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REGULATORY IMPACT ANALYSIS: AN ASSESSMENT OF THE DEMOCRATIC EFFICIENCY OF STATE CONTROL

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Abstract: The research in progress has the scope to verify the Regulatory Impact Analysis (A.I.R.), evaluating its aspects regarding the democratic aspect of the institute. Although in a timid way, A.I.R. has found resonance in the Brazilian regulatory structure. Founded in the paradigm of efficiency of the public administration, the A.I.R. consists of a procedure for decision making of the public administration. Brazil, it has a regulatory structure in several sectors, this regulation is a way to control, and give vent to the government plans. In addition, the present study analyzes the Democratic State of Law and the guiding principles of this order, which, along with the promoted efficiency, permeate the state intervention and allow evidence to be collected so that this intervention is technical, democratic and less impact of management activities.
Keywords: Regulation, State Control, Democratic Efficiency, Government Plans, Impact, Democracy.

INTRODUCTION

Founded on the principle of public administration efficiency, the *A.I.R.* consists of a procedure for decision-making, based on evidence, which seeks to assess, from the definition of a regulatory problem, the possible impacts of the alternatives of action available to achieve the intended goals.

Originating in the USA for over 30 years, the *A.I.R.* is adopted by the member countries of the OECD (Organization for Economic Cooperation and Development). Brazil, as an invited member of such organization, was expressly recommended to adopt the tool called *A.I.R.*, in order to assess its regulatory quality. Also, through administrative measures.

The research problem is outlined in the following question: is *A.I.R.* an expression of the Democratic Rule of Law? Does *A.I.R.* contemplate the constitutional principle of the efficiency of public administration? *A.I.R.* can replace other forms of analysis of state control, other forms of analysis of state regulation may be suppressed or lose validity by *A.I.R.*?

Still not percucious, the results point to a greater efficiency of the *A.I.R.*, which, although it has some similarity with the other forms of verification of state regulation, is more linked to the efficiency and democratization of control.

In this school, it is necessary to verify the conception of the Democratic State of Law, as well as the measure of its interventionism.

Nevertheless, it is pertinent to verify the heteronomy of state control/regulation, which must undergo an analysis, democratic evaluation, guided by the best public interest.

Furthermore, it is useful to demonstrate the inexistence of legal and constitutional impediments to the comparison and possible replacement of the Environmental Impact Study for the Regulatory Impact Analysis. Undoubtedly, the greater the analysis of state control/regulation, the smaller the impact of this control on social systems.

The theme will be approached with the deductive method from the use of existing concepts and theories about the institutes, as well as the legality of the implementation of *A.I.R.* in the country and the real importance that its effective use will bring to state control.

DEMOCRACY AND EFFICIENCY: DEMOCRATIC STATE REGULATION

THE CONCEPTION OF THE DEMOCRATIC STATE OF LAW AND ITS REGULATORY POWER

It is important, initially, to point out that the expression Democratic State of Law is difficult to conceptualize. For this reason, in order to enable a better understanding of the subject, we consider it necessary to discuss the evolution of the Modern State.

The Absolutist State is the "first expression of the Modern State" (STRECK; MORAIS, 2014, p. 35). During absolutism, power was concentrated in the figure of the monarch, who ruled in a full, unlimited way, with no control over other powers. Executive and legislative powers were also in the hands of the king. The monarch was still to be exempt from any responsibility, for his power was a divine gift.

Streck and Morais (2014, p. 35) also state that:

> With this, the absolutist monarchies appropriated the States in the same way that the owner makes the object his property, giving rise to a power of *empire* as an absolute right of the king over the state. On the other hand, with this posture, the kings constituted themselves as lords of the States, in the same way that the feudal lords of the medieval did, individually securitizing the property of the State.

Bastos (1999, p. 16) teaches that "(...) with absolutism, the State identifies itself with power, sovereignty, the king, and society – whether in what comes from afar or in that which brings again – appears on the sidelines of political power and without projection to power".

Little by little, voices against monarchical absolutism began to emerge and, in the 18th century, the resistance reached its peak with the bourgeois revolutions.

The first revolution, known as the "Glorious Revolution", took place in 1688, which dethroned King James II, Catholic and absolutist, with the English throne being occupied by William of Orange, who professed the Protestant religion, with the support of the *Whigs* (liberals) and of the *Tories* (conservatives), who occupied the parliament.

The *Bill of Rights* of 1689 is undoubtedly one of the most important consequences of the Glorious Revolution. The acceptance of this document was placed by parliament as a condition for William of Orange to assume the throne, and this condition was accepted by him in 1689. Then, in England, the so-called constitutional monarchy arose.

