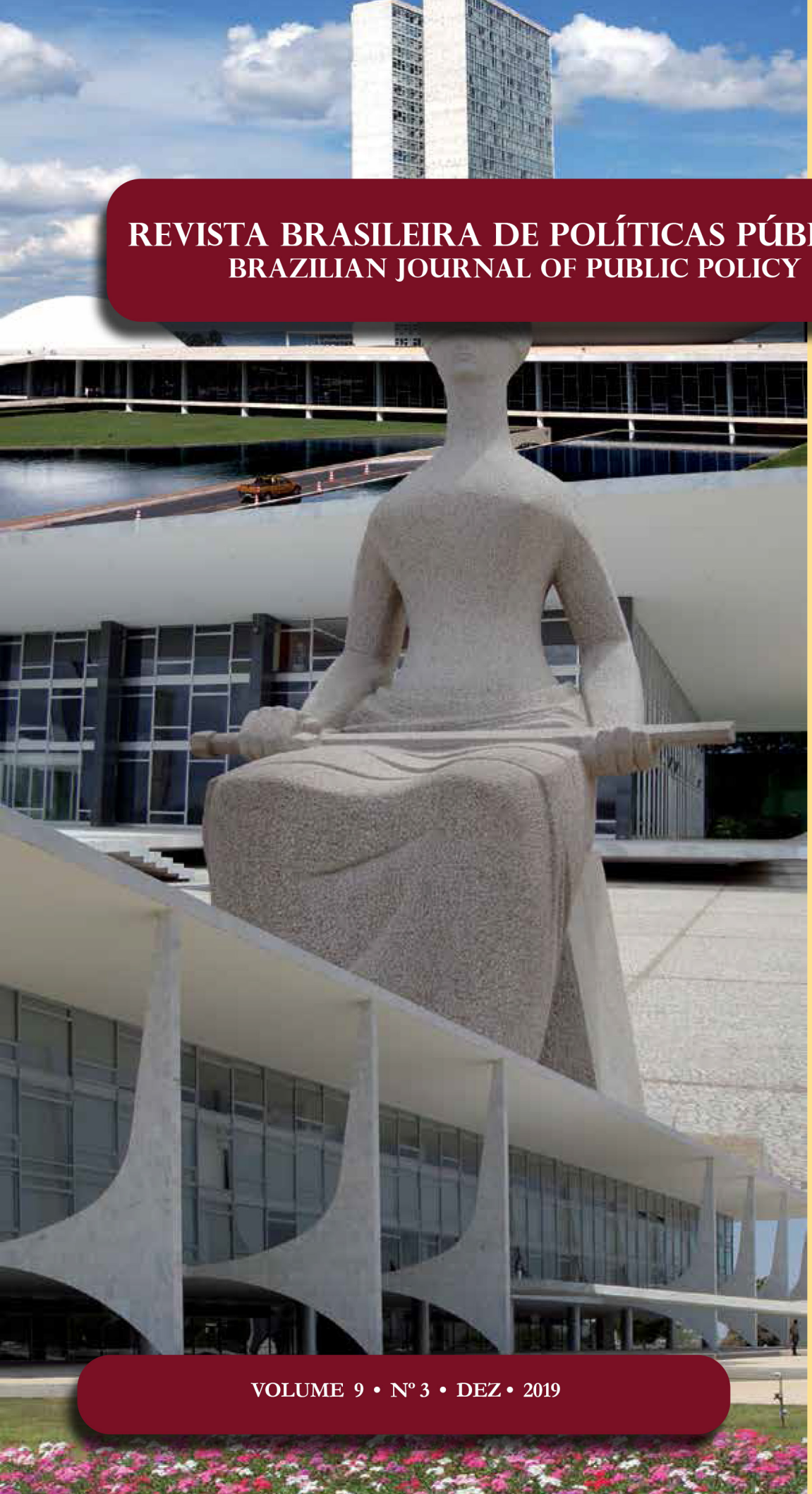

UniCEUB
ISSN 2236-1677

REVISTA BRASILEIRA DE POLÍTICAS PÚBLICAS
BRAZILIAN JOURNAL OF PUBLIC POLICY

The constitutionality of the early prorogation of the public service concessions

Da constitucionalidade da prorrogação antecipada das concessões de serviço público

Odone Sanguiné

Felipe Montenegro Viviani Guimarães

VOLUME 9 • Nº 3 • DEZ • 2019

Sumário

doi: 10.5102/rbpp.v9i3.6195

The constitutionality of the early prorogation of the public service concessions*

Da constitucionalidade da prorrogação antecipada das concessões de serviço público

Odone Sanguiné**

Felipe Montenegro Viviani Guimarães***

Abstract

This article deals with the early prorogation of the public service concessions. It is justified, among other reasons, because the early prorogation of numerous concessions was recently authorized in Brazil by several normative acts, so that the theoretical and practical interest for the theme really is very great at this moment in our country. Therefore, the purpose of this article is to verify whether the early prorogation is or is not compatible with the Brazilian Constitution. And the research hypothesis is that this species of prorogation is constitutional. The method of approach of the theme is the deductive, and the research method, the bibliographic. Finally, the main conclusion of this article is that the early prorogation of the public service concessions is compatible with the Brazilian Constitution, which confirms the research hypothesis.

Keywords: Administrative Law. public service. concession. early prorogation. constitutionality.

Resumo

Este artigo trata da prorrogação antecipada das concessões de serviço público. Ele justifica-se, dentre outras razões, porque a prorrogação antecipada de inúmeras concessões foi autorizada recentemente no Brasil por diversos atos normativos, de modo que o interesse teórico e prático pelo tema realmente é muito grande neste momento em nosso País. Assim sendo, o objetivo deste artigo é verificar se a prorrogação antecipada é, ou não, compatível com a Constituição da República. E a hipótese de pesquisa é que essa espécie de prorrogação é constitucional. O método de abordagem do tema é o dedutivo, e o método de pesquisa, o bibliográfico. Por fim, a principal conclusão deste artigo é que a prorrogação antecipada das concessões de serviço público é compatível com a Constituição da República, o que confirma a hipótese de pesquisa.

Palavras-chaves: Direito Administrativo. Serviço público. Concessão. Prorrogação antecipada. Constitucionalidade.

* Recebido em 24/08/2019
Aprovado em 05/12/2019

** Professor Associado da Faculdade de Direito da Universidade Federal do Rio Grande do Sul. Pós-doutor em Direito pela Washington University School of Law in Saint Louis e pela Universiteit Utrecht. Doutor em Direito pela Universitat Autònoma de Barcelona. Desembargador aposentado do Tribunal de Justiça do Estado do Rio Grande do Sul. Consultor e Advogado. E-mail: odonesang@hotmail.com

*** Doutorando e Mestre em Direito Administrativo pela Pontifícia Universidade Católica – SP. Especialista em Direito Administrativo pela Pontifícia Pontifícia Universidade Católica – SP. Advogado e consultor na área do Direito Administrativo. E-mails: felipemvg@hotmail.com

1 Introduction

In the present article, we will analyze the prorogation of public service concessions, more specifically the so-called "early prorogation" of these concessions.

The referred analysis is justified for many reasons. Firstly, because the early prorogation of numerous concessions was recently authorized in Brazil by several normative acts, so that the theoretical and practical interest for the theme really is very great at this moment in our country. Secondly, because the early prorogation of public service concessions is a major issue, which affects the lives of thousands of users, in general for many years, deserving, thus, an accurate study. And thirdly, because there are only a few articles dealing specifically with the early prorogation of public service concessions, reason why the present work will contribute to the deepening of scientific knowledge about this institute of Administrative law.

Therefore, the purpose of this article is to verify whether the early prorogation is or is not compatible with the Brazilian Constitution. And the research hypothesis is that this species of prorogation is constitutional.

The method of approach of the theme is the deductive, and the research method, the bibliographic, based on the interpretation of the various legal norms (constitutional and infraconstitutional) that regulate early prorogation in Brazil, in the light of jurisprudence and doctrine.

Finally, the present article is basically divided into four sections, considering this introduction. In the second, we will present the species of prorogation of public service concessions, in order to determine the specific characteristics of the early prorogation. In the third, we will verify the compatibility of this specie of prorogation with the Brazilian Constitution. And, in the fourth, we will briefly expose our main conclusions.

