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THE MINERVA PROGRAM

*Control of the normative power of the regulatory agencies by the
Judicial Branch*

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1. INTRODUCTION

This research paper sets out to examine the control of the normative powers of regulatory agencies by the judicial branch. It will be studied in the light of the doctrine of scholars writing on the subject.

The introduction of regulatory agencies in Brazil was accompanied by many voicing enthusiasm about their ability to order the economy and shield it from political interference, but little has been said since then about the controls to be exercised over such entities, especially concerning their normative activity in consideration to Brazilian law.

Brazilian regulatory agencies have a wide range of powers, without there being organized control for auditing the exercise of such powers. The existing forms of control still appear to be attached to the direct spending of public resources, typical of the social State, without the notion of control having been updated since the advent of the regulatory State.

The normative powers of the regulatory agencies will be studied in the light of doctrine. The approach will begin with a brief discussion of the Brazilian doctrine with regard to the possibility of the regulatory agencies being restricted by the judicial branch.

Emphasis will be given to the judicial control of the normative acts of the agencies, by problematizing the instruments and the control parameters. The aim is to criticize the judicial control currently practiced in Brazil on normative regulatory activity, which is exclusively of a diffuse nature.

Finally, a comparison between United States and Brazil's judiciary control will be set up.

An appendix is provided in respect of my fellows back in Brazil working to defend ANEEL's (Brazilian Electricity Regulatory Agency) positions in the courts, showing how General Attorney works.

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2. THE STATE THROUGH HISTORY

a. Liberal state

The construction of the modern liberal state was set up from the necessity of the maintenance of the property and the freedom of each citizen against the absolute state. In liberal doctrine, individuals can make profit, and maximize it without the need for government intervention. Its purpose is to enable individuals to maximize their own gains in a free market that can benefit society, even if it is ambitious and has no benevolent intentions.

The liberal propaganda says the state is not responsible for any obligation into promoting the common wealth, which can only be reached when individuals are open and free to spend own energies to achieve them, without any obstruction from the government.

It is said very often that separation of three powers is the most important in the protection of freedom and property rights, this separation acts as a shield against the tyranny of the state.

The liberal freedom can be summarized as the idea of non-intervention, or the competition between buyers and sellers to channel the profit like a motivation for the individuals on both sides of the transaction such that improved products are produced and at lower costs.

On the other side, the opposite state, the absolute one, the political power is held by who rules the society and the individuals. And after, the economic power begins to control the political one, which is the great contradiction of the 21st century: the liberal-democracy.

Liberal democracy can be described as a form of government in which representative democracy operates under the principles of liberalism, protecting the rights of minorities and, especially, the individual. It is characterized by fair, free, and competitive elections between multiple distinct political parties, a separation of

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powers into different branches of government, the rule of law in everyday life as part of an open society, and the equal protection of human rights, civil rights, civil liberties, and political freedoms for all persons.

b. Social state

The social state is not that one prescribed by Karl Marx, but one standardized in 1930's in USA or in West Europe. It is a concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. This description serves as the goal of the welfare state.

The welfare state is a mitigation of the liberal ideas, maintaining the economic rights background, while including the state responsibility to keep everyone alive in its borders. The welfare state involves a transfer of funds from the state, to the services provided as well as directly to individuals. The welfare state is funded through redistributionist taxation and is often referred to as a type of mixed economy. Such taxation usually includes a larger income tax for people with higher incomes, called a progressive tax. This helps to reduce the income gap between the rich and poor people.

There is some evidence suggesting that taxes and transfers considerably reduce poverty in most countries, whose welfare states commonly constitute at least a fifth of the Gross Domestic Product - GDP. Most states have considerably lower poverty rates than they had before the implementation of welfare programs.

c. Regulatory state

Since the end of the 20th century the world has seen the renewal of liberal thoughts, especially in developing countries, by the ideas from the Washington Consensus.

This is a term designed to refer to specific economic policy prescriptions that are considered constituted in the "standard" reform package promoted for crisis-wracked developing countries by Washington, D.C. It was based on institutions such as the International Monetary Fund (IMF), World Bank, and the US Treasury Department.

The Consensus had set up these parameters to the developing countries:

- i. Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP;
- ii. Redirection of public spending toward broad-based provisions of key pro-growth and pro-poor services like primary education, primary health care and infrastructure investment;
- iii. Tax reform, broadening the tax base and adopting moderate marginal tax rates;
- iv. Interest rates that are market determined and positive (but moderate) in real terms;
- v. Competitive exchange rates;
- vi. Trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions; any trade protection to be provided by low and relatively uniform tariffs;
- vii. Liberalization of inward foreign direct investment;
- viii. **Privatization of state enterprises;**
- ix. Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions;
- x. Legal security for property rights.

