Regulatory control and judicial consequentialism: analysis of regulatory impact as balancing element*

Controle regulatório e consequencialismo jurídico: análise de impacto regulatório como elemento balizador

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ABSTRACT

The implementation in Brazil of a management state model was accompanied by the institutionalization of regulatory agencies, entities

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with significant functional and structural autonomy, being allowed them, including the emanation of acts of a normative nature, endowed with generality and abstraction, characteristics proper to the law in the strict sense. Thus, in the face of the democratic déficit that permeates these entities—since their leaders are not elected by popular suffrage—, processes and legal mechanisms are necessary to equalize referred issue, allowing greater acceptability and efficiency regarding the guidelines issued by regulatory bodies. In this work, therefore, we will proceed to the study of regulatory impact analysis (RIA) as expedient adequate legal both with regard to the proposals of a regulatory environment endowed with more legitimizing and efficient, as its usefulness as a normative tool of control, especially after the insertion of the legal consequentialism conveyed by Law 13,665/2018, since that through AIR the controlling bodies, including the judiciary, will have at their disposal elements parameters, which will provide more assertive parameters regarding the intervention carried out in the sector. In terms of methodology, we used literature review, with emphasis on doctrine and legislation that deal specifically with the theme addressed.

KEYWORDS

Regulatory Impact Analysis — legal consequences — Law of Introduction to Norms of Brazilian Law (LINDB)

RESUMO

A implementação no Brasil de um modelo de Estado gerencial foi acompanhada da institucionalização das agências reguladoras, entidades providas de expressiva autonomia funcional e estrutural, sendo a elas permitida, inclusive, a emanação de atos de natureza normativa, dotados de generalidade e abstração, características próprias da lei em sentido estrito. Com isso, diante do déficit democrático que permeia referidas entidades — visto que seus dirigentes não são eleitos mediante sufrágio popular —, são necessários processos e mecanismos jurídicos tendentes a equalizar a aludida questão, permitindo uma maior aceitabilidade e eficiência quanto às diretrizes exaradas pelos órgãos reguladores. Neste trabalho, portanto, iremos proceder ao estudo da Análise de Impacto Regulatório (AIR) como expediente jurídico adequado tanto no que se refere às propostas de um ambiente regulatório dotado de ares mais legitimantes e eficiente quanto

a sua utilidade na condição de ferramenta normativa de controle, notadamente após a inserção do consequencialismo jurídico veiculada pela Lei nº 13.665/2018, visto que mediante a AIR os órgãos controladores, aí incluído o Judiciário, terão a sua disposição elementos balizadores, que fornecerão parâmetros mais assertivos quanto à intervenção realizada no âmbito setorial. Em termos metodológicos, valeu-se de revisão bibliográfica, com ênfase na doutrina e legislação que tratam especificamente da temática abordada.

PALAVRAS-CHAVE

Análise de Impacto Regulatório — consequencialismo jurídico — Lei de Introdução às Normas do Direito Brasileiro (LINDB)

1. Introduction

The current reality the Brazilian State is inserted in, as well as most of other democratic economies, have been experiencing an interventionist model, according to which, the regulation of private activities plays an increasingly important role in national development capacity and in the effective feasibility of competition in a globalized world.

Thus, legal ordering allows conducting economic interventions in entities that have certain functional and structural autonomy as proposition to enhance technical specialization requirements as attempt to get away from political and sectoral influences that can, in their turn, further compromise the expected outcomes at regulatory scope.

These entities, beside their managerial freedom, also witness the growing possibility of being granted with autonomy towards normative acts aimed at regulating the correlated sectors by embodying traces of generality and abstraction typical of law, *per se*. Therefore, not just the adequacy of the referred legal types to our constitutional formation is questioned, but also the extension and instruments that exert control over them.

Accordingly, we will herein analyze the Regulatory Impact Analysis (RIA) as tool available to control bureaus whenever they need to intervene in the regulatory sector, mainly after the recent changes made in the Bill for the Introduction of Brazilian Law Standards, also known as (LINDB).[1]

[1] Provided in Decree-Law n. 4.657, from September 04, 1942, modified by Law 12376/10.

It, nowadays, demands control decisions to be supported by adjusted judgements that take into consideration the practical consequences resulting from them.

Initially, it is important emphasizing that we used the word 'control' to define any interference activity, be it by administrative bureaus (internal audits, external control by Courts of Account) or legal control by jurisdictional bodies (courts).

Thus, we have divided the present article into three main topics: the first one approaches the compliance of our legal ordering with normative acts recorded by regulatory agencies. Subsequently, it addresses the regulatory impact analysis to show its evolution as prognostic tool and the current legal framework substantiating it. Finally, RIA's relevance for the effective exercise of control is introduced mainly due to the consequentialist proposal bond to LINDB's art. 20.

2. Regulation and normative power

The sense of both regulatory activity and regulatory State organization rose from the decline of the welfare state and from the consequent emergence of neoliberalism. The State, in Brazil, has intensified indirect intervention models by putting the process to shrink its straight participation in the economy at practice. It is done through privatization processes applied to public companies and by recovering the economic liberalization. Such an attitude basically translates itself into the process to drive some fields sensitive to general interests to make "adjustments in the economic activity towards collective interests",[2] as clarified by Odete Medauar:

> Rupture of monopoles and exclusivity, state sectoral activities' transfer to the private sector, flexibility of standards set for economic activities do not necessarily lead to the State's absence from these activities. They concern public services that start being performed by private entities; the State cannot be put aside. As for economic activities, the State must ascend, mainly over sensitive sectors that have more immediate and deeper impact on the life of society.[3]

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[2] ARAGÃO, Alexandre Santos de. O atual estágio da regulação estatal no Brasil. *In*: MARRARA, Thiago (Org.). *Direito administrativo*: transformações e tendências. São Paulo: s.n., 2014. p. 229.

[3] MEDAUAR, Odete. *O direito administrativo em evolução*. 3. ed. Brasília, DF: Gazeta Jurídica, 2017. p. 330. In the original: "A quebra de monopólios e exclusividades, a transferência de atividades do setor estatal para o setor privado, a flexibilização de normas incidentes sobre

Accordingly, similar to an economy focused on having liberalization traces, advancements experienced by the social State no longer allow inequalities and natural power positions deriving from an economic model that lies on the wide opening of private ventures. Therefore, the State does not get totally apart from the market dynamics to allow the process of joining economic activity feasibility to maintain collective interests, since it reinforces its action through indirect interventionism.[4] As clarified by Filipe Lôbo:

> Thus, indirect interventionism no longer deals with the States' control over the economic activity itself (direct interventionism), but with the concrete action of fomenting, regulating, monitoring, mediating, inspecting and planning the economic ordering.[5]

This indirect action in the economy is materialized at spheres beyond the classical application of powers typical of the administrative police—inspection and imposition of penalty –, it takes place through issuing normative acts that are full of generality and abstraction, typical of the legislative competence. Thus, there are three powers inherent to regulation: the one based on ensuring its application (inspection), the power focused on stopping infractions (impose penalty), and that destined to issue rules (normative).[6] It is from this very aspect, that we observe the limits in the freedom to act faced by economic agents and users, due to the process to issue rules set for regulated sectors, where intense claims[7] are put at place, given the very nature of their regulation. Actually, eventual demands related to both inspection and the observation of infractions often start from questioning the fundamental rules of it.

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atividades econômicas não acarretam necessariamente a ausência do Estado nessas atividades. Tratando-se de serviços públicos, que passam a ser desempenhados por particulares, o Estado não se desliga. No caso de atividades econômicas, o Estado há de ter ascendência, sobretudo nos setores sensíveis, que trazem impacto mais imediato e profundo na vida da sociedade".

4 OLIVEIRA, Rafael Carvalho Rezende. *Novo perfil da regulação estatal*: Administração Pública de resultados e análise de impacto regulatório. Rio de Janeiro: Forense, 2015. Edição Kindle.

