obvious conclusion.

It is prudent to remember that in the same situation as the principle of unavailability of the public interest are other constitutional principles of extreme relevance such as the legal certainty, proportionality and reasonableness - none of them found explicitly in a constitutional provision. Despite this situation, there is no major question about the existence of such principles, widely recognized by the doctrine and applied by national jurisprudence. The reason for this is that such rules can easily be deduced from the constitutional text. Identical, again, is the situation of the principle of unavailability, which, being extractable from a wide set of constitutional norms, presents itself as an *implicit* constitutional principle of Brazilian Administrative Law.

In this sense, Mariana de Siqueira (2016, p. 195) agrees that, although it is not a “text expressed in the provisions of the 1988 Constitution, it does not, however, lack legal protection” the principle of unavailability of the public interest. Daniel Wunder Hachem (2011, p. 118), along the same lines, goes so far as to affirm that “there is no doubt that the *unavailabi-*

of the supremacy of the public interest. (*Interesses públicos versus interesses privados*: desconstruindo o princípio da supremacia do interesse público). 3. tir. Rio de Janeiro: Lumen Juris, 2010. p. 181.

lity of public interests, as a synthesis idea of the special subjects of Public Administration in favor of the citizen, can be identified as an implicit principle in the constitutional fabric", being that the "duty of the Administration to obey all its developments (...) results directly from its submission to the Constitution".

The way, then, is to seek to identify in the constitutional text which are the devices that serve as a basis to justify the existence of the principle of unavailability of the public interest in Brazilian Administrative Law.

The preamble already contains the determination (albeit not in a binding way, but as an important hermeneutic orientation) that the Brazilian State is instituted with the aim of ensuring the well-being of the population (among other supreme values such as freedom, equality and justice).[13] In a similar sense - and there with binding force in the face of administrative activity - advocates art. 3º, item IV, that the fundamental objectives of the Republic are to promote the "good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination".[14]

Now, as taught by Héctor Jorge Escola (1989, p. 31), in Argentina the pursuit of public interest is considered a constitutional principle precisely because of the expression "general well-being" in the preamble to the Constitution, in a very similar way as like it happens in Brazil. At the national level, Juarez Freitas (2009, p. 54) is one of the authors who takes a similar position when stating, based on the constitutional provision mentioned above, that "the principle of public interest prescribes that, in the event of a collision, the will must prevail legitimate general will (the 'good of all' as stated in article 3º of the Constitution) about the selfishly articulated or factional will".

In addition to the provisions mentioned above, a systematic interpretation of constitutional rules is also capable of demonstrating the implicit reasoning of the principle of unavailability in the constitutional text in other rules of similar content to the preamble and art. 3º, item IV. When the Constitution, in several of its articles, paragraphs and items, provides as a duty for the State to promote social justice, solidarity and harmony among citizens, it is perceived that it is linking administrative activity to the fight against inequalities, the inclusion of marginalized individuals and the fight against oppression of every kinds. In short, there is an "impossibility of allowing the primacy of exclusively private interests over constitutionally protected legal assets" (HACHEM, 2011, p. 125).

Thus, the fact that the preamble and art. 3º, item IV, of the Constitution (among so many others that, in a less direct way, point to the same sense) determining the achievement of general well-being as a basic objective of Public Administration would already be sufficient normative justification to recognize the existence of the principle of unavailability of the public interest in the Brazilian legal system.

---

13 Constitution of the Federative Republic of Brazil. Preamble (**Constituição da República Federativa do Brasil. Preâmbulo**). We, representatives of the Brazilian people, gathered in a National Constituent Assembly to establish a Democratic State, designed to ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as values supreme of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, internally and internationally, to the peaceful settlement of disputes, we promulgate, under the protection of God, the following CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL.

14 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil**). Art. 3º. The main objectives of the Federative Republic of Brazil are: [...] IV - to promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

There is, however, a device that links administrative activity in an even more consistent way with the full and incessant realization of the public interest. This is art. 1º of the Federal Constitution, which defines the Brazilian State as a *Republic*.[15] Much more than a mere "abstract declaration of intent to appear in the constitutional text", this expression is constituted as "an objective command applicable and demandable to all application of the Brazilian normative system, constitutional and infra-constitutional", being that "the republican principle, allied to the condition of Democratic State of Law, is therefore, *imposing to all the relations between the state and its people*" (LIMA, 2013, p. 108-109).

