

## **Judicial Review of Regulatory Matters: Divergences and Boundaries between Courts and Regulatory Agencies**

Governança e legitimidade em sistemas de justiça

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### **ABSTRACT**

Regulatory agencies have proliferated around the world, emerging as an institutional expression of state adaptation to the age of governance. Little attention has been devoted to the relationship between regulatory agencies and courts, despite its relevance to a broader understanding of modern regulatory governance. Through judicial review of regulatory decisions, courts and regulatory agencies are often called upon to resolve issues involving complex scientific and technical evidence (Vibert, 2014). The choice of an institution to achieve specific goals involves a broad range of possible legal and public policy outcomes, with far-reaching implications for the field of regulation.

The paper explores relationships between the judiciary and regulatory agencies regarding to judicial review of regulatory matters. The main theoretical frameworks for the study were regulatory space and institutional logics. Divergent interpretations of organizational missions are more likely when an organizational field is characterized by multiple institutional logics, each institutionalized to some degree (DiMaggio, 1988; Stryker, 2000). Regulatory space is a conceptual approach built by organizations, people and events acting together and negotiating boundaries in a specific set of regulatory issues subject to public decisions (Hancher & Moran, 1989; Scott, 2001; Windholz, 2018), because it is difficult to fully understand the role of mutual influences from the perspective of the courts or regulators alone.

Brazil has currently 11 federal agencies in charge of overseeing several regulated sectors and all regulatory bodies have been staffed with relevant regulatory expertise through a specific public career that brought qualified professionals of different knowledge fields into their ranks. In this sense, 21 interviews were conducted between April and July 2020, using video conferencing platforms, with law-and-courts and officials of Brazilian regulatory agencies and subjected to textual and content analysis. The interviewees fall into three subgroups: eight officials from six federal regulatory agencies, seven attorneys from five agencies, and six

federal judges. The officials were drawn from professionals with different profiles in different regulatory agencies. Attorneys were included because of their role in handling litigation before courts and their daily exposure to technical and legal rationalities and the need to reconcile them. The third group of interviewees were judges from two federal courts that play a prominent role in regulatory litigation in Brazil: the Regional Federal Court of the 1st Region (TRF1), which is headquartered in Brasilia, the federal capital, where many regulatory lawsuits are filed; and the Regional Federal Court of the 3rd Region (TRF3) which is headquartered in São Paulo, which is prone to receive high profile regulatory cases because of the big firms and industries located in the richest Brazilian State. One judge of the Superior Court of Justice (STJ), the apex court for federal law issues in Brazil, was also interviewed.

The analysis of the interviews shows an intricate relationship among the different players in the regulatory space, characterized by boundary issues where systems overlap and must adapt to each other. This overlapping creates a situation where there is considerable potential for regulatory decision-making and judicial rulings to diverge, resulting in tension and potential conflict between legal and non-legal norms. The findings also indicate the importance of a regulatory space approach in studying judicial review of regulatory decisions. It makes clear that players are continuously reacting to multiple constraints and engaging in cooperative and conflicting behaviors (Windholz, 2018). The results suggest that, to date, regulatory agencies have failed to engage with local institutional contexts. Reflections on regulatory space reflections prompts the thought that, in the exercise of regulation, even state bodies must negotiate boundaries with bodies with which they are interdependent.

Regulatory quality is evidence-based, meaning that better policies are developed on the basis of the best available information about the effectiveness and efficiency of specific regulatory practices. But the information on the hands of the regulators and its accompanying power depend on successful translation into legal language to be convincing when regulatory decisions are under scrutiny in the courts. The attorneys of regulatory bodies perform a key role in the dialogue between regulators and judges, especially by bridging the gap between technical and legal protocols.

The interviews also made clear that regulated agents, especially the economically powerful, seem to take advantage of unclear boundaries between state regulators, and employ their resources to influence the establishment and interpretation of regulatory rules in their

favour, undermining efforts to enforce the decisions of regulators. Agencies end up developing and implementing policies while continually facing the prospect that their actions will be reviewed and may be overturned.

The analysis demonstrates that, when regulatory decision-making is exposed to judicial review, fluid interpretations produce latent conflicts between the key professionals involved, and overlapping authorities compete to define how regulatory functions should be organized. Different expectations were in the background for accounts offered by judges, officials and attorneys, and they have an important impact on how the regulatory system operates and on the way in which rules are made and reviewed. However, the results also suggest that a strict legalistic approach by courts is slowly being replaced by a more pragmatic one that is more open to weighing non-legal arguments and evidence-based knowledge.

**Keywords:** regulatory agencies, regulation, courts, judicial review, judicialization.

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