2 Species of prorogation

At constitutional level, the normative foundation of the legal institute of prorogation of public service concessions lies in the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88), Art. 175, sole para., I, which states that the law shall provide, among other matters, for the "prorogation" of these concessions; *verbis*:

> Article 175. It is incumbent upon the Government, as set forth by law, to provide public utility services, either directly or by concession or permission, which will always be through public bidding.
>
> Sole paragraph. The law shall provide for:
>
> I – the operating rules for the public service concession or permission holding companies, the special nature of their contract and of the **prorogation** thereof, as well as the conditions of forfeiture, control and termination of the concession or permission; (our emphasis)

In the exercise of the aforementioned legislative competence, several ordinary laws (general and sectoral) were edited regulating the prorogation of public service concessions. Example: (i) Law No. 8.987/95 (Concession Law), Art. 18, XIV; 23, XII; and 42, §§ 2nd and 3rd; (ii) Law No. 11.079/04 (Public-Private Partnerships Law), Art. 3rd, caput and § 1st; 5th, caput and I; and 11; (iii) Law No. 12.783/13 (Prorogation Law of the Electric Sector), Art. 1st to 16th; 21, III; and 26; (iv) Law No. 12.815/13 (Port Sector Law), Art. 57, 62, 66 and 67; and (v) Law No. 13.448/17 (Prorogation Law of the Road and Railroad Sectors), Art. 1st to 11th; 22; 24 to 27; 30; and 32.

The systematic interpretation of the various general and sectoral laws on the subject allows us to conclude that the prorogation of public service concessions – that is, the extension of their term of validity – can be basically classified into three species; namely: (i) emergency prorogation; (ii) rebalancing prorogation;

and (iii) public interest prorogation, which is further subdivided into: (a) common prorogation; and (b) early prorogation[1].

Let us see, then, which are the specific characteristics of these species of prorogation, especially of the last one.

2.1 Emergency prorogation

The emergency prorogation aims to ensure the continuity of the provision of the public service granted. It is performed when, near the end of the concession, the Granting Authority verifies that it does not have condition to directly provide the public service nor enough time to carry out the public bidding for the new granting of the activity. In this case, the concession is prorogated for the term necessary for the Granting Authority to prepare itself to directly provide the public service or to perform the public bidding for the new granting of the activity – in general, from six to twenty-four months.

This specie of prorogation is provided, among others, in Law No. 13.448/17, which states, in its Art. 32, that, if there is "study or bidding in progress", and if there is not "enough time for the bidding winner to assume the object of the contract", the Granting Authority can "extend, justifiably, the term of the contract by up to twenty four months, so that there is no discontinuity in the service provision"[2].

In this regard, it is noteworthy that the Jurisprudence has already recognized the legitimacy of the emergency prorogation.

Indeed, in the judgment of ADI 118 MC/PR, the Full Court of the Federal Supreme Court decided that, in order to guarantee the "continuity" of the public service (of "passengers collective transport"), avoiding its *"ex-abrupt"* interruption, the Granting Authority may prorogate, on a "precarious basis", for a short period (in general, for "six months, twelve months"), a "public service concession" which has reached its "term", until the end of the "bidding" for the new grant of the activity. This is the main excerpt from the winning vote of Minister Paulo Brossard; *verbis*:

> When a public service concession comes to an end, as a rule, the service does not stop *ex-abrupt*, because the Administration, having enough time, publishes the notices in advance, do the bidding or, on a precarious basis, prorogate the concession for six months, twelve months, exactly so that there is no solution of continuity in the provision of public service. (our emphasis)

And, in the judgment of the AgRg in AREsp 481.094/RJ, the Second Chamber of the Superior Court of Justice decide that, in order to avoid the "interruption of the provision of the transport public service", "in complete affront to the principle of the continuity", the permission of public service may be prorogated for the period necessary for the "completion of the bidding procedure" (in the concrete case, the prorogation for "up to one year" was allowed), if, "due to the demobilization of the State infrastructure", it is verified the "impossibility of the public entity to directly assume the provision of the referred service" at the end of the grant. This is the main excerpt from the vote of the Rapporteur, Minister Mauro Campbell Marques; *verbis*:

> 4. **It is noteworthy that** the possible interruption of the provision of the transport public service dealt with in the present demand, added to **the impossibility of the public entity to directly assume the provision of the referred service**, due to the demobilization of the State infrastructure, prior to the conclusion of the bidding process, **may lead to the discontinuity of the services provided, in**

[1] Some sectoral laws use the expressions "contractual prorogation" and "early prorogation" to denominate the subspecies of public interest prorogation. Example: Law No. 12.815/13, Art. 57. However, in our view, the expression "contractual prorogation" merits criticism. It is because both "non early prorogation" and "early prorogation" extend a public service concession contract and may, therefore, be called "contractual prorogation". This is why, without ignoring the legal terminology (and, especially, without informing the reader about it), we prefer to use, to designate the subspecies of public interest prorogation, the terms "common prorogation" and "early prorogation", which, in our judgment, denote more accurately its object.

[2] See also: Law No. 12.783/13, Art. 9th.

> **complete affront to the principle of the continuity of essential public services. Thus**, aiming at the continuity of the public transport service and the interest of the entire community, **the realization of the bidding process on the term of up to one year is authorized**, regardless of the res judicata, when the effects of the contracts in question will cease. (our emphasis)

Finally, the Doctrine also accepts the emergency prorogation of public service concessions.

In fact, Antão de Morais[3] teaches that emergency prorogation (whose "legal basis" lies in the "principle of continuity of public service") aims to put away the "danger of abruptly ceasing a public service", taking place in case of "urgent public need", configured when, at the end of the concession, "the Administration is not in a position to provide, by itself or by others, the service", which "obliges the concessionaire to a reasonable prorogation, but with fair compensation"; lastly, the author adds that the Granting Authority has "the power to coerce him [this is, the concessionaire], if he refuses to continue the exploration", being certain that "who agrees to collaborate in a public service knows or must know that he runs that risk."

2.2 Rebalancing prorogation

The rebalancing prorogation aims to recompose the initial relation between the concessionaire's charges and remuneration without raising the tariffs, reducing the concessionaire's obligations and/or compromising public resources. It is performed in case of an economic-financial imbalance of the concession, caused by the concretization of risk included in the concept of extraordinary alea (administrative or economic), contractually attributed to the Granting Authority – namely, the unilateral amendment of the contract, the *factum principis*, the fact of the Administration, the unforeseen subjections and the act of God or force majeure. In this case, the concession is prorogated for the term necessary for the full recomposition of the grant's initial economic-financial balance.

This specie of prorogation is provided, among others, in Decree No. 7.624/11, which, by providing for the conditions for the exploitation of the airport public service by the private initiative under concession, establishes, in its Art. 6th and 18, II, that the granting period will be defined by the Granting Authority, "being prorogable only once, for up to five years, for purposes of economic-financial rebalancing arising from the concretization of risks not assumed by the concessionaire in the contract"[4].

In this regard, it is worth mentioning that the Jurisprudence has already affirmed the legality of the rebalancing prorogation.

In effect, in the judgment of RMS 1.835/DF, the Full Court of the Federal Supreme Court decided that "it is not illegal the act of the Mayor who agreed with the concessionaire of the exploitation of an amusement park the prorogation [of the concession] for more three years, in exchange for the advantage of relocating the park without any expenses to the City Hall". This is the main excerpt from the vote of the Rapporteur, Minister Mário Guimarães; *verbis*:

> The explanation of the City Hall was cabal: it was operating in Quinta da Bôa Vista, for over five years, an amusement park. The City Hall needed the place to install the Zoo, transferred to that Quinta. It entered into an agreement with the park owner, who moved to another location on the same Quinta. **However, since such a transfer would incur expenses for the concessionaire, the agreement**

[3] MORAIS, Antão de. Serviço telefônico, expiração do prazo da concessão, fixação, fiscalização e revisão de tarifas, taxa de expansão do serviço. *Revista de Direito Administrativo*, Rio de Janeiro, v. 49, p. 445-464, jul./set. 1957. p. 447-457. See also: CÂMARA, Jacintho Arruda. O prazo nos contratos públicos. In: PIETRO, Maria Sylvia Zanella di (coord.). *Tratado de Direito Administrativo*: licitação e contratos administrativos. São Paulo: Revista dos Tribunais, 2014. p. 347.; MELLO, Rafael Munhoz de. Prorrogação de concessão de serviço público. *Revista de Direito Público da Economia*, Belo Horizonte, v. 12, n. 46, p. 207-222, abr./jun. 2014. p. 212-213 and 218.; RODRIGUEZ-ARANA, Jaime F. *La prórroga en los contratos administrativos*: concepto, funciones y régimen en los contratos de obras y en los de gestión de servicios públicos. Madrid: Montecorvo, 1988. p. 150-157.; GRECA, Alcides. *Derecho y Ciencia de la Administración Municipal*. 2. ed. Santa Fé: Universidade Nacional del Litoral, 1943. p. 221.

