Cooperative duty of consensuality and the State

Dever cooperativo de consensualidade e o poder público

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ABSTRACT
This work analyzes whether, within the cooperative process model, there is a duty of consensuality, and whether, in view of this duty, the State not only has the possibility of composing or settling the litigation, but also the duty to seriously consider opportunities and proposals of settling. It also seeks to discuss the consequences of non-compliance with this duty of consensuality for the parties, including for the State when acting in court.

Keywords: Civil Procedure, Consensuality, State, Principle of cooperation.

1 INTRODUCTION

The administrative legal system, characterized by the principles of legality and the unavailability of the public interest, imposes contingencies on the actions of the public authorities, which can be seen as an impediment to compromise and transact in the event of conflict.

In fact, due to the principle of legality, expressly provided for in art. 37 of the Federal Constitution, it is stated that the government must act in accordance with the Constitution and the laws, and only do that which is previously authorized by the legal system[1] . As a result of the principle of unavailability of the public interest, it is common to state that the government must manage the public assets and interests as if they were private property, not being able to dispose of them.[2]

These two principles that guide administrative activity, therefore, can be used to justify an inflexible and litigious posture of the public power in the process, since they

[1] MELLO, Celso Antônio Bandeira. *Administrative Law Course*. 21. ed. São Paulo: Malheiros, 2006, p. 98.
[2] GASPARINI, Diogénes. *Direito administrativo*. 17. ed. São Paulo: Saraiva, 2011, p. 24. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788502149236/>. Accessed on: 19 Jul. 2022. In the same sense: MELLO, Celso Antônio Bandeira. Administrative *Law Course*. 21. ed. São Paulo: Malheiros, p. 70.

would create rigid limitations on state action in court, hindering self-composition, or determining the use of all opportunities to challenge court decisions.

In this sense, there are frequent manifestations accusing the public authorities of excessive litigiousness[3], and as one of the main causes for the congestion of the courts [4][5].

On the other hand, there has been a significant legislative evolution towards consensus in the last decades. The law on special civil and criminal courts was a milestone when it established both the mandatory conciliation hearing in civil courts, under penalty of default or dismissal of the case, and the possibility of criminal transaction in offenses of lesser offense potential (Law No. 9099 of 1995, arts. 20, 51, item I, and 76).

Subsequently, leniency agreements, both in the context of violations of the economic order (Law No. 10,149 of 2000) and in acts harmful to the public administration committed by legal entities (Law No. 12,846 of 2013), regulated the possibility of agreement within the administrative sanctioning law. Finally, the Mediation (Law No. 13,140, 2015) and Arbitration (Law No. 13,129, 2015) laws, and the greater openness to criminal transaction through rewarded collaboration (Law No. 12,850, 2013) and nonprosecution agreements (Law No. 13.964, 2019), have made clear what part of the doctrine already advocated: if even in criminal law there is room for conventionality, there is no reason for the public power to claim the unavailability of the interests it defends to stop sitting at the negotiating table.

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[3] ASSOCIATION OF BRAZILIAN MAGISTRATES. *The use of justice and litigation in Brazil*. Brasília, 2015. Available at: <https://www.amb.com.br/wp-content/uploads/2015/08/Pesquisa-AMB.pdf>. Accessed on: 21 Jul. 2022.

[4] BRITTO, Livia Mayer Totola, LACERDA, Lorena Rodrigues, KARNINKE, Tatiana Mascarenhas. *A crise do congestion do Poder Judiciário e a ingerência dos conflitos de massa no prejuízo do acesso à justiça*: Seriam as técnicas coletivas de repercussão individual instrumentos necessários para desestimular a litigância habitual? Paper presented at the III International Civil Procedure Congress, Vitoria, 2018. Available at: <https://periodicos.ufes.br/processocivilinternacional/article/view/26041/18091>. Accessed on: 20 Jun. 2022. The National Council of Justice launched on August 9, 2022 a panel on major litigants in Brazil, a database still in the homologation phase, which unsurprisingly pointed on the launch date to the Union, Caixa Econômica Federal, and the National Institute of Social Security, as the largest litigants in Brazilian common justice. The database is accessible at the following address: <https://grandes-litigantes.stg.cloud.cnj.jus.br/>.

[5] On the other hand, the problem of court congestion has several causes, and is felt in several countries, one should mention the very lack of human and financial structure of the judicial system. In 2014 Peter Gilles reported that in the view of most European countries the overload of court work was considered the great evil of the judicial system. In the same article, Gilles reports that there were 20,395 federal and state judges in Germany (GILLES, Peter. Civil justice systems and civil procedures in a changing world: Main problems, Fundamental reforms and perspectives - A European view. *Russian Law Journal*, v. 2, n. 1, 2014, pp. 41-56. Available at: <https://heinonline.org/HOL/P?h=hein.journals/russlj2&i=42>. Accessed on: 11 Nov. 2022), while in Brazil, in the same year, there were 16,927 magistrates (BRASIL. Conselho Nacional de Justiça. Justice in Numbers 2015. Brasília, 2015. Available at <https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2015/09/204bfbab488298e4042e3efb27cb7fbd.pdf>. Accessed on: 11 Nov. 2022), for a population of 83 million in Germany and about 203 million in Brazil.

In any case, the idea of cooperation among procedural subjects, which is now a principle that aims to achieve, "in a reasonable time, a fair and effective decision on the merits" (art. 6 of the CPC), suggests more than just the possibility of the government negotiating a consensual solution, but also a duty not to litigate frivolously.

This is the hypothesis that I will try to discuss in this article, that is, whether, along with the possibility of concluding agreements to prevent or terminate litigation, the public authorities have a duty to seek consensual solutions and to seriously consider proposals made to terminate a dispute without a court decision.

