

The four pillars for the preservation of the regulatory agencies' technical impartiality in Brazil

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Abstract

Purpose – The purpose of this paper is to debate on how to achieve, in countries that have invested in the North American model of the regulatory state, the greatest efficiency in creating norms for the organization of public and private activities in order to guarantee the autonomy and technical impartiality required for the proper functioning of regulatory agencies.

Design/methodology/approach – This paper describes the development of the legal framework regarding regulatory agencies in Brazil. The research was based on bibliographical data, media reports, and the Brazilian Supreme Court decisions.

Findings – The regulation dissemination through regulatory agencies in Brazil has given rise to a series of controversies concerning the limits of their performance and the extent of their technical discretion. According to the findings, it is concluded that these independent agencies should be guided by the following four pillars: (1) the legal rule of fixed-term in office; (2) the principle of lesser control intensity (deference) of the agency acts; (3) the prohibition of contingency of agencies' budgetary resources; and (4) the prohibition of agency powers suppression. Otherwise, the institutional capacity of agencies will be diminished and their neutral action in technical matters will be compromised.

Originality/value – This paper shows how enhanced autonomy and technical impartiality can be useful for better regulatory governance in other countries, preventing them from suffering from the same problems that have occurred in Brazil.

Keywords Regulatory agencies, Fixed-term, Judicial review, Contingency, Technical autonomy

Paper type Research paper

Introduction

The emergence and diffusion of regulatory agencies in Brazil essentially relates to the federal government's concern in the mid-1990s with the State's transformation into a new public management model. The project aimed to stay apart from patrimonialism and bureaucracy, leading to profound reforms in the Brazilian legal system, e.g., the Constitutional Amendment 19/1998, the legislation related to the expansion of the Third Sector (Statutes 9,637/98, 9,790/99 and 13,019/14), the National Privatization Program (Statute 9,491/97), and the creation of regulatory agencies.

These reforms have following points in common: the efforts towards de-bureaucratization, the increase of the State's efficiency, and the focus on the quality of public services (even those not directly rendered by the State). In addition, privatization has led to private parties showing greater participation in the economy, as well as greater provisions of public services.



That resulted in a higher demand for investments by the private sector, which also needed a stable and predictable regulatory environment (Mendes, 2000, pp. 108-109). During that time, Brazil started a beneficial process – apparently irreversible – of distancing itself from the direct execution of various economic activities and public services, which imposed a broader and more efficient regulatory action. It is noteworthy that, in the telecommunications sector, the creation of a regulatory agency occurred even before the State turned over the activity. Indeed, ANATEL (The National Telecommunications Agency) was created in July 1997, while EMBRATEL's (Brazilian Telecommunications Company) control was sold to the private sector one year later. This episode represents a policy with strong legal repercussions executed in a carefully planned manner.

Inspired by the US regulatory model, which relies on independent agencies, the Brazilian Federal Government created the most diverse regulatory agencies. In some states and municipalities, the focus was on multisectoral regulation. For instance, the State of Rio de Janeiro has two regulatory agencies, AGETRANSP (Transport Regulatory Agency) and AGENERSA (Energy Regulatory Agency), and some municipalities have also created their own agencies, such as AGERSA (Municipal Agency for Regulation of Public Services of Cachoeiro de Itapemirim), and AGEREG (Regulatory Agency of the Delegated Public Services of Campo Grande).

These agencies include features that allow regulations to be more neutral and efficient, which are crucial for a more rational decision-making process (West, 1983). Their legal framework strengthens their autonomy and protects them against harmful political influences in the decision-making process. Moreover, the reliance on technical regulation through special agencies was influenced by a historical context in which, according to Guerra (2008, p. 75), “the abstract formulas of law and judicial discretion no longer bring all the answers”.

A patrimonial and bureaucratic state reveals itself as one in which there is a confusion between the State's and sovereign patrimony (Adams, 2005; Rodriguez, 2008). Furthermore, power is exercised with traditional domination based on bureaucracy and, according to Max Weber (1999, p. 248), there is a focus on “liturgical satisfaction of the political and economic policies of the Lord”. Because the bureaucratic state does not aim for results, it must be abandoned and replaced by a management state. In the words of Lane (2003, p. 4), “a theory of governance in the public sector must be concerned with how things are done and the results”. In Brazil, the management state was profoundly inspired in the English model of new public management and, therefore, the hierarchy was replaced by a consensus-oriented environment (management by hierarchy to management by contract) (Ferlie *et al.*, 1996, p. 13).

The ideas presented in this article can inspire other countries that seek an improvement in their regulatory state model. The state's option for organizing economic activities using regulatory agencies requires a theoretical analysis that honors the presence of minimum characteristics so that they can act with reinforced autonomy. Without a minimum legal framework, regulatory agencies are not able to develop a public policy.

This paper considered previous research on failures in regulatory agencies, especially Black (1987), Sunstein (1990), Moran (2002), and Baldwin *et al.* (2012).