Traditionally, the Republic is seen as a form of government that opposes the Monarchy, for constitutes a State in which public power is exercised by representatives of the *people*, specifically elected for this function and with several limitations in their performance - and not by representatives absolutists brought to power for theological and hereditary reasons (DALLARI, 2012, p. 225-227). Such differentiation, however, despite its importance for educational purposes and its historical value, cannot be fully accepted in contemporary society, considering that the majority of Monarchies in the world today are inserted in democratic regimes (BARCELLOS, 2018, p. 118).

In search of a definition for the term, Ana Paula de Barcellos (2018, p. 118-119) points out that, despite there are numerous divergent positions on the real meaning of the republican principle, making it impossible the task of finding "a univocal and simple historical sense", analyzing all these conceptions it is possible to "identify a common essential idea: it is the notion, somehow associated with the idea of republic, of absolute power restriction, of just government and *the exercise of power oriented towards the good of the community*". In another section, the constitutionalist reinforces that the expression "republic" is "associated with notions of fair government, the rule of law, *primacy of the public interest* and, mainly, control of power". From there, it's already possible to begin to understand the relationship between republicanism and the principle of unavailability of public interest.

In a Republic, the activity of public agents, as representatives of society and holders of public powers, must be guided by a criterion of neutrality (GABARDO, 2009, p. 363), without using the prerogatives provided by the administrative machine to privilege or harm people or social groups in specifics for personal reasons.[16] In the Brazilian constitutional order, this value was confirmed in art. 37 through the principle of impersonality. But its intrinsic relationship with the conception that the Administration should act for *public* interests - and not private - is also evident, something that reinforces the thesis that the unavailability of public interest by the Administration is an implicit legal principle extractable from the republican model of State expressly adopted by the Federal Constitution of 1988.

Thus, it is possible to affirm that the unavailability of the public interest is an indisputable reflection of the ideal of republicanism that permeates the Brazilian Constitution. From this, what can be discussed are at most the practical consequences of the principle of unavailability, but the fact that the Public Administration of a Republic must pursue public interests,

15 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil**). Art. 1º. The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and has as foundations.

16 In this sense, Ana Paula de Barcellos records that "the republican ideal imposes the separation between private interests of public agents and the public interest that they must defend or promote". BARCELLOS, Ana Paula de. Constitutional Law Course (**Curso de direito constitucional**). Rio de Janeiro: Forense, 2018. p. 119.

which concern the whole community and not just certain groups of people, who hold power want to privilege, is indisputable. After all, as taught by Emerson Gabardo (2009, p. 363), "a republic in which the common interest should not be taken as a starting point, that the common interest should be prioritized over the interests of a particular character, it certainly will not be a true republic".

Another constitutional provision that also justifies the existence of the principle of unavailability, although in a more discreet way than the previous ones, is the art. 66, § 1º, which prescribes that "if the President of the Republic considers the project, in whole or in part, unconstitutional or *contrary to the public interest*, he will veto it totally or partially [...]".

As a matter of fact, at this moment the Constitution seems to be referring to a more political concept of public interest, mainly because it places this veto hypothesis next to the one in which the President identifies some unconstitutionality in the legislative project. Even so, this provision is still an indication of the direction that the Constitution intends to impose on Public Administration. It is derived from it that the link of state activity to the realization of the public interest is such that the President of the Republic is authorized to veto a law approved regularly by the democratic representatives of the people, if he considers that the rule will matter in the face of the interest of the collectivity.

The same occurs with art. 57, §6 º,[17] with art. 93, VIII,[18] with art. 95, II[19] and with the art. 231, §6º.[20] They are all constitutional provisions that serve as an example to prove the thesis that: when the presence of a public interest is verified, the Public Administration is urged to act in a certain way, through acts that it could not practice if such a practice was not strictly necessary for the protection of the public interest.

Although not directly at the constitutional level, it is also interesting to bring up art. 2º, "*e*", and single paragraph, "*e*" of Law nº 4.171/65.[21] It is said that it is not directly constitutional, since it is good to remember that although prior to the Constitution currently in force, said legislation has, in the present scenario, the function of regulating art. 5º, item LXXIII of the Constitution.[22] Well. This device provides for the possibility of annulment, through the

17 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil). Art. 57. §6º.** The extraordinary convening of the National Congress will be made: II - by the President of the Republic, by the Presidents of the Chamber of Deputies and the Federal Senate or at the request of the majority of the members of both Houses, in case of urgency or relevant public interest, in all cases of this item with the approval of the absolute majority of each of the Houses of Congress.

