

## ECONOMIC REFORMS, INSTITUTIONS AND DEVELOPMENT: THE INSTITUTIONS OF REGULATION IN BRAZIL – 1991-2013<sup>(+)</sup>

Luiz Carlos Delorme Prado<sup>(\*)</sup>

[lcdprado@gmail.com](mailto:lcdprado@gmail.com)

### 1- Introduction

The relationship between state and market is a key element for the sustainability of modern economic growth. In the recent debate, there was an extensive literature on the regulation economy, inspired by the so-called New Institutional Economics, where regulation is considered an instrument to facilitate the functioning of the market economy through better determination of property rights and reducing costs transaction. In this sense, the state intervention through economic regulation, has been advocated as a tool to increase the efficiency of domestic institutions - and to improve property rights - in an market economy (See Menard & Shirley org, 2008). This view differ from the Chicago approach, such as that of Stigler (1971)) and from the view that Spiller & Tommasi (2005) called incentive approach, exemplified in the works of Laffont & Tirole (1993) and others. But this theme can also be treated under an historical-structural method, that were used by latin-american developmentalist economists, such as Celso Furtado.<sup>1</sup>

Since the developmentalism crisis in the 1980s, relations between State and Market in Brazil have undergone major changes. In particular, in the 1990s there was an accelerated institutional change process. This article discusses the changes in public administration and the State reforms, which was undertaken in Brazil in the last quarter of century.

This article argues that with the decline of developmentalism in the 1980s there was, in the decade of 1990s, an attempt to implement a new development strategy of liberal inspiration. This change occurred through a reform agenda, which was particularly focused on the state's role. However, during the F.H. Cardoso and throughout the First Lula's government the relationship between state and market gradually had acquired a hybrid character. That is, although profoundly changed by the reforms of the 1990s, new

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<sup>(\*)</sup> - Professor of the *Institute of Economics*, Universidade Federal do Rio de Janeiro

<sup>1</sup> - On this method see, Boianovsky, 2007. See this approach applied to the study of Competition policy in Brazil in Prado, 2014.

institutions that were created, maintained some traditional features that had been forged over many decades. This synthesis gave Brazil a unique feature in her region, where there is simultaneously various aspects of the developmentalist old order and a new liberalizing model. This process of partial liberalization will be study in the case of regulation governance of utilities and the operation of regulatory agencies in Brazil, from 1994 to 2013. It will be show that the product of these particular characteristics of Brazilian history, acquires peculiar forms, with a hybrid model of a regulatory state, with some elements, adapted to the Brazilian reality, and a liberal agenda.<sup>2</sup>

## **2- Origins of Liberal Reforms in Brazil**

Economic reforms in Brazil, promoted under the framework of a neoliberal agenda ,was an innovation of the 1990s. Historically, the idea of economic reforms appears in different moments of Brazilian recent history, mostly in times of economic and / or political crisis. In the early 1960's, there was two main opposing approaches to the issue: the idea of “Reformas de Base” and the “Modernizing Economic Reforms”. On the one hand, supporters of the “Reformas de Base”, which was inspired by the structuralist literature, argued that the continuity of Brazilian development required a set of institutional changes that could transform the traditional dysfunctional unequal structure of Brazilian economy. They expected therefore that the reforms would improve the distribution of income and diversify domestic consumption - the most important among those was a Land Reform, but they support also an urban reform to improve access to house ownership to the working class and they demand policies to deepening and improve labors rights.

A different approach was advocated by conservative authors such as Eugenio Gudin and Octavio Gouveia de Bulhões, who sustained that the Brazilian economic problems were due to the developmentalist economic policies, particularly, what they call “populist economic policies”, that is, large public deficits (fiscal populism), wage increases above marginal labor productivity (wage populism) and excessive state intervention. For these authors economic populism was at the root of inflation and other Brazilian economic problems.

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<sup>2</sup> - This hybrid character of the new model of development led to the proposal of several new concepts to explain the period, as for example Erber (2010) that call this period as Restricted Institutional Convention and Filgueiras & Gonçalves, 2007, that call it as Liberal-Peripheral Model.

When the military came to power after the coup d'état on March 31st 1964, Bulhões became the head of the Ministry of Economy and Roberto Campos, another economist whose economic ideas were close to those of Bulhões and Gudin, became Minister of Planning<sup>3</sup>. However, the economic reforms undertaken by Bulhões and Campos did not lead to less State Intervention. Therefore, by modernizing monetary and the fiscal policy and, also, by their ability (by authoritarian means) to impose wage controls and to reduce the inflationary pressure, they made room for the expansion of public debt and the state capacity to spend – that is, they increase the state's role in Brazilian economy. Actually, they not only maintained, as increased the role of the state, by keeping and deepening state intervention, using economic planning and setting up several new state-owned enterprises, combined with pragmatic policies that promoted economic growth, although with increasing concentration of income and high social and ecological costs.

The Economic Reforms controversies that took body in Brazil in the early 1990s was not relate to the previous debate of the early 1960's, its origin and its history were different. The main drive of those ideas was the widespread perception that the first government after the military regime, head by president Sarney (1985-1989), was a huge economic failure. This perception was due to the incapacity of the heterodox stabilization plans (the most famous of which was the cruzado plan) to control the increasing inflation and to deal with the Balance of Payment crisis (Leopoldi, 2000, Diniz, 1997). Actually, by the end of Sarney's presidential term, Brazil was on the eve of a hyperinflation and, since 1987, had default of the external debt.

