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Research Article

The Brazilian Regulatory State and its Role in Service Concessions and Economic Activities

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Abstract

The present work aims to analyze the role of the Brazilian regulatory state, starting from its genesis in the last decade of the 21st century. This emergence was motivated by the growth of this model of the State, which expanded across Latin America. During this period, the Executive Branch began to implement a series of economic reforms focused on privatization and market liberalization, aiming to enhance the efficiency and effectiveness of state agencies, as well as the quality of government's strategic decisions.

In contrast to the Welfare State, the Regulatory State replaces the former model of direct provision of public services and execution of economic activities. Instead, it takes on the functions of planning, regulation, and supervision. Employing a methodology of document analysis, the results demonstrate how the actions of the Constitutional Court and the Court of Audits contribute to the strengthening of the Regulatory agenda. These findings are valuable for the scientific literature investigating the role of the regulatory state by providing evidence to Brazil, policymakers and other economic actors who consider regulatory elements in their decisions.

Keywords: Regulatory state; Economic regulation; Economy; Regulation in Brazil

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Introduction

A series of discussions regarding the ideal model of the State, its respective characteristics, and the purposes it serves, began with the genesis of the Absolutist State in the late 14th century, during the Middle Ages. These discussions spanned centuries and various models that evolved, transitioning from one model to another. This transition was evident, for instance, when moving from Absolutism to the Liberal State model, inspired by the ideals of liberty, equality, and fraternity of the French Revolution, and later to the Welfare State.

Similar to Society, the State model is subject to change over time, necessitating a set of necessary implementations to adapt it to the demands arising from increasingly complex social relationships. This was precisely what happened in Brazil. After twenty years under the Military Regime, the country reestablished democratic rule, enacted a Constitution focused on realizing fundamental rights and guarantees, and reducing social inequalities. This led to a series of political and institutional reforms in the country, including the emergence of the Brazilian Regulatory State in the second half of the 1990s. During this period, the country implemented a series of structural reforms, initiated privatizations, and established Regulatory Agencies.

Therefore, this study aims to investigate the role of the Brazilian state in its regulatory agenda. To accomplish this, a bibliographic and documentary methodology is employed, to map the advantages and/or disadvantages of this new state model. It seeks to examine significant decisions made by the Constitutional Court and the Court of Audits (Tribunal de Contas da União) to identify their influence on the economic sphere and their contribution to legal certainty, as favorable factors for investments in the Brazilian state. The study intends to answer the question: Does this state model contributes to national social-economic development without sacrificing necessary public policies for the effective realization of citizens' fundamental rights and guarantees?

The results reveal that the country can adopt the Regulatory model without forsaking its social function or discouraging economic agents from investing. These findings are valuable for the scientific literature that investigates the state's role in economic activities, as well as for policymakers and society at large, concerned with the effective utilization of resources for investment purposes.

This paper does not aim to advocate for an ideal state model to be adopted by Brazil. Instead, it aims to provide a narrative of the factors that led to this remodeling and to make observations about the current regulatory state model in the country, based on the researched theoretical framework, to address the proposed issue. In addition to this introduction, the paper is divided into four more sections. The second section covers the theoretical framework, followed by a methodology section, a results section where significant positions adopted by the Court of Audits (TCU) and the Supreme Federal Court concerning regulatory agencies will be discussed. Finally, concluding remarks will be presented.

Theoretical Framework

The Welfare State originated in Bismarck's Germany, with the first workers' compensation program for workplace accidents (1873) and the first health insurance program for workers (1883), followed by pensions for elderly workers. Its genesis was notably authoritarian, and its initial orientation was conservative and corporatist, as access to benefits was based on occupational status. Other European countries subsequently implemented similar programs, so that by the time of World War I, nearly all countries in Central Europe had the three aforementioned programs, largely sponsored by the state. Unemployment insurance programs emerged in the subsequent period, in the aftermath of the war, and family benefits became widespread only in the post-World War II period.

