

THE REGULATORY REFORM IN BRAZIL: NEW REGULATORY DECISION-MAKING AND ACCOUNTABILITY MECHANISMS

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ABSTRACT

This article examines the democratic potentials that we might have through the use of mechanisms of public participation inside independent regulatory agencies in Brazil after the state reform in the Nineties. The background of the analysis is the *clientelist* and authoritarian tradition of the Brazilian regulatory state and the dynamics of policy-making processes inside Executive and Legislative powers.

The regulatory agencies were conceived as a new institutional design of the state to regulate markets. Policy-making in Brazil is no longer only in the hands of the President and his ministries, but also inside independent regulatory agencies. This could be understood as a lack of legitimacy. It could be seen as a constitutional law problem, concerning mainly the classical doctrine of separation of powers. It also could be argued that it increases the risk of “capture” of the regulator by the strongest interest groups. But introduction of new mechanism of public participation to control the regulatory decision-making inside state agencies might deepen positive accountability effects over the definition of public policies. The article discusses these questions from a deliberative democracy theoretical perspective.

KEYWORDS: accountability; administrative law; state reform; independent regulatory agencies; Brazilian regulatory state; separation of powers; deliberative democracy; capture theory; clientelism; theories of regulation; theories of democracy.

1. INTRODUCTION

In this article I will describe the regulatory reform that took place in Brazil in the Nineties and I will establish the theoretical bases to a reflection about the legitimacy of the decision-making processes of *independent regulatory agencies* in Brazil (in the exercise of normative, adjudicative, and executive administrative functions), bearing in mind the mechanisms of public participation of public services users, consumers and investors in the normative decision-making process or in the solution of controversies about the rendering of services.

The general hypothesis of my work is that the new mechanisms of public participation inside regulatory agencies in Brazil are new *vertical accountability mechanisms* (beyond the electoral process) capable of deepening the democratization

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process of the Brazilian state bureaucracy as well as the Brazilian legal and political systems.ⁱ

In Brazil, to sustain this hypothesis it seems to be necessary to answer to the following questions: How does the decision-making process inside recently created regulatory agencies work? And to what extent have the kinds of public participation and control proved to be effective? Are the principles on which the model of the regulatory agencies in Brazil is based, that is to say, independence in decision-making and mechanisms of accountability through public participation, actually being put into practice? Has the institutional design of the regulatory agencies according to these principles allowed the democratization of the process of definition of public policies?

I do not intend to exhaust the answers to these questions in the present work. It is a preliminary work for further reflection about the degree of legitimacy of the exercise of normative and adjudicative functions of these independent bureaucracies in Brazil.ⁱⁱ

The present article will be divided into three parts.

In the **first part (items 2 and 3)** I will present the main characteristics of the reform of the Brazilian State in the Nineties concerning the introduction of the model of *independent regulatory agencies* in the Brazilian legal and political systems.

In the **second part (item 4)**, I will situate the relationship between efficiency and legitimacy in the context of economic regulation as formulated in the North American debate, especially in the reading of the critics of economic regulation of the Chicago Schoolⁱⁱⁱ. In this part, I will first try to show the concept of democracy which lies behind these theories, starting from the reconstruction of a description of the theories of democracy proposed by the German philosopher, Jürgen Habermas. Secondly, I will focus on the same tension between efficiency and legitimacy within the debate itself on theories of democracy, as formulated by Habermas in two specific pieces of work^{iv}, pointing out the importance of procedural mechanisms of public participation in the legitimization of the normative process.

Finally, in the **third part (items 5 and 6)**, I will describe the mechanisms of accountability (horizontal and vertical) which exist in the normative framework established for the regulation of one sector of the Brazilian economy – the telecommunications sector^v – and I will present empirical data concerning the use of the mechanisms of public participation (public hearings and public consultations) by interest groups in the definition of telecommunications' regulations (**item 5**) and coming to some preliminary conclusions (**item 6**) about the effectiveness of these mechanisms, given the theoretical approach discussed in the second part of this article.

The theoretical part of this article has the purpose of demonstrate how the North-American and Western European debates on theories of regulation and theories of democracy about accountability mechanisms of the state intervention in economy are the backdrop of the regulatory reforms occurred in Brazil in the Nineties.

The theoretical reconstruction of the tension between efficiency and legitimacy in the Regulatory State considering procedural mechanisms of public participation in the legitimization of the normative process, from a theory of deliberative democracy approach (inspired by Habermas' work), can be read and criticized in the North American as well as in the European debate.

The descriptive part of this article focused on the Brazilian Regulatory State can be useful for those who are conducting research about State reforms in developing countries. Moreover it can be useful to think about institutional design of

supranational apparatus to regulatory decision-making (Mercosur, as an example) in a global administrative law perspective.

2. SETTING THE STAGE

The creation of *independent regulatory agencies* as bodies of the Executive Power to regulate sectors of the Brazilian economy redefined the role of the State in Brazil.

The practices of redefinition of the role of the State in market intervention in Europe^{vi} and in the United States, in a broad sense as a response to the fiscal crisis of the State^{vii}, influenced the State reform in Brazil in the Nineties (Fernando Henrique Cardoso Government – 1995-2002). The OECD guidelines to regulatory reforms can also be considered a source for the design of a new regulatory apparatus to regulate markets in Brazil.^{viii}

However, the State reforms in Europe and in the United States in the Eighties were not only conceived as a response to fiscal crisis, but also as changes in the way in which State bureaucracy works. And the theoretical grounds to justify and analyze the reforms also changed in Europe and in the United States. In both cases, two issues have been mainly addressed in the debate: economic efficiency problems and legitimacy problems.

The problems related to these two issues – economic efficiency and legitimacy – informed the Project of the Reform of the Brazilian State in the Nineties. This project and especially its regulatory proposal can be described by the Recommendation Letter of the State Reform Council of the Brazilian Ministry of Administration and State Reform, dated May 31, 1996^{ix}:

"The State Reform Project aims substitute the old State intervention for the modern regulatory State. The actual regulatory bureaucracy is enormous and non-functional and the State intervention is too pervasive. Thus, it is necessary to first deregulate and then regulate by new criteria and more democratic forms, with less State intervention and less bureaucracy".

The project of state reform in Brazil in the Nineties began to be implemented since the National Privatization Program^x. The legal framework of what can be called the New Regulatory State in Brazil was largely defined by constitutional amendments^{xi} and laws^{xii} passed by the Brazilian Congress from 1990 until 2001.

Main Approved Constitution Amendments and Federal Laws
Constitution Amendments No. 5, 6, 7 and 8 (all dated August 15, 1995), 9 (dated November 09, 1995) and 19 (dated June 04, 1998)
National Destatization Program (PND) (Law No. 8031/90 amended by Law No. 9491/97)
Consumer Protection Code (Law No. 8078/90)
Competition Protection Law (Law No. 8884/94)
Granting of Concessions for Public Utilities Law (Law No. 8987/95)
Federal Administrative Proceedings Law (Law No. 9784/99)

From a legal and political perspective, this new legal framework introduced many changes. The creation of *independent regulatory agencies* is the most important

modification in the organization of State bureaucracy in Brazil, and the model of *independent regulatory agencies* adopted in the State reform process in Brazil during the Nineties was one of the main policies of Mr. Cardoso's Government. A statement of the former President Fernando Herinque Cardoso can illustrate the importance of these agencies as a renewal of the structure of Brazilian bureaucracy:

"In the case of Government action related to the infra-structure and public services sectors, regulatory agencies have been created (ANATEL, for telecommunications, ANEEL, for electricity, and ANP for oil and gas) to replace the Ministry bureaucracy – and the old lobbies inside it – by commissioners appointed by the Executive according to technical expertise and administrative experience and approved by the Senate. This 'regulators' has fixed mandate (to be protected from political pressure) and shall, pursuing the public interest and the consumer interests (who are represented in the agencies consulting committees), control the seriousness, the efficiency and the universal expansion of access to services for groups in the 'civil society' and not only those who have privileges. Thus, with the privatization and the public services concessions, the State get on with its regulatory and social administrative functions, no more in a centralized bureaucratic model but with new actors."^{xiii}

Nine federal regulatory agencies and nineteen state regulatory agencies were created since 1990. The regulatory agencies were conceived as a new institutional design of the state to act in the economic sphere. Policy-making is no longer only in the hands of the president and his ministries, but mainly inside regulatory agencies.

Newly Created Federal Regulatory Agencies
National Telecommunications Agency - ANATEL (Law No. 9472/97) (www.anatel.gov.br)
National Electric Power Agency - ANEEL (Law No. 9427/96) (www.aneel.gov.br)
National Oil Agency – ANP (Law No. 9478/97) (www.anp.gov.br)
National Health Surveillance Agency - ANVISA (Law No. 9782/99) (www.anvisa.gov.br)
National Supplementary Health Agency - ANS (Law No. 9961/2000) (www.ans.gov.br)
National Water Agency - ANA (Law No. 9984/2000) (www.ana.gov.br)
National Waterway Transportation Agency - ANTAQ (Law No. 10233/2001) (www.anta.gov.br)
National Land Transportation Agency - ANTT (Law No. 10233/2001) (www.antt.gov.br)
National Cinema Agency – ANCINE ^{xiv} (Provisional Measure No. 2228-1/2001) (www.ancine.gov.br)

The main characteristics of the regulatory agencies adopted in Brazil are: **(a)** decisions by means of deliberative councils; **(b)** autonomy of the regulatory body in the decision-making processes (i.e. normative, adjudicative and executive powers); and **(c)** the creation of mechanisms of vertical accountability through direct public participation in the decision-making processes (by means of public hearings and public consultations).

Taken together, these characteristics lead to two preliminary conclusions: **(i)** firstly, that conceived in this way, such agencies represent the construction of a new arena of power to make decisions and therefore of the definition and implementation

of public policies; and *(ii)* secondly, that the typical decision-making dynamic is different from that of the central administration of the Executive Power (i.e. President, his ministries and cabinet officials), above all due to the independent decision-making power of the regulatory agencies and the existence of mechanisms that allow citizens (or organized groups from *civil society* in the *public sphere*^{xv}) greater participation in the definition of the content of the regulation (the normative content of public policies).

In order to ensure the independent decision-making power of regulatory agencies the laws that created them establish, as a guarantee of independence, a fixed mandate of the commissioners, financial autonomy of the agency and the impossibility of hierarchical administrative appeals against the decisions of these bodies (appeals can be made only to the Judiciary). Given the impossibility of administrative appeals to hierarchically superior bodies, decisions of the regulatory agencies can be, from the legal point of view, contrary to the political interests of the democratically elected president or the ministries to whom these agencies are linked but not subordinate.

Subsequently, I attempt to describe that which I qualify as regulatory reform in the context of State reform in the 90s and to what extent we could say there is a new regulatory State in Brazil when we compare the institutional designs of state bureaucracy before and after the reforms.

3. STATE BUREAUCRACY AND JURIDICALLY INSTITUTIONALIZED DECISION-MAKING MECHANISMS BEFORE AND AFTER THE REGULATORY REFORM OF THE 90S.

The table below is an attempt based on analytic synthesis focused on the services and infrastructure sector, to present the main features of the Brazilian state bureaucracy organization for the formulation of public policies aimed at State intervention in the economy prior to the regulatory reform of the 90s. Therefore, source of the data presented below is the descriptive analysis of laws applicable to each sector of the Brazilian economy until the 90s. For the purposes of this work, I made an attempt to classify these data according to criteria defined for answering the following questions:

- (i) Was the decision-making process monocratic or was there some sort of decision-making process through governing councils?
- (ii) Was there decision-making autonomy on the part of the regulatory body, or was the latter subordinated to the Ministry Cabinet and the President of Brazil?
- (iii) Were there institutionalized mechanisms for *horizontal accountability* to Legislative Power?
- (iv) Were there institutionalized mechanisms for public participation in the decision-making processes that took place inside regulatory bodies with regard to regulation content?

These criteria shall also be used to describe the state bureaucracy organization that originated from State reform in the 90s. So I shall be able to sequentially compare under the same criteria and also from a descriptive perspective, the features of the two types of state bureaucracy as well as the differences and similarities that could exist

between the two types of regulatory State present in the history of the Brazilian economy.