Beyond the economic crisis, there was also a political crisis, particularly, the populist practices implement by Sarney political group that opened space to the old Brazilian patronage politics and created new opportunities for rent-seeking behavior. Therefore, the widespread perception by broad sectors of public opinion that the failure of Sarney government could be attributed to insistence to keep a development strategy based on state intervention, which opened the space inefficiency and corruption, led to growing support to neoliberal economic reforms. The 1980's crisis was seen as the ultimate proof of the failure of the Brazilian development model. According to this view, the Interventionist State would also be the product of an authoritarian conception of society and should be buried in the same grave of the military regime.

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<sup>3</sup> - See on this period Prado & Earp, 2003.

Beyond that, among the entrepreneurs, particularly among executives and shareholders of the financial sector, but also among academics, upper middle class and the press, the liberal reform agenda was seen as essential for Brazil overcome the persistent high inflation and to resume growth. Also, the international conjuncture contributed to the spread of those policies, that was called by Williamson, in a influent article, Washington Consensus<sup>4</sup>. Actually, the US had been victorious in the Cold War: the socialist system of Eastern Europe disintegrated rapidly. And in Latin America structuralist ideas seemed to have been finally abandoned by the new elected governments. The failure of heterodox stabilization policies in the 1980s in Brazil, Argentina and Peru was seen as evidence that the regional development strategies should be modified.

An important milestone in this process was the end of military rule in Chile. Patricio Aylwin won in December of 1989, a sweeping victory, representing the Concertación Coalition backed by the PDC (Christian Democrat Party), the PS (Socialist Party), the PPD (Party for Democracy and the PRSD (Social Democrat Radical Party) and ended, de facto, Pinochet's military dictatorship. But, the Concertación government did not change the old regime liberal economic policy. This was seen as the main reason for the good performance of the Chilean economy since 1985 and therefore was not be modified by the new democratic governments. In the late 1980s several South American governments have undertaken liberal policies and implement economic reforms, including some governed by politicians with populist tradition as Carlos Andrés Pérez in Venezuela and Carlos Menem in Argentina. At the same time, new right wing candidate, that had strong commitment with liberal policies were elected on the region, such as, César Gaviria in Colombia and Alberto Fujimori in Peru.

The main political effect of the exhaustion of the Cruzado Plan in Brazil, already evident in early 1987, was reducing the popular support for economic strategies identified as heterodox. This occurred in a context of significant institutional changes, after the 1988 Constitution, still influenced by the dying developmentalism. . The bad administrative and political performance of Sarney's presidency helped to strengthen this framework. His government showed itself unable to respond to growing dissatisfaction and demands of the population, at a time when his public support reduced quickly.

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<sup>4</sup> - Ver Williamson, 1990.

The failure of the first democratic government, after the long years of military dictatorship, generated great dissatisfaction. Furthermore, it became widespread the demand for profound changes in Brazilian public policies. Due to this sentiment, the election campaign in 1990 took place with polarization of popular preferences between two candidates of the left and the new right - that is, Brizola, Lula and Collor. The latter, from a traditional family of northeastern politicians, presented himself to the public – with strong support of the conservative media - as an independent candidate with no ties to traditional parties – his campaign was strongly anti-state and argued for a radical agenda of reforms.

The electoral victory of Collor marked the beginning of a lasting transformation of Brazilian economic order. The new president could not be characterized as a liberal, on the contrary, his government provided some bizarre forms of state intervention, that certainly have not to do with the liberal principle of property rights guarantees – such as, a stabilization plan that impose a freeze on banking and saving accounts. However, his program included a profound change in the State's role. In this sense, his government marks the beginning of a cycle of liberal reforms, which the following administrations would deepen. That is, after a populist start, under the Collor government, the following governments have made effective plans for institutional changes and the built of a new development model, based on the Washington Consensus ideas.

During the military regime (1964-1985) the relationship between state and market was well defined. There was a widespread belief, not only among the ruler elite, but also among middle classes, on the effectiveness of state participation. The disagreement was only on the extent of state participation in productive activities. The Minister of Planning, Reis Velloso, published in in a Sunday edition of the *Jornal do Brasil*, October 8<sup>th</sup>, 1972, on the heyday of the so-called “economic miracle”, an article that presented with exceptional clarity, the military government's strategy of state intervention<sup>5</sup>.

In his interpretation, state intervention should be the norm on Public Services. Public goods provision should be state's responsibility due to (i) sovereignty reasons; (ii) management of rights and duties of citizens and (iii) the fact that they are no excludable. On the other hand, the directly productive sectors, except in clearly pioneering situations (and for a specified time) should stay out of state intervention.

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<sup>5</sup> - See the opinion articulated named *Estado e Economia* published in *Jornal do Brasil*, October 8<sup>th</sup>, 1972.

Velloso identified also between these two extremes, a set of services, such as economic infrastructure (energy, transport, communication) that have some similarities with those of the productive sectors and a set of services, such as, social infrastructure (education, health and housing) closer to the function Public Service.

Considering this taxonomy, State responsibility it was well established and public policy could be properly formulated. Thus, intrinsic functions of the state was the provision of public goods, such as justice, individual and collective security, building of public monuments etc. Conversely, intrinsically private functions were the supply of productive assets and services. In this case, the State was acting not directly, but could use financial instruments and became a minority shareholder to stimulate activities considered necessary to its development policy.

The view prevailing in Brazilian society, not only in the rulers elite, until the 1980s was that public companies and state intervention were necessary to Brazil's development. The public opinion considered that the performance of state intervention in economic matters were, in general, of good quality and that State owned Firms did not have a very different quality of management than the large private companies that operating in oligopoly conditions.

Therefore, a key issue of state reform debate in Brazil is the changing perception of the performance of state owned enterprises between 1980's and 1990's. Three factors determined this deterioration of public opinion image of state owned firms in Brazil:

- (i) the growing influence of theories of government failures and policies recommendations for structural reforms from leading economists and international organization;
- (ii) the state owned firms financial crisis, due to their large outstanding debt in dollar, as result of the Latin American Countries sovereign debt crash;
- (iii) the political use by Sarney's government of party nomination for the management of state owned firms, regardless of technical or administrative expertise.

