The importance of popular participation in regulatory impact analysis by Brazilian federal regulatory agencies*

A importância da participação popular na análise de impacto regulatório pelas agências reguladoras federais brasileiras

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ABSTRACT

The article seeks to present the context of the emergence of regulatory impact analysis (RIA) and its gradual implementation in Brazilian federal regulatory agencies, more precisely, aspects of popular participation. It presents critical considerations regarding the current regulation and specifically each regulatory agency. It suggests proposals for better popular participation in the RIA, in order to overcome the democratic deficit, improve regulatory quality, satisfy the public interest, provide an adequate service and enshrine the objectives of a Social State, as well as contribute to an efficient, coherent, greater predictability, transparency and possibility of control of the regulatory decision.

KEYWORDS

Regulatory impact analysis — regulatory agencies — popular participation — regulatory quality — democratic deficit

RESUMO

O trabalho busca apresentar o contexto do surgimento da análise de impacto regulatório (AIR) e sua gradativa implementação nas agências reguladoras federais no Brasil, especialmente quanto às formas e ao momento da participação popular. Apresenta considerações críticas em relação à atual regulamentação geral e em relação às normas internas de cada agência reguladora. Sugere propostas para uma melhor participação popular no procedimento de AIR, a fim de superar o déficit democrático, aprimorar a qualidade regulatória em busca de satisfazer o interesse público, contribuir para a prestação de um serviço adequado, consagrar os objetivos de um estado social, bem como contribuir para que a decisão regulatória seja mais eficiente, coerente, tenha maior previsibilidade, transparência e possibilidade de controle.

PALAVRAS-CHAVE

Análise de impacto regulatório — agências reguladoras — participação popular — qualidade regulatória — déficit democrático

1. Introduction

The origins and causes of State intervention in the economy from the 19th century onwards can be understood by different ideological views. In any case, the intervening State appears at first to foster growth, order financial activity, provide public services and, mainly, control competition and power abuse of the market. In a second moment, the beginning of the 20th century, the idea of the welfare state was born, with the implementation of more protective measures for citizens and with the notion of positive benefits. The welfare state, identifiable from the 1950s onwards, is characterized by its capitalist economic system, albeit with socialist influences, by an interventionist economic regime, and by a model of social well-being.[1]

In this scenario, the culture that has long prevailed (but gradually steps up to change) is that of "regulating first, asking questions later". It happens that, without an effective dialogue with civil society, there are great risks that regulation will end up being an obstacle to social and economic well-being, creating barriers that are often unnecessary, hindering innovation and competition. The decisions of regulatory agencies, which will be regulated, are not taken by representatives elected by the people, in the model of representative democracy. They are taken by government appointed officials. Hence the partial democratic *deficit* and the need that popular participation mitigates this lack of legitimacy.[2]

This article aims to investigate popular participation, through public hearings and consultations, in the administrative procedure of regulatory impact analysis (RIA) in the Brazilian experience of federal regulatory agencies.[3] In summary, RIA encompasses the following phases: problem (comprising

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1 GABARDO, Emerson. Mecanismos de intervención del Estado en Brasil, postmodernidad y la cuestión de la subsidiariedad. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 1, n. 2, p. 6062, July/Dec. 2014. For a deeper study of the causes and origins of State intervention in the economy, see: MOREIRA, Vital. *A ordem jurídica do capitalismo*. Coimbra: Centelho, 1978 and GRAU, Eros Roberto. *A ordem econômica na Constituição de 1988*. 14. ed. São Paulo: Malheiros, 2010.

2 DUARTE JUNIOR, Ricardo César Ferreira. A legitimidade do estado regulador brasileiro: uma análise democrática. *A&C Administrative Law Review & Constitucional*, Belo Horizonte, yr. 11, n. 43, p. 136, Jan./Mar. 2011.

3 For a study on advisory councils in regulatory agencies, another form of popular participation, see: TEIXEIRA, Albano Busato; BITENCOURT, Caroline Muller. Os conselhos de participação popular como instrumento de legitimação das decisões das agências reguladoras. *Revista Eletrônica da Procuradoria-Geral do Estado do Rio de Janeiro — PGE-RJ*, Rio de Janeiro, v. 2, n. 2, May/Aug. 2019.

its causes and consequences), possible alternatives (mapping solutions), and comparison of regulatory options (analyzing the impacts of each). The purpose is to provide technical guidance in decision-making by the State so that regulation is more efficient, has better quality, generates more confidence by regulated entities, gives more predictability, transparency, and legitimacy. In item 2, the context of the emergence of RIA and its implementation will be initially presented, exposing its general characteristics. Then, in item 3, the form of this participation will be critically analyzed and also how it is possible to improve it, so that it can effectively promote the democratization of indirect public administration through consensual mechanisms. In the conclusion, the regulatory agencies that demonstrate progress in overcoming the democratic deficit will be pointed out, as well as those that need further improvement.[4]

2. Brief considerations about the Brazilian context and general characteristics

Before investigating the RIA procedure itself, it is necessary to situate the context and assumptions that limit the conclusions to be developed. In Brazil, the origin of regulatory practice by RIA can be attributed to the initiative of the federal government when Programa de Fortalecimento da Capacidade Institucional para Gestão em Regulação (PRO-REG) was created, instituted by Decree No. 6.602, of March 16, 2007, in order to devise an institutional mechanism to improve the quality of federal regulation.[5]

Regulatory agencies as known today in Brazil started emerging in the 1990s, after the total or partial extinction of the state monopoly of some public

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[4] In this study, the expression "popular participation" means the participation of citizens in administrative activities. Although some authors differentiate "popular participation", "popular participation in administration", and "administrative participation", the expression will be used interchangeably. SANTOS, Fábio Gomes dos. Participação na administração como direito fundamental. *Revista Digital de Direito Administrativo*, v. 1, n. 2, p. 440-442, 2014.

[5] In 2003, the government created the Grupo de Trabalho Interministerial (GT Interministerial) in order to assess the role of regulatory agencies in the current Brazilian institutional arrangement, which culminated in Bill No. 3.337/200, later withdrawn by the Government itself and resubmitted as Senate Bill No. 52 of 2013, which was subsequently approved as the Lei das Agências Reguladoras (Law No. 13.848 of 6/25/2019). However, at the time, there was no articulated regulatory improvement program, which is why PRO-REG in 2008 will be considered the closest source. For further details on the origins of RIA, see: ALBUQUERQUE, Kélvia. A visão da Secretaria de Gestão do Ministério do Planejamento, Orçamento e Gestão. In: PROENÇA, Jadir Dias; DA COSTA, Patrícia Vieira; MONTAGNER, Paula (Org.). *Desafios da regulação no Brasil*. Brasília: Enap, 2006. p. 91.

services and other activities considered sensitive in the society life (cultural production, water use, and other sectors), with the consequent total or partial transfer of these economic activities to the private sector (through concessions, permissions, or authorizations).[6] Therefore, the regulatory agencies were given a relative degree of autonomy and independence, so that they could create a regulatory environment that balanced the interests of the State, citizens, and economic agents of each sector.[7]

From 2008 to 2016, PRO-REG was responsible for disseminating and centralizing studies regarding RIA, as pilot projects in six regulatory agencies: Agência Nacional de Cinema (Ancine), Agência Nacional de Energia Elétrica (Aneel), Agência Nacional do Petróleo, Gás Natural e Biocombustíveis (ANP), Agência Nacional de Saúde Suplementar (ANS), Agência Nacional de Transportes Aquaviários (Antaq), and Agência Nacional de Vigilância Sanitária (Anvisa).[8]

According to the 2013 Final Report of PRO-REG, the diagnosis was quite negative. In general, the absence of a culture of regulatory impact analysis was pointed out (there was no management mindset and few people were trained to deal with regulatory impact in the agencies), as well as the need to improve the decision-making process and the analysis methodology. In short, there was no institutionalization of RIA as a tool for improving regulatory quality.[9]

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6 MEDAUAR, Odete. *Direito administrativo moderno*. 21. ed. Belo Horizonte: Fórum, 2018, p. 63. However, in Brazilian law there have been entities with a regulatory function, though without the name of agencies, since the beginning of the 20th century; see: DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 32. ed. Rio de Janeiro: Forense, 2019. p. 1057.