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The term regulatory state refers to the expansion in the use of regulations, monitoring and enforcement techniques and institutions by the state. These changes in the regulatory state aim at positively effecting society. The expansion of the state nowadays is generally via regulation and less via taxing and spending. The notion of the regulatory state is increasingly more attractive for theoreticians of the state with the growth in the use and application of rule making, monitoring and enforcement strategies and with the parallel growth of civil-regulation and business-regulation. The co-expansion of state, civil and business regulation in the domestic and the transnational arenas suggests that the theories of regulatory governance and regulatory capitalism have been proven practically.

3. WHAT IS REGULATION?

As defined by Black's Law Dictionary: "*REGULATION. The act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept. Curless v. Watson, 180 Ind. 86, 102 N.E. 497, 499. Rule of order prescribed by superior or competent authority relating to action of those under its control. State v. Miller, 33 N.M 116, 263 P. 510, 513.*"¹

On the other hand, Susan E. Dudley and Jerry Brito define it as follows: "*Regulations, also called administrative laws or rules, are the primary vehicles by which the federal government implements laws and agency objectives. They are specific standards or instructions concerning what individuals, businesses, and other organizations can or cannot do.*"²

Regulation can be described as a rule of order having the force of law, prescribed by a superior or competent authority, relating to the actions of those under its control.

In United States, various federal government departments and agencies carry out the intent of legislation enacted by Congress that has given legal authorization for such regulatory action.

The bureaucracy performs a number of different government functions, including rule making. Its rules issued are called regulations and those regulated by the agency guide the activity of U.S. citizens, foreign nationals and the agencies' employees. Regulations also function to ensure uniform application of the law.

Administrative agencies began as part of the Executive Branch of government and were designed to carry out the law and the president's policies. Congress, however, retains primary control over the organization of the bureaucracy, including the power to create and eliminate agencies, and to confirm presidential nominations for staffing the agencies. Congress has also created administrative agencies that exist outside of the executive branch and are independent of presidential control.

¹ BLACK, Henry Campbell. Black's Law Ditionary. St. Paul: West Publishing CO, 1968.

² Susan E. Dudley & Jerry Brito, Regulation - A Primer. Mercatus Center, GW Regulators Studies Center. 2012.

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The judicial and legislative functions of administrative agencies are not exactly like those of the courts or of the legislature, but they are similar. Because regulations are not the work of the legislature, they do not have the effect of law in theory; but in practice, regulations can have an important effect in determining the outcome of cases involving regulatory activity. Much of the legislative power vested in administrative agencies comes from the fact that Congress can only go so far in enacting legislation or establishing guidelines for the agencies to follow. Language that is intrinsically vague and cannot speak for every factual situation to which it is applied, as well as political factors, necessitate that the agencies have much to interpret and decide in enforcing legislation.

It is for the most part common knowledge that administrative agencies and departments make regulations to provide clarity and guidance in their respective areas of the law.

Brazilian regulatory agencies are, in essence, equal to those from the United States. They aim to monitor the economic marketplace, as well as constitutional government services. As dictated by the Federal Constitution, regulation matters are left to specialized administrative entities independent of the government in office.

Their duty is to standardize, organize and overlook the provision by public and private economic agents of certain goods and services of keen public interest. In addition, they also set the rules of conduct between the Public Power, the service provider and the customers, as well as ensuring the quality of public privatized services.

To reiterate, from the regulatory point of view, agencies execute regulations intended by the government.

The regulatory agencies exist to keep the balance of the interests between diverse players, such as the government (which is sensitive to political demands), consumers (who always want lower tariffs combined with a better quality of service) and regulated companies (that need to ensure their return for the resources invested). Therefore to find the right balance, the agencies need to combine economic vision, technical expertise and political sensitivity - a jurisdiction that requires the existence of highly skilled professionals who are independent of groups' pressure.

4. ORIGIN OF REGULATORY AGENCIES IN BRAZIL

a. The Concession Process

Brazil's development model during recent decades required the state to undertake major infrastructure investments. However, the fiscal crisis of the 1980's highlighted the indispensable role of private capital in financing national development. The Law of Concessions (Law 8987/1995), which was complemented by Law 9074/1995, inaugurates a new form of partnership between the private sector and the Brazilian Government, giving greater dynamism to the National Plan of Privatization - PND.

Traditional privatization is signified by the sale of public assets. The Law of Concessions enables the State to offer and relinquish public services to the private sector, where the latter is better equipped to manage such responsibilities. This transfer allows the government to exercise more efficiency in its planning, coordinating, regulating and monitoring functions.

