The independence of United States of America administrative agencies contrasted with the autonomy of Brazilian administrative entities*

Independência das agências administrativas nos Estados Unidos da América: contraste com a autonomia de entes administrativos no direito brasileiro

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ABSTRACT

The article contrasts the independence of administrative agencies in US law with the autonomy granted to administrative entities in Brazilian law. It first registers the historical evolution of the independent regulatory agencies in US law, aiming to identify the main aspects used to express such independence. Then, it verifies if these features are present in Brazilian

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administrative bodies already endowed with relative autonomy, in order to observe similarities and differences. The comparison reveals marked differences between both the constitutional law and the administrative law of these countries, but also shows a reasonable similarity concerning the issues that lead to the autonomy of administrative agencies with regard to the Executive Branch.

KEYWORDS

administrative state — regulation — independence — autonomy — administrative agencies

RESUMO

O artigo contrasta a independência das agências administrativas no direito dos EUA com a autonomia concedida a entes administrativos no direito brasileiro. Para tanto, primeiro registra a evolução histórica da noção de agência reguladora independente no direito dos EUA, de modo a identificar os principais aspectos construídos para demarcar essa independência. Em seguida, verifica como eles se manifestam nos órgãos administrativos brasileiros já dotados de relativa autonomia, para observar similaridades e diferenças. A comparação revela diferenças marcantes entre os direitos constitucional e administrativo desses países, mas semelhança razoável a respeito das questões que levam a se estabelecer certa autonomia dos órgãos administrativos em face do Poder Executivo.

PALAVRAS-CHAVES

administração pública — regulação — independência — autonomia — agências administrativas

Introduction

The legal discipline of economic activity permeates the history of the European continent, featuring frequent state intervention. However, with the success of the liberal revolutions offering greater protection of property rights, contracts and their management by business, the relationship between the State and individuals has gained stronger legal contours, as legislation has moved away from monarchical absolutism.

This process impacted the United States of America intensely. From its colonial past in the 17th century until its independence and the formation of the Union at the end of the 18th century, it absorbed the English liberal model, building its main institutions on a favorable environment for private autonomy and capitalism, preserving slavery, however. This happened in the newly independent states, and was later reflected in the text of the Federal Constitution of 1787.

Formed initially as a country with an agrarian and mercantile economy, disciplined mainly by the federated states, the US went through significant transformation with the industrialization that developed from the 19th century, as the emergence of large companies capable of trading in most of the national territory progressively forced the Union to assume tasks unimagined at its constitution, including the discipline of economic activity and the provision of public services.

The creation of federal administrative structures to carry out this mission in the form of a regulatory agencies will be studied here, with an emphasis on the aspect of independence, in order to explain this institutional characteristic and thus contrast it with comparable instruments under Brazilian law, to better identify their similarities and differences, the problems faced and any proposed solutions.

In this regard, and under the premise that the insertion of the term "regulatory agencies" in the Brazilian legal system was strongly influenced by what happened in the USA, this comparative approach will explore to what extent the Brazilian experience considered the local agencies as independent, depending on the meaning adopted in that country, as well as the consequences of the laws in force to understand the position and functioning of these bodies in the national administrative structure.

An attempt is made to summarize the current state of development of the topic in view of the general lines drawn by the legislation to the administration federal government in Brazil, to identify points of proximity or deviation from that generally adopted by the USA.

1. Public administration in the USA in the early 20th century

1.1 The English influence

In the period that extends from colonization to the independence of the USA (17th and 18th centuries), England went through a period of expressive constitutional changes, supplanting absolutism, with the civil war of 1642-51

and the consolidation of the supremacy of the English parliament, supported by the glorious revolution of 1688. A relevant aspect of these changes was the removal of the monarch from the day-to-day activities of government, stabilizing, throughout the eighteenth century, a government commanded by members of parliament, who should be accountable to this collegiate, notwithstanding administrative bodies belonging to the Crown (Royal Offices).

It is this institutional structure, marked by the centrality and primacy of parliaments in the conduct of public affairs, which the thirteen English colonies in North America understood more closely at the time of their war of independence (1775-83) and subsequent establishment of republican governments, since the victors were completely averse to monarchy. Thus, in the first constitutions of the revolutionary states, the chief executive (president or governor) mainly had the task of conducting government actions in accordance with the norms posed by the parliaments, commanding the security forces with the objective of enforcing what was decided collegiately.[1]

In accord with this political framework, the assemblies safeguarded the power to regulate the extent to which other State activities would be conducted, respecting the constitutional reservation of strict attributions to the head of the local executive. Thus, it should be noted that, in general, the legislative houses maintained the prerogative of choosing different ways of filling administrative positions,[2] vis-à-vis institute bodies with different degrees of independence in relation to the executive manager.

This new order, set out in the respective revolutionary constitutions, greatly influenced the subsequent elaboration of the Federal Constitution of 1787.

1.2 Administration in the US Federal Constitutional Framework

Written in a period of great reservations about a government centered on the figure of the monarch, the US Constitution disciplined, in a measured

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1 Cf., see, for example, the constitution of the State of Virginia, 1776: "[…] A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses […] he shall, with the advice of a Council of State, exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any presence, exercise any power or prerogative, by virtue of any law, statute or custom of England […]". Cf., also the State of Pennsylvania, 1776: "[…] The president, and in his absence the vice-president, with the council, five of whom shall be a quorum […] they are also to take care that the laws be faithfully executed; (...) The president shall be commander in chief of the forces of the state, but shall not command in person, except advised thereto by the council, and then only so long as they shall approve thereof".

2 Like, for example, direct elections to various administrative positions in different states, such as the state attorney general and the state controller.

way, the Federal Executive. It awarded to the President of the Republic, in general terms, besides command of the armed forces, powers of pardon in federal criminal convictions and Congress veto laws, granting, also, representative responsibilities internationally and the power to appoint senior management with the consent of the Senate, reduced administrative attributions in relation to those current.[3]

In this regard, regarding the powers of the Republic, a framework of checks and balances was constructed, the prominence of the US Congress to decide on the power of government that was not constitutionally restricted to the president was expressed in the constitutional text.[4] Thus, in consonance with the previous changes that occurred in England, broad power was granted the federal legislative house to define the functioning of the Union, including bodies endowed with specific attributions.

As marked out, the progressive establishment of federative administrative did not follow a linear pattern with respect to reporting to the president. See, for example, that the first organs created in 1789 in the federal republic, namely, the departments of Foreign Affairs, War and Treasury were not designed to submit to the presidency in a homogeneous way, since the US Congress, while recognizing the status of executive bodies (executive departments) for the first two, initially granted some autonomy to the third, as well as safeguarding its supervisory parliamentary power.[5]

This differentiation of administrative bodies as to their relationship with the Executive and Legislative Powers continued in the expansion process of

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3 SCHWARTZ, Bernard. A commentary on the Constitution of the United States — Part I: The Powers of Government. Nova York. The Macmillan Company, 1963. In the original, p. 35-6: "The present concentration of both political and administrative power in the President is one that was, in all probability, not contemplated by the Framers. In their conception, the President was to be primarily a political chief. It was intended that the President`s powers should be essentially political and military, as enumerated in the Constitution, and that he should not have the direction of administrative affairs. The officers in charge of such affairs were, on the contrary, to be under the direction of, and accountable to, the legislative department".