[4] See also: Resolution ANTAQ No. 3.220/14, Art. 14, III.

> **stated that the concessionaire would have, as compensation for these expenses, extended the concession for three more years.**
>
> **That act did not result in any violation of the rights of the claimant**, seeking to participate of a hypothetical public bidding. (our emphasis)

And, in the judgment of TC 021.919/2015-1, which responded to the consultation made by the Chief Minister of the former Port Secretariat of the Presidency of the Republic, raising doubts about the application of the institute of rebalancing prorogation, the Plenary of the Court of Auditors of the Union stated that the "economic-financial recomposition of the port lease agreements [that much resemble public service subconcession contracts[5]] may be implemented, justifiably, by extending the contractual term". This is the main excerpt from the vote of the Rapporteur, Minister Walton Alencar Rodrigues, contained in Judgment TCU No. 774/16-Plenary; *verbis*:

> In conclusion, such economic-financial recomposition of the port lease agreements may be implemented, justifiably, by extending the contractual term, observing the statutory limits defined by the legislator, which are, the prorogation for only one time, since it is provided in the contract; the additional period should not be longer than originally agreed. (our emphasis)

Lastly, the Doctrine also supports the rebalancing prorogation of public service concessions.

In reality, Celso Antônio Bandeira de Mello[6] affirms that the rebalancing prorogation is intended to "maintain the balance of the concession contract" without, however, "aggravate the users with the increase of the tariffs" nor "implicate any burden for the Public Power" (or rather, for the "public purse"), being performed – regardless of "permissive provision in law" and/or "in the bidding notice or contract" – for sufficient time so that the concessionaire "can obtain, compensatorily, the equivalent of what he would perceive in a shorter period of time, if the tariffs had been readjusted".

2.3 Public interest prorogation

The public interest prorogation aims to promote the adequate provision of the public service. It is performed for reasons of convenience and opportunity of the parties, since the specific requisites of the measure[7] are present and the concessionaire accepts certain conditions (or counterparts) proposed by the Granting Authority, which characterize the advantage of the prorogation *vis-a-vis* the alternatives of direct provision of the public service or public bidding for the new grant of the activity. In this case, the concession is prorogated for the term provided by law or in the concession contract itself.

This specie of prorogation is provided, among others, in Law No. 9.472/97, which estates, in its Art. 99, that the term of validity of the telecommunications public service concessions shall be, at the "maximum", of "twenty years" and may be prorogated "only once, for equal period", since the concessionaire "has fulfilled the conditions of the concession" and accepts the "conditions" proposed by the National Telecommunications Agency in view of the existing circumstances at the time – among others, the "payment" for

[5] MOREIRA NETO, Diogo de Figueiredo; FREITAS, Rafael Véras de. *A nova regulação portuária*. ed. Belo Horizonte: Fórum, 2015. p. 83-88.

[6] MELLO, Celso Antônio Bandeira de. Consulta da Associação Brasileira de Concessionárias de Rodovias – ABCR. In: CARVALHO, André Castro (org.). *Contratos de concessão de rodovias*: artigos, decisões e pareceres jurídicos. São Paulo: MP, 2009. p. 57-65. See also: JUSTEN FILHO, Marçal. A ampliação do prazo contratual em concessões de serviço público. *Revista de Direito Administrativo Contemporâneo*, São Paulo, v. 4, n. 23, p. 109-135, mar./abr. 2016. p. 128-134.; SANTOS, Rodrigo Valgas dos. Concessão de serviço público: a prorrogação do prazo de exploração para recomposição do equilíbrio econômico-financeiro do contrato. *Revista Interesse Público*, Porto Alegre, v. 8, n. 38, p. 85-111, jul./ago. 2006. p. 108-110.; ALBI, Fernando. *Tratado de los modos de gestión de las corporaciones locales*. Madrid: Aguilar, 1960. p. 571-643.; AMORIM, João Pacheco de. O princípio da temporalidade dos contratos públicos: considerações sobre a duração máxima dos contratos e respetiva prorrogabilidade dentro e para lá desse limite temporal. In: GONÇALVES, Pedro Costa (org.). *Estudos de contratação pública*. Coimbra: Coimbra, 2013. p. 64-66.

[7] Example: (i) the provision in the concession contract; (ii) the faithful fulfillment of the contract by the concessionaire; and (iii) the advantage of the measure.

the prorogation of the grant of the "right to operate the service" and the "right to use the associated radio frequencies"[8].

In this regard, it is worth to point out that the Jurisprudence has already recognized the legitimacy of emergency prorogation.

Indeed, in the recent judgment of RMS 34.203/DF, the Second Chamber of the Federal Supreme Court decided that public service concession contracts are normally extinguished at the end of their term of validity, "except for the adjustment, at the end of the term, by the contractual prorogation, if the legal requisites are met and the public interest in the permanence of the contract is present", or rather, "except by means of contractual prorogation, if it were in public interest (administrative discretion) and if the requisites for that were met". This is the main excerpt from the vote of the Rapporteur, Minister Dias Toffoli; *verbis*:

> The rule, therefore, is that the contracting has a predefined term – contractual term – and it is up to the Administration to evaluate, at the end of the term and always in accordance with the legal parameters of fulfillment to the public interest that were outlined (and especially the "promotion of the sustainable national development "), the interest and the possibility of renewing this term.
>
> [...]
>
> Therefore, a concession contract, which is signed based on a bidding process, has the temporality as one of its fundamental marks, and, thus, the extinction of the contract occurs in the term defined on itself, except for the adjustment, at the end of the term, by the contractual prorogation, if the legal requisites are met and the public interest in the permanence of the contract is present.
>
> [...]
>
> As pointed out earlier, the defined contractual term had its ending established to 8/28/13. After this date, there was no guarantee of continuity of the contract, except by means of contractual prorogation, if it were in public interest (administrative discretion) and if the requisites for that were met, among them: (i) fulfillment of the contract; and (ii) the implementation of any regulatory provisions that may be established for the Electric Sector (first sub-clause of clause four of the contract). (our emphasis)

In the judgment of TC 021.919/2015-1, the Plenary of the Court of Auditors of the Union stated that the prorogation of port lease agreements "does not violate the principle of constitutional nature of prior bidding for the conclusion of contracts", as long as: (i) the conclusion of such contracts was preceded by a "regular bidding procedure"; and (ii) the prorogation is conditionated on the lessee making "new investments" in the port infrastructure. This is the main excerpt from the vote of the Rapporteur, Minister Ana Arraes, contained in Judgment TCU No. 2.200/15-Plenary; *verbis*:

> 8. The early prorogation, object of this monitoring, is provided for in Art. 57, of Law 12.815/2013:
>
> [...]
>
> 12. In this context, preliminarily to the merit analysis of the monitoring report, in face of the relevance and unprecedentedness of the matter under consideration, **three fundamental legal questions** caused the submission of this process to the Public Prosecution Service before the TCU: **(i) the constitutionality of early prorogation of lease agreements;** (ii) the regulation of the Art. 57, of the Port Law, by means of an ordinance of the Port Secretariat; and (iii) the attribution of competencies to ANTAQ by the referred infralegal regulation.
>
> 13. In addition to endorsing the proposals made by SeinfraHidroFerrovias, the MPTCU manifested itself **favorably** to the legal questions raised, by concluding that:
>
> - **Art. 57, of Law 12.815/2013** – which provides for the possibility of anticipating the prorogation of port lease agreements signed during the validity of Law 8.630/1993 and preceded by regular bidding procedure, since it is conditionated to new investments – **does not violate the principle of constitutional nature of prior bidding for the conclusion of contracts**;

[8] See also: Law No. 9.074/95, Art. 19 and 25.

