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The Mixed Ownership Company in Brazil between Public Administration and the Market

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Abstract

The article deals with the legal regime of mixed ownership companies in Brazil. After the historical analysis of the adoption of this model of state-owned enterprise, the current legal regime under the Brazilian Constitution of 1988 is analysed with all its specificities. The main discussion revolves around the role of the mixed ownership company as one of the main instruments of State action in the economy.

Keywords

State-Owned Enterprise, Mixed Ownership Company, Economic Law, Development, Role of the State in the Economy

1. Introduction

The mixed ownership company is, in its current structure, a phenomenon of the late nineteenth century and early twentieth century, which intensified, especially in Germany, during World War I (1914-1918), due to the needs of the war economy. The German Constitution of 1919, the Weimar Constitution, in turn, expressly provided, in its Article 156, for the possibility of socialization, nationalization or state participation in the business sector (Brunet, 1921: pp. 298-318; Friedlaender, 1975: pp. 322-348; Ambrosius, 1984: pp. 64-102)[1].

The traditional view, inspired by the writings of the German industrialist Walter Rathenau, understood the mixed ownership company ("gemischtwirtschaftliche Unternehmung") as a free association of private capital and public funds for the exploitation of economic activity, an "economic" phenomenon, which would not belong to administrative institutions (Fleiner, 1933: pp. 82-84; Huber, 1953: vol. 1, pp. 529-530; Forsthoff, 1966: p. 485). This mistaken concep-

[1]For the debate surrounding the economic constitution during the period of the Weimar Republic (1918-1933), see Bercovici (2004: pp. 39-50).

tion led to a series of debates, such as the Brazilian one led by Bilac Pinto, on the impossibility of reconciling public interests (the State's) and private interests (those of the other private shareholders, who crave profit), which would lead to the replacement of the mixed ownership company model by that of the state company, whose capital is exclusively state-owned (Pinto, 1954: pp. 43-57; Ferreira, 1956: pp. 151-153)[2].

In this debate around mixed ownership companies, several authors, such as Hedemann (Hedemann, 1939: pp. 146-157), one of the founders of Economic Law, understood the mixed ownership company from a predominantly privatistic perspective, calling it a "public commercial activity" ("öffentliche Hand"). Others, such as Forsthoff, while still reserving mixed ownership companies as administrative entities, understood them from the standpoint of the influence that the State could exert in the running of the company as a result of its shareholding position, viewing such corporate participation as a constitutive element of the mixed ownership company (Huber, 1953: vol. 1, pp. 519-526; Forsthoff, 1966: pp. 485-486).

2. Mixed Ownership Companies in Brazil

Contemporary Brazilian public doctrine, based on Article 5, III of Decree-Law 200 of February 25th, 1967, defines a mixed ownership company as an entity that is part of the Indirect Public Administration, with a legal personality governed by private law, whose creation is authorized by law as an instrument of state action. Despite its private law personality, the mixed ownership company, like any state-owned enterprise[3], is subject to special rules that derive from its nature as a member of the Public Administration. These special rules derive from its creation authorized by law, the text of which derogates from the corporate, commercial and civil law applicable to private companies. In the creation of a mixed ownership company, authorized by law, the State acts as a Public Authority, not as a shareholder. It can only be incorporated in the form of a joint-stock company, and the majority shareholding control must belong to the State[4], in any of its spheres of government, since it was deliberately created as an instrument of state action (Ferreira, 1956: pp. 133-136; Paiva, 1995: pp. 313-316; Venâncio Filho, 1968: pp. 415-437; Franco Sobrinho, 1983: pp. 68-74; Souza, 1994: pp. 273-276; Bandeira de Mello, 2006: pp. 175-178, 189; Grau, 2007: pp. 111-119; Di Pietro, 2007: pp. 414-415, 420-421).

For the formulators of Decree-Law 200/1967, state-owned companies should have operating conditions identical to those of the private sector. Moreover,

[2]For a contemporary critique of Bilac Pinto's position, see Paiva (1995: pp. 316-317).