The Law of Concessions, which regulates implementation of article 175 of the Federal Constitution, establishes the general rules by which the government authorizes private entities to perform public services. The law requires that specific rules and regulations be set for each sector in which concessions will be granted through competitive bids or auctions, following procedures that will ensure the investor of the transparency and competitiveness of the process. Whoever offers the lowest price, and guarantees that the pre-established conditions of service will be met, wins the concession

The regulatory agencies were built to overlook public services provided by private entities that had received authorization to provide public services, controlling their quality.

Nowadays, there are ten regulatory agencies set by the federal government. All of them are special autarchies characterized by their administrative independence, financial autonomy, and the stability of their directors, and they are not hierarchically subordinated to any other governmental agencies, but linked to specific ministries. Its decisions can only be appealed in court. This appeals process is the focal point of this research paper.

b. The ten brazilian regulatory agencies

Brazilian Electricity Regulatory Agency (ANEEL)

ANEEL is the first Brazilian regulatory agency and it was founded at 1996 to provide favorable conditions for the electric power market to develop a balance between the providers of electricity and its consumers. Its role is to regulate and supervise generation, transmission, distribution and sales of electricity.

Brazilian Agency of Telecommunications (ANATEL)

ANATEL was created in 1997 by Law 9472/1997 to promote the development of telecommunications in Brazil. It has inherited the powers of granting, regulating and supervising telecommunications in Brazil as well as technical expertise and other material assets.

National Agency of Petroleum, Natural Gas and Biofuels (ANP).

ANP was set up in 1998 to regulate the oil and gas industries in Brazil. Its duty is to establish regulations and to supervise the oil market.

National Regulatory Agency for Private Health Insurance and Plans (ANS)

ANS is the Agency established by the Brazilian Government under the Ministry of Health that operates nationwide to regulate, standardize, control and inspect the private health insurance and health plans sector in Brazil.

Brazilian Health Surveillance Agency (ANVISA)

ANVISA was created by Law 9782/1999. It is ruled by a Collegiate Board of Directors composed of five members. Its primary goal is to protect and promote public health, by exercising health surveillance over products and services, including processes, ingredients and technologies that pose any health risks.

The agency is also responsible for health control in ports, airports and borders, as well as establishing relations with the Ministry of International Affairs and with foreign organisms and institutions to deal with international affairs regarding health surveillance.

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National Water Agency (ANA)

ANA is legally liable for implementing the National Water Resources Management System (SINGREH). It was created to ensure the sustainable use of all Brazilian rivers and lakes for the current and future generations.

Cinema National Agency (ANCINE)

ANCINE was established in 2001, is linked to the Ministry of Culture (MinC), and its purpose is to promote the production, distribution and exhibition of cinematographical works.

National Waterway Transportation Agency (ANTAQ)

ANTAQ was founded in 2001, is linked to the Ministry of Transportations. Its duties are to regulate and supervise the services of transportations by canals in Brazil.

National Terrestrial Transportation Agency (ANTT)

ANTT was created in 2001 and its responsibility is the concession process of highways and railways, and the private services of the transportation of passengers by highways and railways.

National Agency For Civil Aviation (ANAC)

ANAC is responsible for the regulation and the safety oversight of civil aviation. ANAC was established in March 2006.

5. NORMATIVE POWER OF REGULATORY AGENCIES

a. Delegation Doctrine in US

The Delegation doctrine is the principle limiting Congress's ability to transfer its legislative power to another governmental branch, especially the executive branch. This doctrine is based on the separation-of-powers concept. It says that the power to declare whether or not there shall be a law, to determine the general policy to be achieved by the law, and to fix the limits which the law shall operate. This requirement is vested by the constitution in the legislature and it shall not be transgressed. Therefore any statute conferring excessive legislative power is invalid because it is unconstitutional to delegate powers. Delegation is permitted only if Congress prescribes clear and adequate standards to guide an executive agency in making its policy.

All states whose constitutions contain a separation of powers doctrine have adopted some version of the delegation doctrine, which permits the legislature to delegate the administration of the law to non-legislative entities, such as administrative agencies. Thus, the delegation doctrine allows the legislature to focus on the fundamentals of a law, leaving the agencies to the task of filling in the gaps by promulgating rules to administer the law. However, if legislation does not provide adequate standards for the agency charged with the task of filling in the legislative gaps, courts can invalidate the legislation.

The U.S. Supreme Court has allowed some delegation of legislative power. In *Wayman v. Southard* (1825), Chief Justice John Marshall distinguished between "important subjects" and "mere details." He wrote that "a general provision may be made, and the power given to those who are to act under such general provision, to fill up the details."

In *Mistretta v. United States* (1989), the U.S. Supreme Court applied the "intelligible principle" test. The Court deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."