[...]

14. Thus, **fully agreeing with the reasons presented in the opinion of the MPTCU**, I pass to the examination of the substance of the monitoring proceedings. (our emphasis)

And, in the judgment of TC 003.379/2015-9, the Plenary of the Court of Auditors of the Union considered "constitutional" the prorogation of all concessions of the public service of electricity distribution for a period of thirty years (since the concessionaires accept the new quality and economic-financial management goals defined by the National Electricity Agency), because it understood to be characterized an "exceptional situation" that justified the non-performance of a public bidding. In fact, the Ministers of the Court agreed that the simultaneous bidding of all concessions of the public service of electricity distribution with the expiration of the term until 2017 (that is, forty-three distribution concessions, which jointly served eighteen States of the Federation, supplying electricity to about fifty million consumer units, and directly moving around sixty billion reais, which represented, in 2014, approximately fifty percent of the national market and distribution revenue), in the economic and political conjuncture of the country existing at that time (this is, in a context of increased funding constraints, high cost of capital, high risk aversion, not to mention the regulatory uncertainty surrounding the distribution segment), would bring significantly greater risks to the continuity of services and to the country's own energy security than the option of prorogation. This is the main part of the vote of the Rapporteur, Minister José Múcio Monteiro, contained in Judgment TCU No. 2.253/15-Plenary; *verbis*:

16. In analyzing the arguments of MME and ANEEL that justify the option for the chosen model, SeinfraElétrica concluded that the prorogation of the contracts under consideration, under the conditions in which it is being made, violates the Art. 175, of CF/88, which provides for the obligatoriness of carrying out bidding for the concession or permission of public services, as follows: [...]

17. In view of this, it proposes to order the MME to promote the bidding of all concessions covered by Art. 7, of Law 12.783/2013, extending the contracts only during the period necessary for the preparation of the bidding procedures and the assumption of a new concessionaire.

18. For the technical unit, consistent information were missing, indicating the advantages and disadvantages of prorogating or bidding, that could be taken into account for better decision making, also remaining not properly demonstrated the risks that the bidding could bring to the fulfillment of the criteria of the law.

[...]

26. As for the lack of information to justify the decision, really, are not in the process files parameters and variables that demonstrate, accurately, that the prorogation would be the best solution. Nevertheless, **I see that the arguments and data presented are enough to conclude that carrying out bid of all the concessions in the actual economic and political conjuncture brings significantly greater risks to the continuity of the services and to the energy security itself than the option for prorogation**.

27. Note that SeinfraElétrica did not declare Article 7, of Law 12.783/2013, unconstitutional, what puts it in a different situation from that of Article 1, of Law 10.577/2002, which provided for the maintenance of postal service exploitation contracts signed by ECT and was considered unconstitutional by the TCU, by violate the Article 175, of CF/1988, according to Judgment TCU No. 574/2006-Plenary.

28. **I also have as constitutional the Article 7, of Law 12.783/2013.** However, in admitting as legally acceptable the option conferred there, I take as a basis not the simple fact that conditions have been set for the prorogation, but the implicit recognition of the strategic importance of the electricity distribution service and the gravity that may result of the discontinuity of your supply, even more when contracts that serve, together, around 50 million consumer units and represent about 50% of the country's captive market are involved, meaning that, in this specific case, the consequences of the risks can be so severe that there is margin for **exceptional situations** that justify the non-conduction of the bidding.

29. Therefore, especially as it is a service that requires large investments for its adequate provision and to meet the permanent necessity of expansion of the grid, I think that we missed in the analysis the **ponderation** of

> the current context of increased funding constraints, high cost of capital, high risk aversion, not to mention the environment of regulatory uncertainties in the distribution segment due to the ongoing changes in the tariff model, which, for the sake of the transparency of the values paid by consumers, now admits greater tariff volatility and brings uncertainties for the remuneration to the distributors.
>
> [...]
>
> 42. Therefore, in face of the risks involved in bidding at this time, and not seeing, in this case, incompatibilities between the reasons presented by the Granting Authority and the discretion conferred by the legislation, **I consider the option for the prorogation of the concessions conferred by the Article 7, of Law 12.783/2013, justified**, since the criteria established there are met. (our emphasis)[9]

Finally, the Doctrine also admits the public interest prorogation of public service concessions.

In fact, Hely Lopes Meirelles[10] teaches that the prorogation of public service concession "is permitted in our law", since: (i) there is "express provision in the bidding notice" – which "is necessary for the correct formulation of the proposals"; (ii) there is "interest for the public service"; and (iii) there is "agreement of the parties".

2.3.1 Subspecies of prorogation by public interest

According to the "moment" it is performed, the public interest prorogation can be classified as: (i) common prorogation; and (ii) early prorogation[11].

Let us see, then, in what each one of them consists.

2.3.1.1 Common prorogation

Common prorogation is that performed at the end of the concession.

This subspecies of public interest prorogation is provided, among others, in Law No. 13.448/17, which states, in its Art. 4, I, that the common prorogation of the road and railroad public service concessions is that carried out at the "end of the term of the adjustment".

2.3.1.2 Early prorogation

Early prorogation is that performed before the end of the concession, respecting, however, the maximum limit of anticipation provided by law or, subsidiarily, in the granting act itself[12].

---

[9] Another important jurisprudential precedent will be the decision that the Court of Auditors of the Union may take in the TC 009.032/2016-9, which deals with the prorogation of the concession of Rumo Logística Operadora Multimodal S/A, regarding the Malha Paulista (Rumo-Malha Paulista) – leading case on the prorogation of railway concessions in the Court of Auditors. By the way, it is worth mentioning that the National Land Transportation Agency has already approved this extension, which is now awaiting the approval of the Court of Auditors of the Union. The Court of Auditors has yet no date to decide on the matter. However, the Public Prosecution Service before the Court recently presented its opinion recommending the "rejection" of the prorogation of the concession of Rumo-Malha Paulista "due to the lack of advantage in the prorogation of the contract in relation to the conducting of new bidding".

[10] MEIRELLES, Hely Lopes. Licitação, adjudicação, anulação. In: MEIRELLES, Hely Lopes. *Estudos e pareceres de Direito Público.* São Paulo: Revista dos Tribunais, 1981. p. 47-48. See also: MARQUES NETO, Floriano de Azevedo. *Concessões*. Belo Horizonte: Fórum, 2015. p. 167-171.; GARCIA, Flavio Amaral. As parcerias público-privadas: prazo e prorrogação. In: JUSTEN FILHO, Marçal; SCHWIND, Rafael Wallbach (coord.). *Parcerias público-privadas*: reflexões sobre os 10 anos da Lei 11.079/2004. São Paulo: Revista dos Tribunais, 2015. p. 416-426.; LAUBADÈRE, André de; MODERNE, Franck; DEVOLVÉ, Pierre. *Traité des contrats administratifs*. Paris: LGDJ, 1983. p. 635-638 and 685-687.; TORGAL, Lino. Prorrogação do prazo de concessões de obras e de serviços públicos. *Revista de Contratos Públicos*, Coimbra, n. 1, p. 219-263, jan./abr. 2011. p. 229-248.

[11] Bernardo Strobel Guimarães and Heloísa Conrado Gaggiano also explain that "the distinction between them [that is, between common prorogation and early prorogation] is more chronological than of essence", being certain that "what distinguishes the two measures is the moment of implementation" GUIMARÃES, Bernardo Strobel; GAGGIANO, Heloísa Conrado. O que mudou no direito das concessões com a aprovação da MP n. 752: perguntas e respostas. *Revista de Direito Público da Economia*, Belo Horizonte, v. 15, n. 58, p. 9-22, abr./jun. 2017. p. 12.

[12] The maximum limit of anticipation varies from case to case according to the specific purpose(s) of the early prorogation, and

This subspecies of public interest prorogation is provided, among others:

(i) in Law No. 12.783/13, which establishes, in its Art. 12, that the Granting Authority can "anticipate the effects of the prorogation" of the electricity public service concessions, respected the maximum limit of anticipation of "up to 60 (sixty) months from the advent of the contractual term";

(ii) in Law No. 12.815/13, which provides, in its Art. 57, that the Granting Authority can make the "early prorogation" of the port lease agreements signed during the validity of Law No. 8.630/93; and

(iii) in Law No. 13.448/17, which establishes, in its Art. 4th, II and 6th, § 1st, that the "early prorogation" of the road and railroad public service concessions is that carried out "before the end of the term of the adjustment", respected the maximum limit of anticipation of "50% (fifty percent) [...] of the originally stipulated term".