With the establishment of the Welfare State, the living conditions of the population improved, life expectancy increased, and the most advanced stage in the enhancement of community life was reached. However, maintaining projects for the satisfaction of collective interests demanded resources that the state no longer possessed. Consequently, a debt accumulation occurred, preventing the funding of even essential state expenses. This fiscal crisis of the welfare state in the early 1980s led to a reduction in the state's dimensions and its direct intervention in the economic sphere.

Kerstenetzky [1], in addressing the Welfare State, categorizes it as a cohesive set of policies and institutions that express the acknowledgment of public responsibility for social well-being (understood as the well-being of individuals and groups within society). This recognition is based on the understanding that such well-being cannot be ensured solely by the institutions of a market economy in normal operation. All modern states are engaged in income distribution, macroeconomic management, and market regulation, but the relative importance of these functions varies from country to country and from one historical period to another. Thus, at the end of the period of rebuilding national economies devastated by World War II, redistribution and macroeconomic management emerged as the top political priorities for most governments in Western Europe. The market was relegated to the role of a provider of resources to pay for governmental generosity, and any evidence of market failures was deemed sufficient for state intervention, often in the intrusive form of central allocation of capital and nationalization of key sectors of the economy. Indeed, centralization and unlimited discretionary policy came to be seen as prerequisites for effective governance [2].

The significance attached to redistribution policies and discretionary management of aggregate demand is evident in labels such as the «Welfare State,» «Keynesian State,» or «Keynesian Welfare State,» which became popular during that period. However, the social-democratic consensus on the beneficial role of the positive state-as a planner, producer of goods and services, and as employer of last resort-began to crumble in the 1970s. The combination of rising unemployment and increasing inflation rates could not be explained within the models of the time, while discretionary public

spending and welfare political generosity were increasingly seen as part of the problem of unsatisfactory economic performance.

According to Majone, it was during this time that the notion of government failure emerged, with public choice theorists identifying various types of public sector failures, much like earlier generations of economists had produced a growing list of market failures. Policies of nationalization seemed to provide undeniable evidence of the failure of the Positive State. From one country to another, state-owned enterprises were criticized for failing to achieve their social as well as economic goals, due to their lack of accountability and their tendency to be captured by politicians and unions.

The recognition of the inefficiency of the state in delivering public services and engaging in economic activities, coupled with the dynamics of capitalist relations, led to the transfer of public service provision and economic activities from the state to the private sector. As a result, the active role of the state through the direct provision of public services begins to give way to a regulatory and normative state role over private initiatives that undertake the provision of public services granted by the state. In response, a new state model is outlined, wherein the state transitions from being the direct provider of public services and executor of economic activities, as seen in the Welfare State model, to becoming a Regulatory State. The Regulatory State takes on functions of planning, regulation, and oversight. This shift was a trend that extended to a significant number of countries in Latin America, which adopted a series of economic reforms aimed at privatization and market liberalization, starting in the late 1980s. This marked a clear reorientation toward a market economy Guasch and Spiller, as cited in Peci, [3].

According to Bercovici [4], «economic regulation has become a trendy topic, with its proponents rushing to proclaim a 'new public law of the economy,' in line with microeconomic reforms structured from the 'Washington Consensus'; in contrast to the 'old' economic law, responsible for the 'outdated' dirigisme of the 1988 Constitution.

The objectives of the Managerial Reform, according to one of its formulators, former Minister Bresser Pereira, are to increase the efficiency and effectiveness of state agencies, improve the quality of the government's strategic decisions, and refocus administration towards the citizen-user. With the state reform, two new areas of action emerge for the Public Power: the Centralized Public Administration and the Regulatory Bodies (the 'Agencies'). While the former formulates and plans public policies, the latter regulates and oversees the provision of public services. One of the consequences of this conception is the assertion that the only, or primary, task of the state is the control of market functioning. This, according to Bercovici [4], contradicts the very foundation of public policies, which is the need for the realization of rights through positive actions of the state, namely through public services. Public policy and public service are interconnected and cannot be separated without emptying them of their meaning.

