

Security of tenure in the Brazilian public administration: about its social representations and the (im)possibility of dismissing public servants*

A estabilidade na administração pública brasileira: sobre suas representações sociais e a (im)possibilidade de demitir servidores públicos

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ABSTRACT

The purpose of this study is to make an approach on security of tenure in the Brazilian public service, presenting some of its social representations, its emergence and transformations in the historical formation of Brazil, and its legal regulation in the legal system after the 1988 Constitution, drawing

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a parallel between the public and private sectors to see if stability would, in fact, prevent the dismissal of incompetent or corrupt public servants.

KEYWORDS

social representations — stability — public administration — dismissal

RESUMO

O presente trabalho tem por objetivo abordar a estabilidade no serviço público brasileiro, apresentando algumas das suas representações sociais, seu surgimento e transformações na formação histórica do Brasil, e seu regramento jurídico no ordenamento jurídico inaugurado pela Constituição de 1988, traçando um paralelo entre os setores público e privado a fim de verificar se a estabilidade, de fato, impediria a demissão de maus servidores.

PALAVRAS-CHAVE

representações sociais — estabilidade — administração pública — demissão

1. Initial considerations

Criticism of public administration — bodies, entities and State agents, in the exercise of their function — has long been part of Brazilian culture. It appears in informal conversations, academic works and, as the preface of this study shows, is a celebrated carnival song.¹

¹ According to Moacyr Scliar: "At one time, the carnival march, by composer Blecaute, was a big success in Brazil, speaking of a certain Maria Candelária. Who was she? 'A great employee', the lyrics explained, adding that she had entered the public service 'by parachute', that is, by some political favour. Then, he went into detail about the activity of Maria Candelária, who 'worked to cause pity'. Her day started at noon; at one she went to the dentist, at two she went to the café, at three to the dressmaker; at four she signed off and walked away. In conclusion: 'What a great crook she is'. The popularity of the song is understandable: it corresponds to the image that, for a long time, Brazilians have had of the civil service, one worth remembering on the eve of October 28, Public Employee Day, instituted in 1943 by president Getulio Vargas. The image is exactly this: of a person who got lucky, is well paid with public money, but who does nothing. A stereotype, which, as with all stereotypes, is a mixture of observation and pure and simple prejudice." (SCLIAR, Moacir. *Adeus, Maria Candelária*. 2010. Available at <http://www.academia.org.br/artigos/adeus-maria-candelaria>. Accessed on: 4 Feb. 2021.).

But the situation is not so clear, as public service in Brazil is an ambiguous area.² While strongly criticized for its lack of quality and efficiency, many still wish to participate in the civil service, generally seeking professional stability. This is a typical prerogative of the public servant, who, rather than trying to affect change impersonally, finds a safeguard against dismissal, that is, permanence and a good salary at the end of the month, as protection against the vicissitudes and vagaries of contemporary life.

This reliability, however, translates into unjustified privilege, preventing the dismissal of incompetent employees. Stability, as will be seen, is referred to as an evil or even a cancer of the Brazilian civil service. But what is this *stability*? Does it really amount to a kind of unemployment insurance? This work will reflect on these and other inherent issues, using bibliographic and documentary research. Where it was necessary to cite a work in a foreign language, the original is kept with the translation in the corresponding note — inviting the reader to compare and consider his own interpretations and understandings.

The work begins with a brief contextualization, dealing with social representations³ of stability in complex of contemporary society (internet society); some elements of stability in the formation of Brazilian public administration will then be discussed, to evaluate the stability in the legal system inaugurated by the 1988 Constitution, drawing a parallel between the public and private sectors to determine if there are, in fact, conditions for the loss of office.

2. A controversial legal and social institution

In a survey carried out a few years ago, the consultants Towers Watson, on evaluating 32,000 employees and 1,637 executives around the world,

² The institution can be thought of from the perspective of Maurice Hauriou: (Free Translation) “A public service is an institution that generally composed of four permanent elements: a territorial area that determines the population for which the service is intended; a staff or employees; material resources, [such as] buildings, furniture, supplies, etc.; financial means to meet personnel and material costs. As an organized institution, every public service naturally tends to acquire an autonomous individuality and obtain a legal personality”. (HAURIOU, Maurice. *Précis de droit administratif et de droit public*. Paris: Librairie de la Société du Recueil Sirey, 1914. p. 17-18).

³ In a few words, a social representation can be thought of as a form of knowledge, resulting from social interactions, socially shared, and that contributes to the construction of common conceptions about reality. For a deepening on the theme, I recommend the pioneering study by MOSCOVICI, Serge. *La psychanalyse: son image et son public*. Paris: Presses Universitaires de France, 1976; as well as the collection of studies organized by JODELET, Denise (Org.). *Les représentations sociales*. Paris: Presses Universitaires de France, 1989.

found that stability is the main concern of people at work. According to the survey, people are more concerned about whether they will have long-term employment than with challenges or career improvements, for example.⁴

Those working in the private sector, in fact, expect a certain guarantee of tenure, which seems like a reasonable concern, especially as we live in a world marked by risk and insecurity. In this sense, Bauman notes that:

*Insecurity affects us all, immersed as we all are in a fluid and unpredictable world of deregulation, flexibility, competitiveness and endemic uncertainty, but each one of us suffers anxiety on our own, as a private problem, an outcome of personal failings and a challenge to our private savoir-faire and agility. We are called, as Ulrich Beck has acidly observed, to seek biographical solutions to systemic contradictions; we look for individual salvation from shared troubles. That strategy is unlikely to bring the results we are after, since it leaves the roots of insecurity intact; moreover, it is precisely this falling back on our individual wits and resources that injects the world with the insecurity we wish to escape.*⁵

The search for stability does not solve, therefore, the problem of *instability* and *risk* itself, which is inherent to society as a whole. This risk can be thought of as whatever can go wrong, and can be correlated with instability and insecurity. However, as Luhmann notes, there is no completely risk-free safety: “Risk is sort of everything that can go wrong. One thinks of ‘safety’ as an antonym, but at the same time admits there is no such thing as safety in a strict, risk-free sense” (translated from the German).⁶

⁴ FORBES. *Estabilidade é a principal preocupação das pessoas no trabalho, indicam estudos*. 1 Oct. 2014. Available at: <https://forbes.com.br/carreira/2014/10/estabilidade-e-principal-preocupacao-das-pessoas-trabalho-indicam-estudos/>. Accessed on: 10 Dec. 2019.

⁵ BAUMAN, Zygmunt. *Community: seeking safety in an insecure world*. Cambridge: Polity Press, 2008. “Insecurity affects all of us, immersed as we are in a fluid and unpredictable world of deregulation, flexibility, competitiveness and endemic uncertainty, but each of us experiences anxiety on our own, as a private problem, as a result of personal failures and a challenge to our savoir-faire and our agility. We are called, as Ulrich Beck acidly observed, to seek biographical solutions to systemic contradictions; we seek individual salvation of shared problems. This strategy will hardly bring the results we seek, for it leaves the roots of insecurity intact; furthermore, it is precisely this regression to our individual knowledge and resources that injects into the world the insecurity from which we wish to escape”.

⁶ LUHMANN, Niklas. *Die Gesellschaft der Gesellschaft*. Frankfurt: Suhrkamp, 1997. p. 1092. Free translation: “In a sense, risk is anything that can go wrong. As an opposite concept, one can think of ‘security’, but at the same time admit that there is no security in the strict sense and without risk”.

The feeling of insecurity and risk is intensified by the perception of the precariousness of employment, a phenomenon that has grown alongside globalisation and the *internet society*.⁷ Joaquin Arriola and Luciano Vasapollo understand precariousness as “a situation marked by unhealthy work, the fear of losing one’s job and not being able to lead a social life, having to commit one’s life only to work and for work” (from the Italian).⁸

Elsa Santamaría Lopez, in turn, observes that this is a less complex phenomenon, analysed on at least three levels: I) socio-economic, as a consequence of production and business dynamics; II) socio-structural, as a threat to the pillars of social cohesion; III) experiential, equivalent to insecurity and uncertainty, regarding working and living conditions. The author also observes that “As far as employment is concerned [...] the definition used the most is that which equates precarious employment with atypical employment, one that does not meet the requirements of what has been socially and legally legitimized as standard employment”.⁹

If *precariousness* is understood as insecurity, poor conditions, lack of labour rights and the subordination of the worker, it has always been present in the West — slavery both in Antiquity and the Modern Age, serfs in the Middle Ages.

