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À PROPOS DE NOUS

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CONSENSUALISM AND STATE: A SOLUTION TO THE LOW ENVIRONMENTAL FINES PAYMENT RATE?

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In May 2019, *O Globo Journal*, after surveying the open database of the Brazilian Institute of Environment and Renewable Natural Resources – IBAMA, analyzed the rate of payment of environmental fines, highlighting the existence of a predominant feature among Environmental offenders: the more serious the violation and the higher the fine amount, the lower the payment rate¹. This analysis took into consideration all fines processed and judged in the last ten years, concluding that among the fines applied within the range of R\$ 50,000 to R\$ 100,000, only 4.48% were paid. In relation to fines between R\$ 100 thousand and R\$ 1 million, only 0.66% were paid. In turn, fines over R\$ 1 million had only 0.54% compliance rate. Also, fines in the range between R\$ 1 million and R\$ 5 million, only 0.33% were met. Finally, fines above R \$ 5 million have an effective payment of only 0.65%.

Considering the data presented, it is necessary, first, to assess their reliability, and once the statistics are confirmed, it is necessary studying why fines are not met, taking consensualism as a possible solution to safeguard the public interest of the State, which is environment preservation.

Therefore, this study aims to analyze the latest IBAMA's Management Report² in order to verify the statistics presented by the *O Globo Journal*, and, afterwards, whether the State's imposing, imperative and unilateral form of action is in accordance with the dynamics of today's society, proposing the use of consensus techniques to increase compliance rates for administrative fines and reduce the rates of environmental violation by consensus culture.

In order to achieve this aim, from the hypothetical-deductive method, it was first sought to conceptualize legal sanction systems, in order to understand why negative sanctions are not

¹ V. SASSINE, « Maiores infratores ambientais são os que menos pagam ao IBAMA », *O Globo*, 2019, [https://oglobo.globo.com/brasil/maiores-infratores-ambientais-sao-os-que-menos-pagam-ao-ibama-23680665]

² Brasil, INSTITUTO BRASILEIRO DO MEIO AMBIENTE E DOS RECURSOS NATURAIS RENOVÁVEIS – IBAMA, *Relatório de Gestão*, December 2017: [https://www.ibama.gov.br/auditorias/relatorios]

met or there is a low compliance rate. Then, the analyses turn to the dogmatic contours of the paradigm breaking of a Sanctioning Public Administration, demonstrating the possibility and the constitutionality of this new way of acting that is called consensualism. Afterwards, were presented the consensus techniques applicable to cases of administrative environmental violations, concluding that these can potentially help the public interest, which is protection of environment, as well as increase the discharge rate of environmental fines.

§1 – IBAMA’S MANAGEMENT REPORT OF 2017

IBAMA annually publishes its Management Report; a document that presents, among several premises, the results of the objectives and strategic projects and institutional indicators³. Although the commitment to publish is annual, the last Management Report published on the municipality’s website was in 2017, the one will be the object of this research.

Considering the delimitation proposed in the introduction, the analysis of the Management Report will be limited to item 3.1. – which regulates IBAMA’s objective on the expansion and effectiveness of environmental control –, item 3.4 – which discusses IBAMA’s operational performance – and item 3.5 – which deals with the management of fines imposed as a result of the inspection activity.

Analyzing the data presented, in fact, the percentages are discouraging, because, not only the fine discharge rate is very low, but also there is a high rate of possible procedural injunctions, as well as pending infringers’ registration in the Public Sector Unsecured Credit Register – CADIN. In the last three years there were more than twenty thousand registrations pending between individuals and companies⁴. Thus, considering item 3.5 of the Management Report, and considering the absolute number and percentage of fines that are at risk of prescription, IBAMA states that there are about 450 administrative proceedings to investigate environmental violations with risk of ending without resolution⁵. Regarding the percentage of fines payment, considering the amount of 15,694 notices of infraction drawn up, equivalent to a value of more than R\$ 3 billion, only 1,786 (11.38%) were paid, which corresponds to only R\$ 9.5 million (0.30%). It is evident, therefore, that the fines discharge rate is very low, and even more alarming is the amount that is actually paid, which is not even 1% of the amount due.

Regarding the objective addressed in item 3.1 of the Management Report, IBAMA emphasizes that its foundation is “to break down environmental control and enforcement strategies that provide

³ *Ibidem*, p. 8.

⁴ *Ibidem*, pp. 78-79.

