The National Water Agency and federative coordination in the new sanitation legal framework*

A Agência Nacional de Águas e a coordenação federativa no Novo Marco do Saneamento Básico

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ABSTRACT

This article aims to analyze the specification of competence of the Union, States, Federal District and Municipalities and the role of the National Water Agency as an institution of federalistic coordination in the new legal framework of sanitation. It presents a qualitative research, with a post-positivist bias and hypothetical deductive character, conducted through a dogmatic bibliographic review, carried out based on Brazilian

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positive legislation and national doctrine. It was concluded by confirming the initial hypothesis, according to which the new legal framework for sanitation contributed to a more precise definition of the attributions of the federated entities in basic sanitation and assigned the National Water Agency the role of federative coordinating agent. The work proposes an analysis, under the prism of cooperative environmental federalism, of the recent legislative change introduced by Law no. 14,026, of July 15, 2020 and contributes to the interpretative technique of the powers of each state entity in matters of basic sanitation.

KEYWORDS

basic sanitation — environmental cooperative federalism — common competence — national basic sanitation policy

RESUMO

Este artigo científico busca analisar a especificação dos campos de competência da União, dos estados, do Distrito Federal e dos municípios e o papel da Agência Nacional de Águas e Saneamento Básico (ANA) como instituição de coordenação federativa no novo marco legal de saneamento. Apresenta-se uma pesquisa qualitativa, de viés pós-positivista e caráter hipotético-dedutivo, conduzida por meio de revisão bibliográfica dogmática realizada a partir de textos do direito positivo brasileiro e da doutrina nacional. Conclui-se pela confirmação da hipótese inicial, segundo a qual o novo marco legal do saneamento contribuiu para uma definição mais precisa sobre as atribuições dos entes federados em relação ao saneamento básico e atribuiu à Agência Nacional de Águas e Saneamento Básico o papel de agente de coordenação federativa. O trabalho propõe uma análise, sob o prisma do federalismo cooperativo ambiental, da recente alteração legislativa introduzida pela Lei nº 14.026, de 15 de julho de 2020, e contribui para a técnica interpretativa das competências de cada ente estatal em matéria de saneamento básico.

PALAVRAS-CHAVE

saneamento básico — federalismo cooperativo ambiental — competência comum — política nacional de saneamento básico

1. Introduction

The expansion of access to basic sanitation services in Brazil is a decisive factor in promoting the reduction of regional inequalities and sustainable development with respect to the 2030 Agenda proposals of the United Nations.[1]

Access to basic sanitation is on the list of fundamental rights that guarantee minimum social and environmental well-being,[2] the "right to live in healthy, balanced and safe conditions".[3] The different stages of meeting the universal goals of sanitation in the sprawling territory of Brazil, and the high level of investments needed, require a careful review of the strategies adopted, privileging sophisticated coordination and greater regionalization of services.

The idea of "cooperative ecological federalism" relates to this context, emerging from the necessary interactions between the entities of the Federation in the advancement of a sustainable environment,[4] an epistemological guideline in understanding the challenges of basic sanitation as part of environmental management in the federation of Brazil.[5]

In this regard, Law No. 14,026, of July 15, 2020,[6] the "New Legal Framework for Basic Sanitation", introduced key innovations for the institutional coordination of federated competences. It emphasised the attributions of the National Agency for Water and Basic Sanitation (ANA), an articulating entity which confers objective parameters for sectoral regulation, encouraging greater security and stability for investments.

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1 SAVIOLI, Anna Beatriz; RIBAS, Lídia Maria. Saneamento básico na agenda 2030: contexto nacional de políticas públicas e desenvolvimento regional. In: CAMPELLO, Lívia Gaigher Bósio (Coord.). *Direitos humanos e meio ambiente*: os 17 objetivos de desenvolvimento sustentável da Agenda 2030. São Paulo: IDHG, 2020. p. 216-246.

2 CARVALHO, Sonia Aparecida de. O direito fundamental ao saneamento básico como garantia do mínimo existencial social e ambiental. *Revista Brasileira de Direito*, Passo Fundo, v. 8, n. 2, p. 6-37, out. 2012.

3 SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago. *Direito constitucional ambiental*: estudos sobre a Constituição, os direitos fundamentais e a proteção do ambiente. São Paulo: Revista dos Tribunais, 2011. p. 117.

4 SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago. A competência constitucional legislativa em matéria ambiental: à luz do "federalismo cooperativo ecológico" consagrado pelo ordenamento jurídico brasileiro. *Revista de Direito Ambiental*, São Paulo, v. 18, n. 71, p. 55-116, jul./set. 2013.

5 ROCHA, Júlio Cesar de Sá da; BARRETO, Ariadne Murichi. Federalismo cooperativo na gestão ambiental: impasses e perspectivas na atuação dos consórcios públicos. *Revista Brasileira de Direito Animal*, Salvador, v. 14, n. 2, p. 107-122, maio/ago. 2019.

6 BRASIL. *Lei n. 14.026, de 15 de julho de 2020*. Atualiza o marco legal do saneamento básico e altera a Lei n. 9.984, de 17 de julho de 2000 […]. Available at: www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L14026.htm. Accessed on: 30 Sept. 2020.

This article offers an analysis of the innovations brought by the New Legal Framework for Basic Sanitation in defining the attributions of the federated entities and on the role of ANA in the coordination of sanitation policies in Brazil. It is assumed the new regulation more clearly established the powers of Brazilian federated entities and gave a leading regulatory role to this agency. Thus, we look, first, at the way cooperative federalism is structured in our legal system. Then, we examine the distribution of basic sanitation competences within the scope of the constitutional framework, to understand the role assigned to each of the federated entities and the cooperation that emerges from the proposal of the constitutional structure. Finally, we outline the changes promoted within the scope of Law no. 14,026/2020 with regard to regulatory integration and coordination, essentially attributed to ANA.

This is a qualitative research study,[7] supported by discussion of supporting texts, with a post-positivist bias. Circumstantial, objective truth is sought[8] through a hypothetical-deductive approach, involving a bibliographic review[9] of Brazilian positive and national doctrinal texts.

