

The control of regulation in Brazil

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I – INTRODUCTION

The control of regulatory agencies in Brazil is still the object of debates that reflect the different conceptions of these entities and their legal competences. The issues under discussion usually focus on the independence or autonomy conferred by law to the agencies and on the existence of so-called “technical discretion”.

The Brazilian Court of Audit has already had the opportunity to discuss and to develop the theme¹ widely. Its decisions are based on the assumption that administrative autonomy, conferred by law, is impossible to dissociate from the exercise of control. It understands that, in a democratic and republican regime, delegation of powers cannot take place without the obligatory accountability of the use of the competences granted², within a modern framework that includes legality, legitimacy and economy.

Without going into the details of the classifications provided by the doctrine regarding control of the Public Administration, the mechanisms provided aim to compel the Administration to act in accordance with the principles approved by the legal system, such as legality, impersonality, morality, publicity, efficiency, reasonability, proportionality, legitimacy and others that require, to some extent, analysis of the merit of the administrative performance.

In this regard, the action of the *TCU* is endorsed by the Constitution, since it exercises external control, headed by the National Congress. Therefore, it belongs to the *TCU* to carry out, with complete autonomy, on its own initiative or in response to a parliamentary request, audits of an accounting, financial, budgetary, operational and patrimonial nature on the Union and all the entities of the direct and indirect administration, focusing specifically on the legality, legitimacy and economy of the deeds performed.

1. See “O TCU e o controle das agências reguladoras” (The TCU and the control of the regulatory agencies), a lecture delivered at the Seminar “The control of the Regulatory Agencies”, TCU, 2003. See also “O Papel do Tribunal de Contas da União no Controle das Agências Reguladoras” (The Role of the Brazilian Court of Audit in the Control of the Regulatory Agencies), lecture delivered by Minister Benjamin Zymler, at the Seminar “External Control of the Regulation of Public Services” promoted by the TCU in 2001.
2. Foreign literature, in the areas of Public Administration and political science, frequently employs the term “accountability”, when addressing the issue of accountability and rendering of accounts. Without a direct correspondence with the technical legal terms, “accountability” should be understood as the obligation to answer for use of attribution or delegated power. It corresponds to rendering of accounts, in a broader sense.

The incorporation of the principle of efficiency in the Federal Constitution, through Amendment no. 19/98, caused, simultaneously, a significant change of the paradigm of Public Administration performance and a clear alteration of the focus of External Control. The Courts of Accounts can no longer evade inspecting the efficiency of state action, since this was included in the Constitution as a guiding principle of the entire administrative legality.

With the creation of the agencies, with the legal nature of special autonomous governmental agencies performing the State's regulatory function, a new question emerged: considering the distinctiveness of the regulatory entity's action, and a new concept of the State and ways of pursuing the achievement of the public actions, what would be the limits and the possibilities of the inspection action of External Control exercised through the Courts of Accounts?

The regulatory entities were conceived, nonetheless with ample independence, as a mechanism of protection against the opportunism of electoral interests and against abuse of economic power. However, it is undisputed that there is a risk of such entities basing their actions on interests other than the purposes expressly provided for in the law. Therefore, there is naturally a range of expressed and implicit controls to restrict arbitrary and capricious behaviors on the part of regulatory entities, which are by the way inherent behaviors in every human activity.

In any case, the instrumental nature of Administrative Law should always be kept in mind, for which reason the autonomy or independence granted by law to the agencies must be understood not as an end in itself, but as an instrument for the achievement of the highest public interests, foreseen in the law, that the legislator sought to assure.

In fact, the Administration cannot endorse resulted contrary to the purposes provided in the legislation. Any regulatory decision resulting in a situation that is not the one intended by the law cannot be considered legitimate. Likewise, the means or instrument adopted by the regulator must be appropriate and necessary for the implementation of the constitutional and legal purposes of the public service. The adoption of inappropriate, useless or costly means for the achievement of the goals established in law should be deemed illegitimate and therefore subject to correction.

In this context, the action of External Control is introduced in the regulatory process. It seeks to identify failures and opportunities to improve procedures, preventing the regulating entity from straying outside the limits imposed to it by the law and that establish its legitimate scope of action, curbing inconsistent and questionable technical decisions that are not focused on the implementation of the legal purpose, or that result from the "capturing"³ of the regulating entity by the interests of the regulated entities.