The ability to delegate legislative authority varies among the states. Researchers often divide the states into three general groups:

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- The "strict standards and safeguards" category. States in this category permit "delegation of legislative power only if the statute delegating the power provides definite standards or procedures" to which the recipient must adhere.
- The "loose standards and safeguards" category. States in this category view delegation as acceptable "if the delegating statute includes a general legislative statement of policy or a general rule to guide the recipient in exercising the delegated power."
- The "procedural safeguards" category. States in this group "find delegations of legislative power to be acceptable so long as recipients of the power have adequate procedural safeguards in place."

In the United States the creation of regulatory agencies was a response to the crisis of the liberal state in the 1930s, which led the government to intervene in the national economy, through the New Deal policy. The creation of these entities was based on their qualification and technical independence, which enabled more efficient decisions in the scientific field of expertise of each agency.

"Administrative agencies are authorities of the government, other than the executive, legislative, or judiciary branches, created for the purpose of administering particular legislation. (...) They may be created by legislative, or enabling, acts, by executive orders authorized by statutes, or by constitutional provisions."³

The administrative powers are assigned to agencies by the legislature, given that they may issue rules to sort the activities of individuals. The law that created each agency sets its procedural form of action, giving it quasi-legislative and quasi-judicial powers. Therefore, these typical activities include the three classic separate but equal powers (i.e. the legislative, executive and judicial).

In order to avoid excesses and economic harm to society, there is the Administrative Procedure Act, one procedural mechanism for control and homogenization of these agencies.

³ GRILLIOT, Harold J. Introduction to Law and the Legal System. Boston: Houghton Mifflin Company, 1983.

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In fact, in order for a U.S. agency to issue a rule or decision, it must demonstrate that such a ruling or decision is reasonable. It must justify them in terms of cost-effectiveness as well as relevant participation on all issues on the part of stakeholders, whether consumers or business owners.

b. Brazil's normative power

There is an extensive doctrinal discussion in Brazil about the extent of the legislative power from the 10 federal regulatory agencies, assigned to them by the federal legislature when editing the laws that created them. The focus of the debate is the legality of bias, and whether or not such normative power infringes on the constitutional principle of legality. There are two positions regarding this constitutional background:

- 1) Some authors argue that a regulatory agency can only act through its regulatory power provided to the President, the strict limits set out in art. 84, IV, of the Constitution of 1988 (issue regulations for the faithful execution of laws). Regulatory agencies are not allowed to innovate beyond the authorization given by the law that created them, nor are they allowed to directly contradict the law, impose restrictions on liberty, equality and property, or restrict civil liberties.
- 2) Others argue the need to promote the de-legalization of some matters, arguing that the principle of legality should adapt to the dynamics of the capitalist economy, giving greater freedom to the Executive to issue supplementary regulations to the law. The de-legalization can be practiced in two ways: first, an assignment to the Executive Branch in constitutional terms, the power to discipline a particular set of materials without the interference of the Legislature (as it is in France). The second would be the legislative delegation competence to develop the generic parameters already established (as it is in the United States).

Brazil adopted the U.S. model referenced above, though without developing the participation procedures that grant legitimacy to the standards of agencies there. Though Brazil legally

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adopted the model, ANEEL is the only agency to have established it in practice in terms of ordinary activity hearings and public consultations, in addition to the public meetings of the Board of Directors.

Regardless of the debate about the legitimacy and legality of the normative power of Brazilian regulatory agencies, the state should ensure the necessary and appropriate instruments for the performance of its regulatory duties. There must be limits to the execution of its delegated powers, and secondarily, its stakeholders.

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6. SEPARATION OF POWERS – THE HISTORY OF JUDICIAL BRANCH

a. History

The judicial branch is one of the powers originally designed by classical and medieval thinkers such as Aristotle and Marsiglio of Padua. Montesquieu formulated his own doctrine of the judicial branch in the mid-18th century.

Montesquieu's theory of the separation of powers is related to the theory of natural law, and has played a progressive historical role in the struggle of the bourgeoisie against absolutism and the arbitrary rule of kings. Montesquieu described the separation of political power among a legislature, an executive, and a judiciary. Montesquieu's approach was to present and defend a form of government which was not excessively centralized in all its powers to a single monarch or similar ruler.

The doctrine was used in a number of countries to justify a compromise between the bourgeoisie, who had won control over the legislature and judiciary, and the feudal-monarchical circles that had retained executive power

With the establishment of the capitalist system, the principle of the separation of powers was proclaimed one of the fundamental principles of bourgeoisie constitutionalism. This principle was first reflected in the constitutional documents of the French Revolution. The principle of the separation of powers was institutionalized in the U.S. Constitution of 1787 (still in effect), which established a strong presidency largely independent of Congress.

Presently, the principle is not consistently followed in the constitutional practices of the capitalist countries. For example, the system of checks and balances, widely used in the "presidential republics," is a significant divergence from the theory. Under this system the legislature is dependent on the executive branch because of the right of the head of state to veto legislative enactments. Also, the legislator is further weakened through judicial review.