REGULATORY DECISION-MAKING BEFORE STATE REFORM

Federal Body	(i) Decision-making through governing councils	(ii) Decision-making autonomy of the regulatory body	(iii) Institutionalized mechanisms for <i>horizontal accountability</i> to Legislative Power	(iv) Mechanisms for public participation in the decision-making process to define regulation content
National Water & Electric Power	YES	NO	NO	NO
National Water and Electric Power Authority (DNAEE), Ministry of Mines and Energy (MME)	NO	NO	NO	NO
National Oil Council (CNP) (Decree-Law No. 395/38) (Decree-Law No. 538/38) (Law No. 2004/53)	YES (Includes representatives of Trade Associations from Industry & Commerce appointed by the President)	NO	NO	NO
National Coal Program Executive Committee (CEPCN) (Law No. 1886/53) (Law No. 3860/60)	YES (it includes representatives of Trade Associations from Industry appointed by the President)	NO	NO	NO
National Commission on Nuclear Energy (CNEN) (Law No. 4118/62)	NO	NO	NO	NO
National Transportation Council (CNT) (Law No. 4563/64)	YES	NO	NO	NO
National Railroad Authority (DNEF)	NO	NO	NO	NO
Merchant Marine Commission (CMM) (Decree-Law 3100/41)	NO	PARTIAL (it has administrative and financial autonomy)	NO	NO
National Ports and Waterways Authority (DNPVN)	NO	NO	NO	NO
National Highways Authority (DNER)	NO	NO	NO	NO
Civil Aviation Authority (DAC)	NO	NO	NO	NO
National Telecommunications Council (CNT) (Law No. 4117/62)	YES (it includes representatives of the three major political parties)	NO	NO	NO

Source: Alberto Venancio Filho. *A Intervenção do Estado no Domínio Econômico: O Direito Público Econômico no Brasil*. Rio de Janeiro: Renovar, 1998.

The table above shows that from a legal/formal perspective, the decision-making process to define content of public policies was characterized by: **(i)** decision-making was concentrated around the President of the Republic and Ministries' bodies and in some cases there were juridically institutionalized governing bodies; **(ii)** absence of institutionalized mechanisms of *horizontal accountability* to Legislative Power; **(iii)** absence of institutionalized channels for public participation, representing different segments of civil society; and **(iv)** in some cases, the presence of mechanisms to organize the interests of preestablished groups inside the state bureaucracy itself.

In the next table I set forth the features of what I refer to as new regulatory state in Brazil. As we can see, the State reform of the 90s resulted in profound changes on a juridical/institutional level.

REGULATORY DECISION-MAKING AFTER STATE REFORM

Federal Body	(i) Decision-making through governing councils	(ii) Decision-making autonomy of the regulatory body	(iii) Institutionalized mechanisms for <i>horizontal accountability</i> to Legislative Power	(iv) Mechanisms for public participation in the decision-making process to define regulation content
National Telecommunications Agency - ANATEL (Law No. 9472/97) (www.anatel.gov.br)	YES (in addition to its Board of Directors it has an Advisory Council composed of representatives of Trade Associations and the Legislative Power)	YES	PARTIAL (Brazilian Telecommunications Act requires full disclosure of agencies' acts to Congress)	YES
National Electric Power Agency - ANEEL (Law No. 9427/96) (www.aneel.gov.br)	YES (in addition to its Board of Directors it has decentralized action by way of agreements with state agencies)	YES	NO ^{xvi} (indirect) ^{xvii}	YES
National Oil Agency – ANP (Law No. 9478/97) (www.anp.gov.br)	YES	YES	NO (indirect)	YES
National Health Surveillance Agency - ANVISA (Law No. 9782/99) (www.anvisa.gov.br)	YES (in addition to its Board of Directors it has an Advisory Council composed of representatives of public administration institutions, civil society organizations and the scientific community)	YES	NO (indirect)	YES
National Supplementary Health Agency - ANS (Law No. 9961/2000) (www.ans.gov.br)	YES	YES	NO (indirect)	YES
National Water Agency - ANA (Law No. 9984/2000) (www.ana.gov.br)	YES	YES	NO (indirect)	YES
National Waterway Transportation Agency - ANTAQ (Law No. 10233/2001) (www.anta.gov.br)	YES	YES	NO (indirect)	YES
National Land Transportation Agency - ANTT (Law No. 10233/2001) (www.antt.gov.br)	YES	YES	NO (indirect)	YES
National Cinema Agency - ANCINE (Provisional Measure No. 2228-1/2001) (www.ancine.gov.br)	YES	YES	NO (indirect)	YES

SOURCE: Analysis of laws that created each one of the mentioned regulatory agencies.

In our table above we can confirm that since early 90s from a juridical/formal perspective the decision-making process in use to define public policies content has been characterized by: **(i)** decision-making autonomy in relation to the President's Cabinets; **(ii)** institutionalization of governing councils that deliberate on normative content formation; **(iii)** partial institutionalized mechanisms for *horizontal accountability* to Legislative Power; **(iv)** institutionalization of channels for public participation of different segments of the civil society in the decision-making process; and **(v)** elimination of institutionalized mechanisms that organized the interests of preestablished groups inside the state bureaucracy itself.

This could be understood as a lack of legitimacy from the point of view of certain theories of democracy. It could be seen as a problem of constitutional law, concerning mainly the classical doctrine of separation of powers. It also could be argued that it increases the risk of "capture" of the regulator by the strongest interest groups. Finally, one could argue that the model of regulatory agencies adopted in Brazil is a copy of the American model (and it certainly is); and that all the problems experienced in the United States (mainly discussed in the context of the *capture theory*, as I will point out bellow) would occur in Brazil or would be worse in Brazil, given the Brazilian *clientelist* and authoritarian tradition.

However, in the case of Brazil, I understand that the adoption of mechanisms of public participation within a model of independent regulatory agency could have democratic potential.

Before the creation of regulatory agencies, only the president and councils organized inside the ministerial bureaucracy defined public policies in Brazil. The power of the president in the Brazilian presidential system is enormous. In history, the Brazilian Legislative power proved to be weak and subordinated to the president's wishes. Clientelism in Brazil means the organization of groups of interests through the state. It could be called a "capture" process from inside, or what Peter Evans called in the 70's: "the triple alliance of multinationals, state enterprises, and their local private allies"^{xviii}. In this perspective, before the implementation of state reform in Brazil, it could be argued that just those with access to the president or to ministry's cabinets could influence the process of regulation of economic activities and social life. What happened after the state reform?

My hypothesis is that the mechanisms of public hearings and public consultations adopted inside the new regulatory agencies might represent a broader guarantee of legitimacy of the content of the regulation in Brazil. It could open a new path for the participation of groups of "civil society" that did not used to have access to the bureaucratic councils inside ministries before the reforms.

This means that by the institutionalization of public participation mechanisms, not only the *triple alliance* but also non-profit organizations, associations of consumer defense, public interest lawyers engaged in the defense of poor or unrepresented people, and citizens by themselves would have the chance and might be encouraged to present arguments before state bureaucracy to defend their interests.

It is true that there is no guarantee that because we now have public participation mechanisms we will necessarily have participation. But it could be true that the institutionalization of public participation mechanisms can be a potential for **(a)** participation of sectors of the Brazilian civil society not yet represented (or unequally represented in the representative democracy system); **(b)** more information about the purposes of economic and social regulation and their consequences for

society; *(c)* more publicity of the state bureaucracy's acts and, thus, more oversight by the press; and *(d)* the specialization of public interest lawyers to represent the interests of unrepresented citizens before the administrative power, using direct-deliberative mechanisms.

All these factors can contribute to make Brazilian state bureaucracy accountable to citizens in a broader sense. However, as noted above, this preliminary conclusion is derived from formal (static) analysis of the law that created the said regulatory bodies. Indeed, such type of analysis would not be enough to properly evaluate the degree of autonomy of each one of those regulatory bodies with reference to President's Cabinets. Then again, it is not possible to evaluate what are the specificities of public participation mechanisms in each regulatory body as well as the conditions of participation in the internal decision-making processes in each one of the aforementioned bureaucracies.

These evaluations would depend on extensive and detailed studies on the functioning of each one of those regulatory bodies and their respective comparative analyses. A study of this nature would entail research on the dynamics of internal political relationships in each one of those regulatory bodies in addition to a research on the dynamics of relationships of the said bodies with both, the President's Cabinets and the Legislative Power. An analysis of the dynamics of administrative decisions control by the Judiciary Power in each one of those bodies would also be imperative.

It is not within the scope of this work to accomplish a study of this nature. Therefore, my option shall be to maintain this (static) juridical/institutional framework as a backdrop and, in sequence, make a broader analysis of the functioning of one of these new regulatory bodies, namely, the National Telecommunications Agency - ANATEL. Additionally, I shall endeavor to present details of changes planned by the Lula Administration in the model of independent regulatory agencies, with ANATEL as case.

However to develop further the analysis of the new regulatory state and new vertical deliberative accountability mechanisms introduced in Brazil it is first necessary to discuss theoretical perspectives of analysis taking into account theories of regulation and theories of democracy debate.

4. EFFICIENCY AND LEGITIMACY: THEORIES OF REGULATION AND THEORIES OF DEMOCRACY THAT INFLUENCED THE BRAZILIAN NEW REGULATORY STATE MODEL

4.1 THE LIBERAL CONCEPT OF POLITICS AND THE THEORIES OF ECONOMIC REGULATION

Starting from the presupposition that political choices are based on technical choices about which neither citizens nor – elected – politicians have sufficient relevant information to make decisions^{xix}, bureaucratic insulation and consequently the delegation of executive and legislative functions to the *independent regulatory agencies* are justified, and in principle, legitimate.

From this perspective, the problem of legitimacy can only be resolved if there are mechanisms of accountability capable to control the *independent regulatory agencies* administrative functions, especially when, as a result of the delegation of the legislative and executive functions, the agencies have the power to decide on the contents of the regulation and establish public policies.

In Weber's concept of bureaucracy^{xx}, within the context of State-regulated capitalism, the concept of *rationalization of state activity* regarding the administrative functions is limited to technical duties which can be performed rationally and non-politically in an administrative manner, and in which technical and scientific knowledge may be put into practice neutrally (without interference of political interests)^{xxi}.

In this context, the idea of bureaucratic insulation is developed. In the classic book *Capitalism, socialism and democracy*, Schumpeter developed his conception of theory of democracy, which strongly influenced in the second half of twentieth century the economic theories of democracy and from these, some of the theories of economic regulation. Schumpeter proposes a conception of democracy that has as its backdrop a theory of mass society. It is unnecessary for the purposes of this work to re-take Schumpeter's theory and reconstruct his theoretical view of society. However, it is worth pointing out that for Schumpeter, democratic governments in modern industrial societies should have an efficient bureaucracy consisting of well-trained technicians able to instruct the politicians who have decision-making posts in ministries.^{xxii}

As Schumpeter points out, individuals in politics act influenced by non-rational or extra-rational impulses. Thus, decisions should not be taken in connection neither with *civil society* beliefs nor within *civil society* participation. In Schumpeter's theoretical perspective, the idea of democracy in mass societies is directly connected to the design and functioning of public institutions and procedures capable of create a stable system for political and administrative rational decisions.^{xxiii}

From this point of view, Schumpeter states that certain functions of the State do not need to be subordinate to the democratic political process. And, in this sense, Schumpeter calls attention to the case of *governmental agencies* (in the case of North America; the example given by Schumpeter is that of the *Interstate Commerce Commission*) which have public authority, but which do not interfere in the field of political decisions. They are, therefore, State bureaucracy bodies consisting of technocrats capable of making purely technical decisions (*non-political agencies*).^{xxiv}

In these cases, Schumpeter states that the operation of such *agencies* must be supervised by the government (the political organs of the Legislative and Executive Powers), precisely in order to guarantee the legitimacy of decisions about the content of the regulation established by the *independent regulatory agencies*, since the authority to take such decisions has been delegated by political governmental organs.

This demand for supervision by political governmental organs is the way found to reconcile bureaucratic insulation with the legitimacy of the public policies (policies) formulated by independent agencies. It is from this perspective that the concept of giving state bureaucracy responsibility is developed. Technocrats must be in some way accountable to political bodies (horizontal accountability). In this perspective, the reconciliation of bureaucratic insulation, necessary to the rationalization of state operation in the regulation of markets, with the legitimization of public policies made by the agencies in the democratic political process (politics), becomes the great challenge.

However, if we start from the presumption that the democratic political process endangers economic rationality, the mechanisms of accountability may degenerate into mechanisms of political influence by governmental organs on the *independent regulatory agencies*.^{xxv} And this political influence is usually unequal, as Robert Dahl pointed out in his concise book *On Democracy*: "Because of inequalities in political resources, some citizens gain significantly more influence than others over

the government's policies, decisions, and actions. These violations, alas, are not trivial. Consequently, citizens are not political equals – far from it – and thus the moral foundation of democracy, political equality among citizens, is seriously violated.^{»xxxvi}

In the North American debate, constitutional theories of democracy are based commonly on two concepts of political democracy^{»xxvii} which are, **(i)** the liberal concept; **(ii)** the republican concept. Jürgen Habermas made the reconstruction of these two concepts in the North American debate in the essay *Three normative models of democracy*. I will use these concepts as formulated by Habermas.

