

Regulação and Brazilian Criminal Law doctrine: Anglo-American scholarship to deter neoliberal ideas¹

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ABSTRACT *Regulação* as Administrative Law is an approach chosen by the Brazilian scholars that takes a toll on the legal professionals, since its normative framework, inspired by neoliberal ideas, misdirects the assessment of regulatory failures and socioeconomic context and their connection with Criminal Law and Criminal Policy. The main goal is to analyze that doctrinal approach, considering regulation theory and comparative Law. The necessity to ensure that academic research is oriented to attend the peculiar Brazilian socioeconomic conditions, considering elements of civil law and the Anglo-American scholarship, even if it is not the Brazilian tradition, is the main conclusion.

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KEYWORDS

Criminal Law – Regulation
– Administrative Law
– Brazil – Criminal Policy.

RESUMO *Regulação como Direito Administrativo é a abordagem escolhida pelos acadêmicos brasileiros, que traz um ônus para as demais profissões jurídicas, já que sua análise normativa, inspirada por ideias neoliberais, desvia a análise de falhas regulatórias e do contexto socioeconômico, como também de sua conexão com o Direito Penal e a Política Criminal. A meta principal deste artigo é analisar a abordagem doutrinária, considerando a teoria da regulation e o direito comparado. A necessidade de garantir que a pesquisa acadêmica seja orientada às peculiares condições socioeconômicas brasileiras, considerando não só elementos da família romano-germânica, mas também de estudos anglo-americanos, mesmo que essa não seja a tradição brasileira, é a principal conclusão.*

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PALAVRAS-CHAVE

*Direito Penal – Regulação
– Direito Administrativo
– Brasil – Política Criminal.*

Regulação y doctrina del Derecho Penal brasileño: estudios angloamericanos para desalentar ideas neoliberales

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RESUMEN *La Regulação como Derecho Administrativo es un enfoque elegido por los académicos brasileños que pasa factura a los profesionales del derecho, ya que su marco normativo, inspirado en ideas neoliberales, desvía la evaluación de las fallas regulatorias y del contexto socioeconómico y su conexión con el Derecho Penal y la Política Penal. El objetivo principal es analizar ese enfoque doctrinal, considerando la teoría de la regulación y el derecho comparado. La principal conclusión es la necesidad de asegurar que la investigación académica esté orientada a atender las peculiares condiciones socioeconómicas brasileñas, considerando elementos de la familia romano-germánica y de los estudios angloamericanos, aunque no sea la tradición brasileña.*

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PALAVRAS CLAVE

*Derecho Penal – Regulación
– Derecho Administrativo
– Brasil Política Criminal.*

1 Introduction

Neoliberalism is a form of political economy that is usually criticised in the Global South, however, neoliberal ideas still shape, at least partially, the legal doctrine in the area, indicating that even without a conscious acceptance of a certain political economy, the replication of ideas might assure its permanency, as Hayek (2023c, 93) foresaw. *Regulação* and Criminal Law might be one of those cases, since the approach chosen on the topic shifts the attention from policy and empirical effects of regulation to focus on a legal framework that complicates the identification of regulatory failures and the very assessment of the socioeconomic context, that is, it creates a sort of decoy that conceals the substantial problems.

The Brazilian concept of *regulação* prepares the field for a series of formalist methods to be adopted in Brazilian Criminal Policy and Criminal Law, especially in business and environmental crimes, ensuring that the legal control is feeble by suggesting a restriction of judicial discretion, shielding regulatory failures from judicial control in criminal cases, which affects both defence and accusation. The importance of Law and its enforcement to define the power dynamics, especially in “Regulatory Capitalism” (Levi-Faur, 2005, 28), is constantly defied. Those doctrinal currents are fuelled with neoliberal influences aimed to downgrade Law’s role in society, (Bourdieu, 1998) challenging the activity of judges, defence attorneys and prosecutors, all essential for the justice system and for social order, as Bourdieu recalls (1998).

In the first section, there is a comparison between *regulação* and regulation. In the second section, *Regulação* and Criminal Policy are examined as *Direito Administrativo Sancionador* (Sanctioning Administrative Law). The third section refers to *regulação* and Criminal law as *Acessoriedade Administrativa* (Administrative Law’s ancillary role in Criminal Law) and Criminal Compliance, indicating the effects of those theories in the judicial activity.

2 *Regulação* and Regulation: Beyond the Translation

The comparison of *regulação* and regulation does not aim to lay down concepts, but to understand how the concept of *regulação* is used to frame certain topics in Brazilian Criminal Law and Criminal Policy.

The Portuguese term *regulação* is not a translation of regulation, whose plethora of concepts, as Black (2002, p. 2, 11, 13) states, makes its definition controversial (Moran, 2010, p. 325). It is possible to say that the Brazilian concept of *regulação* is not related to the idea of directing someone's behaviour, (Lange, 1998, p. 449) that ensues an interdisciplinary (Picciotto, 2017, p. 676) approach. The Brazilian concept is legal (Aragão, 2013, p. 31), one-dimensioned, referring only to Administrative Law, focusing on the legal norm (Sundfeld, 2014, p.112).