2 CONSENSUS AS A COOPERATIVE DUTY

2.1 CONTENT OF THE PRINCIPLE OF COOPERATION

It is well accepted by the doctrine that the constitutional guarantee of the adversary (art. 5, subsection LV, of the Federal Constitution) implies not only a right of the parties to participate in the process, but also duties of the judge to provide this access and dialogue with the litigants[6] . More recently, it has been sustained that the adversarial principle also imposes duties of loyalty and good faith on procedural subjects[7] , as a result of a less patrimonial and individualistic view of that principle, according to which the process is an instrument of democracy and should be used in an ethical manner[8] .

Thus, even before the 2015 Code of Civil Procedure, which established the duty of those who participate in the process to cooperate with each other to obtain a fair, effective and timely decision on the merits (art. 6), the doctrine already affirmed the existence of cooperative duties in the process, from a re-reading of the adversarial principle[9] .

It so happens that, despite the fact that several cooperative duties are now established in the Code of 2015 (arts. 6, 9, 10, 80, items IV and V, 489, § 1, item IV, among others), many of them use vague or indeterminate concepts, which depend on

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[6] DINAMARCO, Cândido Rangel. *Fundamentos do processo civil moderno.* 3. ed. São Paulo: Malheiros, 2000, p. 124.
[7] CABRAL, Antonio do Passo. O contraditório como dever e a boa-fé procedural objetiva. *Revista de Processo*, São Paulo, v. 126, p. 59-81, aug. 2005.
[8] MITIDIERO, Daniel. *Collaboration in the civil process*: Do modelo ao princípio. 4. ed. São Paulo: Revista dos Tribunais, 2020, p. 94.
[9] OLIVEIRA, Carlos Alberto Alvaro de. The guarantee of the adversary. *Revista de Processo*, São Paulo, v. 71, p. 31-39, 1993.

subjective assessment[10] of the conduct of the procedural subjects: to cooperate for a fair and effective decision, not to oppose unjustified resistance, not to proceed in a reckless manner, are expressions that allow multiple interpretations.

This subjectivism of the norms that regulate the conduct of the procedural subjects, in addition to making it difficult for the judge to apply them[11] , allows various procedural duties to be extracted from these concepts, and there is no uniformity in the doctrine as to which would be the cooperative duties of the parties and the judges.

There is talk of the cooperative duties of the judge of clarification, prevention, debate and assistance[12] , but there is also mention of the duty of consultation[13] and loyalty[14] of judges. In relation to the parties, the duties of clarification, loyalty and protection are treated as cooperative duties[15] , but some sustain the existence of the duties of truthfulness, non-obstructiveness, information and preparation[16] .

The lack of uniformity regarding the content of the principle of cooperation and the collaborative duties arising from it is a challenge to the discipline of civil procedure. In fact, the violation of cooperative duties may lead to sanctions (Art. 77 and 81, of the Code of Civil Procedure, for example), which presuppose the predictability of the conducts considered inadequate.

2.2 GROUNDS FOR COOPERATIVE DUTIES IN THE PROCESS

Article 6 of the CPC establishes a clear purpose (a fair and effective decision on the merits, and within a reasonable time), which must be achieved through cooperation among procedural subjects, but it does not directly establish which conducts should be adopted to achieve this end, which is in line with the concept of principle-norm, as dissociated between rules and principles by Humberto Ávila[17] .

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[10] CABRAL, Antonio do Passo. O contraditório como dever e a boa-fé procedural objetiva. *Revista de Processo*, São Paulo, v. 126, p. 59-81, aug. 2005.
[11] CABRAL, Antonio do Passo. O contraditório como dever e a boa-fé procedural objetiva. *Revista de Processo*, São Paulo, v. 126, p. 59-81, aug. 2005.
[12] MITIDIERO, Daniel. *Collaboration in the civil process*: Do modelo ao princípio. 4. ed. São Paulo: Revista dos Tribunais, 2020, p. 69.
[13] AURELLI, Arlete Inês; ANDRIOTTI, Rommel. Principle of cooperation in the Civil Procedure Code of 2015. *Revista de Processo*, São Paulo, v. 322, p. 41-72, dec. 2021.
[14] DIDIER JUNIOR, Fredie. The three models of procedural law: inquisitive, dispositive and cooperative. *Revista de Processo*, São Paulo, v. 198, p. 213-226, aug. 2011.
[15] ZANETI JUNIOR, Hermes. The principle of cooperation and the Code of Civil Procedure: Cooperation for the process. In: *Contemporary civil procedure:* Homage to the 80 years of Professor Humberto Theodoro Júnior. Rio de Janeiro: Forense, 2018, p. 147.
[16] AURELLI, Arlete Inês; ANDRIOTTI, Rommel. Principle of cooperation in the Civil Procedure Code of 2015. *Revista de Processo*, São Paulo, v. 322, p. 41-72, dec. 2021.
[17] According to Humberto Ávila, "rules provide for conducts that serve the realization of due purposes,

Thus the principle of cooperation, as can be constructed from the art. 6 of the CPC, establishes an ideal state of affairs that should be sought by the enforcer of law, so that its interpretation and application require an analysis regarding the correlation between the desired end and the effects resulting from the conduct deemed necessary. As a norm-principle, cooperation is not intended to be a specific solution for a decision, but to contribute by complementing other associated reasons[18] .

However, these characteristics of the principles do not deprive them of their effectiveness: the principles create the duty to adopt the necessary behaviors in order to achieve the ideal state of affairs they declare, and forbid the conducts contrary to these ends[19] . Thus, the principle of cooperation should not be interpreted as a simple value, a foundation of the cooperative model of the process, but as a norm that implies conducts.