The main purpose of this article is, therefore, to present a perspective on how to achieve – in countries that have invested in the North American model of the regulatory state – the greatest efficiency in creating norms for the organization of public and private activities. Even though the regulatory state exists based on a national model (Moran, 2002), it is possible to think of some universal regulatory standards for state regulatory agencies, so they can have their technical decisions preserved in the greatest social benefit.

The main advantage of regulatory agencies comes from their independence and greater technical impartiality. The attributes of these autarchies allow their decisions to become, in theory, immune to political influences. This lack of excessive political influence is able to

strengthen the state capacity to take good and efficient decisions and avoid corruption (Bersch *et al.*, 2017). According to Paulo César Melo da Cunha (2003, p. 57), regulation through regulatory agencies “involves the creation of technical norms, depoliticized, that apply to certain market segments to guarantee the free choice among suppliers in a competitive regime and with affordable prices”.

Most legal scholars believe that regulation is better performed by agencies as they have the autonomy to develop impartial technical norms. They can also issue regulations capable of settling a variety of interests through politically neutral technical discretion, i.e., the authority given to the administrator to decide technical issues in an attempt to limit judicial control and prevent judicial ruling as a replacement for the administrator’s choices (Guerra, 2008). Thus, in times of better regulation, polycentric regulation, smart regulation, nudging, expropriating regulation, and sustainable administrative regulation, one shall recommend that regulatory agencies with a truly enhanced autonomy organize economic activities and public services.

It is quite right that it is not easy to separate technical matters from political choices. In some cases, that is even impossible because the adoption of a given technical criterion may depend on a political evaluation. There are various examples, such as the purchase of fighter aircrafts by the Brazilian State and the decision concerning the digital television system to be adopted in the country.

So, it is hard to define technical impartiality in practice. Theoretically, impartiality exists whenever the regulatory agency makes decisions about the arguments presented by the involved parties and the available scientific evidence. Technical impartiality is crucial for regulatory success and occurs whenever the agency’s decisions consider the best answer that science can offer to satisfy the public interest. This technical neutrality can encourage state policy to adopt consistency and continuity, combining, as Majone (1999, p. 9) reminds us, “expertise with a rule-making or adjudicative function”.

One of the factors that, for example, can impair the technical impartiality of the agencies is the unwanted capture of their agents by a specific segment (Boehm, 2005; Engstrom, 2013). Thus, a state’s normative framework must create and reinforce rules so the agency’s technical decisions are not overinfluenced by external political factors that can compromise the achievements of the best regulatory solutions. Nevertheless, this understanding of technical impartiality does not dispel the criticisms about the meaning of the words impartiality and technical neutrality. With this concern in mind, we identified four pillars for sustaining the technical autonomy and the impartiality of Brazilian regulatory agencies. They include the legal rule of fixed-term in office; the principle of lesser control intensity (deference) of agency’s acts; the prohibition of the contingency of agencies’ budgetary resources; and the prohibition of agency powers harmful suppression. However, it must be acknowledged that this list is not exhaustive and that other rules applicable to agencies are also important. By way of illustration, one can mention the mandatory quarantine of leaders who move away from the office.

Besides, other countries’ regulatory legal framework may consider the pillars described in this article, thereby allowing them to avoid the same problems that occurred in Brazil. Regulatory governance should aim to improve the performance of public administration, and this highlights concern with the effective functioning of the regulatory agencies. The pillars must coexist and thus create a kind of protective shield in favor of a fair, exempt and proportional regulation. Those aspects contribute to a more efficient public policy in the contemporary world where good and smart regulation is crucial for state decisions that demand stability and continuity. Therefore, every regulatory state should at least respect all four guidelines above mentioned.

The identification of minimum features in a regulatory agency model is essential to ensure its autonomy. And the need to implement public policies in a more rational and technical way

demands that any country in the world provide its agencies with some fundamental prerogatives as the ones we will point out in this paper.

The fixed-term in office and the Brazilian Supreme Court's view

In Brazil, the independent agencies' statutes usually require the Senate approval of the appointed board of directors and to establish a fixed-term for such administrators. Article 6 of Statute 9,986/00 (Federal Regulatory Agencies Act) provides that "the term of office of Commissioners and Directors shall be determined by the law of each Agency". In general terms, agency directors will only lose their position if they resign or are dismissed due to a lawsuit with *res judicata* or an administrative disciplinary proceeding (article 9 of Statute 9,986/00). Brazilian statutes – such as 9,986/00, 9,427/96 and 9,478/97 – are also concerned with intentional phenomenon that directors' terms will never expire at the same time, which allow for the regular continuity of services.

There is a belief that with fixed-terms, the agency may be able to make decisions devoid of political influence. The one who performs the regulatory function at a high level would, in the theory, be completely comfortable in making decisions contrary to the Government authorities' interests. Even though regulatory agencies may not create and define public policies, since they are deprived of democratic legitimacy, one cannot deny that some of their technical decisions can have disastrous effects on governing authorities.