Engels’ study: *The Situation of the Working Class in England* is key in this regard, but before discussing it, it is important to note the difficulty of considering Marxism, a theoretical tradition that arouses intense love and hatred. For our purposes, value judgements are not important, only descriptive facts — how the author describes streets filled with filth and mud, the air filled with factory smoke. “Women and ragged children roam there, as dirty as pigs that wallow in filth and mud.” Inside the “tiny houses (which have at most two rooms and an attic and sometimes a basement), live an average of twenty people”, and in the entire neighborhood there was only one toilet for more than 100 people. Elsewhere, Engels says that he toured Manchester in the company a colleague, a man of business, pointing out:

⁷ For Manuel Castells, *network society* refers to the society where social structures and activities are strongly organized around information networks processed electronically (CASTELLS, Manuel. *The rise of the network society*. Malden; Chichester: Wiley-Blackwell, 2010).

⁸ ARRIOLA, Joaquin; VASAPOLLO, Luciano. *L'uomo precario: nel disordine globale*. Milan: Jaca Book, 2005. p. 140. Free translation: “a social situation marked by the malaise of work, the fear of losing your job and of not being able to have a social life again, and of having to commit only to work and for work”.

⁹ LOPEZ, Elsa Santamaria. La precarización del empleo y de las relaciones laborales. In: LOPEZ, Elsa Santamaria; PASCUAL, Amparo Serrano. *Precarización e individualización del trabajo: claves para entender y transformar la realidad laboral*. Barcelona: Editorial UOC, 2016. s.p. Free translation: “the definition that has been used the most is the one that equates precarious work with atypical work, that is, one that does not meet the requirements that were legitimized socially and legally as standard work”.

[...] bad architecture, unsanitary, horrible conditions [...] working-class neighborhoods... and told him that I had never seen a city built in worse condition. He listened to me calmly and, on the corner when we parted, he declared: "And yet, there is a great deal of money made here". The bourgeoisie of England does not care. It doesn't matter whether or not its workers die of hunger, as long as they earn money.¹⁰

Also in the Marxist tradition, Hobsbawm, in turn, observes that if there was one factor that dominated the lives of nineteenth-century workers, it was, precisely, *insecurity*. They didn't know how much they would earn, if they would keep their jobs and, or become unemployed, whether would they be able to go back to work etc.¹¹

In short, there may be a society that did not experience the precariousness of work, but this is definitely not the case in the west. The entire history of the West is marked by it and, with globalisation, this has been exacerbated, due to the relativization or restriction of rights (conquered, above all, in the 20th century), personal security and quality of life. As Bourdieu observes, globalisation means companies, originally linked to a nation-state or place, have become virtual, network enterprises (*entreprise réseau*), exploiting cheaper labour and competition on an international scale:

*Precariousness is part of a new mode of domination, based on the institution of a generalized and permanent state of insecurity aimed at forcing workers into submission, into acceptance of exploitation. This mode of domination, which in its effects resembles the wild capitalism of its origins, is completely without precedent, which may relevantly and expressively be termed flexploitation.*¹²

¹⁰ ENGELS, Friedrich. *A situação da classe trabalhadora na Inglaterra*. São Paulo: Boitempo, 2010. p. 308.

¹¹ In the words of the author, "If any single factor dominated the lives of nineteenth-century workers it was insecurity. They did not know at the beginning of the week how much they would bring home at the end. They did not know how long their present work would last or, if they lost it, when they would get another job or under what conditions" (HOBSBAWM, Eric John. *The Age of Capital: 1848-1875*. London: Abacus, 1977. p. 258.

¹² BOURDIEU, Pierre. *La précarité est aujourd'hui partout*. 1997. Available at: <http://www.ilo.org/wcmsp5/groups/public/>. Accessed on: 11 Jan. 2020. Free translation: "Precariousness is part of a mode of domination of a new type, based on the institution of a state of generalized and permanent insecurity which aims to force workers into submission, into acceptance of exploitation. To characterize this mode of domination which, although in its effects somewhat similar to capitalism in its original form, someone proposed the relevant and very expressive concept of flexploitation".

This is true, but how they depend on particular interests: “When you say things are like this, it is understood that things must be this way, or that it is good that things are this way, or on the contrary, things must no longer be like this.”¹³ In other words, if you are a shareholder of a transnational company, you are likely to see this situation as something necessary or even good. However, if you are a worker who is losing rights, it is clearly negative.

In any case, the key point for the purposes of the present study is that the context of globalisation, of an internet society, increases the perception of precariousness¹⁴ and, with it, the sense of risk and insecurity, which makes people seek stability as a personal, biographical solution to systemic contradictions.

Although the works and authors cited so far are not based specifically on Brazilian reality, they allow us to reflect on our own search for stability. We are not immune to risks and insecurity and seek our own solutions to challenging circumstances. Hence, the ideal of stability in the public sector, common to so many Brazilians.

Traditionally understood as a bulwark against dismissal, stability permeates the imagination of many people Brazilians as a kind of protection against social ills, a goal that needs to be pursued, even if the price is to occupy a position at odds with personal ideology, as a recent report shows:

In times of economic crisis, sleeping and waking up without the spectre of unemployment is a luxury. “I’ve been fighting for five years. I gave up lots of things, activities with family, friends. What I want is to have financial stability, to have a peaceful old age”, were the words of Samuel Nóbrega, 45, after sitting the civil service exams at Salvador Municipal Hall.¹⁵

In the same report we read the testimony of a candidate who recognizes that she does not feel comfortable with the position but only wants stability:

¹³ BOURDIEU, Pierre. *Pierre Bourdieu entrevistado por Maria Andréa Loyola*. Rio de Janeiro: EdUERJ, 2002. p. 14.

¹⁴ What seems more recent is the perception of this precariousness. Elsa Santamaría López observes: “It is advisable to point out that labour precariousness does not respond to a new phenomenon exclusive to current or more recent labour reality; it is more about a historical process, which comes from afar, but with time it acquires different configurations” (Elsa Santamaría López, *La precarización del empleo y de las relaciones laborales*, op. cit.).

¹⁵ WENDEL, Bruno. Estabilidade financeira é o sonho de candidatos do concurso da Prefeitura. *Correio 24 Horas*, 16 jun. 2019. Available at: <http://www.correio24horas.com.br/noticia/nid/>. Accessed on: 10 Dec. 2019.

among the candidates, several had no affinity with the post, but wanted stability. Such was the case with Lorraine Magalhães, 21 “I am completing my Psychology course. I am here because I only want stability. I do not identify with the position”, said the candidate for a transport agency vacancy.¹⁶

In a similar sense, is the statement of Renato Saraiva, founder of a well-known network of legal career preparation courses: “Unfortunately, the vast majority of people who apply to work in the civil service do not do so out of vocation, but for financial stability.”¹⁷

Such statements, conveying the common desire for stability, substantiate the Towers Watson diagnosis mentioned earlier, suggesting a intensification of the problem: for many, stability is the main concern, to the detriment of other concerns, such as remuneration or personal affinity. As it is seen as salvation by so many people, any destabilizing move provokes general panic, damaging the security of incumbent employees and the dream of those preparing for civil service exams.¹⁸

But the dream for so many is a travesty for others. According to Luis Fernando de Freitas Camargo and Maria Regina Fortunato, the MEC has already recognized that “[...] stability is an unbearable evil that encourages

¹⁶ Ibid.

¹⁷ VARELLA, Claudia. *Quer estabilidade de um emprego público, mas não sabe que concurso fazer?* Available at: <https://economia.uol.com.br/empregos-e-carreiras/noticias/redacao/2018/06/19/dicas-escolher-area-funcionalismo-publico-concurso.htm>. Accessed on: 11 Dec. 2019.

