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CONSTITUTIONAL LIMITATIONS TO THE REGULATORY POWER OF REGULATORY AGENCIES

LIMITAÇÕES CONSTITUCIONAIS AO PODER NORMATIVO DAS AGÊNCIAS REGULADORAS

Ana Keuly Luz Bezerra[1]
José Machado Moita Neto[2]
Maria Carolina Oliveira de Araújo[3]

ABSTRACT

This is a qualitative study based on content analysis, about the legality of normative acts issued by Brazilian Regulatory Agencies. It aims to analyze, in the light of the Federal Constitution, the limitation of the normative power of environmental agencies, using the discourse analysis of Direct Actions of Unconstitutionality (ADI) that were proposed against normative acts of this nature. From this analysis, we also sought to understand the motivation of the decisions handed down in the ADIs, whether by motivations of a legal nature aiming at the application of constitutional precepts or motivated by acts of will resulting from individual purposes. It was concluded that the judicial decisions and administrative resolutions studied are biased, sometimes prioritizing the private interest over the collective interest.

Keywords: Constitutionality. Regulatory agencies. Normative Power

RESUMO

Trata-se de estudo qualitativo a partir da análise de conteúdo, acerca da legalidade dos atos normativos emitidos pelas Agências Reguladoras brasileiras. Tem como objetivo analisar à luz da Constituição Federal a limitação do poder normativo das agencias ambientais, utilizando a análise de discurso das Ações Diretas de Inconstitucionalidade (ADI) que foram propostas contra atos normativos desta natureza. Dessa análise buscou-se também entender a motivação das decisões proferidas nas ADIs, se por motivações de cunho legal

1 Master and Doctorate in Environment and Development from the Federal University of Piauí, Bachelor in Administration and Law. Professor of Business Management at the Piauí Federal Institute, Campus Dirceu Arcoverde, Collaborating Professor of the Postgraduate Program in Development and Environment at the Federal University of Piauí. ORCID iD: http://orcid.org/0000-0002-6234-2474. Lattes: http://lattes.cnpq.br/9779727227180112. E-mail: analuz@ifpi.edu.br.

2 He holds a bachelor's degree in Science - Hab. in Chemistry from the Federal University of Piauí (1982), a bachelor's degree in Civil Engineering from the Federal University of Piauí (1989), a bachelor's degree in Philosophy from the Federal University of Piauí (2004), a law degree from the Federal University of Piauí (2017), a master's degree in Chemistry from the State University of Campinas (1987), and a doctorate in Chemistry from the State University of Campinas (1994). He retired as a full professor from the Federal University of Piauí in 2016 but continued researching and advising theses and dissertations in the Postgraduate Program in Development and Environment as a volunteer professor. ORCID iD: http://orcid.org/0000-0003-3268-1907. Lattes: http://lattes.cnpq.br/5047924139977100. E-mail: jose.machado.moita.neto@gmail.com.

3 Bachelor's degree in Law from UFPI (2017), PIBIC Fellow in the years 2016/2017, practicing lawyer in real estate and civil law, Postgraduate student in Business Law at FMU.ORCID iD: http://orcid.org/0000-0002-5362-2378. Lattes: http://lattes.cnpq.br/3295821274547896. E-mail: carolraiara@hotmail.com.

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visando a aplicação dos preceitos constitucionais ou motivadas por atos de vontade decorrentes de propósitos individuais. Concluiu-se que as decisões judiciais e resoluções administrativas estudadas são tendenciosas, por vezes, priorizando o interesse privado em detrimento do interesse coletivo.

Palavras-chave: *Constitucionalidade. Agências Reguladoras. Poder Normativo.*

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1. INITIAL CONSIDERATIONS

The separation of powers, the basic principle of Brazilian democracy, is nowadays an arduous task, made difficult by various interpretations of the constitutional text. At this point a question arises: Does the will of the people prevail? Is the original constituent power extra-legal or political? These questions arise because there is a marked judicial activism, which sometimes results in politicized interpretations of the Federal Constitution.

The study's main objective is to analyze, in light of the Federal Constitution, the limitation of the normative power of environmental agencies. Its secondary objectives are: a) to identify the environmental agencies/bodies with normative power; b) to verify in the constitutional text the legal provision of the competence of these institutions to regulate and its limitations; c) to identify the existing environmental norms not issued by the legislative power and its scope; and d) to verify if there are lawsuits in the judiciary claiming the unconstitutionality of environmental norms issued by regulatory agencies.

The analysis of the normative power of environmental agencies in light of the Federal Constitution, as well as the multiple realities that the judicial system encompasses, allows for a reflection on the performance of these institutions.