7 GUERRA, Sérgio. Direito administrativo e a nova hermenêutica: uma releitura do modelo regulatório brasileiro. *Administrative Law Review*, Rio de Janeiro, v. 243, p. 200, Jan. 2006. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/42559>. Accessed on: 9 July 2020.

8 PRESIDÊNCIA DA REPÚBLICA. Casa Civil. *Histórico do PRO-REG*. Available at: <www. gov.br/casacivil/pt-br/assuntos/governanca/regulacao/sistema-regulatorio-brasileiro/historicodo-proreg>. Accessed on: 29 May 2020. For more details, see: PRESIDÊNCIA DA REPÚBLICA. Casa Civil. *Boletim PRO-REG*. Oct. 2012. Available at: <www.gov.br/casacivil/pt-br/assuntos/governanca/regulacao/documentos/biblioteca-nacional/2012/boletim-pro-reg-1osemestre-de2012>. Accessed on: 29 May 2020. Also, PROENÇA, Jadir Dias; PAULO, Carla Beatriz (Org.). *Experiências exitosas em regulação na América Latina e Caribe*. Brasília: Alia Opera, 2012.

9 MARTINS, Humberto Falcão. *Diagnóstico do processo de formulação e análise de políticas públicas em mercados regulados.* Relatório final. Casa Civil da Presidência da República. Subchefia de Análise e Acompanhamento de Políticas Governamentais. Programa de Fortalecimento da Capacidade Institucional para a Gestão em Regulação. p. 4057. Available at: <www.gov.br/casacivil/pt-br/assuntos/governanca/regulacao/documentos/biblioteca-nacional/2013/diagnostico-do-processo-de-formulacao-e-analise-de-politicas-publicas-em-mercados-regulados1>. Accessed on: 29 May 2020.

It is important to highlight the 12 guidelines of the Council on Regulatory Policy and Governance/OECD, in 2012, recommended for all member countries, with specific provisions for the analysis of regulatory impact,[10] since in 2015 the Federal Accounting Court (TCU) recommended the adoption of these OECD good practices to the regulatory agencies (Account No. 031.996/2013-2). At the time, the TCU pointed out that: (i) in most agencies, RIA was not

[10] "I. RECOMMENDS to members: 1. Make a commitment at the highest political level to an explicit policy of regulatory quality for the government as a whole. The policy must have clear objectives and structures for implementation that ensure that, if regulation is used, economic, social, and environmental benefits justify costs, distributional effects are considered, and net benefits are maximized. 2. Respect the principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and that it is informed of the legitimate needs of stakeholders and parties affected by regulation. This includes offering effective channels (including online), so that the public can contribute to the process of preparing regulatory proposals and to the quality of technical analysis. Governments must ensure that regulations are understandable and clear and that parties can easily understand their rights and obligations. 3. Establish mechanisms and institutions to actively supervise regulatory policy procedures and objectives, support and implement regulatory policy, and, thus, promote regulatory quality. 4. Integrate the Regulatory Impact Analysis (RIA) from the early stages of the policy process to the formulation of new regulatory proposals. Clearly identify policy objectives and assess whether regulation is necessary and how it can be more effective and efficient in achieving those objectives. Consider other means of regulation and identify the tradeoffs of the different approaches analyzed to choose the best alternative. 5. Conduct systematic regulatory stock review programs regarding objectives that are clearly defined in the policy, including cost and benefit considerations, to ensure that regulations are up to date, their costs are justified, effective, and consistent, and that they aim at the intended objectives. 6. Regularly publish reports on the performance of regulatory policy, reform programs, as well as public authorities responsible for enforcing regulations. These reports should include information on how regulatory instruments, such as the Regulatory Impact Analysis (RIA), public consultation practices, and reviews of existing regulations, work in practice. 7. Develop a consistent policy capable of covering the role and functions of the regulatory agencies, in order to provide greater confidence that regulatory decisions are taken in an objective, impartial, and consistent manner, with no conflict of interest or undue influence. 8. Ensure the effectiveness of the systems for reviewing the legality and procedural impartiality of regulations, as well as the decisions taken by the competent bodies in the application of regulatory sanctions. Ensure that citizens and businesses have access to these review systems at a reasonable cost and receive decisions in a timely manner. 9. Apply, as appropriate, risk assessment, management, and risk communication strategies for the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators must assess the effects of regulation and develop strategies for responsive implementation and enforcement. 10. Whenever necessary, promote regulatory coherence through coordination mechanisms between the supranational, national. and subnational levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote consistency between regulatory approaches and avoid duplication or conflict of rules. 11. Foster the development of management and regulatory performance at subnational levels of government. 12. In developing regulatory measures, consider all relevant international standards and cooperation structures in the same area and, when appropriate, their possible effects on parties outside their jurisdiction." OCDE. *Recomendação do Conselho sobre política regulatória e governança*. 2012. Available at: <www.oecd.org/gov/regulatorypolicy/Recommendation%20PR%20with%20cover.pdf>. Accessed on: 29 May 2020.

mandatory yet; (ii) there were practically no internal regulations for the use of the tool; and (iii) public consultations were not mandatory at all agencies.[11]

Starting from May 2016, the coordination of the agenda was redirected from PRO-REG to the Deputy Chief of Analysis and Monitoring of Government Policies (SAG), Civil House, Presidency of the Republic and, together with other ministries, Bill No. 6,621/2016 was developed, with provisions related to RIA, which were subsequently approved in the recent Law No. 13.848 of 2019 (Regulatory Agencies Law). In addition, about two years after the TCU recommendation, in 2017, SAG published a mapping of the status of the RIA in the regulatory agencies and, considering the object of this work, the following aspects stand out, as shown in table 1.[12]

[11] BRASIL. *TCU n. 031.996/2013-2*. p. 22. Available at: <www.gov.br/casacivil/ptbr/assuntos/governanca/regulacao/documentos/biblioteca-nacional/2013/relatorio-de-auditoria-operacionaldasagenciasreguladorasdeinfraestrutura>. Accessed on: 30 May 2020.