[3]On the difficulties encountered by Brazilian public doctrine with the concept of state-owned enterprise, see Venâncio Filho (1968: pp. 385-406).

[4]A mixed ownership company may not enter into shareholders' agreements that transfer the State's controlling power to private minority shareholders. The State must be the de jure and de facto controller, i.e., it cannot share the power to control a mixed ownership company. After all, the State is not free to freely negotiate the public interest, since it is bound by the Constitution and legality (Bandeira de Mello, 2006: p. 179; Comparato, 1999: pp. 65-68; Figueiredo, 2000: pp. 227-235; Grau 2000a: pp. 350-357).

their autonomy should be guaranteed since they would be linked, not subordinated, to the ministries, which could only control results (Dias, 1969: pp. 78-80). This concept was even advocated by President Humberto Castello Branco himself, who stated in his Message to the National Congress in 1965 that he wished, through administrative reform, to "ensure that the public sector could operate with the efficiency of private enterprise" (Dias, 1969: p. 50).

How does one explain the expansion of state-owned companies in the post-military coup of 1964 period? Despite official discourse restricting state action in the economic sphere by unsuspecting liberals such as ministers Octavio Gouveia de Bulhões, Roberto Campos, Antônio Delfim Netto and Mário Henrique Simonsen, some 60% of Brazil's state companies were created between 1966 and 1976 (Martins, 1991: pp. 60-62).

The Brazilian military government installed after 1964 was greatly concerned with containing the public deficit and combating inflation. To this end, it promoted measures that reformed fund raising and intergovernmental transfers to state-owned companies, in addition to demanding a "realistic" price policy. The reforms undertaken by the military aimed at recovering the market economy. One of the explicit objectives of Decree-Law 200/1967 was precisely to increase the "efficiency" of the public productive sector through decentralisation in the execution of governmental activities. State-owned companies thus had to adopt performance standards similar to those of private companies, were obliged to be "efficient" and seek alternative sources of financing.

Endowed with greater autonomy, state-owned companies came to be legally understood as private capitalist enterprises (Article 27, sole paragraph of Decree-Law 200/1967[5]). In this way, applying "business rationality", many state-owned companies expanded into differentiated and highly profitable lines of business, in addition to resorting to external indebtedness. The State expanded its participation in the goods and services sector, increasing the number of state-owned companies in the sectors of energy, transport, communications, manufacturing (petrochemicals, fertilizers, etc.), financial and other services (data processing, foreign trade, equipment, etc.). The expansion of state-owned companies can also be explained by the legal framework of Decree-Law 200/1967. The operational decentralization provided for in Decree-Law 200/1967 afforded the opportunity for the creation of several subsidiaries of already existing state-owned companies, forming sectoral holdings and thus expanding the activities of state-owned companies. The State was already active in most of the sectors mentioned, but expanded its activities to maintain the policy of accelerated economic growth.

The autonomy of the state-owned companies (as Luciano Martins correctly points out, autonomy in relation to the government, not in relation to the economic system) was reinforced by their capacity for self-financing and foreign borrowing. The greater this capacity, the more autonomous (in relation to the

[5]Article 27, Sole Paragraph of Decree-Law 200: "State corporations and mixed ownership companies shall be assured operating conditions identical to those of the private sector, and it shall be incumbent on such entities, under ministerial supervision, to adjust to the general plan of the Government".

government) is the state-owned enterprise. According to Fernando Rezende, it was precisely this "efficiency" that led to greater direct state intervention in the production of goods and services, contradicting official government discourse on limiting and reducing the state's role in the economy (Suzigan, 1976: pp. 89-90, 126; Rezende, 1987: pp. 216-218; Martins, 1991: pp. 70-71, 75-79).

State-owned companies even began to operate on stock exchanges, encouraged by the military government, especially after 1976, with the enactment of Law 6.385 of December 7th, 1976, reforming legislation on capital markets and creating the Brazilian Securities Commission (Comissão de Valores Mobiliários—CVM), and Law 6.404 of December 15th, 1976, the new Corporations Law. Not coincidentally, its shares still account for the bulk of operations carried out on the stock exchange, reflecting the idea of a "businesslike" management that seeks to maximize profit in the state-owned enterprise (Martins, 1991: p. 71).