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3. "Capture" is the technical term used to portray the specific reality of the agency that is composed of entities linked to the sectors that it should supposedly regulate, implying, as a consequence, in the interruption of the fulfillment of its regulation attributions. It is one of the dangers resulting from the absence of a stable bureaucracy, with most of the management positions being changed with each change of government or to alteration in the structure of political support.

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To achieve this result, the action of the control agency cannot be limited to the administrative analysis of the conformity and legality of procedures and acts.

The social demand in favor of the action of the Brazilian Court of Audit, in the sphere of control of the action of the regulatory agencies, has been growing. The National Congress has requested that audits be carried out on a wide range of different aspects of the practical operations of these entities. Not infrequently, the actors involved in the regulation process request audits, and that includes the service providers, interested bidders, the Executive Branch⁴ and at times even the regulatory agency itself, reluctant to perform its attributions without previous *placet* from the *TCU*⁵.

As to the middle area of the regulatory entities, there is no doubt regarding the competence of the Courts of Accounts to inspect it. However, this has not always been so. The first audits carried out by the *TCU* were branded as impertinent and unconstitutional, viewed by some as a classic example of improper interference of the *TCU* in these entities. It was even claimed that these entities were above control, due to the autonomy and independence that, supposedly, was granted to them by the law.

A perfect example of misinterpretation of the original concept regarding the regulatory entities can be found, among others, in the Renderings of Accounts of the National Telecommunications Agency - Anatel, referring to the fiscal years of 1997, 1998 and 1999, in which the entity, to justify the violation of several laws and decrees, stated expressly that the independence conferred to it by the law that created it unbound the Agency from the rules established by other public entities, except in the case of explicit acceptance of these rules by the audited agency itself (TC 004.266/1998-6, TC 007.026/1999-4 and TC 008.249/2000-9)⁶. Several arguments of this type were submitted to the Judiciary Power, without gaining support.

Obviously, such views could not prosper, whether because of the express competence conferred to the *TCU* by the Federal Constitution and the ordinary and complementary legislation, or because it is impossible to conceive of state activity, relevant or not, being outside the law and above inspection.

The existence of norms and controls on the regulatory agencies in no way affects their independence or necessary neutrality for the proper performance of their legal purposes. The autonomy and competence of the regulatory entities has been assured in sentences by the Supreme Federal Court, drawn by Ministers Octávio Gallotti and Sepúlveda Pertence, in several Adin (Direct Unconstitutionality Action), referring to the Agency for Regulation of Delegated Public Services of the State of Rio Grande do Sul - Agergs⁷.

4. For example, the TC-005.302/2003-9 – consultation formulated by the Minister of Communications, regarding the application of the resources of the Fund for Universalization of Telecommunications Services – FUST, which resulted in Plenary Sentence 1107/2003-TCU. The remark made by Alexandre Ditzel Faraco, addressing the action of the TCU regarding the application of the Fust resources, should be noted: “The legal impasse created around the Fust was analyzed by the TCU (...) the role of the TCU, in this context, can even be seen as unexpected, since the Court was not viewed as being able to influence sectoral regulation. However, in the exercise of its competence to inspect the spending of public resources and administrative activity, the TCU also gained an influence in this sphere” (FARACO, Alexandre Ditzel. “Concorrência e Universalização nas Telecomunicações: Evoluções Recentes no Direito Brasileiro” (Competition and Universalization in Telecommunications: Recent evolutions in the Brazilian Law), in *Revista de Direito Público da Economia – RDPE*, 8, Oct./Dec. 2004, p.19).

5. See TC-003.995/2004-0 – consultation formulated by the Ministry of Mines and Energy, regarding the possibility of extending concession contracts for oil exploitation entered into by the National Agency of Oil – ANP and Petrobras (Plenary Sentences 934/2004 and 935/2004).

6. Available at <http://www.tcu.gov.br>

7. The agency’s competences for establishing tariffs and homologation of invitations to bid and concession contracts was recognized in the decision on the writ of prevention of Adin nº 2095-0, Rapporteur Minister Octávio Gallotti; and the autonomy, in decision on preliminary order of Adin nº 1949-0, Rapporteur Min. Sepúlveda Pertence.