[12] The material was produced after several meetings with representatives of regulatory agencies, as well as from the responses to a questionnaire sent to them. The questions addressed the scope of the implementation of the RIA, legal basis (if any), prevision for exceptionality to the implementation of the RIA, internal standardization (internal guide or guidance), methodology, integration with the decision-making process, social participation and transparency, governance, monitoring and RIA *ex post*, data availability, training, decision for non-regulation, internal resistance, and emblematic cases of RIA already carried out in each agency (PRESIDÊNCIA DA REPÚBLICA. Casa Civil. *Nota Técnica nº 4/2017/AESP/SAG/CC-PR*. Available at: <www.gov.br/casacivil/pt-br/assuntos/governanca/regulacao/boas-praticas-regulatorias/consulta-publica/consulta-publica-001-2017-diretrizes-e-guia-air-pasta/abertura/documentacao-produzida-para-construcao-das-diretrizes-gerais-e-do-guia-air/nota-tecnica-consulta-publica-001-2017.pdf>. Accessed on: 30 May 2020).

Table 1

Mapping of Regulatory Agencies (2017)

	ANTT	ANATEL	ANAC	ANTAC	ANCINE	ANVISA	ANP	ANEEL	ANS	ANA
Use	X	X	X	X	X	X	X	X	X	X
Beginning	2009	2013	2013	2015	2013	2012	2013	2011	2010	2015
Obligation	X	X	X			X		X	X	
Internal rules	X	X	X	X	X			X	X	
External consultation after completion	X	X	X	X	X	X	X	X	X	X
External consultation before completion	X	X						X		
Data availability		X							X	

Source: Own production.

From the data obtained in 2017, it is observed that the majority of agencies (six out of 10) started to consider it mandatory to perform RIA. Internal rules have also been created in most regulatory agencies (seven out of 10).

Another point is that, in general, the RIAs are made available to the public only after the drafting of the normative act is completed, through a public consultation hearing. As will be seen following, there are countless benefits in providing discussion with civil society when options and impacts are actually being assessed (not just after the draft, which greatly limits suggestions and criticisms). In effect, a consequence of this is the perception by regulatory agencies that they do not have adequate data availability — understood as the access, the possibility to request them, and the ability to organize and treat them.[13]

This work by SAG, originally intended to be a general regulation of RIA, has been transformed into two very important documents: "RIA Guide" and

[13] Ibid.

"General guidelines and guidance for the preparation of regulatory impact analysis — RIA", as will be exposed further in more detail. Both were subject to Public Consultation in 2017, with broad participation of society: 538 contributions, 105 of which were accepted (equivalent to 20%).[14]

In the same sense, Decree No. 9.203, of November 22, 2017, provided for the "Public administration governance Policy", emphasizing that one of its principles is precisely regulatory improvement (article 3rd, IV). More specifically, they are guidelines to be pursued: decision-making processes oriented by evidence, legal compliance, regulatory quality, bureaucracy reduction, and support to the participation of society (article 4th, VIII); as well as compliance with good regulatory practices in the edition and review of administrative acts, valuing the stability and coherence of the legal system, also reinforcing the need for public consultations whenever convenient (article 4th, VIII and XIX).

Recently, Law No. 13.848 of 2019 (Regulatory Agencies Law) dealt with the regulatory agencies decision-making process in chapter I and, more generally, with conducting regulatory impact analysis (RIA). In short, a good part of the content and methodology was delegated to a future regulation, the minimum requirements, mandatory and exemption cases. At the time of this research, such normative act has not been published by the Presidency of the Republic. The operationalization of RIA, in turn, was referred to the internal regulations of each regulatory agency.

Equally relevant was the provision of article 5th of Law No. 13.874/2019 (Economic Freedom Act), which stipulated the mandatory regulatory impact analysis for public administration in general. Its regulation (Decree No. 10.411/2020), although it does not establish popular participation as mandatory, mentions in article 8th that it may occur "before the decision on the best alternative to address the identified regulatory problem and before the drafting of any regulatory act to be edited". Other devices reinforce the importance of the participation and subsidies of society (article 6th, VIII, article 10, both of Decree No. 10.411/2020).

Another legal basis for RIA in the Brazilian system is article 20 of the Law of Introduction to the Rules of Brazilian Law (Decree-Law No. 4.657/1942,

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[14] PRESIDÊNCIA DA REPÚBLICA. Casa Civil. *Resultado da consulta pública: diretrizes e guia AIR — 001/2017*. Available at: <www.gov.br/casacivil/ptbr/assuntos/governanca/regulacao/boas-praticas-regulatorias/consulta-publica/consulta-publica-001-2017-diretrizes-e-guiaairpasta/encerramento/consultapublicadiretrizeseguiaair0012017>. Accessed on: 30 May 2020.

amended by 13.655/2018) which establishes that in the administrative sphere there will be no decision based on abstract legal values without considering its practical consequences. The sole paragraph explains that the motivation will demonstrate the need and adequacy of the measure imposed or the invalidation of the act, contract, adjustment, process, or administrative rule, including in view of the possible alternatives.

Therefore, RIA in Brazil has been gradually institutionalized, especially by regulatory agencies, after the creation of PRO-REG and, more recently, by SAG. It was possible to identify the first efforts in 2003, advancing to its mandatory nature especially in 2019, with the publication of the Regulatory Agencies Law and the Economic Freedom Act (besides the LINDB), to the present point, in which RIA is a reality. However, several challenges are still present and there is an urgent need for improvement and systematization.

Advancing to the general characteristics of the RIA, it can be defined as an orderly decision-making procedure, in the exercise of regulatory activity, through the systematic use of analyses on the possible effects of a given decision, the main steps of which are: (i) delimitation of objectives and means, (ii) mapping of likely impacts, (iii) analysis of costs and benefits of the measure, (iv) monitoring of effects after its implementation.[15]

Thus, the aim is that RIA guides and subsidizes the regulatory decision-making process, increasing its efficiency, coherence, quality, predictability, transparency, legal certainty, and judicial control — in addition to lawfulness control, in procedural terms, it is also understood that these administrative acts are sindicable/verifiable by the Judiciary, being subject to the proportionality rule (necessity, adequacy, and proportionality in strict sense).[16]

Although it seems obvious, it is important to highlight that RIA cannot be conceived as a simple form or just a formal justification for a particular choice, or a simple explanation of reasons. The "General guidelines and analytical

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[15] VALENTE, Patrícia Rodrigues Pessôa. Avaliação de impacto regulatório: uma ferramenta à disposição do Estado. Dissertation (Master in State Law) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2010. p. 29. Accessed on: 29 May 2020. Similarly, is the definition found in the RIA Guide: "It consists of a systematic evidence-based analysis process that seeks to assess, based on the definition of a regulatory problem, the possible impacts of the action alternatives available for achieving the intended objectives. Its purpose is to guide and subsidize decision-making and, ultimately, contribute to make regulatory actions effective, successful, and efficient" (Presidência da República, Casa Civil, *Resultado da Consulta Pública: Diretrizes e Guia AIR — 001/2017*, op. cit.).