⁵ *Ibidem*, p. 79.

for deterring illicit persons and effectively recovering environmental damage”⁶. At this Report point, it is noticed that there is a low recognition of compliance with environmental administrative sanctions, which led to the promotion of efforts for the adoption of the Fine Conversion Program in services of preservation, improvement and environmental recovery after Federal Decree No. 9.179, published in 2017, as will be explained in a specific topic of this study.

Given this context, it is important to ascertain the reasons for the low rate of compliance with sanctioning administrative decisions to present alternatives to its increase and to reach the public interest: protection and preservation of the environment.

Thus, first, it should be noticed that one of the indicators of the low rate of compliance with fines is IBAMA’s procedural inefficiency. This is because, as noticed in Management Report item 3.1.5, after analyzing the main indicators oriented to the institutional results, the “rate of administrative proceedings for the assessment of environmental infringement judged”⁷ was around 21% in 2017 and the “procedural efficiency ratio – IEP” was in the range of 2.4%⁸.

Accordingly, as regards IBAMA’s operational performance, it is important to highlight that, as stated in item 3.4.2, the execution process performance of the infraction notices is too slow, requiring an average time of three and a half years to conclude the execution, whose calculation considers “the average time between the assessment and the judgment of the infraction notices, for those notices that were ultimately judged”⁹.

What can be seen, therefore, is that the difficulties presented in relation to the low environmental fines payment rate are problems of IBAMA’s own procedural management, especially due to the delay in the finalization of the administrative proceedings and the lack of compliance with the consequences. In the event of non-payment fines, they do not propose to change the conduct of the sanctioned, which shows that the administrative fines are not fulfilling its true function as an instrument to achieve the public interest which is the preservation and repair of the environment.

Beyond the management problem, there is also the recognized “crowding out effect”, named by Brian Sheppard and Fiery Cushman¹⁰, which occurs when there is a massive loss of adherence to the normative text. To illustrate this phenomenon, the example of the rule created by a daycare director who wanted

⁶ *Ibidem*, p. 22.

⁷ *Ibidem*, p. 27-28.

⁸ *Ibidem*, p. 30.

⁹ *Ibidem*, p. 77.

¹⁰ B. SHEPPARD, F. CUSHMAN, « Evaluating norms: an empirical analysis of the relationship between norm-content, operator, and charitable behavior », *Vanderbilt Law Review*, Columbia, vol.63, No.1, pp.55-109, 2009, p. 63.

parents not to be late to pick up their children is brought up¹¹. In order to reduce delays, a fine was imposed on those parents who violated the time to pick up their children. The director's objective seemed clear enough: to increase adherence to the rule, creating a disincentive to noncompliance. Meanwhile, just the opposite was consumed: the fine became an incentive to break the rule. It was worth it the parents to leave their children longer in the nursery, and pay the fine. In conclusion, the creation of the rule encouraged its own breach. With the environmental fines the same happened. Part of the amount there is paid, is not paid because the lawbreakers understood their misconduct, but because is worth it to pay and continue damaging the environment.

Given the problems presented, it is necessary to analyze the legal sanctioning system, in order to effectively understand why negative sanctions have not been as effective as their claim.

§2 – LEGAL SANCTION SYSTEM

The legal sanction has several aspects and is not an absolute gender; it encompasses distinct areas of applicability and coexists with other types of sanction, such as moral sanction, social sanction and religious sanction. According to Daniel Ferreira, this coexistence stems precisely from the fact that the legal order is only a facet of the normative order, which adds the moral order, the social order and the religious order¹². The analysis of these various genres of sanction, however, would be excessively dense, and would lead to a true monographic study of the subject, so that the present analysis will be devoted solely to the legal sanctioning system.

The legal sanction is predominantly recognized as the consequence of the practice of an illicit act, and, therefore, as a negative measure attributed by the order in the face of the non-observance of a behavior prescribed by a primary legal norm¹³. Thus, the legal sanction is recognized as a presumed consequence – because it will not necessarily be applied – determined by the legal system to a behavior incompatible with the violated rules¹⁴.

From the above conceptions, it can be said that, commonly, the sanction is considered in its negative bias, presenting itself as an instrument of defense of the homeland legal system. However,

¹¹ N. STRUCHINER, P. H. CHRISMANN, "Aspectos filosóficos e psicológicos das punições: reunindo algumas peças do quebra-cabeça", *Caderno CRH*, Salvador, vol. 25, n. 2, pp. 133-150, 2012. p. 133, [http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-49792012000500010&lang=pt].