In the liberal concept, “the democratic process accomplishes the task of programming the government in the interests of society, where the government is represented as an apparatus of public administration, and society as market-structured network of interactions among private persons. Here politics (in the sense of the citizens' political will-formation) has the function of bundling together and pushing private interests against a government apparatus specializing in the administrative employment of political power for collective goals.”^{»xxviii}

This liberal concept of politics, centered on the State and on the private interests of each citizen, is the basis of the argument in the debate on *theories of economic regulation* as this was formulated in the United States after the *New Deal*, when the model of *independent regulatory agencies* was introduced as a form of public administration within State bureaucracy.

The relationship between the *theories of economic regulation* and the model of *independent regulatory agencies* in the debate on constitutional theories of democracy is important insofar as the *independent regulatory agencies* have to be constitutionally legitimized in view of the theory of separation of powers.

This demand for legitimacy in view of the theory of separation of powers occurs as the *independent regulatory agencies* are authorized by Congress to **(i)** make norms, exercising a quasi legislative function; **(ii)** decide conflicts, exercising a quasi juridical function, applying and interpreting norms; and **(iii)** executing laws, exercising an executive function of formulating public policies^{»xxix}. In this way, many of the decisions of the administrative agencies involve also political choices, which have to be legitimized.

When we start from a liberal concept of politics, this demand for legitimacy in the action of the *independent regulatory agencies* seems to be stronger insofar as the democratic political process is centered on the electoral process as a moment of political formation of the will of the citizens and the imposition of their interests in state bureaucracy centralized on the figure of the elected President.

Starting from this liberal concept of politics, two sets of theories of economic regulation may be approached in the North American debate: “normative positive theory” and “public-choice theories”.^{»xxx}

The normative positive theory, centered mainly on the school of administrative and constitutional law of the first half of the twentieth century, establishes a normative regulatory principle of the activity of state bureaucracy, according to which the action of the State should guarantee collective ends, or in other words, act in the *public interest*.^{»xxxi} According to this concept, economic regulation carried out by means of *independent regulatory agencies* is justified to the extent to which such agencies are administrative organs consisting of specialized technocrats whose function is to regulate markets and try to correct their failures on behalf of the *public interest*. Here the ideal of decision-making independence is centered on the concept that market regulation should be carried out by experts and in a non-political fashion.

In this concept, public policy is formulated by the elected Congress when it makes laws, and by the President when he executes the laws. In this way, *independent regulatory agencies'* commissioners would merely formulate technical norms and make decisions as technical judges basing these on the economic logic of correction of "market failures". This would therefore be the justification for the intervention of the State in the economy (*correction of market failures*), legitimated by the normative principle that the aim of such intervention is to guarantee collective ends (the *public interest*).

The control of the operation of *regulatory agencies* is performed by the third power, the Judicial Power, whose function is to apply this normative principle, reviewing the norms issued and the decisions taken by the agencies. Thus, the Judiciary exercises control of the content of economic regulation mainly by means of judgments guided by normative principles. In this way, it is the judge, as the interpreter of the norm (by the scrutiny of the substance of statutes or by the scrutiny of the clarity and logical consistency of legislative ends and means^{xxxii}), who defines within the legal system what constitutes the *public interest*, as a ground for administrative action and objective to be reached in the subject of economic regulation. However here the judge is also considered a non-political technician. His function is limited to interpreting technically the norm issued by the administrative agency according to the political choices made beforehand by the elected Congress when making laws.

In this context, according to the theory of public interest, the moment of politics is centered on the electoral process. Elected Congress and elected President make political choices. Public policies are formulated by Congress which votes on laws, democratically legitimized by the electoral process. And the elected President carries out these laws, with a certain degree of discretion to make choices about public policies, also democratically legitimized by the electoral process. Judiciary Power controls such choices when it verifies if the laws passed by Congress go against the established constitutional order, as well as if state bureaucracy is regulating and carrying out public policies according to the rule of law. However, for the theory of public interest, this is no longer a political moment. It is an apolitical regulatory activity limited by the rule of law.

Also based on a liberal concept of politics, the scholars of the Chicago School, inspired by the work of Anthony Downs (*An Economic Theory of Democracy*)^{xxxiii} and Mancur Olson (*The Logic of Collective Action*)^{xxxiv} formulated, at the end of the 60s and in the 70s, in the field of theories of economic regulation, what became known as *public choice theories*. These theories have various formulations (incorporating discussion in Political Science, Economics and Law) and are not limited to theories of economic regulation. For the purposes of our work, I will only discuss the *capture theory*, as it is formulated by the theorists of the Chicago School, as a theory of economic regulation.

One of the main articles of the Chicago School is "*The theory of economic regulation*" of George Stigler^{xxxv}, of 1971. In this article, the grounds of Stigler's argument are two other articles by theorists of Chicago which, in my view of the Chicago School debate, will be fundamental for his argument. They are "*Competition and Democracy*", by Gary Becker^{xxxvi} and "*Why Regulate Utilities?*", by Harold Demsetz^{xxxvii}. In this latter, Demsetz constructs the argument opposed to the justification, in economic theory, that market regulation (i.e. intervention of the State in the economy) is necessary for the correction of market failures. According to Demsetz, competition in the free market disciplines the economy more efficiently

than state regulation. I will not discuss here the steps of Demsetz's argument, nor do I intend to enter this discussion in the present work. However, the part of the argument of Demsetz which will be used by Stigler, is based on the proposition formulated by Gary Becker in the text "*Competition and Democracy*". For Becker, the political process can contaminate the *independent regulatory agencies* inasmuch as interest groups – congressmen and lobbies coordinated by the large economic groups which finance electoral campaigns – put pressure on state bureaucracy to obtain competitive advantages in the economic market (economic groups) and in the political market (congressmen).

Without analyzing the bases of Becker's argument in detail, the conclusion reached by Becker points to the following proposition: *if the failures of the government are greater than the failures of the market, it is better not to regulate*. In this context, Stigler formulates the theory according to which the content of the regulation established by the *independent regulatory agencies* is the fruit of a process of supply and demand by regulation. In this way, if *regulatory agencies* exist and politics cannot be separated from state bureaucracy, even if this latter is composed only by technocrats with guarantees of independent decision-making, according to Stigler, economic agents will try to achieve their private interests and maximize their economic well-being by obtaining competitive advantages.

Thus, for Stigler, the content of economic regulation is "captured" at birth by interest groups which have won the bargaining process for regulation. The *independent regulatory agencies* are not, however, independent. And the commissioners who compose the agencies are not apolitical technocrats. On the contrary, they are members of a state bureaucracy inside the game of political relationships between Congress and the President and are highly susceptible to the electoral process which – because of the mechanisms of financing electoral campaigns – is strongly influenced by the economic groups which act in the market.

In the article "*The theory of economic regulation*", Stigler article does not actually say, as Becker claims, that there is not reason to regulate markets if the failures of the government are greater than the failures of the market. The importance of Stigler's text lies in the fact that his theory questions the normative presumption of the theory of public interest that *independent regulatory agencies* regulate in the public interest. For Stigler, agencies regulate according to private interests with the formal justification that the content of the regulation adopted is in the collective interest. Thus, for Stigler it is pointless to speak of *public interest* as an objective of economic regulation.

The *capture theory* as it was formulate by Stigler, gave rise to a review in depth in the United States of the presuppositions of the classical theories of administrative and constitutional law. The rational justification, from the normative point of view, for the State action in the economy was questioned. However, the idea of *public interest* as a normative principle of the activity of public administration has remained unchanged in constitutional theory. What changed was the belief in mechanisms of independent decision-making, giving rise to studies and discussions on the institutional design of regulatory agencies and decision-making procedures.

However, in this debate, what I want to underline for the argument which I am trying to construct in the present work, is the fact that the theorists in Chicago started out from a liberal concept of politics, in which private agents act in order to maximize their interests and according to which the political process contaminates the efficiency of market practices. In this way, the democratic political process only aims to guarantee individual civil and economic liberties by means of the State, which

constitutes in the final analysis of the argument, a legitimate collective end that must be achieved through the electoral process in the political conditions of a *Polyarchy*^{xxxviii}. By this concept, the only function of politics is to mediate self-interested relationships and it is not understood as a constitutive element in the process of social integration. This is why when politics is identified as an element present in the process of market regulation, it is considered to be a problem.

In other words, the scholars of Chicago School, whose starting-point is a liberal concept of politics, cannot conceive of the existence of a *public sphere* in which, for example, the decision-making process of the regulatory agencies implies the participation of politically aware citizens who argue rationally (even motivated by self-interested behavior – this do not constitute a problem for the analysis; it can be considered a fact^{xxxix}). It is not also possible to conceive an institutional model of regulatory agency in which commissioners are forced to decide making judgments according to normative principles and not only according to apolitical technical principles, in order achieve collective decisions^{xl} with a “substantial degree of directly-deliberative problem-solving”^{xli}.

4.2 THE REPUBLICAN CONCEPT OF POLITICS, A DELIBERATIVE CONCEPT OF POLITICS, AND THE ROLE OF MECHANISMS OF PUBLIC PARTICIPATION

Retaking the concepts of politics in the reconstruction made by Habermas, according to a *republican concept* of politics, “politics is conceived as the reflective form of substantial ethical life, namely as the medium in which the members somehow solitary communities become aware of their dependence on one another and, acting with full deliberation as citizens, further shape and develop existing relations of reciprocal recognition into an association of free and equal consociates under law”^{xlii}. For Habermas, based on this republican concept of politics, the liberal architecture of the State undergoes an important change: “the state’s *raison d’être* lies not primarily in the protection of equal private rights but in the guarantee of an inclusive opinion and will-formation in which free and equal citizens reach an understanding on which goals and norms lie in the equal interest of all”^{xliii}

Based on these two concepts of politics (i.e. liberal and republican), Habermas points out the advantages and disadvantages of the republican model of democracy. The advantage of the theoretical republican model over the liberal model of democracy is the fact that it does not lead to collective ends being derived only from an arrangement of conflicting private interests. The disadvantage of the theoretical republican model, in its turn, lies in the excessive idealism of conceiving the democratic process to depend on the virtues of citizens guided by the common good.

These two models presented by Habermas dominate the discussion between the so-called “communitarians” and the “liberals” in the North American academic debate. And this debate is very important in the concept of the role of law in the relation between state and market. The alternative that Habermas proposes as a third theoretical concept of politics is a concept of *deliberative politics*, according to which in any democratic political process it is necessary to take into account the plurality of ways of communication in which a common will may be formed, not only by an ethical understanding but also by balancing interests and commitments, by the rational choice of means to an end, and by moral justifications and examinations of juridical coherence. From this concept of politics, Habermas proposes a third model of democracy, where what is at stake are the conditions of communication and the procedures which grant the institutionalized formation of political opinion and will.

Habermas' model of *procedural democracy*, introduced here from the article "*Three normative models of democracy*" by Habermas, is the basis for the study which Habermas carried out in the book "*Between Facts and Norms*", especially in relation to what he says about the relationship between law and politics.

The enormous importance which the Law has for Habermas in the model of *procedural democracy*, is in the understanding of law as a means by which *communicative power* can be transformed into *administrative power*. The rule of law should regulate this process in which production of *communicative power* is transformed into *administrative power*, preventing the latter from becoming a "raw and naked" implant of privileged interests. In the words of Habermas, "The constitutionally regulated circulation of power is nullified if the administrative system becomes independent of communicatively generated power, if the social power of functional systems and large organizations (including the mass media) is converted into illegitimate power, or if the lifeworld resources for spontaneous public communication no longer suffice to guarantee an uncoerced articulation of social interests. The independence of illegitimate power, together with the weakness of civil society and the public sphere, can deteriorate into a "legitimation dilemma", which in certain circumstances can combine with the steering trilemma and develop into a vicious circle. Then the political system is pulled into the whirlpool of legitimation deficits and steering deficits that reinforce one another."^{xliv}

What is in question for Habermas is, however, to know the conditions of public participation of interest groups which form in *civil society* and which, from communication structures of the *public sphere*, exercise pressure on the administrative system (understood here as the State bureaucracy).

If we have a *public sphere* which is not very active or the privileged participation of some groups to the detriment of others, the problems of legitimacy appear. The effective conditions for public participation are, from this perspective, a good criterion to evaluate the democratic potential of the mechanisms for institutionalized public participation by means of norms.