[16] For further study: ALEXY, Robert. *Teoria dos direitos fundamentais*. 2. ed. Translation of Virgílio Afonso da Silva. São Paulo: Malheiros, 2014. p. 85-143; BARCELLOS, Ana Paula de. *Ponderação, racionalidade e atividade jurisdicional*. Rio de Janeiro: Renovar, 2005. p. 49-75, 91-145.

script" propose some minimum elements, such as: (i) executive summary; (ii) identification of the regulatory problem to be solved, possible causes and extent; (iii) identification of the actors or groups affected by the problem; (iv) legal basis that supports the agency performance on the topic; (v) definition of objectives; (vi) description of possible alternatives, including the option of no action; (vii) exposure of the possible impacts of the alternatives; (viii) comparison of alternatives; (ix) description of the strategy for implementing the suggested alternative, ways of monitoring and inspection, as well as the need or not to change or revoke the rules in force; (x) considerations regarding information, contributions, and manifestations received for the RIA preparation in the processes of social participation or other subsidies; and (xi) data of those responsible for RIA.[17]

These minimum requirements, although not binding, are relevant, as they increase the argumentative burden of motivating of the regulatory agency regarding decision-making, which has a profound impact on society. For this reason, RIA is an important tool for the public administration to indicate the factual and legal basis of its decisions. Another very important aspect is that the RIA greatly facilitates a later evaluation of a given regulation and its impacts, as it organizes the information for a future comparison of what was predicted and what actually occurred.[18]

RIA is not the decision itself, but a tool for improving regulatory quality. The decision-making competence is attributed to the collegiate body of each agency, according to article 7th of the Regulatory Agencies Law. In the same sense, the "General guidelines and analytical script" point out that RIA is not linked, but the decisions that are against it must be substantiated.[19]

Finally, despite the effort in developing general guidelines and the practical guide in an attempt to standardize the process (which is desirable and does not harm the completely different objects and objectives of each of the regulatory agencies), there is no homogeneity or standardization in the procedures or essential elements of the RIA in the vast majority

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[17] Presidência da República, Casa Civil, *Resultado da Consulta Pública: Diretrizes e Guia AIR — 001/2017*. op. cit.

[18] In suggesting what measures the North American Congress (USA) could take to improve regulatory quality, Cary Coglianese mentions that a well-developed RIA is essential for agencies to carry out the evaluation of a regulatory rule (COGLIANESE, Cary. Improving regulatory analysis at independent agencies. *Administrative Law Review*, Rio de Janeiro, v. 277, n. 3, p. 40, Nov. 2018. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/ article/ view/77675/74640>. Accessed on: 9 July 2020.

[19] Ibid.

of Brazilian regulatory agencies to date. Although each autarchy has very different regulation objects, it does not mean that there cannot be a minimum set of procedures in common. Anyway, there are different stages of institutionalization and maturation of the practice of RIA in each one, as well as of intensity of popular participation.[20]

3. Critical analysis of popular participation in RIA procedures in regulatory agencies

Consensuality can be defined as the mode of action of administrative bodies and entities based on foundations/grounds and procedures that favor the use of business techniques, methods, and instruments, as opposed to imposing and unilateral actions by the public administration.[21]

This form of action represents a beneficial renewal, insofar as it contributes to improve governability, provides brakes against abuses, gives greater legitimacy, and makes state commands more stable.[22] Especially in a context of party-political capture and a *deficit* of democratic legitimacy in regulatory agencies, in which the government and political parties end up appointing leaders and, in exchange, their projects of interest are approved. Such phenomenon occurs even though formally the regulatory agencies have autonomy, as fixed mandates of the (appointed) directors, among other rules.[23]

In this way, popular participation in RIA shows itself as a measure to increase consensus-building in administrative performance, seeking to achieve positive effects in favor of a better regulation that aims to ensure the public interest efficiently, as well as the adequate service when it comes to

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[20] For a complete analysis from the empirical research of the RIAs, from January 2016 to February 2017, including the analysis of internal regulations and concrete cases, see the collective work: INSTITUTO BRASILEIRO DE ESTUDOS DE CONCORRÊNCIA, CONSUMO E COMÉRCIO INTERNACIONAL (IBRAC). *Institucionalização e prática da análise de impacto regulatório no Brasil*. São Paulo: Ibrac, 2019. Kindle edition.

[21] OLIVEIRA, Gustavo Henrique Justino de. *O Contrato de Gestão na administração pública brasileira.* Thesis (doctorate) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2005. p. 281.

[22] MOREIRA NETO, Diogo Figueiredo. Novas tendências da democracia: consenso e direito público na virada do século — o caso brasileiro. *Revista Eletrônica sobre a Reforma do Estado*, Salvador, n. 13, p. 2, Mar./May 2008.

[23] LEAL, Rogério Gesta; RECK, Janriê Rodrigues. A regulação da contratação pública pelas agências reguladoras: limites e possibilidades. *Revista digital de Derecho Administrativo*, n. 19, p. 64, 1st semester 2018. Similarly, Teixeira and Bitencourt, Os conselhos de participação popular como instrumento de legitimação das decisões das agências reguladoras, op. cit., p. 12-14.

public service. The principle of administrative efficiency, inscribed in article 37, *caput*, of the 1988 Constitution of the Federative Republic of Brazil, can be defined as the constitutional duty imposed on the public administration to use the "means best suited to the optimal achievement of the objectives established by positive law (public interest)"[24]. It means that it is not enough to "act regularly on the tracks of law and in the direction of the purpose underlying the norm: it is necessary to choose the most appropriate instruments to reach the optimum point in administrative performance".[25] Thus, the aim is that the public service is adequate (article 175, IV, of the 1988 Constitution of the Federative Republic of Brazil), defined by article 6th, item 1, of Law No. 8.987, dated 2.13.1995, as the one that "meets the conditions of regularity, continuity, efficiency, security, topicality, generality, courtesy in its provision and low fees".

From this perspective, it is observed that there are federal regulatory agencies that do not have an internal rule regulating the hypotheses and forms of popular participation (although mandatory by article 9th of Law No. 13.848 of 2019), there are agencies that have internal regulations and have already carried out several RIAs, and there are those that allow broad social participation.

On the one hand, article 9th of Law No. 13.848 of 2019 brought a democratic advance to the elaboration of the regulatory impact analyses, because until then the public consultation was not mandatory, that is, it was a faculty provided for by article 31 of Law No. 9.784/99 (Federal Administrative Procedure Law), to be exercised when the matter involved a subject of general interest and did not cause damage to the interested party.

Nevertheless, the article 9th of Law No. 13.848 of 2019 was insufficient. Explaining it: the legal text determines participation by public consultation before the board of directors' decision-making, but it does not provide a clear obligation for it to be at the beginning or during the first stages of RIA study. This leads to the problem that consultation and public hearing tend to be carried out only after the draft of the normative act. It is not unknown that regulatory agencies can create internal rules to go beyond Law No. 13.848 of 2019, so much so that article 11 provides a wide degree of possibility in this

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[24] GABARDO, Emerson; HACHEM, Daniel. Responsabilidade civil do Estado, *faute du service* e o princípio constitucional da eficiência administrativa. In: GUERRA, Alexandre Dartanhan de Mello; PIRES, Luis Manuel Fonseca; BENACCHIO, Marcelo (Coord.). *Responsabilidade civil do Estado*. São Paulo: Quartier Latin, 2010. p. 245.

[25] Ibid., p. 250.

sense, but the point is that there is a dependence on the political will of each agency.