18 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil). Art. 93. VIII** - the act of removal, availability and retirement of the magistrate, in the public interest, will be based on a decision by a vote of the absolute majority of the respective court or of the National Council of Justice, ensuring ample defense.

19 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil) Art. 95.** The judges enjoy the following guarantees: II - immovability, except for reasons of public interest, in the form of art. 93, VII.

20 **Constitution of the Federative Republic of Brazil (Constituição da República Federativa do Brasil) Art. 231. §6º.** Acts which have as their object the occupation, dominion and possession of the lands referred to in this article, or the exploitation of the natural resources of the soil, rivers and lakes in them, are null and void, without producing legal effects; subject to the relevant public interest of the Union, according to the provisions of a complementary law, not generating nullity and extinction of the right to indemnity or actions against the Union, except, in the form of the law, for improvements resulting from the occupation in good faith.

21 Law nº 4.171/65 (**Lei nº 4.171/65). Art. 2º** Acts harmful to the assets of the entities mentioned in the previous article are null and void, in the cases of: e) deviation of purpose. **Single paragraph.** For the conceptualization of nullity cases, the following rules will be observed: e) the deviation of purpose occurs when the agent practices the act aiming at a purpose other than that provided, explicitly or implicitly, in the jurisdiction rule.

22 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil). Art. 5º. LXXIII** - any citizen is a legitimate party to bring a popular action that seeks to annul an act that is harmful to the public patrimony or of an entity in which the State participates, to administrative morality, to the environment and to the historical and cultural patrimony, the author remaining, unless proven bad faith, exempt from court costs and the burden of succumbence.

instrument of Popular Action (*Ação Popular*), of administrative acts edited for purposes other than those prescribed by law for such competence.

Especially before Celso Antônio Bandeira de Mello's theories about the matter, the Administration's duty to seek the realization of the public interest was conveyed by the doctrine not by the principle of "unavailability of the public interest", but normally as something linked to the attribute of purpose administrative acts. Paradigmatic in this sense is the lesson of José Cretella Júnior (1966, p. 240) when he pointed out that "if the agent, taken for reasons other than the public interest, edits the administrative act, this leads to a serious defect of origin, informed that it was for a purpose incompatible with that which drives State personnel".

Thus, if, at the time, the attribute of the purpose of administrative acts was seen as the main link that linked Public Administration to the satisfaction of the public interest, it is correct to understand that when prescribing in art. 2º, "e" of the Law of Popular Action that the acts in which there is any deviation in purpose will be null, the legislator at that moment reinforced the anti-legality of any Public Administration action that distanced itself from serving the public interest.

Therefore, it is visible the provision of several normative provisions in Brazilian positive law that justify the existence of the principle of unavailability of the public interest in Brazilian Administrative Law.

MERITUM MAGAZINE • v.15 • n.1 • p. P. 9-29 • Jan./Apr. 2020

5 THE IMPACTS OF INDISPONIBILITY OF PUBLIC INTEREST FOR BRAZILIAN ADMINISTRATIVE LAW

Above, the main normative provisions that support the principle of unavailability of the public interest in the national legal system were seen. From the explanations given about them, it is clear that the legal existence of such a rule in Brazilian Administrative Law is unquestionable. We must now understand what impacts the unavailability of the public interest, once properly recognized as a legal principle, brings to the legal-administrative regime.

According to Celso Antônio Bandeira de Mello (2015, p. 77), the main legal consequences of the principle of unavailability of the public interest are: **(i)** the principle of legality and its consequences such as the purpose, reasonableness and proportionality, the motivation and responsibility of the State; **(ii)** mandatory performance of public activity / continuity of public services; **(iii)** control (internal and external) of administrative acts; **(iv)** the equal treatment of citizens in the face of the Administration; **(v)** publicity; **(vi)** inalienability of rights concerning public interests. Each of these characteristics is now analyzed.