The *Bill of Rights* limited the power of the monarch, but not only that. Comparato (2010, p. 80) states that:

> [...] the essential part of the document consisted in the institution of the separation of powers, with the declaration that the Parliament is an organ primarily in charge of defending its subjects before the King and whose functioning cannot, therefore, be subject to his discretion. in addition, the *Bill of Rights* came to strengthen the institution of the jury and reaffirm some fundamental rights of citizens, which are expressed to this day, in the same terms, by modern Constitutions, such as the right to petition and the prohibition of unusual or cruel sentences (*cruel and unusual punishments*).

The English philosopher John Locke is regarded as the greatest anti-absolutism theorist. He defended the limitation of the monarch's power, asserting that the right to liberty is a sacred right of the people, the people being the only source of power. Thus, power is only legitimate if there is the consent of the people.

Locke (1994, p. 170) also believed that there must be a separation between the powers, stating that:

> And as the temptation to ascend to power can be very great for human frailty, it is not convenient that the same people who hold the power to legislate also have in their hands the power to execute the laws, as they could exempt themselves from obedience to the laws that they did, and adapt the law to their will, both at the time of doing it and in the act of its execution, and it would have different interests from those of the rest of the community, contrary to the purpose of society and government.

As highlighted by Streck and Morais (2014, p. 40), "it is with Locke that we see

the inaugural constitution of the profile of political liberalism sustaining the need to limit the power and functions of the State (...)".

Dallari (1998, p. 10) also asserts that "John Locke is, without any doubt, an important author, whose works, markedly anti-absolutist, exerted great influence on the so-called English Revolution of 1688, as well as on the American Revolution of 1776".

In the eighteenth century, then, the American Revolution (1776) and the French Revolution

(1789).

Comparato (2010, p. 47) states that the "American Revolution was essentially in the same spirit as the *english Glorious Revolution*, a restoration of old franchises and traditional citizenship rights, in the face of abuses and usurpations of monarchical power".

Years after the American Revolution, more precisely, on September 17, 1787, the Constitution of the United States of America was approved in Philadelphia. However, US bills of rights (*Bills of Rights*) were only included in the constitutional text by amendments to the Constitution.

The first ten amendments to the Constitution date from December 15, 1791, with new amendments being approved later.

The North American *Bill of Rights* guarantees certain fundamental rights, among which, we can highlight: the freedom of religion and its free exercise, the freedom of speech, the freedom of the press, the right of the people to assemble peacefully, the right to petition, the prohibition of cruel or aberrant punishment, the prohibition of slavery, the right to vote for all US citizens, the right to due process of law, the right to be defended by a lawyer, etc..

It is also important to point out that even before the Constitution of the United States of America (1787), o *Bill of Rights* de Virgínia (1776) already provided for fundamental rights, being "the first declaration of fundamental rights, in the modern sense." (SILVA, 2005, p. 153).

Unlike the American Revolution, in the French Revolution "all the impetus of the political movement tended towards the future and represented an attempt to radically change the conditions of life in society." (COMPARATO, 2010, p. 47). The French Revolution was also strongly influenced by the French philosopher Jean-Jacques Rousseau, mainly through the doctrine of the social contract.

Thus, the French Revolution pursued a future free from the shackles of absolutism and a new form of society, in which every man could be the holder of essential rights and the people regarded as the only source of power, breaking the chains of the past and inaugurating a new history.

Arendt (1988, p. 44-45), analyzing the American and French Revolutions, emphasizes the more universal character of the French Revolution, stating that:

> It was the French Revolution, not the American, that set the world on fire [...] The sad truth of the matter is that the French Revolution, which turned into disaster, made world history, while the American Revolution, so triumphantly victorious, has remained an event of almost only local importance.

The French Revolution resulted in the Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de I'Homme et du Citoyen)* of 1789, which also has a more universal character compared to the *Bills of Rights,* English and American.

Robert (apud SILVA, 2005, p. 157), supported by the abstract and universalizing character of the Declaration of the Rights of Man and Citizen (1789), he affirms that it has three fundamental characteristics: intellectualism, globalism and individualism.

Intellectualism is due to the fact that the recognition of the existence of imprescriptible human rights and the need to reestablish a power legitimized by the consent of the people did not go beyond the intellectual universe, being only developed in terms of ideas. Its characteristic is globalism because the principles enshrined in the Declaration of the Rights of Man and Citizen are not limited to the French people, but seek a universal value, that is, it has principles of a universal nature. And, finally, individualism is observed because the Declaration of Human and Citizen's Rights only recognizes individual freedoms, omitting the freedoms of association and assembly, being concerned only with the defense of the individual in the face of state (ROBERT apud SILVA, 2005, p.157).