5 GOMES, Filipe Lôbo. A Regulação Estatal Como Instrumento de Concretização do Direito Fundamental ao Desenvolvimento Econômico: um Contributo da Análise Econômica do Direito. *RDU*, Porto Alegre, ed. esp., 97-125, 2016. In the original: "intervencionismo indireto não trata mais da assunção pelo Estado da atividade econômica em si (intervencionismo direto), mas de sua concreta atuação de fomento, na regulamentação, no monitoramento, na mediação, na fiscalização, no planejamento, na ordenação da economia".

6 ARAGÃO, Alexandre Santos de. *Agências reguladoras e a evolução do direito administrativo econômico*. 2. ed. Rio de Janeiro: Forense, 2006. p. 24.

7 According to Guerra: "one of the most sensible issues, and that, recurrently, gets to the courts, regards the identification of limits between the law and the standards issued by the regulating entities". GUERRA, Sérgio. *Agências reguladoras*: da administração piramidal à governança em rede. Belo Horizonte: Fórum, 2012. p. 131.

The State's normative competence is disguised into the Executive function, mainly in the current scenario embodied by the Regulatory Agencies, which resulted not just from enquires about their nature and extension, but from limits posed by the national legal system in order to protect the very basis of the Rule of Law and the principle of legality, for instance, to ensure individual conditioning through the Law, in its formal sense.

The exercise of normative power by the regulatory State, more specifically, by Regulating Agencies, will be further analyzed. These agencies are specialized entities that have, among their legal structure, competences typical of the economic ordering, the ability to issue general and abstract rules to the sectors they belong to.

2.1 Normative power of regulatory agencies and democratic legitimacy

Addressing regulating agencies' normative power necessarily means dealing with the so-called "legality crisis"[8] the Rule of Law has been experiencing. Such a crisis emerged from the need of making the strict model of tripartition of powers implemented after the liberal revolutions flexible and of re-signifying the principle of legality.

At first, the idea was to develop a system where the liberal interests would overlap the interests of the Monarchy in order to limit its absolute power and to provide a social ordering bond to the wills of the ascending bourgeois class. It is so, because the bourgeois class aimed at getting itself free from State interferences, since they were a barrier to the significant growth it was experiencing. Most of all, the "aim of the liberal doctrine was the very limitation posed to the royal power to stop individual freedoms and the guarantee of the State's non-interference in the economic activity".[9]

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[8] Based on Canotilho: "laws are the basic elements of the democratic politics […], but it is necessary observing that they turn themselves into a public policy that gets harder overtime, a fact that makes it essential to have a general theory of legal regulation. […] The idea that the law is the only legal-social regulation procedure must be seen as obsolete (A. Rhinow, N. Achterberg, U. Karpen, E. Baden). The law is, along with the legal decisions and with "decisions" by the administration, one of the social regulation instruments". CANOTILHO, J. J. Gomes. Relatório sobre programa, conteúdos e métodos de um curso de teoria da legislação. *Separata do v. LXIII (1987) do Boletim da Faculdade de Direito da Universidade de Coimbra*, Coimbra, 1990. p. 22.

[9] MEDEIROS, Jackson Tavares da Silva de; NELSON, Rocco Antonio Rangel Rosso. A constitucionalidade do poder normativo das agências reguladoras na ótica do redimensionamento

Hence, the Law emerged as the very core of liberal purposes, since it manifested itself as product of the Legislative Power, which is exerted by the Nation's representatives, who have the legal ability to limit the power of the State through their normative production. The Parliament is the house of the people, and echoes its guidelines, which should be respected as the maximum representation of popular sovereignty. The other powers must obey the law as the institute expressing the collective will.

The strict tripartition of functions lays over this reality, which must last for centuries, since the Legislative Power is the authentic representative of peoples' general will. It produces the law, its only matter; therefore, the other constituted powers must apply the law and mitigate eventual existing conflicts. In this case, the principle of legality concept takes the separation and reciprocal limitation of powers as structuring element of its concrete application.[10] The Executive Power would be in charge of putting legal amendments in practice, in order to emerge as absentee and legal State. This profile is explained by the abuse and excesses experienced during times of oligarchic regime.

Such inflexibility in State functions was necessary, at first to allow the implementation of a strong Rule of Law and to ensure the individual freedoms, but the contemporary complexity of personal and institutional relationships demands certain permeability, mainly in public administration actions. The transition from the Liberal State to the Providing State, and from this last one to the so-called "Regulating State", forced the slow and clear replacement of the bourgeois class' homogeneous interests (characters and guidelines), at that time, by a highly heterogeneous society.[11] This process led to both the overload and unfeasibility of some aspects of the legislative activity exerted by Legislative Power.[12]

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do princípio da legalidade. *RDA — Revista de Direito Administrativo*, Rio de Janeiro, v. 271, p. 109-141, Jan./Apr. 2016. p. 120.

10 OLIVEIRA, Rafael. Carvalho Resende. *Constitucionalização do direito administrativo*. 2. ed. Rio de Janeiro: Lumen Juris, 2010. p. 38.

11 Based on Oliveira: "Different from the Liberal State, which is bond to the concept of 'general will', from the legislative fanaticism and from the social homogeneity (bourgeoisie), the Regulating State faces the 'society of risk', of the crisis of the representative democracy and of the heterogeneity of interests ("Multi-class State"). Oliveira, *Novo perfil da regulação estatal*, *op. cit.*, p. 419.

12 Accordingly, I provide the vote by justice Luiz Fux (STF, ADI n. 4.923), when the judged Law 12.485/2011 (New Regulatory Framework of Cable TV), when he argued the incapacity of law, in his formal understanding, at the scope of ruling all modern behaviors: "Actually, the legislative technique applied to the herein assessed subject is that typical of the contemporary

The post-modern society demanded the State to reconfigure its model of action, and it had inevitable impact on initial propositions about the distribution of Public Powers. The Legislative function displaced part of its axis to the Executive sphere, given its best conditions to deal with emerging matters, mainly in the economic and social fields. Accordingly, the words by Sérgio Guerra are noteworthy:

> The Parliament could not provide solutions for essential economic and social claims and found itself away from the intervention process: "the controversies of its slowly-filtering party profile did not allow it to promptly face issues that demanded legal regulation", and it left this Power in a secondary position. If one takes into account the legal principle in place, the Executive Power consolidated its autonomy by holding several functions that could not be regulated by the Judiciary Power.[13]

Therefore, the principle of legality embodied new contours that, whenever observed from the public administration viewpoint, emerge as distribution of competences at growing specialization degrees. Based on Aragão: "The Legislative Power, which is mainly political and aims at acting in necessarily slow processes, found itself unable to deal with the complexity, plurality and technicality of matters demanding its action".[14] Similarly, Dallari, by addressing the idealized model of tripartition of powers, stated:

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regulating State, according to which, the law defines the main targets and contours of the activity of the regulating entity, by giving it (in these limits and under the control by the Judiciary Power and by the Legislative Power) a relatively wide margin of action. And, as already mentioned, it is good to be this way, since (i) the matter, on the one hand, regards the significant dynamism, as shown by technological convergence trends that make the previous national legislation obsolete, and (ii) the discipline of the audio-visual sector, from different aspects, give rise to highly technological complex matters that demand specialized knowledge, such as that called ANCINE. *Accordingly, demanding the formal law to exhaust the normative content applicable to the species is unfeasible and inadvisable, a fact that takes us back to a paradigm of legality created for a State profile that no longer exists*" (emphasis by the authors).

13 GUERRA, Sérgio. Crise e refundação do princípio da legalidade — a supremacia formal e axiológica da Constituição Federal de 1988. *Interesse Público*, Belo Horizonte, a. 10, n. 49, p. 96, May/June 2008. In the original: "O Parlamento, impossibilitado de oferecer as soluções às questões econômicas e sociais prementes, viuse alijado do processo de intervenção. 'O seu perfil de lento depurador das controvérsias partidárias não permitiu enfrentar prontamente as questões que demandavam um regramento jurídico', deixando-o em uma posição secundária. O Poder Executivo consolidou sua autonomia dotado de funções não sindicáveis pelo Poder Judiciário, em que pese o princípio legalitário vigorante".

