

Brazil's new Basic Sanitation Framework Law and the Public Accounts Tribunal

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Authors

André Macedo de Oliveira

José Guilherme Berman

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André Macedo José Guilherme
Berman

Law 14.026/2020, which substantially changes the legal framework for basic sanitation in Brazil, has added new components to the already complicated relationship between the country's federative structure and the provision of basic sanitation services.

At the regulatory level, there were about 50 state and municipal regulatory agencies responsible for overseeing public services granted to the private sector under concession. With the new legislation, all the agencies will have to follow guidelines to be drawn up by the National Waters Agency (ANA – Agência Nacional de Águas), as discussed in the lead article of this special edition. The ANA will thus have a central role in ensuring regulatory uniformity and the implementation of national policy at all levels of government.

This, however, puts the ANA – a federal agency – in a peculiar position, given that Brazil's Supreme Federal Court has decided that public basic sanitation services fall within the jurisdiction of the municipalities, although services can be regionalized through the formation of metropolitan areas. In other words, the states and the municipalities have powers over basic sanitation services provided in their respective regions, not the federal government.

Although the New Legal Framework recognizes the jurisdiction of local and regional entities, the ANA undertakes a "meta-regulatory" function in which it issues regulatory standards and oversees compliance with those standards by local regulators. In practice, the New Framework interweaves administrative structures at the federal, regional and local levels, which, in turn, requires improvements in the mechanisms for cooperation among

the different levels of government.

One of the consequences of this new interfederative dynamic will be seen in the systems for control of government action. One important issue in this scenario is the role that the federal Public Accounts Tribunal (TCU – Tribunal de Contas da União) may play in the supervision and control of actions taken within the New Legal Framework.

The TCU is charged with the oversight of the financial aspects of federal entities, ensuring that public expenditures meet the standards of legality, legitimacy and economy. Federal regulatory agencies fall under the TCU's jurisdiction, but control of federal agencies is subject to specific parameters to prevent undue interference in the agencies' independence.

As a rule, the TCU makes a distinction between “core activities” and “supporting activities”. Supporting activities (conducted by regulatory and services, hiring procedures and so on) should be subject to the same type of control exercised with respect to other federal bodies; in contrast, in core activities (in other words, the actual exercise of regulatory powers), the TCU should preserve the space for technical deliberation that was the reason for creating the agency. In practice, however, the TCU has not infrequently made use of recommendations and decisions to interfere in the merits of regulatory agencies' work, exceeding the essentially accounting nature of the TCU's inspection and control powers.

The peculiarity of the ANA's new role is that it is not tied to a federal public service and therefore is not subject to inspection and control by the TCU. It is true that for some time now the TCU has been engaged in the review and control of public works related to sanitation, but not of regulation and provision of the service itself. This type of supervision can occur when agreements are made between municipalities and federal entities for construction of sanitation infrastructure, which attract the TCU's jurisdiction because of the use of federal funds.

The New Legal Framework recognizes the importance of federal funds in managing sanitation services. Article 4-B of

the Law, for example, provides that the ANA must publish a list of regulatory agencies that adopt the national standards, as a condition for access to federal public funds. Nonetheless, local and regional entities retain their leadership roles in basic sanitation services.

In such a scenario, some questions necessarily arise: if the ANA's work does not involve federal public services but rather municipal (or regional) services, what is the TCU's role under the New Framework? Would failure to comply with federal standards by the local regulatory authorities be grounds by some type of review or inspection by the TCU? And how can the work of the state and municipal public accounts tribunals be reconciled with the federal authority? It seems natural to suppose that the TCU's work must be subsidiary, and defer to the local public accounts tribunals, since they have jurisdiction over municipal and regional services.

The effects of uncoordinated action by supervision and control authorities are well known, notably in the area of administrative enforcement proceedings, and cause grave legal uncertainty. While the importance of supervisory bodies in the control of state action must be recognized, blind adherence to the idea that "the more control the better" is not wise.

Despite the important mission given to the federal ANA, the TCU's jurisdiction is limited by the fact that basic sanitation is not a federal public service. The TCU must therefore take care to adjust its work, both to respect the inherent jurisdiction of municipal and state governments and their supervision and control authorities, and to ensure that ANA has sufficient technical discretion to carry out its institutional mission.

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André Macedo de Oliveira



José Guilherme Berman