¹⁸ “Trade unions: withdrawing stability is an ‘unlimited setback’” (AUGUSTO, Otávio. Sindicatos: retirar estabilidade é “retrocesso sem limites”. 7 Oct. 2019. Available at: <http://www.metropoles.com/brasil/servidor-brasil/retirar-a-estabilidade-e-retrocesso-sem-limitescriticam-sindicatos>. Accessed on: 10 Dec. 2019); “Behind the scenes: change in the stability of the server remains a taboo topic in government” (FERNANDES, Adriana; TOMAZELLI, Idiana. Bastidores: mudança em estabilidade do servidor continua sendo tema tabu no governo. O Estado de S. Paulo, 9 Oct. 2019. Available at: <https://economia.estadao.com.br/noticias/geral,bastidores-mudanca-em-estabilidade-do-servidor-continua-sendo-tema-tabu-no-governo,70003043783>. Accessed on: 10 Dec. 2019. This does not mean precariousness did not exist, as Bourdieu observed: “It became clear that precariousness is everywhere today. In the private sector, but also in the public sector, which has multiplied temporary and interim positions, [...]” (Pierre Bourdieu, *La précarité est aujourd’hui partout*, op. cit. Free translation: “It became clear that precariousness is everywhere today. In the private sector, but also in the public sector, which has increased the number of temporary and provisional positions”. In Brazil, Francisco Moura and Francysco Gonçalves show that there is a movement in this sense, and cite as an example outsourcing in the public sphere, which, according to the authors, does not seem to be a guarantee of efficiency and quality of services offered to the population. (cp. MOURA, Francisco Ercilio; GONÇALVES, Francysco Pablo. A marca da violência nas relações de emprego: precarização e desregulamentação dos direitos trabalhistas no sector público brasileiro. *Interfaces*, v. 8, n. 2, 2020. Available at: <https://interfaces.leaosampaio.edu.br/index.php/revista-interfaces/article/view/743>. Accessed on: 12 Sept. 2020.).

disengagement with work, often becoming a ‘convenient professional hanger’.¹⁹ Commentators consider it “a public service evil” and “a cancer in the public system”.²⁰

Stability is, in short, a complex legal and social institution. For some it is a life goal, for others a national shame which damages the functioning of the state. In order to understand it properly we will need to reflect on a correlation with the introduction of public administration in Brazil.

3. Citizenship and patrimony: stability in the historical development of Brazilian public administration

As we know, administration in Brazil arises from the implementation of an already problematic model: the Portuguese system.²¹ According to Sérgio Buarque de Holanda, in Portugal there was a culture of personality: compared to other European nations, the Portuguese valued the personal over the collective, and were less likely to build more stable and organized institutions. In a “land where everyone is a baron durable collective agreement is not possible, unless by a respectable, bold outside source”.²²

Raymundo Faoro provides an overview of Portuguese public administration:

¹⁹ CAMARGO, Luís Fernando de Freitas; FORTUNATO, Maria Regina. Marcas de uma política de exclusão social para a América Latina: propostas neoliberais para a educação na região. *Terra Livre* — periódico da Associação dos Geógrafos Brasileiros, n. 13, p. 20-29, ago. 1997. Available at: <http://www.agb.org.br/publicacoes/index.php/terralivre/article/download/122/118>. Accessed on: 12 Dec. 2019.

²⁰ The statements are attributed, respectively, to Cristiano Feitosa, then Secretary of State for Administration and Human Resources (Searh), Rio Grande do Norte. (FEITOSA, Cristiano. *A estabilidade é um mal para o serviço público no Brasil*. Entrevista concedida ao jornal Tribuna do Norte, 16 jul. 2017. Disponível em: <http://www.tribunadonorte.com.br/noticia/a-estabilidade-a-um-mal-para-o-servico-publico-no-brasil/386231>. Acesso em: 12 dez. 2019.); and by Antídio Lunelli, mayor of Jaraguá do Sul (MORAES, Patrícia. Estabilidade no serviço público pode ser alterada. 17 nov. 2018. Available at: <https://ocp.news/colunista/patricia-colunista/estabilidade-no-servico-publico-pode-ser-alterada/>. Accessed on 12 Dec. 2019.).

²¹ “The Portuguese occupation in Brazil also brought with it its culture, the understandings it had about life and its institutions, without bothering to create a new system adequate to the reality encountered, which took into account its own development. In Brazil, even after its independence, there was no rupture with the traditions brought and left, which is why we still keep stepping on foundations that are not our own.” (SILVA, Marcos Fernandes Gonçalves da. *Formação econômica do Brasil: uma reinterpretação contemporânea*. Rio de Janeiro: Elsevier, 2012. s.p.).

²² HOLANDA, Sérgio Buarque de. *Raízes do Brasil*. 26. ed. São Paulo: Companhia das Letras, 1995. p. 32.

The first-level of civil service belonged to the noble, lord of the land, outside the jurisdictional territory. Likewise, the judicial and fiscal jurisdictions depended, for their authority, on royal favour. The body of officials received payment from the incomes of families, villages and parishes, establishments not benefiting from immunity. The offices were, within such a system, dependent on the prince, his wealth and powers.²³

Colonization introduced a series of pernicious aspects from Portuguese administrative culture. As Teresa Cristina Padilha de Souza observes, in Portugal “property was confused with the royal domain, with little or no distinction between the public and private realm of the prince.”²⁴ Brazilian colonization, in turn, was based on the endowment of land and gave rise to a political feudalistic political organization, especially with regard to the full, hereditary transmission of ownership and sovereignty, and patrimonialism,²⁵ which can be thought of, broadly, as the absence of clear boundaries between the public and the private.

For the “patrimonial” employee, political management presents itself as a matter of private interest; functions, jobs and the benefits derived relate to the personal rights of the employee and not to objective interests, as in the real bureaucratic state, with specialization of functions and an effort to ensure legal guarantees to citizens.²⁶

²³ FAORO, Raymundo. *Os donos do poder: formação do patronato político brasileiro*. São Paulo: Globo, 2012. Não paginado (eBook Kindle).

²⁴ SOUZA, Teresa Cristina Padilha de. *Mérito, estabilidade e desempenho: influência sobre o comportamento do servidor público*. Dissertação (mestrado em gestão empresarial) — Fundação Getúlio Vargas, Rio de Janeiro, 2002.

²⁵ Note Jessé de Souza’s criticism of patrimonialism: “The other lie told by the economic elite throughout the 20th century, according to de Souza, refers to the concept of patrimonialism. ‘This concept says that power, and consequently corruption and the evil elite, are in the state. If you have the power, you will have the privileges. However, power in every capitalist society is in the market. Therefore, the concept of patrimonialism is the smokescreen used by the big market players who assail us’. The lie that corruption is political is exposed in Brazil. ‘Everyone knows that the guys are mere lackeys, office boys to the market’” (FIOCRUZ. Jessé de Souza: *identidade do brasileiro é fruto de três mentiras contadas pela elite*. 2018. Available at: <https://cee.fiocruz.br/?q=jesse-de-souza-identidade-do-brasileiro-e-fruto-de-tres-mentiras-contadas-pela-elite>. Accessed on: 31 Jan. 2021.; SOUZA, Jessé José Freire de. *O Brasil tem jeito? Sociedade e saúde em tempos de crise*. Available at: <https://youtu.be/Gy8yBHHtAM>. Accessed on: 31 Jan. 2021.). Unfortunately, there is no space here to adequately respond, but one must clarify that the idea of patrimonialism does not disregard corruption and illicit acts in the private sector but, on the contrary, shows how the public powers end up selling themselves to spurious private interests.

²⁶ Sérgio Buarque de Holanda, *Raízes do Brasil*. op. cit., p. 32.

This model, which for Sérgio Buarque de Holanda is a legacy of the Portuguese model, implemented in Brazil, was characterized by a kind of prostitution of the public in favour of the private.²⁷ In Brazil, patrimonialism was typified by relations between the king and the *governor-captains*. Teresa Cristina Padilha de Souza also observes that in this system personal relationships predominated at the expense of merit — characteristic of patrimonialism — and that the pernicious heritage of this system persists to this day:

Based on this history, it can be seen that for the purpose of appointments or occupation of positions of trust, merit had little or no relevance. Likewise, there was no instrument for or interest in ascertaining this merit, that is, evaluating performance. Although there was still no formal mechanism to provide job stability, it could be said that it existed as a function of factors such as status, heredity, political favour and loyalty to the sovereign. It is evident that this culture, based on feudalism and patrimonialism, brought from Portugal and strengthened with the arrival of the Court to Brazil, would leave marks still evident today in public sector organizations.²⁸

In this context, although it was not legally established, as nowadays, there was a certain stability, a protection against dismissal, as long as the agent met the conditions — status, heredity, political favour — necessary to stay in charge.

On the question of colonization and its legacy, it is necessary to clarify that it is not a question, of course, of arguing that all our problems stem from colonization — the authors cited do not suggest this either. It is, rather, a recognition that some of the problems that existed at that time still remain, to a greater or lesser extent, in public administration.

As Bourdieu warns, “every day that passes an authority sees an irreversible increase in power to overthrow”.²⁹ In the 520 years since the arrival of the Portuguese, there have been almost 400 years of colonialism and empire. We have little more

²⁷ Francisco Ercilio Moura e Francysko Pablo Gonçalves, *A marca da violência nas relações de emprego*, op. cit.