Montesquieu defended a real independence of the judiciary because of its great importance supervising other powers, preventing one branch from becoming supreme.

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"One of the first things anyone learns in an American government course is that two concepts undergird our constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the law, the executive implements those laws, and the judiciary interprets them."⁴

b. United States Judicial Branch

The people elect the Executive and Legislative branches, whereas the members of the Judicial Branch are appointed by the President and confirmed by the Senate.

The federal judicial system is built on a foundation created by two major statements of the 1780s: Article III of the United States Constitution and the Judiciary Act of 1789.

Article III, which establishes the Judicial Branch, leaves Congress significant discretion to determine the shape and structure of the federal judiciary. Even the number of Supreme Court Justices is left to Congress — at times there have been as few as six, while the current number (nine, with one Chief Justice and eight Associate Justices) has only been in place since 1869. The Constitution also grants Congress the power to establish courts inferior to the Supreme Court, and to that end, Congress has established the United States district courts, which try most federal cases, and 13 United States courts of appeals, which review appealed district court cases.

Federal judges can only be removed through impeachment by the House of Representatives and conviction in the Senate. Judges and justices serve no fixed term — they serve until their death, retirement, or conviction by the Senate. By design, this condition insulates them from the temporary passions of the public, and allows them to apply the law with only justice in mind, and not electoral or political concerns.

⁴ Lee Epstein & Thomas G Walker. Constitutional Law for a Changing America. CQ Press, 2001.

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Generally, Congress determines the jurisdiction of the federal courts. In some cases, however — such as in the example of a dispute between two or more U.S. states — the Constitution grants the Supreme Court original jurisdiction, an authority that cannot be stripped by Congress.

The courts only try actual cases and controversies — a party must show that it has been harmed in order to bring a suit in court. This requirement means that the courts do not issue advisory opinions on the constitutionality of laws or the legality of actions if the ruling would have no practical effect. Cases brought before the judiciary typically proceed from the district court to the appellate court and may even end at the Supreme Court, although the Supreme Court hears comparatively few cases each year.

Federal courts enjoy the sole power to interpret the law, determine the constitutionality of the law, and apply it to individual cases. The courts, like Congress, can compel the production of evidence and testimony through the use of a subpoena. The inferior courts are constrained by the decisions of the Supreme Court — once the Supreme Court interprets a law, inferior courts must apply the Supreme Court's interpretation to the facts of a particular case.

c. The Brazilian Judiciary

The Judiciary of Brazil is the Judiciary branch of the Brazilian government whose structure and division of jurisdiction is defined in the Brazilian Constitution.

The system is divided primarily in the ordinary courts and the specialized courts. The specialized courts are kept entirely by the Federal Government and are divided into three categories: the Military courts, the Labor courts and the Electoral courts.

The ordinary courts are divided between the Federal and State judiciaries. The Judiciary of the Brazilian Federal District has the same subject-matter jurisdiction of the ordinary state level judiciary over that special territory, but is kept and organized by the Federal Government.

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Despite the Federal Constitution establishes that the Brazil's federation is formed by the indissoluble union of states and municipalities and the Federal District, and after itself had raise the status of the Federal District, it is clear the municipalities do not hold same status that the other two entities forming the Union: they do not hold any judicial power.

The judiciary system is still composed by two special central Courts that do not fit any of the mentioned divisions of the Judiciary: The Supreme Federal Court and the Superior Court of Justice. Both have headquarters in Brasília.

The Supreme Federal Court (STF) is the highest Brazilian Judiciary. Its main responsibility is to serve as the ultimate guardian of the Brazilian Constitution, with the roles of a constitutional court.

The Supreme court holds the power to analyze the constitutionality of a federal law, state law or statute, and can make the law or statute in question invalid through the Direct Action of Unconstitutionality.

Each state territory is divided into judicial districts, which are composed of one or more municipalities. Each judicial district has at least one trial court, that functions as the first level court for most cases. In large judicial districts, with two or more trial courts, there are usually specializations of the first level courts with regard to the case, such as crime and family litigation. Judgments from the trial courts can be the subject of judicial review following appeals to the Courts of Justice.

All judges in the judicial branch of Brazil are protected by the tenure of office warranty. They cannot be removed from his/her position and his/her wages cannot be reduced during his/her time in office.

7. JUDICIAL CONTROL

Due to the fundamental right of access to the courts (Article 5 , XXXV of the Constitution: The law does not exclude from review by the Judiciary injury or threat to a right). In Brazil, any decision of public administration can be subject to judicial review. Although the literature defends the existence of limits to judicial review, such as the inability of the judiciary to examine the desirability and appropriateness of discretionary administrative decision or technical merit of the decision, there are no legal restrictions to petition for unlawful acts. In fact, the state can even be brought to the court. The limits of judicial review, concerning the scope for policy making and the exercise of a strictly technical expertise, has been defined by the judiciary itself, although there have been oscillations in case law, subsequently, it is open to differing interpretations.