However, the topic of the action of the Courts of Accounts in the inspection and control of the end activities of the regulatory agencies – an issue not yet resolved in the doctrine – is quite different, particularly the possibility of the *TCU* issuing determinations to the agencies in areas of an obviously regulatory nature.

It is timely to mention the MS 23.761-DF, in which it was alleged, at the STF – Brazilian Supreme Court, that the *TCU* is not competent to inspect a service provided by a concessionaire, to interfere in the execution of the concession contract and to act in the place of the regulatory agency. It was also argued that, since it was not an act related to expenditures, the act of the state entity would not be under the jurisdiction of the *TCU*. The Rapporteur of the case, Minister Sepúlveda Pertence, upon denying the writ of prevention, understood that it is not possible to remove the *TCU*'s competence to control the legality of the act in question, and could see “heavy objections” to the source of the argument. Later, in view of this, the concessionaire gave up the cause, removing the examination of the merit from the dispute.

The limits of the competence of external control in relation to the end activity of the regulatory entities is an evolving theme, having been the object of debates and important discussions for the jurisprudential construction of the *TCU*⁸.

In Brazil, the regulation of the public services by independent entities found its major advocate in the Court of Accounts itself, in Minister Alfredo de Vilhena Valladão, whose privileged intelligence allowed him to contribute to the modernization of the Court's performance⁹ and, upon invitation by President Alfonso Pena, to prepare, in 1907, the draft of the Water Code¹⁰ that, however, was not appreciated by the National Congress.

Appointed by Getúlio Vargas¹¹ to join the Sub-commission assigned to update the first draft of the Water Code, Alfredo Valladão modernized its original conception and elaborated the regulatory regime that addressed the utilization of the “hydraulic force of water” for the generation of electric power. After finishing the first draft, in 1933, Minister Valladão dedicated efforts to justify the adoption of the regulation model of the electricity similar to the one in force in the United States, that is, the regulation of public utility services by independent administrative commission, denominated “Public Utility Services Commissions”¹².

In face of the innovative nature of the solution, the proposal for the creation of these commissions was approved, and the Water Code, instituted by Decree 24.643, of July 10, 1934, left the regulation of the electric power sector to the Water Service of the National Department of Mineral Production of the Ministry of Agriculture.

Thus, 63 years went by until the vision of Minister Valladão prevailed, with the creation of the National Agency of Electric Energy – Aneel, by means of Law 9.427, of December 26, 1996.

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8. The self-restriction of the Brazilian Court of Audit should be noted, as it at times refuses to decide on a matter to avoid usurping the competence of the regulatory agency. In this line, the TC-020.556/2003-5 – Representation pursuant to the supposed irregular charging of an additional fee for moving cargo already remunerated by tariff established in the lease contract. By means of Plenary Sentence 2023/2004, the *TCU* demanded from the National Agency of Waterway Transports – Antaq the effective fulfillment of its attributions and the appreciation of the suit, without which the *TCU* could not pronounce on the issue.
 9. For more details on the contribution of Alfredo Valladão in the innovations pursuant to the performance of the Brazilian Court of Audit, see the monograph “O Tribunal de Contas da União na História do Brasil: evolução histórica, política e administrativa (The Brazilian Court of Audit in the History of Brazil: historical, administrative and political evolution, 1890 – 1998), by Artur Adolfo Cotias e Silva, winner of the Serzedello Corrêa Prize in 1998.
 10. Foundations for the Code of Waters of the Republic (1907).
 11. Decree 19.684, of February 10, 1931.
 12. See “Presentation of reasons of the Bill of the Water Code of 1934”. Brasília. DNAEE, 1980.

II – THE PERFORMANCE OF THE TCU IN THE CONTROL OF REGULATION

Once established the *TCU's* competence to carry out operational audits and inspections, and to verify compliance with the constitutional principle of the efficiency, as well as the legitimacy of the state's action, the Court of Accounts could not forgo inspecting the final tip of the spear of the performance of the regulatory agencies, the concession contracts, permits and authorization acts, for the rendering of public services. The providers of such services generate goods and public rights – ex. highways, ports etc. – or of a similar nature, such as reversible goods, linked to the rendering of public services and, ultimately, they are held accountable for the delegated service, which belongs to the Union, the title holder of such rendering.