2. Cooperative Federalism in the 1988 Constitution

A Federation can be thought of in terms of an association or union of entities that gives rise to a State.[10] This association, as the constitutive origin of the federal State, was already promoted by federalist as a guarantee of the sovereignty of the federated entities. As James Madison points out, unlike national or confederate states, in which a supreme (national) authority may supervise, direct or even abolishes local authorities, in federalism these subnational entities "form distinct parts of sovereignty, independent in a circle of general authority, as this general authority is itself independent of them".[11]

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7 GUBA, Egon Gotthold; LINCOLN, Yvonna Sessions. Competing paradigms in qualitative research. In: DENZIN, Norman Kent; LINCOLN, Yvonna Sessions (Ed.). *Handbook of qualitative research*. Thousand Oaks, CA: Sage, 1994. p. 105-117.

8 ANDRADE, José Maria Arruda de. *Interpretação da norma tributária*. São Paulo: MP Editora, 2006.

9 ADEODATO, João Maurício. Bases para uma metodologia da pesquisa em direito. *Revista da Faculdade de Direito de São Bernardo do Campo*, v. 4, p. 171-187, 1998.

10 CARRAZZA, Roque Antonio. Princípio federativo e tributação. *Iustitia*, v. 47, n. 130, p. 162-180, 1996, p. 64.

11 MADISON, James. Conformidade do plano proposto com os princípios republicanos. Exame de uma objeção. In: HAMILTON, Alexander; MADISON, James; JAY, John. *O Federalista*: Rio de Janeiro: Typ. Imp. e Const. de J Villeneuve e Comp., 1840. t. 2. p. 99.

Building a Federation from this associative perspective, even united a single State, enables federated units to maintain a certain degree of autonomy and independence.[12]

The political autonomy of subnational entities in the Federation is directly linked to the realization of the republican principle. There is only one true republic in the federal state when entities have freedom to exercise their constitutional powers.[13] Thus, it is possible to define political autonomy as "the power of self-determination, within a non-determining framework".[14]

It is only possible to speak of the political autonomy of federated entities where there is a guarantee of the financial means to exercise constitutional attributions. Thus, the financial power of the federated entities, embodied in "autonomy of perception, management and expenditure",[15] is the substrate to ensure political autonomy.

In terms of independence, the organization of the State as a federative association entails the geographical decentralization of power, through the establishment of spheres of competence, within which subnational entities can exercise their jurisdiction.[16] Independence is also linked to guaranteeing the participation of the decentralized entities in the formation of the legal order as a whole.[17]

One of the corollaries of independence is the idea of the reciprocal immunity of federated entities, whose origins are rooted in the judgement McCulloch v. Maryland, 1819, in which the American court recognized that "the exercise of the competence of a certain federative entity cannot impede the development of the competences ('constitutional measures') of another".[18] As Fernando dos Santos Arenhart explains:

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12 ZIMMERMANN, Augusto. Federação: conceito e características. In: ALVIM, Eduardo Arruda; LEITE, George Salomão; STRECK, Lênio (Coord.). *Curso de direito constitucional*. Florianópolis: Tirant lo Blanch, 2018. p. 465-478.

13 ATALIBA, Geraldo. *República e constituição*. 3. ed. São Paulo: Malheiros, 2011. p. 45.

14 SAMPÁIO DÓRIA, Antônio. Autonomia dos municípios. *Revista da Faculdade de Direito da Universidade de São Paulo*, v. 24, p. 419-432, 1928, p. 421.

15 SAMPAIO DÓRIA, Antônio Roberto. *Discriminação de rendas tributárias*. São Paulo: José Bushatsky, 1972. p. 11.

16 VELLOSO, Carlos. Estado federal e estados federados na Constituição de 1988: do equilíbrio federativo. *Revista de Direito Administrativo*. Rio de Janeiro, v. 187, p. 1-36, jan. 1992, p. 3.

17 NEVES, Luís Fernando de. *Cofins*. São Paulo: Max Limonad, 1997. p. 47.

18 HORVATH, Estevão; PINHEIRO, Hendrick. Imunidade recíproca e os serviços públicos na visão do Supremo Tribunal Federal. In: FRATTARI, Raphael; LOBATO, Valter. (Org.). *30 Anos da Constituição Federal de 1988*. Belo Horizonte: Arraes, 2019. v. 1, p. 201-216.

> The case of McCulloch v. Maryland expressed the tension existing in the newly formed American federation, the dispute over political power, originating from an alliance between autonomous states. The American federation needed to limit the power of the member states, while strengthening the Union.

Thus, the theory of implicit powers was established.[19] This underlies the construction of reciprocal immunity, an important feature of federalism: the federal state cannot admit that an entity influences the development of the attributions of another.[20] The competence of federated entities denotes both the scope of freedom of its holders and the limits of activities of other members.

In Brazil, the Republican Constitution of 1891 was intended to incorporate federalist ideals of North American origin; however, the loose federative ties and various centralizing interventions led to a contradictory "authoritarian federalism".[21]

Constitutional texts following the Constitution of the First Republic identified the alternation between processes of decentralization of competences at democratic moments (1934 and 1946) and concentration of power in the institution of the Union in markedly authoritarian regimes (1937 and 1967), a process that may be described as the "systoles and diastoles" of the Brazilian federation.[22]

The Constitution is fundamental as an instrument that defines the powers of entities in a Federation[23] and protection of these limits is the role of the Judiciary, whose main remit is to "replace the Union or the federative units in terms of the limits of sovereign power".[24]

In Brazil, the federative model adopted by the 1988 Constitution represents the rupture as a movement of concentration of competences in the institution of the Federal Union of the previous dictatorial regime.[25] This rupture sought to ensure autonomy and independence, administratively

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[19] ARENHART, Fernando Santos. Imunidade recíproca e federalismo: da construção norte-americana à atual posição do STF. *Revista Brasileira de Políticas Públicas*. Brasília, v. 3, n. 2, p. 13-32, 2013, p. 30.

[20] COSTA, Alcides Jorge. Algumas ideias sobre uma reforma do sistema tributário brasileiro. *Direito tributário atual*. São Paulo: Resenha Tributária, v. 7-8, p. 1.733-1.768, 1987-1988, p. 1.741.