The State-owned enterprises began to be used to provide hard currency in the 1970s to finance Brazilian current account deficits during the PND II (National Plan of Development II) after the oil crisis in 1973. Those companies had better access to

international credit market than federal government by the nature of their activities, their assets, their management skills and their guarantees<sup>6</sup>. Thus, the participation of the private sector in Brazilian foreign debt declined continuously since the mid-1970s - between 1972/76, 58.6% of foreign loans, get through the Law 4131, that regulated those operations, went to private firms; between 1977/78 this share dropped to 43%; and between 1979/80 private firms share on those loans decreased to 23%<sup>7</sup>.

On those troubles years, it was easier to the large state-owned enterprises to float foreign to finance investment projects than the federal government. In the 1980s, with the outbreak of the debt crisis, it was the public sector, particularly the state-owned firms, who took the heaviest costs of domestic adjustment to the currency crisis. In these circumstances, there was continued deterioration in the investment capacity and the quality of services offered by those companies. The combination of heavy debt in hard currency and the decreasing of their investment affect the quantity and quality of their service. Those conditions fueled also the image of inefficiency that would fall upon them and deteriorated their reputation on the next decade.

Therefore, by the 1980s, the state-owned enterprises, which previously (up the 1970s) have a reputation by their professional management and efficiency, came to be seen as a bad fruit of an inefficient state intervention. This view was reinforced by the increase influence of neoliberal ideas on the Brazilian elites, particularly a new generation of economists trained abroad, but also among managers, entrepreneurs and high middle classes. Finally, international organizations, such as IMF and World Bank, have had growing influence over the direction of economic policy in Brazil, and structural reforms became a condition to Brazil a deal for external debt under the Brady Plan framework.

Summing up, the Brazilian economic crisis, both in its external dimension - that is, the need to negotiate the foreign debt, as in its internal dimension - that is, the acceleration of inflation - carried out the political condition to end the developmentalist project. Finally, it was the election of a rightwing populist politician who presented himself as anti-state and anti-establishment, Fernando Collor de Mello, that have begun one of the most radical state reform in Brazilian history.

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<sup>6</sup> - See on this topic Coutinho & Beluzzo, 1982, Werneck, 1986 & Gobetti, 2010.

<sup>7</sup> -Data from Cruz, 1974.

### 3- The Reform of State in Brazil

When developmentalism was the hegemonic ideology of government action, there was in Brazil clear limits for the state and the market sectors. Therefore, there was a (i) typical set of economic activities of state, a (ii) set of typically private economic activities (the production of goods and productive services) and (iii) a set of activities that could be exploited by private companies but under indirect control of the state or by joint ventures of public and private capitals. Collor have ended this policy, but did not put an alternative model in place.

Collor has won the election with a tiny political party and neither him or his supporters have clear ideas about the direction they wanted to print for Brazil's future. There was no pressure from political parties of the right for a previous agreed neoliberal agenda, as in Argentina and Mexico, nor the government had been controlled by a neoliberal technocratic group, such as in the cases of Mexico, in the 1980s, and Argentina in the 1970s. Collor's campaign strategy was to attack the organized sectors of Brazilian society and appeal to the disorganized mass that dislike politicians and to conservative sectors of Brazilian urban middle classes. In this sense, his strategy was more like the actions of president De la Madrid and Salinas in his attacks on Mexican corporatism and their intention to use the reforms against trade unions and other organized segments of the society. (/Schneider, 1992)

The Collor's government economic policies rest on the widespread view that the Brazilian State had lost its financial and technical ability to invest. The role of the state-owned companies was no longer view as strategic for the development by large segments of Brazilian society. Actually, Collor economic policies were possible because developmentalism had lost public support after the use of state-owned companies for political ends and the failure of heterodox economic policies during Sarney's presidency. (Schneider, 1992, p.17) Therefore, the idea of economic reforms as part of a new development agenda in Brazil was establishing itself slowly, its starting point was the wild privatization, without regulation of private oligopolies, proposed by Collor, but that was followed for better designed policies in others governments during this decade.

Collor's Structural Adjustment Program had two main axes: (i) a Reform of the State and (ii) a Reform to open Brazilian economy for foreign investment and trade. The first consisted of an Administrative Reform and a Privatization Program. The Second consisted of a Capital Account Reform and a Trade Policy Reform.

The administrative reform was carried out mainly by *medidas provisórias* - a kind of executive order that have force of law. The government also issue a great number of decrees and regulations for speed the implementation of these reforms. The Administrative Reform has begun by the extinction of 3.700 jobs positions in the government. It was also publicized that all sectors of the government, included the state-owned companies, had 60 days to announce a fixed number of public functions that they need. The public servants or employees that were not need would be put on availability and, if they had less than five years of service, would be fired.

In the first week of government, Collor extinguished eleven state-owned enterprises and thirteen other agencies - including the Portobrás, Siderbrás, the Sugar and Alcohol Institute (IAA), the Brazilian Coffee Institute (IBC), the Brazilian Company for Technical Assistance and Rural Extension ( Embrater), Interbrás and the National Department of Works and Sanitation (DNOS). It was also closed several agencies for cultural promotion including: National Pro-Memory Foundation (Fundação Pro-Memória, National Arts Foundation (FUNARTE) and Distribuidora de Filmes SA (Embrafilme). The government also announced the sale real state properties and vehicles owned by the federal government: 42 mansions on Lake South- Brasília, 10,759 apartments and hundreds of cars.