To achieve the meaning of the provisions of art. 6 of the CPC, as well as the idea of cooperation as a model and principle of civil procedure, the doctrine pointed to the evolution of the methodology of the process and its model[20] , or looked to private law for the notion of good faith[21] , which characterizes contractual relations.

In fact, some of the main works that have discussed cooperation in civil procedure have sought to ground the cooperative model as a result of the cultural and methodological evolution of procedural law.

On the other hand, the positivization of the judge's duties of assistance and dialogue in legal systems, such as § 139 of the German CPC and art. 266 of the Portuguese CPC, in the format of general clauses[22] , as later occurred with art. 6 of the Brazilian CPC, supported the doctrine's discourse that these provisions established a new model of

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while principles provide purposes whose realization depends on necessary conducts". (*Theory of Principles.* 21st ed. São Paulo: Malheiros/Juspodivm, 2022, p. 100).

[18] ÁVILA, Humberto. *Theory of principles*. 21. ed. São Paulo: Malheiros/Juspodivm, 2022, p. 101 and 104.

[19] ÁVILA, Humberto. *Theory of principles*. 21. ed. São Paulo: Malheiros/Juspodivm, 2022, p. 108.

[20] MITIDIERO, Daniel. *Collaboration in the civil process*: Do modelo ao princípio. 4. ed. São Paulo: Revista dos Tribunais, 2020.

[21] DIDIER JÚNIOR, Fredie. *Foundations of the principle of cooperation in Portuguese Civil Procedural Law*. Coimbra: Wolters Kluwer Portugal, 2010, p.79-103. In the same sense: GOUVEIA, Lúcio Grassi. The legitimating function of the principle of intersubjective cooperation in Brazilian civil procedure. *Revista de Processo*, São Paulo, v. 172, p. 32-53, jun. 2009.

[22] That is, as a normative text with antecedent formed by vague terms (factual hypothesis) and the consequent (legal effect) undetermined (concept by Judith Martins-Costa, *apud* DIDIER JÚNIOR, Fredie. Foundations of the principle of cooperation in Portuguese Civil Procedural Law. Coimbra: Wolters Kluwer Portugal, 2010, p.56-57).

cooperative process, as well as instituted a principle of cooperation, which had an effectiveness independent of other rules[23] .

This effectiveness of the principle of cooperation was reconstructed from the duties of loyalty and good faith of the law of obligations[24] , since this discipline had already developed to densify the general clause of good faith through the description of enforceable conduct, which would now also be mandatory in the process due to the principle of cooperation.

Thus, it is undeniable the doctrine's effort to make the provision effective, which, alone or in conjunction with other CPC provisions, has been interpreted to extract from it concrete cooperative duties that seek to achieve the objective proclaimed in art. 6 of a fair, effective and timely decision on the merits.

It is in this sense that I will try to explain the existence of a cooperative duty to participate in consensual solutions, based on the provisions of art. 6 in conjunction with other CPC provisions.

2.3 CONSENSUS AS A DUTY OF COOPERATION

The doctrine cites among the collaborative duties of the parties the duty not to oppose unnecessary obstacles to the procedural process (duty of non-obstruction, art. The doctrine cites, among the collaborative duties of the parties, the duty of not placing unnecessary obstacles in the way of the proceedings (duty of non-blocking, art. 77, sub II, of the CPC), of being prepared to provide clarifications about the cause, knowing the factual and legal issues discussed in the dispute (duty of preparation), and of providing all the clarifications and evidence necessary to the resolution of the case (duty of information[25]), telling the truth and not omitting to create difficulties in the investigation of the case (duty of truthfulness, art. 77, sub I, of the CPC)[26] . It is also pointed out as duties of the parties the duty of loyalty, by which plaintiff and defendant must observe the objective good faith, refraining from acting in bad faith (art. 5, 77 to 81 of the CPC);

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[23] DIDIER JÚNIOR, Fredie. *Foundations of the principle of cooperation in Portuguese Civil Procedural Law*. Coimbra: Wolters Kluwer Portugal, 2010, p.79-103.
[24] DIDIER JÚNIOR, Fredie. *Foundations of the principle of cooperation in Portuguese Civil Procedural Law*. Coimbra: Wolters Kluwer Portugal, 2010, p.79-103.
[25] In a similar vein, Hermes Zaneti Jr. cites the duty of clarification (art. 321, sole paragraph, of the CPC), according to which the parties would have to postulate and argue in a clear and coherent manner (O princípio da cooperação e o Código de Processo Civil: Cooperation for the process. In: *Processo civil contemporâneo:* Homenagem aos 80 anos do professor Humberto Theodoro Júnior. Rio de Janeiro: Forense, 2018, p. 147)
[26] AURELLI, Arlete Inês; ANDRIOTTI, Rommel. Principle of cooperation in the Civil Procedure Code of 2015. *Revista de Processo*, São Paulo, v. 322, p. 41-72, dec. 2021.

as well as the duty of protection, according to which the parties may not cause unnecessary damage to the adversary[27] (art. 77, item VI, of the CPC).

All these duties are linked in one way or another to the idea of consensuality: the party must have knowledge of the factual and legal issues under discussion, understanding what its chances of success in the lawsuit are, as well as whether the costs of the lawsuit compensate what it may gain or not lose from the outcome of the litigation (duty of preparation). Moreover, there is no place in the process for withholding information or misleading the judge and the opposing party (duty of information and truthfulness), and, convinced of the advantages of a consensual solution, his obligation is not to oppose the self-composition (duty of non-obstacle), and to collaborate so that the opposing party understands the situation of the litigation (duty of loyalty).

