

Public Governance as a Factor in the Effectiveness of the Constitutional Rules Applicable to State-Owned Enterprises in Brazil

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Abstract

This article evaluates the constitutional provisions regarding direct state exploitation of economic activity or entrepreneurial state, with a specific focus on the inertia involved in forming and managing state-owned enterprises. It aims to provide a balanced analysis without subjective evaluations. Based on analytical research conducted through document analysis, our objective was to establish a constitutional interpretation that links the collective interest with principle of efficiency, while developing a constitutional filter that is backed by a system of public governance. A filter like this can guarantee that the decision-making process surrounding the establishment, upkeep, or privatization of state-owned enterprises is based on evidence and avoids the political-ideological conveniences that periodically change. The guidelines enhance the constitutional understanding of the matter, providing improved guidance for the exercise of representative democracy when conducting an intertemporal analysis of the entrepreneurial state. This enables a more informed public debate on the nature of the state's entrepreneurial activity, aligning it with the collective interest.

Keywords

Entrepreneur State, Principle of Efficiency, Public Governance

1. Introduction

For many countries, state involvement in the economy is still a matter of reflection that goes beyond purely ideological aspects. There are some circumstances that may justify or preclude such state involvement.

On the one hand, government intervention in the economy can stabilize the economy in times of crisis, provide vital infrastructure and public services, and make investments in strategic sectors to promote economic growth. On the other hand, government involvement in the economy can cause other problems, among which we can highlight:

1) Create inefficiencies due to excessive bureaucracy and corruption; 2) Distort market signals, leading to sub-optimal economic decisions and poor allocation of resources; and discourage entrepreneurship and innovation, thereby harming long-term economic growth; 3) Lead to high levels of public debt, creating long-term fiscal challenges; 4) Create a lack of competition in the market sector in which they operate, reducing incentives for efficiency and innovation.

State-owned enterprises (SOEs) can be utilized as a strategy to positively impact the economy or to increase some of the aforementioned negative effects. Consequently, the decision to create and maintain SOEs must have democratic legitimacy and be supported by evidence of their effective socio-economic repercussions.

When politicians decide that the state should directly intervene in the economy through SOEs, this decision must be grounded in evidence that it will address the challenges of globalization. Additionally, the constitutional regulations governing SOE creation do not grant the state a monopoly, meaning that SOEs must operate within a market space that allows private companies to enter and compete. In principle, SOEs should not be viewed as obstacles to economic freedom, but as instruments for strengthening the national economy in relation to the needs of society and the global economic challenges of the markets in which they operate.

Our argument is that the creation of SOEs in Brazilian history has not been accompanied by a rigorous process of assessing their real needs, nor their maintenance as SOEs. And this has been consolidated by a restrictive reading of the constitutional text, whose provisions must be interpreted to provide guidelines for state action in the economy that is appropriate and avoids the aforementioned distortions.

Discussions regarding legal matters can be influenced by various viewpoints such as political, ideological, religious, and moral beliefs. The term “entrepreneurial state”, referring to the government’s active participation in economic undertakings as promoted under article 173 of the Constitution, creates a divide between those who favor a limited state role in the economy and those who perceive government involvement as crucial for entrepreneurial growth. This binary opposition, marked by rivalry between the viewpoints, hinders the advancement of legal discourse on the subject and limits productive academic discussions.

Legal science is not immune to political influence, thus prompting a necessity to consider a multi-dimensional perspective of the legal order in relation to societal factors. This approach is crucial to maintain relevance, adapt to evolving

changes and remain integrated with current trends. Furthermore, it is crucial to underscore that the law can exert a significant impact on society by facilitating the requisite interaction between standards and the actual world. Such an interaction is imperative for maintaining a balance between normative expectations and the realities of everyday life.

The problem does not lie in the supplanting and capture of discussions on the subject by biases, but in the overlapping of ideas that compromises the neutrality required to promote legal advances aimed at maturing the debates around the constitutional discipline of direct exploitation of economic activity by SOEs.

The overlapping of government ideology restricts and captures the issue, limiting the debate that ought to underpin decision-making processes solely to political majorities in power. This prevailing logic hinders rational efforts to guide discussions, which are becoming increasingly narrow. A permanent evidence-based system guided by clear guidelines and criteria, which seeks to align the state's actions with the interests of society represented in the legislative houses, aims for both legality and efficiency.

