

**REGULATORY IMPACT AS AN INSTRUMENT OF STATE EFFICIENCY**  
**IMPACTO REGULATÓRIO COMO INSTRUMENTO DE EFICIÊNCIA ESTATAL**  
**EL IMPACTO REGULATORIO COMO INSTRUMENTO DE EFICIENCIA ESTATAL**



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**ABSTRACT**

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

**Keywords:** Regulation. State Control. Democratic Efficiency. Government Plans. Impact. Democracy.

**RESUMO**

A pesquisa em realização, tem o escopo de verificar a Análise do Impacto Regulatório (AIR), avaliando suas vertentes no que tange ao aspecto democrático do instituto. Ainda que de maneira tímida, a AIR tem encontrado ressonância na estrutura regulatória brasileira. Fundada no paradigma da eficiência da administração pública, a AIR consiste em um procedimento para tomada de decisões da administração pública. O Brasil, detém, uma estrutura regulatória em vários setores, esta regulação é forma de controlar, e dar vazão aos planos governamentais. Ademais, na presente pesquisa, analisa-se o Estado Democrático de Direito e os princípios norteadores desta ordem, os quais, juntamente com a propalada eficiência, permeiam a intervenção estatal e permitem que sejam colhidas evidências para que esta intervenção seja técnica, democrática e menos impactante às atividades da administração.

**Palavras-chave:** Regulação. Controle Estatal. Eficiência Democrática. Planos Governamentais. Impacto. Democracia.

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## RESUMEN

Esta investigación tiene como objetivo examinar el Análisis de Impacto Regulatorio (AIR), evaluando sus aspectos en relación con la naturaleza democrática de la institución. Aunque aún con cierta cautela, el AIR ha encontrado eco en la estructura regulatoria brasileña. Fundamentado en el paradigma de la eficiencia de la administración pública, el AIR consiste en un procedimiento para la toma de decisiones en la administración pública. Brasil cuenta con una estructura regulatoria en diversos sectores; esta regulación es una forma de controlar y dar voz a los planes gubernamentales. Además, esta investigación analiza el Estado Democrático de Derecho y los principios rectores de este orden, que, junto con la tan discutida eficiencia, permean la intervención estatal y permiten la recopilación de evidencia para garantizar que esta intervención sea técnica, democrática y tenga un menor impacto en las actividades de la administración.

**Palabras clave:** Regulación. Control Estatal. Eficiencia Democrática. Planes de Gobierno. Impacto. Democracia.

## 1 INTRODUCTION

Founded on the principle of efficiency of public administration, the *RIA* consists of a decision-making procedure, based on evidence, which seeks to evaluate, based on the definition of a regulatory problem, the possible impacts of the available action alternatives to achieve the intended objectives.

Originating in the USA, for more than 30 years, the *RIA* has been adopted by the member countries of the OECD (Organization for Economic Cooperation and Development). Brazil, as a guest member of this organization, was expressly recommended to adopt the tool called *AIR*, in order to assess its regulatory quality. Furthermore, through administrative measures

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

Not yet relevant, the results point to a greater efficiency of *the RIA*, which, although it has some similarity with the other forms of verification of state regulation, is more linked to the efficiency and democratization of control.

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

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

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

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

## 2 DEMOCRACY AND EFFICIENCY: DEMOCRATIC STATE REGULATION

### 2.1 THE CONCEPTION OF THE DEMOCRATIC RULE OF LAW AND ITS REGULATORY POWER

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

The Absolutist State is the "first expression of the Modern State" (STRECK; MORAIS, 2014, p. 35). During absolutism, power was concentrated in the figure of the monarch, who ruled in a full, unlimited way, without the control of other powers. Executive and legislative powers were also in the hands of the king. The monarch was also to be exempt from any responsibility, for his power was a divine gift.