²⁸ Teresa Cristina Padilha de Souza, *Mérito, estabilidade e desempenho*, op. cit., p. 38.

²⁹ BOURDIEU, Pierre. Le mort saisit le vif: les relations entre l’histoire réifiée et l’histoire incorporée. *Actes de la recherche en sciences sociales*, v. 32-33, p. 3-14, abril/jun. 1980. Available at: <https://doi.org/10.3406/arss.1980.2077>. Accessed on: 10 Jan. 2020. Free translation: “for each day that a power remains, the irreversible part [inheritance] those who overthrow it have to deal with increases.”

than a century of Republicanism, a period punctuated by authoritarian regimes, so that it would be strange to no longer have any non-republican cultural heritage.

Sérgio Buarque de Holanda observes that, in Brazil, the structure of politics, of the economy and society as a whole, were built on rural foundations, which survived time and economic changes. Coffee farms, for example, “almost always followed the traditional patterns of the sugar plantation, constituting a virtually self-sufficient unit.”³⁰

The distances from the Metropolis and the form of colonization contributed to the dominance of local authorities, in some cases, in a despotic way. The sugar mills and farms enjoyed great social, economic and political autonomy, often where the state authority simply couldn’t reach, due to lack of infrastructure, or subservience to rural landowners who, on their lands, enjoyed a status similar to that of heads of state. “In sixteenth and seventeenth-century Brazil, public life was almost entirely personified by the private.”³¹

In the 18th century, while other places were experiencing ideological and social transformations that would culminate in liberal revolution, such as in the USA and France, Brazil saw the rise of the mining tycoons. While the year 1789 in Europe was marked by the French Revolution, the main event in Brazil was the dismantling of the *Inconfidência Mineira*.³² As France experienced the fall of the Ancien Régime and the rise of republican and democratic ideas, in Brazil the authority of the crown was reasserted, symbolically and materially, in the penalties given to the *inconfidentes*, emblematic of colonial tyranny.

According to José de Souza Martins, with Independence, the potentates in rural and local communities became “the guardians of the nascent national state and, therefore, the source of political legitimacy for the new country.”³³ Even with the advent of the Republic, Brazil remained essentially patrimonial, the main characteristic of the Brazilian public administration until this day.

In this context, the prerogatives of public officials — and the guarantee of permanence, in particular — depended on the sponsorship of the state, which

³⁰ Sérgio Buarque de Holanda, *Raízes do Brasil*. op. cit., p. 173.

³¹ MARTINS, José de Souza. *O poder do atraso: ensaios de sociologia da história lenta*. São Paulo: Hucitec, 1994. p. 24.

³² “The *inconfidentes* began to prepare the rebel movement in the last months of 1788, encouraged by the expectation of the levy. However, they did not implement their plans. In March 1789, Barbacena decreed the suspension of the levy, while the conspirators were denounced by Silvério dos Reis, who had been close to them, but had chosen to escape his problems by denouncing the movement.” (FAUSTO, Boris. *História do Brasil*. 2. ed. São Paulo: Edusp, 1995. p. 116.)

³³ José de Souza Martins, *O poder do atraso*, op. cit., p. 27.

only started to change at the end of the first Republic (1889-1930), with the law of 1915. As Teresa Cristina Padilha de Souza explains:

With regard to stability, Law 2.942, from 1915, appears as the first formal provision of Brazilian legislation, wherein the concept is presented clearly. Before this law came into force, there was only a false stability, subject to the tides of political or other change. In order to combat this anti-meritocratic framework, Law 2.924 establishes that civil servants with more than 10 years in office may only be dismissed through an administrative process.³⁴

The 1934 Constitution was the first to bestow an official title on civil servants, terminology used at the time — which we discuss later, recognizing stability in art. 169, for those with more than 10 years in office. Those with more than two years in office by way of admission through civil service exam could only be removed through a court decision or an administrative process in which full right to defence was assured.³⁵

The constitutional provision was maintained in art. 156 of the Constitution of 1937, which increased the standard of entry into the public service, establishing that initial appointment could only be gained through formal, competitive exam. The 1946 Constitution, in turn, in art. 188 stated that stability depended on two years of service if appointed through examination, and after five years without. There were, however, caveats that such provisions did not apply to positions of trust or those declared in law as being “of free appointment and dismissal”.

The revised Constitution, enacted in 1967, maintained the requirement of civil service examination for appointment to public office, except for commissioned positions, declared by law, as “free appointment and dismissal” — updating the terminology, from dismissal to exoneration, opening up the possibility of contracting temporary officials. “Art. 104 — Labour legislation applies to servers temporarily admitted, or contracted to positions of a technical or specialized nature”.³⁶

³⁴ Teresa Cristina Padilha de Souza, *Mérito, estabilidade e desempenho*, op. cit., p. 41.

³⁵ The sole paragraph of the same article established that whoever had less than 10 years of effective service could not be removed, except in the case of just cause or motives of public interest.

³⁶ BRASIL. *Constituição da República Federativa do Brasil de 1967*.

The constitutional provisions referring to appointments to public office never had the expected effectiveness, largely because administrative practice, historically, was grounded in a strongly patrimonial cultural base. As Teresa Cristina Padilha de Souza observes, informal appointments continued as common practice:

At this point, it is important to analyze that, despite the principles of equality and merit inherent to all incarnations of the Constitution, legal provisions and complementary decrees, over time, began to “undermine” the higher law, opening gaps for other admission criteria and functional progression.

Among them, in the history of Brazilian public administration, are innumerable cases of supposedly “special” or temporary exemption from the requirement of civil service examination, which became effective over time.³⁷

These practices aimed at circumventing the constitutional requirement survived, therefore, the 1967 Constitution, largely because the Constitution itself allowed it. According to Celso Antonio Bandeira de Mello:

It has been a Brazilian constitutional tradition to grant stability to civil servants admitted irregularly, without formal examination, i.e., not officially appointed to positions. They were said to have “functions”, and later were called “*extranumeraries*”. Thus, the link between stability and “public service” was reinforced. Stability, however, is a right conferred on officials performing *activities bound to their original appointment*.³⁸

This tradition appears in the current constitutional order, in art. 19 of *Ato das Disposições Constitucionais Transitórias*, which again granted stability to those with five years tenure:

Art. 19. Civil servants of the Union, States, Federal District and Municipalities, direct administration, autonomous and public

³⁷ Teresa Cristina Padilha de Souza, *Mérito, estabilidade e desempenho*, op. cit., p. 41-42.

³⁸ MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. 26. ed. São Paulo: Malheiros, 2008. p. 302.

foundations, in office on the date of promulgation of the Constitution, for at least five continuous years, admitted in the manner regulated in art. 37 of the Constitution are considered stable employees in the civil service.

§ 1 The time of service referred to in this article begins with the employee's initial candidature, in accordance with the law.

§ 2 The provisions of this article do not apply to holders of positions of trust or commission, nor to those whose time of service is not computed for the purposes of the "introduction" of this article, except in the case of a public servant.

§ 3 The provisions of this article do not apply to tertiary level professors, under the terms of the law.³⁹

It is interesting to note that commissioned employees and higher-education professors are omitted, meaning restricted application, to those who, in some way, had been admitted as temporary, *extranumerary* or such.⁴⁰ And it would be a mistake to think the problem was resolved after the promulgation of the 1988 Constitution, with the Proposed Amendments to the Constitution, dubbed the *trens da alegria* ("joy trains"), which, specifically, related to those who entered office without competing in civil service exams.⁴¹

As at the federal level, in the states and municipalities the situation is little different. In 2014 the Supreme Court passed *Ação Direta de Inconstitucionalidade* – ADI 4.876, recognizing the unconstitutionality of art. 7 *Lei Complementar*

³⁹ BRASIL. *Constituição da República Federativa do Brasil de 1988*.

⁴⁰ Non-permanent officials have already received various names, such as auxiliary agents; they were once called supernumeraries. Florivaldo Dutra de Araújo notes that "The distinction between permanent and temporary goes back to the early years of the Empire. Temporaries are already mentioned in laws from the twenties and thirties of the 19th century. Initially, the designation of *auxiliary agents* appears. But in Decree of 5.18.1825, concerning the clerks of the Contadoria da Marinha, there is a reference to the 'Practitioners of the number and supernumeraries of the same Accounting'. These two categories of public servants can be detected in the various legal texts that, on a case-by-case basis, referred to them" (ARAÚJO, Florivaldo Dutra de. Os regimes jurídicos dos servidores públicos no Brasil e suas vicissitudes históricas. *Revista da Faculdade de Direito da UFMG*, Belo Horizonte, n. 50, p. 146, jan./jul. 2007. Available at: <http://www.direito.ufmg.br/revista/articles/32.pdf>. Accessed on: 20 Dec. 2019.).