4 Cf. U.S. Constitution. Art. I, Section 8, particularly its final dispositions: "The Congress shall have Power […] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

5 SUNSTEIN, Cass; LESSIG, Lawrence. The president and the administration. Columbia Law Review, v. 94, p. 1-123, 1994. In the original, p. 27: "Unlike with Foreign Affairs and War, the enacting Congress (1) did not denominate Treasury an "executive department, (2) did specify in detail the offices and functions of Treasury, (3) did impose on the Treasurer specific duties, and (4) did shield the Comptroller (an office within Treasury) from presidential direction".

the federal administrative structure,[6] as that Congress, when establishing new entities, effectively varied the measures of submission or autonomy of these in relation to the Executive Power, an approach upheld by the US Supreme Court.[7]

1.3 The federal administration in the USA throughout the 19th century

In the USA at the beginning of the 19th century, the administrative structure of the Union was much smaller than its current size. However, in the aftermath of the civil war (1861-65), with the victory of the Union over the slaveholding south, federalism was reformulated extensively, leading to an ever-increasing demand for federal administrative actions, such as the formation of a national system of pensions for military veterans with physical or psychological trauma.[8]

In line with these changes, throughout the second half of the 19th century, there was a debate about the services to be offered by the Union. Until then, it was considered appropriate, in the country's political-administrative tradition, that the vast majority of federal officials should be appointed or removed depending on electoral victories (spoils system). However, the assassination of President James Garfield in 1881 by a voter had not received a promised position, reinforced the need for stability and professionalism in the conduct of public services, to regulate rules for the impersonal hiring of civil servants (The Pendleton Act of 1883), an important step to implement wider administrative reforms.

Thus, besides establishing a growing range of public services at the federal level, in the second half of the 19th century, there was debate in the US on the extent to which these services could be provided, professionally and permanently, with a certain autonomy in relation to the political power, along the lines of a bureaucracy that was already present in European states.[9]

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6 TRAUSS, Peter. The place of agencies in government: separation of powers and the fourth branch. 84 Colum. L. Rev., v. 84, n. 3, p. 573-669, 1984. In the original, p. 583: "Congress has employed many different forms of governmental authority in allocating the day-to-day work of government. It has created cabinet departments, cabinet-level agencies headed by individual administrators responsible to the President, independent regulatory commissions, federal corporations, independent regulatory commissions within cabinet department and more as means of carrying into execution the laws it enacts".

7 Cf. Humphrey's Executor v. United States, 295 U.S. 602 (1935) at 629. In the original, "[…] the authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted".

8 MASHAW, Jerry. The American model of federal administrative law: remembering the first one hundred years. 78 Geo. Wash. L. Rev., v. 78, p. 975-992, 2010.

9 On this topic, a seminal work was published in 1887, *The Study of Administration*, whose author, Woodrow Wilson, was later elected president of the USA in 1912 by the Democratic Party, creating the Federal Reserve Board (FRB) and the Federal Trade Commission (FTC) in his first mandate.

1.4 The development of regulatory administrative units in the USA

As mentioned, the sparse references to administrative activities in the Federal Constitution did not prevent them from being instituted by the US Congress. Alongside the formation of the tax structure, post office, patent office, and Union land registry, the tasks of organizing and maintaining the departments of the Executive branch demanded essentially administrative actions, vis-à-vis the inherent issues of organization and adjudication of conflicts, referring to specific laws and common law.

This minimal federal State has expanded, however, in the face of a greater Union control over interstate commercial activities, as well as the need to administer the immense territory annexed through acquisitions and conquests resulting from aggressive actions against indigenous peoples and border states. Thus, the issue gained greater importance, at the federal level, with the economic integration of the US territory in the 19th century, increased by the use of steamboats and, mainly, railroads.

As for steamboats, in 1838 the US Congress, attempting to prevent increasingly recurrent accidents, found no legal obstacles to enact legislation aimed at licensing and inspecting these vessels, based on user safety, consolidated over the years.[10]

With railroads, problems developed more specifically. In step with expansion, there was increasing conflict between the owners and businesses which used railroads to transport of loads, particularly in rural areas, as they became dependent on the network to market their production. This conflict led to a polarization between entrepreneurs in different sectors and, consequently, had repercussions in the federal areas where they exercised greater influence.

Accordingly, state parliaments faced the task of disciplining the operation of railroads in their territory, acting, in line with the British tradition, through committees, generally of a supra-party character, composed of members of the Legislature or nominated representatives.

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[10] BURGER, John. Bursting boilers and the Federal Power. *Technology and Culture*, v. 7, n. 1, p.1-23, 1966. In the original, p. 23: "*Bursting steamboat boilers […] should be seen also as creating a dilemma as to how far the lives and property of the general public might be endangered by unrestricted private enterprise. The solution was an important step toward the inauguration of the regulatory and investigative agencies in the federal government*".

These commissions were multiplied by the federated units and varied in terms of powers given, from making recommendations to actually setting tariffs and adjudicating disputes.[11]

However, when the ineffectiveness of the states in relation to businesses with national operations became evident, requests for intervention by the US Congress increased, related to economic clashes, with claims that could decisively favor one sector to the detriment of the other. To deal with such demands, Congress decided, in 1887, to institute a Commission for railways concerning interstate commerce, the Interstate Commerce Commission (ICC).

1.5 The ICC and the federal independent agency model in the US

Understanding the trajectory of the ICC, from its creation in 1877 to its dissolution in 1995, helps us understand the main aspects of the independent agency model in the US.[12] For the purposes of this study, however, it is worth highlighting the institutional aspects of the ICC as an administrative body, as well as, regarding the choices adopted, references to both substantive issues and contextual situations.

Structurally, it is important to point out that in 1887 Congress decided to adopt norms that regulate the railroads at an interstate level. In principle, demanding application of these norms then becomes the task of the Executive power, mainly through Federal Attorneys, chosen by the President of the Republic with the consent of the Senate, to act in disputes decided by the Judiciary. Note that, in this design, the insertion of a new administrative body with decision-making power could mitigate the protagonism of these Powers, both from a political and technical point of view.