[21] BONAVIDES, Paulo. A evolução constitucional do Brasil. *Estudos Avançados*, São Paulo, v. 14, n. 40, p. 155-176, dez. 2000.

[22] SALLUM JR., Brasílio. Federação, autoritarismo e democratização. *Tempo Social*, São Paulo, v. 8, n. 2, p. 27-52, out. 1996, p. 49.

[23] KELSEN, Hans. *Jurisdição constitucional*. São Paulo: Martins Fontes, 2003.

[24] MANGABEIRA, João. *Em torno da constituição*. 2. ed. Rio de Janeiro: Forense, 2019. p. 103.

[25] TER-MINASSIAN, Teresa. Brazil. In: TER-MINASSIAN, Teresa (Ed.). *Fiscal federalism in theory and practice.* Washington: International Monetary Fund, 1997. p. 438-456, p. 438.

(capacity for self-organization), politically (capacity to elect local officers) and financially (managing resources).[26]

Although the 1988 Constitution sought to promote greater decentralization of federative competences, it is important to note that the structure remained somewhat centralized, attributing to the "Union the power to decide the direction of the vast majority of state and government activities, leaving little for the States and, above all, for the Municipalities".[27]

Another element that denotes the enlargement of the Union in Brazilian government is linked to the concentration of financial resources in the federal entity, a circumstance that increases its political weight as to decisions about which policies will be implemented.[28] The political autonomy of subnational entities must, in this context, be understood as limited directly by the resources they have access to.

The federative form of the Brazilian State is a cornerstone of the Constitution of 1988 (art. 60, item I, of the CF), which consolidates this model of state-owned organization. Indeed, the "super-rigidity"[29] of the Brazilian model guarantees the stable and lasting character of the federal state.[30] Violation of this clause is considered a form of aggression, which seeks to revoke, alter or extinguish administrative structures. It is an affront to the Constitution, a movement "against the autonomy of the States of the Federation, and their capacity for self-government".[31]

While ensuring the independence and autonomy of federated entities, the Constitution of 1988 (consistent with that of 1946) adopts a model of cooperative federalism, aimed at strengthening ties among members.[32]

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[26] CONTI, José Maurício. *Federalismo fiscal e fundos de participação*. São Paulo: Ed. Juarez de Oliveira. 2001. p. 8.

[27] KHAMIS, Renato Braz Mehanna; SARTORI, Ivan Ricardo Garisio. O impacto do federalismo sanitário brasileiro na efetividade do direito à saúde. *Revista Brasileira de Políticas Públicas*, Brasília, v. 7, n. 2, p. 302-312, 2017, p. 308.

[28] FÉ, Raquel Mousinho de Moura. A repartição de rendas entre os entes da federação e sua repercussão na caracterização do federalismo brasileiro: uma investigação acerca do desenvolvimento do federalismo fiscal-financeiro no Brasil. *Revista Brasileira de Políticas Públicas*, Brasília, v. 5, n. 1, p. 93-114, 2015, p. 112.

[29] ATALIBA, Geraldo. *República e constituição*. 3. ed. São Paulo: Malheiros, 2011. p. 45.

[30] DALLAVERDE, Alexandra Katia. *As transferências voluntárias no modelo constitucional brasileiro*. São Paulo: Blucher, 2016. p. 34.

[31] RIBEIRO, Ricardo Lodi. Pacto federativo e reforma tributária. *Revista de Direito Administrativo*, Rio de Janeiro, v. 222, p. 87-96, out. 2000, p. 89.

[32] BERCOVICI, Gilberto. Federalismo e desenvolvimento regional no Brasil. In: SCHOUERI, Luís Eduardo (Coord.). *Direito tributário*: homenagem a Paulo de Barros Carvalho. São Paulo: Quartier Latin, 2008. p. 889-905, p. 890.

The structure of cooperative federalism poses challenges inherent to a system built on two fundamental pillars: the need to coordinate actions in the search of common interest; and the guarantee of autonomy of its members. One of the challenges, for example, is linked to the question of controlling intergovernmental transfers, resources transferred to be applied by other federated units, based on parameters and criteria established by central planning. However, although coordination is fundamental to the success of the policy developed on a decentralized basis, it must leave a reasonable degree of autonomy for the subnational entity to carry out its own government program.[33]

One of the most sensitive features of this model of cooperative federalism is the attribution of competences common to all federated entities (art. 23 of the CF): "they need to be exercised by the three entities, in a cooperative way, at risk of not being fully carried out".[34] As explained by Raul Machado Horta:

> […] The 1988 Constitution, overcoming the dualism of the listed and reserved powers, a powerful creation of classical federalism, added and developed, in the division of competences, the common competence, of a cooperative Union, States, Federal District and Municipalities (art. 23, I to XII) and the concurrent competence, of a legislative nature, of the Union, the States and the Federal District, embracing, among other matters, tax law, financial law […].[35]

The need for cooperation between federated entities is more sensitive in terms of achieving structural purposes, such as promoting development in a sustainable way.[36] The inclusion of environmental management among the common competences of the federated entities represents the recognition that only the coordination of efforts between state entities, according to the paradigm "ecological cooperative federalism",[37] can combat structural bottlenecks in Brazilian society.

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[33] MASCARENHAS, Caio Gama; RIBAS, Lídia Maria. Transferências intergovernamentais de desempenho ou resultado: o federalismo fiscal da Nova Administração Pública. *Revista de Direito Administrativo*, v. 280, n. 1, p. 89-119, 30 abr. 2021, p. 116.

[34] PINHEIRO, Hendrick; SANTOS, Marcela de Oliveira. Planejamento e federalismo na constituição de 1988: os desafios da ordem urbanística. In: COELHO, Diva Julia Safe; FERREIRA, Rildo Mourão; COELHO, Saulo de Oliveira Pinto (Org.). *Direito e sustentabilidade nos 30 anos da constituição*. Florianópolis: Tirant Lo Blanch, 2018. p. 51-72, p. 55.