Regulation encompasses the assessment of the interests that might influence the regulatory decision-making, as Feintuck (2010, p. 57) explains, whilst *regulação* tends to focus on norms, instead of socioeconomic context, which hinders the analysis of regulatory effectiveness (Giles, 2022, p. 160). In this sense, *regulação* does not refer to the desired effect produced in reality, that is, it is not directly related to studies based on Foucault's studies on government as regulation is (Parker; Braithwaite, 2003, p. 119-120). *Regulação*, hence, does not provide any opportunity to question the substantial matter of the legal norms, so the considerations brought by different theories of regulation, as Majone (2013, p. 20) explains, are often ignored, an omission that causes perverse social effects.

The research area of Administrative Law and regulation or *regulação* are often intertwined. The difference between the Brazilian and the English-speaking approaches is that the Brazilian conceals the differences in method of regulation and Administrative Law. The most superficial attempt to distinguish those two disciplines is rejected. Fisher (2020, p. 617-618, 621-622) mentions a superficial differentiation of those two scholarships, referring to the idea that Administrative Law is part of legal theory whilst only a part of regulation deals with Law in the social context. That denial is

based on the understanding that *regulação* is a part of Administrative Law and does not exist as an autonomous discipline, restricting the analysis to the administrative legal norm, without mentioning topics that might underline *regulação* and are potentially more interesting to Criminal Law and Criminal Policy. For instance, even the analysis of self-regulation in Criminal Law is considered as a product of the relationship of administrative and criminal legal norms, (Silveira, 2015, p. 181) which is different from the understanding of regulation by the Anglo-American scholars of Criminal Law as a type of social control (Ashworth, 2017, p. 11-15) whose effectiveness can be empirically measured. Additionally, even when the Brazilian scholars of Administrative Law try to make the scope broader, little is harnessed in Brazilian Criminal Law.

In the early 2000's Medauar (2002, p. 124-126) stressed that the term *regulação* was a novelty to Brazilian scholars of Administrative and Constitutional Law, who were familiarized with the term *regulamento*, which is a legal norm produced by the Executive branch that serves to detail a statute issued by the Legislative Branch. *Regulamentos* in Brazil have been a controversial topic since the first Brazilian Constitution of 1824 (Rocha, 2016, p.206), and was almost totally banned from the Constitution in 1946 (Leal, 1946, p. 379-384). Majone indicates a very similar discussion in the US, referring to the non-delegation doctrine (Majone, 2013, p. 15), where the idea was to limit the normative power of agencies, in order to preserve the political matter for the Congress. This was applied by the American Supreme Court until the 30's. The main Brazilian concern is political, considering that such *regulamentos* might enable an authoritarian government, because the Executive Power would use them to substitute the Legislative law-making, as Leal (1946, p. 380-381) explains. That discussion is justified in a country with recent democracy, and it is still a concern, regarding the recent administrations (Vieira *et al.*, 2024, 41).

That concept of *regulação* was popularized in the 90's (Andrade, 2022, p. 685-686), during a neoliberal phase of the Brazilian Political Economy, when the *Plano Diretor da Reforma do Aparelho do Estado* (the Director Plan to Reform State's Apparatus) created the regulatory agencies. Brosbekier (2023, p. 167) considers that the Administrative Reform marked a change in

the Brazilian doctrine, due to the establishment of the regulatory agencies by reGENCY statutes, conferring normative complimentary power to them. Before that, during the military dictatorship, certain scholars criticized an undue influence of economists in law-making by the Executive branch, although *regulação* had not yet become a widespread term (Mello, 2008, p. 344).

The political importance of restricting the Executive's normative power might indicate a plausible reason for the normative approach given to the topic in Brazil. It is still an unresolved matter, as Rocha (2016, p. 193-196, 216) shows, considering the difficulties of the traditional Brazilian Administrative doctrine in accepting that an infra-legal norm (*regulamento*) might restrict human rights. Medauar (2002, p. 124), for instance, stresses that *regulamento* is not encompassed by the English term: regulation, but it should be understood as a part of *rulemaking*. That statement is an example of the hurdle presented by the topic's centenary conundrum and the effort made by the scholars of Administrative Law to bypass it.