(i) In the words of Bandeira de Mello (2015, p. 78), the principle of administrative legality is "a natural consequence of the unavailability of the public interest". Since the public interest is enshrined in positive legislation, it is logical that the duty of the Administration to promote this public interest arises from the duty to respect the legislation, subordinating all its activity to the legal rules enshrined in the order. The most interesting point, then, seems to be in what Celso Antônio considers as the consequences of the principle of unavailability: **(i.1)** the goal;

(i.2) the reasonableness and proportionality; **(i.3)** the motivation, and **(i.4)** the state responsibility.

(i.1) The attribute of the *purpose/goal* of administrative acts, as already mentioned, is closely related to the notion of unavailability of the public interest. It is certain that "a law is not applied correctly if the act of application is out of step with the scope of the law" (MELLO, 2015, p. 80). Thus, the duty that all legal acts that correspond to manifestations of will of the Public Administration are edited aiming at the fulfillment of a determined purpose foreseen by law (and not any purpose that, personally and subjectively, the public authority) is a result of the principle of unavailability. It is this link that binds administrative activity, under penalty of legal invalidity, to the permanent pursuit of the public interest.

(i.2) Especially in cases where the Administration enjoys a certain margin of discretion to identify a given public interest and, thus, take the decision that is incumbent on it, the unavailability of the public interest requires that this decision be *reasonable* and *proportional* to the rights and interests that are at stake. An administrative act could not be considered to be in the public interest, which deviates from the legal standard of reasonableness or which is not adequate, necessary and proportional to the purpose for which it is supposedly intended.

(i.3) The duty to *motivate* administrative acts is not only an essential requirement for the legal category of public interest to be properly applied in any case, but it also appears as a consequence of the principle of unavailability. Once the assets and rights are public and not owned by the administrator, the authority must demonstrate reasonably all the reasons that led him to take a decision. Only then will citizens and control divisions be able to verify whether the administrative act was actually edited with a view to achieving a public purpose or, on the other hand, whether the Administration disagrees with its duty to carry out the public interest.

(i.4) Only in relation to the State's civil liability regime, one dares to disagree with Bandeira de Mello, as this characteristic is not seen as a result of the principle of unavailability. Unlike what happens with the other factors analyzed above, civil liability is not a typical or extraordinary subjection of the administrative regime. All persons, physical or legal, public or private, are subject to some system of civil liability. Although the State's civil liability regime differs from that which, as a rule, is applied to private individuals,[23] this is not capable of justifying a relationship between this characteristic and the principle of unavailability.

Currently, the objective form of civil liability is already being adopted also for individuals who are inserted in certain contexts. A clear example of this is private companies whose performance in some way impacts on issues related to Environmental Law. In such cases, companies are objectively responsible for the damage they cause to the environment. Thus, it is understood that subjection to the civil liability regime in the objective modality is a legislative option, resulting from the actual situation of the activity that a certain entity is carrying out, not being something unique and exclusive to the legal-administrative regime.

(ii) The duty of *continuing* to carry out administrative activities is a clear result of the principle of unavailability of the public interest, since, being not the owner of the public pro-

23 On the state's civil liability regime in Brazil, see: FARIA, Luzardo. The inefficiency of the current model of state civil liability in Brazil and the need for damage prevention (A ineficiência do atual modelo de responsabilização civil do Estado no Brasil e a necessidade de prevenção de danos). *Revista Digital de Direito Administrativo*, São Paulo, v. 4, n. 2, p. 117-136, Jul. 2017. p. 118-119.

perty, the administrator cannot give himself the possibility to deliberately fail to fulfill a certain administrative competence.[24] As already defended on another occasion, "at the moment when the State takes over the ownership of the provision of a given service, it seems logical to deduce that it is expected to provide a continuous service, under penalty of, not satisfying the needs present in that situation, violating the dignity of the affected citizens" (FARIA, 2015, p. 121). The comment, developed based on the scope of public services, in which the principle of continuity is most commonly studied, applies without major differences to any other administrative activity.

(iii) *The submission of administrative activity to external and internal control* is another typical legal consequence of the principle of unavailability of the public interest.

Its relation to the principle of unavailability of the public interest is indissoluble, because it is only through this control that it will be possible to verify if the acts edited by the Public Administration were in fact issued with a view to realizing the public interest. Control has unparalleled importance to enable full compliance with the principle of unavailability, because without it, other consequences of this postulate (such as legality, purpose and motivation, for example) would be innocuous. It is the possibility of control that allows, through various techniques, the correction of administrative acts that are contrary to the fulfillment of the public interest, imposing coercively on the Administration the obligation to execute only the decisions that give effect to this commandment and discard those that distance themselves from it.