The government's first target to get popular supported was the public employees, which were blamed to be the main cause of the country's problems. The government announced a large reduction in the number of public jobs and employees, through the outright dismissal or, in legal impossibility, placing them in availability. It promised to cut 360,000 employees and the government itself announced have got lay off more than 100,000. Actually, the final numbers of civil servants dismissed were less spectacular than originally announced. Until March 1991, according to data published in the Diario Oficial, they were laid off only 3,869 employees, 36.182 were retired and 54.828 were put available with full wages. The total number of those measure was a reduction of 94,879 employees of the federal government. . Much less reliable were, however, data

from layoffs employees of state-owned enterprises, as they were not subject to the same rules of hiring and firing of civil servants under direct administration.

The fiscal impact of these measures was insignificant. Public expenditure on personnel fell half a percentage point of GDP in 1990 relative to 1989. However, this decline was more likely caused by the deterioration of the real value of the wages than an effective reduction of its contingent. On the other hand, those reduction on wage bill were offset by the increase in social security transfers, which grew 0.6% of the GDP in that year. (Villela, pg.29-30). Therefore, under the fiscal point of view, the Administrative Reform Collor was probably negative – it led to higher costs caused by the administrative disorganization of the state and the great increase in retirement payment, especially of more skilled and trained public employees. In the case of state enterprises, however, the layoffs policy preceded the privatization, and was part of the strategy to prepare these companies to be sold.

The Reform of the State had a short-term component - the sale of Federal Government assets, such as apartments used and official cars - and a structural component, that held long term effects – the so-called PND- National Privatization Program<sup>8</sup>. This was defined by Law nº 8.031 of 12/04/1990. This program should be implemented by the National Privatization Council and BNDES (Banco Nacional de Desenvolvimento Econômico e Social). The CND was the main planning agency of the privatization process. It was directly subordinated to the presidency and had ministerial status. The National Privatization Fund (FND) was managed by the BNDES, that was the public agency responsible for the whole privatization process.

There were approved several ways to transfers firms and activities to the private sectors (Pinheiro & Oliveira filho, 1992, p.343). The law allowed the following privatization process:

- a) Transfers of ownership through selling of shares, preferably spreading stock ownership to a great number of shareholders;
- b) IPOs - Initial public offerings;
- c) Capital increase with resignation or transfer of all or part of subscription rights;

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<sup>8</sup> - See for a study on this program Pinheiro & Oliveira Filho, 1992.

- d) Firms Mergers, consolidation or split;
- e) Sale, leasing, rental, lending of assets and facilities;
- f) Dissolution and closure of companies or partial deactivation of its projects, with the subsequent sale of its assets

The payment obtained by privatization should be used to reduce public debt, not used to cover State expenditure. To overcome the difficulty to privatize in the midst of an anti-inflationary plan that reportedly reduced the liquidity of the economy, the government accepted various means of payments for the acquisition of public companies. It was intended to turn the process of privatization in a large gathering of accounts, where assets and liabilities of the public sector would be traded.

The Privatization Program of Collor, as was common in his government, was also short of original intentions. In January 1991, the president of BNDES, Eduardo Modiano had announced that it would sell 27 companies – it was projected that those firms would be sold by a total of US\$ 18 billion. By the end of the year, five state-owned companies were sold, generating 0.5% of GDP in revenue. Collor governed privatized 14 companies between October 1991 and September 1992, notably in the steel, petrochemical and fertilizer sectors. (Schneider, 1992,p.16; Baer 1995, p.202)

The financial impact of those sale was not great, but it had a huge symbolic role. For the first time were sold firms that were considered, from previous governments, strategic for Brazil's long term development policy. While under the financial aspect, the privatization was not significant, it marked the beginning of a structural adjustment process that continued without interruption throughout the 1990s.

In Collor's privatization programs, regulatory issues were not considered relevant. There was no policy to prevent effects of private oligopolies or monopolies on consumers welfare. Also, during the Collor government there was not a clear frontier between economic activities that would be regulated by the state and those that would be exclusively private. Therefore, Collor did not have an alternative development model - the institutional apparatus of developmentalism was being rapidly dismantled, but was not being created a new institutional arrangements to replace it.

It was the Fernando Henrique Cardoso government that created the regulatory frameworks for the management of privatized utilities. For this, the FHC government

approved the necessary legislation to enable the breakdown of state monopolies and the offer of public services by private firms. This was approved by Constitutional Amendment N°.8, which established the legal basis for public service concessions, as well as other forms of delegations, as permits and permissions (autorizações e permissões). Also, only in FH government the key regulatory agencies were created.

The FHC government had on its staff economists, trained abroad, that were able to formulate and implement liberal economic policies. This was not a populist right wing government, but a neoliberal government, led by technocratic group that considered themselves close to the view of governments such as the New Labour in Britain and Clinton in the USA. This government had also support on large Brazilian economic groups, not only but mainly in the financial sector. This government have intended to go beyond a structural reform agenda – they intended to formulate a new strategy of economic development, based on market friendly policies and a relative small government, that would acted manly through regulatory agencies and not by direct intervention of Federal Government.

#### **4- The New Institutional Model**

The first term of Fernando Henrique Cardoso (1995-1998) propose and implement an broad project of institutional change, mostly based on neoliberal ideas. Unlike Collor, this was a well-structured project, with broad support from intellectuals, economists, political scientists and jurists, affiliated or sympathetic to the PSDB (Partido Social Democrata Brasileiro) and also with broad support in the business community, the press and in important sectors of the middle classes . The FHC government had the political ability and the intellectual respectability to consolidate the dismantle of the old developmentalist model. Brazil, for half a century, before the economic crisis of the 1980s, sustain one of higher economic growth rate in the world. Then, FHC, a former professor of sociology, that considered himself a social democrat, blame developmentalism for all Brazilian malaises, included the economic crisis of the 1980s and the stagnation of the Brazilian economy. From his term, Reform became a concept linked to the dismantle of the developmentalist project. Actually, after the failure of Cruzado Plan in the 1980s, all ideas associated to developmentalism, such as nationalism, industrial policy and state intervention, were considered harmful for Brazil's economic development (See Cardoso, 1998).