¹² D. FERREIRA, *Teoria geral da infração administrativa a partir da constituição Federal de 1988*, Belo Horizonte, Fórum, 2009, p. 80.

¹³ R. M. MELLO, "Regime Jurídico das Sanções Administrativas", *Revista Eletrônica de Estudos Jurídicos da OAB-PR*, Curitiba, No. 4, 2009, p. 37, [http://admin.oabpr.org.br/revistaeletronica/?secao=revista04].

¹⁴ D. FERREIRA, *Sanções Administrativas*, São Paulo, Malheiros, 2001, p. 14.

other aspects of the legal sanction are recognized; Some authors even criticize purely punitive sanctions, such as Burrhus Frederic Skinner, who points out that severe punishment has an immediate effect on reducing the tendency to act in a certain way, but in the long run this behavior is not eliminated, so temporary effects are obtained with the cost of reducing efficiency¹⁵. Thus, when it comes to sanctions arising from the law, Skinner points out that the norm basically has two functions: the first would be to determine a behavior and the second to specify a certain consequence, which is usually a punishment¹⁶. However, the political scientist highlights the existence of alternative techniques to the negative-punitive sanction¹⁷, opening the way to positive sanction by prizes and incentives controls, which would be more effective than negative sanction.

Regarding the positive sanction itself, Norberto Bobbio points out that it is related to a good to whom practices a certain conduct, being the opposite of the meaning of a negative sanction. In his words: « while punishment is a reaction to a bad deed, reward is a reaction to a good deed »¹⁸. According to Bobbio, what distinguish positive from negative sanctions is the fact that in the former there is an encouragement of conduct and in the latter a discouragement¹⁹.

Although the existence of positive and negative sanctions is recognized, the truth is that the control of the behavior of Brazilian society occurs mainly through negative sanctions²⁰. In this case, it is necessary to emphasize that the sanction, as an institute of behavior control, does not correspond to an end in itself; it is an instrument whose purpose consists in the maintenance or restitution of the legal order in a Democratic State of Law²¹.

The reality of noncompliance with punitive sanctions, however, indicates that this exclusively negative character of legal sanctions and their existence as the sole means of controlling behavior must be rethought. This is because the increasingly complex and dynamic evolution of Brazilian society, especially in the search for greater participation, and the gradual opening to a consensus State, require some rethinking of State action. Thus, the encouragement of conducts (positive sanctions) or consensual solutions to covenants is increasingly reiterated, in order to

¹⁵ B. F. SKINNER, *Ciência e comportamento humano*, São Paulo, Martins Fontes, 2003, p. 208.

¹⁶ *Ibidem*, p. 369-370.

¹⁷ *Ibidem*, p. 376.

¹⁸ N. BOBBIO, “As sanções positivas”, in: *Da estrutura à função: novos estudos da teoria do direito*, Trad. Daniela B. Versiani, Barueri, Manole, 2007, p. 24.

¹⁹ *Ibidem*.

²⁰ M J. F. TELLA, F. F. TELLA, “Fundamento e finalidade da sanção: existe um direito de castigar?”, Trad. Cláudia de Miranda Avena, São Paulo, *Revista dos Tribunais*, 2008, p. 45.

²¹ J. B. PALMA, *Sanção e Acordo na Administração Pública*, São Paulo, Malheiros, 2015, p. 87.

mitigate the image of an imperative, repressive and protective State, highlighting its promotional function²². It is in this field that the Consensual Public Administration study is highlighted.

§3 – CONSENSUAL PUBLIC ADMINISTRATION

Unsurprisingly, the establishment of a Democratic Rule of Law based on rights and guarantees requires some rethinking of some forms of State action, recognizing as an integral part of the legal system not only formal law but all explicit and implicit constitutional principles²³. This is because society grows in a complex way, having greater needs, including greater democratic participation. It is in this scenario, therefore, that the transmutation of the bipolar paradigm citizen-State to the multipolar paradigm occurs²⁴. In plural societies, it is no longer possible to speak of a single public interest to be achieved exclusively by imposing sanctions. The public interest is plural, fluid, fragmentary, partial and determined according to each specific situation, and it is very common that in the same situation there are several public interests to be achieved. It changes – but does not give up – the paradigm of public interest supremacy, as it is sometimes commonly acknowledged, considering that “private interests coinciding with community public interests are in conflict with other public interests that have national nature. There is no public-private distinction or opposition, just as there is no superiority of public over private moment”²⁵. Thus, the citizen-administration partnership must be rethought, aiming equality in the construction of the procedure, so that the public interest, previously confused with the subjectivity of the State and conceived in a unitary way, pluralizes itself in the Democratic State, allowing the recognition of various public interests, which require the “substitution of unilateral activity by consensus and equality, in a context of citizen participation”²⁶. Thus, in times of dogma revision, the