As an example of relevant actions by the *TCU* is the recent operational audit on the management of the tariff burden “*Bill for Consumption of Fossil Fuels of Isolated Systems – CCC-ISOL*”¹³ included in subsidies used in the North and Northeast Regions. The huge amount of resources involved resulted from the percentage of three to seven percent of the electricity bills paid by all the users of the system. The *TCU* found a lack of control mechanisms of the regularity of the expenditures; a clear conflict of interest in the action of Eletrobras, which was sometimes manager of the CCC, and at other times the recipient of 49% of these same resources, by means of its subsidiary Manaus Energia S/A; the absence of drafting of the regulation required by law; the problematic and unfair full transfer of the electric losses to the tariffs, which contributed to the inadmissible lack of concern over efficiency on the part of the local electric power concessionaires¹⁴.

When overseeing the bidding process for granting the public service concession for electric power transmission¹⁵, the Court found irregularities related to the calculation of the Maximum Annual Revenue, contained in Bidding Announcement 001/Aneel. The flaws ranged from simple errors in filling out spread sheets to more serious errors with direct economic-financial impact, such as incorrect calculation of the price index variation of the IGP-M and of the burden “Global Reversion Reserve”, projected until the year 2034, although Law 10.438/2002 had established its extinction at the end of 2010.

In the Brazilian legal-constitutional regime, where the *TCU's* inspection can take place *ex ante*, concomitantly and *ex post*, all these relevant issues requiring immediate correction were brought to the knowledge of the agencies, in time for them to formulate the alterations in the ongoing bidding processes, before the *TCU* having to issue determinations. Later, in the audit reports, the *TCU* issued determinations and recommendations on the same matter with a view to preventing future repetition of the irregularities¹⁶.

Another serious problem, related to the electric power transmission concession, refers to the absence of mechanisms for appropriation of business efficiency and competitiveness gains, as provided for in article 14, IV, of Law 9.472/1997. In the scope of the TC-006.226/2004-8, it was verified that the concession contracts determined that the concessionaires should reduce costs, creating conditions for the reduction of the tariffs when carrying out readjustments and revisions, but in the part that disciplined the readjustments and revisions they did not contemplate any hypothesis that would allow effective achievement of such reduction. At the time, the *TCU*, by means of Sentence 649/2005, expressly determined to Aneel that it comply with the law and establish the mechanisms required for transfer of these gains to the users.

An important contribution of the *TCU* took place with the audit on the “Social Tariff”, instituted by Law 10.438/2002, aimed at subsidizing electricity supply to low income home consumers (TC-014.698/2002-7).

13. TC-013.237/2004-1.

14. Plenary Sentence 556/2005 - TCU.

15. TC-006.226/2004-8.

16. Plenary Sentence 649/2005 - TCU.

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On the occasion, the crossing of the income and consumption data of the sample, extracted from the Survey on Standards of Living carried out by the Brazilian Geography and Statistics Institute, identified problems with the criterion established in law - consumption of electricity - to identify the beneficiaries of that very special tariff. The choice would only be appropriate if there was a strong correlation between electricity consumption and income, which in practice was not found. Thus, the enforcement of the legal criteria, besides excluding low income consumers, included among the beneficiaries a significant number of middle and high income households, producing results contrary to the objectives stated in the law.

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In the energy sector, the absence of policy guidelines resulted, above all, from the lack of action on the part of the National Energy Policy Council (CNPE), instituted by Law n° 9.478/1997, responsible for advising the President of the Republic in the formulation of the national energy policy¹⁷. In the telecommunications sector, it was found that the Ministry of Communications, whose role was to advise the President of the Republic in the formulation of the sector's policies, was negligent,

with no provision in law for a collegiate body with such competence.

Due to this omission, the National Agency of Telecommunications was forced to act as it saw fit in assuring public interest. For example, even in the absence of policies related to the use of notified orbital positions by the Country, the agency sought to implement a program that assured the immediate use of the positions allocated to Brazil at the time.

Similar examples with different results were the choice of the digital television standard and the choice of the cellular telephony standard adopted in Band C, D and E calls. In this case, it fell to the Agency to make the policy choice, expressed in terms of choice of the frequency band used, but it meant, in fact, the choice between the European technology (GSM) and the American (CDMA). In the other case, even though the agency has initiated the procedure of selection of the digital standard for broadcasting, the government took on its role of formulator of public policies, which allowed the matter to be conducted in the appropriate sphere, integrated to the other national development guidelines, and with proper insertion in the world market.

