

LEGAL AND CONSEQUENTIAL ASPECTS OF THE CONSTITUTIONAL DIVISION OF COMPETENCES REGULATING LONGITUDINAL WATER TRANSPORTATION IN THE AMAZON

Alexander

Francisca Beatriz

Glauber Negreiros Tavares Cunha

Marcela Sena da Rocha

Pedro Gabriel Machado Sanchez¹

SUMMARY

This article addresses the legal and consequential aspects of the distribution of constitutional powers in the regulation of longitudinal waterway transportation in the Amazon. The 1988 Federal Constitution assigns to the Union the responsibility for the operation of waterway transportation services that cross state boundaries or are located in the border area. However, the regulation of waterway transportation within states and municipalities presents unique challenges, requiring effective coordination between federative entities. The study analyzes state regulations and laws, highlighting Law No. 5,604/2021 and State Decree No. 45,110/2022. It is concluded that the harmonization of standards and cooperation between regulatory agencies are essential to promote safe, efficient, and integrated waterway transportation, meeting the needs of the population and contributing to the sustainable development of the Amazon region.

Keywords: distribution of powers, water transport, Amazonas, navigation.

1. INTRODUCTION

Water transport is vital to the Amazon region, given its vast river network and the continental dimensions of the states that comprise it. The Federal Constitution assigns to the Union the responsibility for operating water transport services that cross state boundaries or are located in the border area. However, regulating water transport within states and municipalities presents unique challenges, requiring effective coordination between federative entities.

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¹ Students of the 10th Period of the Law Course at Faculdade Santa Teresa – FST. E-mail: alexandre.sistematic@gmail.com . Article presented to the discipline Final Course Work - TCCII, taught by Prof. Paulo Queiroz.

This article aims to analyze the legal and consequential aspects of constitutional division of powers in the regulation of longitudinal waterway transport in Amazonas. Through a review of federal and state regulations, as well as resolutions of the National Waterway Transport Agency (ANTAQ) and the Regulatory Agency for Delegated and Contracted Public Services of the State of Amazonas (ARSEPAM), we seek to understand the implications of this division of powers and propose solutions to improve the efficiency and safety of this essential mode of transport for the region.

2. THEORETICAL FRAMEWORK

2.1. DISTRIBUTION OF COMPETENCES IN WATER TRANSPORTATION

The promulgation of the Federal Constitution of 1988 marked the beginning of an era of significant reforms, especially in public administrations, and initiated the transition to a truly democratic and inclusive regime. An excerpt from our Constitution is immediately presented, which establishes the basis for the division of responsibilities in waterway transport (BRAZIL, 1988):

Art. 21. **It is up to the Union:** [...]

XII - explore, directly or through authorization, concession or permission: [...]

d) the services of **transport railway and waterways between Brazilian ports and national borders, or that cross the limits of a State or Territory**; sea, river and lake ports. [...]

f) **thesea, river and lake ports.** (emphasis added by the subscriber). Art. 21. **It is up to the Union:** [...]

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To delineate these boundaries, the 1988 Federal Constitution establishes:

Art. 20. The assets of **Unity**: [...]

§ 2º **Astrip up to one hundred and fifty kilometers wide, along the land borders**, designated as a border strip, is considered fundamental for the defense of the national territory, and its occupation and use will be regulated by law[...]

Art. 30. It is the responsibility of the **Municipalities**: [...]

V - organize and provide, directly or under a concession or permission regime, public services of local interest, including public transport, which is essential; (emphasis added).

Simply put: according to the Constitution, the Union has the responsibility to explore all ports, whether directly or indirectly. This is an essential point for the public to understand: even when a port is operated by a private company, or by state or municipal governments, this operation occurs by delegation of the Union (BRAZIL, 1988).

Similarly, all navigation in the border zone, or that exceeds limits state transport is the responsibility of the Federal Union. Transport within municipalities, including water transport, is the responsibility of city halls. The residual competence lies with the states for transport between different municipalities, including water transport, the focus of this study.

Ente Federativo	Situações
União	1) Navegação internacional, interestadual e em faixa de fronteira; 2) Travessia em diretriz de rodovia federal; 3) Portos.
Estados	1) Navegação intermunicipal, ou seja, a realizada entre os municípios daquele estado.
Municípios	1) Navegação municipal (também chamada intramunicipal), sendo aquela totalmente realizada dentro dos limites do município.

Given what the Federal Constitution dictates, it is necessary to evaluate the different types of water transport. This type of transport is divided into maritime and inland navigation, the latter being the one that takes place in sheltered waters, such as rivers, lakes and the like.

It can be inferred from what is stated in the regulations of the National Waterway Transport Agency – ANTAQ, that in inland waters waterway transport is divided again into longitudinal and crossing, each of these having subdivisions (ANTAQ, 2009).

The word longitudinal refers to something "whose direction is the same as the length of something" (OXFORD, 2021). Therefore, longitudinal routes are those carried out along the length of rivers or other bodies of water, also known as in-line transport.