The purpose of the early prorogation is to allow the Granting Authority to immediately obtain certain benefits that it would only achieve at the end of the concession, with the new public bidding or the common prorogation. Example: (i) earn public revenue from the payment for the prorogation of the grant; (ii) reduce the tariff value in proportion to the levels of investments in reversible assets already amortized; (iii) promote new investments in the concession; (iv) extinguish the exclusivity of the grant; and/or (v) resolve major sectoral administrative conflicts. In fact, the perspective of the prorogation tends to convince the concessionaire to consent with the benefits that are necessary to the public interest.

Finally, to illustrate the purpose of the early prorogation, it is convenient to present the specific objectives sought with the anticipation of the prorogation of the electricity, port and road/railroad public services concessions, respectively contained in the expositions of motives of Provisional Measures No. 579 and 595/12 and 752/16, later converted into Laws No. 12.783 and 12.815/13 and 13.448/17. Let us see it:

(i) EMI No. 37/MME/MF/AGU (which accompanied the Provisional Measure No. 579/12) states that the purpose of the early prorogation of the electricity public service concessions is "to enable the reduction of the cost of electric energy" by the "anticipation the capture of the benefit of the amortization of investments" in reversible assets, "seeking, with that, not only to promote the tariff affordability [...] but also to make the productive sector even more competitive";

(ii) EMI No. 00012-A-SEP-PR/MF/MT/AGU (which accompanied Provisional Measure No. 595/12) affirms that the purpose of the early prorogation of the port lease agreements is to "ensure new investments" in the Port Sector, in order to promote the "reduction of costs" and, consequently, the "expansion [...] of the country's competitiveness" in the "international scenario"; and

(iii) EMI No. 00306/2016 MP/MTPA (which accompanied Provisional Measure No. 752/16) states that the early prorogation of the road and railroad public service concessions contracts seeks, on one side, "to enable the immediate realization of new investments" "in important infrastructure sectors", investments that are "a *conditio sine qua non* for the resumption of economic growth in Brazil", and, on the other side, "modernize such contracts by including new performance clauses, objective goals for the private partners and more effective punishments in case of its non-fulfillment", thus improving the "level of the service provided to the population".

Viewed the specific characteristics of early prorogation, let us verify now whether this specie of prorogation is or is not compatible with the Brazilian Constitution.

its setting is based only on the principle of proportionality (CRFB/88, Art. 1). Indeed, Gaston Jèze teaches that "el número de años [read: years of anticipation of prorogation] depende de la naturaleza del servicio público y de las mejoras posibles" in the concession. JÈZE, Gaston. *Principios generales del Derecho Administrativo*. Traducción: Julio N. S. M. Almagro. Buenos Aires: Depalma, 1950. p. 313.

3 Constitutionality of the early prorogation

On section 2 above, we saw that the normative foundation of the legal institute of the prorogation of public service concessions lies, at a constitutional level, in CRFB/88, Art. 175, sole para., I.

Therefore, in order to verify whether the early prorogation is or is not compatible with the Brazilian Constitution, we need to interpret this constitutional rule.

3.1 Canon of constitutional interpretation useful for interpreting the CRFB/88, Art. 175, sole para., I

Constitutional interpretation is the technical activity by which the interpreter determines the content (meaning and range) of constitutional norms. This activity is performed based on several canons developed by constitutional hermeneutic. The canons of constitutional interpretation are reciprocally complementary and, whenever possible, should be applied together. However, its application can produce contradictory results, and there are no (incontestable) criteria for the solution of eventual conflicts. Therefore, it is up to the interpreter to select, at its discretion, the canon(s) of constitutional interpretation useful in the concrete case, always guided by the search of the most just solution to the problem to be solved[13].

The Doctrine lists several canons of constitutional interpretation, calling them, sometimes methods (classic or traditional), sometimes principles. The methods of interpretation of the Constitution are the same canons of interpretation of the laws in general, developed by Friedrich Karl von Savigny[14] at the end of the century XIX; namely: (i) the grammatical method; (ii) the historical method; (iii) the teleological method; and (iv) the systematic method. In its turn, the principles of constitutional interpretation, most recently proposed by Konrad Hesse[15], are: (i) the principle of unity of the Constitution; (ii) the principle of practical concordance or harmonization; (iii) the principle of functional correction; (iv) the principle of integrative effectiveness; (v) the principle of normative force of the Constitution; and (vi) the principle of maximum effectiveness.

In our opinion, the canon of constitutional interpretation useful for interpreting CRFB/88, Art. 175, sole para., I, and, therefore, to verify the compatibility of early prorogation with the Brazilian Constitution is the principle of maximum effectiveness.

Let us see, then, the result of its application on the concrete case.

3.2 Result of applying the principle of maximum effectiveness

The principle of maximum effectiveness (or effective interpretation) indicates that, when interpreting a constitutional norm, the interpreter must give preference to the meaning that gives it the greatest effectiveness. By the way, it is worth considering that, although it is applied today to any and all constitutional norms (above all, to the consecrators of fundamental rights), the principle of maximum effectiveness was originally linked to the so-called "programmatic constitutional norms"[16].

---

13 BONAVIDES, Paulo. *Curso de Direito Constitucional*. 15. ed. atual. São Paulo: Malheiros, 2004. p. 457-458.; BULOS, Uadi Lammêgo. *Manual de interpretação constitucional*. São Paulo: Saraiva, 1997. p. 2-5.; MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. *Curso de Direito Constitucional*. 4. ed. rev. e atual. São Paulo: Saraiva, 2009. p. 119-135.

14 SAVIGNY, Friedrich Karl von. *Metodología jurídica*. Traducción: J. J. Santa-Pinter. Buenos Aires: Depalma, 1979. p. 18-24.

15 HESSE, Konrad. *Elementos de Direito Constitucional da República Federal da Alemanha*. Tradução: Luís Afonso Heck. Porto Alegre: S. A. Fabris, 1998. p. 63-69.

16 CANOTILHO, Joaquim José Gomes. *Direito Constitucional e teoria da constituição*. 7. ed. Coimbra: Almedina, 2014. p. 1224.; SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de Direito Constitucional*. 2. ed. rev. atual. e ampl. São Paulo: Revista dos Tribunais, 2013. p. 227.; TAVARES, André Ramos. *Curso de Direito Constitucional*. 12. ed. rev. e atual. São Paulo:

Continuing. It is well known that constitutional norms can be classified, among other ways, into: (i) norms of full effectiveness and immediate applicability; (ii) norms of containable effectiveness and immediate applicability; and (iii) norms of limited effectiveness and mediate applicability, which are subdivided, in its turn, into: (a) norms that define institutional principles; and (b) norms that define programmatic principles[17]. Constitutional norms that define programmatic principles are those that establish the general lines of constitutional programs, depending, thus, of the subsequent edition of an integrative law to become effective (*rectius*: produce their main effects)[18]. In this sense, CRFB/88, Art. 175, sole para., I, can be classified as a constitutional norm that defines programmatic principle, considering that, through it, the constituent legislator established only the general lines of the "legal regime of the public service concessionaires and permissionaires", giving the ordinary legislator the power to develop the matter.

Nevertheless, constitutional norms that defines programmatic principles can leave larger or smaller discretionary power to the ordinary legislator[19]. In the present case, CRFB/88, Art. 175, sole para., I, left a large discretionary power to the ordinary legislator. In effect, although it has established that the prorogation will have "special character" (which certainly limits the content of the integrative law to which it refers), CRFB/88, Art. 175, sole para., I, did not set any other limits for the conformation of the legal institute of the prorogation of the public service concessions. Example: it did not provided that the referred legal institute would: (i) serve such purpose; (ii) be performed in face of such factual situation; (iii) be used for such period; (iv) depend of the acceptance of such condition by the concessionaire; and, for what interests us most directly; (v) take place at such moment of the concession.