3. The Mixed Ownership Company in the Brazilian 1988 Constitution

Under the democratic 1988 Constitution, every state-owned enterprise is subject to the general rules of the Public Administration (Article 37 of the Constitution), to the control of Congress (Article 49, X, in the case of state-owned enterprises belonging to the Federal Union). Moreover, the investment budget of federal state-owned enterprises must be provided for in the general budget of the Union (Article 165, Section 5 of the 1988 Constitution).

Mixed ownership corporations are also subject to external control by the Federal Court of Auditors (Article 71, II, III and IV). The constitutional provision on the control of mixed ownership companies by the Federal Court of Auditors is regulated by Article 7 of Law 6.523 of July 14th, 1975 and by Article 1, I of Law 8.443 of July 16th, 1992 (Bandeira de Mello, 2006: pp. 187, 191-192; Figueiredo, 1978: pp. 51-56)[6]. The aforementioned Law 8443/1992 also states in Article 4, IX that its jurisdiction also encompasses "the representatives of the Union or the Public Power in the general assembly of state-owned companies and joint stock companies in whose capital the Union or the Public Power participates, jointly and severally, together with the members of the fiscal and administrative boards, for the practice of acts of ruinous management or liberality at the expense of the respective companies"[7].

In addition, the jurisdiction of the Court of Auditors is limited to "judge the accounts of administrators and other persons responsible for public money, assets and values of the direct and indirect administration" (Article 71, II of the Constitution). Therefore, it does not reach the actual business or commercial ac-

[6]By way of comparison, on the various forms of public control of state-owned enterprises in France, see Colson (2001: pp. 337-350) and Delvolvé (1998: pp. 731-746).

[7]However, the proviso set out in article 7, Section 3 of Law 6.223/1975 "Section 3—The Federal Government, the State, the Federal District, the Municipality or an entity of the respective indirect administration which holds a stake in the capital of a private company with only half or a minority of the ordinary shares shall exercise the right of supervision assured to the minority shareholder by the Corporations Law, such stake not constituting grounds for the supervision provided for in the caput of this article".

tivity of mixed ownership companies, on pain of undue and excessive interference by the Court of Auditors in the economic activity of mixed ownership companies[8].

Centralised control over state-controlled companies, although formally provided for in Decree-law 200/1967, was never actually implemented. Ministerial supervision, as provided for in article 26 of Decree-Law 200/1967, was a failure, also due to the greater importance of many of the state-owned companies in relation to the agencies charged with their supervision. Thus, internal control ended up being limited in the purely bureaucratic sphere and to juridical-formal questions (Rezende, 1987: pp. 224-226; Dias, 1969: pp. 89-98; Penteado, 1982: p. 23). The last attempt to institute internal control over state-owned companies came with the creation, in 1979, of the Secretariat for Control of State-Owned Companies (SEST), which attempted to substitute the 1967 model by centralized control of a highly budgetary nature, which, according to Fernando Rezende, "subverted the principle of managerial autonomy". The emphasis of any administrative control shifted to blaming public spending as the cause of the economic crisis (Rezende, 1987: pp. 228-232)[9].

The mixed ownership company, created by law, cannot be confused with companies in which the Public Authorities have a shareholding, even if under their shareholding control. The entry of the State as a shareholder in a company that was originally private does not produce any change in the legal nature of the status of the company incorporated by private economic agents with the purpose of obtaining profit. The mere participation of public entities, or entities controlled by them, as shareholders is not sufficient to change the structure of a company. The State or State entity that becomes a partner in a legal entity governed by private law that is already operating is subject to its bylaws. In this case, generally in which the State holds a minority interest, the public interest is served by the very fact of the State's shareholding (for a variety of reasons, such as having to finance companies or sectors in need of investment, for example), without any change in the corporate structure being necessary. The joint stock company does not become a mixed ownership company by the appearance, transient or permanent, of the State, or state entity, as its shareholder. Even if the latter acquires a majority of its shares or the controlling power, the company is not transformed into a mixed ownership company. It is a simple inversion of

[8]This possibility has already been rejected in 2003 by the Brazilian Federal Supreme Court in the judgment of Writ of Mandamus 23.875-5/DF (Reporting Justice Nelson Jobim).