Still in the area of telecommunications, an audit carried out on the fulfillment of the universalization goals, defined in the concession contracts, allowed the identification of serious inconsistencies, both in the agency's data management system (SGOU) and in the inspection procedures. The audit team concluded that the inspection procedures needed total reformulation, and a large number of recommendations were issued to Anatel¹⁸.

17. See TC-005.793/2002-7 – Relation 43/2002 – 2ª Chamber. On the subject, see also "O controle externo das agências reguladoras: questões relevantes sobre os setores elétrico e de petróleo e gás natural" (The external control of the regulatory agencies: significant issues related to the electric and oil and natural gas sectors"). Brasília: TCU, Sefid, 2003.

18. Plenary Sentence 1778/2004 - TCU.

This particular experience, obtained by the *TCU* along the years, in the monitoring and inspection of economic regulation in the sector of telecommunications, allowed the identification of government policies and Anatel's weak control over the universalization goals, as well as the incipient activity of economic regulation developed by the Agency.

In spite of the express provision in the Law, and in regulations and contracts, Anatel does not have adequate information on the rendering of the services, is unable to verify the economic-financial balance of the concession contracts for Fixed Switched Telephone Service (FSTS), and does not have the necessary knowledge to carry out tariff revisions, the preferred instrument for the economic-financial re-equilibrium of the agreements, as explicitly contained in the concession contracts and the General Law of Telecommunications. In an audit carried out in 2000, it was verified that the Agency limited itself to receiving and filing official balance sheets, forwarded by the operators, without any analysis¹⁹ or proper study.

In the fiscal year of 2003, in the tariff revision processes promoted by the National Electric Power Agency, the action of the Brazilian Court of Audit was widely publicized. In spite of all the *TCU's* actions along many years in the control of the acts related to the setting of the tariffs and the verification of the economic-financial balance of concession contracts, the debate that followed the audit was exceptional, with unlimited involvement of all the interested parties. The processes are still pending appeal decision.

The inspection action of the *TCU* largely results from the ordinary action of the Court in the oversight of privatizations, as disciplined in the laws that address the National Privatization Plan.

In this field, the action of the *TCU* was extremely fruitful. For example, among others, the corrections determined by the *TCU* in the evaluation of Banespa, nationalized and alienated by the Central Bank, resulted in the rise of its minimum price, in values of the time, more than R\$ 1.17 billion reais. Similar corrections were required in the minimum price of the grants of the personal mobile service, in the "C", "D" and "E" bands, whose initial calculations contained errors that totaled R\$1.6 billion reais. Such data was, at the time, scarcely publicized.

The *TCU's* accumulated knowledge in the area of corporate finances, cash flow analysis, evaluation of investments and all the usual issues in the processes of tariff revision, was obtained gradually, since the overseeing of the first privatization processes, with the assessment of the minimum sale value of the privatized companies and with the problems identified in several highway concession contracts, allowing the understanding of terms and procedures that, for being highly technical, remain unfamiliar to the majority of the interested parties.

In face of the importance of these processes, in the particular context of economic regulation, it is natural for the Court to dedicate special attention to the tariff revisions under the responsibility of the new regulatory agencies, to verify their compliance with the law and the concession contracts.

Obviously, once the public service is granted, the *TCU's* action in the oversight of the execution of concession contracts, is not aimed at - nor could it be - replacing the constitutional and legal role of the regulatory agencies, whose competences are completely different from the *TCU's*. It belongs to them to regulate the market, and it belongs to the *TCU* to act, not as a second tier or reviewer, but as a constitutional body of superposition and control.

By the way, since the first highway concession processes, the Court was called to inspect the calculation of the value of the basic toll tariff, which is, in fact, the reason decreed the cancellation of the tender (Plenary Decision 763/1994)²⁰. After several studies were carried out, the Court concluded that the collection of the Basic Toll Tariff at R\$ 1.20 was correct, although the value initially established was R\$0.78²¹.

19. See TC-003.632/2001-9 and Plenary Decision 215/2002 - TCU.

20. This deliberation was partially changed by Plenary Decision 188/1995, in view of a new set of elements presented in the process.