For the judge, the principle of cooperation implies, among others, the duties to listen to the parties before knowing the factual or legal matter, when they have not had the opportunity to speak previously[28] (duty of consultation or dialogue, art. 10 of the CPC); and to ask the parties to clarify their allegations, requests or positions in court, in order to avoid mistaken decisions for lack of information[29] (duty of clarification, art. 321 of the CPC). These duties are also associated with consensuality, since they imply an active conduction of the process by the judge in search of an adequate treatment of the conflict, and not the mere delivery of the state decision on the conflict.

In any event, among the fundamental rules of the CPC, art. 3, § 3, stipulates that the "consensual conflict resolution methods shall be encouraged by judges, lawyers, public defenders and members of the Public Prosecutor's Office, including during the judicial proceedings". In the same vein, the CPC provides for a mandatory self-composition hearing at the very beginning of the lawsuit, which will only not occur if the subject matter of the lawsuit does not admit this solution, or if both parties show no interest (art. 334). Additionally, art. 139, section V, of the CPC establishes the judge's duty to promote self-composition at any stage of the process.

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[27] ZANETI JUNIOR, Hermes. The principle of cooperation and the Code of Civil Procedure: Cooperation for the process. In: *Contemporary civil procedure:* Homage to the 80th anniversary of Professor Humberto Theodoro Júnior. Rio de Janeiro: Forense, 2018, p. 147.

[28] GOUVEIA, Lúcio Grassi. The legitimating function of the principle of intersubjective cooperation in the Brazilian civil process. *Revista de Processo*, São Paulo, v. 172, p. 32-53, jun. 2009.

[29] GOUVEIA, Lúcio Grassi. The legitimating function of the principle of intersubjective cooperation in the Brazilian civil process. *Revista de Processo*, São Paulo, v. 172, p. 32-53, jun. 2009.

The CPC also prohibits procedural subjects from making claims or defenses that are known to be unfounded, from performing useless or unnecessary acts to promote or defend the right at issue (art. 77, items II and III), and from unreasonably resisting the progress of the case or acting in a reckless manner (art. 80, items IV and V). These norms announce a collaborative and serious attitude of the parties in their claims and defenses, which is not compatible with excessive litigiousness or with the unthinking disregard for proposals of consensual solution of the dispute.

Thus, although not expressly mentioned by the doctrine, the duty to participate in consensual solutions is established in the CPC, especially in art. 3, § 3, this being a conduct that collaborates with the objective of the principle of cooperation, because it contributes to achieving a fair and effective decision on the merits[30] within a reasonable time. Thus, it is one more cooperative duty of the parties and the judge, who should seriously consider the opportunities and proposals for self-composition of the dispute.

In other words, the principle of cooperation includes the duty of (a) the parties and the judge to promote and participate in consensual solutions to the claim, and (b) the duty of the parties to consider seriously the settlement proposals of the opposing party. This conclusion results from the fact that the effects of this posture (incentive to consensual settlement) are correlated with the state of affairs that the principle of cooperation is intended to promote (fair and effective decision on the merits, within a reasonable time), as well as from the aforementioned rules of the CPC, which encourage consensual settlement as an appropriate means of resolving disputes.

If the duty of the judge to promote self-composition is expressed in the CPC (art. 139, item V)[31] , and its disobedience may be subject to questioning and appeal by the parties, the duty of the parties to seriously consider the opportunities and proposals for self-composition may be the focus of resistance, especially in face of the express mention to another principle in the Code: the principle of autonomy of will[32], established in art. 166.

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[30] According to art. 487, item III, line "b", of the CPC, the decision that ratifies the transaction is a decision that resolves the merits.

[31] It is not unknown to discuss the limits of the judge's duty to conciliate, given the need to preserve impartiality, as well as the tendency to passivity of the judge to avoid allegations that he would be assisting one of the parties or infringing its autonomy (see, for example, SOUZA, André Pagani. The importance of the principle of cooperation for the construction of the transaction in judicial conciliation: a reading of the Portuguese and Brazilian law (Part II). *Revista de Processo*, São Paulo, v. 295, p. 41-54, sep. 2019). However, the limits of this paper prevent discussing these issues, having chosen to focus on the contribution that the principle of cooperation can give regarding the cooperative duties of the parties.

[32] Under Annex II of Resolution No. 125 of 2010, the CNJ conceptualizes the principle of autonomy of will as the "duty to respect the different points of view of those involved, ensuring that they reach a voluntary

The autonomy of will of the parties, however, does not authorize the party to act frivolously, failing to participate in the means of conflict resolution and consider seriously the proposals made. Article 3, paragraph 3, of the CPC is categorical in directing those who participate in the process to the consensual solutions of the process, which would be denied if it is considered that the party can unjustifiably disregard these initiatives, without any consequence.

2.4 CONSEQUENCES OF BREACHING THE CONSENSUAL DUTY

But what would be the consequences of not complying with this consensual duty?

The International Institute for the Unification of Private Law (Unidroit), together with the American Law Institute (ALI) and the European Law Institute (ELI), maintains a model of transnational principles and rules of civil procedural law, in which one of the recommendations is precisely that the internal legislation of the countries provides that the parties, before or after the beginning of the judicial process, must cooperate to resolve the conflict by self-composition. In the case of non-cooperation, it is recommended that the costs of the lawsuit should be increased, to punish an irrational or intentional attitude in not participating in these efforts[33] .

As stated in the comments to the model device, the purpose of instituting the duty of cooperation in consensual conflict resolution is to overcome the tradition in some countries that the parties have no obligation to negotiate or seriously consider settlement proposals. Thus, examples such as the Ontario Code of Civil Procedure in Canada[34] and the English Rules of Procedure[35] were used, which provide for formal settlement offer procedures that, if not accepted, may lead to additional costs for the rejecting party, especially if the rejecting party does not obtain a more advantageous result than the settlement offer.