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

As a result, absolute monarchies appropriated states in the same way that the owner makes the object his property, giving rise to a power of *imperium* as the absolute right of the king over the state. On the other hand, with this attitude, the kings constituted themselves as lords of the States, in the same way as the feudal lords of the Middle Ages, individually titling the property of the State.

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

Gradually, voices against monarchical absolutism began to emerge and, in the eighteenth century, resistance reached its apogee with bourgeois revolutions.

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

The *Bill of Rights* of 1689 is undoubtedly one of the most important consequences of the Glorious Revolution. Acceptance of this document was made by Parliament a condition for William of Orange to take the throne, and this condition was accepted by him in 1689. At that time, the so-called constitutional monarchy emerged in England.

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

[...] the essence of the document consisted in the institution of the separation of powers, with the declaration that Parliament is a body primarily responsible for defending its subjects before the King and whose functioning cannot, therefore, be subject to the latter's discretion. In addition, the *Bill of Rights* strengthened the institution of the jury and reaffirmed some fundamental rights of citizens, which are expressed to this day, in the same terms, by modern Constitutions, such as the right to petition and the prohibition of *cruel and unusual punishments*.

The English philosopher John Locke is considered the greatest theorist of anti-absolutism. He defended the limitation of the monarch's power, stating that the right to freedom is a sacred right of the people, with the people being the only source of power. In this way, power is only legitimate if there is the consent of the people.

Locke (1994, p. 170) also believed that there should be a separation of powers, stating that:

And since the temptation to ascend to power may be too great for human frailty, it is not fitting that the same persons who hold the power to legislate should also have in their hands the power of executing the laws, for they might exempt themselves from obedience to the laws they have made, and bring the law into line with their will, both at the time of making it and in the act of its execution, and it would have interests distinct from those of the rest of the community, contrary to the purpose of society and government.

As Streck and Morais (2014, p. 40) point out, "it is with Locke that we see the inaugural constitution of the profile of political liberalism, sustaining the need to limit the power and functions of the State (...)".

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

In the eighteenth century, the American Revolution (1776) and the French Revolution (1789) emerged.

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

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

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

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

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

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

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

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

it was the French Revolution, not the American Revolution, that set the world on fire. The sad truth of the matter is that the French Revolution, which resulted in disaster, made world history, while the American Revolution, so triumphantly victorious, remained an event of almost only local importance.

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

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

Intellectualism is due to the fact that the recognition of the existence of inalienable human rights and the need to reestablish a power legitimized by the consent of the people did not go beyond the intellectual universe, being developed only on the plane of ideas. It is characterized by globalism because the principles enshrined in the Declaration of the Rights of Man and of the Citizen are not limited to the French people, but seek a universal value, that is, it has principles of a universal nature. And, finally, individualism is observed because

the Declaration of the Rights of Man and of the Citizen only recognizes individual freedoms, omitting the freedoms of association and assembly, being concerned only with the defense of the individual against the State (ROBERT apud SILVA, 2005, p.157).

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

In addition, in 1791 the first written Constitution of France was inaugurated, which ensured equality among men, freedom, security, the inviolability of property, etc.

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

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

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

Thus, in the Liberal State of Law, which is the first expression of the Rule of Law, the action (power) of the State was limited by the law. In addition, the law should be applied equally to all. The division of powers also appears as a milestone in the history of the Modern State, with only the Legislative Power (representatives of the people) being responsible for issuing laws. Citizens also have rights and guarantees assured, such as the right to equality, liberty, property, the guarantee of due process, etc. With this, there is a growth in individual freedoms.

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

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

On the theoretical level, the rule of law "emerges as a construction specific to the second half of the nineteenth century, born in Germany – as *the Rechtsstaat* – and, later, being incorporated into French doctrine (...)" (STRECK; MORAIS, 2014, p. 68).

In the Liberal State of Law, the intervention of the State was minimal (minimal State), being the result of the struggle for individual freedoms. The State should be neutral from the religious to the economic field (contractual freedom and free market economy). Thus, it was up to the State only to deal with the security and defense of the individual freedoms of citizens.