At this point, it is important to consider that Habermas is aware of the debate about rational choice theories and assumes that there is going to be more powerful groups pressuring for political influence than others. In other words, he assumes the debate about political influence and how bargaining processes work from the rational choice theories perspectives. However, for Habermas the problem of legitimacy of the normative content inside the juridical system remains and it can not be resolved without understanding the forms of circulation of political power in the *public sphere* and in the political system. Habermas is also aware of the practical limitations on deliberative politics. But, since the legitimacy problem is not solved by rational choice theories (and it is not even a problem), Habermas tries to investigate how the constitutionally regulated circulation of power works and how would be possible to develop a model of deliberative democracy in which communicative power can be converted into administrative power.^{xlv}

In this context, it is particularly interesting the debate that Habermas proposes dealing with Jon Elster's thoughts on how the analysis of circulation of power can be made shifting from a rational choice theory perspective to a discourse theory perspective. For Habermas, from a rational choice theory perspective, "the process of rational agreement becomes equivalent to "bargaining" – the negotiation of compromises. Indeed, such bargaining, which requires a willingness to cooperate on the part of strategic actors, is connected with norms that take the form of empirical constraints or irrational self-bindings. To this end, Elster develops a parallelogram of

forces that explains normatively regulated bargaining processes as a combination of rational calculations of success with social norms that contingently steer from behind^{xlvi}.

However, for Habermas the political process involves more than compromises based on credible threats. This is why Elster introduces “argumentation” as a further mechanism besides “bargaining” for solving problems of collective action. According to Elster, “rational argumentation on the one hand, threats and promises on the other, are the main vehicles by which the parties seek to reach agreement. The former is subjected to criteria of validity, the latter to criteria of credibility.^{xlvii}”

For Habermas the “criteria of validity” can not be considered only in a formal way (the formal validity of the norm by means of the respect of the legal procedures established to create such norm). Since the “criteria of validity” is also submitted to argumentative procedures, a new kind of communication and action (besides threats and promises; besides self-interested action) comes into play. “It follows that the task of politics is not merely to eliminate inefficient and uneconomical regulations but also to establish and guarantee living conditions in the equal interest of all citizens^{xlviii}”.

This idea is normative and comes from a concept of justice that can not be argumentatively non considered in the process of regulation by officeholders that have administrative power. In this sense, Habermas can be useful to on the one hand avoid the excessive idealism of a republican model of democracy (and also the idealism of the public interest theory on regulation), and on the other hand take the public choice theories investigations seriously^{xlix}, not to assume the capture theory conclusions, but to design mechanisms of deliberative politics that can improve argumentative communication and public participation in the process of market regulation^l.

In the North American model of *independent regulatory agencies*, which proliferated as a bureaucratic model to regulate markets after the *New Deal*, the mechanisms of public participation in internal decision-making processes of agencies and legal protection to guarantee the functioning of these mechanisms exist. The right of the citizen to be heard in public hearings or in public consultations in the process of taking decisions about the contents of the regulation was recognized in the *Federal Administrative Procedure Act (APA)*. Thus, the use of the constitutional principle of the guarantee of the judicial review of decisions made by the agencies began to be oriented, not only to judicial scrutiny of the substance of statutes or the scrutiny of the clarity and logical consistency of legislative ends and means, but also to the respect of these agencies for decision-making processes that must include and balance all the interests affected.^{li}

From this perspective Jerry Mashaw argument is important to Habermas approach discussed above. According to Mashaw:

“(...) instead of addressing the issue of whether the administrator was wrong, courts could remand administrative decisions for more complete findings or for a testing of the evidence in a more adversary administrative proceeding. Instead of determining by proofs in court whether an agency had deprived the plaintiff of a statutory entitlement, the courts required that such action be preceded by an administrative hearing that would elicit the relevant facts. Rather than imposing new decisional criteria or priorities on administrators, courts required that decision be taken only after listening to the views or evidence presented by interest that traditionally had not been represented in the administrative process. All of these techniques tended to broaden,

intensify, or redefine the participation of affected parties in the administrative process.^{lii}

Thus, respect for the guarantee of public hearings and public consultations as proceedings of the participation of the citizen, whether in adjudicating proceeding or rulemaking proceeding, became an important question debated in the North American Regulatory State, deepening legal discussion on the legitimacy of decision-making processes in public administration.

The guarantee that all the arguments of the parties affected by the norm to be enacted by a regulatory agency could be heard before the content of the regulation of a determined market be defined, gained a constitutional statute of protection. In this sense, Cass Sunstein affirms:

“The American constitutional regime is built on hostility to measures that impose burdens or grant benefits merely because of the political power of private groups; some public value is required for government action. This norm (...) suggests, for example, that statutes that embody mere interest-group deals should be narrowly constructed. It also suggests that courts should develop interpretative strategies to promote deliberation in government – by, for example, remanding issues involving constitutionally sensitive interests or groups for reconsideration by the legislature or by regulatory agencies when deliberation appears to have been absent.”^{liii}

For Habermas, this legal experience in the North American case, as described by Mashaw and Sunstein, is especially important. It is a “republicanism which has been renewed” but conceived as a means of control by means of the right to the discursive formation of the opinion and will, thus taking on, by means of the protection of the proceeding of public deliberation, the need to guarantee that the influence of interest groups is not imposed on the apparatus of the State to the detriment of general interests.^{liv}

The action of interest groups competing for political influence is, therefore, presumed – it is not a question of an utopian republic of “speaking angels” (i.e. that do not act strategically pursuing private interests) –, but the guarantee that private interests of privileged groups shall not be superimposed on private interest of less privileged groups^{lv} lies exactly in perfecting and controlling, through the Law, the mechanisms of public participation which enable the affected parties to register their arguments in the decision-making processes about the content of the regulation.

In this way, the perfecting of the mechanisms of public participation and of the ways of controlling its observance are part of the process of democratization of the institutions of which State bureaucracy consists and, in this way, is a condition for the legitimacy of the content of the regulation formulated by independent regulatory agencies.^{lvi}

5. THE DECISION-MAKING PROCESS OF INDEPENDENT REGULATORY AGENCIES IN BRAZIL: BRIEF ANALYSIS OF THE CASE OF TELECOMMUNICATIONS SECTOR

The aim of this part of the article is to describe the mechanisms of accountability (horizontal and vertical) existing in the normative framework established for the regulation of one sector of the Brazilian economy. The choice of the telecommunications sector was made from the starting point of an analysis of the normative framework of the National Telecommunications Agency (ANATEL),

comparing it to other independent regulatory agencies created in the reform of the State. ANATEL can be said to be the agency which best disciplines the forms of public participation in Brazilian Law.

Firstly, I will take into consideration the horizontal accountability mechanisms for Legislative, Judiciary, and President's Cabinets control over ANATEL. In this section I will discuss mainly the lack of President's Cabinets control over agencies and, because of that, the reaction of Luis Inacio Lula da Silva Government to the independent regulatory agency model introduced in the Fernando Henrique Cardoso Government.

Secondly, I will analyze the vertical accountability mechanisms of public participation in the decision-making process of ANATEL. With the study of these mechanisms we do not intend to make conclusions about the working of the model of independent regulatory agencies in Brazil, but merely point out some reflections on the model and preliminary conclusions as to the effectiveness of these mechanisms in the functioning of ANATEL.

5.1 ANATEL AND THE TYPES OF DECISION-MAKING AUTONOMY CONTROL ON A LEVEL OF SEPARATION OF POWERS (*HORIZONTAL ACCOUNTABILITY*)

There are several types of democratic control of ANATEL action by the Executive (President's Cabinets), Legislative and Judiciary powers.

With regard to Legislative Power, the conditions for democratic control are mainly connected to mechanisms of accountability of Board of Directors' activities to Legislative Power. These mechanisms are specified in telecommunications law and should be followed by the Agency, and are stipulated in constitutional norms that can be activated by the Legislative Power.

In respect of the control of Agency's administrative acts (including, as noted above, normative acts) by the Judiciary Power, the form of control is straightforward through judicial review.

The Judiciary Power exerts democratic control on regulation content definition by regulatory bodies through its judgment on the merits of administrative decisions that define the content of norms. The Judiciary Power can, in principle, invalidate edited norms on account of the absence or insufficiency of rational justification presented in connection with the reasons (including accomplished or intended effects) of the defined regulation content. The Judiciary Power can – by judging the merits of administrative decisions – significantly analyze the appropriateness of justifications and reasons for the administrative act in relation to its actual or intended effects upon the affected players taking into consideration the existing constitutional and legal limits.

As to the control of ANATEL activities by the Executive Power, particularly the President's Cabinets, there are several mechanisms for *horizontal accountability* in the institutional design established in telecommunications law.

There is a clear separation of competencies with regard to matters subject to definition by the President's Cabinets (i.e., the President of the Republic and the Ministry of Communications) such as *governmental policy for telecommunications* and matters subject to definition or specification by ANATEL, as it carries out governmental policy for telecommunications. In addition, there are clear mechanisms for accountability to President's Cabinets in connection with the carrying out of *governmental policy for telecommunications*, including the possibility of removal

from office of ANATEL Board members when the governmental policy if not adhered to.

On the other hand, notwithstanding the President's power to appoint the members of the Agency's decision-making body and select the President of ANATEL among its members, whenever presidential elections occur the new president-elect has limited power in such political circumstance to control the communication channel between the Agency and the President's Cabinets. The President may change the *governmental policy for the telecommunications sector*,^{lvii} but may not have representation in the Board of Directors of ANATEL to participate in deliberative processes relating to regulation content amendments that may turn out to be necessary to reflect latest changes made to the *governmental policy*.

This is mainly a result of the decision-making autonomy guarantees of the regulatory body, particularly the fixed term of office for Board members. The fixed term of office guarantees that the Agency is a locus of power different from the President's Cabinets and with political power circulation channels different from those inherent to political game-playing between the President's Cabinets and the Congress. Yet, the fixed term of office can be seen as a guarantee of total bureaucratic insulation for regulatory bodies (in the classical sense of *non-political agencies* of the Schumpeterian model of democracy).^{lviii}

This occurs when regulatory agencies are seen as purely technical bodies – apolitical organizations – whose decisions do not imply political choices; which does not seem to be the case in the regulatory agencies model adopted in Brazil.

Nevertheless, the decision-making autonomy model applied to ANATEL resulted in clashes with the President's Cabinets. In the first semester of 2003, at the start of the Luis Inacio Lula da Silva Administration, there was a difference of opinion between the Ministry of Communications and ANATEL which made evident the problem of restrictions faced by the President's Cabinets to implement changes in the national telecommunications policy when, in view of the alternation in power by way of presidential elections, the Board of Directors of ANATEL is run by members appointed by the former President of the Republic.

At that time the President of the Republic said, with reference to the Agencies' competence to negotiate tariff readjustment conditions (established in public utility concession agreements): “Brazil was outsourced. The agencies rule the Country. (...) Decisions that affect the population are not sanctioned by the government”.^{lix}

The above statement was followed by a series of statements made by members of the Lula administration, culminating in a public difference of opinion – widely published by newspapers all over 2003 – regarding the model of regulatory agencies adopted in Brazil and its relationship with the President's Cabinets.

The most significant results of these statements made by the Lula administration (until January 2004) were two preliminary Draft Bills of the Executive Power submitted for public consultation by the Civil Cabinet of the President of the Republic and subsequently transformed into one Draft Bill and sent to the Congress.^{lx} In addition, the Lula administration discharged the President of ANATEL (Mr. Luiz Guilherme Schymura) and appointed a Board member connected to President Lula as his substitute.

Bearing in mind the limits of this article, two aspects of Bill 3337 are worthy of being highlighted here. The first one refers to the establishment of *Management Contracts* between the regulatory agencies and the Ministry to which they are obliged. The management contract was created basically as an instrument to control the power of the agencies to specify content for governmental policies in different sectors of the

economy. The establishment of management contracts appears to be a response of the Lula administration to the excessive decision-making autonomy that regulatory agencies have.^{lxi}

The second aspect is the amendment made to sectorial laws aimed at transferring to the President's Cabinets the powers concerning definition of bid procedures as well as negotiation and specification of clauses for public utility concession agreements. This measure would limit the agencies' functions to defining the terms and conditions for the regulated services rendered by them.

These first two aspects can be interpreted as the way found by the current Federal administration to go around the impossibility of having a direct sway over the process for specifying content for sectorial *governmental policies* in the normative definition of regulatory content that takes place in the regulatory agencies.

The evaluation of these two mechanisms – the management contract and the removal of agencies' power to define bid procedures as well as to negotiate and specify clauses for public utility concession agreements – needs, however, to be made in the light of conditions for democratic control over the formulation of public policies.

It would be appropriate to evaluate what would be the conditions for deliberation and democratic control over the definition of content for management contracts and mainly over the definition of content for bid procedures and public utility concession agreements. More specifically on bid procedures and clauses of public utility concession agreements, it would be appropriate to evaluate if in the model resulting from the aforementioned Bill, still under discussion in Congress, there will be public mechanisms for control by civil society over internal decision-making processes of the President's Cabinets. Of if, following the Brazilian tradition of little control over what happens inside the government's "black box," only privileged groups of interest would have access to what is being decided. If, in this sense, the forms of democratic control were smaller than possible (proceduralized) forms existing inside the regulatory agencies, there could be a larger democratic shortfall in the area of President's Cabinets than in the model of regulatory agencies adopted in Brazil.