A certain part of the Brazilian doctrine aims to develop an interdisciplinary approach of regulation, linking it to public policies (Guerra, 2016, p. 202-206), or even using the introduction of the regulatory impact assessment (Cardoso; Soares, 2022, p. 145), that was introduced in 2019, as an indication of the interdisciplinary nature of *regulação*. Besides that, others are trying to shift the current judicial trend, as seen on the decision of the Brazilian Supreme Court at the ADI 4874 (Brasil, 2019), that praises the deference to the regulatory agency's discretion (Perez, 2018, p. 95-116), criticizing the lack of legal control on the agencies' work (Maranhão, 2016, p. 29-32). There is even suggestions of more administrative control of technical discretion performed by agencies, especially considering the regulatory goals (Rodrigues, 2005, p. 50). That doctrinal current might have become stronger after 2008, when new public policies were set into place to solve the financial crisis, as indicated by Faucher (2018, p. 129, 136-137, 140), demanding legal control of *regulação*. Those efforts do not change the concept accepted by Brazilian Criminal Law, that still considers *regulação* as Administrative Law.

Neoliberal ideas might also be a part of the issue, since the baseline for the Brazilian doctrine is the view of Law as incapable of performing social control (Prittwitz, 2008, p. 58), which constrains Law's role and limits

the concept of *regulação* by proclaiming a predictable failure in directing society. A notion that opposes to ideas underlying the concept of regulation that accepts Law's role in society (Lange, 1998, p. 449), and even grants Law a power to form reality (Cotterrel, 1998, p. 176-177, 182, 185-186). Legal Academy, in this case, might be a replicator of ideas and concepts that were thought to protect a certain political economy (Britton-Purdy *et al.*, 2020, p. 1792), that uses Law as a hurdle to assess the merit of certain regulatory decisions, as Blalock (2014, p. 85-86, 99,102-103) states. The role of judges is also affected by that view, since legal reasoning is restricted in cases where technical knowledge underlies the regulatory decision-making, since it is considered that technical expertise must not be subjected to legal control, a presumption that impairs defence and accusation in criminal cases.

3 The Effects of *Regulação* in Brazilian Criminal Policy

The theory that defends the replacement of criminal penalties for administrative sanctions in Business Criminal Law, (Costa, 2013, p. 126) *Direito Administrativo Sancionador* (Sanctioning Administrative Law) is justified by a reference to: efficiency, which is a known neoliberal device that transplants an economic concept to society (Bourdieu, p. 1998), presenting itself as a virtuous argument to convince the public, especially in the Global South (Schubert, 2022, p. 187). *Efficiency* must not be a justification to substitute criminalization for administrative sanctions, if the defendant's rights are better guaranteed in a criminal case, as it happens in Brazil. For instance, on the decision of Brazilian the Supreme Court ARE 843989, the justice decided that the prohibition of the retrospective enforcement of the law is a Criminal Law principle that is not referred in the Brazilian Constitution as a part of the '*Direito Administrativo Sancionador*', such application to an administrative sanction would be a *disrespect* to the constitutional strict rules that regulate the Public Administration. In such a legal context, *efficiency* cannot be considered the only technical factor linked to policy making without considering carefully the values that are underlying that choice (Hausman; McPherson, 1993).

The concept of *regulação* constrains, frames and directs that criminal policy proposal, since the main focus is on Administrative Law, without referring to the enforcement of regulation and regulatory sanctions in a strategic manner, justifying the analysis on abstract theoretical advantages of administrative sanctions in relation to criminal penalties, being similar to a doctrinal study. There is no empirical assessment of the effects of those sanctions, regarding their capacity of assuring compliance, enabling a defence of a Eurocentric theory to be applied in Environmental Law, even with the marked social, geographic and legal differences between Brazil and Europe that shape the value judgements present in those theories. The concept of *regulação* (with its exclusively normative treatment) is a factor that adds to the impression of universality (Nunn, 1997, p. 343-344, 366) that Eurocentric theories tend to carry, making it almost impossible to oppose them and turning their diffusion a hurdle for the enhancement of decision-making (Bobrow, 2011) and an obstacle for the dissention in Legal Academy and the construction of new proposals (Santos, 2023, p. 132-133, 142; Pildes, 2012, p. 164).

If the concept of *regulação* was closer to *regulation*, empirical data would not be so easily downgraded, since it would be clear that regulation would also refer to a type of policy study, as Haines (2017, p. 181-196) explains, that might develop a strategic approach on crime (Vogel; Cherney; Lowham, 2017, p. 366), when dealing with the method of policy studies.

It is fair to say that European Criminal Law might make a reference to empirical studies to assess the effects of Criminal Law to achieve certain goals, as Schünemann (2018, p. 93-112) does, or Roxin (2006, p. 61-63), who defends empirical studies to influence dogmatics, whilst the Spanish scholar Silva (2010, p. 151) defends that the due place for empirical studies would be restricted to Criminal Policy without prevailing over the scholars of Criminal Law's value judgement. However, it is possible to indicate that the downgrading of empirical studies is also considered a problem (Prantl, 2004, p. 368-369, 371, 374; Burkhardt, 2004, 171, 174).