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and non-coercive decision, with freedom to make their own decisions during or at the end of the process and to interrupt it at any time" (BRASIL, National Council of Justice. *Resolution No. 125*. Brasília, 2010. Available at: <https://atos.cnj.jus.br/atos/detalhar/156>. Accessed on November 1, 2022).

[33] In original: "24.3 The parties, both before and after commencement of litigation, should cooperate in reasonable settlement endeavors. The court may adjust its award of costs to reflect unreasonable failure to cooperate or bad-faith participation in settlement endeavors." (*Principles of Transnational Civil Procedure*. Rome, 2006. Available at: <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/>. Accessed on: 8 Dec. 2022).

[34] See 49.10 of the Rules of Civil Procedure (ONTARIO COURT OF JUSTICE. R.R.O. 1990, Reg. 194: Rules of civil procedure. Ontario, 1990. Available at: <https://www.ontario.ca/laws/regulation/900194#BK445>. Accessed on: 8 Dec. 2022).

[35] See art. 36.17 of the Civil Procedure Rules (Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36#36.17>. Accessed on 8 Dec. 2022.

Similar rules are also provided elsewhere, as is the case with s. 9-1(5)(a) and (d) of the Civil Rules of the Supreme Court of British Columbia[36] , Canada, which also provides for incentives to accept settlements, ranging from waiver of costs to an increase in them, depending on whether or not the proposal is accepted, and on the outcome of the claim.

An example of the relevance of these rules to encourage consensuality of the parties was the case of Park v. Targonski[37] , judged by the Supreme Court of British Columbia. The case concerned a car accident that occurred on July 10, 2009, in which a woman suffered neck and back injuries. After the accident, the victim developed chronic pain and moderately severe clinical depression, and before the accident she was working as a nurse in Vancouver.

Six weeks before the trial began, the defendant-insurer made a settlement offer of $321,407, which the defendant refused. After the trial, the insurer was ordered to pay $302,643.63 in damages, $18,753.37 less than the settlement offer.

In deciding the case, the judge analyzed whether the plaintiff's refusal to accept the offer was reasonable. In doing so, he considered that the settlement offer occurred after mediation of the case, and after the parties had access to the medical reports produced on the victim's condition. Thus, the main issue in dispute at trial was whether the plaintiff had recovered all or most of her pre-accident work capacity. In the opinion of the reporting judge, the medical evidence up to the settlement offer should have led the plaintiff to conclude that her claim of permanent functional disability had no support in the existing medical and professional evaluations.

Thus, although the court noted that the plaintiff's negative view of her ability to work in the future was partially related to her depression and chronic pain she suffered, the judgment concluded that the plaintiff's reasons for rejecting the offer were not objectively reasonable, especially since she was represented by experienced and capable counsel. In the court's view, therefore, the defendant insurer's offer for settlement was within a reasonable range of results based on the information known to the plaintiff at the time the offer was made.

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[36] Available at: <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/168_2009_00:>. Accessed 13 Dec. 2022.

[37] BRITISH COLUMBIA. Supreme Court Of British Columbia. Park v. Targonski. 2016 BCSC 31 (CanLII). Vancouver. 12 Jan. 2016. Available at: <https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc31/2016bcsc31.html>. Accessed on: 13 Dec. 2022.

As a result, the court ordered the victim to be compensated for the costs of the case up to the date of the settlement offer, but not the costs incurred after this date, which amounted to a deduction from her total compensation of $56,207.

The relevant values involved, therefore, show that these rules ultimately serve as a filter to frivolous actions and defenses, requiring litigants to make a careful assessment of the strengths and weaknesses of their cases at the beginning and during the litigation process, and also encouraging litigants to settle whenever possible.

However, even in the absence of similar provisions in the Brazilian legal system, the duty of consensus, linked to the principle of cooperation, as deduced in the previous item, makes it unlawful to conduct contrary to the state of affairs desired by the rule of art. 6 of the CPC, with consequences for the offender.

In the first place, not participating in an opportunity of consensual solution of the demand requires justifications from the party beyond the autonomy of the will: based on art. 334 of the CPC, the judge may designate a specific act to seek mediation or conciliation of the dispute, and indicate that any unmotivated absence will imply a sanction for an act against the dignity of justice (art. 334, § 8).

The use of the technique of art. 334 of CPC, initial mandatory hearing of mediation or conciliation foreseen for the common procedure, also in other procedures and stages of the process, is allowed both by art. 318 and by art. 327, § 2, of CPC, the latter considered as a general clause of flexibility of the procedure[38] . Thus, at any stage, ex officio (CPC art. 139, item V) or at the request of either party, the judge may designate a hearing for mediation or conciliation of the dispute, warning the parties that the unjustified absence will result in the sanctions of art. 334, § 8 of CPC.

Furthermore, the absence cannot be justified based solely on the autonomy of the will, and the disinterested party must demonstrate that there are no serious chances of conciliation, either because the opposing party also has no interest, or because the case does not admit self-composition, in the terms of art. 334, § 4, CPC.

[38] In this sense: CABRAL, Trícia Navarro Xavier. SANTIAGO, Hiasmine. The transposition of art. 334 of CPC for the execution process. In: LUCON, Paulo Henrique dos Santos; OLIVEIRA, Pedro Miranda de. (Org.). Current overview of the new CPC. 1ed. São Paulo: 2019, v. 3, p. 559-570; and DIDIER JÚNIOR, Fredie; CABRAL, Antonio do Passo; CUNHA, Leonardo Carneiro da. Por uma nova teoria dos procedimentos especiais. 2. ed. Salvador: JusPodivm, 2021, p. 70. It is worth noting that for Trícia Cabral the use of the hearing of art. 334 of the CPC is only possible in the execution if it does not bring damage to the creditor, that is, it has to be requested by the creditor and does not interrupt or suspend the other executive acts.