Experience has shown, however, which legal provisions that prevent directors to be discharged *ad nutum* during their terms in office have not preserved the expectations of technical and impartial regulations. When a political authority still in office appoints a member of the agency board, there is a tendency for an alignment that may compromise the essence of the agency's impartiality. Hardly an agent will displease the one that has appointed him for a relevant public position, even if he may not be easily dismissed. In other circumstances, where the appointing authority is no longer in office, there is a high risk that the agency director will act contrary to the governmental interests. In one case, there was excessive compliance and in the other there was exacerbated intolerance. Thus, technical neutrality is not an easily achievable target. Nevertheless, we must state it is easier to obtain technical neutrality with the fixed-term rule than without it.

After the emergence of Brazilian regulatory agencies in the second half of the 1990s, the Supreme Court has already had the opportunity to judge the constitutionality of the fixed mandate. In ADI (Direct Action of Unconstitutionality) 1,949/RS ([Brazilian Supreme Court, 2014](#)), filed by the Governor of the State of Rio Grande do Sul, there was a controversy concerning the State's Statute 10,931/97. The plea was directed against a legal rule that required a previous approval of the state Legislative Assembly for the nomination of AGERGS' (State Agency for Regulation of Delegated Public Services in *Rio Grande do Sul*) counselors, as well as against a legal rule that established the need of the Assembly to agree with the *ad nutum* dismissal of those counselors.

Without any further controversy, the statutory provisions concerning the Legislative Assembly's approval were considered constitutional by the Brazilian Supreme Court, based on article 52, item III, letter "f" of the Constitution. That provision is subject to the principle of symmetry, so that State members may also submit the nomination for an effective position within a public entity to the Legislative Assembly's approval.

As to the counselor of AGERGS' dismissal, the law of the State of *Rio Grande do Sul* established that it could only occur with the Legislative Assembly's consent. This kind of rule, which extends the powers of the state legislature to the detriment of the executive branch, without a similar provision in the Federal Constitution, is unequivocally unconstitutional. Nor is there any complexity to reach this conclusion. The checks and balances system among state powers is dictated by the Brazilian Constitution and the ordinary legislator cannot interfere in

this dimension without violating the separation of powers principle. Moreover, this was what the [Brazilian Supreme Court \(2014\)](#) decided, according to the excerpt from the judgment:

although the participation of the head of the Executive is necessary, the exoneration of the regulatory agencies counselors cannot be left to the discretion of this Branch. This could undermine the nature of that special regulatory agency, which is intended for the regulation and supervision of public services provided within the framework of the political body, the reason why the law has given it a certain degree of autonomy.

The constitutionality of the fixed-term in regulatory agencies was thus recognized. But how can we reconcile what was decided in ADI 1,949 ([Brazilian Supreme Court, 2014](#)) with the Brazilian Supreme Court's Precedents number 8 (which do not preserve the fixed-term), 25 (which do not preserve the fixed-term), and 47 (which guarantees it in the scope of public universities)? This conciliation is not an impossible task. An alternative is to consider that, in the Supreme Court perspective, the fixed-term must be preserved in indirect public administration entities with enhanced autonomy, like public universities and regulatory agencies. In the case of a simple autarchy, the head of the Executive Branch may dismiss its directors at any time, even during their term in office.

Deferent and non-deferential control of the regulatory agencies acts

A judge who controls a specific regulatory agency act may not have full knowledge of the reasons behind that technical norm. For that reason, sometimes a judge that only considers the aspects and arguments presented in a unique suit may evaluate an agency rule as unconstitutional. However, once the technical details that justified its publication become known, one can conclude to the contrary that there was nothing wrong with the norm. This finding reinforces the inadequacy of trivializing the use of principles in the jurisdictional control of regulatory agencies' acts. Principles such as the dignity of the human person, free initiative, proportionality, reasonableness, and free will are fundamental in a State based on the rule of law, but their application in a generic manner, dissociated from the specific reality that permeates regulatory agencies, can lead to disastrous results.

It is common sense in the doctrine that the control of regulatory agencies' acts should be exercised with less intensity than the one carried out within other entities of the public administration. The judge must respect the agency's act and he should not replace the merits of the agency's technical decision by his own understanding, which is often exclusively supported by the evaluation of judicial experts. This kind of control is less intense when it comes to what is decided by the regulatory agency, but in contrast it requires a more rigorous observance of the procedural rules necessary for its acts enactment. Therefore, there must be an appreciation of motivation and social participation in the decision-making process.