14 ARAGÃO, Alexandre Santos de. O poder normativo das agências reguladoras independentes e o estado democrático de direito. *Revista de Informação Legislativa*, Brasília a. 37, n. 148, p. 284, Oct./Dec. 2000.

> […] after proposing this idea, in a systematic way, in the 18th century, mainly to protect freedom; later on, new concepts would be developed and adjusted, in order to separate the powers to also increase the efficiency of the State due to the distribution of its attributions among other specialized bureaus.[15]

Accordingly, the State finds itself accountable not just for respecting the specialization of matters to be regulated, but also for the very specialization of bureaus in charge of issuing these regulations.[16] The process to create the regulatory agencies that, among other attributions, have normative power, lays over the aforementioned reality. This power goes beyond the need of technical specialization, but also depends on social dynamics, although these factors scape the slow legislative-production process ran by the Parliament.

However, it is important pointing out that the basis of the Rule of Law is not about to be disrupted, nor the very principle of legality, if power is given to indirect Administration entities. Actually, the partial transposition of attributions that were centered on the hands of the Legislative power slowly migrated to the Public Administration domain.

This migration process is fully and directly materialized through the skills of the Executive Power to make innovations in the legal system, but in a way detached from legal amendments. Actually, normative acts derive from what Aragão calls law-frameworks or standards[17] that keep the core of the principle of legality healthy, since "the law that creates special autarchies sets the limits for their normative actions through the standards; the rules issued by them must be understood as delegated [standards that] must differ, therefore, from autonomous regulations and from execution [standards]".[18]

Therefore, according to Carlos Ari Sundfeld,[19] the referred laws embody a regulatory framework that works as guideline and basis for the regulatory activity. Therefore, it is essential taking into consideration the regulation

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15 DALLARI, Dalmo de Abreu. *Elementos de teoria geral do estado*. 24. ed. São Paulo: Saraiva, 2003. p. 216. In the original: "[…] proposta essa ideia de maneira sistemática no século XVIII, com o fim exclusivo de proteção da liberdade, mais tarde seria desenvolvida e adaptada a novas concepções, pretendendo-se então que a separação dos poderes tivesse também o objetivo de aumentar a eficiência do Estado, pela distribuição de suas atribuições entre outros órgãos especializados".

16 Aragão, O poder normativo das agências reguladoras independentes e o Estado democrático de Direito, *op. cit.*, p. 284.

17 *Ibid*., p. 287.

18 Medeiros e Nelson, A constitucionalidade do poder normativo das agências reguladoras na ótica do redimensionamento do princípio da legalidade, *op. cit.*, p. 130.

19 SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. São Paulo: Malheiros, 2012. p. 260-280.

authorized by the ordering system, if one observes the strict substances of these parameters.

Accordingly, it does not mean granting the Executive Power with competences typical and specific of the Legislative Power when dealing with legal matters, but the normative power inherent to the Executive function, which is destined to implement its attributions that, *in casu*, would be regulating the economic sector to make it consistent with society's interests.[20] Sérgio Guerra, although referring to the North American regulation model reported similar phenomenon in Brazil:

> Overtime, the Supreme Court, by granting the normative function to agencies, underlines that laws cannot simply represent a blank check (too vague). They must have standards and intelligible principles that guide the actions by agencies. Disrespect to this judicial rule would mean that the Congress would quit its constitutional function.[21]

According to the referred author, regulatory agencies' normative power would gravitate around what he calls "regulatory choices": "a sort of rich and dynamic State function more sensitive than the simple legal discipline or regulation (executive or autonomous)".[22] According to Sérgio Guerra, the referred legal choice, which is practiced by special Agencies, would be a "new" administrative function embodied by the contemporary State that [in its turn] does not identify itself with a *mere legislative delegation* of decentralized entities to provide, with more density, on matters that they are accountable for, [it is

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[20] The Brazilian doctrine also has voices contrary to it: Bandeira de Mello (MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. 28. ed. São Paulo: Malheiros, 2011, p. 359) features the legal granting of normative competences to the Public Administration as "abusive, unconstitutional and scandalous procedure", a lack of respect by "our law-makers […] in keeping the prerogatives of Power they hold". As for Binenbojm (BINENBOJM, Gustavo. *Uma teoria de Direito Administrativo*: direitos fundamentais, democracia e constitucionalização. Rio de Janeiro: Renovar, 2008. p. 283), by referring to the institute of delegalization, which means the removal, by law-makers themselves, of certain matters of the domain of law, in order to attribute them to the discipline of agencies, he states that: "it would constitute a fraud in the legislative process provided in the Constitution, which has the scope of defending citizens' fundamental rights".

[21] GUERRA, Sérgio. Aperfeiçoando a regulação brasileira por agências: quais lições podem ser extraídas do sesquicentenário modelo norte-americano? *In*: GUERRA, Sérgio (Org.). *Teoria do Estado regulador*. Curitiba: Juruá, 2015. p. 61. In the original: "A Suprema Corte vem deixando bem vincado, ao longo dos tempos, que as leis ao conferir função normativa às agências não podem, simplesmente, representar um cheque em branco (*too vague*); devem conter *standards* e princípios claros (*intelligible principle*) que guiem as ações das agências. A inobservância dessa *judicial rule* representaria que o Congresso teria abdicado suas funções constitucionais".

[22] GUERRA, Sérgio. *Discricionariedade, regulação e reflexividade:* uma teoria sobre as escolhas administrativas. 4 .ed. Belo Horizonte: Fórum, 2017. p. 416.

done] in order to balance the regulated sub-system, different from the laws that, after being issued by the Legislative Power, embody a generic character, without concreteness.[23]

Thus, it is essential highlighting that the regulatory administrative activity depends on constitutional or legal license. However, such a license does not need to enter the details of administrative act's contents, in all cases, as it was once expected to. If the law to be substantiated by parameters (standards), a given administrative authority could properly exercise its normative power.[24]

The aforementioned process explains why the rulemaking power embodied by regulatory agencies is not conflicting with the principle of legality and with the fundamentals of the Rule of Law. On the contrary, the current concept of principle of legality emerges as a reserve of law, in relative terms; therefore, it can be translated into "reserve of legal standards". Thus, there is no obstacle to Executive Power attributions of setting the duties imposed to individuals in the exercise of the normative competence, regardless of having them disclosed or hidden in the legal system.[25]

The regulatory activity demands instruments that reinforce its normativity and that grant it with a certain degree of legitimacy in order to avoid eventual democratic shortage, given its own special features, such as non-electivity of its rulers, organizational autonomy towards the central Administration and technical decisions that influence the legal sphere of collectivity.[26] From this viewpoint, Barroso clarifies that: "[…] in times of free press, of society's organization and of an enlightened and acting public opinion, it is essential having the duty of proper encouragement, the duty of arguing and of rationally showing the correct weighing of interests and of choices made".[27]

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[23] *Ibid.*. p. 417.

[24] ARIGONY, A. O poder normativo das agências reguladoras e a constitucionalidade dos princípios inteligíveis. *Revista Digital de Direito Administrativo*, v. 6, n. 1, p. 202-224, Feb. 1º, 2019. p. 210.

[25] GRAU, Eros Roberto. *O direito posto e o direito pressuposto*. 7. ed. São Paulo: Malheiros, 2008. p. 246 e ss.

[26] Cf. BARROSO, Luís Roberto. Agências reguladoras. Constituição e transformações do Estado e legitimidade democrática. *Revista de Direito Administrativo*, Rio de Janeiro, v. 229, p. 285-312, July 2002. p. 285-312.

[27] *Ibid.* In the original: "[...] em tempos de liberdade de imprensa, de organização da sociedade e de existência de uma opinião pública esclarecida e atuante, sobreleva a importância do dever de motivação adequada, do dever de argumentativa e racionalmente demonstrar-se o acerto das ponderações de interesse e das escolhas realizadas".