It is necessary to mention the rules contained in the Regulatory Agencies Law that aim to discipline public hearings in the RIA procedure, in order to guarantee the effectiveness of popular participation. Article 10 of Law No. 13.848 of 2019 provides that: (i) the regulatory agencies may call a public hearing to judge formation and decision-making, and must allow the oral manifestation by any interested parties in a public session previously destined to discuss relevant matter; (ii) the opening of the public hearing must be published in the *Diário Oficial da União* and other means of communication at least five working days in advance; (iii) the necessary documents for popular participation (if any, the RIA Report or technical note and its supporting documents) must also be made available on the internet and in a specific location, at least five working days in advance.

In any case, practically one year after the publication of Law No. 13.848 of 2019, considering that it became effective 90 days after the publication, it is observed that not all the regulatory agencies have adapted to the legal requirement of popular participation.

At Anvisa, the article 6th of Ordinance No. 422 of 2008 cited exactly what was exposed: "At the discretion of the Collegiate Board, the drafts of normative acts may be submitted to public consultation, formalized by publication in the Diário Oficial da União". Article 2nd, IV, of the same ordinance, even defined public consultation as a "mechanism for social participation, open to the public, carried out within a defined period, which allows for a written statement on the draft of a normative act, document, or relevant matter, to subsidize subsequent decision by Anvisa". However, subsequently, Ordinance No. 1.741 of 2018 revoked Ordinance No. 422 of 2008, and one of the changes regarded the provision in article 18 recommending "participation mechanisms as soon as possible, even in the initial stages of analysis". Another innovation was that of article 20, item 4, of Ordinance No. 1.741 of 2018, which stipulates that the Taking of Allowances, to receive contributions and sources of information, must be completed before the draft of the possible regulatory instrument. Therefore, within the scope of Anvisa, it is possible to highlight an evolution and improvement of the standardization on regulation, that is, of the procedures for RIA, going from a mandatory regulatory prevision only at the end, to a since-the-beginning of the procedure one.

In the same way, there was an improvement at Aneel. Initially, article 5th of Normative Resolution No. 540 of 2013 mentioned that the RIA should be

submitted to the public hearing together with the normative act (mandatory) and only allowed public consultation during the instruction of the procedure. However, as in Anvisa, the Normative Resolution No. 798 of 2017 (which revoked Normative Resolution No. 540 of 2013) established in article 5th that before developing any draft of the normative act, the RIA should be submitted to public hearing — not only the RIA report, but also the attached documents.

Within the scope of ANTT, Resolution No. 85 of 2016, which regulates the RIA procedure, seems to be a middle ground, as it counts with (non-mandatory) recommendations for popular participation during the RIA and before the construction of the regulatory act draft (arts. 3rd and 4th of Resolution No. 85 of 2016).

Unlike Aneel, Anvisa, and ANTT, until now, the other regulatory agencies do not have normative provisions regarding the mandatory popular participation before the regulation draft, at most there is a faculty or recommendation that depends on the agency own will.

At Ancine, article 11 of the Collegiate Board Resolution (RDC) No. 61 of 2018 assigns the option for the person responsible for the RIA to consult the external public in advance (surveys, questionnaires, hearings, meetings, technical visits, among others), which is not to be confused with the Public Consultation and Hearing themselves — which will be carried if the Collegiate Board so decides (article 17, RDC No. 61 of 2018).

At Anatel, Internal Regulation No. 612 of 2013 and Ordinance No. 927 of 2015 do not make Public Consultation mandatory (before or after the draft), on the contrary: its occurrence depends on a request addressed to the Board of Directors, which will approve or not popular participation before or during the RIA (arts. 19th to 21st of Ordinance No. 927 of 2015).

ANS has the Normative Resolution No. 242 of 2010, which deals with the participation of civil society, however, article 4th of the aforementioned resolution restricts the discussion or receipt of suggestions to the moment when there is a draft of a normative act only, being also valid the same criticism made initially. In the same sense goes article 15 of Administrative Resolution No. 49 of 2012.

Antaq has a provision in the Internal Regulations (article 52, II, of Resolution No. 3.585 of 2014), however it is extremely vague and there are practically no parameters or even obligation. Currently, Public Hearing No. 05/2020-Antaq is under way, with the objective of receiving contributions from civil society in order to create a specific rule for the implementation of RIA and Evaluation of Regulatory Result (ARR).

ANAC, through article 2nd, item 3rd, of Normative Instruction No. 61 of 2012, timidly mentions that the RIA form must be presented in public consultations and hearings. However, it does not address the mandatory assumptions or the moment when participation should or may occur.

A much more problematic situation is that of the ANP. According to the aforementioned Table of 2017, there is even news of RIA at ANP, as the working group created to carry out the regulatory impact analysis on "requalification of transportable steel containers for GLP" (Ordinance ANP No. 255/2013). Nevertheless, there is no internal rule that regulates the subject yet, much less in terms of consultation and public hearings.[26]

Similarly, ANA is one of the most backward agencies in terms of RIA practice and institutionalization. However, it has no norm or obligation by internal regulation. The need for advances was even audited by CGU in 2018, an opportunity at which the use of only one RIA (on special dam safety inspection) was verified, with no manuals, guides, or even external consultations for the regulation of the sector.[27]

In general, popular participation is carried out at the end of the RIA procedure, at the stage in which the report already exists, which is submitted for public consultation or hearing, together with the regulation draft. This way, the suggestions and contributions are much more about the writing of the text than about the options or impacts that led the agency to choose a certain path. In other words, the popular participation ends up not discussing the intervention model, and the tendency is that it limits itself to occasional adjustments to a pre-conceived choice. As Ibrac concluded, after extensive empirical research on the RIAs of federal regulatory agencies until 2017, "the changes observed after the social participation procedure was carried out always referred to the draft regulation and almost never to the RIA report".[28]

Therefore, as important as the consultation or public hearing itself, is the need that popular participation occur at the moment when options and possible solutions are actually being discussed, that is, at the beginning or

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[26] ANP. *Análise de impacto regulatório em discussão na ANP*. Available at: <www.anp.gov.br/noticias/5486-impacto-relatorio-discussao-anp>. Accessed on: 31 May 2020.

[27] Ministério da Transparência e ControladoriaGeral da União. *Avaliação da implementação da análise de impacto regulatório na Agência Nacional de Águas — ANA*. 2018. Available at: <https://auditoria.cgu.gov.br/download/11385.pdf>. Accessed on: 31 May 2020.

[28] Ibrac, *Institucionalização e prática da Análise de Impacto Regulatório no Brasil*, op. cit. Posição 6264.

during the RIA, but before the draft of the normative act intended to be built[29] (when it is not the case of non-regulation, of course), as now provided for in article 8th of Decree 10.411/2020 (RIA regulation under the Economic Freedom Act). In this way, popular participation may lead to constructive suggestions and even point to another solution.