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

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

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

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

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

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

Thus, the Democratic Rule of Law is based on the idea of social transformation, which, based on the link between the Rule of Law and the democratic ideal, enshrines popular sovereignty, the separation of powers (legislative, executive and judiciary), fundamental rights and guarantees, the principle of legality, democratic political organization, the equality

of all before the law, the written Constitution, etc. This is the State model adopted by the Federal Constitution of 1988 (art. 1, *caput*, CF).

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

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

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

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

## 2.2 PRINCIPLE OF EFFICIENCY AND LIMITING PRINCIPLES OF STATE CONTROL

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

In the legal field, "principles are ordinances that radiate and magnetize the systems of norms" (SILVA, 2005, p. 92).

Or as Ávila (2011, p. 97) prefers, "principles, as they are immediately finalistic norms, establish an ideal state of affairs to be sought, which concerns other norms of the same system, notably the rules".

Constitutional Law is considered to be the starting point, that is, the common core of all the law to which they are linked and from which the various domains of the State's legal order also derive.

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

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

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

In the Brazilian legal system, the democratic rule of law aims to achieve social, participatory, and pluralistic democracy, having as one of the basic principles the principle of efficiency, topographically established in the Federal Constitution of 1988 in its article 37, after constitutional amendment 19/98. Otherwise, let's see:

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

This article provides that the Brazilian public administration, as a democratic administration, must stick to fundamentals, such as: legality; impersonality, morality; advertising and above all to effectiveness.

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

The dignity of the human person, a guiding and basic principle of the entire Brazilian legal system, worthy of note, is defined by Ingo Sarlet (SARLET, 2002, p.82). as follows:

[...] intrinsic and distinctive quality of each human being that makes him or her deserving of the same respect and consideration by the State and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person against any and all acts of a degrading and inhuman nature, as well as guaranteeing him or her the minimum existential conditions for a healthy life. in addition to providing and promoting their active and co-responsible participation in the destinies of their own existence and life in communion with other human beings [...]

Still on the dignity of the human person, Gustavo Tepedino states (TEPEDINO, 2005, p. 105):

In fact, the choice of the dignity of the human person as the foundation of the Republic, associated with the fundamental objective of eradicating poverty and marginalization, and reducing social inequalities, together with the provision of paragraph 2 of article 5 in the sense of not excluding any rights and guarantees, even if not expressed, as long as they derive from the principles adopted by the larger text, constitute a true general clause for the protection and promotion of the human person, taken as the maximum value by the legal system [...]

It should be noted that the Federal Constitution ensures that everyone, without distinction, has the right to a minimum list of constitutional rights and guarantees, so that the suppression and relativization of the guarantees established in the Magna Carta are not consistent with the democratic system, since the non-observance of these guarantees depersonalizes the human being and fosters the methodology of terror. On the subject, José Afonso da Silva states the following:

The configuration of the Democratic Rule of Law does not only mean formally uniting the concepts of Democratic State and Rule of Law. It consists, in fact, in the creation of a new concept, which takes into account the concepts of the component elements, but surpasses them to the extent that it incorporates a revolutionary component of transformation of the status quo. And there is a glimpse of the extreme importance of article 1 of the 1988 Constitution, when it states that the Federative Republic of Brazil

is a democratic State of Law, not as a mere promise to organize such a State, since the Constitution is already proclaiming and founding it there (SILVA, 2005, p. 15).

In other words, the realization of the democratic rule of law requires the strict observance of these and other principles brought in the heart of the Magna Carta, such an attitude shows respect for the difficult and time-consuming construction of the democratic rule of law, until it finally arrived at the modern conception that we have dealt with earlier.

Still in relation to the principles, other principles of paramount importance stand out, namely: the principle of reasonableness and proportionality.