⁴¹ The following is emblematic of these attempts to guarantee stability for those who entered without competition: "Approval of proposed amendments to the Constitution (PECs) that effect at least 260 thousand employees hired informally, the new motion in Congress, may take from Social Security a revenue that today yields BRL 4 billion annually, in addition to perpetuating personnel expenses of around BRL 20 billion annually" (GOBETTI, Sérgio. Trem da alegria tira R\$ 4 bi da Previdência: efetivação de 260 mil servidores perpetua gasto de R\$ 20 bilhões. *O Estado de S. Paulo*, 7 ago. 2016. Available at: <https://politica.estadao.com.br/noticias/geral,trem-da-alegria-tira-r-4-bi-daprevidencia,35621>. Accessed on: 18 Dec. 2019.).

Estadual no. 100/2007, Minas Gerais, which validate the positions of civil servants who had not entered through the competitive process.⁴² In 2019, the TJSP indicted the then mayor of Campinas, the third largest city in the state, for “hiring 1,800 people without resorting to public contest”.⁴³ And even in the Judiciary — which theoretically should condemn such practice — we see the same problem.

There was also widespread outrage at the news, in 2020, that the “judgement involving civil servants hired without competition at TJGO remains frozen.”⁴⁴ These three examples show how such practices continue, and others that could be presented, in addition to the numerous cases where stability of regular employees is affected, through arbitrary persecution.

This compounds what we have already seen, in the sense that before being legally recognized in the current framework, there was a certain stability resulting from factors such as status, family influence, political capital, etc.; and that, as we have seen, even with the advent of the public tender rule, patrimonial practices continued to exist — in the admission of personnel circumventing the aforementioned rule, as with those admitted informally.

Note that the problem is not really stability itself, but the patrimonial foundations on which our public administration is built, where legal instruments are employed in a manner contrary to the public interest. This is reflected in the abuse and lack of criteria in the creation and provision of commission positions. With this understanding, we may now address the notion of stability in the current legal system, making a brief comparison with the private sector and with the experience of other countries.

⁴² “SUMMARY: Direct action of unconstitutionality. Article 7 of Supplementary Law No. 100/2007 of the State of Minas Gerais. Rule that made holders of effective positions civil servants who had entered public administration without public contest, encompassing civil servants admitted before and after the 1988 Constitution. Offense to art. 37, item II, of the Constitution Federal, and to art. 19 of the Transitional Constitutional Provisions Act. modulation of effects. Partial provenance.” (ADI 4876, Relator: Dias Toffoli, Tribunal Pleno, julgado em 26/3/2014, Processo Eletrônico DJe-125 Divulg 27-6-2014 Public 1-7-2014).

⁴³ PACHECO, Lorena. *TJSP afasta prefeito de Campinas por contratar 1.800 pessoas sem concurso público*. 2019. Available at: <https://blogs.correiobraziliense.com.br/papodeconcurseiro/tjspafasta-prefeito-de-campinas-por-contratar-1-800-pessoas-sem-concurso-publico/>. Accessed on: 1 Feb. 2021.

⁴⁴ CARDOSO, Felipe. *Processo que envolve cargos de servidores efetivados sem concurso no TJGO segue enalçado*. 2020. Available at: <http://www.jornalopcao.com.br/ultimas-noticias/processo-queenvolve-cargos-de-servidores-efetivados-sem-concurso-no-tjgo-segue-enalçado-271907/>. Accessed: 1 Feb. 2021.

4. The current scenario

4.1 Establishing some key concepts

In the previous lines we made a digression on the development of public administration in Brazil, but, in respect of stability, and, in the interests of conceptual rigour, focused on *civil servants, public officials and employees*. To this may be added other concepts that may be confused, such as *stability, effectiveness*, etc. To understand stability in the current legal system, it is necessary to clarify what such expressions mean within the law and, with this, establish some key concepts.

Firstly, it is important to remember that the term *civil servant* is still present in some current laws (such as the Penal Code, which we will mention in due course), but which has been falling into disuse.⁴⁵ Currently, we use the expression *public official* to refer to anyone exercising a *public function*, regardless of legal status, independent of remuneration, and type of tenure.⁴⁶ From this perspective, a public official may be considered — for didactic purposes — a genus comprising the following species: I) political officials; II) private individuals in collaboration with the government; III) military personnel; IV) civil service employees.

Civil servants, in turn, can be subdivided into: a) temporary workers; b) public employees (governed by the CLT); c) statutory servants. Statutory servants hold public office. Public positions, in turn, are usually classified as 1) effective; 2) lifetime; and 3) commissioned (free appointment and dismissal). Permanent positions must be filled through the competition, and lifetime positions also, and, with respect to the Constitution, by appointment of the Chief Executive, in the case of the judiciary.

In the present study, we are especially interested in state officials, usually called civil servants — those who, after passing through competition, are appointed, take office and assume a public office, governed by law. The legal

⁴⁵ "It is common knowledge that the expression 'public official' is already outdated in Administrative Law, replaced by the expression 'public agent'." (CARVALHO, Matheus. *Manual de direito administrativo*. 4. ed. Salvador: Juspodivm, 2017. p. 770).

⁴⁶ Definition affirmed in Lei de Improbidade Administrativa: "Art. 2. A reputed public agent, for the purposes of this law, is anyone who exercises, even if temporarily or without remuneration, by election, appointment, hiring or any other form of investiture or bond, employment, a mandate, position, or function in the entities mentioned in the previous article" (BRASIL. *Lei nº 8.429, de 2 de junho de 1992*).

status of civil servant and public official can be found in Law no. 8.112/1990, *Estatuto dos Servidores Cívicos da União*:

Art. 2 For the purposes of this Law, a civil servant is a person legally invested in public office.

Art. 3 A public position is the set of attributions and responsibilities provided for in the organisational structure committed to a server.

Single paragraph. Public offices, accessible to all Brazilians, are created by law, with their own title and salary paid from the public coffers, for effective provision or commission.⁴⁷

The fact that their status is governed by a specific law — a statute — grants public servants guarantees and rights that are not necessarily in a regular employment contract; one of which is stability, as Hely Lopes Meirelles explains: “Stability is a personal attribute of the employee, while Effectiveness is a characteristic of the provision of certain positions. It follows that stability is not in the position, but in the public service, in any position equivalent to the effective appointment”.⁴⁸

In the same vein, Ricardo Alexandre and João de Deus observe:

Focusing on effective positions, we emphasise this should not be confused with stability.

Effectiveness is the legal status of the person that holds a position of effective provision. Posts of effective provision may be held only by state employees, whose appointment depends on passing a civil service exam. At the moment the civil servant enters public office, in a position of effective provision, their status is clear. However, the aforementioned effective official will only receive guarantee of permanence in public office (stability) after three years of service.⁴⁹

Understanding the difference between *stability* and *effectiveness*, we note that, with the exception of patrimonial chicanery — such as the *trens da alegria* — there

⁴⁷ BRASIL. Lei nº 8.112, de 11 de dezembro de 1990.

⁴⁸ MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. 42. ed. São Paulo: Malheiros, 2016. p. 557.

⁴⁹ ALEXANDRE, Ricardo; DEUS, João de. *Direito administrativo*. 3. ed. Rio de Janeiro: Forense; São Paulo: Método, 2017.

are four conditions for acquiring stability: 1) appointment through civil service examination; 2) appointment to an effective position; 3) three-year probation; 4) special performance appraisal by a commission instituted for that purpose.

In short, *stability* is a typical guarantee of civil servants, who occupy positions of *effective provision*, who are part of a broader category: *public officials*.

With these concepts in mind, we move on to the hypotheses of potential loss of *civil service employment*.

4.2 Does stability really prevent dismissal?

In the previous paragraphs we discussed the stability of public officials and saw that it is not a problem in itself, but of the patrimonial foundations of Brazilian public administration. We will now discuss the possibilities of losing such a position, by an official who has met the legal requirements — passed the exam, been nominated, completed the probationary stage and passed a special performance evaluation — and already achieved the long-desired stability.

Both the stability and the four-fold scenario loss hypotheses are provided for in the Federal Constitution, in arts. 41 and 169:

Art. 41. Officials are stable after three years of effective service, appointed to a post of effective provision by virtue of a competitive public examination.