²² G. T. DANTAS, “Função promocional do direito e sanção premial na perspectiva metodológica de Durkheim”, *Revista Direito UNIFACS – Debate Virtual*, No. 149, november 2012, pp. 12-13,

[<https://revistas.unifacs.br/index.php/redu/article/view/2374/1743>].

²³ D. W. HACHEM, « A noção constitucional de desenvolvimento para além do viés econômico: reflexos sobre algumas tendências do Direito Público brasileiro », *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, year 13, n. 53, pp. 133-168, july/september, 2013, p. 140.

²⁴ V. L. L. VALLE, Autoridade e consenso nos contratos administrativos: um reposicionamento do regime jurídico contratual brasileiro à luz da doutrina europeia dos contratos administrativos, in: D. W. HACHEM, E. GABARDO, E. D. SALGADO, (Coord.), *Direito administrativo e suas transformações atuais – Homenagem ao professor Romeu Felipe Bacellar Filho*, Anais do Seminário da Faculdade de Direito da Universidade Federal do Paraná, Curitiba, Íthala, 2016, p. 451.

²⁵ S. CASSESSE, Sabino, La arena pública: nuevos paradigmas para el Estado, in: S. CASSESSE, *La crisis Del Estado*. Buenos Aires, Abeledo Perrot, 2003, p. 159.

²⁶ L. C. PENA, *O papel do controle consensual diante da crise de legitimidade do estado*, Dissertação (mestrado) – Fundação Mineira de Educação e Cultura - FUMEC, Programa de Pós-Graduação em Direito, Belo Horizonte, 2012, p. 38.

phenomenon of consensus State has occupied a significant place on the agenda of doctrinal discussions; phenomenon resulting from the understanding of traditional administrative activity as an activity incompatible with the current scenario experienced in the country, as it is founded on the necessary existence of an imperative power, identified in the obligation of unilateral administrative act, and that rarely makes room for consensus formation. In the words of Luciana Calado Pena, the current scenario takes care of the « overcoming the activity of control-sanction, rooted in the positivism proposed by Kelsen », in which « the State would be as efficient as to strictly comply with all procedures outlined ». Thus, according to the jurist, the overcoming of this control model and the extension of the administrative process to the protagonism, allow the consensual instruments of control to benefit from this change, « being feasible nowadays to replace the sanction-control by the consensus-control.; repression-control, by impulse-control »²⁷.

The existence of this new model of State control based on dialogicity is found in several norms of the Brazilian law order, such as the Law of Rules Introduction of Brazilian Law – LINDB, which in its article 26 – regulated by Federal Decree No. 9.830/19, articles 10 emphasizes that in order to eliminate a contentious situation in the application of public law, the administrative authority may, for reasons of relevant general interest, enter into a commitment with the interested parties. The existence of this State control based on dialogue derives not only from legislation, but also from the participatory characteristic assumed by contemporary society itself, which leaves its status as a mere electoral class to demand effective participation in State decisions, valuing dialogue for the realization of their rights. The valorization of the dialogue, thus, impelled the process of gradual loss of the exclusively unilateral, imperative and imposing character of the State, opening itself wing for a more negotiating action²⁸.

Given this new act, it is necessary to highlight the quality of the administrative sanction as a prerogative²⁹ available to the Administration, starting from the understanding that all administrative activity is instrumental in character, so that « the public administrator never acts for free, but always in function of an objective, qualified by law as a public interest, which must be attained. The end, not the will, drives public administrative

²⁷ *Ibidem*, p. 37.

²⁸ F. A. MARQUES NETO, T. M. CYMBALISTA, « Os acordos substitutivos no procedimento sancionatório e da sanção », *Revista Eletrônica de Direito Administrativo Econômico (REDAE)*, Salvador, Instituto Brasileiro de Direito Público, n. 27, august/september/october, 2011, [http://www.direitodoestado.com/revista/REDAE-27-AGOSTO-2011-FLORIANO-AZEVEDO-TATIANAMATIELLO.pdf].