On the other hand, the party that receives a settlement proposal and refuses the solution must also clarify its reasons, indicating the reasons for its dissatisfaction, which may be subject to evaluation by the judge. The unreasonable refusal, however, can only be sanctioned if it constitutes one of the hypotheses of bad faith litigation or violation of objective good faith (sections 77 and 80 of the CPC), such as, for example, if one of the parties spends several months analyzing the proposal and finally unreasonably refuses to settle the dispute, which could constitute unjustified resistance to the progress of the process or reckless action (section 80, clauses IV and V, of the CPC).

Although the cooperative process model requires that the parties' claims and defenses must be made in a serious and motivated manner, with no room for frivolous attitudes in the process, sanctioning the conduct of those who refuse to explain the reasons for not accepting a settlement proposal, outside the hypotheses foreseen in the Code of procedural penalties, runs up against the parties' right to act strategically in the process[39], a consequence of the guarantees to ample defense and adversary proceedings, as regulated today in our legal system.

In the absence of a specific device that sanctions this conduct, therefore, the requirement of serious consideration of settlement proposals does not have the consequence of generating sanctions to the parties, as occurs in the examples of comparative law cited above[40] . That said, we can inquire whether the public authority would also have the right to act strategically in the process, refusing to compose the dispute or transact in an ill-considered or unmotivated manner.

3 THE PUBLIC AUTHORITIES AND THE COOPERATIVE DUTY OF CONSENSUS

3.1 LEGALITY, PUBLIC INTEREST AND CONSENSUS IN PUBLIC LAW

Administrative scholars differ on the definition of public interest, although they almost always affirm the importance of the concept for the law. In the words of Celso

[39] I recall here the discussions on the subject by Antonio do Passo Cabral, who, when supporting collaborative duties from the principle of adversarial proceedings, recalls the position of several authors who support the possibility of parties to act strategically in the process in order to win the dispute or mitigate their losses (O contraditório como dever e a boa-fé procedural objetiva. *Revista de Processo*, São Paulo, v. 126, p. 59-81, aug. 2005).

[40] Here it is also worth mentioning art. 414 of the Portuguese CPC, which provides for the duty of cooperation of all parties to the proceeding for the discovery of the truth, non-compliance with which may be sanctioned with a fine, unlike our art. 378 of the CPC, which expresses the same duty to cooperate with the Judiciary for the discovery of the truth, but does not provide for a specific sanction for the party that violates this duty, only for third parties (art. 380, sole paragraph, of the CPC).

Antonio Bandeira de Mello, in order to emphasize the importance of the concept of public interest, it is sufficient "to mention that, as scholars emphasize, any administrative act that diverges from it will necessarily be invalid"[41] .

In part to circumvent the problem of vagueness, Marçal Justen Filho seeks to define what is not public interest[42] : first, public interest is not the private, secondary interest of the state apparatus. In other words, the public interest is not to be confused with the interest of the public entity, much less with the interest of its leaders.

On the other hand, public interest is also not the interest of society, understood as an entity superior to individuals, because this reasoning, explains Justen Filho, presupposes the acceptance of the thesis that "the whole (group of individuals) would be more than the result of the sum of the units"[43] .

Finally, the Paraná State professor maintains that the public interest would also not be the interest of the totality of private subjects (a useless concept, because unanimity would never be possible), nor would it be the interest of the majority, because this idea would go against the counter-majoritarian character of fundamental rights, the basis of a Democratic State, which is characterized "by the protection of the interests of both majorities and minorities"[44] .

As it is not appropriate to extend the discussion on this occasion, we adopt Celso Antônio Bandeira de Mello's conception as apprehended by Claudio Madureira[45] , according to which public interest would be "the interest of the State and of society in the observance of the established legal order".

From this concept of public interest, it is possible to infer the importance of the principle of the supremacy of the public interest over the private interest for the configuration of the so-called legal-administrative regime[46] , which imposes a behavior

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[41] MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo.* 21. ed. São Paulo: Malheiros, 2006, p. 56.
[42] JUSTEN FILHO, MARÇAL. *Curso de Direito Administrativo (Administrative Law Course)*. 13. ed, São Paulo: Revista dos Tribunais, 2018. Available at: <https://proview.thomsonreuters.com/launchapp/title/rt/monografias/91049397/v13/document/157101016/anchor/a-157101016>. Accessed on: 29 Oct. 2021.
[43] JUSTEN FILHO, MARÇAL. *Curso de Direito Administrativo (Administrative Law Course)*. 13. ed, São Paulo: Revista dos Tribunais, 2018.
[44] JUSTEN FILHO, MARÇAL. *Curso de Direito Administrativo*. 13. ed, São Paulo: Revista dos Tribunais, 2018.
[45] MADUREIRA, Claudio. *Advocacia Pública*. 2. ed. Belo Horizonte: Fórum, 2016, p. 60.
[46] MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo.* 21. ed. São Paulo: Malheiros, 2006, p. 66.

from public agents always aiming at "a correct application of the law, even when this posture may induce in concrete greater expenses for the public power, or when it harms the collection of revenues"[47].

Now, if the public interest is not the private or secondary interest of the State, which only has legal relevance if and when accessory to the reach of the primary public interest (observance of the law), and public agents must obey both the principle of legality (explicit in art. 37 of the Federal Constitution), and the principle of the supremacy of the public interest over the primary one, it is not up to public agents to defend the merely secondary interests of the State, even when called upon to judicially defend acts practiced by the public power.

In other words, when the public agent is faced with acts performed by the public authorities that are contrary to the law, in honor of the principle of the supremacy of the public interest over the private, he must promote the correction of this act, recognizing to the private individual any rights that were denied to him by the State, even if there is an administrative or judicial dispute in progress.