Deferred control must be favored in technically-complex matters, which is not recommended when faced with sensitive legal cases. In this sense, [Jordão \(2016, p. 57\)](#) states: "on legally sensitive issues, there is a tendency to apply non-deferential judicial control; on technically complex or political issues, there is a tendency to apply deferential judicial control". The principle of deference is now accepted by most administrative scholars, as acknowledged by [Moreira \(2016\)](#), as it has also been invoked, albeit timidly, in REsp (Special Appeal) 1,171,688/DF ([Brazilian Superior Court of Justice, 2010](#)) MCM. Moreover, in REsp 806,304/RS ([Brazilian Superior Court of Justice, 2008](#)), Judge-Rapporteur Min. Luiz Fux defended the following thesis:

(Item) 5. Regulatory agencies have exclusive competence to establish tariff structures that are most suitable to the telephone services offered by the concessionaires.

(Item) 6. The Judiciary must not intervene in the rules established by competent authorities, except in the cases of constitutional control, in order to prevent embarrassments that may compromise the quality of services and even render it unfeasible.

The Supreme Court has already had the opportunity to favor a regulatory agency's decision to the detriment of a law that regulated technical matters. In ADI 5,501 (Brazilian Supreme Court, 2015a), the Supreme Court ruled, in a preliminary decision, that ANVISA's (Brazilian Health Regulatory Agency) ban of synthetic phosphoethanolamine (unproven cancer drug) should prevail over the law that allowed its usage (Statute 13.269/16), under the main reason that drug licensing is more directly related to a regulatory agency competence for scientific regulation than to the National Congress.

One of the reasons for less intense control of agency acts is that these institutions issue more complex technical decisions based on framework laws that promote de-legalization. In Brazil, the admissibility of de-legalization is the result of deep doctrinal controversy; yet, it has already been accepted by the Supreme Court in at least two cases [RE 140,669/PE (Brazilian Supreme Court, 1998); ADI 4,568/DF (Brazilian Supreme Court, 2011)]. According to García de Enterría (2006, p. 186), de-legalization means:

an operation carried out by a law that, without entering the material regulation of a matter, until then regulated by a previous law, opens this subject to the availability of the Administration's regulatory power.

To Souto (2002, p. 47), de-legalization implies:

Withdrawal, by the legislator, of certain matters, from the domain of the law (*domaine de la loi*), passing them to the domain of non-statutory norms (*domaine de l'ordonnance*). The law of de-legalization would not provide details about the matter in question, but would only open the possibility for other regulatory sources, state origin or not, to regulate it by its own acts.

Regulatory agencies have thus been deciding issues of a predominantly technical nature with a broad normative openness. Also, the specificity of their acts demands a higher argumentative burden from the control authorities and deference to the agency's decision.

In the United States, the predominance of a deferential jurisdictional control in respect to the decisions of regulatory agencies dates to the 1984's precedent of the US Supreme Court *Chevron USA Inc. vs. NRDC* (National Resources Defense Council), 467 U.S. 837 (US Supreme Court, 1984) JPS. In this case, it was settled that the Judiciary should accept the unambiguous choice made by the regulatory agency. Besides, if there is any ambiguity within the agency's decision, the agency interpretation should be preferred to the one of the Judiciary, as long it is reasonable.

Non-deferential control of an agency's acts produces clear deleterious effects since the judicial authority does not have full technical expertise on the matter submitted to its judgment, which then may lead to the adoption of a solution that is not suitable for proper regulation. Moreover, the expansion of judicial control may compromise the coherence and uniformity of regulatory practices, hindering the adoption of an efficient regulation model (*better regulation*). Furthermore, the prospective nature of systemic technical regulation is not found in judicial decisions, which are limited and aimed at settling the conflict presented in court. In regulation, there is also a conciliation of multiple interests involved, while the judges, in general, only appreciate the interests of the parties.

Although the application of the deferential principle is commendable, it has also disadvantages that cannot be overlooked. The regulatory agencies' deficit of democratic legitimacy may justify a more intense (not deferential) judicial action, especially when they are faced with legally sensitive issues. Indeed, regulation can drastically affect values of the greatest constitutional scope, and the technical solution is only one among many possibilities. For that reason, control institutions should not be invariably subject to the agency's technical parameters, what is good and necessary, especially because a supposedly scientific criterion used by an agency can result from a previous political evaluation – and it is not always possible to completely separate what is strictly technical from what is political. Therefore, it is

necessary to remember the example of Brazil's digital television system. At the end of a dispute among various systems in the world, the option for the Japanese digital TV system was certainly supported by technical criteria. But the recognition of the predominant role of a certain technical parameter may result from a veiled political assessment since hardly one equipment or system is better than all the others in every technical parameter. Considering the example given, it is possible that one adopted a decision that favors, for example, the political convenience of strategic proximity between Brazil and Japan.