Three regulatory agencies were selected due to the social role they play, the high number of resolutions that are issued by these agencies and mainly because they are constant targets of Direct Unconstitutionality Actions (ADI, in the Portuguese acronym), they are: the National Council of Justice (CNJ, in the Portuguese acronym), the National Health Surveillance Agency (ANVISA, in the Portuguese acronym) and the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA, in the Portuguese acronym). In this paper we will analyze their constitutional functions, as well as the legitimacy or illegitimacy of the actions of these bodies, through the analysis of resolutions adopted by them. The aim is to demonstrate whether the Regulatory Agencies respect the constitutional limits imposed on them, and if they exceed these limits, whether the necessary measures are taken by the competent authorities in an impartial manner.

Therefore, through the content analysis of the decisions pertinent to the subject, we tried to understand if the Constitutional text referring to the competencies and attributions of the Regulatory Agencies is interpreted by virtue of legal precepts or if the diverse interpretations are the result of a way to protect the interest of some social groups, fomenting even more the insecurity, not only legal, but also political and moral, that accompanies the current society.

2. MATERIAL AND METHODS

Initially it was identified which environmental agencies/bodies in Brazil have regulatory and disciplinary power. Then, the constitutional text was read in order to seek the legal support for these agencies to issue these rules and, in this sense, to verify if the public administration can require their compliance as a legal precept.

After determining the legal grounds for the normative action of the environmental agencies/bodies, a search was made for the regulations issued by these bodies, verifying their legal purpose and scope and the relationship with the existence of federal, state, or municipal laws that deal with the same theme that the normative act regulates.

Finally, a theoretical discussion was held, in the light of the constitutional text, about the legality of normative acts issued by environmental agencies/agencies, using as background for the discussion possible direct actions of unconstitutionality of normative acts of this nature, which were interpreted based on content analysis.

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3. REGULATORY AGENCIES: CONCEPT AND ATTRIBUTIONS

The regulatory agencies, nowadays with strong presence in the Brazilian administrative structure, began to be outlined in England in 1834, when they used, for the first time, the word “agency” to refer to a regulatory entity of a certain economic activity. However, it was in the United States of America (USA) that the use of autonomous agencies to regulate economic activities was consolidated. Ferreira Filho teaches us that

> In the United States, since the nineteenth century decentralized entities emerged, with a regulatory function for specific activities. The first of these was the Interstate Commerce Commission, established in 1887. (...) They are generically called agencies. This term, as defined by the Administrative Procedures Act of 1946, designates any entity that participates in the “authority of the Government of the United States (...) with the exclusion of Congress and the Courts”. (FERREIRA FILHO, 2002, p. 63)

In Brazil, regulatory agencies emerged in the mid-1990s, during the government of Fernando Henrique Cardoso. Due to the need to decentralize the monopoly that the State held over some economic activities, agencies were set up to supervise these services. Based on this reality, regulatory agencies were created to discipline the players in the economic scenario, curb excesses, foster development, reconcile conflicting interests, allow fair exchanges, all in order to protect the market, in the absence of which both users/consumers, providers/investors and the State are harmed. The Brazilian legislator instituted the regulatory agencies in the form of Autarchy, however, when granting them regulatory power, it differentiated them from the existing ones in our legal system - and gave them the denomination of Autarchies of Special Regime (FERREIRA FILHO, 2002).

The legal concept of Autarchy is found in Article 5, I, of Decree-Law No. 200, of February 25, 1967, which defines it as: “an autonomous service, created by law, with its own legal per-

sonality, assets, and revenue, to perform activities typical of the Public Administration, which require, for their best operation, decentralized administrative and financial management" (BRASIL, 1967).

According to Di Pietro (2016), there is consensus among scholars that autarchies have the following characteristics: Creation by law; Public legal personality; Capacity for self-administration; Specialization of purposes or activities; Subjection to control or guardianship. As previously mentioned, the regulatory agencies have a special regime, as explained by Moraes:

In Brazil, the Regulatory Agencies were constituted as autarchies of special regime integrating the indirect administration, linked to the Ministry competent to deal with the respective activity, although characterized by administrative independence, absence of hierarchical subordination, fixed term of office and stability; absence of the possibility of dismissal ad nutum of its leaders and financial autonomy. (MORAES, 2002, p. 35)

However, this special regime to which agencies are subjected is subject to criticism, Di Pietro (2016, p. 89) understands that:

> It is often said that regulatory agencies enjoy a certain margin of independence in relation to the three branches of government: (a) in relation to the Legislative Branch, because they have a normative function, which justifies the name regulatory body or regulatory agency; (b) in relation to the Executive Branch, because the rules and decisions cannot be changed or reviewed by authorities outside the agency itself; (c) in relation to the Judiciary Branch, because they have a quasi-judicial function in the sense that they resolve, within the scope of the activities controlled by the agency, disputes between the various delegates who perform public service through concession, permission or authorization and between these and the users of the respective services. (DI PIETRO, 2016, p. 89)

However, these different "configurations" do not keep agencies away from the Brazilian Constitutional Regime, on the contrary, they should be in harmony with the Three Powers, since agencies are controlled by them, as well as by the Federal Audit Court.