[9]For a critique of the argument that state-owned enterprises were primarily responsible for Brazil's public deficit, see Braga (1984: pp. 194-206). On the creation of SEST in the context of increased control over the public budget in Brazil, a process that would end with the Law of Fiscal Responsibility in 2000, see Bercovici & Massonetto (2006: pp. 60-64). Just for the record, the Law of Fiscal Responsibility (Complementary Law 101 of May 4th, 2000) does not apply to any state-owned company, but only to the so-called "dependent state-owned companies", that is, companies controlled by the State that receive state resources for personnel expenses and costs in general, and those that receive resources for capital expenditures, if not from an increase in equity interest (article 2, III of Complementary Law 101/2000). See Grau (2000b: pp. 17-21) and Carrasqueira (2006: pp. 26-37).

public capital into a private company (Ferreira, 1956: pp. 131-133, 176-177; Cirenei, 1983: pp. 538-539, 590-592). Its private law legal nature remains the same, despite the state shareholder, and it is not bound to the limitations that the entities of the Indirect Public Administration, even when endowed with a private law legal personality (such as the mixed ownership companies and state companies), are subject to, such as the need to hire employees through a public exam or submission to the procedures set forth in the Public Procurement Law (Law 14.133 of April 1st, 2021).

The legal regime of mixed ownership companies does not apply to all companies in which the State has a shareholding interest. A subsidiary company established pursuant to legal authorization has the same legal nature as the state entity that controls it. On the other hand, subsidiaries and companies created by a mixed-ownership company, or which have a shareholding therein, without the required legal authorization cannot be deemed mixed-ownership companies. The administrative-law regime is not applicable, even partially, to companies that, although controlled by mixed ownership companies, were not created as mixed ownership companies by law, and thus cannot be classified as "second-tier mixed ownership companies". In any of these cases, what exist are ordinary commercial companies, without any connection with the State's public administration.

Article 235, Section 2 of the Corporations Law (Law 6.404/1976[10]) expressly excludes companies that were not created by law, although they have direct or indirect state shareholding participation, from being classified as mixed ownership companies. Even if controlled by the State or by a state entity, as a mixed ownership company, if it was not created by law, the company in question is governed exclusively by private law, it is not an instrument of state action. The fact that it is controlled by a state entity does not make it a mixed ownership company (Di Pietro, 2007: pp. 415-416, 420; Penteado, 1989: pp. 55-68).

Article 37, XIX of the 1988 Constitution[11] expressly provides that a specific law is required to authorize the creation of a mixed ownership company. If the jointstock company, although it may have state shareholding, has not been instituted by law, it will not be a mixed ownership company. To back this up, Article 37, XX of the 1988 Constitution[12] provides that the creation of subsidiaries of the administrative entities mentioned in point XIX of the same article (agencies, state companies, mixed ownership companies and public foundations), as well as the holding of a stake in a private company, depends on legislative autho-

[10]Article 235, Section 2 of the Corporations Law: "The companies in which mixed ownership companies hold a majority or minority interest are subject to the provisions of this Law, without the exceptions provided for in this Chapter". The chapter to which the provision refers is Chapter XIX of the Corporations Law, which deals precisely with mixed ownership companies (articles 235 to 242, with articles 241 and 242 now revoked).

[11]Art. 37, XIX: "XIX—only by specific law may an agency be created and the establishment of a state company, a mixed ownership company and a public foundation be authorized".

[12]Art. 37, XX: "XX—depends on legislative authorization, in each case, the creation of subsidiaries of the entities mentioned in the previous clause, as well as the participation of any of them in a private company".

risation.