In addition, social control over regulatory agencies acts may influence politically their decision-making process. Regarding the controversial issue of limiting the usage of fixed broadband internet, the apparently exclusively technical ANATEL's (Brazilian Regulatory Agency on Telecommunications) view suffered deep oscillations, due to the unpopularity of the restrictions to the users' rights. In April 2016, ANATEL decided to prohibit the limitation of broadband connection to users that reached the amount of internet hired (franchise). Two months later, in an interview with the Brazilian newspaper *Valor Econômico* (Bortolozzi, 2016), ANATEL's president stated that the agency would not intervene or regulate the private sector business model, leaving the companies to decide on the adoption, or not, of a limited amount of internet (franchises) for customers in fixed broadband contracts. In June 2016, the high controversy surrounding the subject inspired ANATEL to poll the public on this issue.

Given that social control may interfere with the regulatory agency's technical decisions, it may also justify the exceptional adoption of non-deferential judicial control. In synthesis, although the deferential control of agencies acts can encourage a more technically efficient public administration model, the non-deferential one also has its place, especially when there is a need for the effective protection of expressive rights, such as fundamental rights. The initial prestige of the first intensity of control (deferential) cannot annihilate that of the second (non-deferential).

Contingency of the regulatory agencies budget resources and its suffocating effect

On 5 June 2012, TCU's (Brazilian Federal Court of Accounts) Minister Jose Jorge went to the Senate Economic Affairs Committee and highlighted the problem the federal regulatory agencies' high constraint of resources. He also argued that regulatory agencies should have their own budgets, apart from the general budget of the Federal Government. On this subject, one must emphasize that TCU recommended to the Civil House the creation of formal mechanisms/instruments to provide greater stability and greater predictability in the decentralization of resources for agencies and to unbundle their budgets from their respective supervising ministries (Judgment 2,261) (Brazilian Federal Court of Accounts, 2011). However, the same Court also has a decision validating ANEEL's budget constraint (Judgment 2,271) (Brazilian Federal Court of Accounts, 2006).

The constraint of funds allocated to regulatory agencies ends up derailing the adequate performances of special regime agencies and completely undermines their capacity to carry out efficient and independent regulation. The regulatory agency's full institutional capacity can only be exercised if ordinarily earmarked revenues reach their pockets.

Indeed, the proper functioning of a regulatory agency is not exclusively related to the budget constraint. The management quality, too, depends on efficiently-structured measures and processes. It is possible that the resources arrive and that, even so, the agency does not perform as expected. This occurs, for example, when there is a low budget execution, in which the resources received are not spent. But in any case, the constraint makes it much more difficult to adopt regular planning and may significantly jeopardize the agencies' operations. In practice, the constraint effect undermines the autonomy of the regulatory agencies, rendering them deeply ineffective. On the other hand, when a regulatory agency negotiates with the Government to obtain sufficient resources for its operation one may say that it leads

to the harmful effect of transferring technical discretion to those who can decide on the release of budgetary resources.

There is also another problem. Much of the budgetary resources allocated to regulatory agencies come from inspection fees paid by those directly affected by regulations. And everything that is collected under this rubric should be returned to the agency. If everything is not coming back to the agencies' pockets, and yet the agency is working, there are two possibilities: what is collected is excessive and should be reduced, or what is charged as inspection fee is the ideal amount, but the functioning of the agency is substantially impaired. That is why any tolerance of the budget constraints within regulatory agencies ends up unduly pressing the increase of the inspection fees, as verified by Lucas Rocha Furtado in TCU's Judgment 2,271 ([Brazilian Federal Court of Accounts, 2006](#)).

The statute project PL 3,337/04 ([Brazilian Chamber of Deputies, 2004](#)), authored by the Chief of the Federal Executive Branch and which was filed in July 2013, provided for the management, organization, and social control of regulatory agencies. In general terms, the project encouraged public participation in the regulatory agencies decision-making process by the means of public consultations. It also stimulated their deliberation in a collegial manner, increased accountability to the Executive and Legislative Branches, provided for the obligation to sign a management contract with the Ministry to which it belonged, and regulated the agencies' interactions with the competition regulators. However, there were no specific provisions for budget constraints within the regulatory agencies. The Statute 9,986/00, which provides for the management of human resources in federal regulatory agencies, also does not address any prohibition of budget constraints. The absence of legal provisions, in the sense of prohibiting constraints in the regulatory agencies' financial resources, does not, however, deprive the Judiciary of taking the necessary measures to allow these special regime entities to function properly.

The Brazilian Supreme Court has already recognized the need to prevent the constraints of Brazilian National Penitentiary Fund's resources. That fund was created by the Complementary Statute 79/94 and aims to support the modernization and improvement of the Brazilian Penitentiary System. In September 2015, the Supreme Court judged the case ADPF (Claim of non-compliance with a fundamental precept) 347 MC/DF ([Brazilian Supreme Court, 2015b](#)) and acknowledged that the constraint could corroborate the existence of an unconstitutional state of things, which is why it adopted the prohibition of the constraint of the Fund's resources as a structuring measure. In the aforementioned judgment, the Court determined that the federal government should "release the accumulated balance of the National Penitentiary Fund for usage according to the purpose for which it was created, refraining from carrying out new constraints". The realities of Brazilian penitentiaries and regulatory agencies are completely different, but it's important to highlight that the Supreme Court already accepted the possibility of the Judiciary's constraints prohibition. For sure, the ideal solution for the problem would be the existence of a legal provision prohibiting budget constraints meant for the functioning of regulatory agencies, but this type of *inertia* has already been reasonably remedied by the Judiciary.