[35] HORTA, Raul Machado. As novas tendências do federalismo e seus reflexos na Constituição brasileira de 1988. *Revista do Legislativo*, Belo Horizonte, n. 25, p. 14-25, jan./mar. 1999, p. 17.

[36] RIBAS, Lídia Maria; PINHEIRO, Hendrick. Taxa de resíduos sólidos como instrumento para promoção do direito fundamental ao meio ambiente equilibrado. *Revista de Direito Econômico e Socioambiental*, Curitiba, v. 10, n. 2, p. 233-260, set. 2019.

[37] Ingo Wolfgang Sarlet e Tiago Fensterseifer, *Direito constitucional ambiental*, op. cit., p. 116-117.

This necessary cooperation between the federated entities, required by the regime of common and concurrent competences, shows the influence of Brazilian law on the protection of the environment. Recognizing the importance of environmental protection policies — among them basic sanitation —, the 1988 constitution prescribed that Brazilian federative arms have the competence to rule on such matters.

The competence to legislate on basic sanitation relies on a complex constitutional structure and coordination in this matter depends on legislative instruments that establish fields of action of each sphere of government. As seen below, the National Basic Sanitation Policy (Law nº 11,445, of January 5, 2007) was a first step in the division of federal responsibilities. This was improved by the New Legal Framework for Sanitation (Law 14,026, of July 15, 2020).

3. Competence to legislate on basic sanitation in Brazil

The 1988 Constitution presented a complex constitutional arrangement of division of federal competences with regard to basic sanitation. The main provisions are item XX of art. 21 and item IX of article 23.

Article 21 concerns material competences exclusive to the Union, i.e., general competences for concrete action, through the provision of public services or the publication of administrative and political acts, in relation to diverse topics.[38] Here, basic sanitation figures as the object of planning activity in relation to urban development (art. 21, XX).[39] This competence of the Union is fundamental as a form of federative integration and coordination.[40]

Item IX of art. 23 of the Constitution prescribes the elaboration of basic sanitation programs in a list of material competences shared between the various entities of the Federation, called "common competences". These are matters that should be of concern for the entities of the Federation, requiring their joint and coordinated action, "due to the existing public interest in the preservation of common resources (some of which are particularly threatened)

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38 ALMEIDA, Fernanda Dias Menezes de. *Competências na Constituição de 1988*. São Paulo: Atlas, 1991. p. 90-91.

39 HORTA, Raul Machado. *Direito constitucional*. 4. ed. Belo Horizonte: Del Rey, 2003. p. 349.

40 BERCOVICI, Gilberto. Saneamento básico e federalismo: serviço público e competências comuns. In: LUNA, Guilherme Ferreira Gomes et al. (Coord.). *Saneamento básico*: temas fundamentais, propostas e desafios. Rio de Janeiro: Lumen Juris, 2017. p. 197-212.

and in meeting specific targets of social value, demanding a sum of efforts."[41]

These constitutional provisions which deal with basic sanitation do not determine stewardship. Art. 21 only attributes planning competence in terms of general guidelines, while art. 23, IX, "expressly alludes to the contest of the three entities to promote the improvement in the conditions of sanitation, and not to organize and provide these services."[42] In the view of Luis Roberto Barroso:

> The rule does not refer to service jurisdiction, but to the possible action of any of the state entities aimed at the best result. The constitutional objective is productive cooperation among them, and not, of course, a useless and costly overlap.[43]

Common competence does not define federative competence for the provision of services, but only translates the constitutional programmatic intentions through recommendations addressed to the Union, the states, the Federal District and the municipalities, through "non-exclusive rules, not endowed with privacy, which shall constitute a common object of the four levels of government".[44]

Thus, the ownership of basic sanitation services must be inferred from other constitutional provisions. With no mention of these services in the exhaustive list of exclusive competences of the Union, it remains to define whether there is a framework for municipal competences (provided for by art. 30 of the Constitution) or if, otherwise, it is framed in the residual competence of the states (Constitution, art. 25, § 1).

According to the Constitution, municipal matters of local interest (art. 30, I and V). The key to the question, therefore, is to determine whether basic sanitation services fall into the category of local interest. There are sanitation services — such as waste management of solids and rainwater — which are clearly recognized as belonging to the local interest of the municipalities.[45]

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41 Fernanda Dias Menezes de Almeida, *Competências na Constituição de 1988*, op. cit., p. 140.

42 MARQUES NETO, Floriano Peixoto de Azevedo. As parcerias público-privadas no saneamento ambiental. In: SUNDFELD, Carlos Ari (Coord.). *Parcerias público-privadas*. 2. ed. São Paulo: Malheiros, 2011. p. 339.

43 BARROSO, Luís Roberto. Saneamento básico: competências constitucionais da União, Estados e Municípios. *Revista de Informação Legislativa*, v. 38, n. 153, p. 255-270, jan./mar. 2002, p. 260.

44 Raul Machado Horta, *Direito constitucional*, op. cit., p. 355.

45 Floriano Peixoto de Azevedo Marques Neto, As parcerias público-privadas no saneamento

Debate exists in the case of water distribution and sewage collection services, especially when these services require inter-municipal coordination measures, transcending the scope of only one municipality, separately considered. It is understood that water distribution and sewage collection services are a municipal competence,[46] but the controversy regarding the ownership of these services in metropolitan regions has not yet been fully clarified,[47] despite judgment on the issue in ADI no. 1,842 by the STF.[48]

A clear criterion for determining whether a sanitation service is within the competence of the municipality is the possibility of providing an integral part of the service within its territorial scope, since, in these cases, the predominance of local interest over provision of the sanitation will be less questionable. Waste management of solids, for example, can be provided entirely within the scope of the municipality and, therefore, considered municipal ownership.[49]

Two other relevant points of contact between the Constitution and sanitation are related to health and the environment.