In Brazil, the segregation of responsibilities between the Direct and Indirect Public Administration for the autonomous regulation of strategic public utilities (telephony, electricity, etc.) emerged as crucial to creating an environment conducive to the legal security of contracts with the state and attracting private capital (notably foreign). This move aimed to decentralize state governance on complex and predominantly technical issues, lending them a degree of predictability and making them less susceptible to the political/partisan interests and disputes typical of the routines of the National Congress [5]. The new model brought about constitutional and administrative changes in Brazilian law, as the agencies were established as special autonomous bodies with the following characteristics: collegial organization, fixed and staggered terms for their leaders, administrative and decision-making autonomy, encompassing executive, normative, and adjudicative functions.

According to Guerra [5], the debate revolves around the constitutionality of implementing the model regarding its potential violation of the tripartite principle of the separation of powers; the lack of legality in delegating normative functions, under the argument that they are exclusive to the Legislative Power; and the infringement of the principle of hierarchy and governmental unity, particularly concerning the role of the Chief Executive.

Oliveira [6] notes that the adoption of the state intervention model in the economy through regulatory agencies was met with severe criticism in Brazil. Critics associated it with an ideological decision driven by the intention to establish a «neoliberal» state in the country. The initial judgments disregarded the urgency of reevaluating the state's role in the economy which was necessary at that moment due to the ongoing economic crisis.

In Brazil, the term «Regulation» became widespread in conjunction with the creation of entities in the Indirect Public Administration, defined as special autonomous agencies due to their unique autonomy and independence. These agencies were established to regulate specific sectors of the economy, and this movement gained momentum in the 1990s. Thus, from its inception, the idea of a «Regulatory State» was linked to the political choice of creating «regulatory agencies,» which led to the erroneous conception that regulation can only come from the state.

This conception is considered erroneous because it disregards increasingly studied variables of the phenomenon. This includes self-regulation and co-regulation, where regulation is carried out through the active participation of private agents in governing an activity. Self-regulation refers to circumstances where rules are defined by private agent(s) without state involvement. It can be either unilateral self-regulation (where an economic agent defines its own rules of conduct) or self-regulation within a sector (where the collective of economic agents operating in that sector, or a representative part of them, defines rules for their actions).

In regulated self-regulation or co-regulation, private agents and the state collaborate in the task of market discipline. This modality can take various forms of operation: norms can be defined by private agents, subject to state ratification, for example. It falls between the

coercive/centralized form of economic activity discipline and the form that requires voluntary cooperation among private agents.

Oliveira [6] highlights that co-regulation, even though it also involves state participation, differs from traditional regulation, primarily driven by the state and widely propagated in Brazil as the only possible or desirable form. In English, the term used for the unilateral economic activity discipline carried out by the state under penalty of sanction is «command and control» (CAC), or command and control regulation.

In the prevailing regulatory debate in Brazil, the CAC model underlies much of the discussion. The state is assumed to have taken on the responsibility for realizing fundamental social rights, no longer through direct provision, but through oversight, incentives, planning, and standardization of economic activities provided by the private sector. It has shifted from the role of a direct economic actor as an entrepreneur to a subsidiary role while maintaining its duty to promote and realize fundamental social rights. Only the method to achieve this goal has changed.

The new state model, the «Regulatory State,» has a rationale that can be defined as follows: «Having not succeeded with bureaucrats, we will try with experts...» (sic). This is because the discipline of economic activity would be entrusted to technical experts with proven knowledge in their respective fields, endowed with legal guarantees that confer independence and impartiality in their actions. This is aimed at achieving a more efficient, stable, appropriate, and scientifically informed intervention. The objective is closely related to the idea of attracting foreign investments. In the same vein, Bobbio [7] highlights that the shifts toward a protected, regulated, and planned economy have intensified political challenges as they require technical competencies. Consequently, the demand arises for experts and specialists, leading to the substitution of government by legislators with a government of scientists. Until the promulgation of the 1988 Constitution, there wasn't a clear and deliberate intention to establish a regulatory state model, even though a few isolated incidents may seem to suggest otherwise. One such instance is the establishment of the Central Bank of Brazil, way back in the year 1964. Although this entity predates the model in the country and holds distinct characteristics compared to the agencies created in the 1990s, it could potentially be identified as an early step toward the embryonic formation of a Regulatory State in the country.