If the citizen has effective conditions to participate in the public administration process, then it is possible to reduce the democratic *deficit* in the regulatory agencies, since the concept of democracy is not limited to the role of voter. However, regulatory agencies have the duty to provide effective conditions of participation, under penalty of the normative act lacking legitimacy and even being invalidated.[30]

The pressure exerted by society is an important factor in the democratization of public administration, contributing to greater transparency and, thus, control of acts, as well as optimization of the decision that may significantly affect the life of the country. Public hearings, in particular, form a link between interests, enabling discussion and dynamic, creative, and plural solutions, being the citizen an effective agent and not just a spectator. Democracy is strengthened through active participation in decision-making.[31] After all, "the great challenge for regulatory agencies is to impose the implementation of the two basic principles of the legal regime of public service: universality and continuity".[32]

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[29] In this sense, Ibrac already proposed as a suggestion for improving the practice of RIA "conducting a public consultation to discuss only the result of the RIA and the alternatives identified, without providing the draft of the proposed regulation yet" (Ibid., posição 6941).

[30] Duarte Junior, A legitimidade do estado regulador brasileiro: uma análise democrática, op. cit., p. 155157. BRUNA, Sergio Varella. Procedimentos normativos da administração e desenvolvimento econômico. In: SALOMÃO FILHO, Calixto. *Regulação e desenvolvimento*. São Paulo: Malheiros, 2002. p. 259; JUSTEN FILHO. Agências reguladoras e democracia: existe um déficit democrático na "regulação independente"? In: ARAGÃO, Alexandre Santos de. *O poder normativo das agências reguladoras.* Rio de Janeiro: Forense, 2006. p. 329; SACHS, Ignacy. O Estado e os parceiros sociais: negociando um pacto de desenvolvimento. In: BRESSER-PEREIRA, Luiz Carlos; WILHEIM, Jorge; SOLA, Lourdes. *Sociedade e Estado em transformação*. São Paulo: Unesp, 2001. p. 232.

[31] TOAZZA, Vinicius Francisco; SANTIN, Janaína Rigo. Princípio da participação, consensualismo e audiências públicas. *A&C — Administrative Law Review & Constitucional*, Belo Horizonte, yr. 13, n. 54, p. 229, Oct./Dec. 2013.

[32] BACELLAR FILHO, Romeu Felipe. Poder normativo de entes reguladores. *Administrative Law Review*, Rio de Janeiro, v. 230, p. 162, Oct. 2002. Available at: <http://bibliotecadigital. fgv.br/ojs/index.php/rda/article/view/46339/45110>. Accessed on: 9 July 2020.

The field of regulation, usually occupied by imperativity and unilateralism, now seems to be opening up to spaces of consensuality.[33] This new path of administrative law to value and even privilege forms of consensual action can be seen in some regulatory agencies, during the RIA procedures, notably Aneel, Anvisa, and ANTT, but it needs to move forward and be implemented in the others — especially at ANA, Ancine, ANP, and Antaq.

The approach between administration and citizens is made through the individual or collective collaboration of subjects in the administrative process, breaking the traditional notion of administration opposed to society. The administrative process instrumentalizes the pluralist demands of democracy in the administrative action.[34]

In this sense, a significant example is the case of RIA developed by Anvisa in updating the regulation of nutritional labeling of foods. It is noteworthy that this procedure included a Preliminary RIA Report and then a Final RIA Report. In both, there was wide popular participation from the beginning, through public consultations, public taking of allowances, sector dialogues, working groups, and other measures. The Public Taking of Allowances, for example, was open to the public and it received more than 33,000 written contributions and 725 documents related to the preliminary document, which were used to support the RIA Report.[35]

The regulatory problem identified was the difficulty for Brazilian consumers to understand nutrition labeling. It was found that many of the causes were related to regulatory gaps and inconsistencies, so that, after analyzing the various options, a semi-interpretive frontal nutritional labeling model in a rectangular shape with a magnifying glass was recommended to inform the high content of added sugars, saturated fats, and sodium, in order to improve the current rules for the nutritional table and nutrition claims.[36]

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[33] OLIVEIRA, Gustavo Justino de; SCHWANKA, Cristiane. A administração consensual como a nova face da administração pública no século XXI: fundamentos dogmáticos, formas de expressão e instrumentos de ação. *A&C — Administrative Law Review & Constitucional*, Belo Horizonte, yr. 8, n. 32, p. 40, Apr./June 2008.

[34] MEDAUAR, Odete. *Direito administrativo moderno*. 21. ed. Belo Horizonte: Fórum, 2018. p. 162.

[35] MENEGUIN, Fernando B.; SAAB, Flavio. *Análise de impacto regulatório*: perspectivas a partir da Lei da Liberdade Econômica. Brasília: Senado, 2020. p. 15. Available at: <www12.senado. leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td271>. Accessed on: 5 June 2020.

[36] ANVISA. *Relatório de análise de impacto regulatório sobre rotulagem nutricional*. Brasília, Sept. 2019. GerênciaGeral de Alimentos. Available at: <http://portal.anvisa.gov.br/documents/10181/3882585/%281%29Relat%C3%B3rio+de+An%C3%A1lise+de+Impacto+Regulat%C3%B3rio+sobre+Rotulagem+Nutricional/3e2c2728b55a4296b5af6c7960fd6efa>. Accessed on: 5 June 2020.

The case is emblematic not only because it highlights the importance of regulation, given that nutritional information on food interests the whole society, but also because it counted on thousands of contributions from civil society, highlighting the essentiality and relevance of democratization of the public administration. After all, unilaterally, Anvisa would hardly be able to capture all the nuances and complexity of the issue to improve the current regulation on food labeling.

And when it comes to complexity, it is not limited to strictly technical points of view. Hyper-rationalist pretensions in practice can produce states of affairs quite distant from those imagined by those who insist on the approach of real and ideal.[37] It means that a technical view only may not capture how citizens effectively see (or fail to see) nutritional information, thus it is beneficial that non-specialist citizens can discuss and present their considerations, as occurred in the RIA of food labeling.

Clearly, in the present case, it appears that popular participation enables the creation of new rights and the defense of those already consolidated, implementing the democratic principle. Not only that, but also serving as an element of the social and democratic state of law.[38]

RIA, as a tool of greater transparency and popular participation, has great potential to implement the principle of the public interest supremacy, understood by its two levels of significance: (i) state action not only for the well-being of current individuals, but also of later generations; and (ii) the public interest understood not only by national interests, but also by those of humanity as a whole.[39]

The determination of the public interest is largely developed through dialogue, negotiation, agreement, coordination, decentralization, cooperation, and collaboration. Thus, the process of determining the public interest starts to be developed from a consensual and dialogical perspective, which contrasts with the dominant imperative and monological one, averse to the use of communication mechanisms that are internal and external to the

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[37] LEAL, Fernando. Análise de impacto regulatório e proporcionalidade: semelhanças estruturais, mesmos problemas reais? *Revista Brasileira de Políticas Públicas*, Brasília, v. 9, n. 3, p. 342, 2019.

[38] SCHIER, Adriana da Costa Ricardo; MELO, Juliane Andrea de Mendes Hey. O direito à participação popular como expressão do Estado Social e Democrático de Direito. *A&C — Administrative Law Review & Constitucional*, Belo Horizonte, yr. 17, n. 69, p. 144, July/Sept. 2017.

[39] GABARDO, Emerson. O princípio da supremacia do interesse público sobre o interesse privado como fundamento do direito administrativo social. *Revista de Investigações Constitucionais*, Curitiba, v. 4, n. 2, p. 95130, May/Aug. 2017. DOI: http://dx.doi.org/10.5380/rinc.v4i2.53437

administrative organization.[40] In order to overcome the notion of unilateral and legal uncertainty acts, "the definition of clear mechanisms for the participation of society in the processes, the weighting, and the technically motivated valuation"[41] is urgent.