The Declaration of Human and Citizen's Rights, despite its abstract character, is undoubtedly a milestone in the history of human rights and even served as a source of inspiration for many other subsequent declarations. Its spirit is one of freedom and equality. In it, man is seen as the holder of rights and free by nature. Furthermore, we can say that the Declaration of the Rights of Man and Citizen symbolizes the end of the era of absolutist monarchy.

Furthermore, in 1791 the first written Constitution of France was inaugurated, which ensured equality between men, liberty, security, the inviolability of property, etc.

With the end of the absolutist State, the Rule of Law is born, which, in short, is a State that submits to the Law. This state model is marked by the phenomenon of constitutionalism.

According to Silva (2005, p. 112), the rule of law, initially, was a typically liberal concept, which had the characteristics of:

> (a) *submission to the rule of law*, which was the primary note of its concept, the law being considered as an act formally emanating from the Legislative Power, composed of representatives of the people, but of the citizen-people; (b) *division of powers*, that separates the Legislative, Executive and Judiciary powers independently and harmoniously, as a technique to ensure the production of laws to the former and the independence and impartiality of the latter vis-à-vis others and the pressures of powerful private parties; (c) *statement and guarantee of individual rights*.

Thus, in the Liberal Rule of Law, which is the first expression of the Rule of Law, the performance (power) of the State was limited by law. Furthermore, the law must apply equally to all. The division of powers also appears as a milestone in the history of the Modern State, with only the Legislative Power (representatives of the people) being responsible for enacting laws. Citizens also have guaranteed rights and guarantees, such as the right to equality, freedom, property, the guarantee of due legal process, etc. With that, the growth of individual freedoms occurs.

Ferrajoli (2002, p. 690) also highlights the profound transformation in the social structure with the advent of the rule of law, stating that:

> [...] the transformation of the absolute State into the Rule of Law occurs simultaneously with the transformation of the subject into a citizen, that is, into a subject of holder of rights that are no longer exclusively "natural" but "constitutional" in relation to the State, which in turn becomes, linked in relation to that.

On a theoretical level, the Rule of Law "emerges as a construction specific to the second half of the 19th century, born in Germany – as: *Rechtstaat* – and, later, being incorporated into the French doctrine (...)" (STRECK; MORAIS, 2014, p. 68).

In the Liberal State of Law, the intervention of the State was minimal (minimum State), being the result of the struggle for individual freedoms. The State must be neutral from the religious to the economic field (contractual freedom and free market economy). This

way, it was up to the State only to deal with the security and defense of the individual freedoms of citizens.

It so happens that this model of the Liberal Right State, little by little, was being changed, as the minimum state intervention did not result in the idealized social model. On the contrary, society began to feel the effects of the State's non-interference in many aspects, as social inequalities and injustices had only increased. The State, then, began to intervene more and more.

Thus, in the 20th century, "due to a progressive assumption by the State of activities in the economic, social, social security, educational field, etc., its classic feature of a Liberal State gives way to that of a Social State" (BASTOS, 1995, p.70).

The Social State of Law is characterized as an interventionist State, which implements social rights (health, education, security, etc.) provided for by law. It is a State that is founded on the duty to guarantee the realization of social rights and, with this, expands the list of fundamental rights.

Furthermore, it must be noted that "with the Social Rule of Law, a model is projected in which welfare and social development guide the actions of the public entity" (STRECK; MORAIS, 2014, p.73).

The Democratic Rule of Law appears as a new concept, which umbilically links the concept of Rule of Law to that of democracy, making them inseparable concepts. In the words of Silva (2005, p. 119):

> The configuration of *Right Democratic state*, it does not just mean formally uniting the concepts of Democratic State and Rule of Law. It consists, in fact, in the creation of a new concept, which takes into account the concepts of the component elements, but surpasses them insofar as it incorporates a revolutionary component of transformation of the *status quo*.

Thus, the Democratic Rule of Law is based on the idea of social transformation, which, starting from the link of the Rule of Law to the democratic ideal, enshrines popular sovereignty, the separation of powers (legislative, executive and judiciary), fundamental rights and guarantees, the principle of legality, democratic political organization, equality of all before the law, the written Constitution, etc. This is the State model adopted by the Federal Constitution of 1988 (article 1.º, *caput*, Federal Constitution).