²⁹ Sanctioning prerogative means the power of public administration to impose imperative and unilateral administrative sanctions. J. B. PALMA, *Op. cit.*, p. 87.

activity»³⁰. In the present study, the public interest analyzed is the preservation and repair of the environment. In this sense, it is clear that if the end that is sought with the sanction can be achieved by other means, if these prove to be more efficient, they can be prioritized over that. Especially because the State should no longer act apart from society, but should act jointly society through consensual mechanisms³¹.

Thus, the classic image of a Public Administration based solely on unilateral forms of conflict resolution needs to be overcome, especially because the pursuit of consensus by citizens must be the substantial criterion for justifying and guiding administrative decisions³². Thus, effective democracy, pluralist affirmation, heterogeneity of interests and greater proximity between the State and society are the relevant factors that demonstrate the need to adapt administrative law to its time³³. Therefore, it is possible to understand that there is no more exclusive space to the State imperative face, and the degree of legitimacy of State action should also take into account the degree of interaction between the State and civil society³⁴.

A) Consensualism and Public Interest

Considering this paradigm break, the guidelines for consensual administrative activity, with their new mechanisms and structures, should have their legal viability evaluated, especially from the perspective of legality versus consensus, especially considering its democratic face. In this sense, it is necessary to deepen the doctrinal discussions related to the applicability and effectiveness of the conclusion of agreements in the environmental sphere, considering the existence of express legal permissive to the formation of consensual acts³⁵ replacing – or jointly – unilateral acts in environmental administrative proceedings, as foreseen in Federal Decree No. 6.514/2008.

³⁰ A. A. DALLARI, « Administração Pública no Estado de Direito », *Revista Trimestral de Direito Público*, São Paulo, No. 5, January/mars, 1994, p. 36.

³¹ E. ANDRADE, *O Mandado de Segurança: a busca da verdadeira especialidade*, Rio de Janeiro, Lumen Juris, 2010, p. 43.

³² A. S. ARAGÃO, « A consensualidade no Direito Administrativo », *Revista de Informação Legislativa*, Brasília, a. 42, No. 167, July/september, 2005, p. 294.

³³ O. MEDAUAR, Odete, « Direito administrativo em evolução », 2nd ed, São Paulo, *Revista dos Tribunais*, 2003, p. 210.

³⁴ G. J. OLIVEIRA, « Governança Pública e Parcerias do Estado: a relevância dos acordos administrativos para a nova gestão pública », *Revista Eletrônica sobre a Reforma do Estado (RERE)*, Salvador, Instituto Brasileiro de Direito Público, No. 23, September/october/november, 2010, p. 2,
[<http://www.direitodoestado.com/revista/RERE-23-SETEMBRO-2010-GUSTAVO-JUSTINO-OLIVEIRA.pdf>].

³⁵ Consensual administrative acts are conceptualized by Juan Parejo ALFONSO as the agreement of wills between a Public Administration and one or several citizens, regulated by Administrative Law, concluded within an administrative process. L. P. ALFONSO, « Los actos administrativos consensuales en el derecho español », *AC&C - Revista de Direito Administrativo & Constitucional*, Belo Horizonte, a. 1, n. 13, pp. 1-244, July/september, 2003, p. 17.

In this context, it is important to highlight that consensual acts, in general, can be mechanisms of State efficiency and economic-social development, since “the decision being built in a participatory manner, with effective management and individual action, is unlikely to be challenged administratively or judicially”³⁶, reducing costs (financial, personnel and time) and ensuring speedy compliance with the proposed measures. For the principle of participation, as it encourages citizens to intervene in administrative tasks, is the basis that legitimizes the consensual actions of the Government³⁷.

Consensualism, therefore, should not be evaluated as an instrument of public interest disposition, but as a mechanism to achieve it more efficiently. Thus, when the Public Administration opts for a dialogical solution, it is neither compromising the public interest nor having it, but rather it is choosing a competent means to defend its own public interest³⁸.

Not without reason, the low rates of discharge of environmental fines show that the imposition of the imperative and unilateral decision has not proved to be an adequate means to achieve the objectives of the law, since its imposing and extroversive character is not, to a large extent, accepted by the sanctioned³⁹. Moreover, in plural societies, “the very concept of public interest opens itself to dialogue with the plurality of interests that law disciplines”⁴⁰.