Thus, we understand that the Regulatory Impact Analysis (RIA) would be an extremely relevant instrument to provide more legitimacy to and, consequently, acceptance of normative decisions issued by regulatory agencies, since it brings along the fundamentals, mostly the technical nature, to justify the adopted orientations. The herein referred decision-making instrument is materialized through a structured process[28] that takes into account data collected overtime, even those collected abroad, as well as the consultation to members of the regulatory sector, sectoral impact maps, public hearings, implementation strategies, among others. RAI would then be the procedural aspect[29] of the regulatory activity, since it would provide more democratic conformity to State interventions and shine light on the sense of "justice" of parts directly and indirectly affected by the decisions made. The words by J. J. Gomes Canotilho are very fruitful, he states:

> One of the nowadays suggested orientations lies on […] State decision plans, it is interesting not just reinforcing the democratic legitimation, but fair decisions. Decision 'fairness' will mostly depend on choosing the 'bureau' presenting the completest organization, function and procedural apparatus for decision-making.[30]

In light of the foregoing, given the social evolution currently witnessed by the multifaceted body of interests, which is sometimes conflicting (mainly at regulatory scope), the State found itself accountable for such demands due to the reconfiguration of its classical mode of action. The Executive Power, besides the need of decentralizing part of its functions, also had to give autonomy and normative competences to the so-called regulatory agencies, which were created to provide more technicity to sectors sensitive to social interests. These special entities, on the other hand, were born within an environment where, despite its relevant institutional strategic position, demands effort towards the structural duties of democratic formation. Thus,

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[28] PORTO, Antônio José Maristrello; GAROUPA, Nuno; GUERRA, Sérgio. Análise de impacto regulatório: dimensões econômicas de sua aplicação. *EALR*, Brasília, v. 10, n. 2, p. 173-190, May/Aug. 2019. p. 178.

[29] Oliveira, *Novo perfil da regulação estatal*, *op. cit.*, position 5681.

[30] Canotilho, Relatório sobre programa, conteúdos e métodos de um curso de teoria da legislação, *op. cit.*, p. 54. In the original: "Uma das orientações hoje sugeridas é a de que, no plano das decisões estaduais, interessa não só ou não tanto o reforço da legitimação democrática, mas que a decisão seja justa. A 'justeza' da decisão dependerá, em grande medida, de se escolher o 'órgão' mais apetrechado quanto à organização, função e forma de procedimento para tomar essa decisão".

an in-depth analysis of RIA will be made in the next section, since, besides the legitimating proposal of its regulatory action, it can work as balance for what is currently provided in the Introduction of Standards for the Rule of Law (LINDB), so that control bureaus can have an accurate and adequate decision-making tool based on the legal ordering in place.

3. Regulatory impact analysis as legitimization and control tool

As duties of the Central Administration were slowly transferred to entities that have both organic and functional autonomy, and that have the license to issue normative acts, it became clear that, on the one hand, it was necessary reinforcing the reasoning processes and, consequently, the legislation of decisions made by them. The Regulatory Impact Analysis (RIA) is among the tools adopted for such a purpose, since it is used to subsidize sectoral positions, mostly those of normative character.

The Regulatory Impact Analysis emerges as tool aimed at ensuring the adequacy, effectiveness and efficiency of regulatory interventions.[31] Accordingly, once it is used to help the decision-making process, its propositions include the evaluation of likely regulatory alternatives, even of those based on not regulating anything. According to Rafael Carvalho, RIA can be defined as "auxiliary procedure for regulatory decision-making to expose the risks, benefits and consequences of regulatory policies that can be adopted to meet constitutionally protected interests".[32]

OECD report from 1997 pointed out RIA adoption as transparency, efficiency and structuring mechanism for decision-making in regulatory environment. This document also addressed that 15 RIAs elaborated by the United States were assessed; their operationalization costs reached 10 million dollars. However, the regulatory reviews deriving from it led to gross benefits

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[31] Based on the Orientation Guideline for the elaboration of the regulatory impact analysis (2018): "RIA is one of the main instruments focused on improving the regulatory quality. It consists in a systematic analysis process based on evidences, as well as seeks to evaluate, from the definition of a regulatory issue, the likely impacts of action alternatives available to reach the expected outcomes. It aims at guiding and subsidizing the decision-making process and, at a last analysis, at contributing for regulatory actions to be effective and efficient". (Avaliable at: https://www.gov.br/casacivil/pt-br/centrais-de-conteudo/downloads/diretrizes-gerais-e-guia-orientativo_final_27-09-2018.pdf/view. Access on: Aug. 12, 2020).

[32] Oliveira, *Novo perfil da regulação estatal*, *op. cit.*, position 5681.

close to 10 billion dollars—this number corresponds to 1000:1 ratio.[33] This finding shows RIA's strategic potential to optimize and distribute public or private resources.

RIA used by regulatory agencies in Brazil was initially boosted by Decree 4.172/2002, which demanded normative acts proposed by the Federal Executive Power to be subjected to produced impact evaluation. It was further reinforced by Decree 6.062/2007, which implemented the Program to Reinforce the Institutional Capacity for Regulation Management, also known as PRO-REG, whose terms addressed the need of implementing RIA as important tool to support regulatory decisions.[34] This Decree was later repealed and the subject was addressed in Decree 11,738, of October 18, 2023, which sophisticated the mechanisms to mirror the complete cycle of public policies, including their monitoring, monitoring and evaluation, in the form of paragraph 16 of art. 37 of the Federal Constitution.

From that point on, mainly from the last aforementioned normative document, several regulatory agencies started internally adopting the regulatory impact analysis as one more stage in processes to edit or change regulatory interventions. Ancine, for example, issued the Direction Collegiate Resolution n. 52/2013[35] to establish RIA as admissibility requirement for the deliberation of normative acts. Similarly, Aneel, through Resolution n. 540, from March 12, 2013,[36] institutionalized RIA among its procedures for issuing any normative act. Another example of it is Anatel, which made RIA mandatory for normative acts' issuing through Resolution n. 612, from April 29, 2013.

In light of the foregoing, regulatory entities have been establishing and implementing the regulatory impact analysis as necessary stage for sectoral interventions' approval, although there is no legislation, *stricto sensu*, to determine its mandatory application. Actually, the Deputy in Chief of Analysis

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33 OCDE. *The OECD Report on Regulatory Reform*. Paris: OCDE, 1997. Available at: http://www.oecd.org/gov/regulatory-policy/2391768.pdf. Access on: Aug. 11, 2020.

34 Oliveira, *Novo perfil da regulação estatal*, *op. cit.*, position 5936.

35 Repealed by Resolução de Diretoria Colegiada nº 81, de 2 de agosto de 2018. BRASIL. Ancine. Avaliable at: https://www.gov.br/ancine/pt-br/acesso-a-informacao/legislacao/resolucoes-diretoria-colegiada/resolucao-no-81. Access on: June 25, 2024.

36 Repealed by BRASIL. Aneel. RESOLUÇÃO NORMATIVA Nº 798, DE 12 DE DEZEMBRO DE 2017. Available at: https://www2.aneel.gov.br/cedoc/ren2017798.pdf. Acesso em: June 25, 2025. The latter repealed by BRASIL. Aneel. RESOLUÇÃO NORMATIVA ANEEL Nº 941, DE 6 DE JULHO DE 2021, Available at: https://www2.aneel.gov.br/cedoc/ren2021941.pdf. Access on: June 25, 2025.

and Follow-up of Governmental Policies of the Civil Office of the Presidency of the Republic issued the Technical Note n. 4/2017/AESP/SAG/CC-PR,[37] from 2017, whose terms acknowledged that all 10 federal regulatory agencies must use regulatory impact analysis elements, but at different coverage, depth and maturity levels.

However, given RIA's relevance, mainly due to its technical propositions and profile as element encompassing the constitutional principle of administrative efficiency, two bills were approved by the National Congress in 2019 to set its essential role in issuing and changing general-interest normative acts, as follows:

> Art. 6 The adoption of and alteration propositions for normative acts of general interest by economic agents, consumers and users of provided services will be, based on the terms of the regulation, preceded by Regulatory Impact Analysis (RIA), which will have information and data about the likely effects of the referred normative act. (Law n. 13.848, from June 25, 2019—Regulatory Framework of Regulating Agencies).
>
> Art 5 The propositions about the issuing and changes in normative acts of general interest by economic agents or users of the provided services, which were issued by federal public administration bureaus or entities, including autarchies and public foundations, will be preceded by regulatory impact analysis, which will encompass information and data about the likely effects of the normative act in order to assess the reasonability of its economic impact.
>
> Single paragraph. The regulation will provide on initial data about the need of treating the caput of this article and of its content, the regulatory impact analysis methodology, the minimum requirements to be object of analysis, the hypotheses based on which it will be mandatory to have it done and the hypotheses according to which it could be dismissed (Law n. 13.874, from September 20, 2019).