The regulatory agencies, in relation to the segment in which they operate, are endowed with regulatory, supervisory, sanctioning and conflict mediation powers. Besides these powers, common to all regulatory agencies, others may be conferred by law for the benefit of the exercise of their functions. This is the case of the power to declare the public utility of certain goods for the implementation of electric power facilities, and the power to grant the operation of public services or the use of public goods.

The Magna Carta of 1988, provides in its Article 5, II, that "no one is obliged to do or not to do something except by virtue of law"; and further in Article 84, IV, informs that: "It is privately up to the President of the Republic to sanction, promulgate and make the laws public, as well as to issue decrees and regulations for their faithful execution" (BRASIL, 1988). At this point, doubts and criticisms arise about the legality of the resolutions issued by Regulatory Agencies.

The Administration is obliged to exercise the power conferred on it by law, within the limits of the law. There is no discretionary power, since without the exercise of power, either the administrative act is not perfected, or it is perfected in a flawed manner, or, even if not flawed, it does not reach the expected public purpose. The powers granted to Regulatory Agencies are fundamental to the performance of their activities. That is why the laws that establish regula-

tory agencies grant them the power to issue normative acts. Much has been debated about the nature of the normative acts issued by these agencies, and there are several positions. For the purposes of this study, some of them were examined.

Based on the Theory of Implicit Powers4, Aragão (2002) concludes that it is possible for agencies that are part of the Executive Branch to issue autonomous regulations5. The hypothesis does not violate article 84, item IV, of the Constitution, because regulatory authority is not exclusive to the Chief Executive Branch, and is often granted by law to other administrative bodies. The regulatory agencies, thus, exercise regulatory power with the purpose of concretely translating the concepts, the purposes and the abstract parameters contained in the law. Justem Filho (2002) understands that the abstract normative aptitude derives from the regulatory power held by the Chief Executive. The regulatory function belongs to the State, which exercises it through its non-personalized agencies (direct administration) or creates autonomous entities for this purpose (indirect administration).

In this second hypothesis, the regulatory function, with the inherent duties-powers, will be transferred to the customized entity. By virtue of the delegation operated, the agency may issue regulatory decrees that aim to facilitate the execution of the law.

For Di Pietro (2016), the generic and abstract rules issued by regulatory agencies expressly derive from the law. They do not constitute manifestation of regulatory power because such power was granted by the Constitution, privately, to the Chief Executive. Its delegation, in the hypotheses in which it is admitted, requires a manifestation of will from the holder of the competence, which, in the hypothesis examined, is not the legislator. The existence of constitutional support for autonomous regulation is ruled out, so that the agencies cannot issue norms in relation to subjects that are not covered by law. In other words, they cannot innovate in the legal field without a provision in the law.

Furtado (2007) sees in the regulatory power of agencies the exercise of administrative discretion. The regulatory power is exclusive to the Chief Executive, and, once exercised, is mandatory to all Administration. As a corollary, no agency, even if independent, can issue rules that overlap with the regulating decree. However, the law and the regulation do not always provide the best solution for the specific case. Therefore, the normative power of the independent regulatory agency arises, to use its technical knowledge to adopt the most adequate solution.

Starting from the distinction between regulatory function and regulating function, he affirms that the normative power of the agency is not to be confused with the regulatory power of the Chief Executive Officer. The regulatory function is eminently political, involving the interpretation of the law and the creation of mechanisms for its execution, which includes the elucidation of terms and concepts, and the establishment of procedures and routines. The regulating function, on the other hand, eminently administrative, aims to discipline a particular economic segment in order to ensure the proper functioning of the market (Guerra, 2012).

The regulatory function is exhausted in the issuance of the normative act that complements the law. The regulating function has in the issuance of a normative act the partial performance of its attributions. In this sense, the normative power of the regulating agency is merely instrumental, while the regulatory power is the exercise of constitutional competence and autonomous emanation of political power. Thus, the thesis of delegation of powers is ruled out.

Despite the various positions, a majority opinion has not yet been formed on the subject, in this sense, the courts that have analyzed these cases have considered the normative action of the agencies to be legitimate. What is understood through the constitutional text and specific legislation of the Regulatory Agencies is that the normative acts issued by them have a secondary nature, since they are exercised through existing laws.

However, an observation should be made regarding the subservience to the regulating decree. The exercise of normative activity, whether for the production of primary or secondary norms, is not a simple task. It requires reflection, debate, consideration of consequences, and sometimes the availability of resources. When dealing with a law, the debate takes place in the parliamentary arena; when dealing with an interna corporis act (such as internal regulations, legislative decrees, etc.), the discussion takes place among peers; and when dealing with an administrative normative act, the hearing of the technical areas involved is necessary. Normative activity cannot be rushed, under penalty of causing untold harm.