The doubt that may exist concerns the expression "in each case" for the legislative authorization for the creation of subsidiaries or participation in a private company of the state entities mentioned in Article 37, XIX of the Constitution. In this subsection XX of Article 37, contrary to subsection XIX, there is no reference to "specific law", as in the case of the creation of state companies, but to the case of each company or public entity. There is no need to expressly indicate which specific company will receive public investment. The expression "each case" indicates the area or activity to be contemplated. I believe that the expression "in each case" should be understood as "in the case of each entity" that proposes to create subsidiaries or participate in other companies. State companies which have legislative authorisation, whether by their law of creation or by a subsequent law, can act in this sense. If this clause were understood in any other way, the existence of numerous state entities that operate in participation operations, such as the BNDES (National Bank for Economic and Social Development) itself, would be unfeasible (Tácito, 1997a: pp. 683-686; Tácito, 1997c: pp. 1154-1155)[13].

This view of the provisions of Article 37, XX of the Constitution has also been adopted by the Congress, which has passed several laws granting broad authorisations for the creation of subsidiaries by mixed ownership companies. In the case of Petrobrás alone, for example, Law 8.395, dated January 2nd, 1992, authorizing Petrobrás Química S.A. (Petroquisa) to hold minority stakes in companies of private capital in the Chemical Axis of the Northeast, formed by the States of Bahia, Sergipe, Alagoas, Pernambuco and Rio Grande do Norte, Law 8.403 of January 8th, 1992, which authorizes Petrobrás and Petrobrás Distribuidora S.A. (BR) to participate in the capital of other companies, and article 65 of Law 9.478 of August 6th, 1997, which authorizes Petrobrás to form a subsidiary with specific powers to operate and build its pipelines, marine terminals and vessels for transporting oil and oil products and natural gas, and to associate with other companies. Article 64 of the same Law 9.478/1997[14] also provided generic authorization for Petrobrás to form subsidiaries[15]. Similarly, Law 11.908 of March 3rd, 2009 authorizes Banco do Brasil (a mixed ownership company) and Caixa Econômica Federal (a state-owned company) to form wholly-owned or con-

[13]To the contrary, defending the obligation of legislative authorization on a case-by-case basis, see Bandeira de Mello (2006: pp. 189-190).

[14]Art. 64: "For the strict compliance with the activities of its corporate purpose that are part of the oil industry, Petrobrás is authorized to establish subsidiaries, which may form a majority or minority association with other companies".

[15]The Brazilian Federal Supreme Court has also adopted this interpretation on the reach of the legislative authorization provided in article 37, XX of the Constitution in the judgment of Direct Action of Unconstitutionality 1.649/DF (Reporting Justice Maurício Corrêa), judged on March 24th, 2004: "Syllabus: Direct Action of Unconstitutionality. Law 9.478/97. Authorization for Petrobrás to create subsidiaries. Offense to Articles 2nd and 37, XIX and XX, of the Federal Constitution. Inexistence. Allegation groundless. Law 9.478/97 did not authorize the creation of a mixed ownership company, but rather the creation of subsidiaries distinct from the parent company, in accordance with item XX, and not XIX of article 37 of the Federal Constitution. Legislative authorization for the creation of subsidiary companies is dispensable provided that there is a provision to that effect in the very law that established the parent mixed ownership company, taking into account that the creating law is the authorizing measure itself. Direct action of unconstitutionality dismissed as unfounded".

trolled subsidiaries, as well as to acquire holdings in public or private financial institutions, including companies in fields complementary to the financial sector (articles 1st and 2nd of Law 11.908/2009).

The expression "private enterprise", which refers to the participation of state entities in Article 37, XX, also cannot be interpreted in any way. The Constitution always refers expressly to state-owned companies and their species (state company and mixed ownership company). Despite the constitutional determination of equivalence of legal regimes between state-owned companies (state companies and mixed ownership companies) that explore economic activities and private companies (article 173, Section 1, II), the constitutional text always distinguishes state-owned companies from the private companies themselves. Every time the Constitution refers to "private company" it refers to private companies properly so called, composed of wholly private capital, and never to mixed ownership companies, composed of partially private capital. Article 37, XX mentions private enterprise in this same sense.