This law concerns the need of issuing a regulation to discipline how RIA's operation will be put in place at Federal Executive Power scope, as it can be observed in both propositions. The aforementioned regulation was only put at practice one year later, through Decree n. 10.411, from June 30, 2020,[38] which

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[37] Avaliable at: https://www.gov.br/casacivil/pt-br/assuntos/governanca/regulacao/boas-praticas-regulatorias/consulta-publica/consulta-publica-001-2017-diretrizes-e-guia-air-pasta/abertura/documentacaoproduzida-para-construcao-das-diretrizes-gerais-e-do-guia-air/nota-tecnica-consulta-publica-001-2017.pdf. Access on: Aug. 11, 2020.

[38] Although it was once in force, art. 24 of the aforementioned Decree establishes that its effects will only be produced from April 15, 2021, onwards, for the Ministry of the Economy, for regulating agencies listed in Law 13.848/19 and for Inmetro; its efficacy for the other federal administration bureaus and entities will start on October 14, 2021.

provided on the minimum stages and requirements to be set for RIAs about to be issued by bureaus and entities composing the Federal Administration.

Overall, the decree mentioned above reinforces that such a content only applies to normative regulatory acts of general interest; it deliberates on issuing, changing or repealing the matter to be regulated. Paragraph § 2, of art 3, provides on the hypotheses, according to which, it would not be necessary to perform RIA to issue normative acts, like to provide on the administrative nature that has limiting effect on the internal scope of the referred bureaus or entities, and that has concrete effects on the discipline of specific situations regarding individual destines, namely: the ones referring to budgetary and financial executions, among other situations. Art 4, in its turn, provides on cases whose RIA can be dismissed, among them one finds situations concerning urgent sectoral regulation, low-impact normative acts, and acts aimed at updating or repealing obsolete standards, among others. It is important highlighting that, in case of circumstances demanding RIA's dismissal, the aforementioned Decree demands the standard to be substantiated and the propositions for normative acts' issuing and changes to be followed by a technical note or equivalent document, in order to put in place all due transparency and publicity, by even making it available in websites.

Finally, it is also relevant pinpointing that one finds the minimum elements to be integrated to the report that follows the regulatory impact analysis in the very core of the regulatory Decree, namely: I—objective and brief executive summary; II—identifying the regulatory issue to be solved, based on presenting its causes and extension; III—identifying economic agents, users and other effected entities; IV—legal fundamentals; V—defining the aims to be reached; VI—describing likely alternatives, by taking into consideration the non-action option, the normative solutions and, whenever possible, the non-normative solutions; VII—exposing the likely impacts of identified alternatives, including their regulatory costs, VIII—considerations concerning eventual social participation processes; IX—mapping international experiences; X—effects and risks resulting from normative acts' issuing, changing or repealing; XI—comparing the considered alternatives, which must be followed by substantiated analysis—based on the chosen specific methodology—; and XII—strategy to implement the suggested alternative, which must be followed by both monitoring and evaluation procedures.[39]

[39] The elements are well-detailed in the referred Decree; I have cut the main terms of each item in order to make the text more fluid.

There is evident concern with alternatives open for State intervention, as well as with likely outcomes from administrative actions and with their impacts, as addressed in recent studies about the Economic Analysis of Law (EAL). According to its overall positions, the aim of EAL is to bring the contributions from knowledge in the economic sciences field to legal sciences.[40] Thus, the regulatory justice-economic approach is not limited to the mere imposition of conducts resulting from normative regulations, but, actually, it takes "Law as a set of rules that establish the costs and benefits for agents that substantiate their behavior based on such benefits".[41]

Thus, in fact, there is close correlation between the economic theory and RIA,[42] since guidelines encompassing a sectoral analysis are necessarily based on likely choices made within an environment featured by scarcity, where agents must maximize their legal positions based on the costs and benefits they are subjected to. Accordingly, RIA has, among other aims, the goal of diagnosing eventual flaws in the market, and it would justify the aforementioned regulation, as well as reduce informational asymmetries by allowing the formulation of efficient and responsive decisions towards the expected goals.

Hence, the description of alternatives available to regulatory entities is among the legally predicted instruments expected to integrate the sectoral impact analysis. It must be followed by the exposure of likely impacts deriving from the identified alternatives that, in their turn, are followed by regulatory cost predictions, as well as by risks and effects (consequences) resulting from regulatory interventions. It is noteworthy that all these requirements seem to be closely connected to changes in LINDB, as provided in its art. 20, single paragraph, whose terms demand decisions to take practical consequences into account, as well as to have the due motivation to expose the need of and adjustment in the referred measure, even in face of likely alternatives.

RIA should then consider the interests of stakeholders, delimit the regulatory problem, outline objectives and propose alternatives for action, or not action, and normative or non-normative for its solution. It must be guided, therefore, by state regulation in its subsidiary aspect.

Following a line internalized in the Federal Constitution, it should consider the impacts on microenterprises and small businesses, giving

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40 GICO JÚNIOR, Ivo. Introdução ao direito e economia. *In*: TIMM, Luciano Benetti (Org.). *Direito e economia no Brasil*. 2. ed. São Paulo: Atlas. 2014. p. 1.

41 *Ibid*. p. 21.

42 Porto et al., Análise de Impacto Regulatório, *op. cit.*, p. 175.

priority to the principle of economic freedom. In addition, it should consider the history of learning, whether through processes of social participation and benchmarking with experiences from other countries.

The balancing on the risks and effects is fundamental because it must follow in step with the monitoring, evaluation and alteration or revision of the regulatory framework. The Processuality is important in this sense to the time that in the dialogue with the participants and the constant construction and review allow more dynamics and adaptability to the regulated sector.

For this purpose, the standard proposes the adoption and detailing of methodologies that advocate multicriteria or sectoral criteria, cost-benefit analysis, cost-effectiveness, that is, legitimacy, cost, risk and risk risk, often choosing among the possible risks.

Are structured guidelines, therefore, to strengthen the dialogical and democratic administrative legal relationship, the norm of administrative decision, considering the possibilities and anticipating elements for a choice with a greater degree of rationality and focused on the implementation of the general interest.

Thus, the regulatory impact analysis justifies and supports the model for sectoral decisions made by control bureaus, since it systematically presents the adopted measures based on visible and feasible options, as well as introduces itself as balancing legal tool to the exercise of control power. It is so, because it has data and predicted scenarios at its disposal, as well as the assumed existing alternatives. This process can be analyzed in a more accurate way in the next section, from this very perspective.

4. LINDB, consequencialism and regulatory impact analysis as balancing element

The Economic Analysis of Law (EAL), which is a branch of the North-American legal realism, started gaining room in the legal debate back in the 1970s, mainly after the contributions by Richard Posner in his book "Economic Analysis of Law". His premises resulted from the assumption that Law cannot be understood apart from social realities; therefore, it must be assessed in a completely autonomous way, in comparison to the other social sciences. This scenario opens room for using ideas and methods coming from other subjects at the time to analyze the legal reality; it reinforces the need of a multi-disciplinary profile, in our case, the correlation between Law and

economic sciences.[43] Nevertheless, EAL emerges as reaction to abstract legal reasoning, which is purely dogmatic, and not committed to the economic efficiency of legal commands.

The normative efficiency perspective is closely related to economic principles that see themselves as rational individuals whose respective behaviors head towards maximizing their own interests. Thus, the Law can understand how legal regulations set human conducts based on contributions from economic studies,[44] and on a viewpoint substantiated by a whole set of incentives that favor efficient conducts and penalizes the inefficient ones. Therefore, according to EAL, the traditional legal thought brings along a certain imperfection, since it focuses on the normative aspect (validity) of legal regulations; thus, doctrinal statements and justifications must be supported by economic analysis in order to be more objective and accurate at decision-making moments, mainly when it comes to statements, according to which, Law must be understood as the means to reach social goals. Adjustments in normative commands are related to effectively and efficiently reaching these goals.