As previously stated, the regulatory agencies are established by law, and it is according to these that the greater or lesser amplitude of power conferred to them is given. The regulatory power is common to all agencies, and it is from this that the name "Regulatory Agencies" appears. They are granted the power to regulate through general and abstract infralegal normative acts, which may limit rights and impose obligations related to the regulated activity. Mendes (2000) explains that:

> Possessing normative power, then, we will consider the entity as a regulatory agency. This will be, therefore, not the entity that simply exercises regulation in any of the forms, but, above all, the one that has competence to produce general and abstract rules that directly interfere in the sphere of private law. (MENDES, 2000, p. 97).

We conclude that the normative power is inherent to the Agencies' activities and, as long as these regulations are technical in nature and do not contradict rights and guarantees of constitutional nature, they would not suffer from illegality. Corroborating our understanding, Motta (2000) teaches us that:

> It would then be up to the regulatory agencies to issue administrative acts on strictly technical matters, without innovating the legal system. The standards would then be outlined in the laws. The laws creating the regulatory agencies establish the general bazilaments of regulation in telecommunications, for example, and it would be up to the regulatory agency, in the exercise of its normative function, to particularize the rule, providing the details for its implementation, preferably in technical matters. (MOTTA, 2000, p. 46)

In Brazil, as time went by, the figure of the Regulatory Agencies became more and more present and comprehensive due to the changes in the organization of the administrative structure of the State itself. There is an increasing number of public services that are granted or delegated to the private sector, leading to a need for greater supervision of services by the Administration. Furthermore, the political moment that the country is going through "pressures" our authorities to take attitudes that allow the public machine to work more efficiently, and it is in this scenario that the Regulatory Agencies have been gaining more space. In this paper we will study resolutions issued by two Brazilian Regulatory Agencies linked to different Branches of Power, in order to verify whether they preserve the principles by which the agencies were created or whether they are going beyond the power they hold and for what reasons.

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3.1 NATIONAL COUNCIL OF JUSTICE: BEYOND NORMATIVE POWER?

In the mid 90's Brazil was marked by a dissatisfaction of the population in relation to the Judiciary, and the need for an external control of its activity. As a result, Constitutional Amendment No. 45, known as the "Judiciary Reform", arose, which established the National Council of Justice (CNJ), an administrative body with the function of external control of the activities of the Brazilian Judiciary, and which became an administrative arm of internal control of the STF over the entire judiciary.

The structure and competencies of the CNJ are described in article 103-b of the Federal Constitution, and the competencies are specifically described, in clauses I to VII, of §4 of that article as follows:

> I watch over the autonomy of the Judiciary and the compliance with the Statute of the Judiciary, and may issue regulatory acts, within the scope of its competence, or recommend measures;
>
> II zeal for the observance of art. 37 and examine, ex officio or upon provocation, the legality of administrative acts practiced by members or agencies of the Judiciary, being able to deconstitute them, review them, or set a deadline for the adoption of measures required for the exact observance of the law, without prejudice to the competence of the Federal Audit Court;
>
> III to receive and hear complaints against members or agencies of the Judiciary, including its auxiliary services, notary and registry services rendering agencies that operate by delegation of the public power or are officialized, without prejudice to the disciplinary and correctional competence of the courts, being able to evoke disciplinary proceedings in progress and to determine removal, availability, or retirement with allowances or provisions proportional to the time of service and to apply other administrative sanctions, ensuring ample defense;
>
> IV to represent the Public Prosecution Service, in the case of crime against the public administration or abuse of authority;
>
> V to review, ex officio or upon provocation, the disciplinary proceedings of judges and court members tried less than a year ago;
>
> VI to elaborate every six months a statistical report on cases and sentences rendered, per unit of the Federation, in the different organs of the Judiciary;
>
> VII prepare an annual report, proposing the measures it deems necessary, on the situation of the Judiciary in the country and the Council's activities, which must be part of a message from the President of the Supreme Court to be sent to the National Congress at the opening of the legislative session (BRASIL, 1988, Art. 103-b, §4, I - VII).

Through the understanding of the attributions given to the CNJ by the constitution, it is understood that the CNJ was instituted with the purpose of exercising an administrative control of the Judiciary, due to flaws that it had been pointing out, sometimes failing to effectively comply with constitutional principles. Hodiernamente arises many criticisms in the performance of the Council, because it is understood that sometimes it goes beyond its powers, usurping typical functions of the legislative and even of the judiciary itself.

On October 18, 2005, Resolution no. 07 was issued by the CNJ, which, according to its terms of reference: “Disciplines the exercise of positions, jobs and functions by relatives, spouses and companions of judges and public servants in management and advisory positions in the organs of the Judiciary and makes other provisions” (NATIONAL COUNCIL OF JUSTICE, 2005). As a way to implement the principles described in Article 37 of the Federal Constitution, among them impersonality, efficiency, administrative morality, among others.