B) Environmental Agreements

Responsibility for environmental damage received great importance in the country following the 1988 Constitution, on its Article 225 disciplining that “everyone has the right to an ecologically balanced environment”⁴¹. Likewise, Article 225, §3 of the Brazilian Constitution, stipulates that “conduct and activities deemed harmful to the environment will subject violators, individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage

³⁶ L. C. PENA, *Op. cit.*, p. 40.

³⁷ O. A. BATISTA JÚNIOR, *Transações Administrativas*, São Paulo, QuartierLatin, 2007, p. 463.

³⁸ A. A. DALLARI, *Op. cit.*, p. 16.

³⁹ F. A. MARQUES NETO points out that « traditional unilaterality and exorbitance public authority exercise (extroversial power) must give way to dialogue, mediation and the balancing of divergent interests, without obviously neglecting the protection of the community against abuses of economic agents ». F. A. MARQUES NETO, “Poder de Sanção – Órgão Regulador – ANEEL”, *Revista de Direito Administrativo*, Rio de Janeiro, vol. 221, 2000, p. 355,
[<http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/47607/45131>].

⁴⁰ M. P. D. BUCCI, *Políticas públicas: reflexões sobre o conceito jurídico*, São Paulo, Saraiva, 2006, p. 45.

⁴¹ A. WUNDERUCH, « A responsabilidade por danos ambientais: do cenário atual à avaliação crítica ao modelo de imputação de entes coletivos e individuais trazidos pela Lei 9.608/1995 no Brasil », *Revista Brasileira de Ciências Criminais*, vol. 114, a. 23, pp. 203-221, São Paulo, Ed. RT, May/June, 2015, p. 204.

caused”. In addition, following the promulgation of Constitutional Amendment No. 42 of 2003, “the defense of the environment” became part of the principles to be followed by the economic order, according to article 170, item VI, of the Constitution. There is no doubt, therefore, that the protection of the environment is a fundamental principle of the Rule of Law and must be achieved through proper strategic environmental management, which can be done through public policies.

Although there is no consensus on the concept of public policy, it can be said that it is a “field of knowledge that seeks at the same time to put government into action and/or to analyze this action (independent variable) and, when necessary, propose changes in the course of these actions (dependent variable)”⁴². Still, it can be said, according to Maria Paula Bucci, that thinking of public policy is to seek coordination, either between federated entities, between powers, between entities, or between the State and society, which is why the importance has grown consensual instruments⁴³.

Thus, in the environmental sphere, these public policies can, for example, be motivated to raise society’s awareness through positive sanctions, guaranteeing prizes to those who adopt conducts to preserve the environment, or to solve environmental conflicts through the institution of remediation programs, such as the conversion of administrative fines into environmental preservation, recovery and improvement services. In this sense, it can be emphasized that public policies have repercussions on the economy and society, so that any theory of public policy must also explain the relations between State, politics, economy and society⁴⁴.

As far as environmental conflicts are concerned, the applicable rule is Federal Decree No 6.514/2008, which deals precisely with environmental infractions and administrative sanctions and establishes the federal administrative process for the determination of these violations. Thus, its first chapter is intended to discipline environmental conduct and its respective administrative sanctions; Chapter II, in turn, regulates the administrative process to investigate environmental violations.

This study will be limited to the analysis of Section VII of Chapter II, which deals with the “Simple Fine Conversion Procedure to Preservation, Improvement and Recovery of Environmental Quality Services”.⁴⁵ It is understood that this procedure was a public policy introduced on October 23, 2017, through Federal Decree No. 9.179/2017, which amended the

⁴² C. SOUZA, “Políticas públicas: uma revisão de literatura”, *Revista Sociologia*, Porto Alegre, a. 8, No. 16, July/December, p. 20-45, p. 26.

⁴³ M. P. D. BUCCI, *Op. cit.*, p. 44.

⁴⁴ C. SOUZA, *Op. cit.*, p. 25.