The Brazilian enforcement authorities, though, do not condone the theory, adopting what can be called as *all-hands-on-deck* approach that can be understood as a convergence of not only enforcement authorities,

but also administrative agencies to tackle a certain unlawful context. For example, it has become common to see joint-operations of the Brazilian Prosecution Service and other enforcement authorities with the assistance of different public bodies, such as the Brazilian competition agency or the Brazilian Federal Revenue. For instance, at the *Operação Fim da Linha* São Paulo's Prosecution Service in a joint operation with the Competition Agency and the Federal Revenue unveiled the use of contracts for public transportation in a money-laundering scheme. (Brazil, 2024a). That strategy can only point to a concern with intelligence activity to gather data to design a course of action to deal with a certain context, yet, it is important to stress that the cooperation between public entities must follow the due process as stated in Brazilian Law, avoiding the use of informal inquiries at the decision *Reclamação* 43.0007/DF (Car Wash Operation), as it was considered *espionage industry*, repealed by the Brazilian Supreme Court in the *Operação Lava Jato* (Car wash Operation).

That approach is justified by the crescent expansion of organized crime in regulated sectors, such as public transportation, fuel sector, and real estate development. Even consumption crimes as fuel adulteration and pollution by methanol are being linked to organized crime in the Southeast. It was reported (Costa, 2024) that São Paulo's governor expressed his concern on organized crime's operations expansion to gas stations (more than one thousand) and the possible acquisition of an ethanol plant in São Paulo, which would create a context of violence and coercion to the sugar cane producers; and it was also indicated (Ré, 2024) that there would be evidence that with the organized crime in gas stations, the use of toxic substances soared. Whereas in Rio, a connection between *milícias* and real estate developers was discovered (Verenicz, 2024).

The idea that a public servant would be able to independently and safely inspect those businesses is hard to imagine. In Rio, for instance, a recent report showed that the *milícias* armed groups (GENI, UFF, 2021, p. 5,12,27,35) are acting in diverse regulated sectors, from essential public services to real estate development, with evidences of corruption enabling illegal constructions in the city through the use of violence against the inspectors, which is aggravated by the lack of police operations in those areas.

Besides that, the evidences of corruption and fraudulent firms controlled by the organized crime eliminates any expectation of efficiency of administrative sanctions. The São Paulo's prosecution service in the *Operação Munditia* investigates the role of organized crime in bidding procedures,² authorities (Brasil, 2024b), finding evidence of fraud in contracts that add up to U\$ 50 million (R\$ 200 million). A known area of *regulação* in diverse cities of the state, where competition was simulated, suggesting evidences of corruption of public authorities.

It is important to stress that those groups from São Paulo and Rio de Janeiro are violent, heavily armed and have a state-like hierarchical organization (Dias, 2009, p. 83, 85-88), which explains their expansion to the Amazon region and the difficulties generated for the Brazilian government to access certain areas. The UN report on the area described a chaotic scenario with the involvement of those new organizations in illegal conducts ranging from land-grabbing to money laundering, including violent crimes, also identifying evidences of inspectors' corruption (UNODC, 2023, p. 63). A recent study showed that (Lima *et al.*, 2023, p. 131-132, 155) the possibilities of drug trafficking near the border and money laundering through illegal gold mining attracted those organizations to the area. Nonetheless, the institutional limitations of environmental inspectors to work in an area without proper assistance of enforcement authorities might enable organized crime to control the area. That connection between the Brazilian Southeast organized crime and the environmental crimes in the North at the Amazon region is another evidence for the unsuitability of the proposal.

The violent confrontations between enforcement authorities and organized crime and the necessity of social assistance and socioeconomical state interventions in those areas are unquestionable national demands, however, that Eurocentric theory does not offer a viable solution, since there is no commitment to local socioeconomic conditions.

Economic sanctions are a quite questionable solution in Brazil, since the execution of fines is a problem that the Brazilian Judiciary acknowledges as an inefficient process (Brasil, 2023a, p. 149-150, 154-155), adding up to 27, 3 million judicial cases with pending decisions, whose average time is over six years. When those sanctions are indeed effective, their negative

and unreasonable effects in the national economics are staggering, and do not depend if those sanctions are criminal or administrative. One of the many errors of the *Operação Lava Jato* (Car Wash Operation), the so-called *lavajatismos*, was the major impact of that operation in Brazilian economics. Economic sanctions caused the estimated loss of 4.4 million jobs and a retraction of 3.6% of the GDP (Cut; Dieese, 2021, p. 2), thus a policy that aims to dismantle the firms involved, instead of imposing criminal imprisonment penalties showed itself an inadequate strategy for Brazil. It is hard to accept those negative impacts are not consequences of the violation of the principles of non-transcendence of punishment and the social function of propriety, both stated at the Brazilian Constitution (Brasil, 1988).

The cooperation between agencies might be an important leverage to construct a better criminal policy. For instance, in a case where the Brazilian competition agency *Conselho Administrativo de Defesa Econômica* – (CADE) is already conducting its investigations, the analysis of the economic sanctions' impact on the relevant market might inform the strategy to be adopted by the enforcement authorities and the prosecution service, preventing the repetition of the recent national crisis.