Finally, with regard to the decision of the President of the Republic to discharge ANATEL's President before the latter could complete his term in office, it is appropriate to make a few general comments about this event within the scope of this analysis.

Without discussing the juridical possibility of dismissing the President of the regulatory body prior to completion of his term in office, it is appropriate to note that there could be an institutional mechanism for direct representation of the President's Cabinets on the Board of Directors of the Agency. This could be useful so that, in case of alternation in power by way of presidential elections, the new president-elect may have a direct channel for circulation of political power at the Agency precisely to allow deliberation – inside the regulatory body – of specification – by the regulatory body – of content for sectorial *governmental policies* defined by the President's Cabinets consistent with the applicable limits. The availability of an institutionalized channel of this nature could also allow greater publicity of the relationship between the President's Cabinets and the Regulatory Agency and, above all, improved (proceduralized) control by civil society players over the game with political pressures derived from the President's Cabinets/Congress front, exerted upon the regulatory body.

The abovementioned political pressures will always exist (with greater or smaller degrees of autonomy of the regulatory body) and are inherent in democracy. However, from the standpoint of the model I'm working with it is necessary that the abovementioned game be democratically controllable by civil society beyond *vertical accountability* by way of elections.

The fact of being possible that the new president-elect changes the president of the regulatory body – selected by the preceding President of the Republic – replacing him with one of the other Board members, could be one way of creating an institutionalized direct channel for circulation of political power in the Agency. However, this possibility should be specified by law and could be conditioned to change of President of the Republic. So, for the duration of a President's mandate the president of a regulatory body selected by him would be insulated against dismissal until the end of his own Presidential term of office. These rules should be considered so that the regulatory body may remain stable and operative, and so that democratic control over it can be exerted above and beyond the control exerted by the President of the Republic.^{lxii}

5.2 ANATEL AND THE INSTITUTIONALIZED PUBLIC PARTICIPATION MECHANISMS FOR CONTROL OF DECISIONS (DELIBERATIVE MECHANISMS OF *VERTICAL ACCOUNTABILITY*)

Based on an analysis of the norms in the Brazilian Constitution, it can be stated that public participation in public administration action is a constitutional guarantee. Paragraph 3 of article 37 of the Brazilian Constitution, introduced by Constitutional Amendment 19, expressly foresees that the forms of participation of the user in public administration must be regulated and guaranteed.

In the norms which discipline the action of ANATEL, three procedural mechanisms of direct public participation are established, which are, **(i)** public consultations; **(ii)** public hearings; and **(iii)** complaint procedures.

Public consultation and public hearings are the main mechanisms of public participation in the decision-making process of ANATEL. This is because they are directly linked to the normative function of the Agency.^{lxiii}

Subsequent to a description of mechanisms of public participation available in the ANATEL case, it is possible to state that these mechanisms could be qualified as participation mechanisms allowing public participation in regulation content, as they allow affected parties to register their lines of reasoning in the internal decision-making processes at ANATEL.

In the case of the *public consultation* mechanism the parties affected by the regulations have the opportunity to discuss implications of the norms that are being drafted and appropriately express their points of view. And so through *public consultation* the parties can influence the definition of regulation content. However, the said influence occurs in keeping with preestablished procedural rules that are subject to control.

On the other hand, the mechanisms of *public hearing* and *denunciation and complaint* are also key public participation mechanisms for control of execution of public policies defined for the sector by the Agency, as well as for dispute resolution. Parties interested in a particular administrative proceeding initiated upon denunciation or in a specific dispute that is being resolved inside the regulatory body can and should be heard, so that their opinions can be considered in the relevant decision-making process.

However, in order to be carried out, public hearings require a suitability opinion issued by the Board of Directors. This requirement clearly illustrates its difference – and lesser significance – in relation to the public consultation mechanism. Activation of the public consultation mechanism is obligatory and does not call for any suitability opinion of Board members, as public hearings do.

In order to have make these mechanisms effective as form of public deliberation on regulation content, they should be guaranteed and complied with by the regulatory body. Firstly, this guarantee would be dependent on provision of law on public participation mechanisms and on control of compliance with the provision of law specifying the said mechanisms.

According to the Federal Administrative Proceedings Law only the public hearing mechanism is required in administrative proceedings throughout the exercise of adjudicative functions by the Administration. Consequently, the Brazilian Administrative Proceedings Law does not include any provision requiring *public consultations* (or *public hearings*) in administrative proceedings during the exercise of normative function by the Administration.

This represents a democratic control shortfall, as in the absence of legal provision in the applicable sectorial law requiring public consultations (or public hearings) during the exercise of normative function, the said practice shall always depend on suitability opinion of the management.

Secondly, the guarantee that the interests of players affected by regulation content will be heard by the agency at norm formulation time, requires improvement of public participation mechanisms by way of practice – deliberative experience.

But before discussing how these mechanisms can be improved, I would like to briefly present the findings of the empirical research that I have conducted in Brazil in order to know *(a)* who is participating inside ANATEL using mechanisms of public hearings and public consultations; *(b)* what kind of interests are being presented in the public hearings and public consultations; and *(c)* if the arguments presented by the public to change the draft of the regulation in debate were adopted or not and if we have statistical differences among different types of groups.

The research took into account the Brazilian Telecommunications Agency (Anatel) activities from 1997 to 2003. It covered regulations related to universal service regulation, quality regulation, and price regulation. I have analyzed 1053 proposals for changes in telecommunication regulations declared by different actors in public hearings and public consultations.

The conclusions about the actors that participate in the public hearings and public consultations are:

- (1) Approximately 48% of the participation comes from the telecommunications companies and law firms that represent their interests;
- (2) We do have participation of independent citizens (35%);
- (3) We have low participation of NGOs (consumer defense associations, disabilities associations, including universities and schools that deal specifically with digital exclusion problems, etc.) (6%);
- (4) We do not have declared public interest lawyers representing interests of any specific interest group of the Brazilian civil society at Anatel;
- (5) We have low participation of consumer defense associations (2,11%). In spite of their existence in Brazil, they still prefer to defend consumers' interests in the Judiciary. According to interviews that I have done with them, they know about the existence of the new mechanisms of public participation

but they do not have lawyers specialized in telecommunications regulation (for instance). Thus, they prefer to go to the Judiciary to discuss general consumer law matters other than technical issues related with telecommunications services; and

(6) We do have – answering public consultations – participation of Ministries (central administration), public departments of Municipalities and State Governments (5,79%).

In relation to the interests defended in public hearings and public consultations and incorporated into the regulations, the conclusions are:

(A) The interests represented are not only those of the telecommunications companies. However, 66,57% of the proposals for changes in the norms represent telecommunications companies interests;

(B) Public departments of Municipalities and State Governments participate more than consumer associations defending the interests of consumers and poor people without access to telecommunications services (14,74% of the proposals for changes in the norms in favor of consumers comes from the public sector; 7,69% of the proposals comes from consumer associations). Independent citizens have the highest participation defending consumer, poor people and other disadvantaged actors interests (60,26%);

(C) Proportionally less proposals of the telecommunications companies are incorporated into the content of the regulation than proposals defending *diffuse interests* (24,49% of the proposals for changes that defends telecommunications companies interests are incorporated by Anatel; 31,37% of the proposals defending interests of consumers, poor people and other disadvantaged actors are incorporated by Anatel); and

(D) Taking in account all of the proposals, Anatel has incorporated only 24,31% them.

This empirical data shows that practice of public participation mechanisms requires much more than simple carrying out of *public consultation* by ANATEL in our case. It will depend on a permanent control over the appropriate execution of all procedures prescribed by law for the operation of the regulatory body. In other words, it is not enough to make *public consultations* obligatory; response to them received from various groups of interest affected by the norm to be issued should be effectively analyzed and incorporated – being either discarded or utilized – based on reasoning provided by the Board of Directors as it opts for normative content X or Y of a given norm.

Thus, the procedure control is not limited to a formal control over the participation mechanism (whether the mechanism is activated or not) and goes well beyond its formal control. In spite of the administrative difficulties and costs entailed in this task, it does not seem to be reasonable to have participation mechanisms that are operated by the agencies only as a legal formality that should be observed.

The control over decision-making process in connection with regulation content formulation requires substantial control over the lines of reasoning and justifications presented to the regulatory body by the interested parties, mainly in the course of the formulation of norms. The aforesaid control should be characterized by:

(i) the possibility that the players participating in public consultations may have access to the opinion of other players and counterargue (for an indefinite period of time), thus expanding the public discussion of reasons and intended effects of the regulation content to be defined. In the course of my research this possibility occurred only three times, which represents a democratic shortfall from a procedural standpoint;

(ii) by the legal basis of decisions made by the agency's Board of Directors, including the said legal basis the response to the players that expressed their opinions and justifying why the final content of the issued norm was X and not Y. This would be an institutional guarantee that the Board of Directors would effectively analyze the normative amendments suggested by the public and consider them at the time of drafting the relevant norm. Additionally, the substantial control over the reasons for the administrative act would be an important condition at the level of *horizontal accountability* procedure (including judicial review along the lines pointed out by me). During my research the Agency formalized response to players that expressed their opinions in only one of the analyzed public consultations, which also represents a democratic shortfall from a procedural standpoint; and

(iii) by the carrying out of *public hearings* together with *public consultations*, thus generating deliberative forums for the duration of the period in which the draft of the norm to be edited is under discussion. It is not possible to state herein that the deliberation is necessarily more or less efficient than the presentation rooted in suggestions received during public consultations. However, the possibility of real-life deliberation allows to expand the amount of control over the relevant decision-making process. Players with media and press contacts can be particularly valuable for wider publicity of deliberations carried out during the said audiences, expanding the debate about regulation content in the public sphere. As noted above, the *public audiences* are not obligatory in the exercise of normative functions by ANATEL, as their carrying out is dependent on suitability opinion issued by the Board of Directors. With regard to ANATEL's public consultations analyzed by me, public hearings were held in only four of them, which is a democratic shortfall from a procedural standpoint.

The abovementioned control over procedures is an ideal that should be pursued in order to improve *regulatory agencies* as democratic institutions. Clearly, this has nothing to do with guaranteeing regulations under the concept of "public interest." But it could be one of the guarantees that the decision-making process for formulating public policies could be increasingly better controlled by civil society players, thus allowing relevant regulation content topics (which, as I point out throughout this thesis, imply political choice) to reach the public sphere and be publicly discussed. Additionally, the existence and improvement of those mechanisms could represent a restriction in order that only the private interests of regulated companies would prevail over other interests present in Brazilian society, for example those termed by me diffuse.

At this point I would like to highlight a third aspect of Bill 3337 sent to Congress by the Lula administration. This Bill provides for institutionalization of public consultations as a mechanism for control over norms formulation concerning

all regulatory agencies. Supposing that we make a comparative study on agency-related laws we would confirm that currently public consultations are obligatory and prescribed by law only in the case of ANATEL. Other agencies that carry out public consultations are not obligated by law, nevertheless, they have incorporated the aforementioned practice to their bylaws.

At the same time, it is appropriate to highlight the creation of an interesting mechanism aimed at correcting *information asymmetry* between different groups of interest. The possibility for specific groups to have access to technical support on norms definition at the regulatory agencies would allow a more informed and qualitatively better participation of the said groups during public consultations. In addition, the Bill provides that agencies shall make available in advance to the public the technical studies done by the Agency so as to substantiate norm formulation. This would make possible to clearly understand the Agency's intended results for the norm and the technical/economic variables at issue. This aspect of the Bill could represent greater juridical/institutional guarantee of democratic control mechanism effectiveness through public consultations in the regulatory bodies.

6. CONCLUSIONS

As we compare the juridical/institutional conditions of control over regulation content decision-making process in the Brazilian regulatory State before and after reform, we could say that – from the standpoint of a static and formal analysis of the indicated legal basis – the conditions of the regulation content decision-making process made the Brazilian state bureaucracy more permeable and *accountable* to public. From this perspective the decision-making process inside regulatory agencies can now be considered– in principle – less centralized and less insulated.

Considering the institutionalization of deliberative councils in the regulatory agencies, there is, at the juridical level, requirement of rational and public basis for decisions made by their members, which allows greater control of the objectives, reasons and basis of public policies defined by the Administration. Which is particularly important for an evaluation of the conditions of control over the regulatory action of the State by the Judiciary Power – in the form of judicial review of the content of norms issued by agencies – as well as over conditions for *social control* – by civil society – over regulation content decision-making processes.

The provision for institutionalized juridical mechanisms of public participation – such as *public consultations* and *public hearings* – created the possibility for direct and public control over agencies' actions by the "civil society" and removed the institutionalized mechanisms for privileged participation and control over normative content by restricted segments of civil society, that existed in the model prior to the reform in the decade of the 90s.