There were and still are many controversies regarding the aforementioned resolution, because the CNJ was established as an Administrative body, being a judicial body, but not a jurisdictional one. According to Sampaio (2007, p. 35)

> The National Council of Justice is an administrative-constitutional body of the Judicial Power of the Federative Republic of Brazil with semi-autonomous status or relative autonomy. The constitutional stature derives from its presence in the text of the Constitution. The administrative nature is given by the list of attributions provided in the constitutional article 103-B, § 4, which escape the framework, obviously, legislative, since it cannot innovate the legal order as author of normative act, general and abstract, and, by submitting to judicial control, even if by the STF, escapes the jurisdictional feature (SAMPAIO, 2007, p. 37).

The Internal Rules of the CNJ in article 102, informs that: “The Plenary may, by absolute majority, issue normative acts, through Resolutions, Instructions or **Administrative Statements**, and also Recommendations.” [emphasis added] (National Council of Justice, 2009). Now the internal regulation itself tells us that the Normative Acts issued by the Council should be only of administrative nature, thus Resolution No. 07 of 2005, would be contrary to the Federal Constitution, given its normative character.

As a consequence of the discussion about the constitutionality or otherwise of Resolution no. 7 of 2005, a Constitutionality Action no. 12 (ADC 12 DF) was proposed, in whose judgment the STF upheld its validity, by majority vote. Reporting Justice Carlos Ayres Britto in his vote emphasizes that: “the CNJ did not invade the area reserved to the Legislative Branch, but limited itself to exercising the constitutional powers that were reserved to it” (STF, 2009), concluding that the resolution affects the provisions of article 103-b of the Federal Constitution, and is therefore constitutional.

The dissenting vote was cast by Justice Marco Aurélio, who made some important observations that were apparently ignored by his colleagues. According to him: “The CNJ, when issuing the Resolution, did so totally outside the powers provided for in the Federal Constitution, and I do not see the possibility of granting an injunction that ends up empowering the Resolution of the Council itself”, stressing that the Council has an administrative nature and not a jurisdictional one (STF, 2009).

It is understood that the Resolution issued by the National Council of Justice was intended to apply the constitutional principles, reduce problems related to corruption and consequently improve the service provided by the Judiciary. As previously stated, the Regulatory Agencies, in this case the CNJ, have an administrative nature and are not empowered to issue resolutions with normative force beyond their jurisdiction, emphasizing the exercise of the atypical function of the Powers.

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3.2 NATIONAL HEALTH SURVEILLANCE AGENCY: PUBLIC HEALTH PROTECTION.

During the Middle Ages there was an increase in the concentration of the population in the cities, without the cities offering adequate hygiene, housing, and food conditions to meet this growing demand. Given this situation, in which the basic conditions of the population were not met, there was a proliferation of diseases. As time went by, it became clear that these diseases were mostly caused by contaminated food and water.

From this observation, an inspection started in the markets, warehouses and ships that transported food. During the Second World War, with all the bacteriological discoveries, this type of inspection was articulated in order to protect the health of the population. Brazil in the 80s already had VISA - Sanitary Surveillance - and due to popular participation, soon the National Agency for Sanitary Surveillance (ANVISA) was created (PORTAL EDUCAÇÃO - Education Portal, 2017).

ANVISA was established by Law 9.782 of January 26, 1999, having the legal nature of an Autarchy under a Special Regime, and, as stated in the sole paragraph of Article 3 of that Law: “is a regulatory agency characterized by administrative independence, stability of its leaders during the period of their mandate and financial autonomy, and is linked to the Ministry of Health” (BRAZIL, 1999). As previously mentioned, the inspection of products arose as a result of human need, and it was through the improvement of this inspection that the Regulatory Agency emerged in order to improve the quality of life and protect the health of the population, as follows:

> Art. 6 The Agency will have the institutional purpose of promoting the protection of the population’s health, through the sanitary control of the production and marketing of products and services subject to sanitary surveillance, including the environments, processes, inputs and technologies related to them, as well as the control of ports, airports and borders (BRASIL, 1999).

ANVISA’s activities include health regulation and economic regulation of the market. The competencies of this regulatory agency are mainly listed in Articles 7 and 8, and their respective paragraphs and sections of the law that created it:

> Art. 7 The Agency is responsible for the implementation and execution of the provisions in items II to VII of art. 2 of this Law, and must:
>
> ...
>
> XV - to prohibit the manufacture, importation, storage, distribution, and commercialization of products and inputs, in case of violation of the pertinent legislation or imminent risk to health;
>
> ...
>
> Art. 8 It is the Agency’s responsibility, in compliance with the legislation in effect, **to regulate, control, and supervise products and services that involve risk to public health. (our emphasis)**
>
> **...**
>
> **X - cigarettes, cigarillos, cigars and any other smoking product, whether or not derived from tobacco** (emphasis added), (BRASIL, 1999).