The radical anti-state Collor economic measures have began the end of the developmentalist policies. But only after his impeachment a new development policy began to be built in Brazil. In FHC government this new project was present on a coherent set of policies and, it was able to get strong popular support. Actually, the widespread support for the end of developmentalism could not be explained only the success of Plano Real – the FHC's stabilization plan, but it was a more deep process the beginning of a new convection, that Fabio Erber (2008) called Neoliberal Convention, that was the opposite of the Developmentalist Convention.

The government project was ambitious. It includes fiscal, retirement and social rights, administrative reforms and a Privatization program. The main document that established a new frontier between state and market role was the Plano *Diretor da Reforma do Aparelho do Estado* (Master Plan of the State Reform ), published in 1995<sup>9</sup>. This document has the assumption the Brazilian economic crisis was due to the role played by the state on the previous strategy of development. This excessive state intervention led to high inflation rates and the deterioration of quality and diversity of Public services supply. According to this document the international crisis of 1970s was also caused by the overstretch of State intervention. Therefore this crisis of the state has the following tracts:

- a) A fiscal crisis, due to the lost of public confidence in state finance and deterioration of credit conditions and also due to negative public savings;
- b) The exhaustion of state intervention strategies, that manifest itself in different ways: crisis of welfare state in developed countries; crisis of import substitution in developing countries and crisis of state planning in communist countries;
- c) The exhaustion of the traditional way of management in government functions, that is, the end of a bureaucratic way of management public services.

According to this document the crisis of the State in Brazil has as main tracts a fiscal crisis and the exhaustion of import substitution strategy. Therefore, this country had to change the relationship of the state and the private sectors, and liberalize her economic and social policies. Therefore, it was pointed three answers for the crisis of the state in Brazil. The first, after the democrat transition in the 1980s, was to give no attention to it.

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<sup>9</sup> - See Brasil – Câmara de Reforma do Estado, 1995.

A second was a neoliberal policy that the document suggested that was the Collor's government response. A third was a reform to rebuilt the role of the state in new basis, to resume its financial capacity and its ability to implement public policies.

The paper reexamines the history of public administration in Brazil, featuring three models of governance: (i) A Patrimonialist Public administration; (ii) - A Bureaucratic Public Administration and (iii) A Managerial Public Administration. In the first the state apparatus was an extension of the sovereign power and their assistants receive the posts as sinecures. In the second, it creates public servant careers, functional hierarchy and impersonality, forming a rational-legal power. In this model, rigid and bureaucratic, the state would losing the notion that its basic mission was to serve society. Finally, an alternative to the previous model was a reform of the state driven by the values of efficiency and quality in the provision of public services and the development of a managerial culture.

Therefore FHC government proposes an agenda that, although consistent with neoliberalism, was considered by their ideologues closes to British New Labour policies or to the US Democratic Party's policies and not to those supported by Thatcher or Regan governments (See Cardoso, 1998). This project intended to promote convergence between private and public interests through a culture of efficiency. The project therefore advocates a new way to deal with state affairs, whose efficiency (technical) is understood as equivalent to managerial form of administration. At this point, the economic reform strategy move away from an anti-state policy, merely disruptive and populist, like the one held during the Collor administration. Economic Reform was seen by FHC government as a new development strategy, based on market friendly policies.

Actually, up to the early 1980s, progressive economic reforms was in Brazil as a developmentalist project, after the 1990s economic reforms was reinvented as a neoliberal concept. This was a new agenda for development. On one hand, it implies in privatization of state-owned firms and concession to private firms of a large number of public services. On the other hand, it implies the creation of new market friendly institutions, included Regulatory Agencies and a new antitrust legislation. The new agenda should deal with protection of propriety rights, enforcement of contracts and judicial decisions and improvement of public management. But, the fundamental tract of FHC microeconomic

policy was the creation of a legislations and a regulatory framework for public services that had been privatized.

Nevertheless, established a regulatory framework for privatizes utilities in Brazil was not an easy task. In the government there was not a consensus on this model. The most influential project for Reform of State was elaborated by Bresser-Pereira, that was closer of leftwing groups of the PSDB. He published several papers from 1995 to 1998 to defend change the bureaucratic model of public management – that he identified as a model created by Getúlio Vargas – by a managerial model of administration, based on indirect government strategies<sup>10</sup>. He was not a defendant of a minimal state, but supported an active State that operates thought market-friendly policies. So, he believes that the state should promote efficiency and should be compatible with improvement of the country's competitiveness.

This was not the first time that there was an attempt to create civil servant that should be isolated from political pressures. His diagnosis of the former administrative reforms of state in Brazil was wrong. The creation of DASP (Departamento de Administração do Serviço Público) on Estado Novo, and the Administrative Reform in the military regime (Decreto-Lei nº 200) were based in views very close to that (Warlich, 1975; p.29; Castor & José, 1998, p.102/103). The idea of MARE (Ministério da Reforma do Estado) headed by Bresser-Pereira, that the state was managed in the past only in bureaucratic or patrimonialist ways, was not based on good evidences of Brazilian administrative history. Actually, the public administration in Brazil expanded in layers, there was a patrimonialist segment of public servant, a bureaucratic sector (since DASP was created) and and managerial groups (such as executive groups in the 1960s and public executives in the 1970s). (See Fleury, 1997, p.302).