Up until the promulgation of the new Political Constitution in 1988, the Brazilian state was primarily guided by a traditional model of state intervention, adhering to classical parameters stemming from the theory of separation of powers. The alteration of this scenario, however, began notably from that year onwards. In its text, within Title VII that governs the Economic and Financial Order, the Constitution of the Republic explicitly set forth the following limits for state involvement in the economy: i) direct involvement through state-owned enterprises should be exceptional and only in cases of national security or significant public interest (Article 173); ii) indirect involvement, as a normative and regulatory agent of the economy, permits actions through supervision, incentives, and planning, with the latter being purely indicative for the private sector (Article 174).

In reality, as per Oliveira [6]:

"The implementation of a different model of state intervention in the economy at that time did not arise from an ideological triumph. As is often the case, the relentless economic reality dictated the necessary course changes, which the law had to facilitate. Fiscal and economic crises, along with the imperative to enhance the quality of life for individuals, particularly concerning access to goods and services, necessitated a reevaluation of the state's role in the economy.

In this context, foreign experiences pointed to a different path, where bureaucratic administration was replaced by a model of managerial administration in economic matters. Inspired by these experiences, the federal government established the State Reform Master Plan in 1995 . Successive constitutional amendments altered the original 1988 text to authorize the country's economic opening. In two of these amendments, provisions were included to establish regulatory entities: Article 20, XI, allowed for the model in the telecommunications market, and Article 177, for the petroleum sector. Following that, numerous other agencies were created for sectors such as electric energy, supplementary health, sanitary surveillance, water, civil aviation, land transportation, water transportation, and cinema. The legal basis for the latter was derived from the interpretive space authorized by the text of Article 174 of the 1988 Constitution.

While Brazil was opening its economy, it avoided entrusting economic sectors solely to the discretion of the market. Instead, it opted for the Regulatory State model, where the state relinquishes the direct provision of public services, entrusting them to private agents while preserving its normative prerogatives to intervene in the regulated market, directing it towards specific purposes [8]. According to Chaves [9], regulation has become a prominent tool in recent decades, as governments have turned their attention to regulating economic activities. In an increasingly interconnected world, the international context significantly affects the formulation and implementation of regulatory instruments. This is due to systemic risks present in financial markets, as well as considerations in health, environment, security, investments, and competition among companies. Major regulatory divergences tend to generate uncertainties and additional costs for businesses, which is why this topic is gaining more prominence on the governmental agenda.

Over the course of nearly three decades, regulatory improvements have been made with varying intensity, depending on the peculiarities of each sector and the institutional maturity of their respective agencies. This is evident in the adoption of public consultations, regulatory impact assessments (RIA), and the utilization of new regulatory models distinct from the traditional command and control approach. The latter relies solely on punitive mechanisms and extrinsic incentives, which involve imposing sanctions in case of non-compliance with regulations by regulated entities.

According to Cunha and Goellner [10], federal regulatory agencies in recent decades have embraced the division of roles between ministries and regulatory agencies, in line with the official model. The reputation gained by these agencies has led to the consistent establishment of this institutional model in the country, even spreading to sub-national levels. At the federal level, there are currently eleven regulatory agencies, as defined by Law No. 13.848, enacted on June 25, 2019. This law was extensively debated between the executive and legislative branches, establishing a sort of general framework for regulatory agencies.

Methodology

As per mentioned in this paper, we have conducted a literature review and documentary research, given it's a valuable approach for our study, as it allowed us to build a solid theoretical foundation and gather insights from various authors who have discussed the topic of Regulation, particularly Amanda Flavio de Oliveira and Sérgio Guerra.