Contextually, in turn, it should be noted that the ICC was created at the time of Democratic Party prevalence, in its first victory in the federal elections in the second half of the 19th century. Significantly, the situation in which the presidency of the republic and choice of federal judges, including in the

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[11] CUSHMAN. Robert. *The independent regulatory commissions*. Nova York: Oxford Press, 1941. No original, p. 23.: "*Viewed generally, therefore, these earliest commissions were occasional, and created for the handling of special or ad hoc situations. They had a variety of functions, but mainly they were to serve as fact-finding agencies for the legislature and to handle tasks which that body had undertaken and in which it had failed. They were looked upon as agents of the legislature and not in any sense as part of the executive branch*".

[12] HOOGENBOOM, Ari; HOOGENBOOM, Olive. A history of the ICC: from panacea to palliative. Nova York: Norton, 1976.

Supreme Court, were repeatedly commanded by the rival Republican party, helped consolidate in Congress the proposal that the ICC should not fully submit to the President of the Republic.

To establish this new body, it was decided, in line with several federated units, that the commission would be made up of five members, with a term of six years, appointed by the presidency with Senate approval. However, no more than three could be appointed by the same political party, and, in the event of inefficiency, negligence or illegality, they could be removed by the President of the Republic. In addition, two years later, it was amended, so that the Commission would no longer report to the Executive Branch (Department of Interior), but directly to Congress.

Regarding the Judiciary, it was conceived that the ICC, besides monitoring and investigating the activities of the railways, could decide on the conflicts arising from non-compliance with the regulations present in the 1887 law. This central competence, of adjudicating in the disputes about the application of this law, suffered serious setbacks in the U.S. Supreme Court, only recovering at with subsequent statutes that reaffirmed and expanded the attributions of the ICC, even allowing it to edit norms vis-a-vis the railways.

Thus, in the first decade of the 20th century, an administrative body capable of supervising, editing norms, adjudicating in conflicts and applying sanctions was already at the heart of the federal government. An entity (agency) was conceived with concentrated attributions of a legislative, executive and judicial character, capable of regulating economic activity independently of the President of the Republic,[13] accountable to Congress and subject to review by the Judiciary.

1.6 The expansion of the administrative state and agencies in the US

The subsequent growth of the administrative state developed, by expanding services provided under the supervision of the Executive Power, as seen, for example, in 1906, with the organization of a organ of food and drug inspection at the Department of Agriculture, or by creating entities

[13] BEERMANN. Jack. Inside administrative law: what matters and why. Nova York: Aspen Publ., 2020. In the original, p. 12: "The independence of independent agencies is largely a product of the struggle for control between the President and Congress. Formally, Congress designates some agencies as 'independent' in order to shield them from presidential influence. Congress states, in the enabling acts creating these agencies, that they are 'independent' and not located in any department of the executive branch".

specifically geared towards the new objectives assigned to them by law, as occurred in 1913, with the institution of a Federal Reserve Board (FRB) to order US monetary policy, and, in 1914, with the creation of a body to implement antitrust actions, the Federal Trade Commission (FTC).

With regard to these movements, it should also be noted that, in the first half of the twentieth century, alongside political issues inherent to the institutional design of state bodies, the conviction spread that management would address eminently technical and specialized issues, demanding the presence of organizations and permanent servers, capable of facing the growing economic and social complexity, decisive for the expansion of the administrative state in the US.[14]

Against this background, the economic crises of the crash of the New York Stock Exchange in 1929, arising mainly from business activity in a deregulated financial market, profoundly altered the perception of the State role in social well-being and helped consolidate, in US political thought, the need for a greater participation of the Union, leading to the creation of other administrative bodies, such as the Securities Exchange Commission (SEC) and the Federal Communications Commission (FCC). With regard to this expansion, it is worth recalling that Congress has broad access to the state administrative organization, able to vary the degree of subordination of this structure to the President of the Republic.[15] By using this prerogative, the Legislature developed a heterogeneous structure, dimensioning administrative bodies in an arc, from complete integration into the structure of the Executive Branch to positions of greater independence, notwithstanding various intermediary situations.

On the other hand, the performance of administrative bodies initially disciplined only by the law of their creation, sometimes sparsely supervised by Congress, triggered criticism of the possibility of abuse. A substantial answer to these problems was the enactment of a federal law to establish general rules as for the functioning of administrative bodies, dealing especially with

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[14] DATLA, Kirti; REVESZ, Richard. Deconstructing independent agencies (and executive agencies). 98 Cornell L. Rev., v. 98, p. 769-843, 2013. In the original, p. 777: "This goal of impartial expertise motivated many of the structural features of the early independent agencies. Commissioners and board members were appointed for a term of years because expertness "springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem".

[15] WOLL, Peter. American bureaucracy. Nova York: Norton & Co., 1977. In the original, p. 63: "Congress has virtually complete authority to structure the administrative branch and determine where formal lines of accountability shall be placed. It may or may not decide to let the President exercise various types of controls".

procedures for editing rules and adjudicating conflicts, the Administrative Procedure Act (APA) of 1946.

Therefore, at the beginning of the second half of the 20th century, the administrative dimension of the Union was already fully structured, endowed with specific rules and general norms, affirming the unequivocal presence, in the U.S., of a legally consolidated federal administrative law in the statutory and jurisprudential framework.

2. Modulation of the autonomy and independence of agencies in USA

Concerning agencies in the USA, we observe there is no legal definition a priori of what an "independent" agency is, although the term is broadly doctrinal in use.[16] A key aspect is the stability conferred to the directors, synthesized in the provisions, first inserted in the law that created the ICC, that members of the commission have a defined mandate, of bipartisan composition, which the President may withdraw in case of inefficiency, negligence or illegality committed in the exercise of office ([…] *inefficiency, neglect of duty, or malfeasance in office)*.[17]

Another aspect of independence in relation to the structure of the Executive power refers to Congress exceptionally authorizing administrative bodies to litigate in court (*litigation authority*) without necessarily using the structure of the US Department of Justice. This prerogative, not recognized for criminal actions, may involve attributions of the agency in a broad or limited way.[18]

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[16] Kirti Datla e Richard Revesz, Deconstructing independent agencies, op. cit. In the original, p. 775. "This article […] surveys the enabling statutes of both independent and executive agencies for seven indicia of independence: removal protection, specified tenure, multimember structure, litigation authority, partisan balance requirements, budget and congressional communication authority, and adjudication authority".

[17] Synthesized in the expressions removal protection, specified tenure, multimember structure and partisan balance.

[18] DEVINS, Neal; HERZ, Michael. The battle that never was: Congress, the White House, and Agency Litigation Authority. Law and Contemporary Problems, v. 61, p. 205-222, inverno 1998. In the original, p. 208: "To be sure, Congress has carved out a variety of exceptions to DOJ control.12 However, these exceptions have been anything but systematic. A slight pattern can be found: Congress grants litigating authority more often to independent agencies than to executive agencies, but it does not grant such authority to all such agencies, to all the litigation of any such agencies, or only to such agencies".