As already discussed, the Regulatory Agencies have the role of inspecting products and public services. In the case of ANVISA, these services and products are closely related to the quality of life and health of the population, being a serious matter of national and international interest, so much so that a specialized agency was created to regulate and supervise the quality of services and products related to sanitary surveillance. This regulation and supervision occurs mainly through the Resolutions of the Collegiate Directorate (RDCs), as follows:

> Art. 15 - The Collegiate Directorate is responsible for
>
> ...
>
> III - issue norms on matters within the Agency's competence, which must be accompanied by technical justifications and, whenever possible, by studies of economic and technical impact on the regulated sector and impact on public health, this requirement being waived in cases of serious risk to public health (BRASIL, 1999).

On March 15, 2012, ANVISA published the RDC No. 14, which provides for maximum limits of tar, nicotine and carbon monoxide in cigarettes and the restriction on the use of additives in tobacco products, and makes other provisions. This resolution prohibited the use of most additives in all tobacco products, with the intention of making them less attractive for consumption, since the additives would have the role of disguising the bad taste of nicotine and reduce the smoke coming from the cigarettes, therefore the use of tobacco products and the incidence of new smokers would decrease. The resolution finally granted a period of 18 months for manufacturers and importers of tobacco products to comply with it.

There was a lot of commotion at the time of the publication of the resolution cited above, especially in the industry. The Interstate Tobacco Industry Union (SINDITABACO, in the Portuguese acronym), filed a lawsuit requesting the suspension of the effects of some articles of the RDC-ANVISA n° 14/2012, because, according to it, there was no formal law in Brazil dealing with the use of ingredients in tobacco products, and that only a formal law could promote the ban intended by the regulatory agency. In the absence of a law, Anvisa could not create new restrictions or obligations.

The lawsuit was filed under No. 0002696-87.2013.4.01.0000 in the Federal Judiciary Section of Bahia, had a favorable decision to SINDITABACO in the first instance, but in the second instance the Federal Regional Court of the 1st Region in a decision issued on 26/12/2013, considered the RDC No. 14/2012 legal, emphasizing the lethality of cigarette consumption (TRF1, 2013).

On the other hand, the National Confederation of Industry (CNI), filed a Direct Action of Unconstitutionality (ADI no. 4874) with a request for an injunction to suspend the legal effectiveness of RDC No. 14/2012, arguing that ANVISA illegitimately "extended" its competence; such resolution violated the constitutional principles of isonomy, legal certainty, consumer freedom, among others, requiring finally that it was: "given an interpretation in conformity with the Constitution to the final part of Article 7, item XV, of Law 9.782/99, without reduction of text, to establish that the Agency may only ban products or inputs in the exercise of its strictly executive police powers, of a precautionary and exceptional nature" (STF, 2012).

The Direct Unconstitutionality Action n° 4874 was reported by Minister Rosa Weber, and was dismissed by the Full Court on 12/01/2018, even revoking the Injunction requested by CNI, which had been granted, as follows:

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> ... Taking into account the aspects invoked by the plaintiff, as well as the requests made by the amici curiae National Federation of Workers in the Tobacco and Allied Industries - FENTIFUMO and the Tobacco Industry Union of the State of Bahia/BA (petitions Nos. 45.695/2013 and 45.912/2013, also received on September 13, 2013), I hereby grant, based on the general power of precaution (arts. 798 of the CPC and 21, IV and V, of the RISTF) and in order to ensure isonomic treatment to all those potentially affected by the contested normative acts, the requested preliminary injunction to suspend the effectiveness of arts. 6th, 7th and 9th of the Collegiate Directorate Resolution (RDC) No. 14/2012 of the National Health Surveillance Agency until its consideration by the Plenary of this Court.

According to the WHO, cigarettes kill more than 5 million people annually in the world, both smokers and passive smokers. The number is alarming and we emphasize that ANVISA as a regulatory agency linked to the Ministry of Health should take action, as in fact it has tried to do; the problem lies in the medium used.

According to article 15, III, of Law 9287 of 1999, the resolutions issued by ANVISA must be accompanied by technical justifications and, whenever possible, by economic impact studies. In the case of RDC No. 14/2012, at the time of its publication, no economic impact studies had been conducted. Secondly, CNI itself released data on the economic impacts of the RDC: The measures adopted in the Resolution would reach approximately 98% of the national production of tobacco products, with systemic effects on the entire production chain involving various sectors from farmers to traders (ADI No. 4874-DF), directly affecting unemployment rates and the country's economy.