The principles of the Democratic Rule of Law are: a) principle of constitutionality, which determines that the Democratic Rule of Law must be based on a written Constitution; b) democratic principle (democracy of representation and participation); c) fundamental rights system; d) principle of social justice; e) principle of equality; f) principle of division of powers; g) principle of legality and; h) principle of legal certainty (SILVA, 2005, p. 122).

Some observations must be made regarding the principles of the democratic rule of law. The first is that a State can only be considered a Democratic State of Law if there is a separation of powers. Without this separation, power would be concentrated in the hands of a single person or a few people and there would be no control of state power. The second is that the Democratic Rule of Law is a State thirsting for effective popular participation (democracy of representation and participation) and, therefore, it is governed by the democratic principle. The third is that the written Constitution limits the power of the State and guarantees fundamental rights, being the basis of the Democratic Rule of Law. And, finally, as a precise lesson from Streck and Morais (2014, p. 73), the legality in this State model "takes the form of an effective search for the realization of equality, not by the generality of the normative command, but

by the realization, through of interventions and regulations that directly imply a change in the situation of the community".

We can also highlight that article 3, items I, II, III and IV, of the Federal Constitution establishes the fundamental objectives of the Federative Republic of Brazil which, in fact, are also the objectives of the Democratic State of Law, since the article 1.º, *caput*, of the Federal Constitution expresses that the Federative Republic of Brazil constitutes a Democratic State of Law. Thus, we have that the objectives of the Democratic State of Law expressed in the constitutional text are: a) to build a free, fair and solidary society; b) guarantee national development; c) eradicate poverty and marginalization and reduce social and regional inequalities; d) promote the good of all, without prejudice of origin, race, sex, color, age, and any other forms of discrimination.

Finally, in the field of intervention, in the field of state control, as we will see below, the constitutional principle of efficiency appears as a limiting factor for the interventionist or overly dirigiste state, making regulation a democratic expression of this control.

PRINCIPLE OF EFFICIENCY AND PRINCIPLES LIMITING STATE CONTROL

The word principle, from the Latin: *principium*, means origin, beginning, primary cause, what comes before.

> In the legal field, "principles are ordinances that radiate and magnetize the systems of norms" (SILVA, 2005, p. 92).
>
> Or as Ávila (2011, p. 97) prefers, "the principles, as they are immediately finalistic norms, establish an ideal state of affairs to be pursued, which concerns other norms of the same system, notably the rules".
>
> Constitutional Law is seen as the starting point, that is, the common core of all the law to which they are attached and from which the various domains of the legal order of the State also derive.

It follows then that Constitutional Law is of paramount importance for administrative law. This is because the branches of law must always be correlated, never being interpreted in isolation, as the Federal Constitution, the main source of Constitutional law, brings in its wake the so-called constitutional principles, which are generic rules that serve as a basis for the entire legal system, including for state control, establishing limits to political action, as well as instituting protection for the individual in relation to the State, this statement becomes clear because we are dealing with a democratic State under the rule of law. About this, let's check it:

> [...] The democracy that the Democratic Rule of Law performs must be a process of social coexistence in a free, fair and solidary society (article 3º, I), in which power emanates from the people, and must be exercised for the benefit of the people, directly or by elected representatives (article 1, sole paragraph); participatory, because it involves the growing participation of the people in the decision-making process and in the formation of government acts; pluralist, because it respects the plurality of ideas, cultures and ethnicities and thus presupposes the dialogue between divergent opinions and thoughts and the possibility of coexistence between different forms of organization and interests in society; it has to be a process of liberating the human person from forms of oppression that depends not only on the formal recognition of certain individual, political and social rights, but especially on the existence of economic conditions likely to favor their full exercise.. (SILVA, 1988, p.24).

That is, the Constitution of a State is interpreted as a presupposition for the validity of all laws, more specifically, it is the foundation for the construction of regulatory norms.

In the Brazilian legal system, the democratic rule of law aims to implement social, participatory, and pluralist democracy, having as one of the basic principles the principle of efficiency, topographically established in the Federal Constitution of 1988 in its article 37, after the amendment constitutional 19/98. If not, let's check it:

> Article 37. The direct and indirect public administration of any of the Powers of the Union, States, Federal District and Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency, and also the following: [...].

The aforementioned article provides that the Brazilian public administration, as a democratic administration, must adhere to fundamentals, such as: legality; impersonality, morality; advertising and above all to efficiency.