The Constitution expressly places basic sanitation within the scope of public health policies, admitting the participation of the Union in the planning and execution of sanitation policies.[50] Item IV of art. 200 of the Constitution determines that it is the competence of the Unified Health System (SUS) "to participate in the formulation of policy and execution of basic sanitation actions".[51]

In the specific field of sanitation, we see a misalignment between a centralized federative structure, which focuses in the Union the power to define the direction of public policies, with a high level of decentralization provided for by the Constitution in the implementation of health policies. The alignment of these two understandings of federalism in the Brazilian

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ambiental, op. cit., p. 337

46 CAMMAROSANO, Márcio. A divisão constitucional de competências e a cooperação federativa na prestação de serviços municipais de saneamento básico. In: DAL POZZO, Augusto Oliveira; OLIVEIRA, José Pimenta de; BERTOCCELLI, Rodrigo de Pinho (Coord.). *Tratado sobre o marco regulatório do saneamento básico no direito brasileiro*. São Paulo: Contracorrente, 2017. p. 245.

47 MARTINS, Ricardo M. Titularidade do serviço de saneamento básico. *Revista de Direito Administrativo*, Rio de Janeiro, v. 249, p. 171-198, set. 2008.

48 BRASIL. Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade* n. 1842. Rel. min. Luiz Fux, julg. 6 mar. 2013, DJe-181, pub. 16 set. 2013.

49 Floriano Peixoto de Azevedo Marques Neto, As parcerias público-privadas no saneamento ambiental, op. cit., p. 339.

50 Luís Roberto Barroso, Saneamento básico, op. cit., p. 264.

51 BRASIL. *Constituição da República Federativa do Brasil de 1988*. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 30 Sept. 2020.

constitutional structure is fundamental for the coordination of sanitation policies. In this sense, the creation of forums such as the Bipartite (CIB) and Tripartite (CIT) Inter-manager Commissions is a way to "establish arenas of negotiation and agreement between the federative entities for the purpose of implementing public health policies".[52]

Although there is no express mention of sanitation in the constitutional provisions on the environment, effective public policies for sewage collection and solid waste management clearly have an environmental impact. Their formulation must be understood as a duty of the public authority, in the light of art. 225 of the Constitution.[53]

Basic sanitation can also be analysed from the perspective of the economic order of the Constitution of the Republic. This stems from its characterization as a public service in the proper sense,[54] integral to the set of State activities "endowed with economic content, with special social relevance, whose exploitation the Constitution or the Law attach to the ownership of one of the spheres of the federation to ensure access for everyone, permanently."[55] Its provision characterizes a public service, as it serves the collective interest, but this does not exclude its economic exploitation — as is the case with jurisdiction or police powers — since the public service itself involves the provision of an economic utility to citizens, individually enjoyable.[56]

Public services, in the sense outlined above, are part of the economic order of the Constitution, as regulated by its art. 175, which determines that "the Public Authority, in the form of the law, directly or under concession, always through a bidding process, is responsible for the provision of public services".[57] This instrument, despite attributing stewardship of public services to the State, by virtue of essentiality in meeting the interests of the community, allows delegation of its exploitation to the private sector, due to the economic

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52 Renato Braz Mehanna Khamis and Ivan Ricardo Garisio Sartori, O impacto do federalismo sanitário brasileiro na efetividade do direito à saúde, op. cit., p. 311.

53 PESSOA, João Paulo. Constituição, saneamento básico e controle social. In: Augusto Neves Dal Pozzo, José Roberto Pimento Oliveira and Rodrigo de Pinho Bertoccelli (Coord.), *Tratado sobre o marco regulatório do saneamento básico no direito brasileiro*, op. cit., p. 972-974.

54 MEDAUAR, Odete. *Direito administrativo moderno*. 19. ed. São Paulo: Revista dos Tribunais, 2015. p. 376-377.

55 MARQUES NETO, Floriano Peixoto de Azevedo. Nova regulação dos serviços públicos. *Revista de Direito Administrativo*, Rio de Janeiro, v. 228, p. 13-30, abr. 2002, p. 22.

56 ARAGÃO, Alexandre Santos de. O conceito de serviços públicos no direito positivo brasileiro. In: DI PIETRO, Maria Sylvia Zanella; SUNDFELD, Carlos Ari (Org.). *Doutrinas essenciais*: v. 5: Direito administrativo. São Paulo: Revista dos Tribunais, 2012. p. 71.

57 BRASIL. *Constituição da República Federativa do Brasil de 1988*. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 30 Sept. 2020.

nature of these services.

The interfaces of the constitution with basic sanitation public services relates to the function of planning, referred to in the chapter on the economic order, more specifically in art. 174. The Constitution provides for the instrument not as a way of planning the economy, but as a feature of rational action of the State,[58] which determines national development objectives, articulating the means for this purpose, binding on the Public Authority — but not on the private sector.[59] More than just a form of macroeconomic intervention of the State, planning is an essential stage of the public policy formulation cycle itself,[60] a way of guiding and organizing State action in general.[61]

Planning is an essential component for the basic sanitation regime in Brazil. In this case, its constitutional foundation is not extracted directly from art. 174 of the Constitution, but from art. 21, XX, which determines that the Union is responsible for the elaboration of basic sanitation guidelines as a way of structuring, guiding and coordinating the action of other federative entities in relation to basic sanitation services. Vinicius Marques de Carvalho explains, this is:

> […] nothing more than the realization of the Union's planning function in the sanitation sector. It stipulates the ends to be pursued by the agents that interact in the management of services and the most appropriate means to pursue them. In addition, because it is the organization at the national level of a service that is the target of interventions by all entities of the Federation, national guidelines cannot refrain from instituting distribution criteria and sharing regulatory functions, stimulating cooperative relationships. With this, the Union assumes the role of organizer of the actions concerning the implementation of public policy in the basic sanitation sector.[62]

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58 PINHEIRO DA SILVA, Hendrick. Planejamento e controle: uma reflexão sobre ética. *Revista Contas Abertas*, v. 3, n. 3, p. 24-27, 2017.

59 MARQUES NETO, Floriano Peixoto de Azevedo; QUEIROZ, João Eduardo Lopes. Planejamento. In: CARDOZO, José Eduardo Martins; QUEIROZ, João Eduardo Lopes; SANTOS, Márcia Batista dos (Org.). *Curso de direito administrativo econômico*. São Paulo: Malheiros, 2006. v. 2, p. 74.