The Brazilian Constitution designates three circumstances under which the state may directly engage in economic activity. The first involves the Constitution explicitly granting such authorization, while the second is when national security demands it and the third is when there is a significant collective interest. Except for the first, the other two authorizing hypotheses rely on the interpretation assigned to each specific case concerning the meaning of “imperative of national security” and “relevant collective interest”. It is impossible to attribute a single definition to these expressions. Therefore, we assume that the meanings of these expressions remain highly uncertain. The adjectives used do not effectively clarify their intended meanings. Instead, they add another layer of interpretation to already ambiguous expressions. This further complicates the already vague nature of the language.

The lack of a clear definition for the aforementioned expressions leads to interpretation based on convenience, creating the possibility of elastic or restricted meanings without proper justification. This poses a problem in decision-making, as it can lead to inconsistent results. However, if we consider that a broader interpretation could lead to the establishment of a company with its own organizational framework, the ramifications of implementing this approach seem more consequential. This is particularly true when the economic ties supported by the company become impractical, resulting in greater expenses than societal advantages and making it arduous to reverse the impact of this strategy. It should be noted that this perception is not a priori, and requires systematic and periodic evaluation, debate, and consideration. It applies not only to the creation of state participation in a company but also to the decision-making process of whether to keep it or shut it down.

An objective interpretation of the Constitution that establishes a uniform approach to the state's direct involvement in economic activities requires further reflection. The issue remains stagnant, with conflicting ideas regarding the boun-

daries set by Article 173 of the Brazilian Constitution prevalent in both academic and practical realms.

From a legal perspective, it is important to note that a change in socio-political context, or simply the passage of time, may render the foundation for a SOE obsolete. In such cases, it is imperative that the state possess the necessary tools to ensure its actions as a business entity align with constitutional standards. This statement holds true as the constitutional assumptions that permit the state to participate in economic endeavors are applicable both during the creation and operation of the SOE.

To analyze the establishment processes of SOEs under direct control of the Federal Government, explanatory memoranda and relevant documents were subjected to documentary analysis. In this regard, the proposed method is an analytical approach to examine publicly available data that centers on federally owned and operated SOEs.

Based on organized data, studies of public governance practices, specialized doctrine, and an analysis of international experiences regarding the state's function as an entrepreneur, this article evaluates the constitutional elements that facilitate and maintain the entrepreneurial state. The goal is to construct an interpretation that establishes a more coherent and long-term approach to the direct involvement of the state in economic activities.

2. Constitutionalization of State Business Activity

A look back at the state's behavior as an entrepreneur reveals that the extent, manner and intensity of its actions have fluctuated several times, even in antagonistic movements, sometimes more interventionist and sometimes more abstentionist.

The state can take on various forms when it comes to the economy: it can take on the role of provider of goods and services or, on the other hand, relegate this task to private individuals. It can also reserve for itself the responsibility of exploiting some specific business niches, as well as intervening in the economy in a more lenient way, through regulatory techniques, or simply not promoting any kind of interference.

The ways in which the state interacts in the economic sphere are therefore varied, and there is no single, universal standard to be followed by all nations. Each state organizes itself, legally and institutionally, according to its particularities and the context in which it operates. There is therefore no single formula for the architecture of the legal-institutional framework relating to the role of the state in the business field—and, more broadly, in the economy.

The different formats that the state can take in the economy are reflected in the varied and distinct legal treatments given to the matter by the Constitutions and the agents responsible for their application over time. In this sense, the legal system needs to provide space for and reflect the prevailing values in a given society, so that the constitutional treatment of a given matter expresses the command that society expects to be disseminated and respected.

In Brazil, the constitutional rise of the economic issue, with the insertion of its own title dedicated to the subject, occurred with the promulgation of the Constitution of the Republic of the United States of Brazil, of July 16, 1934, following the movement observed in several other countries at the beginning of the 20th century, driven above all by the economic recession and criticism of the liberal model that had prevailed until then. Since the 1934 Constitution, all subsequent Brazilian Constitutions have dealt with economic issues, with a title for the subject. This gives rise to the concept of an Economic Constitution, understood here, objectively, as the set of constitutional rules that deal with economic issues, whether they are included in a title organized for this purpose or dispersed throughout the constitutional text.

In fact, several authors divide the concept of the Economic Constitution into two classifications: one formal and the other material. The former is made up of absolutely all the constitutional provisions that deal with this subject, regardless of their topographical location, and the latter encompasses not only the provisions of constitutional scope, but also any other normative acts, constitutional or not, with this content. Regardless of the classification adopted, the simple creation of a concept such as the Economic Constitution reinforces the importance of the subject and its connection with so many other constitutional topics (Souza, 2002).

The provision of a specific title to deal with economic matters reflects the constituent's choice to outline rules, principles, objectives, values, limits, among others, on the subject, which in itself is a constitutional manifestation demonstrating the state's active stance on this issue. From this perspective, the simple decision to elevate economic issues to the highest level in the legal system represents the constituent's choice to legislate on the matter, with all the effects that the constitutionalization of the issue entails.