(iv) *The equal treatment of citizens vis-à-vis the Administration and the principle of administrative impersonality*, of which it is a direct expression, are also supported by the unavailability of the public interest. This relationship was already emphasized when it was demonstrated that the main legal provision that underlies the normative plan for the existence of the principle of unavailability in the country's Administrative Law is art. 1º of the Federal Constitution, when classifying the Brazilian State as a Republic. It is that "being in charge of managing the interests of the entire community, the Administration does not have the availability over these assets that gives it the right to treat those whose interests it represents unequally" (MELLO, 2015, p. 86). Indeed, if the administrator is, according to the principle of unavailability, a mere manager of the *res publica* (FARIA, 2013, p. 69), he obviously cannot manage it in a way that privileges or harms someone for personal reasons.

(v) Finally, *the inalienability of rights concerning public interests* is the last result of the principle of unavailability of public interest identified by Celso Antônio Bandeira de Mello. The reason for this, according to this author, is that "because the administration is a servient activity, developed at the infralegal level, it cannot alienate or be stripped of the rights that the law enshrined as internal to the public sector" (MELLO, 2015, p. 88). Similarly, Hely Lopes Meirelles (2012, p. 105) argues that the Administration "cannot renounce the powers that the law has given it for such protection, even because it does not hold public interest, whose the holder is the State".

24 In the words of Celso Antônio Bandeira de Mello, "since the administration is curator of certain interests that the law defines as public and considering that the defense, and their pursuit, is, for its, mandatory, a true duty, the continuity of the activity administrative is a principle that is imposes and prevails in any circumstances". MELLO, Celso Antônio Bandeira de. Administrative Law Course (*Curso de Direito Administrativo)*. 32. ed. São Paulo: Malheiros, 2015. p. 84.

The position, however, must be viewed with great caution. In fact, the assets and rights of the Public Administration are not "*free*" available to the administrator. It happens, however, that in certain situations the legal system may require - if this is the best answer that is offered to resolve the conflict verified in the specific case - that the Administration has a specific asset or right. Again: this does not involve a free and subjective appreciation of the administrator's personal desires, but rather the indications that can be extracted from the body of legal rules to which he is bound.

Thus, it appears that often the pre-formatted and stagnant position of the unavailability of assets and rights securitized by the Public Administration, may ultimately correspond to a violation of the principle of unavailability. As previously mentioned, it's common that *supposed* general public interests (duly guaranteed by the legal system) to lose their real quality of public interest in certain concrete situations, including making it possible to meet, in this sense, individual or collective interests *stricto sensu*. In other words, it is perfectly possible that, given a specific factual and legal context, the Administration is authorized to dispose of a portion of its assets or rights, if this is the option that best meets the public interest identified in that specific case.

This is just one of the examples able to justify that the time has come to re-read the principle of unavailability, in order to "allow, according to the legal order and in light of the factual circumstances, the use of consensual instruments for the densification of the concept of public interest, as well as for the resolution of administrative conflicts" (MORETTI, 2012, p. 465-466).

In general, all of these consequences arising from the incidence of the principle of unavailability of the public interest on the legal-administrative regime are "mechanisms capable of compelling the public administrator to satisfy the interests of the collectivity, removing personalist behaviors or linked to manifestations of his own will, and directing him towards achieving the public interest " (HACHEM, 2011, p. 49). Thus, its main function is to remove any margin of free performance in administrative activity. It is obvious that the spaces of discretion are preserved, however these must be explored by the Administration in a way conditioned to the realization of the public interest. That is, "the Administration cannot *give up* acting to satisfy the interests entrusted to it, although this does not stop it from *choosing*, within the limits of its own norm and law, how, when and how to do it" (MOREIRA NETO, 2006, p. 90).

6 CONCLUSIONS

There is no consensus in Brazilian doctrine regarding the content of the principle of unavailability of the public interest - and perhaps this is precisely because the writings on the subject as a rule have never faced it with the specificity necessary to understand it properly.