However, the principle of efficiency does not emerge in the legal system only with the constitutional reform of 98, we join the current that defends that efficiency, although not explicit, was present in the main body of the Magna Carta, given its allocation implicit in principles such as human dignity, reasonableness and proportionality.

The dignity of the human person, the guiding and fundamental principle of the entire Brazilian legal system, worthy of mention, is defined by Ingo Sarlet (SARLET, 2002, p.82). this way:

> […] intrinsic and distinctive quality of every human being that makes him worthy of the same respect and consideration by the State and the community, implying, in this sense, a complex of fundamental rights and duties that assure the person against any and all degrading and inhumane acts, how they will guarantee you the minimum existential conditions for a healthy life, in addition to providing and promoting your active and co-responsible participation in the destinies of your own existence and life in communion with other human beings […]

And also about the dignity of the human person, says Gustavo Tepedino (TEPEDINO, 2005, p. 105).:

> Indeed, the choice of human dignity as the foundation of the Republic, associated with the fundamental objective of eradicating poverty and marginalization, and reducing social inequalities, together with the provision of § 2 of article 5 in the sense of non-exclusion of any rights and warranties, even if not expressed, as long as they result from the principles adopted by the larger text, they constitute a true general clause for the protection and promotion of the human person, taken as the maximum value by the ordinance […]

It is noted that the Federal Constitution ensures that everyone, without distinction, is entitled to a minimum list of constitutional rights and guarantees, so that the suppression and relativization of the guarantees established in the magna do not comply with the democratic system, given that the failure to comply with these guarantees depersonalizes the human being and encourages the methodology of terror:

> The configuration of the Democratic Rule of Law does not only mean formally uniting the concepts of Democratic State and Rule of Law. It consists, in fact, in the creation of a new concept, which takes into account the concepts of the component elements, but surpasses them insofar as it incorporates a revolutionary component of transformation of the status quo. 1988 Constitution, when it states that the Federative Republic of Brazil constitutes itself in a democratic State of Law, not as a mere promise to organize such a State, since the Constitution is already proclaiming and founding it there. (SILVA, 2005, p. 15).

In other words, the realization of the democratic rule of law requires the strict observance of these and other principles brought about in the Magna Carta, such an attitude demonstrates respect for the difficult and time-consuming construction of the

democratic rule of law, until it finally arrived at the modern conception of which discussed above.

And also in relation to the principles, there are other extremely important principles, namely: the principle of reasonableness and proportionality.

This analysis allows us to verify that all citizens will be assured of state intervention, diligent, balanced, democratic state control and, above all, backed by findings and evidence.

In fact, the non-adoption of the efficiency of public regulation greatly infringes on the guarantee of equal treatment, given by the constitution to citizens and restricts the dignity of the human person as well as state renunciation, since government policy is lame with a fair, solidary and of consecration of free enterprise.

ANALYSIS OF THE REGULATORY IMPACT: VALIDITY AND REQUIREMENT FOR EXISTENCE

DEFINITION AND METHODS OF REGULATORY IMPACT ANALYSIS

As mentioned elsewhere, as of the 19/98 Amendment, the efficiency of the administration was raised to the level of constitutional principle. Thus, Brazil started to have a regulatory structure in several sectors, through regulatory agencies (around 12 agencies) or through other actors that issue normative instruments of an administrative nature. It is unforgettable, regulation is a way to control and give vent to government plans.

Although timidly, the *A.I.R.* has found resonance in the Brazilian regulatory framework. Founded on the principle of public administration efficiency, the *A.I.R.* consists of a procedure for decision-making, based on evidence, which seeks to assess, based on the definition of a regulatory problem, the possible impacts of the alternatives of action available to achieve the intended goals, let's check it:

> It consists of a systematic process of analysis based on evidence that seeks to assess, based on the definition of a regulatory problem, the possible impacts of the alternatives of action available to achieve the intended objectives. Its purpose is to guide and support decision-making and, ultimately, to contribute to regulatory actions being effective, effective and efficient. (GUIA AIR, 2018, p. 01).

Originating in the USA for over 30 years, the *A.I.R.* is adopted by the member countries of the OECD (Organization for Economic Cooperation and Development). Brazil, as an invited member of such organization, was expressly recommended to adopt the tool called *A.I.R.*, in order to assess its regulatory quality, it is important to highlight:

> There needs to be a systematic strategy, with a regulatory analysis structure that ensures transparency, social participation and economic efficiency, with explicit responsibilities at the political and administrative level. Discussion about the standardized process for preparing new regulatory standards that include their impact assessment is starting to take place. There is also a need to prepare regulatory capacities within the administration in the medium and long term. (VALENTE, 2010, p. 31).