4 *Regulação* and Criminal Law: The Brazilian Judicial Decisions

The different theoretical approaches to *Regulação* and Criminal Law in Brazil tend to the same effect, restricting judicial discretion or even legal interpretation. Judicial discretion is a key element of the legal system, as Bourdieu (1987, p. 822-823) acknowledges, since the judge's discretion is a *safety valve* to maintain the legal system, the latter must be an object of study and criticism by the scholars, who are going to assess it, accordingly to legal theory. Even if the judicial decision has a negative reception, it cannot justify the restriction of legal interpretation, since, as Cotterrel (1998, p. 187) indicates, it aims to look into how facts and norms interplay in Law, an analysis that is the core of a judicial decision.

Bourdieu (1987, p. 822-823) explains that the judges must be concerned with the socioeconomical context and the practical effects of the legal decision. That function may be at odds with neoliberal ideas that demand the deployment of Criminal Law would keep the market safe of any risks, (Bustos Ramírez, 1983, p. 22) that can even be posed by the Judiciary branch. The judicial discretion was criticized by Hayek (2023b, p. 119, 144), who understood the judge as a serve of the market's rules, whose function would be to decide accordingly to the market's logic, which is a view criticized by Posner (2005, p. 149-151), since it misreads the judicial activity in common law. In the Global South, judicial discretion is key to deter undue neoliberal influences in the national Law, or inspire the scholars to construct new theories (Santos, 2023, p. 152-155).

5 The Almighty Inspector vs the Helpless Judge

Street-level bureaucracy is a concept that encompasses both the inspector and the low-court judge, since it refers to those who deal with the public and can use discretion to apply sanctions (Lipsky, 2010). The common assumption would be to consider that the judicial activity demands discretion to interpret the law (Posner, 2005, p. 152, 154), whilst a formalist view of bureaucracy could eliminate the inspector's discretion in the enforcement of rules to accomplish their function (Pires, 2010, p. 2, 3). In Brazil, though, the most important doctrinal current *Acessoriedade Administrativa* (ancillary role of Administrative Law in Criminal Law) demands a restriction of the criminal judge's discretion when applying criminal sanctions in crimes based on the breaches of regulatory duties, whilst there is not a defence of the same restraints to the inspector's work.

The theory advocates for a restricted view of the judicial discretion (Costa, 2010, p. 205-208), that must not be expanded to encompass an assessment of expertise and policy, including balancing of values, embodied in the administrative legal norm, the *regulação*. Costa (2010, p. 205-208) concludes that it would not be up to the criminal judge to define concepts

and to question regulatory standards, even if the crime is set out in a statute without any clear mention of *regulação*, as an attempt to avoid judicial discretion to interfere with the definition of causality, an argument based on a so-called excessive complexity of the expert evidence that would be necessary to prove causal nexus in the concrete case. Naves (2022, p. 463-465) criticizes the undue influence of Administrative Law in Criminal Law, a reference to criminal sanctions related to *regulação*, which are considered as a set of administrative legal norms, demanding that any administrative decision recognizing the defendant's conduct as lawful such as the Conduct Adjustment Commitment, must have a binding effect over the judicial criminal decision.

That disconnection between norms and facts in legal interpretation is a trait of a certain type of legality that allows the dominance of the normative dimension (Santos, 1987, p. 470). The idea that the regulatory decisions of agencies, as well as those of private technical bodies, are considered as an expression of *immutable* scientific knowledge is very questionable and it is fomented by the normative approach of *regulação*, that frames the analysis to focus on the legal norm, setting aside the substantial matter and the legal control on the market's logic, reinforcing the justification for the exclusion of judicial control in criminal cases.

Santos (1987, p. 470, 81) refers to that difficulty in drawing a distinction between facts and norms in the regulation of certain sectors connected to technical expertise. Larenz (2019, p. 660-664), for instance, indicated that the regulatory standards cannot ground a judgement without the application of the probabilistic rule underlying the standard to the facts of the concrete case. Besides that, the *pre-understandings* of the judge on that matter might have an important impact on the decision, since they affect the legal reasoning (Larenz, 2019, p. 289-290), indicating the necessity of an interdisciplinary approach. Similarly, on the English-speaking theory of regulation, Malloy (2010, p. 281-282) explains that "regulation" has little to do with the legal statement relying heavily in the social context of that regulated sector. A part of Brazilian doctrine highlights the importance of differentiating between the formal violation of the technical standard and the production of risk in the concrete criminal case, as explained by Tavares (2018, 347-348), who advocates for

the necessity to prove causal nexus in a criminal case, even after the breach of an administrative legal norm.