Therefore, it does not seem arbitrary to us to conclude, based on the principle of maximum effectiveness of constitutional norms, that the concept of prorogation contained in CRFB/88, Art. 175, sole para., I, comprises the three basic species of prorogation currently regulated by the ordinary legislation, namely emergency prorogation, rebalancing prorogation and public interest prorogation and, in the ambit of the last one, both common prorogation and early prorogation[20].

At this point, it is worth mentioning that, although it is a relatively recent legislative tendency in Brazil, Jurisprudence has already recognized the legitimacy of the early prorogation of public service concessions.

Indeed, as seen in section 2.3 above, in the judgment of TC 024.882/2014-3 and 003.379/2015-9, which respectively dealt with the early prorogation of port lease agreements and electricity distribution contracts, the Plenary of the Court of Auditors of the Union considered such prorogations constitutional, since the terms of Laws No. 12.783 and 12.815/13 were observed. By the way, it is worth remembering that the Court of Auditors is competent to incidentally declare the unconstitutionality of laws and normative acts of the

Saraiva, 2014. p. 187-188.

17 SILVA, José Afonso da. *Aplicabilidade das normas constitucionais*. 2. ed. rev. e atual. São Paulo: Revista dos Tribunais, 1982. p. 75.

18 SILVA, José Afonso da. *Aplicabilidade das normas constitucionais*. 2. ed. rev. e atual. São Paulo: Revista dos Tribunais, 1982. p. 129.

19 SILVA, José Afonso da. *Aplicabilidade das normas constitucionais*. 2. ed. rev. e atual. São Paulo: Revista dos Tribunais, 1982. p. 115.

20 By the way, it is worth bringing up the lesson of Mário Saadi and Raul Dias dos Santos Neto, for whom, "from the constitutional point of view, it seems to us that the law can provide (without any kind of restriction to the economic-financial rebalancing) about the possibility of prorogation of the term of the concessions", considering that "the CF/88 allocated to the legal level the delineation of the aspects relatives to its prorogation (Art. 175, sole para., I)". SAADI, Mário; SANTOS NETO, Raul Dias dos. Prorrogação antecipada de prazo de contratos de concessão. *Revista de Direito Administrativo Contemporâneo*, São Paulo, v. 4, n. 27, p. 79-107, nov./dez. 2016. p. 87-89.

Public Power (Precedent 347/STF), what, as seen, did not happened in these concrete cases[21]e[22].

On its turn, the Doctrine also recognizes, here and elsewhere, the legitimacy of early prorogation as a mechanism for anticipating the benefits of public interest prorogation.

In fact, in Brazil, Rafael Wallbach Schwind[23] teaches that the "early prorogation" of administrative contracts in general – and port lease agreements in particular – is compatible with the Brazilian Constitution, because: (i) "the Constitution itself expressly provides for the possibility of prorogation of the term of administrative contracts"; and (ii) such specie of prorogation aims to promote the "public interest", consistent in the "realization of immediate investments in the Port Sector", without the Granting Authority having to "wait for the termination of the current contracts" – investments that are necessary to adapt the "port infrastructure" and the "conditions of service provision" to the "users needs".

In France, Clément Colson[24] affirms that "une Compagnie qui n'a plus devant elle une durée suffisante cesse nécessairement de se préoccuper avec des besoins futurs, et c'est là un grand mal", being certain that, to contain it, "il est sage de proroger les concessions 15 ou 20 ans avant qu'elles expirent"[25]; lastly, the author adds: "l'offre d'une prorogation est, à toute époque, un excellent moyen d'obtenir l'extension ou l'amélioration du service, comme on en voit actuellement de nombreux exemples pour les tramways municipaux".

In Portugal, Diogo Freitas do Amaral and Lino Torgal[26] state, when dealing with the "momento temporal" of the public interest prorogation, that "mostra, ainda, a experiência em matéria de concessões que tende a diminuir, consideravelmente, nos últimos anos de exploração, o volume dos investimentos dos concessionários com a conservação e a actualização do estabelecimento da concessão", which is why "a prorrogação, decidida com alguma antecedência, dissipando incertezas dos concessionários interessados em prosseguir a exploração [...] poderá, porventura, contribuir para a melhoria da performance financeira da concessão". The authors also exemplify that, in a concession of "35 anos", it seems reasonable a proroga-

[21] The Federal Supreme Court will examine soon the theme of early prorogation of public service concessions. Indeed, it is scheduled for the second half of this year the trial of the writ of prevention of ADI 5.991/DF, proposed by the Attorney General's Office against some provisions of Law No. 13.448/17. In this regard, it is noteworthy that, in this lawsuit, Dr. Raquel Dodge expressly manifested the understanding that, despite the unconstitutionality of the contested provisions, the institute of early prorogation "itself" is compatible with CRFB/88, Art. 175, sole para., I. This is the main excerpt from the initial petition of that lawsuit: "It is important to emphasize that the unconstitutionality of the institute of early prorogation itself is not argued here. What is defended is that, although the Constitution provides for the possibility of prorogation of concession contracts in Art. 175–sole paragraph–I, such prorogation cannot be allowed – much less realized – in disagreement with the constitutional dictates that guide the Public Administration and inform their actions, in particular the efficiency, morality, impersonality and reasonableness, provided for in Art. 37–*caput*, as well as with the bidding rule".

[22] Another important jurisprudential precedent will be the decision of the Court of Auditors of the Union regarding the early prorogation of the concession of Rumo-Malha Paulista – leading case on the early prorogation of railway concessions in the Court. By the way, it is significant that, although it has had recently presented opinion recommending the "rejection" of the referred prorogation, the Public Prosecution Service before the Court of Auditors did not oppose itself, at any time, to the constitutionality of the legal institute of early prorogation.

[23] SCHWIND, Rafael Wallbach. Prorrogação dos contratos de arrendamento portuário. In: PEREIRA, Cesar; SCHWIND, Rafael Wallbach (org.). *Direito portuário brasileiro*: Lei 12.815, porto organizado, poligonal, arrendamento e autorização, arbitragem, São Paulo: Marcial Pons, 2015. p. 496-499. See also: CRETELLA JÚNIOR, José. *Comentários à Constituição brasileira de 1988*. 2. ed. Rio de Janeiro: Forense Universitária, 1993. p. 4110-4111.; FREITAS, Rafael Véras de; RIBEIRO, Leonardo Coelho. O prazo como elemento da economia contratual das concessões: as espécies de "prorrogação". In: MOREIRA, Egon Bockmann (coord.). *Contratos administrativos, equilíbrio econômico-financeiro e a taxa interna de retorno*: a lógica das concessões e parcerias público-privadas. Belo Horizonte: Fórum, 2017. p. 296-298.; PINHEIRO, Armando Castelar; RIBEIRO, Leonardo Coelho. *Regulação das ferrovias*. Rio de Janeiro: FGV, 2017. p. 144-177.

[24] COLSON, Clément. *Cours d'economie politique*: les travaux publics et les tranports. 2e éd. Paris: Gauthier-Villars, 1910. p. 419.

[25] The author thought about the prorogation having before him public service concessions with a term of validity of "99 ans", and not, as we, concessions with a term of ten, twenty or thirty years, on average. That is why he imagined a maximum limit of anticipation seemingly so long.

[26] AMARAL, Diogo Freitas do; TORGAL, Lino. Concessão de exploração de jogos de fortuna ou azar: da prorrogação do prazo e outras alterações do contrato. In: AMARAL, Diogo Freitas do; TORGAL, Lino. *Estudos sobre concessões e outros actos da Administração*. Coimbra: Almedina, 2002. p. 547-549.

tion "7 anos antes do termo do prazo, e 28 anos depois do seu início".

Lastly, in Argentina, Héctor Jorge Escola[27] explains that the prorogation of public service concessions may be agreed by the parties "durante la vigencia del contrato y antes de su vencimento [early prorogation], o una vez producido éste [common prorogation]".

4 Conclusion

At the end of this article, we briefly present our main conclusions:

(i) The prorogation of public service concessions may be basically classified into three species; namely: (a) emergency prorogation; (b) rebalancing prorogation; and (c) public interest prorogation;

(ii) The subspecies of public interest prorogation are: (a) common prorogation; and (b) early prorogation; and

(iii) The early prorogation of public service concessions is compatible with CRFB/88, Art. 175, sole para., I, due to the large discretionary power conferred to the ordinary legislator to conform the legal institute of the prorogation, notably to determine the moment that such administrative measure may be applied.