Accordingly, based on theoretical propositions at EAL scope, legal consequentialism emerges as prognostic exercise carried out by those who have the right to make decisions, a fact that is related to consequences (effects) in the sensory world that are not limited to the directly involved parts, but to the overall collectivity.[45] Therefore, from the consequentialism proposition perspective, the simple solution of normative nature issues is not enough, since it must bring along efficient correspondence in the world of facts.[46]

Art. 20 of LINDB comes from this very perspective and was reinforced by Law 13.655/2018, the so-called "Security Law for Public Innovation", whose terms are "*The administrative, controlling and legal spheres will not decide based on abstract legal values, without taking into consideration the practical consequences*

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[43] POSNER, Richard. La decadencia del derecho como disciplina autónoma. *In*: ROEMER, Andrés. Derecho y Economía: *una revisión de la literatura.* México: Fondo de Cultura Económica, 2000. p. 102, 123.

[44] Gary Becker was one of the individuals in charge for adding the theory of prices to the legal discipline; it broadened its incidence to sphere beyond the market, since the economic analysis could be overall applied to human behavior, and extend itself, for instance, to criminal conducts, to marriage and divorce, among others. BECKER, Gary S. *The economic approach to human behavior*. Chicago: The University of Chicago Press, 1976.

[45] NUNES, Tatiana Couto. A sinépica como mecanismo de eficácia das decisões judiciais. *In*: BRANCO, Paulo Gustavo Gonet (Org.). *A Eficácia das decisões judiciais com foco nas decisões da jurisdição constitucional STF.* Brasília: IDP, 2012. p. 27.

[46] *Ibid.*, p. 27.

of the decision made", and in its single paragraphs "*Motivation will show the need and adjustment in the measure imposed or in the invalidation of the act, contract, adjustment, process or administrative standard, including cases of possible alternatives*".

Therefore, the consequentialist judgement is demanding in occasions when the legal ballast lies on abstract values, a fact that demands Law application to intensify the argumentation level, in our case, arguments based on weighing about the concrete effects coming from it. It is so, because, not just from the legal viewpoint, but also from the factual perspective, occasions when control bureaus act in quite complex situations are not rare; their effects are also felt by agents and interests apart from the claim (externalities). Thus, the fundamentals used by Senate Bill n. 349/2015—which led to law 13.655/18— justify "*The trend to shallowness in the formation of judgement about complex legal-public matters*".[47] According to Marçal Justen Filho, when he specifically refers to art. 20 of LINDB, "the sought purpose is to reduce decisions' subjectivity and shallowness by imposing the mandatory character of the effective assessment of circumstances linked to the concrete case, such as the evaluation of several alternatives from the proportionality viewpoint".[48]

This last transcription shows the possibility of easily applying LINDB to the logic that has inspired the use of regulatory impact analysis as tool to increment the reasoning about interventionist decisions made by the public power, which must be substantiated by a process applied to effects and weighing of alternatives, based on values one aims to follow. Therefore, RIA is an element that gathers, on the one hand, the technical support for regulatory decisions and, on the other hand, it ensures the operationalization of the control exerted at regulatory scope.

This operational control is a crucial factor, since matters to be discussed in the regulatory sector concern extremely technical circumstances that oftentimes are not included in knowledge available for control bureaus, mainly for the Judiciary Power, whose magistrates' formation is traditionally juridical-demagogical. Thus, André Cyrino shines light on the need of matching the impossibility of having the jurisdiction (provided in our Constitution) away

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[47] Available at: https://www25.senado.leg.br/web/atividade/materias/-/materia/121664. Access on: Aug. 19, 2020.

[48] JUSTEN FILHO, Marçal. Art. 20 da LINDB — dever de transparência, concretude e proporcionalidade nas decisões públicas. *Revista de Direito Administrativo*, Rio de Janeiro, ed. esp.: Direito Público na Lei de Introdução às Normas de Direito Brasileiro — LINDB (Lei nº 13.655/2018), p. 13-41, Nov. 2018.

to the Judiciary's effective ability to deal with the complexity of the regulatory field.[49] Therefore, if one takes into account the institutional abilities, in other words, the degree of information and knowledge of each State bureau, it is important to initially honor the positions adopted by regulatory agencies, given the care taken when external interventions are made in the regulatory environment.

This 'evaluation prerogative"[50] in favor of regulatory bureaus derives from the fact that they are closer to and more familiarized with issues observed in the spectrum of their attributions, besides the very institutional rigging they have in hands. Accordingly, André Cyrino, based on proposition by Bruce Ackerman about a contemporary view of the division of Public powers, clarifies that it is essential defining the role each bureau must play in democratic regimes, actually, the role of the Regulatory State. Intervention guidelines must be mostly accounted for impartial entities and, most of all, for the ones that have technical-professional knowledge.[51]

Thus, despite situations when judges have the technical knowledge necessary to decide or when they face the mere application of legal standards, external subsidies must be sought when one faces the so-called 'hard cases', which often concern solutions built over undetermined legal principles and concepts. In light of the foregoing, Cyrino suggests that the referred hard cases, whose object regards acts of regulation, must be supported by regulatory *amicus curiae,* which would be expressed by regulatory agencies in order to clarify their technical and systemic nature, which would be beyond magistrates' specialization scope. From this perspective, this author states: "Our argument is that, if one does not have elements enough to conclude about the legality of a given regulation, and if there are means, within the State institutional arrangement itself, for it to be, at least, enlightened, the judge must make use of them".[52]

Therefore, although the author uses the procedural figure of *amicus curiae*, its ultimate aim would be the embodiment of institutes that would work

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[49] *Ibid.*, p. 11.

[50] KRELL, Andreas J. *Discricionariedade administrativa e proteção ambiental*: o controle dos conceitos jurídicos indeterminados e a competência dos órgãos ambientais: um estudo comparativo. Porto Alegre: Livraria do Advogado, 2004. p. 38.

[51] CYRINO, André Rodrigues. Separação de poderes, regulação e controle judicial: por um amicus curiae regulatório. *Revista Eletrônica de Direito Administrativo Econômico*, n. 20, p. 7, Nov. 2009/Jan. 2010.

[52] *Ibid*., p. 25.

as permissive element of legal intromission in regulatory matters, in other words, the prediction of mechanisms to make it feasible putting into practice the necessary institutional dialogue. Since the Judiciary cannot simply put aside its legal duty of deciding, it must be done with enough subsidies and based on all legal tools available to it.

Accordingly, the regulatory impact analysis would work as balancing institute, since it has the necessary elements to the adjusted judgement based on adopted position, likely alternatives and eventual predicted impacts. It is so, because, as states Luis Fernando Schuartz: "[…] by selecting and intending to fundament a certain decision, based on the analysis of consequences deriving from it and from its alternatives, the decision-maker opens a window to accountability requirements whose fulfillment will be subjected to scientific adequacy criteria (extralegal)".[53] RIA will provide these extralegal scientific criteria to support decision-makers' positions.

However, it is essential pointing out that such a claim issued by control bureaus must be attached to descriptive components of regulatory decisions, i.e., to the exposure of alternatives and of consequences of it, by making judgements in compliance with the witnessed fundamentals and outcomes. In other words, it is necessary observing whether the expected consequences were actually reached, as observed in the descriptive scope of the interventionist conduct. Normative dimensions related to the set of consequences depending on valuing criteria[54] initially belonged to regulatory bureaus' discretion scope. Based on the orientation of public policies, these bureaus will decide for options that better suit their goals. A legal interference aimed at correcting, or even at invalidating, a normative act—given its legal mismatch to positive social values—, would only be applied to cases whose orientation adopted by the regulating bureau would be apart from the normative provisions protected by the legal ordering, mostly the constitutional ones.

