THE REGULATORY POWER OF REGULATORY AGENCIES IN BRAZIL: ORIGIN, CONTENT AND LIMITS

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Abstract: This paper aims to discuss the origin, content and limits of the normative power of regulatory agencies in Brazil. We present the framework for regulatory agencies in the Brazilian legal system; we specify its legal status and the way the 1988 Constitution provided for the State's role in the economy; and we investigate how this role was modified after the adoption of the constitutional reforms during the 1990's. Then we address laws that decentralized the regulatory activity, in compliance with the constitutional purposes, by creating agencies that shifted the legal power to new bodies of executive power. At last we draw the distinction between regulatory power and the power to regulate, in order to specify the limits of the exercise of regulatory activity, especially considering the principles of legality and separation of powers.

Keywords: Regulatory agencies; Normative power; Decentralization; Legal reservation; Separation of powers

1 Introduction

The Brazilian constitutional model adopted the capitalist system of production, attributing, however, great responsibilities to the State regarding the guarantee of social rights, a political phenomenon denominated as a capitalist Social State. With the deepening of the fiscal crisis of the Brazilian State, the State's way of acting in the economy was rethought, since the maintenance of the Entrepreneurial State no longer faced the constitutional needs of providing efficient and universal services to the population.

Institutions imported from Comparative Law, regulatory agencies gained relevance in Brazil from the re-reading of the economic activity of the Brazilian State, occurred after the constitutional reforms of the 1990s, since the state's performance in the economy migrated from the bureaucratic to the managerial model, considering the implementation of partnerships with the private initiative, through mechanisms that align this activity to the constitutional purposes.

Therefore, this regulatory activity is endowed with regulatory power and, once conferred to regulatory agencies, implies the competence to issue coercive norms of abstract and generic character. Despite this grant legitimated by the Federal Constitution itself, the regulatory power of regulatory agencies in Brazil is a polemic issue, due to the transfer of normative competence to an organ different from those existing in the scope of the Legislative power, traditionally in

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charge of the production of norms. This attribution is often analyzed in the face of the principles of legality, administrative typicality and separation of powers, which is often approached from its traditional perspective, reasoning incompatible with the complexity of the modern State.

Therefore, with the objective of approaching the regulatory power of the regulatory agencies in the face of these questions, the present work will consider the present paradigm of the action of the Brazilian State in the economy, drawing arguments by which it is not allowed that the regulatory power is the result of a mere delegation of the National Legislative Power through autonomous regulations.

From this perspective, the limitations for the exercise of regulatory power by the Brazilian regulatory agencies from a political perspective will be addressed, considering the need of independence of these organs before the political powers and, also, from a constitutional perspective, regarding efficiency as a principle to be observed by the public administration.

Finally, these limits will be treated from a legal point of view, in view of the need for harmony between administrative rules with individual rights and guarantees and with the constitutional principles of legality and separation of powers, which must be understood from a modern constitutional perspective, consistent with the complexity of current social conflicts.

2 Overview of regulatory agencies under Brazilian law

In the Brazilian Constitution of 1988, which is in force today, there are markedly different ideological positions, oscillating between the models of the Liberal State and the Social Welfare State, which can be clearly observed from the reading of Article 3, a mechanism that directs the state efforts primarily to promote a free, fair and solidary society, national development and the promotion of the common good.

To fulfill the objective of encompassing opposing political perceptions (if one considers the political-ideological concepts referring to capitalism and classical socialism), this constitutional text is analytical and directing, completely regulating the public and private spheres.

In the section devoted to the "economic order" it is possible to observe the constitutional objective of adopting a partially capitalist production system, by making this system compatible with other interests of predominantly social nature, such as the social allocation of property, consumer protection, reduction of regional and social inequalities, etc.

To enable the formation of a capitalist social State, it was necessary to create and institutionalize strong instruments of state intervention in the economic domain, so that the Brazilian State could exercise its regulatory function as widely as possible, always with a view to the attainment of its social aims, while observing the liberal principles mentioned above, although considerably mitigated.

The new Brazilian economic and social reality that was in force after the re-democratization process that took place in the late 1980s, inspired by the pursuit of social rights effectiveness, required a new form of State action in the economy, notably in the performance of the regulatory function dedicated to ensuring the efficiency of public instruments aimed at satisfying the needs of the population.