Actually, the Reform of State promoted by the MARE in the FHC government has modernized public servants carriers and help to rebuilt the capacity of intervention of the state after the blows of the late 1980s and the first half of 1990s. But the reform did not change Brazilian state. What Bresser tried to created was not different what has been attempted in the past – to create an elite of civil servants, relatively protected from political influence and committed to the pursue in a professional way the public interest.

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<sup>10</sup> - Good summaries of this debate can been found in Bresser-Pereira 2001 and 2002.

The Reform of State (the PEC- Constitutional Amendment Project nº173) was approved, after a bitter dispute in Congress and several changes, as the Constitutional Amendment No. 19 of June 4, 1998. The creation of regulatory agencies was an important issue of the administrative reform, that took further time to be settle. In the original document the MARE have made remarks about the Autonomous Agencies, but there was no discussion of the role of regulatory agencies. Bresser-Pereira, who was the mastermind of the Cardoso state reform project treated differently the regulatory agencies from the executive agencies. Both are autonomous agencies, but the first would exercise State functions and the second government functions.

Brazilian regulatory agencies have had their lines of action defined for the first time in the document “ *Recomendação de 31 de Maio de 1996* (Recommendation of 31 May 1996) of the Council of State Reform. Therefore, the new Regulatory agencies, that were created in the following years should have the tracts of the recommendations of the Council of State Reform. Those Agencies were established along the following lines:

- a) decision-making autonomy and independence;
- b) wide publicity of the relevant rules, decisions and activity reports, except in the cases of secrecy provided by law;
- c) fast processual decisions, simplification of the relationship between the regulator and consumers, users and investors;
- d) users, consumers and investors should be consulted by public hearings in process the regulations norms, on the ways established by law;
- e) State intervention in the provision of public services should be as small as possible..

The Council of State Reform recommended as the objective of the agencies:

- a) promote and ensure the competitiveness of the relevant market;
- b) guarantee the rights of consumers and users of public services;
- c) encourage private, domestic and foreign investment in Public Services and related activities companies;
- d) to seek quality and safety of Public Services at the lowest possible cost to consumers and users;

- e) ensure a fair remuneration of investments in Public Services and related activities companies;
- f) settle disputes between consumers and suppliers of public services companies;
- g) prevent the abuse of market power by Public Services and related activities companies.

It has been recommended also to ensure financial and managerial autonomy and decision-making autonomy of the regulatory body the following rulers:

- 1) appointment of directors members or commissioners by the President by a fixed period not exceeding four years after the approval of the senate ;
- 2) collegial decision-making process;
- 3) exclusive dedication of the occupants of directors and commissioners; not being allowed any accumulation of jobs;
- 4) appointment should have as the only criteria merit and professional competence;
- 5) Directors and commissioners could not be dismissed except by the decision of the Senate, by request of the President of the Republic;
- 6) the miss certain number of consecutive meetings or an percentage of interspersed meetings would leave to automatic loss of the office.

However, when those principles were established some important economic sectors had already be privatized – among those were Electricity and Oil. Therefore, the creation of two very important regulatory agencies (ANEEL and ANP) occurred under strong political controversies.

## **5- The Creation of the Regulatory Agencies**

The First regulatory agencies were created in sectors of infrastructure in the late 1990s, after (not before) the privatization of the public services on those areas. The exception was telecommunication, where the regulation framework and the regulatory agency was the result of a well conceived project, before privatization. The project of the first regulatory agency was not made by the MARE, but by Casa Civil Ministry. From 1995 the Law nº8.987 of 2/13/1995 had provision for regulatory powers for the state in concessions of public services. However, at the time, there was not the idea of regulatory

agencies, but executive agencies – that is “autarquias”, that did not have the legal capacity to autonomous decisions and other formal tracts of the regulatory agencies – such as, fixed term mandate to members of their board. This project was considered not good enough for the supporters of the USA model of regulatory agencies. After strong dispute on the Congress, a project that have the support of FHC led to the creation of ANEEL- Agência Nacional de Energia Elétrica, with the approval of Law nº9.427 of 12/27/1996. This was the first regulatory agency in Brazil created by a new statute in Brazilian Law, a “*Autarquia, sob regime Especial*”, with most (but not all) the tracts of autonomy proposed by the *Recomendação de 31 de Maio de 1996*. Nor ANEEL, neither ANP (Agência Nacional do Petróleo) the second regulatory agency created as “autarquia especial” by the Law 9.478 of 8/9/1997, have wide normative capacity. The ANATEL (Agência Nacional de Telecommunication) created by the Law nº 9.4772 of 7/16/1997, was the first that had wide autonomy and normative capacity delegated by law.

Brazil did not have legal tradition of autonomous regulatory agencies, such as those created in the USA in the 1930s. But Brazil had his own executive agencies, the autarquias, that were create in Brazil in the 1930s. The autarquias come from Italian law, and it is a way of indirect government administration. It was a way for decentralized executive powers, give more flexibility to state actions in some areas. But those were executive agencies, controlled by the government, although with a degree of autonomy. It was very different of the north-american regulatory agencies, created also in the 1930s, with wide autonomy in relation to the federal government, such as the ICC – Interstate Commerce Commition and the FTC – Federal Trade Commission.

In the USA regulatory agencies were created to treated differently regulatory power from politics – therefore it increase state intervention but insulate the agencies from direct subordination to federal government.(Clayes, 2007). In Brazil the regulatory agencies created in late 1990s did not have the same role of the old autarquias. But their institutional role was not that of the USA regulatory agencies. In Brazil they were created as an alternative to direct state intervention, in the USA they were created to increase the role of the state during the New Dealer years.