References

ALBI, Fernando. *Tratado de los modos de gestión de las corporaciones locales*. Madrid: Aguilar, 1960.

AMARAL, Diogo Freitas do; TORGAL, Lino. Concessão de exploração de jogos de fortuna ou azar: da prorrogação do prazo e outras alterações do contrato. In: AMARAL, Diogo Freitas do; TORGAL, Lino. *Estudos sobre concessões e outros actos da Administração*. Coimbra: Almedina, 2002. cap. 9.

AMORIM, João Pacheco de. O princípio da temporalidade dos contratos públicos: considerações sobre a duração máxima dos contratos e respetiva prorrogabilidade dentro e para lá desse limite temporal. In: GONÇALVES, Pedro Costa (org.). *Estudos de contratação pública*. Coimbra: Coimbra, 2013. p. 19-77.

BONAVIDES, Paulo. *Curso de Direito Constitucional*. 15. ed. atual. São Paulo: Malheiros, 2004.

BRASIL. Constituição da República Federativa do Brasil, de 5 de outubro de 1988. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 5 out. 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/Constituicao/ConstituicaoCompilado.htm. Acesso em: 1 ago. 2019.

BRASIL. Decreto nº 7.624, de 22 de novembro de 2011. Dispõe sobre as condições de exploração pela iniciativa privada da infraestrutura aeroportuária, por meio de concessão. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 23 jun. 2011. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Decreto/D7624.htm. Acesso em: 1 ago. 2019.

BRASIL. Exposição de Motivos Interministerial nº 00012-A-SEP-PR/MF/MT/AGU, de 3 de dezembro de 2012. Apresenta os motivos para a edição da Medida Provisória nº 595, de 6 de dezembro de 2012. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 7 dez. 2012. Disponível em: http://legislacao.planalto.gov.br/legisla/legislacao.nsf/Viw_Identificacao/mpv%20595-2012?OpenDocument. Acesso em: 1 ago. 2019.

BRASIL. Exposição de Motivos Interministerial n.º 00306/2016 MP/MTPA, de 7 de novembro de 2016. Apresenta os motivos para a edição da Medida Provisória nº 752, de 24 de novembro de 2016. *Diário Oficial*

[27] ESCOLA, Héctor Jorge. *Tratado integral de los contratos administrativos*: parte especial. Buenos Aires: Depalma, 1977. p. 141.

da República Federativa do Brasil, Brasília, DF, 25 nov. 2016. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Exm/Exm-MP-752-16.pdf. Acesso em: 1 ago. 2019.

BRASIL. Exposição de Motivos Interministerial nº 37/MME/MF/AGU, de 11 de setembro de 2012. Apresenta os motivos para a edição da Medida Provisória nº 579, de 11 de setembro de 2012. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 12 set. 2012. Disponível em: http://legislacao.planalto.gov.br/legisla/legislacao.nsf/Viw_Identificacao/mpv%20579-2012?OpenDocument. Acesso em: 1 ago. 2019.

BRASIL. Lei nº 9.472, de 16 de julho de 1997. Dispõe sobre a organização dos serviços de telecomunicações, a criação e funcionamento de um órgão regulador e outros aspectos institucionais, nos termos da Emenda Constitucional nº 8, de 1995. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 17 jul. 1997. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L9472.htm. Acesso em: 1 ago. 2019.

BRASIL. Lei nº 12.783, de 11 de janeiro de 2013. Dispõe sobre as concessões de geração, transmissão e distribuição de energia elétrica, sobre a redução dos encargos setoriais e sobre a modicidade tarifária; altera as Leis nºs 10.438, de 26 de abril de 2002, 12.111, de 9 de dezembro de 2009, 9.648, de 27 de maio de 1998, 9.427, de 26 de dezembro de 1996, e 10.848, de 15 de março de 2004; revoga dispositivo da Lei nº 8.631, de 4 de março de 1993; e dá outras providências. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 14 jan. 2013. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12783.htm. Acesso em: 1 ago. 2019.

BRASIL. Lei nº 12.815, de 5 de junho de 2013. Dispõe sobre a exploração direta e indireta pela União de portos e instalações portuárias e sobre as atividades desempenhadas pelos operadores portuários; altera as Leis nºs 5.025, de 10 de junho de 1966, 10.233, de 5 de junho de 2001, 10.683, de 28 de maio de 2003, 9.719, de 27 de novembro de 1998, e 8.213, de 24 de julho de 1991; revoga as Leis nºs 8.630, de 25 de fevereiro de 1993, e 11.610, de 12 de dezembro de 2007, e dispositivos das Leis nºs 11.314, de 3 de julho de 2006, e 11.518, de 5 de setembro de 2007; e dá outras providências. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 5 jun. 2013. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12815.htm. Acesso em: 1 ago. 2019.

BRASIL. Lei nº 13.448, de 5 de junho de 2017. Estabelece diretrizes gerais para prorrogação e relicitação dos contratos de parceria definidos nos termos da Lei nº 13.334, de 13 de setembro de 2016, nos setores rodoviário, ferroviário e aeroportuário da administração pública federal, e altera a Lei nº 10.233, de 5 de junho de 2001, e a Lei nº 8.987, de 13 de fevereiro de 1995. *Diário Oficial da República Federativa do Brasil*, Brasília, DF, 6 jun. 2017. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13448.htm. Acesso em: 1 ago. 2019.

BRASIL. Superior Tribunal de Justiça. Acórdão de decisão que reconheceu a legitimidade da prorrogação por emergência. *Agravo Regimental no Agravo em Recurso Especial nº 481.094/RJ*. Agravante: Linave Transportes Ltda. Agravado: Ministério Público do Estado do Rio de Janeiro. Relator: Ministro Mauro Campbell Marques. 21 de maio de 2014. Disponível em: https://ww2.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ATC?seq=35273953&tipo=91&nreg=201400429861&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=20140521&formato=PDF&salvar=false. Acesso em 2 ago. 2019.

BRASIL. Supremo Tribunal Federal. Acórdão de decisão que reconheceu a legitimidade da prorrogação por emergência. *Ação Direta de Inconstitucionalidade nº 118-MC/PR*. Requerente: Governador do Estado do Paraná. Requerida: Assembleia Legislativa do Estado do Paraná. Relator: Ministro Aldir Passarinho. Relator p/ o acórdão: Ministro Néri da Silveira. 3 de dezembro de 1993. Disponível em: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=346192. Acesso em 2 ago. 2019.

BRASIL. Supremo Tribunal Federal. Acórdão de decisão que reconheceu a legitimidade da prorrogação por interesse público. *Recurso em Mandado de Segurança nº 34.203/DF*. Recorrente: Cemig Geração e Transmissão S/A. Recorrido: União Federal. Relator: Ministro Dias Toffoli. 19 de março de 2018. Disponível em: http://

redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14526265. Acesso em 2 ago. 2019.

BRASIL. Supremo Tribunal Federal. Acórdão de decisão que reconheceu a legitimidade da prorrogação por reequilíbrio. *Recurso em Mandado de Segurança nº 1.835/DF*. Recorrente: Emílio Lourenço Dias. Recorrido: Distrito Federal. Relator: Ministro Mario Guimarães. 23 de setembro de 1953. Disponível em: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=103342. Acesso em 2 ago. 2019.

BRASIL. Tribunal de Contas da União. Acórdão de decisão que reconheceu a legitimidade da prorrogação por interesse público. *Acórdão TCU nº 2.220/15*. Interessadas: Secretaria dos Portos da Presidência da República e Agência Nacional de Transportes Aquaviários. Relatora: Ministra Ana Arraes. 2 de setembro de 2015. Disponível em: https://pesquisa.apps.tcu.gov.br/#/documento/acordao-completo/*/NUMACORDAO%253A2200%2520ANOACORDAO%253A2015/DTRELEVANCIA%20desc,%20NUMACORDAOINT%20desc/0/%20?uuid=3afa5850-afb4-11e9-994d-fd70d475765f. Acesso em 2 ago. 2019.