On the other hand, concern over the decision-making autonomy of the regulatory bodies caused the laws that created them to provide for, a guarantee of their independence, decision-making governing council with fixed terms of office for its members, financial autonomy of the agency and impossibility of administrative appeals to the superior authority from decisions made by these bodies.^{lxiv} In other words, this means that decisions made by regulatory agencies regarding the sector they regulate can be, from the legal standpoint, contrary to political interests of the democratically elected President of the Republic or the Ministries to which they are subordinated. This denotes a significant change in relation to the preceding model,

where the President of the Republic and the Ministries centralized the public policies formulation process.

In the present model the President and the Ministries continue to have the power to define public policies. However, this power has been reduced as sectorial laws now limit the area where the President's Cabinets can take action to define targets to be met by the regulatory bodies.

Additionally, the bond between agencies and Ministries still exists at the political level, notwithstanding the institutional autonomy mechanisms prescribed by law, as the President of the Republic is in charge of selecting the members of the agencies' deliberative bodies.

However, based on specific regulation analysis concerning the telecommunications sector, it is appropriate to state that ANATEL has a high degree of decision-making autonomy in relation to the Federal Administration compared to other regulatory agencies. The exercise of normative function by ANATEL has resulted in the most important norms for the telecommunications sector, which substantiate the public policies for the sector. This is why there was a difference of opinion between the Ministry of Communications and ANATEL in the beginning of the Lula Administration, which culminated in the Draft Bill that provides for alteration in model of independent regulatory agencies.

With regard to other agencies, it is possible to say that they feature totally different dynamics in the exercise of their administrative functions; particularly in their relationship with President's Cabinets bodies and the Legislative branch in connection with the formulation of sectorial public policies.

In the electric power sector there is still extensive participation of state owned companies in the conduction of electric power generation, which companies remain directly subordinated to guidelines issued by Ministry with reference to energy public policy. Additionally, due to the energy supply crises that occurred in recent years, the President's Cabinets has been deeply involved in crises management and the Legislative branch was strongly motivated to approve laws regulating the conditions for adoption of emergency management policies. And the end result was that ANEEL (National Electric Power Agency) practically lost its decision-making autonomy.

In the sector of oil and natural gas one cannot ignore the presence of PETROBRAS, state owned company and a facto monopoly in various segments of the oil industry production chain. The relationship between PETROBRAS and ANP (National Oil Agency) determines the relationship of ANP with the President's Cabinets.

Therefore, I'm aware of these specificities and understand they are extremely relevant in order to evaluate the extent to which the juridical/institutional (static) conditions, described in the table above, occur in the (dynamic) interaction of power relations defined in political power circulation channels between the Agency and the President's Cabinets, and between the Agency and the Legislative branch.

Finally, it is appropriate to note that the mechanisms for regulation content formulation accountability to Legislative branch were juridically institutionalized. The aforementioned accountability can be activated by the Legislative branch by summoning the Agency's president to render account to Congress by way of reports or in person.

In view of the above, it is possible to say that from the perspective of strictly formal analysis of the institutional design of agencies established by specific law, the current model of regulatory State in Brazil is less centralized in the President of the Republic and his Ministry Cabinets. Additionally, with the adoption of guaranteed

decision-making autonomy for agencies, the regulatory State may have become characterized by bureaucracies that are more insulated from political power circulation channels between the Executive (President's Cabinets) and Legislative branches. On the other hand, through institutionalization of public participation mechanisms in the internal decision-making processes of these new bureaucracies, the regulatory agencies may represent a new locus of direct and public participation of the "civil society" in decision-making processes respecting regulation content.

The aspiration to secure mechanisms in the *regulatory reform* process for public participation in the *social control* of public utilities calls into question the problem of democracy in Brazil. The spaces for democratic control by civil society over decision-making processes of the agencies – as regulatory bodies – can only become effective on condition that the available juridical/institutional apparatus is considered in connection with *Brazil's real state of affairs*. In other words, it is appropriate to evaluate to what extent the legal basis of decisions made by the new regulatory agencies – as administrative governing councils – can be discussed by civil society and how the civil society is using the institutionalized public participation mechanisms and how the agencies are making their decisions.

In this sense the requirement of public and rational juridical basis for decisions made by agencies' deliberative council members should be analyzed not only in view of its existing juridical/institutional guarantees, but also in consideration of the political dimension of the decision-making process in connection with regulation content.

The participation of groups of interest in the formulation of regulation content inside the Brazilian state bureaucracy would continue to exist – however, now in the locus comprised by the regulatory agencies. Yet, with regard to the present model it would be possible to say there is greater democratic potential with expanded participation of the civil society in the regulatory action of the State if we to compare the currently existing juridical/institutional conditions against the model in use prior to the reforms that took place in the 90s.

However, plain institutionalization of public participation mechanisms does not allow us to conclude that this degree of democratic potential really exists or is being accomplished. The adoption of these mechanisms could be interpreted simply as a way for state bureaucracy to aggregate preferences, without calling into question the expansion of the conditions of democratic legitimacy in connection with the regulatory action of the State.

Having described the mechanisms of public participation established in the case of ANATEL and presented empirical data regarding the use of these mechanisms by different interest groups, I understand that these mechanisms can be considered as mechanisms which allow the citizens to communicate their arguments in the internal decision-making processes to ANATEL.

In the case of the mechanisms of *public consultation* and *public hearings*, the parts affected by the regulation are able to discuss the meaning of the norms to be issued, expressing their opinions. In this way, by means of *public consultation* and *public hearings*, the parts can influence the definition of the content of the regulation. However, such influence is exercised according to pre-defined procedural rules which must be respected and can be controlled by the Judicial Power.

If we take here the meaning of *administrative hearings* as described by Mashaw in North American debate, these are in what Mashaw describes as “the participatory ideal in administrative policy formation”.^{lxv} This ideal appears to have arrived in Brazil, even if its shape is somewhat unclear from a theoretical point of

view, with the public participatory mechanisms established in the operation of the *independent regulatory agencies*.

However, for such mechanisms to be effective as forms of public deliberation on the contents of regulations, their observance must be mandatory and guaranteed by the regulator or by the Judicial Power. And such a guarantee depends, in first place, on control of the enforcement of the Law which establishes the existence of such mechanisms.

In the United States, the demand for such control reached the Supreme Court – the “due process hearing rights” were recognized at a constitutional level^{lxvi}. Despite criticism of the results of the excessive use of the argument on the violation of these rights in North American courts^{lxvii}, it is a fact that the existence of the mechanisms of public participation – and their legal protection – permitted the widening of institutional experiences which included mechanisms of participation in the decision-making processes of state bureaucracy as well as their improvement.

The *ideal of public participation* in the decision-making process of the contents of regulation established by agencies was not necessarily achieved. The norms issued by the agencies continued to be formulated considering a series of other factors, including the convenience judgments of the technically specialized bureaucracy^{lxviii}. But such experiences decisively shaped the North American public administration structure of *independent agencies* and made it more democratic, in the sense of the legitimacy of its operation.

In this context, the mechanisms of public participation recently introduced into the Brazilian legal system as a way to ensure that all the interests which are affected are heard when the norm is formulated by a specialized technical organ, can, if legally guaranteed, be experienced and improved.

Nevertheless, the practice of mechanisms of public participation implies much more than simply holding *public consultations* by, in our case, ANATEL. It depends on the permanent control of the functioning of all the procedures established for the working of the regulatory organ. In other words, it is not sufficient for the *public consultations* and *public hearings* to be mandatory; the arguments presented, coming from various interest groups affected by the norm to be issued, have to be effectively analyzed and incorporated – discarded or used – in the argument given by the agencies' commissioners when they decide for normative content *x* or *y* of a determined norm.

Thus, the control of procedures is not limited to the formal control of the mechanism of participation (and in this sense it is not a formal accountability mechanism), but goes far beyond this. Despite the administrative difficulties and the costs which such a duty represents, the existence of participatory mechanisms which are unable to legitimize decision-making processes effectively does not seem to make sense.

Such control of procedures is an ideal to be pursued in order to perfect the regulatory agencies as democratic institutions. It is obviously not the guarantee of an ideal regulation in the public interest. But it is certainly one of the guarantees that the decision-making process can be increasingly controlled, which may mean a limit to the extent to which private interests of privileged groups can prevail over private interests of less privileged groups (i.e. over public interest). In other words, it may mean a limit to the “capture” of agencies by a certain interest group to the detriment of others.

The other choices would be a non-regulated market, following the orthodox arguments of the Chicago theorists, or only regulated according to technical criteria of

efficiency by means of bureaucracies composed of technicians who make increasingly centralized and closed decisions (Schumpeter's ideal of *non-political agencies*). Although these options exist, they no longer seem to be possible after the experience of the *welfare state* and of the increase in conditions for the democratization of political institutions^{lxix} – including here the phenomenon of the regulating State and all the difficulties in its administration^{lxx}.

In this context, the debate pursued above about concepts of politics and democracy (liberal, republican and procedural), and the importance of public participation guaranteed by legal procedures in the decision-making processes inside *independent regulatory agencies* in the North American debate, can help to understand to what extent the reform of Brazilian State opened new paths of circulation of power from the *public sphere* to the administrative system of power (legal and political). Moreover, if some of these new paths can be assumed as direct-deliberative mechanisms or deliberative accountability mechanisms (as a vertical accountability mechanism beyond the electoral process) – and I think they can mainly in the case of *public consultations* –, then they can be understood as an institutional change that can deepen the democratization of the State bureaucracy in Brazil.

In this sense, *independent regulatory agencies* could be understood in Brazil as a political *locus* in which we have technical competence with centralized responsibility to perform market regulation as well as a political *locus* vertically accountable to citizens (in addition to the *horizontal accountability* mechanisms^{lxxi}), taking seriously into consideration the democratic potential of the public participation mechanisms introduced in the reform of the Brazilian State. Furthermore, since the public participation mechanisms introduced in the Brazilian legal system as a form of deliberative democracy is guaranteed by the Brazilian Constitution, the Brazilian Judicial Power in the review of regulatory agencies action should protect it.

In this sense, by the radicalization of the use of mechanism of public participation (with institutional improvements) to introduce a more directly-deliberative problem-solving and to define the content of norms, the *public sphere* can be taking seriously in the process of circulation of political power in Brazil. And, thus, the focus of the debate can change from a single systemic analysis of the axis state-market to an analysis that also includes the *public sphere* as an important element in the discussion about the tension between efficiency and legitimacy.

It is true that there is any guarantee that by the simple fact that now we have public participation mechanisms (as in the ANATEL's case) we will have participation. But it could be true that the institutionalization of public participation mechanisms can be **(i)** a stimulus for participation of sectors of the Brazilian *civil society* not yet represented (or unequally represented in the representative democracy system – through the electoral process); **(ii)** a pressure over the Judiciary Power to perform the judicial oversight of the *independent regulatory agencies* by means not only of formal control of procedures but also a substantive control by means of scrutiny of the logical consistency of the content of the norms according to the arguments presented by citizens and groups of interests affected by the norm and the justifications given by the agency in its final decision; **(iii)** a stimulus for more information about the purposes and the consequences of the regulations over society and more publicity of the agency acts and, thus, more public control over the *independent regulatory agencies* by the press^{lxxii}; and **(iv)** a stimulus for the specialization of public interest lawyers to represent the interests of unrepresented citizens before the administrative power, using the direct-deliberative mechanisms, and before the Judiciary. Furthermore, public interest lawyers might play an important

role pushing the use of these mechanisms by NGOs^{lxxiii} (what is not common in legal practice in Brazil and it is not part of the Brazilian law schools curriculum).

In this context, it is possible to conclude that, on the one hand, the adoption of mechanisms of public participation like public hearings and public consultations within the new regulatory agencies model has a democratic potential for the accountability of policy-making processes inside state bureaucracy in Brazil. It occurs because the “black box” of the presidential cabinets and ministries has lost importance and new ways of participation and circulation of communicative power have been established. However, on the other hand, the empirical data shows that we still have a legitimacy deficit and an unbalanced representation of interests. But, comparing to the former model (a closed model of participation limited to the bureaucratic councils inside the ministries and President’s cabinets “black boxes”), I understand that the adoption of mechanisms of public participation inside regulatory agencies are an important step to strengthen democracy in Brazil.

We should believe that our *public sphere* – in spite of all social problems that we still have in Brazil – could develop and mechanisms of public participation could start to be used more effectively and equally to express different interests. The other alternative seems to be the organization of “civil society” through a centralized state or through a populist government. But recently in history this showed to be a step towards authoritarianism.