The exclusion of judicial discretion is not a necessary effect of the legal theory that Brazil imported. In German doctrine, the use of scientific knowledge to shield certain norms from legal control was already criticized by Roxin (1979, p. 121, 134, 168), and by Schünemann (1994), who justifies the need for judicial control of the value judgements connected to the technical norms. Those value judgements are clearly acknowledged by Brazilian law, since article 4, item III of Lei Federal nº 13.874, published on September 20th 2019 (Declaration of the Rights of Economic Freedom) (Brasil, 2019) recognizes the possibility of “abuse of regulatory power”, which could be expressed by requiring “technical specification that is not necessary to achieve the desired end”. Such provision might strengthen judicial control of regulation, especially in cases where objective and technical criteria will be applied with misuse of purpose. Even with those recent changes in Brazilian legislation, the insistence of *regulação* as the legal norm conceals most of the substantive matter that might give support for judicial control.

It is the Brazilian concept of *regulação* as Administrative Law that constructs an argument in favour of deference to the regulatory decision in criminal cases, which is controversial even in American case-law (Levine, 2019, p.10), where the Chevron doctrine was constructed. Kagan (1993, p. 392) even states that the regulatory decision-making might be constrained in criminal cases, considering the due process and the unforeseen results that can come from the judicial discretion. Giles (2022, p. 81-82) indicates that in the US the regulatory standard can be object of judicial discretion, referring to the merit of the standard. Schmidt and Scott (2021, p. 460) acknowledge a crescent of judicial control of administrative discretion in the US by the assessment of the decision-making procedure, especially after the application of a sanction.

The restriction of the judicial decision is not a necessary consequence of a study of comparative law, the neoliberal influence is the other hypothesis. The idea underlying the Brazilian doctrine, that it is impossible for one person to assess different kinds of knowledge, is actually a known neoliberal Hayekian idea (Hayek, 2023a, p. 58, 61-64), a presumption that lays the ground for restricting judicial reasoning.

Besides that, the relevance given to expert knowledge as a neutral and immutable certainty is, as Harvey (1974, p. 256-257) claims, conclusion fuelled by ideology, again, a neoliberal expression, since it ignores that science is made in a socio-economic context. Demortian (2017, p. 141-142, 145) even states that regulatory failures might begin with the neutrality assumption of science, that in so many cases has shown itself inexistent, considering the allegiance of scientists and the regulated sector. Kagan (1993, p. 382-385) refers to social and political factors to explain reasons for the malpractices in agencies decision-making. All in all, as Douglas (1990, p. 10) declares, the substantive evidence presented by an expert is not enough to determine the decision-making, that is, science cannot be called to substitute Law.

The lack of discretion in the regulatory enforcement is called by American regulators "legalist" (Kagan, 1978, p. 94) and it is not recommended even for inspectors, since it is not oriented to the effects of the regulation. Kagan (1989, p. 92) incentives the inspector to interpret the regulatory rule before enforcing it, and to ponder the facts that might indicate a different solution to each case. Bardach and Kagan (2002, p. 123-124) propose that the enforcement of regulations is only viable in cases where the regulatory goals are attained, indicating that the inspector might assess the reasonability of the regulatory standard, which is not recommended to the Brazilian criminal judge, hindering the very core of the judicial activity.

One example of criminal case that would have a very different outcome, if that theory were applied, is the case of those accused of international drug dealing for importing seeds of *cannabis sativa* for medicinal purposes. The Brazilian agency did not regulate its domestic cultivation for medicinal purposes, which was considered drug dealing. The crime of drug dealing depends on the list of forbidden drugs, as state at the article 1's *parágrafo único* of the *Lei Federal nº 11.343* (Brasil, 2006) which is an administrative legal norm issued by the Brazilian Ministry of Health, *Portaria SVS/MS nº 344/1998*, the Brazilian Superior Court of Justice considered that the omission to regulate the matter was based on prejudice against the substance; and the habeas corpus was granted at the *Resp nº 1.972.092/SP*. If *Acessoriedade Administrativa* was applied, the conviction would be a strong possibility.

Money laundering connected to illegal mining in Amazon is also another case where *Acessoriedade Administrativa* might cause a serious impact. The Brazilian Federal Prosecution Service (Brasil, 2020, p. 132-133) pointed out a flaw in the sectoral regulation, since art. 39, I of the *Lei Federal nº 12.844*, published in 2013, relays on a declaration of the gold seller to attest its origin, which enables money laundering of illegal gold, a crime that is not monitored by the purchasing companies, since they are entitled to a legal presumption of good-faith, stated in art. 39, §4º *Lei Federal nº 12.844* (Brasil, 2013). Even if the accusation is able to determine the illegal origin of gold, the *Acessoriedade Administrativa* (Costa, 2010, p. 205-208; Naves, 2022, p. 463-465) will be an obstacle for the criminal proceeding, since *regulação* is supposed to be out of reach of the judicial discretion and good-faith presumption is an administrative statement of the conduct's lawfulness radiating its effects to the criminal case.