60 CALIL, Ana Luiza Fernandes. *O planejamento público como mecanismo para a inovação*: os desafios jurídicos de planejar para inovar. Dissertação (mestrado em direito) — Faculdade de Direito, Universidade do Estado do Rio de Janeiro, Rio de Janeiro, 2019. p. 44.

61 GRAU, Eros Roberto. A ordem econômica na Constituição de 1988. São Paulo: *Revista dos Tribunais*, 1990. p. 318.

62 CARVALHO, Vinicius Marques de. Elementos para a implementação do novo marco regulatório na gestão dos serviços de saneamento básico no Brasil: qual o espaço da iniciativa privada? In: SHAPIRO, Mário Gomes (Coord.). *Direito econômico*: direito e economia na regulação setorial. São Paulo: Saraiva, 2009. p. 197-198.

In sanitation policy, the Union operates as a coordinating agent responsible for editing general rules. However, subject to the understanding of the scope of "general norms", there may be a concentration of power in the Union. As Carlos Bastide Horbach points out, the interpretation of the Supreme Federal Court considers what the Union enacts to be a "general rule", reducing the autonomy of states.[63] In this context, although the general rules are a fundamental instrument of federative cooperation, subnational entities should not be jettisoned from participation in the formulation and implementation of public policy.

These guidelines were implemented by the National Sanitation Law Basic (Law No. 11,445/2007), which originally established general rules applicable to sanitation services. This normative instrument gives prominent role to the planning activity, defining the elaboration of sanitation plans (art. 9, I), both by the Union — the national plan and the regional sanitation plans — as well as by the federal entities in charge of sanitation services.[64]

However, the role of the Union in planning policy was accentuated in the new sanitation framework, which provided for the possibility of creating, in a subsidiary manner to the states, reference blocks for the regionalized provision of these services (art. 52, § 3, of Law no. 11,445/2007).

The new sanitation framework (Law no. 14,026/2020) makes it clear that the ownership of basic sanitation services belongs to the municipalities and the Federal District, only in cases of local issues.[65] The State, in conjunction with the municipalities, holds sway in the case of metropolitan regions, urban agglomerations and micro-regions (art. 8, items I and II, respectively, of Law No. 11,445/2007).

The metropolitan region depends on cooperation between the municipalities that form it.[66] However, according to the previous wording, where it was identified as common interest (even in metropolitan regions),

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[63] HORBACH, Carlos Bastide. Forma de Estado: federalismo e repartição de competências. *Revista Brasileira de Políticas Públicas*, Brasília, v. 3, n. 2, p. 1-12, 2013, p. 11.

[64] OLIVEIRA, José Roberto Pimenta de. O planejamento do serviço público de saneamento. In: Augusto Neves Dal Pozzo, José Roberto Pimento Oliveira e Rodrigo de Pinho Bertoccelli (Coord.), *Tratado sobre o marco regulatório do saneamento básico no direito brasileiro*, op. cit., p. 561- 578.

[65] Márcio Cammarosano, A divisão constitucional de competências e a cooperação federativa na prestação de serviços municipais de saneamento básico, op. cit., p. 245.

[66] PINHEIRO, Hendrick; SANTOS, Marcela de Oliveira. Planejamento e federalismo na constituição de 1988: os desafios da ordem urbanística. In: COELHO, Diva Julia Safe; FERREIRA, Rildo Mourão; COELHO, Saulo de Oliveira Pinto (Org.). *Direito e sustentabilidade nos 30 anos da constituição*. Florianópolis: Tirant Lo Blanch, 2018. p. 51-72.

management depended on the establishment of inter-federative consortia or collegiate bodies. The new standard attributes to the state the ability to regulate matters in the metropolitan sphere, promoting cooperation and articulation between the municipalities. It also establishes the state as the arbiter of rules in this regard.

With the changes to the new framework, the law also makes it clear that agents are responsible for regulating and inspecting sanitation services (art. 8, § 5, of Law No. 11,445/2007). This provision seeks to eliminate overlapping of powers and bodies responsible for supervising these services.

Additionally, besides outlining a more concrete definition regarding stewardship, as mentioned, the National Law of Basic Sanitation, in the wording provided by Law nº 14,026/2020, sought to give greater attention to federative cooperation, either by delimiting the use of associated management instruments in the sector, or attributing to the National Water Agency (in the new wording, the National Water and Sanitation Agency) the setting of reference standards, the objective to give greater uniformity to sectoral regulation.

4. ANA as a federative coordination structure

To advance the sustainable use and exploitation of water (art. 2), the Union, through the competence provided for in art. 21, XIX, of the Federal Constitution, instituted the National Water Resources Policy, in Law no. 9,433/1997. An institutional apparatus was planned — National Water Resources Management System — composed of several public bodies, among which the water agencies, entities with a fundamental management role. To effect implementation of the National Policy on Water Resources, a coordinating national entity was needed, to regulate the water agencies. Following the experience of other infrastructure sectors, a national regulatory agency for water resources was established, National Water Agency (ANA), through Law no. 9,984, of July 17, 2000.[67]

It should be noted that this agency contemplated, from the outset, an essential role in articulating bodies and entities of the other federated entities, towards implementation of a public policy with supervisory competencies

[67] BRASIL. *Lei n. 9.984, de 17 de julho de 2000*. Dispõe sobre a criação da Agência Nacional de Águas e Saneamento Básico (ANA) […]. Available at: www.planalto.gov.br/ccivil_03/leis/l9984.htm. Accessed on: 30 Sept. 2020.

shared between the Union, the Federal District, states and municipalities (art. 23, XI, Federal Constitution). ANA's regulatory competence was limited, however, in the sphere of water resources.

With the modification proposed by Law no. 14,026/2020, ANA encompasses, also, the institution of reference norms for the regulation of basic sanitation services. According to the modifications of Law no. 9,984/2000, the content of the standards will cover material aspects of regulation such as quality benchmarks, efficiency and universalization of services, reduction and control of water loss, reuse of sanitary effluents and replacement of unitary systems (respectively items I, IV, VI, IX, XII and XIII of article 4-A), as well as procedural elements, such as the definition of contract models, criteria for regulatory accounting and calculation and evaluation of the achievement of goals (items III, V, VII, VIII, XII of art. 4-A). It covers, therefore, an extensive and detailed range of aspects.