In this article, it was argued that the legal content of the principle of unavailability represents the inescapable duty of the Public Administration to undertake absolutely all its activity in order to satisfy the legally defined public interest. By virtue of the principle of unavailability, there can be no administrative act aimed at achieving any objective that does not coincide with the public interest. If not, it must be declared invalid.

The principle of unavailability of the public interest acts as a tie to administrative activity. This is the other side of the coin, made up of the principle of supremacy. It is this principle that justifies (theoretically) the exorbitant prerogatives that the legislation confers on the Public Administration when conditioning its handling to the satisfaction of the public interest.

The unavailability, therefore, much more than simply saying the obvious (as some authors criticize), has an important function of directing the legal-administrative activity. It is the unavailability of the public interest the answer, existing in the legal-administrative regime itself, to curb the undesirable excesses that the Administration could come to commit if it were granted only prerogatives.

As for its legal nature, it was seen that according to the criterion of *degree of fundamentality* there is no doubt that the unavailability of the public interest is presented as a principle. This is the central rule of Administrative Law, which, alongside supremacy, sets the tone for the entire legal-administrative regime.

Based on the criterion of the *logical-normative structure*, it was argued that the unavailability of the public interest is presented, in this point of view, as a rule. After all, supposing that the unavailability of the public interest could be seen as an optimization warrant could lead to the conclusion that, depending on the factual and legal situations of the specific case, the Public Administration could be more or less linked to the realization of the public interest. In this sense, it would be admitted that in some cases the Administration deliberately failed to serve the public interest, which goes exactly against what is considered to be the legal content of the unavailability.

Afterwards, it was demonstrated that the unavailability of the public interest is a norm that finds its foundation in positive Brazilian Law. Not expressly, but, rather, implicitly in the constitutional text, based on several normative provisions that link administrative activity to the pursuit of the public interest. It was also seen that, in an infraconstitutional basis, there are several devices that link the Public Administration to the realization of the public interest, with Law nº 4.171/65 standing out on this point.

In the end, the main implications brought by the principle of unavailability to the legal--administrative regime were identified, analyzing them one by one, specifically. It is: **(i)** the principle of legality and its consequences as the purpose, reasonableness and proportionality, motivation and responsibility of the State; **(ii)** mandatory performance of public activity / continuity of public services; **(iii)** control (internal and external) of administrative acts; **(iv)** the isonomic treatment of citizens vis-à-vis the Administration; **(v)** the publicity; and **(vi)** the inalienability of rights concerning public interests.

REFERENCES

ALEXY, Robert. *Teoría de los derechos fundamentales*. 2. ed. Madrid: Centro de Estudios Políticos y Constitucionales, 2012.

AMARAL, Diogo de Freitas. Administrative Law Course (*Curso de Direito Administrativo)*. v. II. Coimbra: Almedina, 2001.

ARAÚJO, Edmir Netto de. Administrative Law Course (*Curso de Direito Administrativo)*. 5. ed. São Paulo: Saraiva, 2010.

ATALIBA, Geraldo. Constitution change. Public Law Review (Mudança da Constituição. *Revista de Direito Público)*, São Paulo, n. 86, p. 181- 186, Apr./Jun. 1988.

ÁVILA, Humberto. Rethinking the "principle of the supremacy of the public interest over the particular" (Repensando o "princípio da supremacia do interesse público sobre o particular"). In: SARMENTO, Daniel (Org.). Public versus private interests: deconstructing the principle of the supremacy of the public interest (*Interesses públicos versus interesses privados*: desconstruindo o princípio da supremacia do interesse público). 3. tir. Rio de Janeiro: Lumen Juris, 2010.

BACELLAR FILHO, Romeu Felipe. Preface (Prefácio). *In*: HACHEM, Daniel Wunder. Constitutional principle of supremacy of the public interest (*Princípio constitucional da supremacia do interesse público)*. Belo Horizonte: Fórum, 2011.

BARCELLOS, Ana Paula de. The legal effectiveness of constitutional principles: the principle of human dignity (*A eficácia jurídica dos princípios constitucionais*: o princípio da dignidade da pessoa humana). 3. ed. rev. e atual. Rio de Janeiro: Renovar, 2011.

BARCELLOS, Ana Paula de. Constitutional Law Course (*Curso de direito constitucional)*. Rio de Janeiro: Forense, 2018.