Acessoriedade Administrativa misdirects the legal professionals from regulatory failures and their effects in Criminal Law, protecting the market's logic from Law's control. It is a success in unsettling a proper legal response in criminal cases, but its structure is not so well developed to impair it completely. On the medicinal *cannabis* case, the Superior Court of Justice in the *Recurso Especial nº 2.024.250-PR* dealt directly with the regulation of the matter. On the illegal gold case, that is connected to indigenous land grabbing and Yanomami people's humanitarian crisis (Brasil, 2023b), the social and political pressure worked, and those legal norms were suspended in 2023 by Brazilian Supreme Court as *medidas cautelares* of the ADI 7273/DF and the ADI 7345/DF.

The discretion of an American inspector is viewed as an acceptable power that demands control, whilst the judicial discretion of a Brazilian criminal judge is viewed as an abuse of power, an undue legal interference in a matter that must be exclusive to experts and the market. The Brazilian criminal judges, however, must acknowledge the fragilities of the regulator and the inspector, so clearly detailed by the English-speaking literature, even if they are not uncovered by the national Criminal Law doctrine to deal with the national reality properly.

6 The Notary-Judge

A notary is a professional whose activity is restricted to legal procedures, without assessing the substance of a private act. That professional seems to have little similarity with the social expectation of the criminal judge's performance, but a certain Brazilian doctrine is constructing a framework that might hinder judicial review in a criminal decision, granting assessment only to the formalities of the compliance program (Coca Vila, 2019, p. 10).

Criminal compliance, presented as a criminal policy method (Saad-Diniz; Gomes, 2019, 19), seeks to create grounds to punish the legal entity, completely losing sight of the humanity that affects the matter, as Aguilera Gordillo (2024, p. 550-553) explains. In Spanish doctrine, Coca Vila (2019, p. 10) indicates that understanding criminal compliance as a complement of the legal criminal norm is based on Teubner's theory. Criminal compliance is also connected to the assumption that the legal criminal norm is blank, and it is supposed to be complemented by the private *regulação* (Nieto Martin, 2019, p. 41-42) describing *what* must be done to comply with a legal duty, identifying the criminal responsible in a certain enterprise structure (Silveira, 2015, p. 128-132).

The normative Brazilian concept of *regulação* and *autorregulação* (the Portuguese translation of the English word for self-regulation) creates a framework that focuses on the interplay of the public and private norms (Silveira, 2015, p. 181). The reference to Teubner's concept of "enforced self-regulation" (Teubner, 1988, p. 307-309) is a manner to explain the necessity to soften the Criminal Law's control over the Economy, that would be accomplished by a focus on procedures in self-regulation. Teubner's framework does not refer to any specific values (Parker, 2002, p. 247; Black, 2000, p. 602-603), so the normative Brazilian concept of *regulação* seems a natural fit. It is even possible to find translations to Portuguese of "criminal compliance" as "*cumprimento normativo*" (Saad-Diniz; Gomes, 2019, p. 17) that would translate to: normative compliance. The influence of private interests in misguiding the construction of the regulation's meaning during

the enforcement by compliance programs, as Parker and Nielsen (2017, p. 218) indicate, is not a main concern.

Self-regulation is presented as a way for the enforcement authorities to understand the business dynamic, since it is the firm itself that will conduct the investigation and define the culprits, as Parker (2002, p. 255) states, which makes compliance programs a key tool for Meta-regulation, as Black (2012, p. 1045) indicates. The empirical knowledge's crucial role in regulation to be extracted from the operations management of the corporations is stressed by Hayek (1945, p. 521-525), thus, the compliance programs can be seen as a form to attain data, since self-regulation is based on the peculiar conditions of that business, as indicated by Shearing and Wood (2003, p. 415) and Braithwaite (2008, p. 27-28). The proponents of Meta-Regulation do not accept the efficacy of the modern concept of regulation, being sceptical towards regulation itself, an idea that can linger even after the end of neoliberalism, as Gerstle (2022, p. 295) alerted.

Meta-regulation itself does not seem to be a Criminal Law theory, but it is considered a logical effect of the regulatory method to restrict the legal responsibility of the firm's directors (Silveira, 2015, p. 62, 132-134), since it is argued that the compliance program establishes a connection between the criminal liability of the firm and the natural person. That connection is seen, in Brazil, (Silveira, 2015, p. 160) as a trend in common law to intensify the criminal liability of the corporations, instead of the individual criminal liability of their directors. However, that does not seem to be the case (Shalchi, 2022, p. 13). The tendency seems to be a concern with corporate crimes, even with the creation of new crimes, maintaining the individual criminal liability of the directors. In the UK, the Deferred Prosecution Agreement guide mentions that the cooperation with the investigation is established if evidence of the individual conduct is provided by the corporation (UK, 2014, p. 5, 8,12, 16). Even the directors' personal criminal records are considered factors that advocate against a DPA.