As mentioned earlier, it is also possible to mitigate interference of the Executive Branch in the relationship between the administrative bodies and the US Congress, allowing them to present their budget proposal without presidential review, or if sent concurrently vis-a-vis the Executive and the Legislative. Franchises of equal latitude can be repeated for bills and dealings with the Legislature.

Above all, emphasis should be placed on the already highlighted competences to supervise, regulate and adjudicate conflicts, which may be structured without allowing the power to review such actions by the President of the Republic or the ministry (cabinet). As the doctrine clarifies:

> Because an agency performs administrative functions it does not mean that it is part of the structure of the Executive Branch, as reaffirmed by both former and current members of Congress. The emphasis on this consideration must be given since administrative functions are no more executive than legislative and judicial. To the extent that [agencies exercise] a legislative function, it is natural for Congress to consider the agencies as its extension; to the extent that [agencies exercise] a judicial function, the Congress understands that administrative independence is often desirable, to avoid partisan influence on judicial processes.[19]

However, it should be noted that, according to this model, the general regulatory power resides ultimately in the US Congress, which may intervene, from disapproving relevant proposed regulation of agencies before it enters into force (*The Congressional Review Act* of 2006) to laying down in law the rules to be obeyed.

It should be noted, however, that these characteristics are attributed to administrative bodies with different emphasis. Thus, an agency may be run by a director, but not by a collegiate and, in both cases, the legislative

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[19] Peter Woll, American bureaucracy, op. cit. In the original, p. 63: "Simply because an agency is engaged in administrative functions does not mean that it should be placed within the executive branch, according to many past and present members of Congress. This view is emphasized because administrative functions are not so much executive as they are legislative and judicial. Insofar they are legislative, it is natural for Congress to consider the agencies as an extension of itself; insofar they are judicial, Congress feels in many instances that administrative independence is desirable, to avoid partisan influence over judicial proceedings".

decision varies on whether to establish a mandate or protection in the office.[20] In the same way, this protection may be received, but not be given budgetary autonomy, it being also conditional on the regulatory capacity to suffer greater or lesser interference from the Executive.

As a result, although traditionally U.S. agencies are traditionally classified in terms of executive[21] or independent,[22] it is worth noting a certain heterogeneity between various administrative bodies, avoiding organization into strict classes, as reasonable variation exists among entities.

2.1 Independence of the agencies in the decisions of the Judiciary

Some key provisions regarding agency independence were subject to scrutiny by the Judiciary, and the regulatory powers of the ICC emerged, then, as an initial fundamental issue presented to the Supreme Court. It should be noted, as an important guideline, that the basic structure of the agency was soon recognized in terms of its constitutionality, no major objections being raised against the powers of Congress to establish federal administrative bodies with such attributions.

However, as already highlighted, the power of the agency to determine tariffs and adjudicate in conflicts, especially autonomy to weigh evidence and resolve questions of law, was questioned by the Judiciary, to allow a full review of its decisions and to prevent it from effective regulatory capacity,[23] which remained until Congress gave it express powers in 1906 (*The Hepburn Act* of 1906).

As the Supreme Court upheld the constitutionality of acts of Congress regarding agencies, such laws have become the main benchmarks for gauging the possibility and extent of judicial review of respective administrative decisions. However, with the advent of Administrative Procedure Act (APA)

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[20] DISIMONE, Rita. Social security administration created as an independent agency: Public Law 103-296. Soc. Security Bull., v. 58, n. 1, p. 57-65, jan. 1995. In the original, p. 57: "The new legislation officially separates the Social Security Administration (SSA) from the Department of Health and Human Services (HBS), effective March 3 1, 1995, and restores the SSA to its original status as an independent Federal agency. (Since 1939, SSA has operated under the direction of a 'parent' agency.) A single administrator will lead the agency with a seven-member bipartisan advisory board".

[21] Cf., a classic example, The Federal Bureau of Investigation (FBI).

[22] Cf., a classic example, The Federal Trade Commission (FTC).

[23] ELY JR., James. The troubled beginning of the Interstate Commerce Act. Marq. L. Rev., v. 95, p. 1131-1134, 2012. No original: By the early twentieth century, the ICC was largely toothless and spent much of its energy gathering statistics about the rail industry.

broad authorization was established for this,[24] excepting specific legislative restrictions that are not declared unconstitutional. There is, therefore, detailed discipline on this review, accompanied by respective case law.[25]

Another point of great importance dealt with by the Judiciary regards the possibility of the President of the Republic removing the commissioners or agency directors on a discretionary basis. In 1935 the Supreme Court ruled on this,[26] in the sense that the presence, in law, of said provisions to protect the exercise of office prevent dismissal, with the need for the president to demonstrate that the foreseen cause is present in law (*removal protection*).

The other aspects of independence already outlined follow, in general, the understanding of the Judiciary in the sense of Congress respecting the legislated, thus causing some tensions with the Executive Power regarding such prerogatives, as shown below.

2.2 Independence of agencies in relation to the Executive Branch

Understanding agency independence as more accentuated in relation to the President of the Republic, it is necessary to point out that the expression does not mean that such bodies operate without any influence from the Executive power. Although this ascendancy is mitigated, there are pressures and clashes over the possible resulting limits, which emerge in different facets of this relationship.[27]

Thus, it is worth remembering, as a major influence, the presidential power to appoint commissioners or directors with the consent of the Senate. Also add, for collegiate management agencies, the power of the president to choose who will be the head manager (*chair*), endowed with executive and administrative attributions to guide the work of the committee and the functioning of the body.

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[24] Cf. 5 U.S. Code § 704: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority".

[25] Cf., central to this jurisprudence, the decision by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[26] Cf. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[27] MORENO, Angel. Presidential coordination of the independent regulatory process. 8 Admin. L.J. Am. U., v. 8, p. 461-516, 1994. The author systematically addresses the relationship between the president and independent agencies.

Another aspect to be observed is that the Executive Branch supervises the facilities, budget execution and maintenance of permanent servants of the Agencies, with the exception of hiring reserved for commissioners.[28] It should also be considered that, a discussed, in the absence of authorizations to conduct litigation in court, the Agency will necessarily have to use the services of the US Department of Justice.

Thus, the budgetary, administrative and coordination powers of judicial litigation attributed to the President of the Republic appear highly effective instruments to influence the performance of public administration, giving rise to potential areas of friction with the independent agencies. Initially formed to manage administrative bodies under presidential aegis, an auxiliary administrative structure progressively expanded, until, in 1970, the *Office of Management and Budget* (OMB) was established, with budgetary and administrative supervision duties. For the purposes of this study we should highlight, in particular the Office of Information and Regulatory Affairs (Oira).