21. Decision - 14/2000 TCU - Second Chamber.

This example demonstrates, in itself, the complete impartiality of the *TCU*'s action, in seeking the enforcement of the legal parameters, whose results are not neutral, as sometimes they favor the users of the services, at others the concessionaires. The action of the *TCU*, therefore, is aimed above all at compliance with the law and favors the security and the stability of the contractual relations, preventing undue profits on either side.

As to the highway concessionaires, a bad memory is the irregular exaction of the Tax on Services of Any Nature, of five percent, on the values corresponding to all the tolls tariffs collected from the users since 1996. The agency responsible for inspection of the execution of concession contracts authorized the collection by the concessionaires of a tax that did not exist, and that, precisely for this reason, after being charged, was not transferred by the concessionaires to the municipal public coffers, because there was no law to authorize its collection. In this case, the irregularity was considered serious, because the agency, since the beginning of the tender procedures, had full knowledge of the lack of legal support for the exaction of the tax and still allowed its collection.

Due to failure to comply with these deliberations, as well as relapse in the illegal practice, several sanctions were imposed on the managers of the entity, and it was necessary to check the values unduly collected by the concessionaires and revert them back to the respective cash flows, in order to re-balance the concession contracts²².

In the process of overseeing the revision of the tariffs of Escelsa, in 2001, the *TCU* identified irregularities in the procedures adopted by the Agency, especially regarding the calculation of the capital cost (Decision 1483/2002). In spite of Aneel's appeal, most of the issues raised by the *TCU* were duly corrected in a new capital cost study, prepared for the tariff revisions in the year of 2003 (TC-014.291/2003-2).

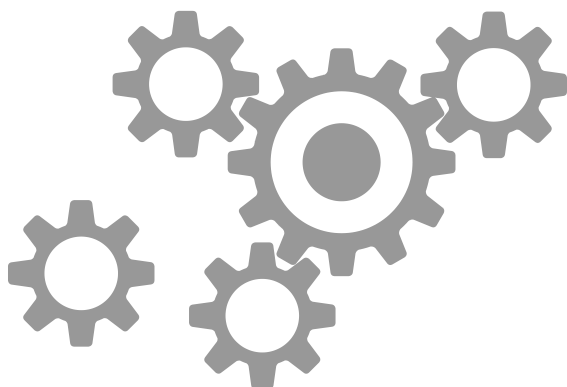
In this last process, the *TCU*'s analysts found inconsistencies in the method of calculation of the productivity factor (X Factor), adopted by the Agency. "X Factor" is the estimate of the productivity gains by the concessionaire that have to be transferred to the users. The theoretical analysis of the model chosen by the regulator already indicated, in the expert's opinion, the inadequacy of the method. To corroborate its analysis, the technical unit applied this methodology to a hypothetical company with no efficiency gains. Since the data used corresponded to the company with zero productivity gain, "X Factor" would also have to be zero. However, the result was different from zero, being, therefore, incompatible with the actual absence of efficiency gain contained in the data used.

Due to these inconsistencies and other irregularities that were found – such as double counting of certain accounting groups, in the definition of the working capital – the Court determined that Aneel adopt measures to correct the irregularities²³.

In all the cases mentioned, the *TCU* aimed to act within the constitutional and legal boundaries, never hindering the action of the regulatory agency. Therefore, it did not choose the methodology for calculation of the "X Factor", nor fixed the value later considered correct. Its action was limited to pointing out the improper choice of the regulatory entity and to determining the correction of the errors.

22. On the matter, see the Plenary Decisions 434, 485 and 516, all of 1999, and Plenary Sentences 138/1999 and 56/2001.

23. Plenary Sentence 1757/2003.



III – FINAL CONSIDERATIONS

As a result of the new constitutional order, the recent history of the *TCU* has been marked by challenges. The basic challenge is to confer maximum consolidation to the constitutional rules, above all to the principles of legality, morality and efficiency, allowing, within this framework, the safe action of the Administration. This challenge unfolds into innumerable others, concrete and quantifiable, that allow progress in the development of effective, more reliable and more efficient External Control of the Administration.

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Along this line, the International Organization of the Supreme Audit Institutions (Intosai), which congregates government inspection and audit bodies of all the UN member countries, publicized guidelines and best practices for the control of economic regulation²⁴, evidencing a general and increasingly greater concern with the action of the regulation authorities. In England, for example, the National Audit Office encourages and carries out studies on regulation and control with an exceptional degree of excellence²⁵.