Thus, the principle of supremacy of the public interest over the private interest, if interpreted as the duty to apply the Constitution and the laws (juridicity[48]), obliges the government to provide services and deliver the administered goods to those entitled to them. This duty of observance of the legal system prevents the government from acting strategically in the process, as is sometimes admitted to be done by private parties, even in the face of the principle of cooperation[49] .

Public agents, including public lawyers, in the exercise of their functions, must act in accordance with the principle of the supremacy of the public interest, seeking the realization of the law as set forth in the Federal Constitution and in the laws validly enacted thereunder. It is not incumbent on the public lawyer to defend acts practiced by the public power that are out of line with the law, even if they consubstantiate "political

[47] MADUREIRA, Claudio. *Advocacia Pública*. 2. ed. Belo Horizonte: Fórum, 2016, p. 92.
[48] We adopt here the definition of public interest by Celso Antônio Bandeira de Mello, with the updates made by Claudio Penedo Madureira, for whom the public interest is the "interest of the State and society in the observance of the established legal order" (*Advocacia pública*, 2. ed. Belo Horizonte: Fórum, 2016. p. 95).
[49] AUILO, Rafael Stefanini. *The cooperative model of civil procedure in the new CPC*. Salvador: Juspodivm, 2017, p. 70. Also in this sense, Antonio do Passo Cabral, when supporting collaborative duties from the adversarial principle, recalls the position of several authors who support the possibility of parties to act strategically in the process in order to win the dispute or mitigate their losses (O contraditório como dever e a boa-fé procedural objetiva. *Revista de Processo*, São Paulo, v. 126, p. 59-81, aug. 2005).

and administrative options preconceived by the governors and other public managers"[50] , a posture that has already been called "Public Treasury without Judgment"[51] .

Thus, once convinced of the unlawfulness of a conduct of the public authority, the public lawyer who represents it must withdraw the suit or the appeal, in the case of being a plaintiff or appellant, or cease to contest and appeal, or still recognize the validity of the claim, in the case of being a defendant or a succumbing party. To proceed in this way, composing the litigation, the public lawyer does not need specific legal authorization[52] , because he only submits the public power to the legal system, which is a consequence of the Rule of Law recognized in the Constitution (art. 1), besides the principles of legality and of the supremacy of the public interest.

On the other hand, it is possible that, in order to prevent or close a conflict, the government may transact, that is, formalize an agreement in which there are mutual concessions, as defined in art. 840 of the Civil Code. In this hypothesis, as the government renounces part of the rights it is obliged to defend (public interest), it is only possible to consider a transaction when the advantageous nature of the agreement is demonstrated, as well as when there is legal authorization[53] .

The settlement of the dispute, applying the law to the case, and the transaction, making mutual concessions, can be carried out before or after the judicial process is initiated. Moreover, the settlement of the dispute may be formalized by a unilateral act of the public authority (acknowledgement of the claim, withdrawal of the action or appeal) or by an agreement between the parties; the settlement, which requires mutual concessions, is formalized in a bilateral term, usually called an agreement. Both being forms of self-composition, they can result from mediation, conciliation or any other form of consensual solution of the demand.

These records are necessary to remove any doubts as to the possibility of self-composition by the public authorities, and therefore the rules that encourage and regulate self-composition in civil proceedings are entirely applicable to state entities.

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[50] MADUREIRA, Claudio. Fazenda Pública 'without judgment': news of a collective unconscious. *Revista de Processo*, v. 41, p. 301-327, 2016.
[51] MADUREIRA, Claudio. Fazenda Pública 'without judgment': news of a collective unconscious. *Revista de Processo*, v. 41, p. 301-327, 2016.
[52] In this sense, Claudio Madureira states: "strictly speaking, this authorization (which is actually an imposition) can be extracted from the Constitution itself, because it stems from the direct application of the principles of legality and the supremacy of public interest over private interest" (*Advocacia Pública*, 2. ed. Belo Horizonte: Fórum, 2016, p. 338)
[53] MADUREIRA, Claudio. *Advocacia Pública*. 2. ed. Belo Horizonte: Fórum, 2016, p. 346-350.

3.2. THE PUBLIC AUTHORITIES AND THE COOPERATIVE DUTY OF CONSENSUS

From the above considerations it is possible to conclude that the government, when litigating, does not act with autonomy of will, but defends the public interest, that is, the application of the legal system[54] . Furthermore, there is no right to confidentiality[55] of the public power regarding the reasons on which its acts are based. On the contrary, the public power obeys the duty of transparency and motivation of its acts, arising from the principles of impersonality and publicity foreseen in art. 37 of the Federal Constitution.

These are the grounds for affirming that the judicial representatives of the public authorities should not act strategically in the process, at least in the sense of postponing or failing to recognize the rights of the opposing party, or refusing to settle when there is authorization, and this solution is advantageous to the public interest.

In the cooperative process model, therefore, the government not only can but must participate in the consensual solutions existing in the process, as well as the other parties (item 2.3 above), and must seriously consider the settlement proposals. This conclusion derives not only from the administrative legal regime discussed in the previous item (item 3.1), but also from the provisions of articles 3, § 2, 174, of the CPC, which impose the self-compositive solution as the standard method of dispute resolution by the public authorities.

Thus, the failure to comply with the duty of consensus by the government as a litigant leads to the consequences already discussed in item 3.4, common to the parties. Moreover, as this attitude represents an act contrary to the public interest, practiced by the public authority, the refusal to seriously consider an agreement proposal represents

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[54] In this sense, Cláudio Madureira maintains that "given the incidence of the administrative principles of legality, of the supremacy of public interest over the private and of the unavailability of the public interest, [the Public Treasury] is not allowed to, in court, contest the undisputable, or sustain the untenable, thus opposing to the homeland law, even if under the pretext of expanding its revenues and/or minimize its expenses" (The Civil Procedure Code of 2015 and the conciliation in proceedings involving the Public Treasury. In: ZANETI JR., Hermes; CABRAL, Trícia Navarro Xavier. *Multiport Justice: mediation, conciliation, arbitration and other means of adequate conflict resolution*. 2 ed.)