⁴⁵ IBAMA's Normative Instruction nº 6/2018. Brasil, INSTITUTO BRASILEIRO DO MEIO AMBIENTE E DOS RECURSOS NATURAIS RENOVÁVEIS – IBAMA, *Normative instruction nº 6, february 2018*, [<https://www.ibama.gov.br/conversao-multas-ambientais#modalidades>].

provisions of Federal Decree No. 6.514/08, precisely those from Article 139 thereof, considering the low fines payment rate, in order to ensure that the public interest is met. This justification is contained in several excerpts of the 2017 Management Report, so IBAMA points out that one of the factors that contributed to a low collection of environmental fines in 2015 was « the non-improvement of the environmental sanctioning process due to the absence of the fines conversion instrument »⁴⁶. Thus, the municipality expressed in its report that the program of conversion of fines into environmental services would be a true paradigm shift in the performance of IBAMA that could bring important benefits to the entity⁴⁷.

As far as the converting fine procedure is concerned, it should be noticed that its applicability applies only to simple fine cases, and in fact, there is no total conversion, but a discount to the consolidated value of the fine, behold, the one who chooses to promote services of preservation, improvement and recovery of the quality of the environment will have a discount of up to sixty percent in relation to the value of the fine (art. 143, §2), and the resulting discount value may not be less than the minimum fine applicable to the infringement (art. 143, §7). In addition, there is no applicability of the request for conversion of the fine to repair the damages arising from the infractions themselves (art. 141), as these must be repaired (art. 143, §1), as will be highlighted below. Pursuant to the Federal Decree under review, the taxpayer may request the conversion of the simple fine until the time of final allegations submission in the sanctioning administrative proceeding. If the application submitted is accepted, Article 146 provides that « the parties shall enter into a commitment, which shall establish the terms of the plaintiff's attachment to the object of the fine conversion for the execution term of the approved project or its share in the project chosen by the federal agency that issued the fine ». Paragraph 1° of the referred article emphasizes that the term of commitment shall contain mandatory clauses, such as the qualification of the parties, the environmental service being converted, the term of the commitment, a fine in the event of obligations breached, goals to be met, effects of partial or total non-compliance with the object, reparation of damage resulting from the environmental infringement and competent court to settle disputes.

Paragraphs 4° and 5° of the aforementioned article state that « the signing of the commitment term suspends the enforceability of the fine imposed and implies waiver of the right to appeal administratively » and that « the execution of the commitment term does not end the administrative process and the environmental agency shall monitor and evaluate at any time the

⁴⁶ BRASIL, INSTITUTO BRASILEIRO DO MEIO AMBIENTE E DOS RECURSOS NATURAIS RENOVÁVEIS – IBAMA, *Relatório...*, p. 81.

⁴⁷ *Ibidem*, p. 02.

fulfillment of the agreed obligations ». As can be seen, these norms confirm the idea that there is no substitution of the imperative and unilateral act by the agreement, which is signed in order to consensually model the final act. Therefore, the conversion procedure will only be concluded when the agreement is concluded, that is, « after the conclusion of the object, an integral part of the project, its proof by the executor and the approval by the federal agency issuing the fine » (art. 146, Paragraph 6).

CONCLUSION

Given the theme proposed in this study, it should be noticed that consensualism can be a public policy capable of preserving the environment. As seen, making a public policy is to seek coordination, which can be between the State and society.

Thus, the disciplined commitment term in article 146 resulting from the "simple fine" conversion procedure can be considered a public policy, as well as an effective solution to the attainment of the public interest, which is the preservation of the environment. Still, it can be an instrument capable of increasing the discharge rate of environmental fines. This is because, on the one hand, there is no denying that consensual solutions, - unlike the imposition of fines - can be more efficient to the public interest, as consensus decisions tend to be less disrespected than unilaterally imposed decisions; and on the other hand, if there is a consensus to convert the fine with discount, if the agreement is effectively enforced, the fine will be paid and the damage repaired.

In this sense, although the possible benefits arising from the Simple Fine Conversion Program cannot be stated with the necessary certainty, since the 2018 management report has not yet been released to ascertain the rate of adherence to the program and the increase in payment of fines, Skinner's behavioral analysis demonstrates that, in the long run, consensual mechanisms are more effective than negative sanctions. Even if negative sanctions appear to be effective in the short term, in the long run it do not eliminate the intended behavior, so that temporary effects are achieved with the cost in reducing efficiency. Thus, the proposal to change the behavior of violators through positive agreements and sanctions may allow the reduction of environmental infractions.

It is concluded, therefore, that public policies aimed at consensualism can be mechanisms used to achieve the public interest of preserving the environment without damaging its unavailability and supremacy.

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