§ 1 The stable public servant will only lose the position:

I — by virtue of a final and unappealable court decision;

II — through an administrative process in which broad defence is ensured;

III — through a periodic performance evaluation procedure, by way of a supplementary law, ensuring full defence.

[...]

Art. 169. Expenditure on active and inactive personnel of the Union, States, the Federal District and the Municipalities cannot exceed the limits established in the supplementary law.

[...]

§ 3 To comply with the limits established based on this article, during the period established in the supplementary law referred to in the lead paragraph, the Union, States, Federal District and Municipalities will adopt the following measures:

I — reduction of at least twenty percent of expenses for commissioned or trust posts;

II — exoneration of non-stable officials.

§ 4 If the measures adopted based on the previous paragraph are not sufficient to ensure compliance with the provisions of the supplementary law referred to in this article, **the stable employee may lose the post**, provided a normative act motivated by each of the Powers specifies the functional activity, body or administrative unit subject to staff reduction.

§ 5 A civil servant who loses his position in this way will be entitled to compensation to the sum of one month remuneration per year of service.

§ 6 The position described in the previous paragraphs will be considered extinct, and the creation of a similar position, job or function is prohibited for a period of four years.

§ 7 Federal law will provide for the general rules to be followed in the effectiveness of the provisions in § 4.⁵⁰

A superficial reading of the articles shows that stability is not, at least in theory, a refuge for incompetent servants, and the possibilities for dismissal may not be so different from the private sector. Civil servants may have more guarantees and rights than those contracted under the CLT, but with regard to loss of position, the measures provided for in arts. 41 and 169 are not unfamiliar in the private sector.

It is natural and understandable that a serious private company needs to reduce its people in a time of crisis. In this case, there is a clear parallel between the situation of the civil servant and the private sector employee.

It is also typical for a private company to carry out appraisal performance reviews and replace employees who do not meet targets, akin to the state sector. The issue is the lack of a regulatory law for periodic performance evaluation. Paragraph 4 of art. 169 was inserted into the Constitution by Amendment 19 of 1998. More than two decades later, the law has not received official regulatory approval.⁵¹

⁵⁰ BRASIL. *Constituição da República Federativa do Brasil de 1988*.

⁵¹ Of course, it would be reasonable to debate whether the device in question could be considered effective — or, at least, contained — which would allow its direct and immediate application, but, judging by its inapplicability, the dominant understanding seems to be of norms of *limited effectiveness*.

Another scenario, in the private sector, is that employees who commit an offence are given the opportunity to defend themselves – similar to the public sector. Thus, at least in theory, there is a certain homology.

In relation to *item I* of art. 41 above, meanwhile, we see that, if the law were strictly followed, the private sector employee may even be at an advantage over the public servant, since the CLT provides, in art. 482, “a”, that the act of improbity allows for termination of contract with just cause, or even continuation of employment.

Probity is related to morality, a broader concept than legality. Misconduct refers to wrongdoing, to what is unworthy. Jorge Emicles Pinheiro Paes Barreto, in an extensive study, considers *improbity* as homologous with *corruption*, “given that both of them hurt the aforementioned administration, as clear factors of destabilization of the whole system.”⁵² Acts of impropriety are actions or omissions causing illicit enrichment (art. 9), actions or omissions, wilful or negligent, which damage the treasury (art. 10); actions or omissions in granting, applying or improperly maintaining financial or tax benefits (art. 10-A); actions or omissions that violate principles of public administration; in addition to others perhaps disciplined in other laws. It is worth remembering that, before recent amendments, if correctly applied, the penalty of loss of office contained in *Lei de Improbidade Administrativa* could be reassignment to an alternative post.⁵³

Finally, in the case of criminal proceedings against employees in the private sector, art. 482, “d”, of the CLT stipulates *just cause for termination of the contract, res judicata, if there has been no suspension of the execution of the sentence,*

⁵² BARRETO, Jorge Emicles Pinheiro Paes. *A improbidade administrativa como instituto jurídico político de combate à corrupção e a matiz decisional dos juízos de direito da comarca de Crato-CE nos casos de combate às patologias corruptivas: a construção de políticas públicas de combate efetivo à corrupção*. Dissertação (mestrado em direito) – Universidade de Santa Cruz do Sul, Universidade Regional do Cariri, Santa Cruz do Sul, Crato, 2017. p. 48.

⁵³ The Second Panel of the STJ, in AgInt in REsp 1701967, recorded that “As for the penalty of loss of public office or function, the local court has ruled that the sanction is aimed at any attachment that the offender has at the time of conviction. The second session of STJ establishes firm jurisprudence that ‘the sanction of loss of public office aims to extirpate anyone who exhibited moral unsuitability (or incapacity) and unethical conduct for the exercise of public function, covering any activity exercised at the time of irrevocable condemnation’ (REsp 1.297.021/PR, Rel. Ministra Eliana Calmon, Segunda Turma, DJe 20/11/2013). Decision: RMS 32.378/SP, Rel. Ministro Humberto Martins, Segunda Turma, DJe 11.5.2015. In the same sense, see decisions: AREsp 785.137, Rel. Ministro Og Fernandes, publicado em 29.9.2016; and REsp 1.528.429, Min. Mauro Campbell Marques, 29.9.2015”. Among the setbacks of Law no. 14.230/2021 is the provision contained in art. 12, § 1, that the sanction of loss of public office will only affect the position of the same character that the agent had with the public authority at the time of committing the infraction, or given the circumstances of the case and the seriousness of the infraction, exceptionally, extended to other positions.

i.e., the employer may be dismissed, depending on the circumstances. For public officials, meanwhile, the regime, in turn, is more incisive:

Art. 92 — The following are also consequences of the conviction:

I — loss of office, public function or elective mandate:

- a) when a custodial sentence is applied for an equal time or more than one year, in crimes of abuse of power or breach of duty vis-a-vis the Public Administration;
- b) when a custodial sentence for a longer period of than 4 (four) years is applied in other cases.⁵⁴

We are aware of circumstances, in the sense that loss of office may not be a logical consequence of the conviction,⁵⁵ if the official has not taken advantage of their office to commit the criminal offence. For example, if the agent occupied a professorship and a technical position, and committed the crime in the exercise of technical duties, they would keep the teaching position. This understanding can benefit criminals, keeping them in public administration and, as a result, damage the administration and the collective, not to mention the punitive notion. The Penal code is, of course, the base of the conviction. The Law allows for cases where there is a conviction which does not lead to loss of office, benefiting those who, in some way, are enriched by public official crime, which is totally incompatible with the constitutional values that govern public administration.

The same can be said of the clarity of the *Lei de Tortura* (Law no. 9.455/1997), which states in art. 1, § 5, that “The conviction will result in the loss of public office, function or employment and the ban on its exercise for twice the term of the penalty applied”.⁵⁶ A slightly different situation, on the other hand, is *Lei do Racismo* (Law no. 7.716/1989), whose art. 16 establishes a

⁵⁴ BRASIL. *Decreto-Lei nº 2.848, de 7 de dezembro de 1940.*

⁵⁵ Cezar Roberto Bitencourt, for example, says that “The specific effects of the conviction are not automatic, [...]. The loss must be limited only to that position, function or activity in the exercise of which the abuse was committed, as the interdiction presupposes that the criminal action was carried out vis-a-vis inherent abuse of power or breach of duty” (BITENCOURT, Cezar Roberto. *Código penal comentado*. 7. ed. São Paulo: Saraiva, 2012.).

The Fifth Panel of the Superior Court of Justice, in REsp 1452935, in turn, understood that “As a rule, the penalty of forfeiture must be restricted to the public office held or function exercised at the time of the crime. Thus, the loss of public office, for violation of duty inherent to it, needs to be for a crime committed in the exercise of that position, in the function for commission of the crime”.

⁵⁶ BRASIL. *Lei nº 9.455, de 7 de abril de 1997.*

“consequence of the conviction is loss of public office or function, for the civil servant, and suspension of private enterprise for a period no longer than three months”, but provides the specific provision in art. 18 that “The effects dealt with in arts. 16 and 17 of this Law are not automatic, and must be stated, with reasons, in the sentence.”⁵⁷

Thus, if criminal legislation is taken literally — more consistent with the principles and values that should govern administration — criminal conviction would invariably mean forfeiting public office, under the terms of the law; but, as already mentioned, in the private sector, the same conviction would only allow the employer to terminate, with just cause, the employee’s contract in that sector.