Normative Resolution No. 912-ANTAQ defines a shipping line as a waterway passenger transport service or mixed transport service, carried out in the connection of two extreme points, open to the general public, of a regular and permanent nature, with an operational scheme defined in the act of its authorization.(ANTAQ, 2007).

For information purposes only, crossing transport is defined in another Antaq standard, as follows:

I – inland crossing navigation:**performed transversely**to the courses of rivers and canals;**between 2 (two) points of the margins**in lakes, lagoons, bays, coves and inlets; between islands and the banks of rivers, lakes, lagoons, bays, coves and inlets, within an extension of less than 11 (eleven) nautical miles**or between 2 (two) points on the same highway or railway intercepted by a body of water.** (As amended by Resolution No. 2047-ANTAQ, 2011)

(Emphasis added by the subscriber)

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However, the focus of this work is on longitudinal transport, especially the mixed type that transports cargo and passengers, known in the Amazon region.

as a “motor”. Given the continental dimensions of the Amazon states, the division of powers regarding the regulation of such transport is subject to discussion.

More specifically, water transport lines that operate on the federal regulation, since they are directed to another state of the federation or to the border area, they have most of their stops and route, in an area of jurisdiction of the states (BRAZIL, 1988).

Still on the subject, it must be said that the interpretation on which the division of regulatory competence between states and the Union is based is based on a summary of Antaq itself, and not on law, as was to be expected.

This is Administrative Summary No. 001, of August 9, 2004, with subsequent amendments changes. The aforementioned summary, deliberated at the 108th Ordinary Meeting of the ANTAQ Board of Directors, states that navigation carried out partially or totally in a strip of up to 150 kilometers wide, along land borders, is the responsibility of ANTAQ (ALENCAR; FRANCO, 2021).

According to Alencar and Franco, 2021, the interpretation was accepted without objection in Amazonas, probably due to the complete lack of state regulation on the subject, after all, some regulation is better than none. It is worth noting that Law No. 5,604, of September 16, 2021, was enacted, regulating the Public Service of Intermunicipal Waterway Transportation of Passengers and Cargo, within the scope of the State of Amazonas, paving the way for the federative entity to exercise the regulation of waterway transportation under its jurisdiction.

Further on, we continue to address the regulation of water transport by the State of Amazonas, but first, a pause is necessary to conceptualize and study the entities responsible for regulating the water transport mode.

2.2. THE REGULATORY AGENCIES MODEL

In Brazil, regulatory agencies emerged during the privatization process that accompanied the implementation of the Real Plan and the reform of the State, resulting in

current configuration. These privatizations were made possible by the enactment of constitutional amendments during the 1990s, allowing the relaxation of state monopolies and the privatization of companies responsible for the management and provision of public services (NUSDEO; ET AL., 2017).

However, the economic advantage resulting from transferring the investments needed to provide public services to the private sector comes with the risk that the pursuit of profit in private activity is not always aligned with the public interest. Thus, the State has evolved from its traditional role as a provider of public services to acting as a mediator between public and private interests, ensuring that economic efficiency does not compromise social well-being.(NUSDEO; ET AL., 2017).

For the sake of context, it is interesting to quote the doctrinaire Ricardo Alexandre on the subject. (ALEXANDER; OF GOD, 2015):

In this context, several state-owned companies were privatized and, as a consequence of abandoning the direct production of goods and services, the State lost an important instrument of economic intervention. It is worth remembering that, by controlling part of the production, the State also exerted a strong influence on the formation of the prices of products and services in the Brazilian economy.

Given the weakening of the old mechanism of direct intervention in the economy and to prevent abuse in the actions of various private agents, the State expanded its regulatory and supervisory role over various economic sectors through the creation of so-called regulatory agencies.

Second Celso Antonio (2019) Regulatory agencies were established with the purpose of regulating the sectors of delegated public services, seeking a harmonious balance between the State, users and concessionaires. However, this can also be seen as a form of state interference in the economy. This concept is quite enlightening and addresses the issue from a finalistic perspective.

Regarding the etymology of the word "agency", BY PIETRO (2020) highlights that the The term was introduced into Brazilian law as a fad resulting from globalization, being imported from North American law, where it has a broader meaning. It refers to any authority of the United States Government, whether or not under the supervision of another agency, with the exception of Congress and the Courts.

It is important to emphasize that for Maria Sylvia Zenella de Pietro, the concept of agency regulatory in Brazilian law in a broad sense refers to any body of the Direct Administration or entity of the Indirect Administration with the function of regulating the specific matter that affects it (BY PIETRO, 2020).

Specifically regarding the characterization of regulatory agencies, it is important to highlight their regulatory power to issue technical standards in the areas in which they operate and the existence of a certain independence of these entities in relation to the bodies of the Executive Branch to which they are linked, teaches (ALEXANDER; OF GOD, 2015).

According to the aforementioned author, the regulatory capacity of agencies is intrinsically linked to their reason for existing, acting as a means to achieve their purpose of regulating a given segment or topic. In contrast, the independence of agencies has an instrumental character, allowing the adequate exercise of their institutional functions, something that manifests itself mainly through fixed mandates and the relative stability of their leaders.