BINENBOJM, Gustavo. A theory of administrative law: fundamental rights, democracy and constitutionalization (*Uma teoria do direito administrativo*: direitos fundamentais, democracia e constitucionalização). 3. ed. rev. e atual. Rio de Janeiro: Renovar, 2014.

BRASIL. Constitution of the Federative Republic of Brazil, of October 5, 1988 (*Constituição da República Federativa do Brasil*, de 05 de outubro de 1988). Available in: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm

BRASIL. Law nº 7.347, of July 24, 1985 (*Lei nº 7.347*, de 24 de julho de 1985). Available in: http://www.planalto.gov.br/ccivil_03/leis/L7347orig.htm

BRASIL. Law nº 9.784, of January 29, 1999 (*Lei nº 9.784*, de 29 de janeiro de 1999). Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l9784.htm

CANOTILHO, J. J. Gomes; MOREIRA, Vital. Fundamentals of the Constitution (*Fundamentos da constituição)*. Coimbra: Coimbra Editora, 1991.

CRETELLA JÚNIOR, José. Treaty of Administrative Law: Theory of administrative act (*Tratado de Direito Administrativo*: Teoria do ato administrativo). v. 2. Rio de Janeiro: Forense, 1966.

DALLARI, Dalmo de Abreu. Elements of General Theory of the State (*Elementos de Teoria Geral do Estado)*. 31. ed. São Paulo: Saraiva, 2012.

DI PIETRO, Maria Sylvia Zanella. *Administrative law (Direito Administrativo)*. 2. ed. São Paulo: Atlas, 1991.

DWORKIN, Ronald. Taking rights seriously (*Levando os direitos a sério)*. 3. ed. São Paulo: Martins Fontes, 2010.

ESCOLA, Héctor Jorge. *El interés público*: como fundamento del derecho administrativo. Buenos Aires: Depalma, 1989.

FARIA, José Eduardo. Law and economics in Brazilian democratization (*Direito e economia na democratização brasileira)*. São Paulo: Saraiva, 2013.

FARIA, Luzardo. The inefficiency of the current model of civil liability of the State in Brazil and the need for damage prevention. Digital Journal of Administrative Law (A ineficiência do atual modelo de responsabilização civil do Estado no Brasil e a necessidade de prevenção de danos. *Revista Digital de Direito Administrativo)*, São Paulo, v. 4, n. 2, p. 117-136, Jul. 2017.

FARIA, Luzardo. Suspension of the provision of essential public service due to user default: the public interest between efficiency and dignity (Suspensão do fornecimento de serviço público essencial por inadimplemento do usuário: o interesse público entre eficiência e dignidade). *In*: BLANCHET, Luiz Alberto; HACHEM, Daniel Wunder;

SANTANO, Ana Claudia (Coords.). Efficiency and Ethics in Public Administration (*Eficiência e Ética na Administração Pública)*. Curitiba: Íthala, 2015.

FREITAS, Juarez. Control of administrative acts and fundamental principles (*O controle dos atos administrativos e os princípios fundamentais)*. 4. ed. São Paulo: Malheiros, 2009.

GABARDO, Emerson. Public interest and subsidiarity: the State and civil society beyond good and evil (***Interesse público e subsidiariedade***: o Estado e a sociedade civil para além do bem e do mal). Belo Horizonte: Fórum, 2009.

GASPARINI, Diógenes. Administrative Law (*Direito Administrativo)*. São Paulo: Saraiva, 1989.

HACHEM, Daniel Wunder. Constitutional principle of the supremacy of the public interest *(Princípio constitucional da supremacia do interesse público)*. Belo Horizonte: Fórum, 2011.

HAEBERLIN, Mártin. A theory of public interest: foundations of the Meritocratic State of Law (*Uma teoria do interesse público*: fundamentos do Estado Meritocrático de Direito). Porto Alegre: Livraria do Advogado, 2017.

LEAL, Rogério Gesta. Control of public administration in Brazil: critical notes. Journal of Administrative and Constitutional Law (Controle da administração pública no Brasil: anotações críticas. *A&C - Revista de Direito Administrativo e Constitucional)*, Belo Horizonte, ano 5, n. 20, p. 125-143, abr./jun. 2005.