[55] Following this line of reasoning, article 2, paragraph 3 of Law No. 9307 of 1996, which provides for arbitration, states that arbitration involving the public authorities "shall respect the principle of publicity". Although he believes that confidentiality applies "even when it involves the Public Treasury, it should be confidential," Leonardo Carneiro da Cunha also holds that it is the content of the mediation and conciliation sessions that is confidential, not the outcome or the motivation of the Public Treasury to conclude or not the agreement, which should be disclosed (*A Fazenda Pública em Juízo*. São Paulo: Grupo GEN, 2021, p. 659. E-book. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9786559640386/>. Accessed on: 14 Dec. 2022).

bad faith litigation, because it implies the deduction of a claim or defense against an express text of law (art. 80, item I, of the CPC).

In fact, if article 3, §2, 174, of the CPC, states that the public administration must adopt self-compositive solutions whenever possible, and article 182 is express in attributing to the Public Attorneys the defense of the public interest (legality), there is no room in civil procedure for the public administration to lightly disregard proposals for consensual resolution of the dispute. In order to refuse a settlement proposal, the public authority must present the reasons that justify the refusal, be it legal impossibility or lack of advantageousness.

It is possible that the reasons why a consensual solution is not advantageous or not feasible cannot be presented in the process for reasons of secrecy. In these cases, however, the government must expose the impediment, a matter that may be discussed by the opposing party and controlled by the judge.

Thus, the cooperative duty of consensus demands from the public authorities in court a serious attitude in relation to opportunities and proposals for self-composition, which can only be rejected if it is not possible to conciliate or if it is disadvantageous to the public interest, under penalty of constituting an act against the dignity of justice (unjustified lack of an opportunity for conciliation, art. 334, § 8, of the CPC), or bad faith litigation, for offense to art. 80, item I, of the CPC.

4 CONCLUSION

The 2015 Code of Civil Procedure adopted a cooperative model of process that imposes duties on the parties and the judge. However, the collaborative duties were expressed in the 2015 Code with the use of open concepts, which allow a breadth of interpretation not always desirable to ensure the predictability of the expected conduct of the procedural subjects.

Although not expressly mentioned by the doctrine, the duty to participate in consensual solutions is established in the CPC, especially in art. 3, § 3, since it is a conduct that collaborates with the goal of the principle of cooperation, because it contributes to achieving a fair and effective decision on the merits[56] within a reasonable time. Thus, it is one more cooperative duty of the parties and the judge, who should seriously consider the opportunities and proposals for self-composition of the dispute.

[56] According to art. 487, item III, line "b", of the CPC, the decision that ratifies the transaction is a decision that resolves the merits.

This duty of consensus has a double aspect: the duty of the parties and of the judge to promote and participate in consensual solutions to the demand, and the duty of the parties to seriously consider the proposals of agreement of the opposing party. The duty of the judge to promote self-composition is expressed in the CPC (art. 139, item V)[57] , and its disobedience may be questioned and appealed by the parties, but the duty of the parties to seriously consider the opportunities and proposals for self-composition may be the focus of resistance, especially in view of the express mention in the CPC to the principle of autonomy of will (art. 166).

Nevertheless, failure to participate in a consensual solution opportunity requires justification from the party beyond the autonomy of the will: based on art. 334 of the CPC, the judge may designate a specific act to seek mediation or conciliation of the dispute, and indicate that any unreasonable absence will imply sanction for an act against the dignity of justice (art. 334, § 8). The non-appearance must demonstrate that there are no serious chances of conciliation, either because the opposing party is not interested or because the case does not admit self-composition, in the terms of art. 334, § 4, of the CPC.

For private parties, in the absence of a specific provision that sanctions the requirement of serious consideration of settlement proposals, the unreasonable refusal can only be punished if it constitutes one of the hypotheses of bad faith litigation or violation of objective good faith (arts. 77 and 80 of the CPC). An example would be if one of the parties spent several months analyzing the proposal and finally unreasonably refused to settle the dispute, which could constitute unjustified resistance to the progress of the lawsuit or a reckless action (art. 80, clauses IV and V, of the CPC).

As for the government, however, the non-compliance with the duty to seriously consider the settlement proposals entails, in addition to these consequences common to the parties, the condemnation for bad faith litigation, because it implies the deduction of a claim or defense against an express text of the law (art. Furthermore, articles 3, paragraph 2, 174, of the CPC, state that the public power must adopt self-compositive

[57] It is not unknown to discuss the limits of the judge's duty to conciliate, given the need to preserve impartiality, as well as the tendency to passivity of the judge to avoid allegations that he would be assisting one of the parties or infringing its autonomy (see, for example, SOUZA, André Pagani. The importance of the principle of cooperation for the construction of the transaction in judicial conciliation: a reading of the Portuguese and Brazilian law (Part II). *Revista de Processo*, São Paulo, v. 295, p. 41-54, sep. 2019). However, the limits of this paper prevent discussing these issues, having chosen to focus on the contribution that the principle of cooperation can give regarding the cooperative duties of the parties.

solutions whenever possible, and article 182 expressly attributes to the Public Attorneys the defense of the public interest (legality).

Thus, when the government refuses a consensual solution when it is possible and advantageous, it violates legality, an illegality that can and must be controlled by the judge, constituting bad faith litigation in the terms of art. 80, Subparagraph I, of the CPC.

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