In accordance with other legislative normative acts (The Paperwork Reduction Acts of 1981 and 1995) and executive decisions (e.g., The Executive Order 13.563 of 2011), the duty of administrative bodies to forward budgetary, legislative and regulatory proposals for review by the OMB, subordinating them to the guidelines outlined by the President of the Republic.[29]

In this sense, Oira's role in enforcing the guidelines established in each presidential term is elaborated with a wide scope.[30] It should be noted

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[28] Peter Strauss, The place of agencies in government, op. cit. In the original, p. 589: "The President's influence reaches somewhat more deeply into the top layers of bureaucracy at an executive agency than at an independent commission. Where subsidiary officers in the executive agencies may be subject to presidential appointment and certainly require White House clearance, in the independent agencies only commissioners are appointed with required executive participation; staff appointments, even at the highest level, are made by the commission".

[29] DEMUTH, Christopher. Oira at thirty. Admin. L. Rev., v. 63, special issue, p. 15-26, 2011. In the original, p. 16: "Throughout, the core procedure has been centralized review: agencies must submit proposed and final regulations, along with information and analyses describing their rationales, benefits, and costs, to OIRA for review and approval before issuing them. OMB is part of the Executive Office of the President, and OIRA reviews are for consistency with the executive orders' core and ancillary policies".

[30] SUSTEIN, Cass. Smarter regulation: remarks from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs. Admin. L. Rev., v. 63, special issue, p. 7-14, 2011. According to the author's observations, as administrator of Oira, summarizing the guidelines of President Barack Obama. In the original: "In Executive Order 13,563, the President laid the foundations for a regulatory system that protects public health' and welfare while also promoting economic growth, innovation, competitiveness, and job creation. The President's approach promises to eliminate unnecessary regulatory burdens and costs on individuals, businesses both large and small, and state and local governments".

that, in principle, this approach does not involve independent agencies,[31] although doctrine records recent attempts of the Executive in the sense of also submitting them, at least partially, to presidential directives.[32]

2.3 Agencies with regulatory attribution

With these general lines drawn, we may contrast the plans of subordination or independence of the administrative entity with administrative regulation, to highlight how they interact. Indeed, the definition of the term "regulation" in this context denotes the ability of the entity to restrict or punish the conduct of individuals. It can be assigned to administrative bodies in general, subordinated or not to the president, in the latter case identifying the so-called independent regulators.[33]

At first, this independence was established considering a collegiate manager that would monitor, indict and judge individuals, to determine whether they had violated the law established by Congress disciplining a certain activity, resulting, from these decisions (case law), in a continuous production of concretizing understandings of general norms (standards) of regulation in the respective statute.[34] In this conception, the protection of committee members from interference made sense for preserving the integrity of this authority to decide,[35] as seen in the model outlined for the ICC and the FTC.

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31 FRAAS, Arthur; LUTTER, Randall. On the economic analysis of regulations at independent regulatory commissions. Admin. L. Rev., v. 63, special issue, p. 213-242, 2011. In the original, p. 214: "Independent regulatory commissions develop and issue regulations outside the process of the regulatory planning and review established by President Clinton's Executive Order 12,8661 and President Obama's Executive Order 13,563".

32 BREGER, Marshall; EDLES, Gary. Established by practice: the theory and operation of independent federal agencies. Admin. L. Rev., v. 52, p. 1111-1294, 2000. The authors offer a detailed discussion of these attempts.

33 Robert Cushman, The independent regulatory commissions, op. cit. In the original, p. 4: "By an 'independent regulatory commission,' then, is meant any commission, board, or authority which lies outside the regular executive departments and which has for its major job the exercise of some form of restrictive or disciplinary control over private conduct or private property".

34 SHAPIRO, David. The choice of rulemaking or adjudication in the development of administrative policy. Harv. L. Rev., v. 78, p. 921-972, 1965. In the original, p. 921: "One of the most distinctive aspects of the administrative process is the flexibility it affords in the selection of methods for policy formulation. While a legislature must normally confine itself to the declaration of generally applicable standards of conduct, and a court must deal with a problem as defined by the particular controversy before it, an administrative agency may often choose between these approaches or may even reject them both in favor of more informal means of regulation".

35 VERKUIL, Paul. The purposes and limits of independent agencies. Duke Law Journal, p. 257- 279, 1988. In the original, p. 261: "When the three qualities of independence are added in (namely bipartisan appointments, terms of years and for cause removal), it becomes clear the independent agencies emulate our most revered collegial bodies-the courts, or, more precisely, the appellate courts".

However, when assigning to independent entities the responsibility to establish general norms to discipline the activities of individuals, such as happened for the ICC, the FRB, and in a more integral way, the SEC, an administrative entity model was completed which, within the scope of its performance, could discipline, inspect, indict, condemn or absolve, requiring compliance with sanctions – a regulatory body endowed with attributions similar to the legislative, executive and judicial functions.

As seen, these two lines of approach are explicitly addressed in the APA, both regulating the establishment of general norms (rulemaking procedures) and the adjudication of rights (adjudication procedures).

At this juncture, it is important to specify that, in the US tradition, "agency" is a term used broadly to identify internal or autonomous administrative bodies,[36] "commission" refers to the collegiate nature of its governing body, "independent" refers to a variety of prerogatives of the administrative entity in the face of the executive command structure, and "regulator" refers to the competence of the body to oversee, indict and decide on the application of the norms, as well as, on occasion, establish them.

It is clear, then, that these predicates may exist in the administrative structure in a multifaceted way, as established by the US Congress. Thus, in the resulting set of entities, not all will necessarily be regulatory, nor all with regulatory attributions be independent in relation to the president of the Republic, nor have a collegiate direction and so on.

3. Influences on Brazilian law

Although U.S. law influenced the formulation of the Brazilian Constitution of 1891, the determining factors of Brazilian State public administration structure came from continental Europe. In Brazil, the Union was formed as

[36] 5 U.S. Code § 551 — "Definitions or the purpose of this subchapter — (1)'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title — (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix".

a regular provider of administrative services. These turned out to be posts, in general, under the direction of the President of the Republic, as spelled out in the 1967 Constitution[37] and repeated in the 1988 Constitution.[38]

In this approach, it should be noted, unlike in the U.S., the organization and functioning of the federal public administration are regulated by constitutional dispositions that reserve to the Executive the initiative to create laws and the attribution of regulating them[39] and provide for the budget proposal of its member bodies.[40] In such a structure, the debate on the autonomy of administrative entities goes beyond ordinary laws, as bound by the provisions of the 1988 Constitution.

The Brazilian administrative system also typically allows a wide range of administrative bodies, with or without legal personality. Apart from normative exceptions, all of them are subject to ministry supervision, or supervision exercised directly by the President of the Republic.[41] In this way, although administrative authority over private activity is, broadly, disciplined by the Legislative Power, perceived as an attribution of the Executive Branch, in principle it may reside with any agency linked to it.[42]

Despite this organization, with marked differences from the U.S., it should be noted that, in Brazil, attribution of functions of regulatory agencies to Executive bodies has a long history. The creation of *Comissão de Valores Mobiliários* (CVM), in 1976,[43] endowed with express regulatory

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37 BRASIL. Constituição Federal de 1967 (according to Amendment no. 1 of 1969). "Art. 81. It is exclusively incumbent upon the President of the Republic [...] I — to exercise, with the assistance of the Ministers of State, the superior direction of the federal administration".