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

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

### **3 REGULATORY IMPACT ANALYSIS: VALIDITY AND NECESSITY OF EXISTENCE**

#### **3.1 DEFINITION AND METHODS OF REGULATORY IMPACT ANALYSIS**

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

Although timidly, *the RIA* has found resonance in the Brazilian regulatory structure. Based on the principle of efficiency of public administration, the *RIA* consists of a decision-making procedure, based on evidence, which seeks to evaluate, based on the definition of a regulatory problem, the possible impacts of the available action alternatives to achieve the intended objectives, as follows:

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

Originating in the USA, for more than 30 years, the *AIR* is adopted by the member countries of the OECD (Organization for Economic Cooperation and Development). Brazil,

as a guest member of such an organization, was expressly recommended to adopt the tool called *AIR* in order to assess their regulatory quality, It is important to highlight:

It is necessary to have a systematic strategy, with a structure for analyzing regulation that ensures transparency, social participation and economic efficiency, with explicit responsibilities at the political and administrative levels. The discussion on the standardized process of preparing new regulatory standards that include their impact assessment is beginning to take place. There is also a need to prepare regulatory capacities within the administration in the medium and long term. (VALENTE, 2010, p. 31)

In early 2018, Brazil, through the Chief of Staff, edited the General RIA Guidelines and the RIA Guide, which set the complex and comprehensive tone of *the AIR*. Such guidelines and guidelines are embryonic initiatives in the field of *RIA*. Such guidelines are already an anticipation of PL 6.621/2016, called the Agencies Bill, which will deal in greater depth with the implementation of the *RIA* in Brazil.

Bill No. 6,621/2016 – Agencies Bill – which provides for the management, organization, decision-making process and social control of regulatory agencies, amends Law No. 9,427, of December 26, 1996, Law No. 9,472, of July 16, 1997, Law No. 9,478, of August 6, 1997, Law No. 9,782, of January 26, 1999, Law No. 9,961, of January 28, 2000, Law No. 9,984, of July 17, 2000, Law No. 9,986, of July 18, 2000, Law No. 10,233, of June 5, 2001, Provisional Measure No. 2,228-1, of September 6, 2001, Law No. 11,182, of September 27, 2005, and Law No. 10,180, of February 6, 2001, and provides for other provisions. The processing and the full text of the Bill in question, approved in the Federal Senate as PLS No. 52/2013, is available at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2120019> (op. cit. 2018, p. 05).

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

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

Through numerous phases, an approximate number of 11, the *RIA* aims to study the impact of government regulation and not of an isolated human or business action. With a

positive notion of impact, the *AIR*, does not need to be used only in regulatory agencies, it can be used in government plans that impact the rights and obligations of people, companies and economic agents.

Furthermore, other ways of verifying the impact of state regulation are only informative, do not help in better decision-making, do not give a direction to the public administration, are only a sieve for the embargo or not of government decisions, which may or may not be degrading to the administration.

This time, other ways of verifying the impact of state control have a merely informative condon.

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

With an extremely negative notion of impact, the other forms of analysis of state intervention are less comprehensive, given its compulsory aspects, which make the absence of control evaluation generate administrative and even criminal consequences.

Undoubtedly, the greater the analysis of state control/regulation, the lower the impact of this control on social systems. Thus, the other forms of evaluation of state control, which are not *RIA*, are shown, as an analysis of the impact of state control, lame and narrow-minded.

Regulatory impact studies seem to be institutes that have already been surpassed, in comparison with the *AIR* Regulatory Impact Analysis. Unlike the *RIA*, the other studies of the impacts of controls are not very democratic and not very technical, since they are linked to greater political sieves.

The *AIR*, seems to suppress and supplant the pretensions of other studies of the impact of regulation. It is a more fruitful analysis of the impact of state control, closer to public and private bodies, with a greater reach of data, evidence and accuracy in decision-making.

In this essay, regulatory agencies, as well as other government entities, can and should be reached by the *RIA*, as a way to give truth, efficiency and validity to state controls.