The creation of regulatory agencies were stimulated by the State Reform programs sponsored by the IMFs and World Bank from the late 1980s<sup>11</sup>. Many legal experts did not consider the regulatory agencies legal framework compatible with Brazilian legislation – and many influential legal academics and lawyers have opposed to the model of *Autarquia Especial* created to emulate to insulate regulatory powers from politics. Professor Di Pietro, a well known expert in administrative law, argued that it is not possible by Brazilian legislation, without a provision in the Constitution, to transfer power to create norms from the Congress to a *autarquia especial*. According to her, in the USA there is not the Brazilian concept of public services, a kind of service where the state can delegate the supply for private firms, but the responsibility for guarantee the supply belongs only the state. In the USA the relevant concept is of Public Utilities Service, whose supply is made by private firms, under the supervision of the State (Di Pietro, 2004, pp.42-44).

Actually, Regulatory Agencies in Brazil never have the traits that neoliberal policies wanted to promote. They did not become models of technical rationality free from political influence and fully committed to the promotion of short term consumer welfare. They became from the beginning deeply involved in economic planning and on the debate of development policies. Botelho (2002) has described in detail how nationalist policies (which are, in fact, industrial and technological policies) arise on those institutions as early as the late 1990s. Actually, some agencies have technical staff from developmentalist period and they also have been involved in the design of several kinds of public policies and planning activities of great scope and intensity (Botelho 2002, p.12).

From 1999 to 2005, seven new regulatory agencies were created, adding to the three agencies that regulate infrastructure (ANP, ANATEL and ANEEL). These new agencies were created as *autarquias especiais*, in the same legal model of the formers. The de facto autonomy of each one of those agencies were not only a legal but also a political issue. Because they have a well trained and better paid staff they became increasingly involved in the formulations of public policies. Actually, some of them became essential for increase the technical ability of state intervention. In the end they keep some autonomy, but frequently their behavior was that of an executive agency, and their staff operates as a

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<sup>11</sup> - According to a study of 36 European and Latin American Countries, from late 1980s to the first decade of the 2000s were created 174 regulatory agencies and 107 of those were created in the 1990s. See Jordana & Levi-Faur, 2006.

modern Weberian bureaucracy . So the ideal of distinct regulatory power and political aims did not hold – but the state modernization was real and effective.

These ten agencies can be divided into four distinct groups:

- (i) the large infrastructure agencies, which have gained greater prestige and prominence, over that period (ANEEL, ANATEL and ANP,);
- (ii) the smaller infrastructure agencies, ie those dealing with transport and ports (ANTAQ, ANTT, ANAC) and the use of water resources (ANA) ;
- (iii) Those dealing with Public Services, mainly in Health issues (ANVISA, ANS) and finally (iv) ANCINE, which is an agency whose peculiarity puts it in a separate group - has a hybrid function of promotion and regulation, and also, after Law nº 12,485 of September 12th, 2011, regulate audiovisual activities and contents.

Each of these agencies arise from different circumstances and have led to different results. Privatization, and especially the model of regulation, in many cases, was influenced by International Consultants studies, such as the Coopers & Lybrand, for the electricity and, McKinsey & Company, to telecommunications, or by international organizations recommendations, such as *World Bank Toolkit* for the regulation of Ports.<sup>12</sup>

Finally, the creation of ANCINE was part of a process of reconstruction of the culture industry that was dismantled during the Collor government. This Agency was originally linked to the MDIC (Ministry of Development, Industry and Trade), and in 2003 became an Agency of the Ministry of Culture. In the beginning its operation was similar of an executive agency with a mandate to promote the development of cultural activities. During the Lula government there was an attempt to transform ANCINE in an agency to regulate the audiovisual market as a whole, which also involved the television market – so, by the name of ANCINAV. This was justified by the fact that ANATEL did not have a mandate to regulate contents or the audiovisual industry. The opposition to this new agency was very large, especially for major television networks, accusing that it would affect the freedom of expression. The initiative was eventually abandoned, although with

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<sup>12</sup> In many cases, Brazilian law firms have done excellent work, adjusting proposals of international consultants to the Brazilian reality. One example was the excellent work done by Sundfeld Advogados in the preparation of the Lei Geral de Telecomunicações. For a more detailed discussion of privatization program and regulation of infrastructure see Ferreira, 2000; Tomasquim 2000.; Nunes, Ribeiro & Peixoto, 2007 Herrera, 2001, Castro 2000 Cavalcanti, 2002; Mota Prado, 2008).

Law 12,485 of 09/12/2011, known as the Audiovisual Law, ANCINE gained some functions of the never born ANCINAV.

Table I

Criação das agências reguladoras na esfera federal		
Agência	Lei	Ministério supervisor
Agência Nacional de Energia Elétrica (Aneel)	Lei nº 9.427, de 26 de dezembro de 1996	Ministério das Minas e Energia (MME)
Agência Nacional de Telecomunicações (Anatel)	Lei nº 9.472, de 16 de julho de 1997	Ministério das Comunicações (MC)
Agência Nacional de Petróleo (ANP)	Lei nº 9.478, de 6 de agosto de 1997	Ministério das Minas e Energia (MME)
Agência Nacional de Vigilância Sanitária (Anvisa)	Lei nº 9.782, de 26 de janeiro de 1999	Ministério da Saúde (MS)
Agência Nacional de Saúde Suplementar (ANS)	Lei nº 9.961, de 28 de janeiro de 2000	Ministério da Saúde (MS)
Agência Nacional de Águas (ANA)	Lei nº 9.984, de 17 de julho de 2000	Ministério do Meio Ambiente (MMA)
Agência Nacional de Transportes Aquaviários (Antaq)	Lei nº 10.233, de 5 de junho de 2001	Ministério dos Transportes (MT)
Agência Nacional de Transporte Terrestre (ANTT)	Lei nº 10.233, de 5 de junho de 2001	Ministério dos Transportes (MT)
Agência Nacional do Cinema (Ancine)	Estabelecida pela MP nº 2.228, de 6 de setembro de 2001	Casa Civil
Agência Nacional de Aviação Civil (Anac)	Lei nº 11.182, de 27 de setembro de 2005	Ministério da Defesa

Source: Pacheco 2006.