The aforementioned scenario regards the fact that the legislation gives certain autonomy to regulatory entities to issue normative administrative acts full of technical content and based on legal parameters (standards).[55] Thus, the referred autonomy is uncertain when it comes to the so-called technical discretion, which is decision-making field that initially belongs to the public

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[53] SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. *Revista de Direito Administrativo*, Rio de Janeiro, v. 248, p. 130-158, May 2008. p. 131.

[54] *Ibid.*, p. 132.

[55] Oliveira, *Novo perfil da regulação estatal*, *op. cit.*, position 1355.

administration. According to Carlos Ari Sundfeld and Jacintho Arruda Câmara, the judge can evaluate technical matters, but it cannot hold technical--political options. Therefore, if there is more than one technique likely to be followed, the choice among them is on the hands of the Administration's discretion. This is a matter of administrative nature about the most convenient and adequate decisions. As highlighted by the aforementioned authors:

> The existence of different opinions only shows that, among all confronting alternatives, it is not possible unquestionably refuting any of them, the accountable administrative authority must decide about which one to adopt. The exercise of the competence of making choices concerns what was conventionally called technical discretion, and it is not subjected to refutation based on legal arguments; i.e., it is not a matter whose accountability can be attributed to legal bureaus that have functions constitutionally limited to the field of Law.[56]

Furthermore, by dealing with a similar topic, Andreas Krell lectures that, in the field of undetermined legal concepts—or abstract legal values, as in the text by LINDB—, in the so-called grey areas (uncertain zones), control must be limited to assessing the sustainability of reasons that have led to administrative positions, since certain margin for decision-making must be on the hands of the Public Administration, in the modern State context, mainly when one is facing scenarios that demand technical specialization.[57] Thus, according to him, a normative act can be sustainable in case its echo is moored on a procedural programming that is previously defined by lawmakers, who must respect a legitimating process related to the acts' development, such as hearings with society representatives, public hearings, among others.[58]

We added the very regulatory impact analysis to the aforementioned examples of sustainability in administrative conducts, since its elaboration is materialized through a broad procedure that regards not just the exercise of

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[56] SUNDFELD, Carlos Ari; CÂMARA, Jacintho Arruda. Controle judicial dos atos administrativos: as questões técnicas e os limites da tutela de urgência. *Interesse Público*, Porto Alegre, n. 16, p. 36, Oct./Dec. 2002. In the original: "A existência de opiniões abalizadas divergentes apenas indica que, entre as alternativas em confronto, não sendo possível refutar de modo inquestionável qualquer uma delas, cabe à autoridade administrativa responsável decidir a respeito de qual adotar. O exercício desta competência de escolha envolve o que se convencionou chamar de discricionariedade técnica e não está sujeita a refutação por argumentos jurídicos; ou seja, não é matéria cuja responsabilidade possa ser atribuída a órgão jurisdicional, cuja função foi delimitada constitucionalmente ao campo do direito".

[57] Krell, *Discricionariedade administrativa e proteção ambiental*, *op. cit.*, p. 37-40.

[58] *Ibid.*, p. 48.

technical prognosis, but also increments resulting from social participation, be it by directly affected agents or by indirectly affected sectors.

Nevertheless, based on a consequentialist concept, Schuartz highlights that the attitude adopted by regulatory entities:

> will be objectively inappropriate if one can show that the consequences associated with the decisions at stake are different from those idealized by decision-makers. The social space for the solution, or further accommodation, of divergences, in this case, is no longer science, but politics.[59]

That is why we had previously mentioned that the Regulatory Impact Analysis would work as balancing legal mechanism for control decisions to allow—based on the very parameters limited by the regulating bureau—an adjustment in the judgment. Thus, adjustment in judgment will be attached to the descriptive terms of the normative act that is the object of questioning; the Judiciary Power, therefore, must use the structuring fundamentals of act issuing—in this case, RIA—as legal argumentation and support element. It is so, because, in case it is apart from the technical component observed in an instrument of such a nature, control decisions migrate to the subjectivity field—this is an aspect the regulatory sector has been making institutional and structural efforts to evade from.

Accordingly, it is worth mentioning that, despite its clear contribution to regulatory control, the regulatory impact analysis does not have indefectible character, since eventual doses of agents' partiality gravitate over it, as well as certain degree of uncertainty regarding prognosis' materialization, among others.[60] However, we still see that RIA, nowadays, emerges as the most adequate tool to eventual external interferences in the regulation environment among the legal mechanisms available to the ones who apply the law, mainly after its legal mandatory profile. Control bureaus must understand these limitations and make the necessary adjustments and weighing demanded by each case.

Thus, although we cannot state that LINDB currently adopts consequentialism as the only argumentative institute for control purposes,

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[59] Schuartz, Consequencialismo jurídico, racionalidade decisória e malandragem, *op. cit.*, p. 132. In the original: "Uma das orientações hoje sugeridas é a de que, no plano das decisões estaduais, interessa não só ou não tanto o reforço da legitimação democrática, mas que a decisão seja justa. A 'justeza' da decisão dependerá, em grande medida, de se escolher o 'órgão' mais apetrechado quanto à organização, função e forma de procedimento para tomar essa decisão".

[60] Porto et al., Análise de Impacto Regulatório, *op. cit.*, p. 175.

once well managed, RIA is an excellent tool to be put at practice in the regulatory environment. It is so, because, based on the aforementioned, it is an institute that encompasses the growing search for decision-making rational, a fact that easies the subjective profile compromising legal security due to the feasibility of adjustments in judgments to be practiced by control bureaus when it comes to matters of high technical-legal complexity.

What is certain is that the consequences were internalized in the hypothesis or factual support of the legal norm, so that they were received as legal facts. The RIA, at this point, serves as an internalization mechanism of the facts with adequate balancing of the costs, benefits and risks involved. In this sense, given the transversality of the principles of prevention, probable risk, and precaution, risk not calculated or predictable, it is necessary to give greater justification and contextualization of legal choice, and scientific criteria and measures that balance fundamental rights and freedom in its economic spectrum.

5. Conclusion

Normative acts issued by regulatory agencies, although somehow innovative in the legal world, must be protected by laws (in their formal sense) that give them such a possibility. This concept adjusts itself to the new context of Modern State, whose State functions no longer encompass the strict tripartition of public powers initially proposed by the liberal revolutions.

Moreover, the eventual shortage of legitimacy linked to regulatory agencies has been compensated by the intense technical specialization of their activities and by the rationalization of interventionist measures. Among all propositions for objectivity gain, the Regulatory Impact Analysis is the one emerging as institute capable of gathering provisions of a more efficient and dialogic Public Administration, since its methods are based on both expertise and positions deriving from a structured procedure that also concerns the participation of directly or indirectly impacted agents.

The prognostic exercise used by control bureaus emerged as problematic in sectors with high technical specialization, such as economic regulations, after our legal ordering embodied the legal consequentialism. It is essential seeking mechanisms to allow the combination of the need of solving conflicts to the structural and knowable limitations of control bureaus in this particular field.

Accordingly, likely conflicts at regulatory scope may use RIA as balancing element, be it from the Administration viewpoint—in order to support the adopted measures—or from the perspective of control bureaus—in order to analyze the relevance and adequacy of the questioned act. This analysis must be limited, at first, to assessing the compliance between fundamentals supporting acts' issuing and the effectively witnessed outcomes. Therefore, the valuing choices properly motivated by specialized bureaus must be favored, except when one is facing the violation of constitutionally protected fundamental values.

References

ARAGÃO, Alexandre Santos de. *Agências reguladoras e a evolução do direito administrativo econômico*. 2. ed. Rio de Janeiro: Forense, 2006.

ARAGÃO, Alexandre Santos de. O atual estágio da regulação estatal no Brasil. *In*: MARRARA, Thiago (Org.). *Direito administrativo*: transformações e tendências. São Paulo: [s.n.], 2014.

ARAGÃO, Alexandre Santos de. O poder normativo das agências reguladoras independentes e o estado democrático de direito. *Revista de Informação Legislativa*, Brasília, a. 37, n. 148, p. 275-299, Oct./Dec. 2000.