### 3.2 THE HETERONOMY OF WILL AS AN INSTRUMENT OF VALIDITY OF THE ANALYSIS OF THE REGULATORY IMPACT

"Where there is no respect for life and for the physical and moral integrity of the human being, where the minimum conditions for a dignified existence are not ensured, **where there is no limitation of power**, in short, where freedom and autonomy, equality and

fundamental rights are not recognized and minimally ensured, there will be no room for human dignity and the person will be nothing more than a mere object of arbitrariness and injustices."

(Ingo Sarlet – Brazilian Judge and Jurist)

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

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

In this vein, when we deal with heteronomy in the *AIR*, we are talking about the sovereignty that is conferred solely and exclusively on the state to carry out all government plans, verifying their impact and extent. From this point of view, we can, with more propriety, understand as one of the purposes of a Social and Democratic State of Law, where the State takes upon itself the responsibility of managing the entire political, economic, social and cultural system, this is the model that the Brazilian State adhered to as a form of government being guaranteed by our Federal Constitution. In view of the above, the Brazilian State holds for itself the exclusivity of the Right of Regulation.

In this bias, the *RIA* adopted in Brazil does not violate the constitutional impediments on heteronomy.

Thus, it is concluded that after the demystification of the possible danger of adopting *RIA* in the Brazilian administrative system, together with the clarification of the models in force and admitted by our State, we can now understand that *RIA* gains space in national regulation, in order to combat the bankrupt system that we have operated today, which we can link to the panacea of all evils accumulated by decades of neglect of the public administration system in the Brazilian administrative system. which concerns the verification of the best regulation and its impacts on the beneficiaries of governance systems.

In our entire legal system, there is not a single legal or jurisdictional impediment that prevents the adoption of *RIA* and its multiple processes of filtering and comparison of the best regulation.

Checking the definition previously addressed about *AIR*, however, what exists are rules that deal with the unavailability and non-delegability of functions and attributions of the public administration, many of which are even binding and incapable of having, in their impacts, an accurate analysis or measurement.

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

Contrary to impediments, the *RIA* is legitimized and this legitimacy is demonstrated within the characteristics of the Democratic Regulatory State itself, as follows:

With regard to the points of contact between independent agencies and the democratic principle, at least two lines of argument are plausible. First, the idea of submitting control over policies aimed at the long term and demanding, by their nature, a predominantly technical and professional management, can be seen as a form of democratic exercise.

Remember that democracy is not a concept that can be confused with majority rule; Democracy is, above all, a project of collective self-government in which social deliberations are carried out over time. In this vein, a collective deliberation that represents pre-commitment in the medium or long term requires, as a condition for its fulfillment, a management that is less responsive to the political-electoral logic and more responsive to the law and technical rationality.

Ultimately, enforcing democratically assumed pre-commitments is also a way of realizing the democratic ideal of collective self-government.

[...]

On the other hand, independent authorities do not need to and should not be closed spaces, inimical to the positions and opinions of economic agents, consumers, and civil society as a whole. The procedural opening of regulatory deliberations represents, in fact, an attempt to foster the constitution of a new public sphere, shaped by more technical parameters and specifically related to the regulated matter. (BINENBOJM, 2008, p. 303).

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

We will present only two obstacles that are most discussed among jurists, sociologists, people who participate in society in general, as well as their negative views of the Regulatory Impact Analysis. In the first place, we would find the obstacle in the political sphere, there is

a possible speculation about the possibility that the private interest of companies and individuals will influence the terms of the evaluation with the State and even in the conduct of the country's government policy. In other words, with the proper inclusion and systematization of *the RIA* in Brazil, there would be pressure from companies and/or individuals to increase or reduce the control of regulation, fostering or removing the focus of public plans from certain areas. However, this practice, already known by countries such as the USA and Germany, is called Lobbying , which means "influencing legislators and/or public actors, that is, for this deviation of purpose proposed by those opposed to greater control of the sectors to work, we would depend solely and exclusively on the public manager. In this sense, we would be admitting that the legislator and other actors of the administration, who must be impartial and meet the social interests, would be corrupting themselves by giving in to the pressures of private individuals, which proves once again that it will not be the *RIA* or any other type of administrative decision or control of administrative decision that will prevail in the occurrence of such a fact. (DONAHUE, 1992, p. 190).