LIMA, Martonio Mon'Alverne Barreto. Comments on art. 1º. *In*: CANOTILHO, J. J. Gomes; MENDES, Gilmar Ferreira; SARLET, Ingo Wolfgang; STRECK, Lenio L. (Coords.). Comments on the Constitution of Brazil (*Comentários à Constituição do Brasil)*. São Paulo: Saraiva/Almedina, 2013.

LIMA, Ruy Cirne. Principles of Administrative Law (*Princípios de Direito Administrativo)*. 7. ed. São Paulo: Malheiros, 2007.

MARTINS JÚNIOR, Wallace Paiva. Principle of public interest (Princípio do interesse público). *In*: DI PIETRO, Maria Sylvia Zanella; MARTINS JÚNIOR, Wallace Paiva. Administrative law treaty: general theory and principles of administrative law (*Tratado de direito administrativo*: teoria geral e princípios do direito administrativo. Review of the Courts). vol. 1. São Paulo: Revista dos Tribunais, 2014.

MEILAN GIL, José Luis. Intereses generales e interés público desde la perspectiva del derecho público español. In: BACELLAR FILHO, Romeu Felipe; HACHEM, Daniel Wunder (Coords.). Administrative Law and public interest: studies in honor of Professor Celso Antônio Bandeira de Mello (*Direito Administrativo e interesse público*: estudos em homenagem ao Professor Celso Antônio Bandeira de Mello). Belo Horizonte: Fórum, 2010.

MEIRELLES, Hely Lopes. Brazilian Administrative Law (*Direito Administrativo Brasileiro)*. 38. ed. São Paulo: Malheiros, 2012.

MELLO, Celso Antônio Bandeira de. Administrative Law Course (*Curso de Direito Administrativo)*. 32. ed. São Paulo: Malheiros, 2015.

MOREIRA NETO, Diogo de Figueiredo. Administrative Law Course (*Curso de Direito Administrativo)*. 14. ed. rev., ampl. e atual. Rio de Janeiro, 2006.

MORENA, Luis de la Morena y de la. Derecho Administrativo e interés público: correlaciones básicas. *Revista de Administración Pública*, Madrid, n. 100-102, p. 847-880, ene./dic. 1983.

MORETTI, Natalia Pasquini. A contemporary conception of the principle of unavailability of the public interest (Uma concepção contemporânea do princípio da indisponibilidade do interesse público). *In*: MARRARA, Thiago (Org.). Principles of administrative law: legality, legal certainty, impersonality, publicity, motivation, efficiency, morality, reasonableness, public interest (*Princípios de direito administrativo*: legalidade, segurança jurídica, impessoalidade, publicidade, motivação, eficiência, moralidade, razoabilidade, interesse público). São Paulo: Atlas, 2012.

NIETO, Alejandro. La administración sirve con objetividad los intereses generales. *In*: BAQUER, Sebastián Martin--Retortillo (Coord.). *Estudios sobre la Constitución española*: Homenaje al profesor Eduardo García de Enterría. v. 3. Madrid: Civitas, 1991.

ROCHA, Cármen Lúcia Antunes. Constitutional principles of Public Administration (*Princípios constitucionais da Administração Pública)*. Belo Horizonte: Del Rey, 1994.

SILVA, José Afonso da. Course of Positive Constitutional Law (*Curso de Direito Constitucional Positivo)*. 32. ed. São Paulo: Malheiros, 2009.

SILVA, Virgílio Afonso da. Principles and rules: myths and misconceptions about a distinction. Latin American Journal of Constitutional Studies (Princípios e regras: mitos e equívocos acerca de uma distinção. *Revista Latino--Americana de Estudos Constitucionais)*, Belo Horizonte, n. 1, p. 607-630, Jan./Jun. 2003.

SIQUEIRA, Mariana de. Public interest in Brazilian administrative law: from the construction of the frame to the composition of the painting (*Interesse público no direito administrativo brasileiro*: da construção da moldura à composição da pintura). Rio de Janeiro: Lumen Juris, 2016.

TAVEIRA NETO, Francisco. The evolution of Public Administration and its control mechanisms in the Federal Constitution. Journal of Administrative and Constitutional Law. (A evolução da Administração Pública e de seus mecanismos de controle na Constituição Federal. *A&C - Revista de Direito Administrativo e Constitucional)*, Belo Horizonte, year 6, n. 23, p. 135-144, Jan./Mar. 2006.

Recebido/*Received*: 20.11.2019

Aprovado/*Approved*: 25.05.2020