Regarding the development of the regulatory entities, Brian Levi and Pablo T. Spiller advocate that the institutional evolution of the regulatory agencies derives from the need to limit discretionary action in regulation. And, in these terms, they claim that “the analysis of the evolution of the regulation of public utilities in England suggests that the limitation of regulatory discretion is behind the development of the regulatory institutions in industrialized countries”²⁶.

In this work, the authors present the following summarized conclusions:

a) the performance of regulation can be satisfactory under a wide range of different arrangements and regulatory procedures, **as long as there are mechanisms in place to limit the discretionary action of the regulator**, formal or informal restrictions to the alteration of the regulatory system and institutions that assure such limitations; and

b) ample discretionary powers assured to the regulator will not induce the desired investments if the institutions of the Country are unable to distinguish the arbitrary behavior of the regulatory authority from the appropriate use of its discretionary attributions.

24. INTOSAI. Guidelines on Best Practice for the Audit of Economic Regulation. Seoul, 2001. Text available at <http://www.nao.gov.uk/intosai/wgap/ecregguidelines.htm>.

25. See, for example, Pipes and Wires NAO report (HC 723 2001-2002).

26. Regulations, Institutions, and Commitment: Comparative Studies of Telecommunications Cambridge University Press. 1996, p.2.

As can be seen, the same problems are disseminated all over.

In this context, technical discretion would be nothing more than the limits of the action of the manager in the choice of strictly technical solutions.

The conclusions of Sergio Antonio Silva Guerra's lecture are very stimulating. According to him, "the term technical discretion is aimed only at jurisdictional limitation of the control of its exercise, with a view to preventing the technical choices the Administration from not being replaced by the technical options of the judge" and "the Regulatory agencies do not enjoy a strictly technical discretionary function in the issuing of their acts, but rather pure administrative discretion"²⁷.

Diogo de Figueiredo Moreira Neto, when addressing regulatory agencies, claims that "technical discretion only exists when the decision based on it is also motivated technically. This is perhaps the most important limitation, since it removes, all at once, **arbitrary decisions, error, imposture and unreasonableness**, and moves away unnecessary, inadequate and biased decisions"²⁸.

On the same track, Professor Maria Sylvia Zanella Di Pietro points out that it is always possible, in the establishment of technical criteria, for **abuse of power, arbitrary decisions, error, malice and guilt** to occur²⁹.

Along the same lines, Marçal Justen Filho teaches that "the decision adopted at the time of enforcement of the law does not reflect the manager's free and limitless assessment, but translates the consolidation of the most appropriate and satisfactory solution, in view of abstract criteria provided in law or derived from technical-scientific knowledge or cautious evaluation of the reality"³⁰.

The "technical" choices derived from "technical discretion" can also prove to be entirely improper, inadequate, unreasonable, costly, contrary to the public interest and the legal purpose, which would require the adoption of corrective measures, in precisely the same terms as in administrative discretion.

The discretionary scope in Brazil, either administrative or technical, is, therefore, unique and deserving of the same treatment. The resulting choice must always be linked to the public purpose, otherwise it will not be valid.

By inspecting the end activities of the regulatory agencies, the Court does not intend to replace the agencies that it controls, otherwise the controller would change into regulator; it cannot establish the content of a regulatory act, which will be issued by the competent agency, nor impose the adoption of measures that it considers appropriate, unless when it finds weaknesses regarding legality, errors, or omission of the agency in proper enforcing of the law.

In any case, this is, perhaps, the biggest challenge for External Control, to distinguish arbitrary behavior by the regulatory authority of the appropriate use of its discretionary attributions.

The scope of the irregularities considered by the *TCU* reinforces the imperious need for improvement and strengthening of the system of the regulatory agencies. Particularly in relation to the basic configuration and improvement of its specialized technical staff, whose instability – from lack of permanent staff, high turnover of temporary contracts, changes in commissioned positions, systematic reductions of resources and absence of qualification and training courses – severely hinders and undermines the entire regulatory activity³¹.

27. Discricionariedade Técnica e Agências Reguladoras. (Technical Discretion and Regulatory Agencies). Lecture delivered at Seminar "The Regulatory Agencies", promoted by the ESMAF.