In this vein, we also have the accurate observation of Patrícia Pessoa Valente, let's see:

After addressing three grounds for the adoption of regulatory impact assessment (state efficiency, legitimacy of regulatory decisions, and political control), one question still remains unanswered. How is it possible for this tool to be considered a mechanism of political control of regulatory agents by the principal, while at the same time having the potential to play a fundamental role in legitimizing regulatory decisions through the active participation of the administered? In other words, it is the same as the reducing element of the democratic deficit of the regulatory State identified by *the RIA* is sometimes seen from the perspective of the administered (users and suppliers of services and goods in the regulated sectors), or from the perspective of the main one (Legislative and Executive Branches). Which of the two angles should prevail?

In theory, the logic of each of the controls carried out is quite different and, why not say, divergent. Suppose the case of a regulatory decision on the granting of licenses for the provision of a certain service by a greater number of economic agents. In this case, the control exercised by the principal will be focused on whether the objectives desired by the voters will be met. The private party that will no longer have a market reserve with the decision will seek to contest it, while others will seek to maintain it with the prospect of also passing and providing the service. Users, in an even different way, will want more affordable rates and a greater number of providers to be able to choose the one that suits them.

[...]

However, the concept of regulatory impact assessment presented in *chapter 2* allows us to understand that this apparent contradiction of interests is part of the institutional design of the agents involved in the Regulatory State. What is verified, in fact, is a flow of interests in different directions in a triangulation that represents the effectiveness of the Democratic State of Law through the regulatory State. (2010, p. 158-159)

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

Therefore, the regulations submitted to this analysis can have a much higher performance than the simple interference of public agencies, their administrators directly contribute to this feat, in case of mismanagement of the *AIR*, the penalty for the administration is the collapse of the activity and the better allocation of government plans.

#### 4 CONCLUSION

State intervention, that is, fruitful and necessary state control, can only exist, state regulation can only exist, so that social relations are balanced and government plans are given vent, as well as there is promotion of sectors of the economy, thus enshrining a professional, technical, instrumental, popular, democratic bias of this control, making it appear, among others, the principle of efficiency of administration, which calculates, predicts, seeks evidence, encompasses experiences and measures the size of the impact of state interference.

The absence of regulatory impact assessments, or the existence of weak studies to analyze the effects of regulation is not consistent with the model of the Democratic Rule of Law. The regulatory trend experienced by contemporary Western societies has put in check the forms of implementation of government plans, public policies and economic designs. The fact is that when state regulation is used too much, without a filter, without an evidence base, democratic values are inverted, opening the door to the abuse of state interventionist power.

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

The *RIA*, already implemented in Brazil, brings democracy closer to the state's regulatory power, making this power a delineator of proportionality and reasonableness of the regulated and the regulator. Now, with a technical procedure, attributed to numerous phases, filled with fewer political actors than social, cultural, economic, it will certainly have the power to verify the size of the impact of the state's control and make the public administration more efficient.

It is important to emphasize that the greater the analysis of the impact of state control, the lower this control will be. From Amendment 19/98 onwards, the efficiency of the administration was raised to the level of a constitutional principle, therefore, it is unforgettable that only the *RIA* can give the regulation its true function and democratic conception.

Finally, in Brazil, what is perceived are numerous ways of measuring the impacts of state regulation, forms that are dissociated from democracy, technique, popularity, and even legal basis. However, the Regulatory Impact Analysis (RIA) seems the only way to supplant this narrow-minded, lame and anti-democratic regulation. The *RIA* is the legitimate way, with democratic expressions to promote control, a balanced and efficient state regulation.

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