In this sense, in the 1990s, some reforms of the Brazilian State were initiated to redirect State action in the economy, especially in view of the difficulties faced in obtaining the necessary financing to maintain the direct provision of various activities of undeniable public interest.

As one of the measures necessary to address the so-called fiscal crisis of the Brazilian State, and faced with its inability to pay for the provision and to fund the universalization of public services in the globalization process, several constitutional reforms were implemented aiming at reframing the state function and valuation of the private performance in certain economic segments that until then were of exclusive exercise of the State. This phenomenon – the transfer of competence, but not of title, from the State to private entities – implied a strengthening of the regulatory function of the State.

The filling of positions in public enterprises by the political power was one of the major causes of the failure to offer public services to the population, a fact that also established the need to protect the agencies from this pernicious practice, reason for which the technical aspect of the regulatory function was privileged.

To achieve the new objectives corresponding to the regulatory procedure, the changes inserted in the model sought to reduce the risks of capture of the regulatory agencies by the political powers, granting independence and autonomy to the agencies, and ensuring that the choice of their managers was made in the most exempt way possible.

At this point, one should not confuse independence of political pressures with political autonomy.

The policies implemented by the regulatory agencies, because they are State policies – legally defined above the discretion of the governments –, give more exemption and autonomy in the performance of their duties. However, this does not allow us to say that these agencies enjoy political autonomy, because it is not allowed to define what policies will be implemented, but simply the implementation of legally defined policies to achieve the constitutional objectives.

In this context of change in the State's performance profile, regulatory agencies have gained a significant role in the Brazilian administration, especially with the purpose of assuming a role of "promoter and regulator of social and economic development" and promoting the increase of public governance, understood as the "capacity to implement public policies, from the perspective of efficiency, efficacy and effectiveness, through the insertion of new organizational models and new partnerships with civil society".

Thus, the decentralization of state power was carried out in the economic sphere, with the subsequent privatization of public enterprises, for example. To meet this greater need for governance, Law No. 9,491 / 1997 was issued, which reformulated the necessary basis for consolidating this process, which was already contained in Federal Law No. 8,031 / 1990. Article 2 of Law 9,491 / 1997 stipulated what could be the object of privatization, highlighting public companies and public services.

Transformations carried out by said plan are: a) withdrawal of restrictions on foreign capital; b) easing of state monopolies; and c) denationalization and privatization and the concession of public services to private services.

Article 174 of the Constitution of the Republic (BRASIL, 1988) clearly defines the functions of the Regulatory State: "as a normative agent and regulator of economic activity, the State shall exercise, in the form of the law, the supervision, incentive and planning functions, being this determinant for the public sector and indicative for the private sector". Under this command, the Brazilian regulatory agencies were created, and they were granted the power to create norms of generic incidence, a power called normative. Examples of this model are Law No. 9,427 / 1996, which created the National Agency for Electrical Energy (Agência Nacional de Energia Elétrica – ANEEL), and the Law No. 9,472 / 1997, which created the National Telecommunications Agency (Agência Nacional de Telecomunicações – ANATEL).

3 The legal bases of the regulatory power conferred on the regulatory agencies

The reformatting of Brazilian state performance in the economy therefore required a managerial performance substantiated in the decentralized regulatory activity of direct administration, through autarchies created specifically for this purpose. From a legal point of view, such agencies enjoy independence from the powers of the State, except for the Federal Executive Branch, which establishes rules that condition its independence.

Given the above, the regulatory activity consists of a State activity, in view of the implementation of policies defined by law. Within the scope of this regulatory function is the regulatory power of the agencies, adopting a flexible perspective of regulatory power, since, in a strict sense, the norms issued by regulatory agencies are not set out in rules, since this regulatory function is exclusive to the head of the Executive Branch.

Therefore, the regulatory activity is exercised in a decentralized manner in function of the new managerial model adopted after the constitutional reforms carried out in the 1990s, which presupposes the regulatory power necessary to carry out the purposes established by the Constitution and regulated by the legislation. The regulation of the statutes issued by the agencies are derived from the Constitution itself, since they are issued in accordance with the concrete directives established by the Brazilian Legislative branch. Therefore, this normative function

must be exercised in the form determined legally and directed to the achievement of the objectives specifically chosen by Parliament.