In early 2018, Brazil, through the Civil House, published the General *A.I.R.* Guidelines and the *A.I.R.* Guide, which set the complex and comprehensive tone of A.I.R. Such guides and guidelines are embryonic initiatives in the field of A.I.R. These guidelines are already an anticipation of PL 6.621/2016, called PL das Agencies, which will deal in greater depth with the implementation of *A.I.R.* in Brazil.

> o Law Project: 6,621/2016 - Bill of Agencies - which provides for the management, organization, decision-making process and social control of regulatory agencies, amends Law Number: 9,427, of December 26, 1996, Law Number: 9,472, of July 16,

1997, Law Number: 9,478, of August 6, 1997, Law Number: 9,782 of January 26, 1999, Law Number: 9,961 of January 28, 2000, Law Number: 9,984, of 17 of July 2000, Law Number: 9,986, of July 18, 2000, Law Number: 10,233, of June 5, 2001, Provisional Measure Number: 2228-1, of September 6, 2001, Law Number: 11.182, of September 27, 2005, and Law Number: 10,180, of February 6, 2001, and other provisions. The procedure and the full text of the law project at stake, approved by the Federal Senate with law Project, number: 52/2013, is available on the website:

http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2120019 (op. cit. 2018, p. 05).

Checking the recommendations of the OECD, as well as the guidelines issued by the Brazilian executive, it is observed that the A.I.R. brings a technical basis to the public administration, that is, it makes regulation (state intervention) done through evidence. The political nature of governmental decisions is removed, such decisions are attributed a democratic character and based on logical studies. A.I.R. checks costs, scopes, trends, degradations, incentives, in short, all of this that can be seen as the IMPACT OF REGULATION.

Through a multidisciplinary team, from the regulatory body itself, *A.I.R.* intervenes in government decision-making. In addition to the multidisciplinary team, *A.I.R.* seeks evidence in public hearings, which are very common.

Through numerous phases, an approximate number of 11, the *A.I.R.* aims to study the impact of government regulation and not an isolated human or business action. With a positive sense of impact, the *A.I.R.*, it does not need to be used only in regulatory agencies, it can be used in government plans that impact on the rights and obligations of people, companies and economic agents.

Furthermore, other ways of verifying the impact of state regulation are only informative, do not help in better decision-making, do not provide guidance to public administration, are just a sieve for the embargo or not of governmental decisions, which can be degrading, or not, to the administration.

This time, other forms of verification of the impact of state control have a merely informative purpose.

Filled with few procedures, or watertight and limited phases, the other forms of verification of the impact of the regulation are only intended to analyze the governmental impact of a human action, without comparing the impacts on the environment, on the economy, on free enterprise, on individual freedoms, that is, without analyzing other demands of other agents.

With a notion of extremely negative impact, other forms of analysis of state intervention are less comprehensive, given their mandatory aspects, which cause the absence of control assessments to generate administrative and even criminal consequences.

Undoubtedly, the greater the analysis of state control/regulation, the smaller the impact of this control on social systems. Thus, the other forms of assessment of state control, which are not *A.I.R,*. as an analysis of the impact of state control, lame and narrow-minded.

The regulatory impact studies seem to be institutes that have already been surpassed, in comparison with the Regulatory Impact Analysis - *A.I.R.* Unlike the *A.I.R.,* the other control impact studies show little democratic and little technical, as they are linked to greater political scrutiny.

The *A.I.R.*, seems to suppress and supplant the claims of other regulatory impact studies. It is a more fruitful impact analysis of state control, closer to public and private bodies, with greater scope of data, evidence of correct

decision-making.

In this school, regulatory agencies, as well as other government entities, can and must be reached by the A.I.R., as a way to give true efficiency and validity to state controls.

THE HETERONOMY OF WILL AS A VALID INSTRUMENT FOR REGULATORY IMPACT ANALYSIS

> "Where there is no respect for life and for the physical and moral integrity of human beings, where the minimum conditions for a dignified existence are not guaranteed, **where there is no power limitation,** finally, where freedom and autonomy, equality and fundamental rights are not recognized and minimally ensured, there will be no room for human dignity and the person will be a mere object of discretion and injustices.."
>
> (Ingo Sarlet – Brazilian judge and jurist)