This very brief comparison between the hypotheses of loss of office in the public sector and in the private sector already shows us that stability should not be — at least in normative terms — a safeguard for public servants. This becomes even clearer when we consider that stability is not exclusive to the Brazilian public service. On the contrary. The United States,⁵⁸ France⁵⁹ and other ostensibly developed countries recognize the stability of civil service employment, according to Erasto Villa-Verde Filho:

The stability of public service employment is not a creation of Brazilian law. Rather, it is a guarantee that has long been assured according to records from different countries.

In 1917, Araujo Castro said that “everywhere there is great tendency to guarantee a certain stability to public servants” (p. 127), which he called *Movimento em favor da estabilidade do funcionário*. As he stated, such was

⁵⁷ BRASIL. *Lei nº 7.716, de 5 de janeiro de 1989*.

⁵⁸ According to Bibiana Souza da Silva: “The Stability Principle originated in the United States to extinguish an inhuman and immoral custom, not to mention the abuse of democracy in Public Administration, by way of the customary exchange of administrative heads by influential political parties, the Democrats and the Republicans” (SILVA, Bibiana Souza da. *O princípio da estabilidade e seu propósito*. 2017. Available at: <https://jus.com.br/artigos/55179/o-principio-da-estabilidade-e-seu-proposito>. Accessed on: 25 Sep. 1981).

⁵⁹ According to Vitor Kleber Almeida Santos: “Stability is inherent to the civil service and applies to all French civil servants, regardless of their functional category (State Civil Service, Territorial Civil Service and Health Civil Service). The public administration can only dismiss by just cause. The civil service is properly structured with suitable career plans for the various positions and functions. The employees who reach the highest levels are often called upon to exercise senior positions in the administration. Merit, dedication and study are the foundations of promotion in the French public service” (SANTOS, Vitor Kleber Almeida. *Os limites constitucionais na criação de cargos de provimento em comissão na Administração Pública*. Dissertação (mestrado em direito) — Faculdade de Direito, Pontifícia Universidade Católica de São Paulo, São Paulo, 2016.).

the case already was already in Spain, Germany, Italy and Belgium.

In France, Duguit, as Araujo Castro notes (1917, p. 129) also strongly defended stability, demonstrating the great advantage this would bring to the State itself.

The same Araujo Castro says that civil servants already enjoyed stability in England (the hypothesis that a good official could not be arbitrarily removed), Switzerland (where, although permanence was not guaranteed, not even to its judges, tradition prevented anyone from being dismissed without just cause) and Argentina (where discretionary power in terms of exemptions was already considered inconvenient to the interests of State).

In Latin America, in 1916, the *Congresso Sul-Americano de Ciências Sociais de Tucuman* reached the following conclusion: “In terms of general administration, it is indispensable to ensure regularity in public service, an existence of legal precepts based on the stability of employees” (apud CAVALCANTI, Themistocles Brandão. 1958, p. 405).

The stability of officialdom continues to this day. Traditionally in comparable national laws, in certain countries, the guarantee is even greater than the one in force in Brazil, according to Josemar Dantas (1995): “The most developed nations in the world, including Germany and Italy, adopt the policy to a much broader extent than in Brazil. Even the political posts just below a minister are occupied by permanent civil servants. This criterion explains why political crises in countries that practice stability never become institutional crises or interrupt the full functioning of the administrative machine”.

In Portugal, civil servants are guaranteed the “right to ownership of the post”, as defined by the doctrine:

“By the right to ownership of the post, we understand the right to occupy permanently, without possibility of dismissal, except by means of an expulsion penalty of a disciplinary or criminal nature” (Alfaia, J., 1985, p. 477).

As can be seen, the employee’s right to remain in the post, in Portugal, is similar to that in Brazil.⁶⁰

⁶⁰ VILLA-VERDE FILHO, Erasto. A estabilidade no serviço público em face da proposta do governo “FHC” de “flexibilizá-la”. *Revista de Informação Legislativa, Brasília*, n. 134 abr./jun. 1997. Available at: <http://www2.senado.leg.br/bdsf/bitstream/handle/id/235/r134-16.PDF?sequence=4>. Accessed on: 5 Jul. 2020, p. 189-190.

Noting that stability is a constant in countries where public administration works effectively, we cannot be sure that it is the singular problem. It is a mistake to say that stability is an evil in itself, but rather that it is problematic in Brazil, where administration is strongly marked by patrimonialism and its resultant ills.

To think that merely ending stability would solve everything is an error. We would only go back to the time when the employment of a worker depended, not on his performance, but on the bounty of superiors or a sponsor — e.g., an important politician — to keep them in office.

Another common criticism is that stability — along with competition — makes people complacent. According to this argument, some of the best brains squander their potential, content with job security alone, failing to maximize their talents. This can happen, but at least from the legal point of view, it may be that officials feel encouraged to seek other positions, reassured by the promise of reappointment to the position already held in the event of disapproval or withdrawal at the probationary stage.⁶¹

5. Final considerations: paths to Brazilian public administration

As we have seen, we may conclude that stability is not an evil in itself, and that ending it, far from solving the problems of the Brazilian civil service, would only contribute to a return to a time when permanence depended on political sponsorship. The error, rather, is in the patrimonial culture that permeates our public administration. Are we, then, a hopeless case? Is there any solution?

To answer this, we need to identify the real causes of the problem and, from there, evaluate the possibility of building solutions. We already know that the problems of public administration are related to patrimonialism, the absence of boundaries between the public and the private, a characteristic present in absolutism, where “The State becomes the property of the prince,

⁶¹ Re-appointment, under the terms of the Federal Constitution and Law No. 8.112/1990, is the right of the formally hired officer, to return to the position previously held, in two circumstances: 1) due to the reinstatement of the previous occupant of the position; 2) due to disqualification at a new probationary stage of another position. It is recognized in doctrinal and jurisprudential teaching, that the withdrawal in the probationary stage also makes it possible to return to the previous position. This is an interesting issue in relation to Amendment 19/1998 that deserves a specific study.

who intervenes in everything, an audacious businessman, courting risks for the sake of wealth and glory: an enterprise of peace and of war."⁶²

As already mentioned, *patrimonial public administration* is a legacy of the Portuguese administration model implemented in Brazil, characterized by a kind of prostitution of the public at the bidding of the private. If we think in terms of ideal types — which do not need correspond to reality, but only help in its understanding —, we can say that, in addition to asset management, there are also *bureaucratic and managerial administrations*, which is called the New Public Administration (NAP). These three public administration models⁶³ in Brazil — *patrimonial, bureaucratic and managerial* — are recurrent in Brazilian texts, in manuals, dissertations, documents etc.⁶⁴

Bureaucratic public administration is an administrative model that recognizes privileges, governed by the principle of impersonality, by the rule of law and procedures legally defined by it, and among the instruments that, in theory, satisfy impersonality, are precisely the public tender, competitive entrance exams,⁶⁵ and impersonality.⁶⁶ Despite initiatives to implement a bureaucratic and a managerial administration in Brazil, inherited practices never disappeared, which is one of the main problems of the Brazilian public administration.

This patrimonialism, in turn, is related to the lack of what perhaps could be called republicanism. In Ancient Rome, according to Marco Tulio Cicero, "*res publica res populi; populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione*

⁶² Raymundo Faoro, *Os donos do poder*. op. cit.

⁶³ According to Andrei Trevisan, the patrimonialist stage ranges from colonization to 1930, when the public administration begins to bureaucratize itself, and the bureaucracy that goes from the 1930s to 1995, when, from the arrival of the neoliberalism, reforms tend to install the managerial model: "In this way, neoliberal ideology begins to penetrate Brazil with greater force, precisely from the beginning of the 90's. This movement brought with it a new way of seeing the role of the State and of conceiving its apparatus — this would culminate in the beginning of the dismantling of the Welfare State, notwithstanding CF/88, given the reforms and amendments. In public administration, the reflex was the adoption of techniques from the market, substantiating the managerial phase, currently called the New Public Administration (NAP)" (TREVISAN, Andrei Pittol. *Análise de políticas públicas: o caso do Projeto Microbacias 1*. Dissertação (mestrado em administração) — Universidade Federal de Santa Catarina, Florianópolis, 2008. p. 39.).

⁶⁴ Francisco Ercilio Moura e Francysco Pablo Gonçalves. *A marca da violência nas relações de emprego*, op. cit.

⁶⁵ According to Hely Lopes Meirelles: "The public contest, therefore, removes the inept and those that cram up offices, in a degrading spectacle of protectionism and lack of scruples, of politicians who rise and remain in power by auctioning positions." (Hely Lopes Meirelles, *Direito administrativo brasileiro*, op. cit., p. 68).