38 BRASIL. Constituição Federal de 1988. Art. 84. It is exclusively incumbent upon the President of the Republic […] II — to exercise, with the assistance of the Ministers of State, the superior direction of the federal administration".

39 BRASIL. Constituição Federal de 1988. "Art. 84. It is exclusively incumbent upon the President of the Republic […] III — to initiate the legislative process, in the manner of and in the cases provided for in this Constitution; IV — sanction, promulgate and publish the laws, as well as issue decrees and regulations for their faithful execution".

40 BRASIL. Constituição Federal de 1988. "Art. 165. Laws initiated by the Executive Power shall establish […] III — the annual budgets".

41 BRASIL. Decreto-Lei 200/67. "Art. 19. Each and every body of the Federal Administration, directly or indirectly, is subject to the supervision of the competent Minister of State, with the sole exception of the bodies mentioned in art. 32, which are subject to the direct supervision of the President of the Republic".

42 Cf., for example, Law no. 1.283/1950 and its regulations, on the attributions of the Ministry of Agriculture (Mapa) to provide for the industrial and sanitary inspection of products of animal origin, and Law no. 9.782/1999, which provides for the competence of the Agência Nacional de Vigilância Sanitária (Anvisa) to establish norms, and propose, monitor and execute health policies, guidelines and actions.

43 BRAZIL. Law no. 6.385/76, which deals with the securities market and creates the Securities Commission.

attribution, is an unequivocal example of a Brazilian state entity whose creation was inspired by the U.S. model. However, as established by a dictatorial government, its regulations made clear that directors could be dismissed *ad nutum*.[44]

With re-democratization and the advent of the 1988 Constitution, as well as later amendments, the monolithic structure of subordination to the President of the Republic, considerable in the military regime, was mitigated, the original text in fact establishing the administrative autonomy of the Public Prosecutor's Office[45] and universities,[46] as well as the possibility to decide on offices whose appointment must be approved by the Senate.[47]

A larger movement, however, began in the final decade of the last century, in the sense of transferring management and operation of various public services provided by the Union, whereby regulation of private actors was sought by entities created for this purpose. In this regard, several federal administrative bodies named "agencies" were endowed with sectorial regulatory competence, a denomination later applied to other organs not necessarily linked to the concession or delegation of public services.[48]

Within this orientation, granting autonomy to administrative procedures was legislatively expanded, through constitutional permission,[49] or by enacting laws with special provisions, as seen not only with the mentioned agencies, but also other entities, such as the CVM and the Central Bank of Brazil (BCB), by way of comparison with the points already discussed.

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44 BRAZIL. Law no. 6.385/76, art. 6, § 1 of the original text (already revoked).

45 BRASIL. Constituição Federal de 1988. "Art. 127 […] § 1st. Add to this the idea that the dismissal of the Attorney General of the Republic depends on approval of the absolute majority of the Senate".

46 BRASIL. Constituição Federal de 1988. "Art. 207. Universities enjoy didactic, scientific, administrative, financial and asset management autonomy, and will obey the principle of inseparability between teaching, research and extension"

47 BRASIL. Constituição Federal de 1988. Art. 52, III, Item f.

48 BRASIL. Medida Provisória nº 2.228-1/2001, that creates the National Cinema Agency (Ancine), an agency for the promotion, regulation and supervision of the cinematographic and videophonographic industry, endowed with administrative and financial autonomy.

49 BRASIL. Constituição Federal de 1988. "Art. 37 […] § 8 The managerial, budgetary and financial autonomy of the bodies and entities of direct and indirect administration may be expanded by means of a contract, signed between administrators and public authorities, whose purpose is to set performance targets for the body or entity, with the law providing for: I — the duration of the contract; II — the controls and criteria for evaluating the performance, rights, obligations and responsibilities of managers; III — the remuneration of the personnel".

3.1 Contrast with aspects of autonomy observed in the USA

Initially, it should be remembered that the mechanism by which administrative bodies are appointed by the President of the Republic after approval by the Senate, by which directors receive a mandate and professional guarantees, can be seen in other Brazilian laws, currently standardized for the set of bodies grouped together as "agencies".[50] The rule, indeed, is repeated in other areas, such as the CVM, *Conselho Administrativo de Defesa Econômica* (Cade)[51] and the BCB.[52]

In this sense, we note the legislative concern to preserve the deliberative autonomy of the governing body when deciding on the supervision and application of sanctions to individuals, as well as the issuing of standards, in cases where it is expected by the respective administrative entity.

Regarding budgetary autonomy, following constitutional norms, repeated Supreme Court (STF) jurisprudence does not interpret that normative authorization must be present, in the sense of administrative entities establishing budget proposals without the intermediation of the President. However, specific constitutional devices already grant budget initiatives to the Public Prosecutor's Office[53] and Public Defender's Office.[54]

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50 BRASIL, Lei n. 9.986/2000. "Art. 5 The President, Chief Executive Officer or General Director (CD I) and other members of the Board of Directors or Collegiate Board of Directors (CD II) will be Brazilians, appointed by the President of the Republic, after approval by the Federal Senate, in the terms of item "f" of item III of art. 52 of the Federal Constitution, from among experts in the field of their specialty, one (1) of the requirements of items "a", "b" and "c" of item I must be met and, cumulatively, the item II: (Wording provided by Law no. 13.848, of 2019)".

51 BRASIL, Lei nº 12.529/2011, which structures the Brazilian Antitrust System and governs the Administrative Council for Economic Defense (Cade). "Art. 6 The Administrative Court, the adjudicating body, is led by a President and six Councilors chosen from among citizens over 30 (thirty) years of age, with expert knowledge and recognized reputation, appointed by the President of the Republic, after being approved by the Federal Senate".

52 BRASIL. Lei Complementar n. 179/2021. "Art. 6. The Central Bank of Brazil is an autonomous body, characterized by a lack of guardianship or hierarchical subordination, with technical, operational, administrative and financial autonomy, according to the term investiture of its directors and the stability across mandates, as well as the other provisions contained in this Complementary Law or specific laws intended for its implementation".

53 BRASIL. Constituição Federal de 1988 "Art. 127 […] § 3 The Public Prosecutor's Office will prepare its budget proposal within the limits established in the budget guidelines law".