28. *Mutações do Direito Administrativo*. (Mutations of the Administrative Law 2nd edition. Rio de Janeiro: Renovar 2001, p. 169-170.

29. *Parcerias na Administração Pública* (Partnerships in the Public Administration) 4th edition. São Paulo: Atlas, 2002, p. 156.

30. *O direito das agências reguladoras independentes* (The law on the independent regulatory agencies) São Paulo: Dialética, 2002. p. 516.

31. See "Report and Previous Expert Opinions on the Accounts of the Government of the Republic: fiscal year 2004". Brasília: TCU, 2005.

Thus, the action of the *TCU*, on the one hand restricting arbitrary and unjustifiable behaviors on the part of the regulator, and, on the other, stimulating the action of the State, contributes to the proper functioning of the institutions.

Instead of going against the model, this action assures its proper functioning, hindering abuse, arbitrary decisions and error as much as possible and within its specific competence of operational inspection.

In the republican regime, the Congress and civil society demand reliable information on the action and performance of all the government's agencies. On this matter, the *TCU* has the constitutional competence, technical knowledge, political impartiality, access to information related to the Public Administration and organized administrative structure. These factors allow the *TCU* to render to the Parliament and to society all the information, necessary and reliable, that provides the foundation for the democratic debate on state action and, particularly, on the action of the regulatory agencies. ■

BIBLIOGRAPHICAL REFERENCES

BRAZIL. Brazilian Court of Audit. *Several Processes, Sentences and Decisions* (1994-2005).

_____. *External control of the regulatory agencies, relevant issues on the electricity, oil and gas sectors: executive summary* – Brasília: TCU, Secretaria de Fiscalização de Desestatização, 2003.

_____. *Report and previous expert opinions on the accounts of the Government of the Republic: Fiscal Year 2004*. Brasília: TCU, 2005.

_____. *Social tariffs and challenges in the universalization of the electric power services in Brazil: executive summary* – Brasília : TCU, Secretaria de Fiscalização de Desestatização, 2004.

DI PIETRO, Maria. S. Z. *Parcerias na administração pública: concessão, permissão, franquia, terceirização e outras formas*. 4. ed. São Paulo: Atlas, 2002, p. 156.

FARACO, Alexandre Ditzel. Concorrência e universalização nas telecomunicações: evoluções recentes no Direito brasileiro. *Revista de Direito Público da Economia – RDPE*, n. 8, Oct./Dec. 2004, p.19.

GUERRA, Sérgio Antonio Silva. *Discrecionabilidade Técnica e Agências Reguladoras. Anais do seminário As Agências Reguladoras*. Esmaf, 2004.

INTOSAI. *Guidelines on best practice for the audit of economic regulation*. Seoul, 2001.

JUSTEN FILHO, M. *O direito das agências reguladoras independentes*. São Paulo: Dialética, 2002.

LEVI, Brian e SPILLER, Pablo T. *Regulations, institutions, and commitment: comparative studies of telecommunications*. Cambridge University Press. 1996.

MOREIRA NETO, Diogo. de F. *Mutações do direito administrativo*. 2.ed. Rio de Janeiro: Renovar, 2001, pp.169-170.

NATIONAL AUDIT OFFICE. NAO report (HC 723 2001-2002): *Pipes and Wires: Report by the Comptroller and Auditor General*. London, 2002.

RODRIGUES, Walton Alencar. *O TCU e o controle das agências reguladoras*. Lecture delivered at the seminar "O Controle das Agências Reguladoras", held in Brasília, in November/2003. (mimeo).

SILVA, Artur Adolfo Cotias e. *O Tribunal de Contas da União na História do Brasil: evolução histórica, política e administrativa (1890 – 1998)*. Brasília: TCU. Instituto Serzedello Corrêa, 1999.

VALLADÃO, Alfredo de Vilhena. Exposição de motivos do anteprojeto do Código de Águas. *Código de Águas – Volume I*. Brasília: DNAEE, 1980.

ZYMLER, Benjamin. *O papel do Tribunal de Contas da União no controle das agências reguladoras*. Lecture delivered at the seminar "O controle externo da regulação de serviços públicos", held in Brasília, in October/2001. Brasília: TCU, 2002. p. 53-65.