The reinforced economic-financial autonomy of the regulatory agencies should become a reality through the prohibition of budgetary constraints; otherwise, there is no reason for these special regime entities to exist. Furthermore, in the absence of a legal prohibition regarding the constraint, the forbiddance may be guaranteed by the Judiciary, which is responsible for assuring the technical impartiality of the state regulation, a goal sought by article 174 of the Brazilian Constitution:

As a normative agent and regulator of economic activity, the State shall exercise, in the form of the law, the functions of supervision, incentive, and planning, being this determinant for the public sector and indicative for the private sector.

Harmful suppression of regulatory agencies powers

The enhanced autonomy of regulatory agencies also depends on the preservation of their legally stipulated competencies. The statutes that create regulatory agencies set their tasks very broadly. Statute 9,478/1997, for example, stipulates that ANP (Brazilian National Agency of Petroleum, Natural Gas, and Biofuels) has the ability to prepare bidding documents and to promote bids for oil exploration concessions, including contract conclusion and its supervision. If ANP's president disagrees with the content of bidding documents drafts informally proposed by the head of the Executive Branch, the agency could see its jurisdiction suppressed overnight, through an executive order that would transfer it to the Ministry of Mines and Energy, a body occupied by someone, necessarily, politically aligned with the President of the Republic.

It is unthinkable to consider the enhanced autonomy of a regulatory agency, if their powers may be withdrawn by the Executive power provisional measures. We do not propose a state ossification, in a way that inhibits any kind of changes in competencies between the direct public administration and those special regime agencies. However, the political option for regulation through agencies justifies measures to make it more difficult to weaken their jurisdiction. The fixed-term rule would not reach its goal, if the head of the Executive Branch could, for example, avoid an undesirable regulatory agency technical decision with a new law that removes the agency's powers.

The current wording of article 62, paragraph 1 of the Brazilian Constitution already provides for material restrictions on the issuance of provisional measures. They all have the clear and salutary purpose of avoiding that the Chief of the Executive Power, on the pretext of disciplining urgent and relevant matters, violates the separation of powers, impairs fundamental rights, and weakens the regular functioning of the rule of law. Ideally, that same constitutional provision would also expressly prohibit the issuance of a provisional measure intended to eliminate or reduce the powers of regulatory agencies. As long as this prohibition does not exist, we will have severe weaknesses in the Brazilian regulatory model.

The analysis of the four pillars previously mentioned allows us to identify that they are closely related to each other and that they have a common goal: the objective of enabling a regulatory environment capable of ensuring stable and technically fair responses. The four aspects strengthen the model of a regulatory state that best serves the interests of society, avoiding the excessive political contamination of the regulatory agency's decisions.

Conclusion

We present below the main ideas defended in this paper, which are essentially concerned with preserving the technical impartiality of regulatory agencies considering four structural pillars.

1. In times of better regulation, polycentric regulation, smart regulation, nudging, expropriating regulation, and sustainable administrative regulation, it is recommended that the organization of economic activities and public services be carried out by a self-governing entity with real enhanced autonomy. In addition, this attribute must be secured not only by the means of legal formalities but also with simplistic discourses that disregard the underlying economic interests of those who are affected by regulation.
2. We identified four minimum pillars to support the technical autonomy of Brazilian regulatory agencies, without which their impartiality is compromised. They are: (1) the legal rule of fixed-term in office; (2) the principle of lesser control intensity (deference) of the agency acts; (3) the prohibition of contingency of agencies' budgetary resources; and (4) the prohibition of agency powers suppression.