ⁱ In this sense, the diagnoses about the authoritarianism in Brazil, since the end of the military dictatorship of 1964 – 1985, can be reviewed within the re-democratization process in a broader sense. About the authoritarianism in Brazil, see: Alfred Stepan (ed.). *Authoritarian Brazil: origins, policies, and future*. New Haven. Yale University Press, 1973; Alfred Stepan. *The Military in Politics – changing patterns in Brazil*. Princeton: Princeton University Press, 1971; Sérgio Henrique Abranches. *The Divided Leviathan: State and Economic Policy Formation in Authoritarian Brazil*. PhD. Dissertation. Cornell: University of Cornell. 1978; Peter Evans. *Dependent Development – the alliance of multinational, state, and local capital in Brazil*. Princeton: Princeton University Press, 1979; José Luis Fiori. *O Vôo da Coruja – para reler o desenvolvimentismo brasileiro*. Rio de Janeiro: Record, 2003; Philippe Schmitter. *Interest Conflict and Political Change in Brazil*. Stanford: Stanford University Press, 1971; Fernando Henrique Cardoso. *Autoritarismo e Democratização*, Rio de Janeiro: Paz e Terra, 1975.

ⁱⁱ For a complete analysis, see: Paulo Todescan Lessa Mattos. *O Novo Estado Regulador no Brasil: Eficiência e Legitimidade*. São Paulo: Editora Singular, 2006.

ⁱⁱⁱ In the debate of the Chicago School on theories of economic regulation, I am dealing with following articles: Harold Demsetz. “Why Regulate Utilities?” in the *Journal of Law and Economics* 11 (April 1968), pp. 55 – 65; George Stigler. “The Theory of Economic Regulation” in the *Bell Journal of Economics and Management Science* – 2 (1971). pp. 3 – 21; Richard Posner. “Theories of Economic Regulation” in the *Bell Journal of Economics and Management Science* – 5 (1974). pp. 335 – 338; San Peltzman. “Toward a More General Theory of Regulation” in *Journal of Law and Economics* 19, no. 2 (August 1976), pp. 234 – 266; George Priest. “The Origins of Utility Regulation and the “Theories of Regulation Debate” in *Journal of Law and Economics*, vol. XXXVI, (April 1993), pp. 289 – 323. On the same debate, in a context of deregulation of the economy, see, among others: Roger G. Noll and Paul L Joskow. “Regulation in Theory and Practice: an Overview” in G. Fromm, ed., *Studies in Public Regulation* (MIT Press, 1981), pp.1 – 65; Gary Becker. “A Theory of competition among pressure groups for political influence”, in *Quarterly Journal of Economics* 98 (August 1983), pp. 371-400; Theodore Keeler. “Theories of Regulation and the Deregulation Movement” in *Public Choice*, vol.44, no.1, (1984), pp. 103-145; San Peltzman. “The Economic Theory of Regulation after a Decade of Deregulation” in *Brookings Papers on Microeconomics* (1989), pp.1-59; and Susan Rose-Ackerman. “Progressive Law and Economics – and the New Administrative Law” in *Yale Law Journal* 98 (December, 1988).

^{iv} Jürgen Habermas, “Three Normative Models of Democracy” in *Democracy and Difference: contesting the boundaries of the political* (S. Benhabib, ed.), Princeton, Princeton University Press, 1996; and Jürgen Habermas. *Between Facts and Norms: contributions to a Discourse Theory of Law and Democracy*, Cambridge, The MIT Press, 1996.

^v The choice of the telecommunications sector was made due to an analysis of the normative framework of the National Telecommunications Agency (ANATEL) compared with other independent regulatory agencies created within the reform of the Brazilian State. It can be affirmed that ANATEL is the agency which disciplines the forms of public participation in Brazilian Law in the best way. Therefore, the study of the institutional design of ANATEL and its mechanisms of participation allows some general conclusions to be made, in order to understand the model of the independent regulatory agency adopted in Brazil.

^{vi} In this article I am not considering the Eastern European countries, especially the former socialist countries. In Brazil it is possible to affirm that the practices of the former socialist countries were not considered as a model for the Reform of the State in Brazil in the Nineties.

^{vii} James O'Connor. *The fiscal Crisis of the State*, New York, St. Martin's Press, 1973; Simon Clark. *Keynesianism, Monetarism and the Crisis of the State* - Aldershot, Edward Elgar, 1988.

^{viii} Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, dated 15 September 1995 ([http://www.oalis.oecd.org/oalis/1995doc.nsf/LinkTo/OCDE-GD\(95\)95](http://www.oalis.oecd.org/oalis/1995doc.nsf/LinkTo/OCDE-GD(95)95)).

^{ix} Approved by the Federal Decree n° 1.738/96.

^x Approved by the Federal Law 8.031/90 and changed by the Federal Law 9.491/97 under Mr. Cardoso's Government.

^{xi} The main changes in the Brazilian legal framework concerning the reform of the Brazilian State are the Constitutional Amendments 5, 6, 7 e 8 (all dated of August 15, 1995), 9 (dated of September 11, 1995) and 19 (dated of April 6, 1998). The Amendment 5 establishes the legal regime of natural gas services rendering by the States; the Amendment 6 establishes the legal regime of research and extraction of mineral resources; the Amendment 7 establishes the legal regime of air, aquatic and terrestrial transportation; the Amendment 8 establishes the legal regime of telecommunications services and defines the creation of a regulatory agency for the telecommunications sector; the Amendment 9 eliminates the legal monopoly of oil and natural gas and defines the creation of a regulatory agency for the oil and gas sector; and the Amendment 19, among other changes, introduces the *efficiency principle* in the organization and action of the public administration, and establishes that *public participation* mechanisms shall be created in the administrative processes.

^{xii} Among the Consumer Law Code (Law n.º 8.078/90) and the Brazilian Competition Law (Law n.º 8.884/94), both previous the reforms that took place in the Mr. Cardoso's government, the following legal framework forms what can be defined as the reform of the Brazilian Regulatory State: (i) Public Services Concession Law (Law n.º 8.987/95) and Federal Administrative Process Law (Law n.º 9.784/99); (ii) Brazilian Telecommunications Law (Law n.º 9.472/97) – which creates the National Telecommunications Agency; (iii) the Brazilian Electric Energy Law (Law n.º 9.427/96) – which created the National Electric Energy Agency; e (iv) the Brazilian Oil and Gas Law (Lei 9.478/97) – which created the Brazilian Oil Agency. Afterwards have been created the Brazilian Food and Drug Agency (Law 9.782/99), the Brazilian Private Healthcare Agency (Law 9.961/2000), the Brazilian Water Agency (Law 9.984/2000), the Brazilian Aquatic Transportation Agency (Law 10.233/2001); the Brazilian Terrestrial Transportation Agency (Law 10.233/2001). Furthermore, in the States level have been created *State Commissions* for the control of the rendering of services by private companies (as an example, is worth to mention the State of São Paulo Commission of Energy Services – CSPE). (State of São Paulo Law n° 833/1997).

^{xiii} Fernando Henrique Cardoso. *Notas sobre a reforma do Estado* (“Notes on reform of the State”) in *Revista Novos Estudos do CEBRAP* - n.º 50, 1998 - p. 10.

^{xiv} Notwithstanding being qualified as promotion agency and not as a services or infrastructure regulatory body, ANCINE has normative function and competency to regulate, in accordance with applicable law, the activities of promotion and protection of the national cinematographic and videofonographic industries.

^{xv} For the purposes of the present article, we shall be taking the concept of “public sphere” and “civil society” as they were formulated by Jürgen Habermas in *Between Facts and Norms*: “The *public sphere* is a social phenomenon just as elementary as action, actor, association, or collectivity, but it eludes the conventional sociological concepts of “social order” The public sphere cannot be conceived as an institution and certainly not as an organization. It is not even a framework of norms with differentiated competences and roles, membership regulations, and so on. Just as little does it represent a system; although it permits one to draw internal boundaries, outwardly it is characterized by open, permeable, and shifting horizons. The public sphere can best be described as a network for communicating information and points of view (i.e., opinions expressing affirmative or negative attitudes); the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified *public* opinions. Like the lifeworld as a whole, so, too,

the public sphere is reproduced through communicative action, for which mastery of a natural language suffices; it is tailored to the *general comprehensibility* of everyday communicative practice". (...) "This sphere of *civil society* has been rediscovered today in wholly new historical constellations. The expression 'civil society' has in the meantime taken on a meaning different from that of the 'bourgeois society' of the liberal tradition, which Hegel conceptualized as a 'system of needs', that is, as a market system involving social labor and commodity exchange. What is meant by 'civil society' today, in contrast to its usage in the Marxist tradition, no longer includes the economy as constituted by private law and steered through markets in labor, capital and commodities. Rather, its institutional core comprise those nongovernmental and non-economic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld. Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. (...). Such associations certainly do not represent the most conspicuous element of a public sphere dominated by mass media and large agencies, observed by market and opinion research, and inundated by the public relations work, propaganda, and advertising of political parties and groups. All the same, they do form the organizational substratum of the general public of citizens. More or less emerging from the private sphere, this public is made of citizens who seek acceptable interpretations for their social interests and experiences and who want to have an influence on institutionalized opinion- and will-formation." Jürgen Habermas. *Between Facts and Norms*, cit., p. 360 and p. 366.

^{xvi} At present there is a Draft Bill already not approved by the Constitution and Justice Committee at the Senate (CCJ), which creates an organization and formal procedures for control of regulatory agencies activities by the Legislative branch.

^{xvii} Congress control is possible but requires a formal request of information to agencies. The agencies are not obliged to render information to Congress. However, National Audit Administrative Tribunal (TCU) can oblige agencies to inform about their activities and disclosure such information to Congress.

^{xviii} Peter Evans. *Dependent Development*, cit., p. 47.

^{xix} As Bernard Manin, Adam Przeworski and Susan Stokes point out in the article "Elections and Representation", in Adam Przeworski, Susan Stokes and Bernard Manin (eds.), "Democracy, Accountability and Representation", Cambridge University Press, 1999. pp. 29 – 55.

^{xx} Max Weber. *Economy and Society*. Berkley, University of California Press, 1978; To an analysis on the relationship between bureaucratic rationality and democracy, suitable for the purposes of the present article, see: Wendy N. Espeland, "Bureaucratizing Democracy, Democratizing Bureaucracy", Law & Society, 2000.

^{xxi} Jürgen Habermas. *Técnica e Ciência como Ideologia* in *Técnica e Ciência como "Ideologia"*. Lisboa. Editions 70. pp. 45-93. Translated into Portuguese from the original *Technik und Wissenschaft als "Ideologie"*. Frankfurt, Suhrkamp, 1968.

^{xxii} Joseph A. Schumpeter. *Capitalism, Socialism and Democracy*. New York. Harper, 1975 pp. 289 – 296

^{xxiii} Joseph A. Schumpeter. *Capitalism, Socialism and Democracy*. cit., p. 257.

^{xxiv} Joseph A. Schumpeter. *Capitalism, Socialism and Democracy*, cit. p. 293.

^{xxv} Joseph A. Schumpeter. *Capitalism, Socialism and Democracy*, cit. p. 293

^{xxvi} Robert A. Dahl. *On Democracy*. New Haven. Yale University Press, 1998. p. 178.

^{xxvii} For a broader view in the North American debate and different approaches than Habermas, see, among others: Robert A. Dahl, *Democracy and its Critics*, New Haven, Yale University Press, 1989; Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age*, Berkley, University of California Press, 1984; Amy Gutmann, "The Disharmony of Democracy" in J. Chapman & I. Shapiro (ed.), *Democratic Community*. New York, New York University Press, 1993; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement*, Cambridge, MA, The Belknap Press of Harvard University Press, 1996; James Fishkin. *Democracy and Deliberation: New Directions for Democratic Reform*. New Haven, Yale University Press, 1991. For a broader view on models of democracy, see: David Held. *Models of Democracy*, Cambridge, Polity Press, 1996.

^{xxviii} Jürgen Habermas, "Three Normative Models of Democracy", cit. p.21.

^{xxix} In North American administrative law. See: Bernard Schwartz. *Administrative law*. 3rded. Boston: Little, Brown and Co., 1991.

^{xxx} See: George Priest. "The Origins of Utility Regulation and the 'Theories of Regulation Debate'", cit.

^{xxxi} The "schools of public interest" can be found in different forms in the comparative administrative law legal debate. The North American and French (especially) schools were which had the greatest

influence on Brazilian public law. All of them, however, are based on the same normative principle: *state action aiming at the public interest*

^{xxxii} To a distinction between both and a defense of the second, see: Susan Rose-Ackerman. *Rethinking the Progressive Agenda*. cit., p. 95.

^{xxxiii} Anthony Downs, *An Economic Theory of Democracy*, New York, Harper and Row, 1957.

^{xxxiv} Mancur Olson, *The Logic of Collective Action – Public Goods and the Theory of Groups*, Cambridge, MA, Harvard University Press, 1965.