## 6- Regulation and State Reform in Lula's Government

The State Reform, held during the two terms of Fernando Henrique Cardoso, was completed when the PT won the elections of 2002. When a opposition party, PT had opposed those reforms. In late 2002, it began an institutionalized process of transition, through a political arrangement between the staffs of Cardoso and President-elect Lula. At that time, there was in the press tells criticism on the excessive concentration of power of regulatory bodies and also lack of transparency in the regulatory policies (Nunes it allii, 2005). It looked like the model could suffer important changes – it had also projects for those changes by PT members of Congress, such as deputy Telma de Souza.

But the debate about regulatory agencies was made by a working group organized by the Casa Civil Ministry under the direction of Luiz Alberto dos Santos Rodrigues, an competent civil servant. As a result, A Report was made public in September 2003,

named “*Análise e Avaliação do Papel das Agências Reguladoras no Atual arranjo Institucional brasileiro*”. This report had the same importance of the Plano Diretor da Reforma do Aparelho de Estado of 1996. The document indicate that the new government should keep the same model of regulatory agencies.

Generally speaking, the report recommend the same features for regulatory agencies such as fixed mandates for the directors or commissioners of regulatory agencies, decision-making autonomy, the role of collegiate bodies, the role of public hearings etc. The main conclusions of the document were as follows:

- i. the total investment in the Brazilian economy should increase from the current 19-20% to 22-25% of Gross Domestic Product (GDP);
- ii. the government is responsible for creating an environment conducive to public and private investments in infrastructure;
- iii. the presence of regulatory agencies is essential to the success of private investments, which are very important to reduction of the investment deficit in existing infrastructure in Brazil. This is because major part of this investment will have to be borne by the private sector, and infrastructure investments involving significant sunk-costs, amortized over a long period of time.
- iv. Public Services is a responsibility of the State, according Brazilian law. For improve the quality and quantity of the supply of those services it was necessary to preserve and strengthened the role of Regulatory Agencies;
- v. the strengthened of regulatory agencies would contributing to reducing the cost of capital in these sectors, with important consequences to the price of tariffs and the supply of services;
- vi. economic regulation - not necessarily through regulatory agencies - is indispensable in sectors that have market failures. The need for regulation applies even to sectors unrelated to infrastructure, such as pharmaceuticals;
- vii. Brazil must emulate the vast majority of countries where regulatory agencies are not eminently responsible for the formulation of sectorial policies. These policies, especially with regard to planning and universalization targets and access, should be formulated by the Ministries, so that sectoral policy is not taken for economic regulation and vice versa.

- viii. On the other hand, the economic regulation should be constantly improved, to promote competition as an organizing mechanism of economic activity.
- ix. the development of social control instruments of the agencies is an essential improvement for the he model. So, it is necessary to improve public hearing mechanisms, which should be mandatory for all the agencies.
- x. performance or management contracts can be added to the instruments of social control, mainly to monitor the implementation of "transparency goals," thus contributing to improving regulatory efficiency
- xi. Finally, it should remain clear that, despite the economic regulation is necessary where there are market failures, this is not a sufficient reason for the creation of an agency - this occurs only where it is necessary promote large investments with equal large sunk-costs.

At the time the debate in the press has given too much emphasis to minor changes proposed by the new government, - but it have made only small changes in the model. Therefore, Lula's government keep the project of regulatory agencies, as autarquias especiais, created at FHC government , unchanged.

One of the government's proposals was to increase the ability to formulate public policies by ministries staff. So the agencies should only regulate the market, rather than formulate policies. However, the notorious lack of technical personnel in the federal government hindered such an alternative. Indeed, the new government initiated the re-equipment of the State. For this, the new functions created in FHC's government Reform of State, such as the new career of public manager, which had attractive wages, help to recreate a technical staff of senior career officials for managerial and advisory roles. But this was not a fast process. Although, most of new staff were very qualify and well trained, they were young and inexperienced. In this sense, the agencies that had already been equipped with qualified staff since the previous government ended up having a very important role in shaping new policies.

Finally, analyzing FHC reform of state from the perspective of the first Lula government, there is a remarkable continuity. In addition, it appears that the objectives of this reform were not distinct from that pursued in other moments of Brazilian administrative history, since the reform of DASP in the 1930s. That is, the formation of

a body of independent civil servants with technical and political ability to formulate public policies

## 7- Conclusion

The Brazilian experience in state reform in public administration resulted in the creation of a new set of regulatory agencies administered with the rationality of a Weberian bureaucracy. Several of the directors and commissioners of those agencies, although have been appointed by political reason, were career civil servants. The system was not free from problems – some directors, mainly in the smaller agencies, were not qualified and were the product of clientelism and political influence of pressure groups. But in these cases, the presence of the press and other kinds of checks and balances reduces the ability of harmful actions of these directors. Finally, the *de facto* autonomy of the agencies was not as large as was planned in the original project, but this is certainly not incompatible with a rational bureaucracy – as far as there was democratic control of public policy.

Therefore, the technocratic project to create regulatory agencies very similar to the USA model were not successful. It was not possible to make a complete separation of political and regulatory powers. But the state was modernized and the quality of public managers have improved. The state intervention was not as active as was in the developmentalist period – but the state did not become so small as was intended in the 1990s neoliberal projects. The state role changes, but less than was projected. It can be found evidences of changes and continuities in this history. Last, but not at least, Brazilian experiences shows that institutions and institutional models are strongly path dependent. The relationship between state and market in Brazil, as in Lampedusa short history has changed to keeping being the same.

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