We have based our work on significant positions taken by the Brazilian Supreme Federal Court and the Court of Audits (Tribunal de Contas da União) as they are well-justified, given their importance for the effective functioning of the Regulatory State. The role of the Constitutional Court, in evaluating the constitutionality of legal norms established by regulatory agencies and ensuring their alignment with the 1988 Constitution, is a critical aspect. Additionally, the Court of Audits, as a Branch of the legislative power, focuses on administrative matters and renders highly technical decisions.

Analyzing the decisions made by these Tribunals is indeed pertinent, as it contributes to providing legal certainty for policymakers and agents who are concerned with the allocation of resources for investment purposes. Understanding the legal and regulatory landscape through the lens of these institutions can offer valuable insights into the functioning of the Regulatory State and its impact on various sectors of the economy.

Results

At the time of the creation of regulatory agencies in Brazil, in the mid-1990s, when the doctrine was still forming regarding the possibilities of controlling these entities, the position that allowed for greater possibilities of control pointed out that the Court of Audits (TCU) was responsible only for formal legal control and operational control over management contracts, due to the inherently technical nature of decisions made by these agencies about regulated activities, and it could not be conceived to have unlimited judicial control, since the Judiciary would not possess the necessary knowledge to assess the correctness of decisions made in the realm of 'technical discretion' (Schirato apud Gomes, [11].

According to Gomes [11], what is observed today is an extension of the aforementioned operational control to the oversight of actions and omissions of directors, review and annulment of normative acts, and even the actual replacement of the regulator. This can be observed in recent decisions of the Court of Audits.

The oversight of actions and omissions of directors can be seen in Ruling 738/2017-P:

"This is a Monitoring Report on the concession contract of BR-040/MG-RJ, duplication of the New Petrópolis Hill Climb, in which there was a proposal for fines and disqualification from performing duties for members of the ANTT board and second and third-level technicians who were involved in the matter".

Still within the scope of the TCU, in Ruling 1704/2018-P, related to operational Audits on the main bottlenecks for the release of containerized cargo in imports at maritime ports in the Southeast region, the directors of the regulatory agency that participated in the issuance of Resolution No. 2.389/2012 were fined R$ 30,000.00 for «omission on the part of managers in minimizing market failures and in issuing a new norm compatible with the new regulatory framework,» without prejudice to investigations against previous directors.

Regarding the review and annulment of normative acts by regulatory agencies by the Court of Audits, Ruling 380/2018-P determined that ANTAQ refrain from examining requests for authorization for chartering foreign vessels according to the parameters established in its Normative Resolution ANTAQ No. 1/2015, as the regulatory agency's normative act was believed to have incurred a serious violation of the principle of legality.

Gomes also highlights another recent issue of interest in the control of regulatory agencies, which is the possibility of replacing the regulator when it requires a change in the methodology of study used by the regulator for the adoption of a methodology developed within the control body itself. An example is Ruling 290/2018-P, in which the Court of Audits endorsed a precautionary measure to instruct ANTT to change the criteria applied in toll rate adjustments, specifically due to the impact of Law No. 13.103/2015 (the Truck Drivers' Law).

To identify potential risks and structural flaws that could compromise state regulation and propose operational and legislative solutions to strengthen the current regulatory model, the Court of Audits of the Union (2011) conducted operational Audits to assess the governance of infrastructure regulatory agencies in Brazil and issued a framework of best practices for regulatory agencies.

Regarding the position of the Supreme Federal Court, the Court's plenary in Direct Action of Unconstitutionality – ADI-4874 noted that:

"The establishment of sectoral regulatory agencies represents an undeniable enhancement of the institutional architecture of the contemporary Rule of Law, responding to the Public Administration to address the complexity of social relationships observed in modernity. The increasing demand for agility and flexibility from the State in the face of continuous economic and social demands has led to the emergence of relatively autonomous and independent administrative structures — the so-called agencies — equipped with suitable and effective mechanisms for the regulation of specific sectors, including the competence to issue qualified normative acts.