Finally, the concept of regulatory agency according to Ricardo Alexandre and João de Deus is presented:

Following the previous notions, we can define regulatory agencies as legal entities under public law, with the legal nature of special regime autarchies, whose function is to regulate, control and supervise a certain economic sector or activities that constitute the object of delegation of public service or concession for the exploration of public property.

2.3. REGULATORY AGENCY FOR DELEGATED AND CONTRACTED PUBLIC SERVICES OF THE STATE OF AMAZONAS – ARSEPAM.

In the State of Amazonas, the regulation of transport, including the mode waterway, is exercised by the Regulatory Agency for Delegated and Contracted Public Services of the State of Amazonas (ARSEPAM). The agency was originally created by Law No. 2,568, of November 25, 1999, with amendments promoted by Law No. 2,597, of January 31, 2000, and by Law No. 2,715, of January 2, 2002, it was transformed into the Regulatory Agency (ARSEPAM, 2024)

As stated on the Agency's own website (ARSEPAM, 2024), besides the Intermunicipal waterway passenger transport, ARSEPAM also regulates public services granted for the distribution and sale of piped natural gas in the Amazon, intermunicipal collective road passenger transport, semi-urban, regular and chartered.

It is necessary to recognize the advances made by the State of Amazona in regulating water transport, with special mention being made of State Decree No. 45,110, of January 14, 2022. (AMAZON, 2022), which approved the Regulation of the Public Service for Intermunicipal Waterway Transportation of Passengers and Cargo in the State of Amazonas (SPTHI).

Although it is not a technical standard issued by the Agency itself, since it is if it is a decree of the Executive Branch, the rule issued (State Decree No. 45,110) was developed with technicality, presenting a scope adequate to the challenges it proposes to overcome, even more so when the text in question is contrasted with the other state regulatory frameworks for waterway transport, considering the survey carried out in the research of (ALENCAR; FRANCO, 2021).

The aforementioned regulation contains segments of definitions and concepts, rights and duties, accreditation, remuneration for services, aspects of the provision of the service itself, in addition to inspection tools and penalties, enabling ARSEPAM's role in regulating waterway transport. (ARSEPAM, 2024).

Finally, on the ARSEPAM website there are standards drawn up by the regulatory agency itself regarding water transport, which despite being simple, represent in themselves an advance in the exercise of regulatory powers by the State of Amazonas.

2.4. CURRENT SITUATION OF WATER TRANSPORT REGULATION IN THE AMAZON REGARDING THE DIVISION OF COMPETENCIES.

As previously mentioned, due to the interpretation of the summary of the National Waterway Transportation Agency – ANTAQ, the transport lines that cross

state borders or those that touch areas marked with a border strip, are subject to federal regulation.

However, the current scenario of water transport regulation is quite different. Firstly, there is a regulatory apparatus in force capable of exercising the regulation of the water transport mode under the jurisdiction of the State of Amazonas, when evaluating the existing regulations from the perspective outlined by (ALENCAR; FRANCO, 2021).

At this point, some debates might be pertinent at the current time, such as on state supervision and jurisdiction in the purely intermunicipal sections of the routes currently regulated by ANTAQ, or arguing for the application of the concept of border strip even if navigation is only partially carried out in this condition.

An apparent sign that the State of Amazonas is moving towards occupying its space regulatory is a provision observed in the aforementioned State Decree No. 45,110, in its Art. 7:

§ 2. Vessels that provide interstate transport services, **authorized by ANTAQ, with a section in any municipality in the State of Amazonas, must undergo the same accreditation process required for intercity lines**, under the terms of Law No. 5,604/2021 and this Regulation. (Emphasis required)

Another example of this can be seen in Resolution No. 002/2024 - CERCON/ARSEPAM, which established a price ceiling for the Manaus – Parintins transport line. (ALENCAR; FRANCO, 2021). This route experiences competition with vessels sailing to the State of Pará, and therefore, are subject to federal inspection. In practice, the measure works due to the monitoring of prices carried out by the federal regulator, however it illustrates the connection between overlapping transport lines subject to different regulations.

3. CONCLUSION

The regulation of longitudinal waterway transport in the Amazon presents unique challenges due to its geographical characteristics and the complexity of the distribution of powers between the different levels of government. The legal analysis carried out in this study

highlights the need for effective coordination between the Union, states and municipalities to ensure the efficiency and safety of this essential mode of transport for the region.

The 1988 Federal Constitution and subsequent regulations, such as ANTAQ resolutions and state laws, provide a robust legal framework, but it still requires adjustments and greater clarity on some points. Recent state legislation, such as Law No. 5,604/2021 and State Decree No. 45,110/2022, represents a significant advance in the regulation of waterway transportation in Amazonas, allowing greater autonomy and oversight capacity on the part of the state.

However, it is crucial to continue the debate on regulatory competence and monitoring of intermunicipal and interstate routes, especially those that cross the border. Harmonization of standards and cooperation between regulatory agencies are essential to overcome challenges and promote safe, efficient and integrated waterway transportation that meets the needs of the population and contributes to the sustainable development of the Amazon region.

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