Therefore, although RIA does not in itself mean a guarantee of improvement in regulatory quality, the need to clarify the problem, options, and desired results is extremely important, as this announcement of criteria, priorities, goals, means, and results is a parameter to which the regulatory agency is bound. Popular participation in these administrative procedures greatly enhances the pursuit of these objectives, as it expands the distinct and plural points of view and interests.

4. Conclusion

It can be seen that within the scope of federal regulatory agencies in Brazil, the paradigm "regulate first, ask later" has been gradually replaced by consensuality, through popular participation in administrative procedures for regulatory impact analysis (RIA). After all, the dialogue with civil society has great potential to improve regulatory quality in order to meet the public interest and enshrine the objectives of a welfare state. This is because the information presented by the population (often unknown to the public administration) and the different points of view can contribute to make the regulatory decision more efficient, coherent, with greater predictability, transparency, and possibility of control, both in procedural and discretionary terms, according to the proportionality rule (necessity, adequacy, and proportionality in strict sense).

It was shown that the emergence and institutionalization of RIA in Brazil were driven by federal government initiatives since 2003 (PRO-REG and SAG), which have had an effect on regulatory agencies. Especially with the obligation in 2019, through the publication of the Regulatory Agencies Law, the Economic Freedom Act, and the new LINDB wording, such administrative procedure has become a reality in practically all the aforementioned autarchies.

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[40] Oliveira, Schwanka, A administração consensual como a nova face da administração pública no século XXI, op. cit. p. 318.

[41] GUERRA, Sérgio. *Discricionariedade, regulação e reflexividade*: uma nova teoria sobre as escolhas administrativas. 3. ed. Belo Horizonte: Fórum, 2015. p. 361.

Despite this, the democratization of indirect public administration depends on consensual mechanisms that effectively allow popular participation in the regulatory impact analysis at the most appropriate time. In other words, as important as the public consultation or hearing itself, it is essential that popular participation occurs at the beginning or during the RIA, but before the draft of the normative act intended to be built (when the case is not of non-regulation, of course). In this way, popular participation can achieve the aforementioned objectives and reduce the democratic deficit; otherwise, the rule that does not have such participation may be considered invalid. Aneel, Anvisa, and ANTT are noteworthy for their good practices and internal regulatory provision. ANA, Ancine, ANP, and Antaq, on the other hand, deserve special attention and monitoring, so that there is a normative improvement.

References

ALBUQUERQUE, Kélvia. A visão da Secretaria de Gestão do Ministério do Planejamento, Orçamento e Gestão. In: PROENÇA, Jadir Dias; DA COSTA, Patrícia Vieira; MONTAGNER, Paula (Org.). *Desafios da regulação no Brasil*. Brasília: Enap, 2006. p. 83-104.

ALEXY, Robert. *Teoria dos direitos fundamentais.* 2. ed. Translation of Virgílio Afonso da Silva. São Paulo: Malheiros, 2014.

BACELLAR FILHO, Romeu Felipe. Poder normativo de entes reguladores. *Administrative Law Review*, Rio de Janeiro, v. 230, p. 153-162, Oct. 2002. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46339/45110>. Accessed on: 9 July 2020. DOI: http://dx.doi.org/10.12660/rda.v230.2002.46339.

BARCELLOS, Ana Paula de. *Ponderação, racionalidade e atividade jurisdicional*. Rio de Janeiro: Renovar, 2005.

BRASIL. ANP. *Análise de impacto regulatório em discussão na ANP*. Available at: <www.anp.gov.br/noticias/5486impactorelatoriodiscussaoanp>. Accessed on: 31 May 2020.

_____. Anvisa. *Relatório de análise de impacto regulatório sobre rotulagem nutricional.* Brasília. Sept. 2019. GerênciaGeral de Alimentos. Available at: <http://portal.anvisa.gov.br/documents/10181/3882585/%281%29Relat%C3%B3rio+de+An

%C3%A1lise+de+Impacto+Regulat%C3%B3rio+sobre+Rotulagem+Nutricional/3e2c2728b55a4296b5af6c7960fd6efa>. Accessed on: 5 June 2020.

____. Ministério da Transparência e ControladoriaGeral da União. *Avaliação da implementação da análise de impacto regulatório na Agência Nacional de Águas — ANA.* 2018. Available at: <https://auditoria.cgu.gov.br/download/11385.pdf>. Accessed on: 31 May 2020.

____. Presidência da República. Casa Civil. *Boletim PRO-REG*. Oct. 2012. Available at: <www.gov.br/casacivil/ptbr/assuntos/governanca/regulacao/documentos/bibliotecanacional/2012/boletimproreg1osemestrede2012>. Accessed on: 29 May 2020.

____. Presidência da República. Casa Civil. *Histórico do PRO-REG*. Available at: <www.gov.br/casacivil/ptbr/assuntos/governanca/regulacao/sistema regulatorio-brasileiro/historicodoproreg>. Accessed on: 29 May 2020.

____. Presidência da República. Casa Civil. *Nota Técnica nº 4/2017/ AESP/ SAG/CC-PR.* Available at: <www.gov.br/casacivil/ptbr/assuntos/governanca/regulacao/boas-praticas-regulatorias/consulta-publica/consulta-publica-001-2017-diretrizes-e-guia-air-pasta/abertura/documentacao-produzida-para-construcao-das-diretrizes-gerais-e-do-guia-air/nota-tecnica-consultapublica0012017.pdf>. Accessed on: 30 May 2020.

____. Presidência da República. Casa Civil. *Resultado da Consulta Pública: Diretrizes e Guia AIR — 001/2017*. Available at: <www.gov.br/casacivil/pt-br/assuntos/governanca/regulacao/boas-praticas-regulatorias/consulta—publica/consulta-publica-001-2017-diretrizes-e-guia-air-pasta/encerramento/consultapublicadiretrizeseguiaair0012017>. Accessed on: 30 May 2020.

____. *TCU nº 031.996/2013-2*. Available at: <www.gov.br/casacivil/pt br/assuntos/governanca/regulacao/documentos/biblioteca-nacional/2013/relatorio-de-auditoria-operacional-das-agencias-reguladoras-de-infraestrutura>. Accessed on: 30 May 2020.

BRUNA, Sergio Varella. Procedimentos normativos da administração e desenvolvimento econômico. In: SALOMÃO FILHO, Calixto. *Regulação e desenvolvimento.* São Paulo: Malheiros, 2002. p. 231-262.

COGLIANESE, Cary. Improving regulatory analysis at independent agencies. *Administrative Law Review*, Rio de Janeiro, v. 277, no. 3, p. 15-47, Nov. 2018. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/

view/77675/74640>. Accessed on: 9 July 2020. DOI: http://dx.doi.org/10.12660/rda.v277.2018.77675.

DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 32. ed. Rio de Janeiro: Forense, 2019.

DUARTE JUNIOR, Ricardo César Ferreira. A legitimidade do estado regulador brasileiro: uma análise democrática. *A&C Administrative Law Review & Constitucional*, Belo Horizonte, yr. 11, no. 43, p. 135166, Jan./Mar. 2011. DOI: http://dx.doi.org/10.21056/aec.v11i43.231.