The competence to adjudicate a lawsuit challenging a regulatory agency decision is held by the federal court judges. The level of court is determined by the status of the defendant. (art. 109 , I of Federal Constitution).

This matter will be examined on appeal by the Federal Court in the region that it has authority over (art. 108, II of Federal Constitution) and can still be taken to the Superior Court of Justice and/or the Supreme Court if applicable for Special Review.

a. Diffused Control

Diffused control is also known by other names: open control, incidental, *incidenter tantum*, or way of exception. Regardless of the *nomen juris*, the diffuse control operates on the case, which means that any individual who claims an action against them as unconstitutional. Their case can be brought to the first level of the courts, to any judge (depending, of course, the rules of allocation of powers), with the primary issue of the unconstitutionality of the regulation or law itself. This action must comply with the reserve clause plenary and can reach a degree of extraordinary appeal to be considered by the Supreme Court, which will have the final word on the constitutionality of the provision of that case before generating the decision, *inter partis* effects.

b. Concentrated Control

The concentrated control is also termed as abstract control. In this case, the analysis of unconstitutionality is not limited to a particular case, including, in fact, all situations that may arise from the rule. Thus, concentrated control proceeds to check compatibility with the Constitution of the standard as a whole. The Supreme Court has the duty to control the adequacy of the legal system of the Federal Constitution, which can occur through Direct Action of Unconstitutionality (ADI) generic, Declaratory Action of Constitutionality (ADC), accusation of breach of fundamental precept (ADPF), Direct Action unconstitutionality by omission (ADO) and interventional ADI.

8. FINAL CONSIDERATIONS

The purpose of this paper was to examine the control of the normative powers of regulatory agencies by the judicial branch. I set up a comparison between the United States and Brazil in terms of how both systems set up the judicial branch.

It was designed within the light of the doctrine of American and Brazilian scholars who have already written extensively on this subject.

The regulatory agencies in Brazil were built to overlook public services provided by private entities that had received authorization to provide public services, controlling their quality, which was inspired by the U. S. model.

This model can be described as a way where the Legislative Branch delegates competence to the agencies. They will develop generic parameters already established by law, without actions beyond or against it, respecting civil rights.

Brazil adopted the U.S. model referenced above, though without developing the participation procedures that grant legitimacy to the standards of agencies there. Again, it is very important to emphasize that ANEEL is the only one agency to have established standards of public participation in practice in terms of ordinary activity hearings and public consultations, in addition to the public meetings of the Board of Directors.

Because of this lack of legitimacy in agencies' decisions, it is possible to establish that each one involved in regulatory matters could be able to sue an agency or its decision. The right to sue someone is granted by the Federal Constitution (Article 5, XXXV: The law does not exclude from review by the Judiciary injury or threat to a right) and it is the role of Judicial Branch supervising other powers, including regulatory agencies linked to the Executive Branch. In Brazil, any decision of public administration can be subject to the judicial review, by diffused or concentrated control.

This right to sue is not healthy for the regulatory or the judicial system. The number of suits against regulatory agencies concerned to regulation decisions and economic law has greatly increased in

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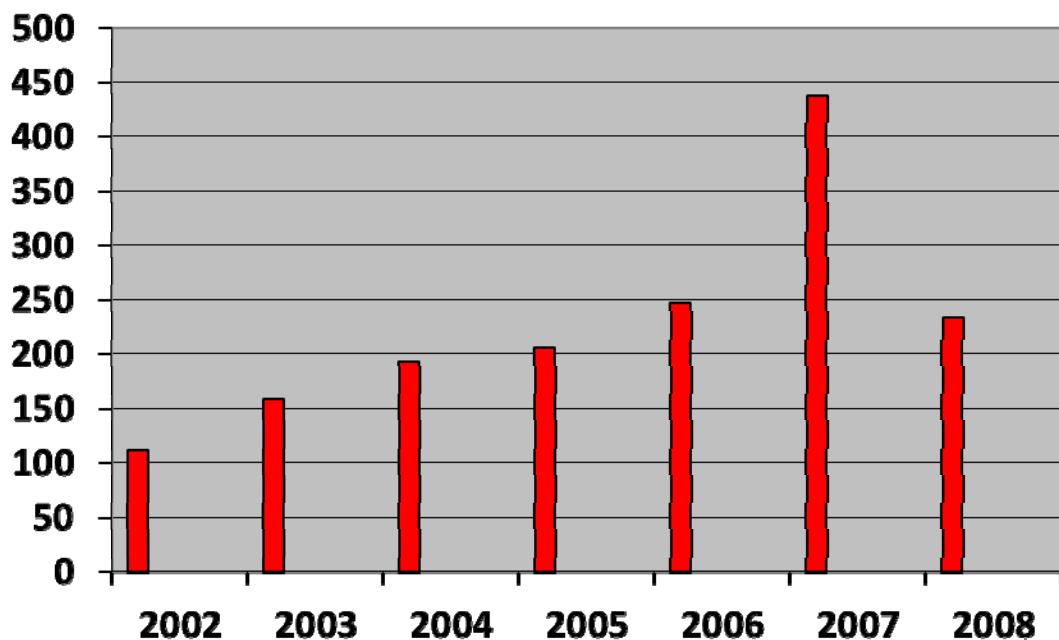
the past years. And it shows that agencies are failing in his duty to overview the regulatory system because they are a kind of referee in reconciling the interests of governments, businesses and consumers.