BRASIL. Tribunal de Contas da União. Acórdão de decisão que reconheceu a legitimidade da prorrogação por interesse público. *Acórdão TCU nº 2.253/15*. Interessados: Ministério de Minas e Energia e Agência Nacional de Energia Elétrica. Relator: Ministro José Múcio Monteiro. 9 de setembro de 2015. Disponível em: https://pesquisa.apps.tcu.gov.br/#/documento/acordao-completo/*/NUMACORDAO%253A2253%2520ANOACORDAO%253A2015%2520RELATOR%253A%2522JOS%25C3%2589%2520MUCIO%2520MONTEIRO%2522%2520COLEGIADO%253A%2522Plen%25C3%25A1rio%2522/DTRELEVANCIA%20desc,%20NUMACORDAOINT%20desc/0/%20?uuid=4d054560-8a3d-11e. Acesso em 2 ago. 2019.

BRASIL. Tribunal de Contas da União. Acórdão de decisão que reconheceu a legitimidade da prorrogação por reequilíbrio. *Acórdão TCU nº 774/16*. Interessada: Secretaria dos Portos da Presidência da República. Relator: Ministro Walton Alencar Rodrigues. 6 de abril de 2016. Disponível em: https://pesquisa.apps.tcu.gov.br/#/documento/acordao-completo/*/NUMACORDAO%253A774%2520ANOACORDAO%253A2016%2520RELATOR%253A%2522WALTON%2520ALENCAR%2520RODRIGUES%2522%2520COLEGIADO%253A%2522Plen%25C3%25A1rio%2522/DTRELEVANCIA%20desc,%20NUMACORDAOINT%20desc/0/%20?uuid=ed4b0ba0-8a3c-11e9-910. Acesso em 2 ago. 2019.

BULOS, Uadi Lammêgo. *Manual de interpretação constitucional*. São Paulo: Saraiva, 1997.

CÂMARA, Jacintho Arruda. O prazo nos contratos públicos. In: PIETRO, Maria Sylvia Zanella di (coord.). *Tratado de Direito Administrativo*: licitação e contratos administrativos. São Paulo: Revista dos Tribunais, 2014. p. 339-353.

CANOTILHO, Joaquim José Gomes. *Direito Constitucional e teoria da constituição*. 7. ed. Coimbra: Almedina, 2014.

COLSON, Clément. *Cours d'economie politique*: les travaux publics et les tranports. 2e éd. Paris: Gauthier-Villars, 1910.

CRETELLA JÚNIOR, José. *Comentários à Constituição brasileira de 1988*. 2. ed. Rio de Janeiro: Forense Universitária, 1993.

ESCOLA, Héctor Jorge. *Tratado integral de los contratos administrativos*: parte especial. Buenos Aires: Depalma, 1977.

FREITAS, Rafael Véras de; RIBEIRO, Leonardo Coelho. O prazo como elemento da economia contratual das concessões: as espécies de "prorrogação". In: MOREIRA, Egon Bockmann (coord.). *Contratos administrativos, equilíbrio econômico-financeiro e a taxa interna de retorno*: a lógica das concessões e parcerias público-privadas. Belo Horizonte: Fórum, 2017. p. 283-300.

GARCIA, Flavio Amaral. As parcerias público-privadas: prazo e prorrogação. In: JUSTEN FILHO, Marçal; SCHWIND, Rafael Wallbach (coord.). *Parcerias público-privadas*: reflexões sobre os 10 anos da Lei 11.079/2004.

São Paulo: Revista dos Tribunais, 2015. p. 579-608.

GRECA, Alcides. *Derecho y Ciencia de la Administración Municipal*. 2. ed. Santa Fé: Universidade Nacional del Litoral, 1943.

GUIMARÃES, Bernardo Strobel; GAGGIANO, Heloísa Conrado. O que mudou no direito das concessões com a aprovação da MP n. 752: perguntas e respostas. *Revista de Direito Público da Economia*, Belo Horizonte, v. 15, n. 58, p. 9-22, abr./jun. 2017.

HESSE, Konrad. *Elementos de Direito Constitucional da República Federal da Alemanha*. Tradução: Luís Afonso Heck. Porto Alegre: S. A. Fabris, 1998.

JÈZE, Gaston. *Principios generales del Derecho Administrativo*. Traducción: Julio N. S. M. Almagro. Buenos Aires: Depalma, 1950.

JUSTEN FILHO, Marçal. A ampliação do prazo contratual em concessões de serviço público. *Revista de Direito Administrativo Contemporâneo*, São Paulo, v. 4, n. 23, p. 109-135, mar./abr. 2016.

LAUBADÈRE, André de; MODERNE, Franck; DEVOLVÉ, Pierre. *Traité des contrats administratifs*. Paris: LGDJ, 1983.

MARQUES NETO, Floriano de Azevedo. *Concessões*. Belo Horizonte: Fórum, 2015.

MEIRELLES, Hely Lopes. Licitação, adjudicação, anulação. In: MEIRELLES, Hely Lopes. *Estudos e pareceres de Direito Público*. São Paulo: Revista dos Tribunais, 1981. p. 42-63.

MELLO, Celso Antônio Bandeira de. Consulta da Associação Brasileira de Concessionárias de Rodovias – ABCR. In: CARVALHO, André Castro (org.). *Contratos de concessão de rodovias*: artigos, decisões e pareceres jurídicos. São Paulo: MP, 2009. p. 51-65.

MELLO, Rafael Munhoz de. Prorrogação de concessão de serviço público. *Revista de Direito Público da Economia*, Belo Horizonte, v. 12, n. 46, p. 207-222, abr./jun. 2014.

MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. *Curso de Direito Constitucional*. 4. ed. rev. e atual. São Paulo: Saraiva, 2009.

MORAIS, Antão de. Serviço telefônico, expiração do prazo da concessão, fixação, fiscalização e revisão de tarifas, taxa de expansão do serviço. *Revista de Direito Administrativo*, Rio de Janeiro, v. 49, p. 445-464, jul./set. 1957.

MOREIRA NETO, Diogo de Figueiredo; FREITAS, Rafael Véras de. *A nova regulação portuária*. Belo Horizonte: Fórum, 2015.

PINHEIRO, Armando Castelar; RIBEIRO, Leonardo Coelho. *Regulação das ferrovias*. Rio de Janeiro: FGV, 2017.

RODRIGUEZ-ARANA, Jaime F. *La prórroga en los contratos administrativos*: concepto, funciones y régimen en los contratos de obras y en los de gestión de servicios públicos. Madrid: Montecorvo, 1988.

SAADI, Mário; SANTOS NETO, Raul Dias dos. Prorrogação antecipada de prazo de contratos de concessão. *Revista de Direito Administrativo Contemporâneo*, São Paulo, v. 4, n. 27, p. 79-107, nov./dez. 2016.

SANTOS, Rodrigo Valgas dos. Concessão de serviço público: a prorrogação do prazo de exploração para recomposição do equilíbrio econômico-financeiro do contrato. *Revista Interesse Público*, Porto Alegre, v. 8, n. 38, p. 85-111, jul./ago. 2006.

SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. Curso de Direito Constitucional. 2. ed. rev. atual. e ampl. São Paulo: Revista dos Tribunais, 2013.

SAVIGNY, Friedrich Karl von. *Metodología jurídica*. Traducción: J. J. Santa-Pinter. Buenos Aires: Depalma, 1979.

SCHWIND, Rafael Wallbach. Prorrogação dos contratos de arrendamento portuário. In: PEREIRA, Cesar; SCHWIND, Rafael Wallbach (org.). *Direito portuário brasileiro*: Lei 12.815, porto organizado, poligonal, arrendamento e autorização, arbitragem, São Paulo: Marcial Pons, 2015. p. 494-518.

SILVA, José Afonso da. *Aplicabilidade das normas constitucionais*. 2. ed. rev. e atual. São Paulo: Revista dos Tribunais, 1982.

TAVARES, André Ramos. *Curso de Direito Constitucional*. 12. ed. rev. e atual. São Paulo: Saraiva, 2014.

TORGAL, Lino. Prorrogação do prazo de concessões de obras e de serviços públicos. *Revista de Contratos Públicos*, Coimbra, n. 1, p. 219-263, jan./abr. 2011.

Para publicar na revista Brasileira de Políticas Públicas, acesse o endereço eletrônico www.rbpp.uniceub.br
Observe as normas de publicação, para facilitar e agilizar o trabalho de edição.