54 BRASIL. Constituição Federal de 1988 "Art. 134 […] § 2 The State Public Defender's Offices are guaranteed functional and administrative autonomy and the initiative of budget proposals within the limits established in the law of budget guidelines and subordination to the provisions of art. 99, § 2 and § 3. The provisions of § 2 apply to Public Defenders of the Union and the Federal District."

With regard to the ability to act in court, the Constitution determines that the Union must be represented, judicially and extrajudicially, by the *Advocacia-Geral da União* (AGU), directly or through a linked body, responsible also for activities of consultancy and legal advice for the Executive Branch. As for administrative bodies, autonomous bodies and federal public foundations are represented by the Federal Attorney General's Office,[55] an organ responsible also for related activities of consultancy and legal assistance.

Finally, several items of the law refer to administrative bodies endowed with functional, administrative, financial and patrimonial autonomy.[56] To date, however, these terms have not translated into significant differentiation for federal entities, since they remain subject to a constitutional regime of assets, budget and contracts that seek to unify the mode of action of direct and indirect administration, also requiring this standardization to satisfy supervisory bodies and the control, including budgetary, of the Union, especially vis-a-vis the Federal Executive.

Along the same lines, officials are subject to the legal regime constitutionally established and appointment of management and senior positions must follow the general parameters set by the Executive power.[57] Some of these positions, however, remained, in terms of appointment and dismissal, the purview of the Agency itself.[58]

Furthermore, for federal bodies called "agencies" in Brazil, recent legislative practice has sought to establish common traits. This deserves specific analysis.

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55 BRASIL. Lei nº 10.480/2002. "Art. 10. The Federal Attorney General's Office is responsible for the judicial and extrajudicial representation of federal public authorities and foundations, respective legal consultancy and advisory activities, determination of the liquidity and certainty of credits, of any nature, inherent to their activities, registering them in overdue debt, for the purposes of amicable or judicial collection".

56 BRASIL. Lei nº 9.961/2000, that created the National Supplementary Health Agency (ANS): "Art. 1 […] Sole paragraph. The nature of a special autonomous body conferred on the ANS is characterized by administrative, financial, patrimonial and human resource management autonomy, independence in its technical decisions and a fixed mandate of its directors".

57 BRASIL. Lei nº 13.346/2016. "Art. 5. Act of the Federal Executive Power will define the criteria, professional profile and general procedures to be observed for the occupation of the FCPE and the positions in the commission of the Grupo-DAS".

58 BRASIL. Lei nº 9.986/2000. "Art. 2. The Commissioned Management positions — CD, Executive Management — CGE, Advisory — CA and Assistance — CAS, and Technical Commissioned Positions — CCT, are created for exclusive exercise in the Regulatory Agencies, as set out in Annex I of this Law. Art. 3 The Commissioned Positions of Executive Management, Advisory and Assistance can be freely appointed and dismissed by the Agency's highest decision-making body".

3.2 The autonomy of Brazilian agencies in Law No. 13.848/2019

In 2019, law[59] was enacted to provide for the management, organization, decision-making and social control of regulatory agencies, a statute that must be applied both to the set of bodies identified there and the special autonomous body that may be created vis-à-vis its effectiveness, characterized, under the terms of the same law, as regulatory agencies.

In this normative text, several elements seem to be inspired by the experience of the USA, with few exceptions to the general limitations to which they are submitted by the Brazilian federal administration, since the use of terms such as functional, administrative and financial autonomy minimally translate into effective modifications of the general parameters hitherto established. However, a relevant exception is the express provision regarding its special nature, characterized in terms of absent guardianship or sub-hierarchical ordering, which gives the director, in relevant matters, decision-making autonomy in relation to the head of the executive branch.

The same law establishes, however, that each agency must respond to a sectoral body of the internal structure of planning and budgetary execution of the Executive, as well as the institutional organization, civilian personnel and management of technology resources. This structures the position of the agencies in accord with the limitations placed on administrative bodies, so that respective internal provisions may undergo specific adaptation.

With regard to administrative autonomy, in particular, it was understood in terms of the autonomy to make requests directly to the Ministry of the Economy, maintaining, in this sense, the agencies under ministerial supervision, along with the possibility of executing contracts according to general administrative expense laws, regardless of the amount contracted.

Similar to the U.S., an increase in requirements relating to the publication of general rules by administrative bodies was seen, requiring that the entities involved perform additional tasks, such as a prior hearing and express analysis of the impact that may arise from the normative proposals, considering in particular, the economic consequences, reserving for the Ministry of Economy an advisory role.

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[59] BRASIL. Lei nº 13.848/2019, which provides for the management, organization, decision-making process and control of regulatory agencies.

3.3 The autonomy of administrative bodies relative to Supreme Court jurisprudence

In 1961, judging a writ of mandamus[60] that questioned the dismissal of a member of the Board of Directors of *Conselho Administrativo do Instituto de Aposentadoria e Pensões dos Industriários*, the STF debated whether the President of the Republic could discretionally remove a director, legally mandated to hold office for a certain period. By a slim majority, the plenary of the Court, moving away from the traditional position of infra-constitutional literality, denied any guarantee, confirming the thesis that, exercising political, social or economic power, officials in positions of commission or trust of could be dismissed *ad nutum*.

The judgment is important for the purposes of this study, since Minister Victor Nunes Leal, approving the divergence, presented detailed analysis of the situation in the U.S., thus guiding the Court dealing with the role and scope of powers of the President of the Republic at the administrative level,[61] and the extent to which administrative bodies could disagree.[62] The narrow majority understood the need for alignment of the administration with the head of the executive branch.

With the 1988 Constitution and the provision of autonomy to certain administrative bodies, the STF was then called upon to rule on the extension of this concept vis-à-vis the Executive Power, highlighting initial understandings on the subject.

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[60] BRASIL. Supremo Tribunal Federal. Mandado de Segurança n. 8.693/DF — Tribunal Pleno. Rel. min. Ribeiro da Costa. 17/11/1961. Published 20/8/1962.

[61] Ibid. Depending on, for example, this excerpt from the deciding vote: "[…] Will the Government, whose economic and political program is linked to helping workers in general, which outlines its program and appoints people to represent it, be tied to the investiture for a period of four years, in case of failure to comply with its determinations, its program? This would be admitting the absurd, would be admitting an inexpressive and redundant President of the Republic. It is impossible for the law to intend such an error. What the law seeks is that things occur within an environment of understanding, obedience and discipline, with respect for a governmental program".

[62] Ibid. Depending on, for example, this excerpt from the vote that established the divergence: "[…] The investiture of a certain term is just one, among several admissible techniques, to protect the public official from arbitrary or unmotivated dismissals, aimed at transcending this immediate consequence, that of guaranteeing the continuity of orientation and the independence of the administrative bodies that the legislator endowed with autonomy. This is, I repeat, is the general purpose, the reason for public service that inspires the investiture of a certain term."