Just as a mixed ownership company must have its creation authorized by law (Article 37, XIX of the Constitution), it can only be terminated by law or in the form of the law. This need for legislative authorisation to extinguish state-owned companies in general (including mixed ownership companies) has always been defended by Brazilian administrative doctrine (Bandeira de Mello, 2006: p. 190; Di Pietro, 2007: pp. 414-416) and is now enshrined in Article 61, Section 1, II, "e" of the 1988 Constitution, as amended by Constitutional Amendment 32 of 2001[16].

4. The Mixed Ownership Company as an Instrument of State Action

It is incorrect to uncritically accept pre-constitutional concepts and principles just because they are consolidated in the administrative doctrine. The Constitution requires all categories of Administrative Law to be reformulated, even partially. The realisation of constitutional programmes does not depend on legal operators, but on countless other factors, such as the Public Administration, in order to be realised. This "political protagonism" of the Administration, as emphasized by Paulo Otero, is a far cry from the liberal administrativist tradition. It is clear, therefore, the need to build a dynamic Administrative Law, at the service of the realization of fundamental rights and the Constitution (Badura, 1966: pp. 12-27; Reigada, 1999: pp. 87-98; Otero, 2003: pp. 147-151).

Under the 1988 Constitution, state-owned enterprises are subordinated to the purposes of the State, such as development (Article 3, II of the Constitution). In this sense, the statement of Paulo Otero is correct, for whom the public interest is the foundation, limit and criterion of the public economic initiative (Otero, 1998: pp. 122-131, 199-217; Püttner, 1969: pp. 87-98; Colson, 2001: pp. 99-111;

[16]Article 61, Section 1, II, "e": "Section 1—The President of the Republic has the exclusive right to initiate laws that: II - provide for: e) the creation and extinction of Ministries and organs of the Public Administration, with due regard for the provisions of art. 84, VI".

Bandeira de Mello, 2006: pp. 178-183). The constitutional legitimization, in the Brazilian case, of this public economic initiative occurs through compliance with the constitutional and legal requirements set for its performance.

As Washington Peluso Albino de Souza points out, the creation of a state-owned enterprise, such as a mixed ownership company or a state company, is already an act of economic policy (Souza, 1994: p. 278). The objectives of state-owned enterprises are established by law and they cannot evade these objectives. They must fulfill them, under penalty of misuse of purpose. To this end, they were created and maintained by the government.

The mixed ownership company is an instrument of state action, and must therefore be above private interests. The Corporations Law (Law 6.404/1976) applies to mixed ownership companies (Ferreira, 1956: pp. 131-133, 138-145)[17] provided that the public interest that justifies its creation and operation is preserved (Article 235). Article 238 also provides that the purpose of a mixed ownership company is to serve the public interest that motivated its creation. The mixed ownership company is bound by the purposes of the law authorising its creation, which determines its object and allocates a portion of the public assets to that end. Therefore, the mixed ownership company cannot, of its own volition, use the public assets to serve a purpose other than that provided for by law (Di Pietro, 2007: pp. 417-418), as stated in Article 237 of the Corporations Law.

The essential purpose of mixed ownership companies is not to obtain profit, but to implement public policies. According to Fábio Konder Comparato, the legitimacy of the state's action as an economic player (the public economic initiative of Article 173 of the 1988 Constitution) is the production of goods and services that cannot be obtained efficiently and fairly under the private economic exploitation regime. There is no sense in the State seeking revenue by directly exploiting economic activity (Comparato, 1977: pp. 289, 390-391; Grau, 1994: pp. 273-276; Püttner, 1969: pp. 86-87). The sphere of action of mixed ownership companies is that of economic policy objectives, of structuring larger ends, whose institution and operation exceed the rationality of a single individual actor (such as the company itself or its shareholders). The state-owned company in general and the mixed ownership company in particular not only pursue microeconomic, i.e. strictly "entrepreneurial" ends, but essentially have macroeconomic objectives to be achieved, as an instrument of state economic action (Cirenei, 1983: pp. 479-480, 483; Paiva, 1995: pp. 319-320; Emmerich, 1969: pp. 71-78).