In this context, the scope of the regulatory model adopted in Brazil extends beyond competition regulation and goes beyond addressing «market failures.» On the contrary, it also incorporates necessary instruments to achieve broader public interest objectives: social regulation, not just economic regulation." .

«In the scope of that Constitutional Court as well, the full court unanimously declared constitutional provisions of Law 13.848/2019 that deal with the appointment of members in the management structure of regulatory agencies. The decision was made in the Direct Action of Unconstitutionality (ADI) 6276, filed by the National Confederation of Transport (CNT). According to the rapporteur:

"Within the scope of these entities' activities, there are numerous conflicting interests, both from private entities and those being regulated, as well as the interests of consumers and the State itself. «Avoiding capture» means maintaining impartiality during the decision-making process to ensure the efficiency of the regulatory state." .

In a recent ruling (ADI 5906), the Supreme Court upheld rules that authorize the National Land Transportation Agency (ANTT) to establish, through a resolution, administrative infractions and penalties related to road transportation services. In the leading opinion of the judgment, Justice Alexandre de Moraes noted that:

"Regulatory agencies are special administrative bodies (Article 37, XIX, of the Federal Constitution) and are granted delegation through the law that establishes them to exercise their regulatory authority. However, they cannot create regulations without explicit delegation, nor can they regulate matters for which there is no prior generic concept in their establishing law."

Proceeds arguing that:

"The interpretation sought by Abrati would almost eliminate the normative competence of ANTT, removing a relevant tool for fulfilling its regulatory activity. «The role of the agency would be reduced to that of a true manager of public service concession contracts. The rules are by Law 10.233/2001, as they protect the interests of users regarding the quality and availability of transportation services that meet standards of efficiency, safety, comfort, regularity, punctuality, and affordability of fares. In their view, the sanctions established in the regulation do not exceed the parameters established by the law."

FINAL CONSIDERATIONS

This paper aimed to analyze, in a non-exhaustive manner, the Brazilian Regulatory State as a new state model replacing the Welfare State, which has been in effect since the promulgation of the Constitution of the Republic on October 5, 1988.

The emergence of the new State model has been met with severe criticism for transferring the provision of services once considered within the realm of public competence to private entities.

[4] STF ADI 4874/DF, REL. MIN ROSA WEBER, RULED ON 1.2.2018.

[5] STF ADI 6276.

Meanwhile, the State assumes a predominantly managerial role, primarily focused on controlling the functioning of the market, which, according to critics of the model, could lead to the demise of essential public policies by the State.

Although the Brazilian State has adopted the Regulatory model and established Regulatory Agencies as special autarkic entities with administrative and financial autonomy, it does not fully embrace the Laissez Faire model. It allows its administrative institutions, such as the Federal Court of Audits (Tribunal de Contas da União), for example, to exercise their full supervisory competence, contributing to stability and legal security.

In the judicial sphere, as demonstrated in this paper through the analysis of the ADI-4874 case, the Brazilian Supreme Federal Court determined that the regulatory model adopted in the country extends beyond mere competition regulation and goes beyond correcting "market failures." The Court recognized that the current model also incorporates necessary instruments to achieve broader objectives of public interest, encompassing both social and economic regulation.

Therefore, it can be observed that this relatively new model, especially when compared to the United States, remains the subject of extensive discussion. However, it is equipped with instruments that can enhance its effectiveness and efficiency, without Brazil relinquishing its essential public policies aimed at realizing fundamental rights and guarantees outlined in its 1988 Constitution.

This study reveals that Brazil, through its Constitutional Court (judicial) and Administrative Court of Accounts (administrative), ensures the proper functioning of regulatory agencies, leading to stability and legal security. These factors contribute to a favorable environment for the necessary investments to drive the socio-economic development of the country, while not sacrificing its social function.

These findings contribute to the scientific literature that investigates the role of the state as a regulator by bringing evidence to Brazil, to policymakers who work with regulation and to the population in general, which is increasingly attentive to the quality of public utility services. As a suggestion for future research, the impacts of certain concessions on socioeconomic variables could be measured [12-19].

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Conflict of Interest

No conflict of interest.

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