The injunction granted by Justice Rosa Weber is based primarily on studies of economic impacts, leaving the intrinsically constitutional issues to be discussed at trial.

The subject dealt with in the RDC is very controversial and it is understood that it involves other aspects beyond the simple prohibition of the use of additives, the period allowed for companies to adapt to the measures imposed was reduced, but ANVISA is doing its role as a regulatory agency, and it was in this sense that the full body of the STF judged the action.

The fact is that the tobacco market is the driving force behind the development of hundreds of municipalities, generating US$ 3.26 billion in exports, R$ 10.5 billion in taxes, and R$ 4.6 billion in revenues for the 165 thousand integrated producers in southern Brazil (ABRASEL-SP). In this case the private interests of industrialists who profit from the market override the questions about the constitutional competence dedicated to ANVISA.

The aforementioned Law 9782/99 in its article 8 entrusts ANVISA with the duty to regulate, control, and supervise products and services that involve risk to public health, provided that the legislation in force is respected. Now, there is no legislation in force that deals with the use of additives in smokers. In this sense, the decision of the STF was consistent with the actions of the executive branch in the fight against smoking and in raising the population's awareness about the harmful effects of smoking.

3.3 IBAMA AND CONAMA: INSUFFICIENT RESOURCES FOR EFFECTIVE ENVIRONMENTAL PROTECTION

The Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA, Portuguese acronym) was created by Law No. 7735 on February 22, 1989, with the legal nature of Federal Autarchy linked to the Ministry of Environment with the following purposes:

> I - exercise the environmental police power;
>
> II - to carry out actions of the national environmental policies, referring to the federal attributions, related to environmental licensing, environmental quality control, natural resources use authorization, and environmental supervision, monitoring and control, observing the guidelines issued by the Ministry of the Environment; and
>
> III - execute the supplementary actions of the Union's competence, according to the environmental legislation in effect (BRAZIL, 1989).

The National Environmental Council (CONAMA, Portuguese acronym) is the advisory and deliberative organ of the National Environmental System, established by Law 6.938/81, which was partially repealed by the Law that established IBAMA:

> I - to establish, upon IBAMA's proposal, norms and criteria for the licensing of effectively or potentially polluting activities, to be granted by the States and supervised by IBAMA;
>
> II - to determine, when deemed necessary, the performance of studies of alternatives and of the possible environmental consequences of public or private projects, requesting from federal, state and municipal agencies, as well as from private entities, the indispensable information for the appreciation of environmental impact studies, and the respective reports, in the case of works or activities of significant environmental degradation, especially in areas considered to be national heritage
>
> ...
>
> V - determine, upon IBAMA's representation, the loss or restriction of tax benefits granted by the Government, in general or conditionally, and the loss or suspension of participation in financing lines in official credit establishments;
>
> VI - to establish, privately, national norms and standards for the control of pollution by automotive vehicles, aircraft, and vessels, after hearing the competent Ministries;
>
> VII - to establish norms, criteria and standards related to the control and maintenance of the quality of the environment with a view to the rational use of environmental resources, especially water resources (BRASIL, 1991).

Both CONAMA and IBAMA are part of the National Environmental System (SISNAMA, Portuguese acronym) and are not subordinated to each other. The National Environmental Policy is constituted by CONAMA, while IBAMA is mainly responsible for the execution of the National Environmental Policy, exercising control and inspection over the use of natural resources.

As with fundamental rights in general, one can also identify with the environment a historical evolution that begins in antiquity and consolidates - albeit somewhat belatedly - with the formation of national states and that, in a more current phase, overflows national boundaries

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and becomes a concern of all mankind, embodied in international declarations and treaties (MARUM, 2002, p.128-129).

The right to an ecologically balanced environment is a third generation fundamental right. According to Bobbio (1992, p. 23), "the most important of the third generation rights is the one claimed by the ecological movements: the right to live in an unpolluted environment". The Brazilian Federal Constitution consecrated the precepts related to the right to the Environment in its chapter VI:

> Art. 225. Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, imposing on the public authorities and the community the duty to defend and preserve it for present and future generations (BRASIL, 1988).

Today there is a worldwide concern in relation to the possible scarcity of natural resources, there are serious problems with lack of drinking water in many communities on the planet and risks of extinction of species of fauna and flora worldwide. For a long time there was the myth that everything in nature was renewable, infinite, and even today there is a certain resistance, especially from large companies that carry out activities that exploit the environment, such as construction companies and the livestock industry, to realize the importance of the conscious use of natural resources.