3. The board members' fixed-terms should be preserved in those entities of the indirect public administration with enhanced autonomy, such as public universities and, more recently, regulatory agencies. During the mandate period in a regulatory agency, it is inadmissible to withdraw it by means of a new legal provision, as well as the *ad nutum* dismissal of any director, since the right to remain in that post is already incorporated into the patrimony of its beneficiary. In the case of a simple entity or an institution governed predominantly by private law (a mixed-capital company or a public company), the Chief of the Executive branch may, on the other hand, exonerate his or her directors at any time, even during the term of office, either because of the Brazilian Supreme Court precedents number 8 and 25 or because of the reasons set forth in ADI 2,225, which recognized the unconstitutionality of Legislative Branch approval as a requirement for position nominations in private law entities of the indirect public administration. The legal regime of the latter authorizes the Chief of the Executive Branch to carry out the dismissal *ad nutum* of its directors at any time.
4. The trivialization use of principles in the jurisdictional control of regulatory agency acts can lead to disastrous results. Principles such as the dignity of the human person, free initiative, proportionality, reasonableness, and free will are fundamental in a State governed by the rule of law, but their use in a generic way and separated from the specific regulated subject matter can unduly undermine the regulation created by an agency.
5. The control of regulatory agencies' acts, whether exercised by the direct public administration, the Court of Accounts, or by the Judiciary, must be guided by the principle of deference, which recommends the controller to avoid the use of vague principles when interpreting the validity of technical rules. One cannot take principles so seriously. Regulatory agencies have thus decided issues of a predominantly technical nature with very wide normative openness. The specificity of their acts requires of the controlling authorities a higher argumentative burden and an initial deferent behavior to the agency's choice.
6. The principle of deference imposes a less forceful control over the content of what is decided by the agency, but, on the other hand, it requires a more rigorous observance of the procedural norms for its acts enactment. Therefore, there must be an appreciation of motivation and society's participation in decisions.
7. Although the observance of the deference principle in the control of regulatory agency acts is commendable, it has some disadvantages that cannot be overlooked. And in this context, its deficit of democratic legitimacy may justify a more intense (not deferential) judicial action, especially when faced with legally sensitive issues. In such cases, the institutions that control regulatory agencies cannot be naive and invariably subject to the technical parameters built by the agency, especially because the choice of a predominant technical criterion can result from a previous political evaluation, and it is not always possible to separate completely the technical and the political. To summarize, although the deferential control of agencies acts can encourage the public administration to become more technically efficient, non-deference also has its place, especially when there is a need for effective protection of relevant rights, such as the fundamental ones. The prestige of the first intensity of control cannot annihilate that of the second.
8. The constraint of allocated funds to regulatory agencies ends up derailing the adequate performance of these special regime entities and completely undermines

their capacity to carry out efficient and independent regulation. The absence of a legal prohibition on the constraint on the budget of regulatory agencies does not deprive the judiciary from taking the necessary measures to allow these special regime entities to function properly.

9. The strengthened autonomy of regulatory agencies is also guaranteed by their legally stipulated competences. Thus, it is unthinkable to ensure its autonomy if it is possible to remove its powers, for example, by employing a provisional measure. Therefore, the state's political and legal options for regulation through regulatory agencies justifies the increased difficulty in reducing its competences. That is why article 62, paragraph 1, of the Brazilian Constitution, expressly prohibited issuing a provisional measure to eliminate or reduce the powers of regulatory agencies.
10. The country that adopts, in its regulatory public policy, a normative parameter that guarantees the observance of the four pillars will be more able to guarantee greater effectiveness in the regulation of technical matters. Furthermore, this will imply a significant reduction of the political influence in the decision-making process of regulatory agencies.
11. The difficulties in the experience of Brazilian regulation as a state policy raised the concern of the four pillars presented in this article. The dissemination of those ideas to other countries may help create a protective shield in regulatory governance that brings, as a practical implication, an improvement in regulation, so that the interests of all parties involved in the regulation are better considered and harmonized.

References

- Adams, J. (2005), "The rule of the father: patriarchy and patrimonialism in early modern Europe", in Camic, C. et al. (Eds.), *Max Weber's Economy and Society: A Critical Companion*, Stanford University Press, Stanford, C.A., pp. 237-266.
- Baldwin, R., Cave, M. and Lodge, M. (2012), *Understanding Regulation: Theory, Strategy and Practice*, Oxford University Press, Oxford.
- Bersch, K., Praça, S. and Taylor, M.M. (2017), "State capacity, bureaucratic politicization, and corruption in the Brazilian State", *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 30 No. 1, pp. 105-124.
- Black, J. (1987), *Rules and Regulators*, Clarendon Press, Oxford.
- Boehm, F. (2005), "Corrupción y captura en la regulación de los servicios públicos (Corruption and capture on the public service regulation)", *Revista de Economía Institucional (Journal of Institutional Economy)*, Vol. 7 No. 13, pp. 245-263, available at: <https://revistas.uexternado.edu.co/index.php/ecoins/article/view/128/116> (accessed 6 May 2020).
- Bortolozzi, T. (2016), "Anatel diz que não pode proibir teles de limitar banda larga fixa (Anatel says it cannot ban telcos from limiting fixed broadband)", *Valor Econômico*, Vol. 1, June, available at: <https://valor.globo.com/empresas/noticia/2016/06/01/anatel-diz-que-nao-pode-proibir-teles-de-limitar-banda-larga-fixa.ghtml> (accessed 17 September 2016).
- Brazilian Chamber of Deputies (2004), "PL 3,337/2004 (Project of Statute 3,337/2004)", available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=248978> (accessed 2 September 2020).
- Brazilian Federal Court of Accounts (2006), "Judgment 2,271, Brasília", 29 November, Brazilian Federal Court, Brazil.
- Brazilian Federal Court of Accounts (2011), "Judgment 2,261, Brasília", 24 August, Brazilian Federal Court, Brazil.