Regarding this matter, the analysis of the origin of the regulatory power of regulatory agencies by Cuéllar (2001) is of great relevance, followed by the understanding that it is not a delegation made by the Legislative Branch, since a current re-reading is necessary of separation of powers. In this approach, the concept of delegation, which implies precarious and exceptional normative power, does not conform to the constitutional rule.

In any case, it should be noted that, since delegation is always precarious and exceptional, if the regulatory power of the agencies derives from delegation, it could, in theory, be revoked, which would lead to the abolition of agencies – or frustration of their essential legal nature. Moreover, in the Brazilian case, unlike the American, there is no political control over the acts that result from the exercise of regulatory power by the agencies. Maybe that's the nodal point. The delegation must be controlled *pari passu* by the delegate – which is unfeasible in the Brazilian system. Thus, it seems to us that the obstacle to justification of the attribution of regulatory power to agencies as delegation of powers is not the "principle of separation of powers", but the very legal nature of the act of delegating.

Even though there are divergent positions regarding the origin of this power in Brazilian doctrine, and also regarding the exclusivity of the head of the Executive Branch in the regulatory activity, it is perfectly possible to conclude that, although the regulatory activity was decentralized to indirect administration by law approved by the national parliament, notably through autarchies under special regime (see the cases of ANEEL, ANATEL and ANP), the legislative power does not derive from delegation of the Legislative Branch.

This conclusion is based on a flexible interpretation of the principle of separation of powers and on the fact that the delegation implies control by the delegating power, given the precarious nature of the delegation and the temporary character of this institute, elements that do not fit the constitutional norm.

On the other hand, although the figure of autonomous regulations is admitted in some cases in Brazil, it is necessary to note that the theory of autonomous regulatory power does not offer a consistent response to the legal framework of normative activity performed by regulatory agencies, since this activity is attached to the purposes specified constitutionally, so that treating it as a free activity could bring unpredictability to regulatory executive performance, affecting citizens' fundamental rights.

4 Normative limits imposed on the performance of regulatory agencies

Therefore, it is necessary to highlight the content and limits of the regulatory power of regulatory agencies in Brazil. For this, it is essential to distinguish the normative production

carried out outside the Legislative Branch, from the differentiation between regulatory function and regular function. Carvalho Filho (2007) makes this differentiation, noting that the regulatory function is not exercised exclusively for the purpose of supplementing the existing norm: "the expressions 'regulatory' and 'regular' do not have synonymy: that means complementary, specify, and presupposes whenever there is a superior hierarchical norm capable of complementation; this, in the broadest sense, indicates disciplinary, normative, and does not require that its objective is to complement another norm."

Therefore, it is important to understand that the regulatory power exercised in the regulatory process carried out by the regulatory agencies is not merely regulatory power, that is, exercised with the exclusive purpose of complementing the meaning of a legal mechanism, making it feasible. There is a talk about a power to produce abstract and generic rules as a result of constitutional provision, see the principle of efficiency inserted in the *caput* of Article 37 of the Federal Constitution by virtue of Constitutional Amendment No. 19/98.

In this sense, it is possible to conclude that the content of the normative regulatory power granted to the agencies must be attached to the respective law of creation of the regulatory agency, specifically because these bodies lack constitutional provision. Notwithstanding the necessary restriction of regulatory activity to legally established standards, these regulations are of a certain magnitude if we consider the technical matters dealt with by the agencies and which therefore require a transfer of power through the decentralization of the regulatory function.

Thus, the critical task assigned to legal scholars is to assess whether the agencies have extrapolated their regulatory power from the figure of the standards established by law. These parameters must therefore be interpreted in a way that does not imply restriction of the powers granted, nor in the illegal extension of these powers.

This analysis of the adequacy of the regulations to the legally established limits implies verifying that certain objective criteria were observed by the regulatory agencies when exercising their regulatory power. According to Carvalho Filho (2007), the first requirement is that such agents are not politicians, but administrators. The second is that of efficiency, which can be observed by verifying the technical capacity of its managers, as well as the need to ensure a structure suitable for the performance of the functions conferred by the legislation.

For this author, in view of the need for norms and state action compatible with the level of technical complexity of current social and economic issues, there are no major problems in the regulatory power of regulatory agencies, under the aspect of legality or constitutionality, and there are greater challenges regarding the ability of these agencies to exercise regulatory activity in an efficient manner. According to the author, "what one wants is that they reach the goals and that they pursue results" (CARVALHO FILHO, 2007, p.).