This does not necessarily mean that the Brazilian state has adopted a markedly interventionist stance in the economy since 1934. Analysis of the degree of interventionism depends not only on the content of the text, but above all on how the text is interpreted and applied in practice. The constitutional arrangements of the economic order from 1934 to the 1967 Constitution were conceived and applied under different currents of thought, reflecting the values that prevailed at the time. It is interesting to note that the 1988 Constitution, although it stands out from the others when it includes the rule of economic freedom in its text, did not prevent the state from intervening to a greater or lesser extent.

However, it is necessary to reflect that the current of thought that once prevailed, more specifically in the Constituent Assembly debates, will not necessarily remain dominant in the years that follow, especially if we consider the constitutionalization of rules that were considered governmental. And this cannot be ignored by the law enforcer, not least because the Constitution is a document that was born to last, and therefore its reading and interpretation must be capable of dialoguing with and sustaining the changes that may arise in society.

This ability to adapt is much more a characteristic of the legal system than a distinctive qualification of legal science in relation to other sciences, not least because it would be materially impossible to demand the permanent timeliness of the legal text, considering that every normative act is issued within a certain period of time, with the limitations inherent in the development and evolution of society itself (Häberle, 2015). In this sense, the interpretation of legal norms is essential, reconciling the written text with current reality.

As will be seen in the following sections, what was understood by national security when the 1967/1969 Constitution was promulgated did not necessarily reflect the same understanding at the end of the 1980s, and it was up to the recipients of the constitutional text at that time to apply the constitutional provision in accordance with the socio-political and economic context, as well as considering all the other factors pertinent to the matter. Regarding the role of the Brazilian Supreme Court in maintaining the normative force of the Constitution, in *Claim of noncompliance with a fundamental precept* (ADPF) n. 46/2009, it has been recognized that the Court cannot simply adhere to interpretations made in the distant past that are no longer applicable to present realities. The Court must, instead, prioritize the normative force of the Basic Law and concretize constitutional principles through observance of the dialectical and uninterrupted process of conditioning between the norm and reality. This necessitates carrying out constitutional precepts in the most effective way possible.

As important as it is to read the current constitutional command, it is also essential to study the path taken and, more specifically, the discussions that were held at the time of the Constituent Assembly on a given matter, in order to understand the contours that guided the promulgation of the text as it stands today.

The convening of the National Constituent Assembly, with its subsequent installation, was an important milestone, especially as it produced one of the longest-lasting constitutional texts, albeit with more than a hundred amendments to the original text. One of the hallmarks of its drafting process was the plurality of segments and agents contributing, discussing and actively participating in the work to build a new constitutional text (Pilatti, 2008). At the same time as emphasizing the democratic tone of the Constituent Assembly's work, the process also signals the dialectical nature of its outcome, the result not only of the composition of the thematic commissions that were created to draft the text to be deliberated, but also of the dissent arising from the different views on the issues to be submitted to the National Constituent Assembly.

On the subject of whether or not the state should act as a businessman, the central discussions took place within the then subcommittee on General Principles, State Intervention, Underground Property and Economic Activity, which was part of the Economic Order committee. As soon as the work of this subcommittee began, a meeting was held to receive suggestions from organizations and contributions at a public hearing. There were different views on the subject of state intervention in the economy, with positions leaning towards reducing

the number of SOEs, others wishing for a rigid exception to the state's presence in the economy and also those who credited the country's level of development at the time to state intervention in the economy.

Once the drafting committee had made its adjustments, the constitutional text was promulgated with the following wording: "Article 173. With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law."

Based on these factors and the interviews with National Constituent Assembly participants, it can be said that the enacted text reveals, to a certain extent, a consensus in the dissent that persisted during the Constituent Assembly's work (Carvalho, 2017). It was not, therefore, a duality of antagonistic perspectives, but rather a myriad of disharmonious proposals about the role of the state in the field of business activity, a scenario in which the search for a text that has the ability to reconcile the positions put forward becomes much more difficult, increasing the chances that the final result will represent much more indecision than a clear message to law enforcers about the contours within which state action in the economy is considered legitimate.

The literalness of article 173, with the combined use of the expressions "except in cases [...]" and "the direct exploitation of economic activity by the state will only be permitted when [...]", would signal the intention of the constituent to limit state action as an entrepreneur only to such hypotheses. This sign gains even more strength if the provision is read in the light of article 170 of the Constitution, which, when referring to the economic order, states that it is based on free enterprise, which is also treated as a foundation of the Federative Republic of Brazil (article 1, item IV), as well as if the provisions of article 37, item XIX are considered, which makes the creation of a SOE conditional on the prior publication of an authorizing law.