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9. APPENDIX I - Brazilian Associations of Infrastructures and Basic Industries Report - ABDIB

Every year the Brazilian Associations of Infrastructures and Basic Industries - ABDIB sets a report concerning to the brazilian infrastructure sector. In the 2008 report it was related that the number of law suites against regulatory agencies concerned to regulation decisions and economic law had increased a lot in the past years.

The Federal Court of First Region (this court concentrates all the suits against federal agencies settled in Brasilia) had already 1,754 process around july 2008 about themes that involve all the 7 federal agencies linked to infrastructure field, as such as ANEEL, ANATEL, ANP, ANTAQ, ANTT, ANA and ANAC.



Unfortunatelly there is no any other study with new numbers about it.

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In thesis, this increase of lawsuits and executions involving regulatory decisions is a matter of attention because regulatory agencies are a kind of referee in reconciling the interests of governments, businesses and consumers.

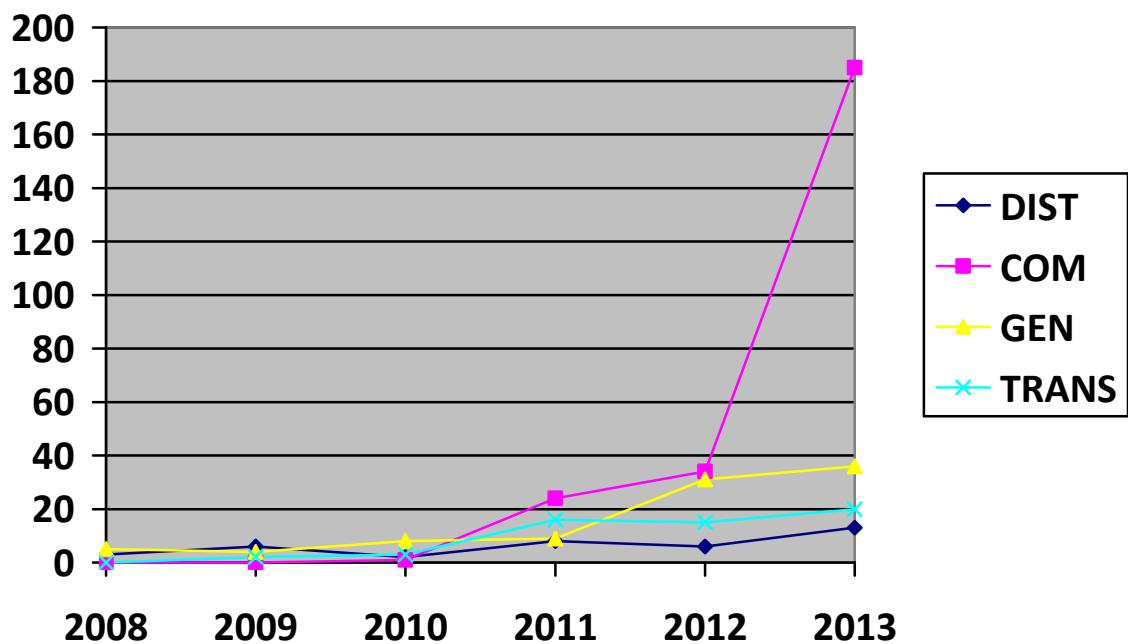
Excess court challenge against these institutions shows that conciliation is not being successful and that the outcome of regulatory conflicts and economic rights are being transferred to the discretion of the court, by these all litigations. The consequence is the legal uncertainty in business, as companies, public authorities (representing the grantor) and users come to work without there-term solution without stable for decision making parameters.

Control of the normative powers of the regulatory agencies by the Judicial Branch

APPENDIX II – ANEEL data

The following graphics shows the amount of lawsuits that ANEEL had to in the past 6 years, divided by matter (commercialization, distribution, generation and transmission of electric energy).