The most significant limitation of the regulatory power of regulatory agencies lies in the law. As mentioned earlier, the power to issue generic and abstract rulings derives from the

Constitution, but the task of specifying all the functions and objectives of the agencies in detail is carried out through laws approved by public (political) agents elected democratically and directly by the holder of all republican power, that is, by the people.

In this sense, part of the content of Pereira's work (2009) is highlighted, in which the author emphasizes that, although there is no political autonomy in the regulatory agencies, their agents, as public agents, seek their legitimacy in foundations that go beyond legislation, creating and using means of connection between the State and society.

Therefore, what is important to say here is that, although this regulatory power is limited by the legal standards approved by the democratically constituted parliament, the implementation of normative legal purposes may extend the basis of the regulatory power of these agencies beyond the legislation itself, through the intervention of the parties using the instruments of democratic participation made available by the agencies themselves.

In addition to the limits related to the efficiency and independence manifested by Carvalho Filho's thinking, there are others related to the normative performance of the agencies treated by the specialized doctrine, which are of great relevance for this work, so that the limits outlined by Cuéllar (2001) will be exposed.

For this author, the first limitation is in the law itself: the *contra legem* regulation is not admissible. Here it is important to note that the principle of legality, according to the post-positivist theory, is treated as a principle of what is legal, given the necessary observance not only of the norm as a positive instrument, but also of other instruments of a cogent nature of our legal system, such as principles.

The second limitation arises from the application of the principle of typicity to administrative law: the regulation cannot be edited to deal with matters requiring a certain and determined legislative procedure. Regulatory power also cannot face equality, liberty and property, and it is forbidden for this power to promote changes in the state of persons.

It cannot, likewise, seek to achieve facts already implemented according to the previous legal order, that is, it cannot have retroactive effects, except to work for the benefit of the private. Every emanation of this power, moreover, depends on reasoning. It should also observe the constitutional division of competences of the federative entities, noting that this division does not mean complete separation of functions according to the classical theory of separation of powers, but an interdependence between these powers, if all of them, in specific situations, perform activities related to the typical function of the other.

Finally, this author emphasizes that these acts, as well as those coming from the Legislative Branch are subject, under the Brazilian constitutional order, to the control carried out by the Judiciary Branch. As can be seen from the limitations discussed here, these are very relevant subjects if analyzed in relation to the principles of legal reserve and separation of powers. However, the analysis of the overflow of these limits must take place according to the new role

of the State performance in economic activity and with the efficiency principle included in Article 37 of the constitutional text.

5 Conclusion

In view of the above, it is possible to observe that the change in the paradigm of the Brazilian State's performance in the economy, from a bureaucratic and direct action, from a developmental matrix, to a managerial performance that seeks to establish guidelines and reconcile the interests of the State with those of the private initiative, making it perform activities aiming at reaching the public interest established by the constitution and infra-constitutional legislation, made necessary a more structured regulatory action of a technical and independent nature.

In this sense, the regulatory power currently exercised through a decentralized structure, the regulatory agencies, derives from the constitutional text, in accordance with the legal standards emanating from the Legislative Branch, and this action must take place in full compliance with the Brazilian legislation (*secundum legem*) and the general principles of law.

The content of this action, therefore, must be in accordance with the principles of public administration outlined by Article 37 of the constitutional text. Among which, the efficiency deserves attention, since the decentralization of regulation and the privatization of economic activities are due to the unfeasibility of the state's performance as entrepreneur.

In addition, this normative activity is limited, not being able to innovate in the legal system (*ab ovo*), nor to oppose the general principles of law and the law in a broad sense, whether to impose aggressions on freedom, equality and property rights, or to operate retroactively, except to benefit the individuals involved in the regulatory activity. As administrative acts, such rules must be reasonably substantiated and subject to judicial control.

Finally, it is possible to conclude that this normative activity does not imply an affront to the principles of legal reserve and separation of powers, according to the treatment given by modern doctrine, which admits a relativization of the former to establish matters that are absolute, relative, formal reserve or law material, and the second to establish that the complete separation of powers in tight functions is also no longer allowed in modernity, so the legislative activity of the Executive Branch is perfectly constitutional, provided that the limitations herein are observed.

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