On September 06, 2002, CNI filed before the Supreme Court a Direct Unconstitutionality Action (ADI no. 2714) with a request for a preliminary injunction, of Resolution No. 03 of 1988 of CONAMA and IBAMA's Normative Instruction No. 19 of 2001, which dealt with the creation and performance criteria of the position of volunteer environmental agent:

> The NATIONAL COUNCIL OF THE ENVIRONMENT - CONAMA, in the use of the attributions conferred upon it by Article 48, of Decree 88.351, of June 19, 1983, RESOLVES:
>
> Art. 1 - Civil entities with environmental purposes may participate in the surveillance of public or private Ecological Reserves, Environmental Protection Areas, Ecological Stations, Areas of Relevant Ecological Interest, other Conservation Units, and other protected areas.
>
> Art. 2 - The participation in the inspection, foreseen in this Resolution will be made through the constitution of Environmental Task Forces, integrated by at least three people accredited by the competent Environmental Agency (CONAMA, 1988).
>
> PRESIDENT OF THE BRAZILIAN INSTITUTE OF THE ENVIRONMENT AND NATURAL RESOURCES, in the use of his powers granted to him by Article 24, ANNEX I, of Decree No. 3.833, of June 5, 2001, published in the Official Gazette of the Union of the following day, in view of CONAMA Resolution No. 003, of March 16, 1988.
>
> ...
>
> Considering the need to establish rules of procedures for inspection actions, as well as for the processing and control of the Notices of Incrimination issued by the participants of the ENVIRONMENTAL MUTIRONS, resolves:
>
> Art. 1. The participants of ENVIRONMENTAL MUITIONS, indicated by environmentalist civil entities or similar, duly trained and accredited by the General Coordination of Environmental Inspection of IBAMA, are now called Voluntary Environmental Agents.

> Sole Paragraph. For the accreditation referred to in the head of this article, the Voluntary Environmental Agent must sign a Declaration with IBAMA (Attachment I), which will also be signed by the legal representative of the entity responsible for the indication.
>
> ...
>
> Art. 3. The Volunteer Environmental Agents are responsible for
>
> I - always act through ENVIRONMENTAL MUITIONS, as foreseen in article 2, of CONAMA Resolution # 003, of 1988;
>
> II - draw up detailed Notices of Incident (ANNEX II) duly signed by those present, whenever a violation of the environmental legislation is identified;
>
> III - retain, whenever possible, the instruments used in the commission of the criminal infraction and/or the products resulting from it, and immediately forward them to the nearest police authority (IBAMA, 2001).

The CNI argued that although the volunteer environmental agents were participants in environmental task forces appointed by civil environmental organizations and trained by IBAMA, they had no connection with the government, and IBAMA's granting of police power to these agents violated article 174 of the Federal Constitution (STF, 2002).

The STF, in turn, considered that the CNI did not meet the requirements to file this ADI. The majority of the justices considered that the questioned norms did not have a constitutional nature and could not be appreciated by the STF. They also concluded that there was a "lack of thematic pertinence" (STF, 2003).

Now, the Industry is the sector most inspected by IBAMA AND CONAMA, because their activities, as said before, are closely linked to the exploitation of natural resources. It is clear that the CNI is trying at all costs to protect the private interests of its confederates and, in this specific case, has attempted to use Constitutional Law as a weapon in this fight, to reduce the scope of services performed by IBAMA, services which, according to the data presented above, are already in a delicate situation due to the lack of employees and find in partnerships with other voluntary agencies and agents a way to fulfill their role more effectively. The STF, on the other hand, has placed the collective interest above the private interest, deciding in a wise manner, applying the constitutional precepts.

4. FINAL CONSIDERATIONS

Brazilian society has been going through a "revolution", on one hand the discredited political field of the country, which privileges private interests to the detriment of the collective interest, and on the other hand a judiciary that tries at all costs to solve problems, going beyond its jurisdiction. We exemplify this in the present work: The CNJ, in order to remedy a moral issue within the judiciary, went beyond its powers and even obtained the approval of the STF, exactly because we are living a moment of rescue of morality. From another perspective, we have the CNI, which tries at all costs to protect the economic interests of big businessmen, and most of the time it succeeds, even without sufficient legal backing, as we have seen in the cases of the ANVISA and IBAMA resolutions.

We can see that sometimes judicial decisions and administrative resolutions are biased, serving as political and economic pawns, not effectively impartial. Harming the population that expects a social return, that needs better living conditions as a whole, a better education, a better health, as the old song "We don't want only food / We want food, fun, and art" goes. The Federal Constitution is the guardian of the right of collective interests, where the principles that should govern this country are found, and the STF is the guardian of the constitution, it is not fair that those who should apply the FC suffer external influences to the point of inspiring decisions with particular grounds disguised as interpretation of the constitution.

Finally, we verify that the theme addressed is of utmost importance nowadays, where Constitutional Law is sometimes "taken by the tide". There are heated discussions and uncertainties about the correct application of the Law. We need to understand, discuss, debate about the theme. The Brazilian population needs issues of national interest to be treated with the seriousness and respect due by the State. We cannot accept that the 1988 Federal Constitution be used to favor certain groups to the detriment of the collective.

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