ARIGONY, A. O poder normativo das agências reguladoras e a constitucionalidade dos princípios inteligíveis. *Revista Digital de Direito Administrativo*, v. 6, n. 1, p. 202-224, Feb. 1º, 2019.

BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 28. ed. São Paulo: Malheiros, 2011.

BARROSO, Luís Roberto. Agências reguladoras. Constituição e transformações do Estado e legitimidade democrática. *Revista de Direito Administrativo*, Rio de Janeiro, v. 229, p. 285-312, July 2002.

BECKER, Gary S. *The economic approach to human behavior*. Chicago: The University of Chicago Press, 1976.

BINENBOJM, Gustavo. *Uma teoria de direito administrativo*: direitos fundamentais, democracia e constitucionalização. Rio de Janeiro: Renovar, 2008.

BRASIL. *Decreto 4.172, de 21 de março de 2002*. Available at: https https://www.planalto.gov.br/ccivil_03/decreto/2002/D4172.htm. Access on: June 25, 2024.

BRASIL. Ancine. *Resolução de Diretoria Colegiada nº 52, de 10 de janeiro de 2013*. Available at: https://www.gov.br/ancine/pt-br/acesso-a-informacao/legislacao/resolucoes-diretoria-colegiada/resolucao-no-52. Access on: June 25, 2024.

BRASIL. Aneel. *Resolução Normativa nº 540, de 12 de março de 2013*. Available at: https://www2.aneel.gov.br/cedoc/ren2013540.html. Access on: June 25, 2024.

BRASIL. Anatel. Resolução nº 612, de 29 de abril de 2013. Available at: https https://informacoes.anatel.gov.br/legislacao/resolucoes/2013/450-resolucao-612. Access on: June 25, 2024.

BRASIL. Aneel. *Resolução Normativa nº 798, de 12 de dezembro de 2017*. Available at:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www2.aneel.gov.br/cedoc/ren2017798.pdf. Access on: June 25, 2025.

BRASIL. Aneel. *Resolução Normativa Aneel nº 941, de 6 de julho de 2021*. Available at:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www2.aneel.gov.br/cedoc/ren2021941.pdf. Access on: June 25, 2025.

BRASIL. *Decreto 6.062, de 16 de março de 2007*. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6062.htm. Access on: June 25, 2024.

BRASIL. *Decreto 10.411, de 30 de junho de 2020*. Available at: https https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/decreto/d10411.htm. Access on: June 25, 2024.

BRASIL. *Decreto 11.738, de 18 de outubro de 2023*. Available at: https https://www.planalto.gov.br/ccivil_03/_Ato2023-2026/2023/Decreto/D11738.htm#art11. Access on: June 25, 2024.

BRASIL. *Lei nº 13.848, de 25 de junho de 2019*. Available at: https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/l13848.htm. Access on: June 25, 2024.

BRASIL. *Lei nº 13.874, de 20 de setembro de 2019*. Available at: https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/l13874.htm Access on: June 25, 2024.

BRASIL. Supremo Tribunal Federal. *ADI 4923*. Relator(a): Luiz Fux, Tribunal Pleno, julgado em 08-11-2017, Processo Eletrônico DJe-064, Divulg 04-04-2018, Public 05-04-2018.

CANOTILHO, J. J. Gomes. Relatório sobre programa, conteúdos e métodos de um curso de teoria da legislação. *Separata do v. LXIII (1987) do Boletim da Faculdade de Direito da Universidade de Coimbra*, Coimbra, 1990.

CYRINO, André Rodrigues. Separação de poderes, regulação e controle judicial: por um amicus curiae regulatório. *Revista Eletrônica de Direito Administrativo Econômico*, n. 20, p. 1-30, Nov. 2009/Jan. 2010.

DALLARI, Dalmo de Abreu. *Elementos de teoria geral do Estado*. 24. ed. São Paulo: Saraiva, 2003.

GICO JÚNIOR, Ivo. Introdução ao direito e economia. *In*: TIMM, Luciano Benetti (Org.). *Direito e economia no Brasil*. 2. ed. São Paulo: Atlas, 2014. p. 1-33.

GOMES, Filipe Lôbo. A regulação estatal como instrumento de concretização do direito fundamental ao desenvolvimento econômico: um contributo da análise econômica do direito. *RDU*, Porto Alegre, ed. esp., p. 97-125, 2016.

GRAU, Eros Roberto. *O direito posto e o direito pressuposto*. 7. ed. São Paulo: Malheiros, 2008.

GUERRA, Sérgio. *Agências reguladoras*: da administração piramidal à governança em rede. Belo Horizonte: Fórum, 2012.

GUERRA, Sérgio. Aperfeiçoando a regulação brasileira por agências: quais lições podem ser extraídas do sesquicentenário modelo norte-americano? *In*: GUERRA, Sérgio (Org.). *Teoria do Estado regulador*. Curitiba: Juruá, 2015. p. 13-106.

GUERRA, Sérgio. Crise e refundação do princípio da legalidade — a supremacia formal e axiológica da Constituição Federal de 1988. *Interesse Público*, Belo Horizonte, a. 10, n. 49, p. 89-111, May/June 2008.

GUERRA, Sérgio. *Discricionariedade, regulação e reflexividade*: uma teoria sobre as escolhas administrativas. 4. ed. Belo Horizonte: Fórum, 2017.

JUSTEN FILHO, Marçal. Art. 20 da LINDB — dever de transparência, concretude e proporcionalidade nas decisões públicas. *Revista de Direito*

Administrativo, Rio de Janeiro, ed. esp.: Direito Público na Lei de Introdução às Normas de Direito Brasileiro — LINDB (Lei nº 13.655/2018), p. 13-41, Nov. 2018.

KRELL, Andreas J. *Discricionariedade administrativa e proteção ambiental*: o controle dos conceitos jurídicos indeterminados e a competência dos órgãos ambientais: um estudo comparativo. Porto Alegre: Livraria do Advogado, 2004.

MEDAUAR, Odete. *O direito administrativo em evolução*. 3. ed. Brasília: Gazeta Jurídica, 2017.

MEDEIROS, Jackson Tavares da Silva de; NELSON, Rocco Antonio Rangel Rosso. A constitucionalidade do poder normativo das agências reguladoras na ótica do redimensionamento do princípio da legalidade. *RDA — Revista de Direito Administrativo*, Rio de Janeiro, v. 271, p. 109-141, Jan./Apr. 2016.

NUNES, Tatiana Couto. A sinépica como mecanismo de eficácia das decisões judiciais. *In*: BRANCO, Paulo Gustavo Gonet (Org.). *A eficácia das decisões judiciais com foco nas decisões da jurisdição constitucional STF*. Brasília: IDP, 2012. p. 17-37.

OCDE. *The OECD report on regulatory reform*. Paris: OCDE, 1997. Available at: http://www.oecd.org/gov/regulatory-policy/2391768.pdf. Access on: Aug. 11, 2020.

OLIVEIRA, Rafael Carvalho Rezende. *Constitucionalização do direito administrativo*. 2. ed. Rio de Janeiro: Lumen Juris, 2010.

OLIVEIRA, Rafael Carvalho Rezende. *Novo perfil da regulação estatal*: administração pública de resultados e análise de impacto regulatório. Rio de Janeiro: Forense, 2015. Edição Kindle.

PORTO, Antônio José Maristrello; GAROUPA, Nuno; GUERRA, Sérgio. Análise de impacto regulatório: dimensões econômicas de sua aplicação. *EALR*, Brasília, v. 10, n. 2, p. 173-190, May/Aug. 2019.

POSNER, Richard. La decadencia del derecho como disciplina autónoma. *In*: ROEMER, Andrés. *Derecho y economía*: una revisión de la literatura. México: Fondo de Cultura Económica, 2000. p. 102-122.

SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. *Revista de Direito Administrativo*, Rio de Janeiro, v. 248, p. 130-158, May 2008.

SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. São Paulo: Malheiros, 2012.

SUNDFELD, Carlos Ari; CÂMARA, Jacintho Arruda. Controle judicial dos atos administrativos: as questões técnicas e os limites da tutela de urgência. *Interesse Público*, Porto Alegre, n. 16, p. 23-38, Oct./Dec. 2002.