With regard to federal universities, the extent of their autonomy was questioned by the Federal Public Prosecutor a few months after the promulgation of the 1988 Constitution, leading to the conclusion that autonomy, foreseen in the constitutional text, of the administrative entity would be, in principle, that delimited by the infra-constitutional laws in force,[63] an understanding reaffirmed below.[64]

With regard to the so-called agencies, the questioning of the STF by political parties regarding the constitutionality of Law No. 9.472, of 1997, which created the National Telecommunications Agency (Anatel), should be highlighted. Beginning in 1998, with a decision on precautionary measures, this situation only ended in 2021, when the Court confirmed the understanding adopted when issuing the precautionary measure, whereby the concept of "independent administrative authority" would not exclude ministerial control and supervision, as provided for by Decree-Law No. 200/1967, notwithstanding any action on this point.[65]

Finally, we should note the challenge made by the National Confederation of Industry (CNI) to art. 7, III and XV, final part, of Law no. 9.782/1999 and the RDC 14/2002 of the National Health Surveillance Agency (Anvisa), which restricted the use of additives in tobacco products.[66] In this case, among various aspects of the debate on the validity of the request, it is worth noting the express reference to technical justification to legitimize the administration's regulatory actions,[67] as well as the questioning of whether such normative power should not be eminently representative.[68]

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63 BRASIL. Supremo Tribunal Federal. Medida Cautelar na Ação Direta de Inconstitucionalidade n. 51/RJ — Tribunal Pleno. Relator(a): min. Paulo Brossard. 25/10/1989. Published: 19/10/1990.

64 BRASIL. Supremo Tribunal Federal. Medida Cautelar na Ação Direta de Inconstitucionalidade n. 1.599/DF — Tribunal Pleno. Relator(a): min. Maurício Corrêa. 26/02/1998. Published: 18/05/2001.

65 BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade n. 1.668/DF — Tribunal Pleno. Relator(a): min. Edson Fachin. 01/03/2021. Published: 23/03/2021.

66 BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade n. 4.874/DF — Tribunal Pleno. Relator(a): min. Rosa Weber. 29/05/2020. Published: 17/06/2020.

67 Ibid., see the excerpt of the rapporteur vote, min. Rosa Weber: "[…] Indeed, the regulatory norm must be compatible with the legal order, integrate the primary normative species, adapting and specifying its content, and not replace it by innovating in the creation of rights and obligations. Its proper domain is that of filling, in the light of technical criteria, the normative spaces left open by the legislation, not the creation of new spaces".

68 Ibid., see the one of the dissenting votes, min. Gilmar Mendes: "[…] When we talk about the principle of legality, we are not only talking about a formal aspect. We are talking about value. Whoever has decided, whether we like it or not, has representation, has representativeness. And this indeed may be questioned. And another thing, there cannot be — as the Constitution says —, on the pretext of regulating, suppression. This is key! We are led to this debate,

Conclusion

This comparative study between the independence of administrative bodies in the USA and the related autonomy in Brazil, allows a better understanding of both the differences between the two systems and the sharing of common problems. The Anglo-American tradition has always advanced greater attention to the control of Executive Power, as it is perceived that the accumulation of executive power could degenerate into tyranny and possible coups d'état. Thus, in the U.S., although it did not mirror the English parliamentary configuration, the presidency of the executive branch was narrowly shaped, both at the state and the federal level, initially perceived more in terms of an executor of laws than head of civil administration, without embargo power in terms of tasks of this nature vis-a-vis deliberations of the Legislative power.

In Brazil, however, a broadly opposite trajectory was registered, from its beginnings as an absolutist monarchy to a democratic republican system, wherein the President of the Republic is the leader, both of the civil administration and of the military forces, in the exercise of a hierarchical power without modulations. More recently, this situation has been mitigated with greater participation of the Legislative Power in the appointment of civil servants, as well as by the notion of autonomy of administrative entities.

On the other hand, it is perceived that the idea of independence, or autonomy, of administrative entities in the face of the structure of state power, relates to the different operating plans of public administration, which reflects, if not the solutions proposed in different countries, at least some similarities regarding the problems that emerge in the provision of services in an environment of greater complexity than a purely hierarchical structure.

With regard to the relationship between the administrative entity and the Executive Branch, we should note how this can influence the composition and functioning of an body endowed with a certain autonomy, where the follow-up and supervision undertaken by the executive manager does not result in indirect administrative subordination. Consequently, the relationship of the said entity with the Legislative Power will also reflect the extent of these

because, with the multiplication of regulatory agencies and with the natural expansionist vindication of their regulatory power, we will certainly have to discuss many times the law of the agency itself, which requires authorization or delegation, and also the normative act produced by these bodies".

choices, in areas such as budget, server regime and execution of administrative activities, both mediate and final.

Other important aspects stand out, such as autonomy.

Note, that there is a need to preserve a technical space, resistant to interventions which disregard this quality, protecting specialized knowledge essential for implementing services and adequate results. However, the technical dimension of administrative action intertwines with the exercise of state power, prompting debate about whether it can be dissociated from political-electoral representation, in Brazil, in particular, vis-à-vis establishing abstract norms.

On the other hand, this technical dimension of administrative action seems better accepted in terms of the legal scope at state level, recognizing that certain bodies may deal autonomously with legal matters regardless of the absence of political-electoral representation configured as an insurmountable obstacle to its functioning.

Another aspect that draws our attention is the need for deliberative bodies whose members receive protection to decide on conflicts that may be subject to pressure from interested groups, or from the State itself. In this way, the formation of an administrative justice system in European countries or the special designation of officials with similar protections in administrative procedures, as studied here, is increasingly adopted, creating an environment capable of legitimizing the administrative decision, attributive or sanctioning, to avoid possible delegitimization leading to the automatic review of all administrative acts by the Judiciary.

It can be seen, both in the USA and in Brazil, with so-called agencies, that the administrative autonomy in question arose in bodies with the task of dealing directly with business interests in conflict with the state. However, while in the USA we find a model in which administrative decisions may be questioned before the council, or server (Administrative Law Judge), with express independence to conduct the process through a qualified procedure, such a solution, in Brazil, is still developing. Although advanced for entities with greater business performance, it is less used in deliberations of conflicts, not forgetting that internal bodies are already emerging with a heterogeneous composition.

Finally, while the notion of regulation is entrenched in the USA, whether of bodies with only supervisory and sanctioning power, or those with the added task of deciding on general norms, restricting the performance of individuals, in Brazil, the first objective is often perceived as a way of exercising police

power and the second a phenomenon of strict regulation. In both countries, nonetheless, we find, in parallel, bodies such as the FTC and Cade, in one group, and the SEC and CVM, in the other.

Regarding this approach, our study has found, in both countries, tension over the extent to which the work of making such norms and organizing respective services provided will be implemented with the participation of the President of the Republic, bearing in mind administrative entities with a degree of autonomy preserved by the legislature.

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