- Brazilian Superior Court of Justice (2008), “REsp 806,304/RS, Brasília”, 2 December, available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=200502124091&dt_publicacao=17/12/2008 (accessed 2 September 2020).
- Brazilian Superior Court of Justice (2010), “REsp 1,171,688/DF, Brasília”, 1 June, available at: https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=200902425347&dt_publicacao=23/06/2010 (accessed 2 September 2020).
- Brazilian Supreme Court (1998), “RE 140,669/PE, Brasília”, 2 December, available at: <https://bit.ly/3tCFqsz> (accessed 2 September 2020).
- Brazilian Supreme Court (2011), “ADI 4,568/DF, Brasília”, 3 November, available at: <https://bit.ly/36Q22Mf> (accessed 2 September 2020).
- Brazilian Supreme Court (2014), “ADI 1,949/RS, Brasília”, 17 September, available at: <https://jurisprudencia.stf.jus.br/pages/search/sjur284744/false> (accessed 2 September 2020).
- Brazilian Supreme Court (2015a), “ADI 5, 501, Brasília”, 19 May, available at: <https://jurisprudencia.stf.jus.br/pages/search/sjur370670/%20false> (accessed 2 September 2020).
- Brazilian Supreme Court (2015b), “ADPF 347 MC/DF, Brasília”, 9 September, available at: <https://bit.ly/2YW6LaZ> (accessed 2 September 2020).
- Cunha, P.C.M. (2003), *Regulação Jurídica da Saúde Suplementar no Brasil (Legal Regulation of Health Plans in Brasil)*, Lumen Juris, Rio de Janeiro.
- Engstrom, D.F. (2013), “Corralling capture”, *Harvard Journal of Law and Public Policy*, Vol. 36, pp. 31-39.
- Ferlie, E., Fitzgerald, L. and Pettigrew, A. (1996), *The New Public Management In Action*, Oxford University Press, New York.
- García de Enterría, E. (2006), *Legislación delegada. Potestad Reglamentaria y Control Judicial. Derecho Comunitario Europeo y Proceso Contencioso-Administrativo Español. (Delegated legislation, Normative power and Judicial Review, European Community Law and Spanish Litigation-Administrative Proceedings)*, Editorial Arazandi, Navarra.
- Guerra, S. (2008), *Discrecionalidade e reflexividade: uma nova teoria sobre as escolhas administrativas (Discretionary and Reflexivity: A New Theory about Administrative Choices)*, Forum, Belo Horizonte.
- Jordão, E. (2016), *Controle Judicial de uma Administração Pública Complexa: a experiência estrangeira na adaptação da intensidade do controle (Judicial Control of a Complex Public Administration: The Foreign Experience in Adapting the Intensity of Control)*, Malheiros, São Paulo.
- Lane, J.E. (2003), *New Public Management*, Routledge, London.
- Majone, G. (1999), “The regulatory state and its legitimacy problems”, *West European Politics*, Vol. 22, pp. 1-24.
- Mendes, C.H. (2000), “Reforma do Estado e agências reguladoras: estabelecendo os parâmetros de discussão (State reform and regulatory agencies: setting parameters for discussion)”, in Sundfeld, C.A. (Ed.), *Direito Administrativo Econômico (Economic Administrative Law)*, Malheiros, São Paulo, pp. 108-109.
- Moran, M. (2002), “Review article: understanding the regulatory state”, *British Journal of Political Science*, Vol. 32 No. 2, pp. 391-413.
- Moreira, E.B. (2016), “Crescimento econômico, discricionariedade e o princípio da deferência (Economic growth, discretion and the principle of deference)”, available at: <http://www.direitodoestado.com.br/colunistas/egon-bockmann-moreira/crescimento-economico-discricionariedade-e-o-principio-da-deferencia> (accessed 17 November 2016).
- Rodríguez, R.V. (2008), *Análise do Patrimonialismo Através da Literatura Latino-Americana (Analysis of Patrimonialism in Latin American Literature)*, Documenta histórica, São Paulo.
- Souto, M.J.V. (2002), *Direito Administrativo Regulatório (Regulatory Administrative Law)*, Lumen, Rio de Janeiro.

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- Sunstein, C.R. (1990), *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, Cambridge.
- US Supreme Court (1984), “Chevron USA Inc. vs. NRDC, 467 U.S. 837, Washington D.C.”, available at: <https://www.loc.gov/item/usrep467837/> (accessed 2 September 2020).
- Weber, M. (1999), *Economia e Sociedade: fundamentos da sociologia compreensiva (Economy and Society: An Outline of Interpretive Sociology)*, Imprensa Oficial do Estado de São Paulo, São Paulo.
- West, W.F. (1983), “Institutionalizing rationality in regulatory administration”, *Public Administration Review*, Vol. 43 No. 4, pp. 326-334.

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