GABARDO, Emerson. Mecanismos de intervención del Estado en Brasil, postmodernidad y la cuestión de la subsidiariedad. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 1, no. 2, p. 5971, July/Dec. 2014. DOI: www.dx.doi.org/10.14409/rr.v1i2.4618.

____. O princípio da supremacia do interesse público sobre o interesse privado como fundamento do direito administrativo social. *Revista de Investigações Constitucionais,* Curitiba, v. 4, n. 2, p. 95130, May/Aug. 2017. DOI: http://dx.doi.org/10.5380/rinc.v4i2.53437.

____; HACHEM, Daniel. Responsabilidade civil do Estado, *faute du service* e o princípio constitucional da eficiência administrativa. In: GUERRA, Alexandre Dartanhan de Mello; PIRES, Luis Manuel Fonseca; BENACCHIO, Marcelo (Coord.). *Responsabilidade civil do Estado.* São Paulo: Quartier Latin, 2010. p. 240-292.

GRAU, Eros Roberto. *A ordem econômica na Constituição de 1988*. 14. ed. São Paulo: Malheiros, 2010.

GUERRA, Sérgio. *Direito administrativo e a nova hermenêutica*: uma releitura do modelo regulatório brasileiro. *Administrative Law Review*, Rio de Janeiro, v. 243, p. 168207, Jan. 2006. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/42559>. Accessed on: 9 July 2020. DOI: http://dx.doi. org/10.12660/rda.v243.2006.42559.

____. *Discricionariedade, regulação e reflexividade*: uma nova teoria sobre as escolhas administrativas. 3. ed. Belo Horizonte: Fórum, 2015.

INSTITUTO BRASILEIRO DE ESTUDOS DE CONCORRÊNCIA, CONSUMO E COMÉRCIO INTERNACIONAL (IBRAC). *Institucionalização e prática da análise de impacto regulatório no Brasil.* São Paulo: Ibrac, 2019. Kindle edition.

JUSTEN FILHO, Marçal. Agências reguladoras e democracia: existe um déficit democrático na "regulação independente"? In: ARAGÃO, Alexandre Santos de. *O poder normativo das agências reguladoras*. Rio de Janeiro: Forense, 2006. p. 301-332.

LEAL, Fernando. Análise de impacto regulatório e proporcionalidade: semelhanças estruturais, mesmos problemas reais? *Revista Brasileira de Políticas Públicas,* Brasília, v. 9, n. 3, p. 313349, 2019. DOI: http://dx.doi.org/10.5102/rbpp.v9i3.6278.

LEAL, Rogério Gesta; RECK, Janriê Rodrigues. A regulação da contratação pública pelas agências reguladoras: limites e possibilidades. *Revista digital de Derecho Administrativo*, n. 19, p. 4981, 1st semester 2018. DOI: https://doi.org/10.18601/21452946.n19.05.

MARTINS, Humberto Falcão. *Diagnóstico do processo de formulação e análise de políticas públicas em mercados regulados*. Relatório final. Casa Civil da Presidência da República. Subchefia de Análise e Acompanhamento de Políticas Governamentais. Programa de Fortalecimento da Capacidade Institucional para a Gestão em Regulação. Available at: <www.gov.br/casacivil/ptbr/assuntos/governanca/regulacao/documentos/biblioteca-nacional/2013/diagnostico-do-processo-de-formulacao-e-analise-de-politicas-publicas-em-mercadosregulados1>. Accessed on: 29 May 2020.

MEDAUAR, Odete. *Direito administrativo moderno*. 21. ed. Belo Horizonte: Fórum, 2018.

MENEGUIN, Fernando B.; SAAB, Flavio. *Análise de impacto regulatório*: perspectivas a partir da Lei da Liberdade Econômica. Brasília: Senado, 2020. Available at: <www12.senado.leg.br/publicacoes/estudoslegislativos/ tipos-deestudos/textosparadiscussao/td271>. Accessed on: 5 June 2020.

MOREIRA, Vital. *A ordem jurídica do capitalismo*. Coimbra: Centelho, 1978.

MOREIRA NETO, Diogo Figueiredo. Novas tendências da democracia: consenso e direito público na virada do século — o caso brasileiro. *Revista Eletrônica sobre a Reforma do Estado*, Salvador, no. 13, p. 1-17, Mar./May 2008.

OCDE. *Recomendação do Conselho sobre política regulatória e governança*. 2012. Available at: <www.oecd.org/gov/regulatorypolicy/Recommendation%20PR%20with%20cover.pdf>. Accessed on: 29 May 2020.

OLIVEIRA, Gustavo Henrique Justino de. *O contrato de gestão na administração pública brasileira.* Thesis (doctorate) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2005.

____; SCHWANKA, Cristiane. A administração consensual como a nova face da administração pública no século XXI: fundamentos dogmáticos, formas de expressão e instrumentos de ação. *A&C — Administrative Law Review & Constitucional*, Belo Horizonte, yr. 8, n. 32, p. 3150, Apr./June 2008. DOI: http://dx.doi.org/10.21056/aec.v8i32.504.

PROENÇA, Jadir Dias; PAULO, Carla Beatriz (Org.). *Experiências exitosas em regulação na América Latina e Caribe*. Brasília: Alia Opera, 2012.

SACHS, Ignacy. O Estado e os parceiros sociais: negociando um pacto de desenvolvimento. In: BRESSERPEREIRA, Luiz Carlos; WILHEIM, Jorge; SOLA, Lourdes. *Sociedade e Estado em transformação*. São Paulo: Unesp, 2001. p. 197-217.

SANTOS, Fábio Gomes dos. Participação na administração como direito fundamental. *Revista Digital de Direito Administrativo*, São Paulo, v. 1, n. 2, p. 436453, 2014. DOI: https://doi.org/10.11606/issn.23190558.v1i2p436453.

SCHIER, Adriana da Costa Ricardo; MELO, Juliane Andrea de Mendes Hey. O direito à participação popular como expressão do estado social e democrático de direito. *A&C — Administrative Law Review & Constitucional*, Belo Horizonte, yr. 17, n. 69, p. 127147, July/Sept. 2017. DOI: http://dx.doi. org/10.21056/aec.v17i69.825.

TEIXEIRA, Albano Busato; BITENCOURT, Caroline Muller. Os conselhos de participação popular como instrumento de legitimação das decisões das agências reguladoras. *Revista Eletrônica da Procuradoria-Geral do Estado do Rio de Janeiro — PGE-RJ*, Rio de Janeiro, v. 2, n. 2, p. 1-22, May/Aug. 2019.

TOAZZA, Vinicius Francisco; SANTIN, Janaína Rigo. Princípio da participação, consensualismo e audiências públicas. *A&C — Administrative Law Review & Constitucional*, Belo Horizonte, yr. 13, n. 54, p. 207231, Oct./Dec. 2013. DOI: http://dx.doi.org/10.21056/aec.v13i54.119.

VALENTE, Patrícia Rodrigues Pessôa. *Avaliação de impacto regulatório*: uma ferramenta à disposição do Estado. Dissertation (Master in State Law) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2010. DOI: 10.11606/D.2.2010.tde-26032012-092844. Accessed on: 29 May 2020.