The change is significant. Up to that point, although there was great weight attached to the existence of a regulatory authority, validating basic sanitation contracts, its exercise was promoted fully by the municipalities (directly or through delegation) and, in certain situations, by states and municipalities, jointly, without much attention to the need for standardization beyond the federated entity(ies) to which the services were linked. In fact, the characteristics of the sanitation sector privilege and encourage such a regulation model, so that the particularities of each locality are covered by regulatory standards. As Egon Bockmann Moreira, Heloisa Conrado Caggiano and Gabriel Jamur Gomes point out:

> […] The constitution considered the need to observe local peculiarities would make the provision of the service more efficient. Any standardization of the rules of the game, therefore, losing sight of these elements, tends to generate inefficiency. This is one of the risks of having federal regulation for basic sanitation, as it may eventually be disconnected from the demands and the reality of each municipality or region.[68]

[68] MOREIRA, Egon Bockmann; CAGGIANO, Heloisa Conrado; GOMES, Gabriel Jamur. O novo marco legal do saneamento básico: os pontos mais importantes da Medida Provisória n. 844/2018. *Revista de Direito Público da Economia* — RDPE, Belo Horizonte, v. 16, n. 63, p. 177219, jul./set. 2018, p. 101.

Thus, it is possible from the outset to rule out a more general, abstract usurpation, by the Union, of municipal competence in relation to basic sanitation services. In fact, the sharing of competences is, as seen, a highly complex topic, either because there are grounds for common action, coordinated action, or because, in concrete terms, high investments and infrastructure logic demand collaboration in different spheres. Regardless of this scenario, it should be noted that the Constitution provided the Union the function of standardizing the rules, granting it exclusive legislative authority to define general guidelines for basic sanitation, enacted in Law no 11,445/2007 and by the institution of planning with a national scope, observed by other entities.

Although the regulatory delegation granted to ANA was not met, a priori, within the scope of the aforementioned constitutional competence, it is clear that the establishment of a national standardization body helps realize the legislative function granted to the Union, and build an environment of greater stability and regulatory security.

It is important to note that there was a concern on the part of the legislator to protect the autonomy of municipalities and states (including metropolitan regions, micro-regions and urban agglomerations) and to the regulatory structure by providing that adherence to the reference standards promulgated by the ANA will be voluntary. According to the new wording of art. 23 of Law no. 11,445/2007, regulatory agencies retain the competence to issue norms relating to technical, economic and social dimensions of the services provided, observing, however, the "guidelines determined by ANA" in case of prior adherence to them.[69]

Nonetheless, to ensure adhesion to the norms of the ANA, the Union employed two funding mechanisms. Promotion is an instrument available to the State to enable or assist, directly or indirectly, the fulfilment of public interest, without coercion. In this sense, Jordana de Pozas defines it as:

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[69] BRASIL. *Lei n. 11.445, de 05 de janeiro de 2007*. Estabelece as diretrizes nacionais para o saneamento básico; cria o Comitê Interministerial de Saneamento Básico; altera as Leis n. 6.766, de 19 de dezembro de 1979, 8.666, de 21 de junho de 1993, e 8.987, de 13 de fevereiro de 1995; e revoga a Lei n. 6.528, de 11 de maio de 1978. Available at: www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/l11445.htm. Accessed on: 29 Sept. 2020.

> […] action of the Administration designed to protect or promote activities, instruments or resources owed to individuals, which satisfies public needs, considered of general utility, without the use of coercion, nor the creation of public services.[70]

Through this mechanism, agents freely adhere to incentives, which are enjoyed only if public interest is satisfied.[71] Note that, although the concept was initially conceived with a focus on intervention in the private economic domain, its use has expanded to include the internal structure of the public administration.[72] Nothing prevents, in this sense, the funnelling of incentives to other state bodies and entities to serve public needs. We now analyse how such incentives provide reference standards for the sanitation sector overseen by ANA.

The first is the transfer of federal resources. Art. 50 of Law no. 11,445/2007 states that the allocation of federal resources and financing by the Union, managed or operated by bodies and entities of the Union, must be applied in compliance with the Federal Basic Sanitation Policy, in addition to the new conditions, "[…] the reference norms for the regulation of the provision of public sanitation services issued by ANA" (art. 50, item III).[73] Thus, access to federal funding is only allowed those entities that, among other requirements, adhere to ANA regulatory standards. In the context of meeting universalization goals and the need for resources to involve corresponding investments, the legal provision is unparalleled importance for the feasibility of basic sanitation.[74]

The second mechanism consists of the possible transfer of regulation, by the incumbent entity, to regulatory agencies located in other states of the Federation. Although the delegation of regulation was covered in the original wording of Law no. 11,445/2007, a territorial limitation, its exercise could only be transferred to entities incorporated within the respective State. Thus, a

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[70] Original wording: "*a acción de la Administración encaminada a proteger o promover aquellas actividades, establecimientos o riquezas debidas a los particulares y que satisfacen necesidades públicas o se estiman de utilidad general, sin usar de la coacción ni crear servicios públicos*". (POZAS, Jordana de. Ensayo de una teoria del fomento em el derecho administrativo. *Revista de Estudios Políticos*, Madri, n. 48, 1949, p. 46).

[71] MARQUES NETO, Floriano de Azevedo. Fomento. In: DI PIETRO, Maria Sylvia Zanella (Coord.). *Funções administrativas do Estado*. São Paulo: Revista dos Tribunais, 2015. v. 4, p. 410-411.

[72] MELLO, Célia Cunha. *Atividade estatal de fomento*. Belo Horizonte: Del Rey, 2003. p. 32.

[73] Brasil, *Lei n. 11.445, de 05 de janeiro de 2007*, op. cit.

[74] Egon Bockmann Moreira, Heloisa Conrado Caggiano and Gabriel Jamur Gomes, *O novo marco legal do saneamento básico*, op. cit.

territoriality relationship was maintained, inherent to the idea of adequate inspection of services.