During 2013 ANEEL receive more than 200 subpoenas involving commercialization of electricity because of the process involving municipalities that were supposed to receive the control of the public lightning systems.



Source: SicNet 2.0 (March 10th, 2014).

Control of the normative powers of the regulatory agencies by the Judicial Branch

APPENDIX III - ROLE OF AGU – GENERAL ATTORNEY OF THE UNION

The General Attorney of the Union (AGU) is a Brazilian institution responsible for the exercise of public advocacy at the federal level. By federal attorney means the defense of all the Union's powers in judicial office as well as the exercise of consultancy and legal advice of the Federal Executive Branch activities. Moreover, it also represents Brazil to justice in other countries and international jurisdictions. At the Constitution (art. 131), AGU is treated as an essential function to justice besides of the prosecution, Public Defender, Private Law and the judiciary itself.

The structure of AGU tilts in the General Federal Attorney (PGF), which centralizes the judicial representation of hundreds of federal authorities and foundations such as the Brazilian Electricity Regulatory Agency, under the command of the Attorney General.

Besides the legal representation, PGF provides consulting and legal advisory activities, and also the calculation of liquidity and certainty of claims of any nature.

It is important at this point transcribe part of the art. 3 of the Ordem de Serviço n. 003/2013 establishing the Internal Rules of the General Attorney of ANEEL, department of PGF, that follows in portuguese:

- I. *"Assessorar juridicamente a Diretoria;*
- II. *Orientar a Diretoria quanto ao adequado cumprimento das decisões judiciais em que a ANEEL figure como parte ou interessada.*
- III. *Opinar prévia e conclusivamente sobre as seguintes matérias do interesse da ANEEL:*
 - a) *procedimentos de natureza licitatória e concursos públicos, em especial sobre editais e contratos administrativos;*
 - b) *atos pelos quais se reconheça a inexigibilidade ou se decida pela dispensa de licitação ou procedimento congênere;*
 - c) *edição, alteração ou extinção de atos normativos, súmulas, arrestos e enunciados;*

- d) processos de natureza disciplinar;
- e) interpretação de atos normativos no caso de divergências entre órgãos da ANEEL;
- f) atos de delegação de competência;
- g) celebração de termos de compromisso e cessação de prática ou de ajuste de conduta em procedimentos administrativos sancionatórios;
- h) força executória de decisões judiciais, especialmente quando determinarem pagamentos ou restituições, a qualquer título, pela ANEEL.

- IV. Fixar a interpretação da Constituição, das leis, dos tratados e demais atos normativos, em matérias afetas às atividades da ANEEL, a ser uniformemente seguida pelos Procuradores Federais;
- V. Propor à Diretoria a declaração de nulidade de ato administrativo praticado no âmbito da ANEEL;
- VI. Exercer a representação jurídica extrajudicial da ANEEL, inclusive perante órgãos policiais, parlamentares e de controle externo;
- VII. Representar à Diretoria da ANEEL e ao Procurador-Geral Federal, conforme o caso, providências de ordem jurídica que lhe pareçam reclamadas pelo interesse público e pela legislação aplicável;
- VIII. Representar judicialmente os servidores, bem como os ocupantes de cargos e funções de direção, com referência a atos praticados no exercício de suas atribuições institucionais ou legais, competindo-lhe, inclusive, a impetração de mandado de segurança em nome deles para defesa de suas atribuições legais, bem como Habeas Corpus, quando for o caso, nos termos do artigo 22 da lei nº 9.028, de 12 de abril de 1995, e nas orientações editadas pela Advocacia Geral da União;
- IX. Prestar assessoria jurídica para a elaboração de informações em mandado de segurança e habeas data impetrados contra servidores e agentes da ANEEL;

- X. Representar a ANEEL em juízo, prioritariamente, nas ações especiais, definidas nos termos do Parágrafo único deste artigo, bem como nas demais ações judiciais, nos termos dos atos normativos editados pelo Procurador-Geral Federal e pelo Advogado-Geral da União;
- XI. Manifestar-se à Diretoria da ANEEL sobre a força executória de decisões judiciais que abranjam medidas ou ações classificadas como especiais, nos termos do §1º deste artigo, ou que determinem pagamentos ou restituições, a qualquer título, pela ANEEL;
- XII. Prestar consultoria jurídica nas atividades relacionadas à cobrança e à recuperação de créditos da ANEEL até a conclusão do procedimento de constituição e a inclusão dos nomes dos devedores no Cadastro Informativo de Créditos não Quitados do Setor Público Federal – CADIN;

Articular-se com a Coordenadoria Geral de Cobrança e Recuperação de Créditos da Procuradoria Geral Federal – CGCOB para fins de inscrição em dívida ativa, bem como para fins de saneamento do processo administrativo;”.

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