These constitutional provisions are distinct forms of constitutionally defined legal binding and conformation that go beyond the provisions of Article 173,

[17]On the influence of public law on the corporate structure of state-owned enterprises in Germany, see Püttner (1969: pp. 318-324, 374-378) and Emmerich (1969: pp. 162-165, 189-210).

[18]On the influence of the activity performed (public service or economic activity) in the legal regime of state-owned enterprises (state companies and mixed ownership companies), see Bandeira de Mello (2006: pp. 183-184); Grau (2007: pp. 140-146) and Di Pietro (2007: pp. 412-414). In foreign doctrine, see, for instance, Fleiner (1933: pp. 198-209) and Colson (2001: pp. 330-332). In this article I will not analyse the recent Law 13.303 of June 30th, 2016, which intends to establish the legal status of state-owned enterprises because this law is full of unconstitutionalities, among them the failure to distinguish distinct regimes for state-owned enterprises providing public services and state-owned enterprises providing economic activity.

Section 1, II, which equates the legal regime of state-owned companies that provide economic activities to that of private companies in the civil, commercial, labor and tax aspects[18]. The legal nature of Private Law is a technical expedient that does not derogate Administrative Law, under penalty of rendering the state-owned company unfeasible as an instrument of governmental action (Tácito, 1997b: pp. 691-698; Grau, 1981: pp. 101-111; Bandeira de Mello, 2006: pp. 178-183, 185-188; Grau, 2007: pp. 111-123, 278-281; Di Pietro, 2007: pp. 416-418, 421-428)[19].

The 1988 Constitution similarly guarantees private economic initiative, cooperative economic initiative (Articles 5, XVIII and 174, Section 3 and Section 4 of the Constitution) and public economic initiative (Articles 173 and 177 of the Constitution, among others). Therefore, the creation of mixed ownership companies in no way harms the constitutional principle of free enterprise (Articles 1, IV and 170 of the 1988 Constitution). Free enterprise, in the constitutional text of 1988, does not represent the triumph of economic individualism, but is protected together with the valuation of human labor, in an economic order with the objective of guaranteeing to all a life of dignity, based on social justice. This means that free enterprise is the foundation of the constitutional economic order in what it expresses as socially valuable (Grau, 2007: pp. 200-208; Comparato, 1991: pp. 18-23; Souza Neto & Mendonça, 2007: pp. 709-741).

Free enterprise cannot be reduced, under penalty of a partial and mistaken interpretation of the constitutional text, to full economic freedom or freedom of enterprise, since it encompasses all forms of production, individual or collective, such as individual economic initiative, cooperative economic initiative and public economic initiative itself. The Brazilian Constitution, as well as several other contemporary constitutions, does not exclude any form of state intervention, nor does it prohibit the State from acting in any area of economic activity. The greater or lesser extent of such state economic action is a consequence of democratically legitimated political decisions, not of some express constitutional determination. But the State must have its public economic initiative protected in a manner similar to that of private and cooperative initiatives. The public economic initiative, obviously, has its specificities, since it is positively determined by the Constitution or by law (just as the freedom of private initiative is also limited by law) and must comply with the public interest, or, more specifically, with the imperatives of national security or relevant collective interest (article 173 of the Constitution). The Brazilian State is governed by a constitution whose precepts claim, in one way or another, state action in the economic field. The mixed ownership companies, as well as the other state-owned enterprises, are the fundamental instruments of this action.

[19]In foreign doctrine, on the legal regimes of state-owned enterprises, in general, and mixed ownership companies, in particular, see Huber (1953: vol. 1, pp. 530-532); Forsthoff (1966: pp. 478-483); Püttner (1969: pp. 125-140, 368-380); Emmerich (1969: pp. 58-62); Farjat (1971: pp. 189-198); Giannini (1999: pp. 163-166); Colson (2001: pp. 297-301, 328-330); Delvolvé (1998: pp. 672-675, 706-731) and Badura (2005: pp. 145-164).

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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