With the new framework, regulation can be promoted by any regulatory entity, regardless of location, through inter-federative cooperation instruments,[75] observing certain conditions defined exhaustively within the scope of art. 23, §1-A, of Law No. 11,445/2007, which are:

> […] I — there is no established regulatory agency in the holder's State that has adhered to the ANA reference standards;
>
> II — priority is given, among the qualified regulatory agencies, to that closest to the holder's location; and
>
> III — there is consent of the chosen regulatory agency, which may charge a differentiated regulation fee, according to the distance from its State […].[76]

Thus, priority is given to regulatory agencies that have adhered to the ANA reference standards.

Although the wording is not explicit, in this sense, it can be inferred that delegation of regulatory competence is only authorized in cases where there is no entity incorporated in the holder State, where the aforementioned rules have been adhered to. The incentive in this case, is, therefore, primarily directed to regulatory bodies (and not to the holders). First, because it means that, if agencies observe the reference norms, they will automatically restrict the possibility that a particular municipality (located in its state) may delegate regulatory competence to agencies in another state. Second, because it represents a possibility of increasing said regulatory entities, insofar as the Law creates a clear hiring preference.

Furthermore, as a measure to protect municipal autonomy, the exercise of ANA normative power was limited by the demand that reference standards consider methods, techniques and processes that adapt and consider local and regional peculiarities (art. 4-A, § 3, IV, of Law No. 9,984/2000).

These indicators serve to substantiate the argument that, in abstract terms, there was no stain, on the part of the Union, on the competence assigned and assured the municipalities. Despite the instrument provided for by the

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[75] PIRES, Thiago Magalhães. Federalismo, flexibilidade e assimetria no direito brasileiro: agrupamentos municipais, convênios de cooperação e consórcios públicos. *Revista de Direito Administrativo*, Rio de Janeiro, v. 275, p. 125-154, maio/ago. 2017.

[76] Brasil, *Lei n. 11.445, de 05 de janeiro de 2007*, op. cit.

legislation, in the last instance it is up to each incumbent, in the use of its attributions, to assess compatibility, as well as the feasibility of adhering to the reference standards (given the incentives described above), the particularities of the provision of services in the scope of that entity and, finally, the maturity of the existing regulatory framework.

In addition to such express legislative provisions, some precautionary additional resources help preserve municipal autonomy in terms of regulation.

First, because the content of the reference standards, as highlighted, is essentially extensive, it encompasses practically any and all matters related to the provision of basic sanitation services. The risk here is that consequent rules of regulatory content, especially those of a material nature (definition of quality and efficiency standards, as well as universalization goals and progressive reduction and control of water losses) excessively limit the planning and management functions of services, resulting in partial or complete usurpation of the competence of the incumbent.

Caution in editing the reference standards, in this sense, is linked directly to the need to ensure a normative space aimed at addressing local and regional peculiarities. This space could be less extensive depending specifically on the topic to be addressed and the implementation difficulties related to it. Yet, elements such as deadlines and procedures, in particular, must be carefully administered, so as not to cause impediments or restrictions that make it difficult for the holders to incorporate regulatory norms. This whole scenario must also consider the characteristics inherent to the Federative levels and inequality — both in terms of structure and compliance with basic sanitation service standards — existing among them, resulting from regional socioeconomic differences.

Secondly, we enter into a more theoretical, but equally relevant, debate. The legislator was careful to adopt the expression "norms reference" — until now little used in the legal system. This has positive effects, insofar as it moves away from the traditional dispute concerning delimitation of general norms, which, although well known in national doctrine and jurisprudence, still remains undefined.[77] On the other hand, the singularity of the term causes significant insecurity regarding the exercise of such competence: in terms of detailing such themes, or in a more generic way, with respect to a general norm. The only conclusion to draw from an initial reading is that such norms

[77] MOREIRA NETO, Diogo de F. Competência concorrente limitada: o problema da conceituação das normas gerais. *Revista de Informação Legislativa*, v. 25, n. 100, p. 127-162, out./dez. 1988.

are, at least in theory, indicative, i.e., a reference for the entities that choose to apply them. As to the extent of its content, however, uncertainties remain.

Caution, here, is required for the delimitation of reference standards, which must be constructed through the concrete application of normative power. In this sense, the instruments of participation (such as consultations and public hearings), collaboration with sectoral agents and regulatory impact studies, all provided for in Law 9,984/2000, may, therefore, be relevant thermometers in relation to the limits of exercise of normative competence.

The New Regulatory Framework for Basic Sanitation established ANA competence to create reference standards, an attribution accompanied by promotion mechanisms that guarantee adherence. It conferred to this body the role of federative coordination, without thereby offending or limiting the fields of independence and autonomy of federated entities.

5. Conclusion

Thus, it is clear that, despite the provisions to guarantee the autonomy of the federated entities, the Federal Constitution of 1988 privileged, essentially, a model of cooperative environmental federalism that reflects, either in the anticipated division of competences, or by the provisions of the text, the possibility of associated management between the federated entities.

This need for cooperation becomes even more evident in the context of the sanitation sector. The prospective sanitation and environmental protection competences to be developed by the Union, the states, the Federal District and the municipalities, concomitantly, as well as the general Union guidelines, bound to controversies related to the framing of the different sanitation service local interest categories (municipal competence) or regional (state competence combined with the municipalities), reflects part of the complex scenario of feasibility of investments.

Among the various changes resulting from Law no. 14,026/2020, which seek to mitigate conflicts of competence and promote a more coordinated federative action, the normative role assigned to ANA should be highlighted, as it now has the power to administer sanitation regulations. Although it is not a violation of the system of division of competences described, there remain uncertainties regarding its exercise, either due to the vastness of the subjects encompassed in its object, or the sense of imprecision regarding the extent of content encompassed by reference standards properly considered.

They will, therefore, require more concrete analysis, with regard to the realization of the normative power of the ANA, and the possible need of for additional balancing instruments for safeguarding the autonomy of the entities responsible for sanitation services.

The initial hypothesis is confirmed, therefore. The New Sanitation Legal Framework brought greater clarity to the attributions of the federated entities in relation to sanitation and assigned the National Water and Basic Sanitation Agency the role of federative coordination agent.

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