⁶⁶ For the reasons just explained.

sociatus.⁶⁷ Therefore, a republican spirit as for the common good is absent — a republic in the sense of originating in a popular legitimation of power,⁶⁸ but also in the sense of managing the *res publica* for the benefit of the people. It is not a question of correlation — partly mistaken — between republicanism and the will of the majority⁶⁹ or the elective character and temporality of the mandates, but the supra-principles of administration, namely, both the supremacy and unavailability of public interest, which unfold in the well-known administrative constitutional principles of legality, impersonality, morality, transparency and efficiency.

In plainer terms, we can say that Brazil has not yet managed to fully build a culture of respect for what is public. This is due to a series of factors, among which, certainly, colonisation bears some weight, as well as the heritage of slavery, a late development compared to much of the West. As has been said, while France saw the fall of the *Ancien Régime*, Brazil witnessed the Portuguese Crown execute Tiradentes. Our history has been marked by coups and institutional ruptures,⁷⁰

⁶⁷ CICERO, Marco Tulio. *De república*. Wilhelm Ferdinand Steinacker, 1823. p. 36. Available at: https://books.google.com.br/books?id=u2MUAAAAQAAJ&pg=PR1&dq=Ciceronis+de+re+publica&hl=pt-BR&source=gbs_selected_pages&cad=3#v=onepage&q&f=false. Accessed on: 7 Feb. 2021. Free translation: “A republic [is] a people thing; the people are not a group of men, nor the whole people in any way assembled, but the assembly gathered on the basis of a juridical consensus and for the common good”.

⁶⁸ BOBBIO, Norberto; MATTEUCCI, Nicola; PASQUINO, Gianfranco. *Dicionário de política*. Brasília: Editora Universidade de Brasília, 1998.

⁶⁹ Although Cicero already spoke of a natural tendency of men to join society (“*naturalis quaedam hominum quasi congregatio*”), an intuitive sociability by which the group settled in a certain place, with common spaces such as squares and temples (Marco Tulio Cicero, *De república*, op. cit., p. 36-39) and the republic dating back to antiquity, the realm of the public (public interest, public goods, public services etc.), as we understand it today, is a notion consolidated above all from the French Revolution.

The concept of republic is opposed to that of monarchy and is often associated with how power is instituted and the relationship between ruler and ruled, for some referring to the eligibility, temporality and responsibility of rulers; and for others the duty to govern for the people, with some defining the republic as the government for the majority. This is the understanding of Cruz and Schmitz, which seems wrong, as it dilutes the republic within another concept, that of democracy. CRUZ, Paulo Márcio; SCHMITZ, Sergio Antonio. *Sobre o princípio republicano*. *Novos Estudos Jurídicos*. v. 13, no. 1, 2008. Available at: <https://doi.org/10.14210/nej.v13n1.p43-54>. Accessed on: 6 Feb. 2021.

What ends up being overlooked, however, is that all this only makes sense if there is something public, that is, public goods to be administered, public services to be provided, public interest to be preserved etc. It is worth recording this, although we do not have the space to develop the issue properly.

⁷⁰ Between coups and ruptures, we had, among other events: the dissolution of the Constituent Assembly in 1823, the declaration of the majority of Pedro II in 1840, the Proclamation of the Republic in 1889, the closing of the Congress and the Revolt of the Armada in 1891, the Revolution of 1930, the Estado Novo in 1937, the deposition of Vargas in 1945, the coup of 1964. A history deeply marked by political instability.

and, of course, the ignorance of a large part of the population — regardless of their level of education — on the functioning of public administration and its instruments of control.

Are we, then, a hopeless case? Certainly not. A culture of respect for what is public is built with time. No republic — and no people — in the world has emerged in a perfect and finished form. The constitutional process is slow and the shortcuts more often than not lead to blind alleys. Of course, given this, we may ask what should be done with the *Marias Candelárias*, i.e., with erring or corrupt public officials. The answer may come simply from application of the already existing instruments, designed to punish those who act in a negligent or errant manner, committing an administrative⁷¹ or civil⁷² offence, or even a crime.⁷³ In any case, the penalty is dismissal.

Note that there are a number of ways to control administrative activity, by the administration itself, by the Judiciary and by the Legislature, Audit Courts, Public Prosecution Office, etc., not excluding the participation of citizens, “individually or through organized society. There are several guarantees aimed at achieving this, for example civic action, and the right of petition, which guarantees public access to the operations of supervisory bodies”.⁷⁴ Indignant citizens do not, therefore, have their hands tied: they can and must participate in the administrative monitoring, acting against irregularities, together with the administration itself, the public prosecutor, and, if applicable, the judiciary.⁷⁵

⁷¹ Law nº 8.112/1990, statute of civil servants of the Union, provides for the sanction of dismissal of the civil servant who *does not work*, whether in case of abandonment of the position itself (art. 132, II), habitual idleness (art. 132, III), or incompetence (art. 117, XV c/c art. 132, XIII). These possibilities are also present in the state and municipal statutes.

⁷² In a recent judgment, the First Panel of the STJ recorded that the server who earns without working commits an act of administrative impropriety (AgInt in AREsp 310.101/SE, rel. minister Napoleão Nunes Maia Filho, 11/23/2020, DJe 11/26/2020).

⁷³ The situation here is somewhat controversial. It seems evident that the official that does not work will invariably incur malfeasance. However, “The Superior Court of Justice established an understanding in the sense that the public official who appropriates remuneration without fulfilling the duty to provide services for which he was appointed, even though he commits a functional error of the greatest seriousness, in theory, an act of administrative improbity, has not committed the crime described in art. 312 of the Penal Code.” (RHC 132.594/TO, rel. ministro Reynaldo Soares da Fonseca, Quinta Turma, 22/9/2020, DJe 28/9/2020).

⁷⁴ Jorge Emicles Pinheiro Paes Barreto, *A improbidade administrativa como instituto jurídico político de combate à corrupção e a matiz decisional dos juízos de direito da comarca de Crato-CE nos casos de combate às patologias corruptivas*, op. cit., p. 52.

⁷⁵ Administratively, the statutes of civil servants provide for the possibility of denouncing the illegal actor to the authority of the public body. In Law No. 8.112/1990, for example, arts. 143 and 144 provide that “The authority that is aware of irregularities in the public service is obliged to promote their immediate investigation” and that “Reports about irregularities will be subject to verification, provided that they contain the identification and address of the complainant and are made in writing, authenticity confirmed”. ►

Civil participation is also of fundamental importance in solving administrative problems. As Agustín Gordillo observes, “*One of the main causes that we have identified [...] for the progressive deformation of the administrative system and the growing importance of the para-system, is lack of adequate social control of the public administration, the insufficiency or non-existence of citizen participation*”.⁷⁶

We may conclude that stability as currently envisaged, as well as the public competition norm, not new in Brazilian law, have regularly been circumvented, in a detrimental, immoral way. Even today there are attempts to circumvent stability, including efforts to officialise those who joined the Administration without passing through the competitive process. This shows that the focus should not be on ending permanency or stability, provoking a regression to a system of patronage and privilege. What we really need is *more stability*, in the sense of constitutional integrity: whoever enters through the correct channels and is duly approved after a probationary period, has job security, subject to the legal hypotheses, involving disciplinary administrative process and periodic performance evaluation.

► Administratively, the Constitution provides, in art. 74, § 2, that “Any citizen, political party, association or union is a legitimate agent to, under the law, denounce irregularities or illegalities before the Federal Audit Court”.

Civilly, we have a good example in Lei de Improbidade Administrativa (Law nº 8.429/1992): “Art. 14. Any person may advise the administrative authority to initiate an investigation to determine the practice of an act of improbity”.

The Public Prosecutor’s also receives representations or news of various illicit acts. Depending on the act, the citizen himself can, under the terms of the Constitution, promote *popular action*: “Art. 5th [...] LXXIII — any citizen is a legitimate party to propose action aimed at annulling an act harmful to public property or to an entity in which the State participates, administrative morality, the environment and the historical and cultural heritage, leaving the author, unless bad faith is proven, exempt from court costs and the burden of loss of suit”.

⁷⁶ GORDILLO, Agustín. *Tratado de derecho administrativo y obras selectas*: Tomo 6: Libro II: La administración paralela. Buenos Aires: Fundación de Derecho Administrativo, 2012. cap. IV, p. 1. Free translation: “One of the main causes that we have been pointing out [...] for the progressive deformation of the administrative system and the growing importance of the parasystem, is the non-existence of adequate social control of the public administration, that is, the insufficiency or lack of citizen participation”.

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