The "Heteronomy of the will" was a concept created by Immanuel Kant in his work "Foundation of the Metaphysics of Customs" published in 1785 to denominate the subjection of the individual to the will of third parties or a collectivity, in this case the will of the State to the detriment of individual will of each one of us. The individual's autonomy, in a society, is set aside to make room for heteronomy, which is considered a basic principle related to the rule of law, in which everyone must submit to the will of the law (state) (IMMANUEL KANT, 2007, p. 86). And also on this explanatory path, the philosopher Emmanuel Levinas elucidates with his point of view:

> Heteronomy is not slavery, but its opposite. Morality is not based on a sovereign will of the Self, but on respect for the Other's freedom, and for that it is necessary to be willing to limit oneself in order not to impose oneself on another. Obedience to the law created by Others does not mean servitude or submission to a tyrant, but the overcoming of the claim of the Self to be the ultimate and only foundation of all rules. Heteronomy is the norm, the external rule and does not depend on the subject's will.

In this tuning fork, when we deal with heteronomy in *A.I.R.*, we are talking about the sovereignty that is conferred solely and exclusively on the state to carry out all governmental plans, verifying their impact and extent. From this perspective, we can more properly understand as one of the purposes of a Social and Democratic State of Law, where the State takes on the responsibility of managing the entire political, economic, social and cultural system, this is the model that the The Brazilian state has joined as a form of government and is guaranteed by our Federal Constitution. In view of the foregoing, the Brazilian State holds for itself the exclusive right to Regulation.

In this bias, the *A.I.R.* adopted in Brazil does not infringe constitutional impediments on heteronomy.

Thus, it is concluded that after demystifying the possible danger of adopting *A.I.R.* in the Brazilian administrative system, together with the clarification of the models in force and accepted by our State, we can now understand that the *A.I.R.* gains space in national regulation, in order to fight the failed system that we have operated today, which we can link to the panacea of all the evils accumulated by decades of neglect of the public administration system regarding the verification of better regulation and its impacts on the beneficiaries of governance systems.

Throughout our legal system, there is no single legal or jurisdictional impediment that prevents the adoption of *A.I.R.* and its multiple filtering and best-regulation comparison processes.

Checking the definition discussed above about *A.I.R.*, however, there are norms that deal with the unavailability and non-delegability of functions and attributions of the public administration, many of which are

even binding and incapable of having, in their impacts, an accurate analysis or measurement.

This way, we confirm that there are no rules or legal impediments that prevent the assessment of the regulatory impact on the performance of material assistance or essential to the proper functioning and quality of the execution of government plans.

Unlike impediments, the *A.I.R.* legitimizes itself and this legitimacy is demonstrated within the characteristics of the Democratic Regulatory State itself, let's check it:

> With regard to the points of contact between independent agencies and the democratic principle, at least two lines of argument are plausible. First, the idea of subjecting control over policies aimed at the long term and demanding, by their nature, a predominantly technical and professional management, can be seen as a form of democratic exercise.
>
> Remember that democracy is not a concept to be confused with majority rule; Democracy is, above all, a project of exercising collective self-government in which social deliberations take place over time. In this vein, a collective deliberation that represents pre-commitment in the medium or long term requires, as a condition for its fulfillment, a management that is less responsive to political-electoral logic and more responsive to law and technical rationality.
>
> Ultimately, enforcing democratically assumed pre-commitments is also a way of realizing the democratic ideal of collective self-government[...]
>
> On the other hand, independent authorities do not need and must not be closed spaces, inimical to the positions and opinions of economic agents, consumers, and civil society as a whole. The procedural opening of regulatory deliberations actually represents an attempt to foster the constitution of a new public sphere, shaped by more technical parameters and specifically related to the regulated matter.. (BINENBOJM, 2008, p. 303).

Ending the permissive legal bases for the Regulatory Impact Analysis with a view to better state interference in the social, economic and cultural gears, we definitively conclude that it is an irrefutable, uncontroversial, indisputable matter as to the possibility of *A.I.R.*, if there is interest, to provide services to the public sector, in the numerous administrative activities.

We will present only two obstacles that are most discussed among jurists, sociologists, people who participate in society in general, and their negative views on Regulatory Impact Analysis. First, we would find the obstacle in the political sphere, there is a possible speculation about the possibility of the private interest of companies and individuals starting to influence in terms of the assessment with the State and even in the conduct of government policy in the country. That is, with the proper inclusion and systematization of the *A.I.R.* in Brazil, there would be pressure on the part of companies and/or individuals to increase or decrease the control of regulation, promoting or removing the focus of public plans in certain areas. However, this practice is already known by countries like the USA and Germany and named *Lobby* which means "influencing legislators and/or public actors, that is, for this deviation of purpose proposed by those opposed to greater control of the sectors to work, we would depend solely and exclusively on the public manager. In this sense, we would be admitting that the legislator and other actors in the administration, who must be impartial and attend to social interests, would be corrupting themselves by giving in to the pressure of individuals, which proves once again that it will not be the *A.I.R.* nor any other type of administrative decision or control of administrative decision that will result in the occurrence of such fact. (DONAHUE, 1992, p. 190).