The American corporate liability is also mentioned in Brazil as an example of method to restrict individual criminal liability, if the enforcement of a proper compliance program occurs. Yet, in the "Yates memorandum" (US Department of Justice, 2015, p. 1), it is clearly stated that the criminal policy

chosen is to concentrate efforts to investigate and prosecute natural persons that committed the crime instead of companies. The UK Bribery Act 2010 takes a special place in Brazilian doctrine (Silveira, 2015, p. 160, 213-214), since Section 7 (2) allows a defence to be used by the corporation based on an effective compliance program, which is used by Brazilian scholars to indicate a focus on corporate crime rather than individual liability, even if such opinion isn't backed by English law (Korotona, 2024, p.16).

The criticism is aimed to the decision to convict a compliance officer of a financial institution in the *Mensalão* (AP 470/MG), a case of corruption and money laundering, involving mainly financial institutions' directors, businessmen and congressmen. The main criticism is that the lack of effectivity of the compliance program to deter Money Laundering grounded the conviction of the compliance officer (Silveira, 2015, p. 209), which dashed the expectation of no individual liability. The lack of accountability does not seem to be a direct influence of Meta-Regulation, since the legal liability of the directors is defended by the proponents of self-regulation, such as Parker (2002, p. 255), or Braithwaite (1982, p. 1470, 1499), who even suggests criminal charges in a case of omission to report to the government any breach of the self-regulation. It is possible to discuss, though, if the compliance officer or the directors are liable for the enforcement of the regulation, for instance, the European Banking authority (EU, 2022, p. 41) suggests the board of directors as the preferable choice.

In the *Mensalão* case (Brasil, 2012, fl. 52.813), the pointed *flaw* of the compliance program was the adulteration of the internal compliance report, in order to exclude suspicious operations connected to congressmen, ordered by the compliance officer to an employee of the compliance sector, aiming to avoid reports of those operations to the Brazilian Central Bank and FIU. That *modus operandi* of breaching the duty to report to regulatory agencies, is also being investigated in the *Brumadinho* case (RE 1378054 -MG), where the directors of the firm are accused of breaching their duty to report to the systemic risk surveillance system, the *Sistema Integrado de Gestão de Barragens de Mineração* (SIGBM) of the National Mining Agency – ANM, by not providing the correct data that would alert the authorities

to take preventive measures to deter the tailings dam from collapsing. The criminal sanction is not based on the lack of “internal organization capacity” of self-regulation, which would make them illegitimate, as Souza (2022, p. 69) adverts. In the *Mensalão* case, the Brazilian Supreme Court was not lured by the procedures adopted by the compliance sector of the bank. There was a legal decision on the individual conduct, accordingly to Criminal Law principles.

The impairment potential of self-regulation regarding Law’s enforcement is known (Short; Toofel, 2010, p. 366), considering its lack of efficacy in attaining the regulatory goals, though it is not easily detected, since the compliance program projects the image of a full enforcement (Moran, 2010, p. 325-341), indicating the lack of efficacy in Meta-regulation and the necessity to constantly review regulatory standards and monitoring methods, which can be too lenient.

The negative impacts of enforced self-regulation have been assessed since the 2008 crisis, as Lange and Haines (2015, p. 9) argue, when the failures in overlooking the financial system were known and experienced by society. Those setbacks of systemic regulation and its enforcement, as Dill (2020, p. 167, 175-178) points out, are due to the collapse of its very philosophical roots. The critical factor is probably the lack of sincerity of the regulated institutions in internalizing the regulatory goals of self-regulation. As Black (2012, p. 1045-1047, 1061) states, the compliance programs were not a true picture of the actual enforcement conditions in those financial institutions, hence, the successful deception of regulators is also partially due to their incapacity to see through that decoy for lack of expertise on the sector. The insistence in that method bewildered Deakin (2015, p. 14, 26), to whom the foundations of Meta-Regulation resemble a non-scientific creed, which seems to be the case of “criminal compliance”. There are speculations over how the Brazilian criminal judge will react to that alluring novelty that promises headway and delivers a pruned version of the judicial activity.

7 Conclusion

Neoliberal ideas, such as *efficiency* and the restriction of the judicial discretion, still linger over Brazilian Criminal Law and Criminal Policy. The normative concept of *regulação* is a facilitator to that hegemony, since it undermines interdisciplinary studies on policy and complicates the assessment of regulatory failures and their impacts on Criminal Law. The aforementioned neoliberal influence must be clarified and discussed by the Brazilian legal professionals to make an informed decision on which kind of criminal justice system would benefit Brazilian society (that longs for some kind of justice concept that is equally distant from punitivism and impunity).

There is a demand of studies referring to Anglo-American scholarship to acknowledge *regulation* and its effects on Criminal Law, to inspire the construction of a legal theory that is a better fit for socioeconomic conditions, as a way to offer the legal professionals different solutions to the national problems, even if that is not the Brazilian tradition.

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