^{xxxv} George Stigler. “The Theory of Economic Regulation” in the *Bell Journal of Economics and Management Science* – 2 (1971). pp. 3-21

^{xxxvi} Gary S. Becker. “Competition and Democracy” in *Journal of Law and Economics* 1 (October 1958), pp. 105-109

^{xxxvii} Harold Demsetz. “Why Regulate Utilities?” in *Journal of Law and Economics* 11 (April 1968), pp.55-65

^{xxxviii} I am assuming the conditions and institutions of a polyarchy as stipulated by Robert A. Dahl. See: Robert A. Dahl. *Democracy and its critics*, cit., p. 221.

^{xxxix} See: Amy Gutmann and Dennis Thompson. *Democracy and Disagreement*, cit.

^{xl} See Mancur Olson and his analysis about the problems to achieve collective decisions. Mancur Olson. *The Logic of Collective Action*, cit.

^{xli} This idea comes from the thoughtful article *Directly-Deliberative Polyarchy* from Joshua Cohen and Charles Sabel. I am not using in the present work the institutional framework sketched by Cohen and Sabel, since they are thinking participation and deliberation beyond the administrative agencies (and the three branches of power). However, I understand that Cohen and Sabel analysis permit also to think about new direct-deliberative participatory mechanisms inside regulatory agencies.

^{xlii} Jurgen Habermas, “Three Normative Models”, cit. p. 21.

^{xliii} Jurgen Habermas, “Three Normative Models”, cit. p. 22.

^{xliv} Jurgen Habermas. *Between Facts and Norms*, cit. p. 386.

^{xliv} Jurgen Habermas. *Between Facts and Norms*, cit., p. 327.

^{xlvi} Jurgen Habermas. *Between Facts and Norms*, cit. p. 338.

^{xlvii} Jon Elster, “Arguing and bargaining in two constituent assemblies”, *The Storr Lectures*, Yale Law School, 1991, ms., pp. 37f., cit. Jürgen Habermas. *Between Facts and Norms*, cit., p. 339.

^{xlviii} Jurgen Habermas. *Between Facts and Norms*, cit., p. 339.

^{xlix} See: Jerry Mashaw, *Greed, Chaos, and Governance: using public choice to improve public law*. New Haven. Yale University Press, 1997. Mashaw points out that on the one hand public choice has failed to present a methodology for construing statutes and interpret statutes, but on the other hand public choice theory may help us understand why public institutions behave as they do. This seems to be important to explore public choice theory mainly to design administrative procedures. According to Mashaw: “Public choice can help us to better understand how certain choice procedures structure or allocate decisional powers. It can help us to see possibilities for strategic behavior and strategic equilibria that yield likely outcomes in particular decision processes having particular structures and stakes”. Jerry Mashaw, *Greed, Chaos, and Governance*, cit., p. 157.

^l I am thinking at this point influenced by the debate proposed by Michael C. Dorf and Charles F. Sabel in “A Constitution of Democratic Experimentalism”, cit. I understand that the critic done in this article on the APA limits and problems can be useful to imagine and improve procedural mechanisms of public participation in Brazil. See: Michael C. Dorf and Charles F. Sabel. “A Constitution of Democratic Experimentalism”, cit., pp. 438 – 469. In that perspective are also interested and thoughtful some of the ideas proposed by Julia Black. See: Julia Black, “Proceduralizing Regulation: Part I” in *Oxford Journal of Legal Studies*, vol. 20, n° 4, 2000. pp. 597 – 614; Julia Black, “Proceduralizing Regulation: Part II” in *Oxford Journal of Legal Studies*, vol. 21, n° 1, 2001. pp. 33 – 58.

^{li} Rejecting this approach see: Susan Rose-Ackerman. *Rethinking the Progressive Agenda*, cit., pp. 61 – 62.

^{lii} Jerry L. Mashaw. *Due Process in the Administrative State*. New Haven. Yale University Press, 1985, pp. 26-27

^{liii} Cass R. Sunstein. *After the Rights Revolution*. New York. Oxford University Press, 1990, p. 164.

^{liv} Jurgen Habermas *Between Facts and Norms*, cit. p. 276.

^{lv} That must be avoided, as a principle, for the guarantee of political equality in democracies. See: Robert A. Dahl, *On Democracy*, cit., p. 178.

^{lvi} For Habermas, such a condition for legitimacy, within the concept of deliberative democracy, is applicable to any process of normative production; not only to those within independent bureaucracies.

^{lvii} Which could mean changes in conditions of public utility concession agreements. The problem, therefore, is not in the possibility of contract amendments. This possibility exists although it represents unilateral breach of contract by the Administration. What is being called into question is how the negotiation of the aforementioned amendments should be carried out and what are the effects of the said amendments. In the case of the model of the telecommunications law, the negotiation of amendments to contract clauses is carried out by ANATEL and there could be governmental guidelines of the Direct Administration to be observed by the Agency in connection with matters within the scope of responsibilities assigned to the Direct Administration.

^{lviii} Cf. Joseph A. Schumpeter. *Capitalism, Socialism and Democracy*. New York: Harper Colophon Books, 1975, p. 293.

^{lix} Cf. *Folha de S.Paulo*, “Lula critica agencias e diz que fara mudançãs”. 02/20/2003, p. A1 and A4, Edicao Sao Paulo.

^{lx} Draft Bill No. 3337 dated 2004 of the Executive branch – With provisions governing the management, organization and control of Regulatory Agencies, adds and amends provisions of the Laws No. 9472 dated July 16 1997, No. 9478 dated August 06 1997, No. 9782 dated January 26 1999, No. 9961 dated January 28 2000, No. 9984 dated July 17 2000, No. 9986 dated July 18 2000 and No. 10233 dated June 05 2001, and of Provisional Measure No. 2228-1 dated September 06 2001.

^{lxi} In the United States a similar mechanism was established upon creation of the Office of Management and Budget (OMB) to control the regulatory action of agencies. The creation of OMB was aimed at establishing centralized and direct control of regulation content by Presidential Cabinets. The type of control had as main objective to control the management and performance of agencies consistent with *cost and benefit analysis* criteria. Suzan Rose-Ackeman typified the said control mechanism during the Reagan Administration: “Early in Reagan administration the President issued an Executive Order that required Cabinet-level authorities to prepare cost-benefit analyses justifying major rules. These analyses would be scrutinized by newly established Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) in the White House and approved or returned to agency for revision. In 1985 the White House issued a second Executive Order requiring these same agencies to submit a regulatory plan detailing the agency’s priorities for next fiscal year and reporting regulatory action taken. This assertion of White House involvement in agency rulemaking was not an entirely new initiative. Similar programs were carried out in the Ford and Carter administrations. The Reagan plan, however, was more secret, more centralized in the White House, and did not provide for public input or for public reports from OMB. From the beginning the goals of the first executive order were confused: was it designed to produce better, more well-thought-out regulations and improve interagency coordination, or was it set up to give the White House more political control over regulatory programs? Accusations of undue political influence were countered by technocratic arguments about merits and demerits of particular rules, by data showing that few rule were delayed, and by revisions in OMB practices to provide for a more open, accountable process. Even if the claims of political influence were overdrawn, one can, nevertheless, be concerned that the appearance of politicization can be used to discredit all attempts to introduce more rationality and consistency into the regulatory process”. Susan Rose-Ackerman. *Rethinking the Progressive Agenda – The Reform of the American Regulatory State*. New York: The Free Press, 1992. p. 151

^{lxii} Otherwise se shall (again) be moving toward the model of “delegative democracy” well described by O’Donnell, where the president-elect has a “blank check” in his hands (and, when the aforementioned power is opposed, the Brazilian history demonstrates a clear authoritarian trend – in its several versions, including the populist one). In view of the little effectiveness of *vertical accountability* by way of elections in new democracies, according to O’Donnell there would be a trend of continuance in office which he termed “delegative democracy”. Cf. Guillermo O’Donnell. “Horizontal Accountability in New Democracies” in Andreas Schedler, Larry Diamond, e Marc F. Plattner, eds. *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder, CO and London: Lynne Rienner, 1999.

^{lxiii} “The drafts of normative acts shall be submitted to public consultation, formalized by publication in the “Federal Official Gazette”, and any criticisms and suggestions will be examined and remain at the disposal of the public in the Library.” (article 42 of Law 9.472/97 – Brazilian Telecommunications Law - “LGT”). (a LGT version in English can be found at www.anatel.gov.br).

^{lxiv} That is, impossibility of dismissing governing council members, existence of own budget appropriation not bound to budgets of Ministries, and impossibility of having its decisions reviewed by people at hierarchically higher levels in the Executive branch (for example, a State Minister or the

President of the Republic). Governing councils decisions can only be appealed to, by right of constitutional right and privilege, Judiciary branch.

^{lxv} Jerry L. Mashaw. *Due Process in the Administrative State*. New Haven. Yale University Press, 1985 pp. 26-27

^{lxvi} Jerry L. Mashaw. *Due Process in the Administrative State*. New Haven. Yale University Press, 1985, p.264

^{lxvii} Criticized by Mashaw: “The trend toward judicialization that reached its apex in *Goldberg – Goldberg v. Kelly* – could in the end permit the development of a Kafkaesque welfare state monster that is the antithesis of the liberal ideal.” Jerry L. Mashaw. *Due Process in the Administrative State*. cit., p.264

^{lxviii} “They are shaped by history, experience, research, public participation, and political oversight, as well as by bureaucratic convenience.” Jerry L. Mashaw. *Due Process in the Administrative State*. cit. p. 270

^{lxix} Gunther Teubner. *Juridification: Concepts, Aspects, Limits, Solutions*, in R. Baldwin, C. Scott, C. Hood (eds.). *A Reader on Regulation*. Oxford, Oxford University Press, 1998. pp.389 – 443.

^{lxx} “The central domestic concerns of modern government – steering the economy, controlling externalities, and maintaining some semblance of distributional equity – can be addressed only by institutions combining technical competence with centralized responsibility. But such institutions seem remote, perhaps unapproachable. The inner working of vast administrative agencies are obscure; their policies proceed from an expertise that may also harbor not a little trained incompetence. This is surely one of the bureaucratic problems that makes a major contribution to our sense of unease about the administrative state.” Jerry L. Mashaw, *Due Process in the Administrative State*, cit. pp. 255 – 56.

^{lxxi} In this context, I am proposing that in developing countries that had strong dictatorships (like Brazil) or an authoritarian State bureaucracy past it is not sufficient achieve the polyarchy conditions stipulated by Dahl to have democracy in a broader sense. This idea is not new and O’Donnell affirms the same in the article *Horizontal Accountability and New Polyarchies*, pointing out to the unexplored democratic potentials of *horizontal accountability* mechanisms. However, I understand that in countries in which the *public sphere* and *civil society* have not been being the ground of the organization of the political system (but the State), direct public participation mechanisms and an ideal of direct-deliberative democracy should be pursued in order to design public institutions and deepen the democratization process of State bureaucracy (beyond the electoral process and the *horizontal accountability* mechanisms possibilities). See: Guillermo O’Donnell. “Horizontal Accountability in New Democracies” in Andreas Schedler, Larry Diamond, e Marc F. Plattner, eds. *The Self-Restraining State: Power and Accountability in New Democracies*. cit.; and Philippe Schmitter. “The limits of horizontal accountability” in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds. *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder, CO and London: Lynne Rienner, 1999.

^{lxxii} A broader debate should be done in Brazil about the role of the press in democracy and not only about the legal guarantees for a free press (what it is most discussed in Brazil). The responsibilities of a free press in democracies, manly in a deliberative democracy perspective, should be discussed. In the North American debate, it is important the discussion of the Fairness Doctrine, as analyzed by Owen Fiss. See: Owen Fiss. *The Irony of Free Speech*. Cambridge, MA, Harvard University Press, 1996. pp. 50 – 78.

^{lxxiii} In the North American debate it is interesting the place of *public interest lawyers* in the representation of interests of consumer associations and disadvantaged groups. See: Symposium “Lawyering for a New Democracy: Changing Roles and Practices”. *Wisconsin Law Review*, volume 2002, number 2. Symposium Issue; Louise G. Trubek. “Foreword”. *Wisconsin Law Review*, volume 2002, number 2, pp. 271-276; and Louise G. Trubek. “Public Interest Lawyers and New Governance: Advocating for Healthcare”. *Wisconsin Law Review*, volume 2002, number 2, pp. 575-602. See also: Symposium “Panel Discussion: The Changing Shape of Government”. *Fordham Urban Law Journal*, 28. p. 1319. In the European debate it is interesting the place of public participation for the accountability of European Union bureaucracy. See: Christian Joerges and Jurgen Neyer. “Deliberative Supranationalism’ Revisited” in EUI Law Working Paper n° 2006/20.