In this sense, we also have the accurate observation of Patrícia Pessoa Valente, let's check it:

> After addressing three fundamentals for adopting regulatory impact assessment (state efficiency, legitimacy of regulatory decisions and political control), one question still remains unanswered. How is it possible for this tool to be considered a mechanism of political control of regulatory agents by the principal, at the same time that it has the potential to play a fundamental role in legitimizing regulatory decisions through the active participation of those administered? In other words, it is the same as the reducing element of the regulatory State's democratic deficit identified by the *A.I.R.* is sometimes seen from the perspective of the administrator (users and providers of services and goods in the regulated sectors), sometimes from the perspective of the principal (Legislative Power and Executive Power). Which of the two angles must prevail?
>
> In theory, the logic of each of the controls performed is quite different and, why not say, divergent. Suppose the case of a regulatory decision on the granting of licenses for the provision of a certain service by a greater number of economic agents. In this case, the control exercised by the principal will be focused on whether the objectives desired by voters will be met. The individual who will no longer have a market reserve with the decision will seek to contest it, while others will seek to maintain it with the perspective of also passing and providing the service. Users, in an even different way, will want more affordable rates and a greater number of providers to be able to choose the one that suits them[...]
>
> However, the concept of regulatory impact assessment presented in *chapter 2* allows us to understand that this apparent contradiction of interests is part of the institutional design of the agents involved in the Regulatory State. What is verified, in fact, is a flow of interests in different directions in a triangulation that represents the realization of the Democratic State of Law through the regulatory State. (2010, p. 158-159).

Finally, and a very fragile argument used as an impediment to the implementation of the *A.I.R.* is in the economic management, the opposites claim that the excess of phases, the complexity of the analysis, the deepening of debates, the call for public hearings, the cost of the transfer would be much higher than the investments applied by the State, as occurs, for example, with the state privatizations.

Therefore, the regulations submitted to this analysis are able to perform much better than the simple interference of public bodies, their administrators directly contribute to this achievement, in case of poor management of the *A.I.R.*, the penalty for the administration is the collapse of the activity and the better allocation of government plans.

CONCLUSION

State intervention, that is, fruitful and necessary state control, can only exist, state regulation can only exist, so that social relations are balanced and governmental plans flow, as well as encouragement to sectors of the economy, enshrining, therefore, a professional, technical, instrumental, popular, democratic bias of this control, bringing out, among others, the principle of efficiency of administration, which calculates, predicts, seeks evidence, encompasses experiences and measures the size of the impact of interference state-owned.

The absence of regulatory impact assessments, or the existence of lame studies analyzing the effects of regulation, is not consistent with the Democratic Rule of Law model. The regulatory trend, experienced by contemporary Western societies, has called into question the forms of implementation of government plans, public policies and economic designs. The fact is that when state regulation is overused, without a filter,

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without an evidence base, democratic values are inverted, opening the doors to the abuse of state interventionist power.

Thus, state regulation must be proportional, adequate, backed by evidence. Regulatory Impact Analysis has been moving towards this ideal (A.I.R.), procedure for public administration decision-making, which has the power to verify the impacts, scope and, without any doubt, the democratization of state regulation, public administration plans.

A.I.R., already implemented in Brazil, it makes democracy closer to the state regulatory power, making this power a delineator of proportionality and reasonableness of the regulated and the regulator. Now, with a technical procedure, attributed to countless phases, filled with fewer political actors than social, cultural, economic ones, it will certainly have the power to verify the size of the impact of state control and make public administration more efficient.

It is important to emphasize that the greater the analysis of the impact of state control, the smaller this control will be. As of the 19/98 Amendment, the efficiency of the administration was raised to the level of constitutional principle, therefore, it is unavoidable, that only the *A.I.R.* can give regulation its true function and democratic conception.

Finally, in Brazil what can be seen are countless ways of measuring the impacts of state regulation, ways that are dissociated from democracy, technique, popularity, and even legal basis. However, the Regulatory Impact Analysis (A.I.R.) seems the only way to overcome this narrow, lame and undemocratic regulation. *A.I.R.* is the legitimate way, with democratic expressions to promote a balanced and efficient state control, regulation.

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