With over 35 years in effect, Article 173 has not undergone any textual changes; however, despite its longevity, it still lacks maturity in terms of its applicability. This is due to the absence of clear delineation to guide compliance with the "imperative of national security" and "relevant collective interest" assumptions. It is important to note that the absence of a defined constitutional understanding of these assumptions does not pose a significant challenge to constitutional democracy in Brazil. This is due to the fact that the Brazilian Constitution is not the appropriate venue for navigating issues that are frequently subject to partisan debates. Such issues should instead be addressed within other normative or managerial spheres.

Given the nature of the provisions that deal with the state acting as an entrepreneur, any constitutional restriction on the matter would impose a limit on democracy, insofar as it would mean the imposition of rigid contours, with prospective effects, guided exclusively by the political force that governed the matter at the time it was established.

Based on this premise, Brazilian constitutional texts have followed the path of not scrutinizing, in constitutional terms, the concept of each of the assumptions that authorize the state to act as an entrepreneur. The meaning of a univocal and stratified concept of one of these assumptions would be harmful from a democratic perspective, when changes experienced by society are capable of directly impacting it, as well as making it difficult for the Constitution to adapt to the new realities that, by the simple passage of time, are brought to the fore during its validity.

Once again, we can see the importance of constructing a robust constitutional interpretation. The fact that the Constitution is not the appropriate place to specify the contours of the assumptions that authorize the state's entrepreneurial activity does not mean that the handling of these assumptions by the rulers of the day can be done in an absolutely unrestricted manner.

2.1. The Anachronism of “National Security Imperatives”

According to the Constitution, the state can directly explore economic activity if there is a national security imperative that justifies it. This means, therefore, that the state is legitimized to act as an entrepreneur if this assumption is present. Narrowing down its boundaries is therefore an essential activity in order to verify compliance with the constitutional command.

As an adjective that precedes “national security”, the meaning of “imperative” must be properly understood, since it was, by constitutional choice, allocated as a necessary adjective in defining the limits of state action in the business field. An imperative is something that is imposed without even allowing opposition or discussion, in other words, something that is incontestable. This qualifies the national security motive, while at the same time reinforcing the state's exceptional action in the field of business activity.

Promulgated in an anti-democratic historical moment, the command that establishes the “imperative(s) of national security” as an authorizing condition for the state to directly explore economic activity must be interpreted in the light of current circumstances, not just those that have passed.

The 1967 Constitution was the first to list national security as a reason for state intervention in the economy. The context in which this assumption was introduced into the constitutional economic order cannot be ignored. The purpose here is not to discuss the ideological biases that surrounded the period in which the Constitution was in force, but rather to consider the motto that led to it, which was to combat the threats that loomed over the country, leading to a greater concern for national security, not only in constitutional terms, but also in infra-constitutional legislation.

In this latter respect, the regulations adopted on national security, all of which were influenced by the doctrine of national security, stand out. These regulations had a pronounced authoritarian tone, especially through the use of vague and abstract types of crimes, under the guise of safeguarding national security, while on the other hand they exposed all their recipients to the risk of violating fun-

damental rights, such as freedom of expression, depending on how they were treated. National security was employed as an obstacle to economic freedom, resulting in the establishment of multiple monopolies in the Brazilian economy over several years. Therefore, a systematic interpretation of the constitutional text is necessary to consolidate a *ratio decidendi* and prevent abuses and distortions. This “purifying” reading enables state action to be endowed with legitimacy and plausibility based on the public interest.

From this perspective, even without the declaration of nonacceptance by the Brazilian Supreme Court, but also without a declaration to the contrary, there are no national security regulations left in the Brazilian legal system, with the exception of Article 173. In this context, the question arises as to whether the only constitutional provision on “national security” is still valid or whether, on the contrary, it represents a remnant of the authoritarianism that once prevailed and which, with the maturation of the Constitution, no longer exists. If the first hypothesis prevails, it is time to outline the minimum meaning that should be given to this expression. In this regard, the doctrine emphasizes the link between the concept of national security and the issue of national sovereignty.

Constructing the meaning of a legal rule is a permanent task for the interpreter, who must be guided by the attribute of timeliness, so that the result of his work must give applicability, in the present, to that provision enacted days, months, years or decades ago. Overcoming the gap between the publication of a normative text, regardless of whether it is constitutional in scope, and the moment of its application is achieved above all through the interpretative activity of the law enforcer (Ávila, 2005).

In fact, the existence of “national security imperative(s)” does not necessarily lead to the establishment of a state-owned company by the State to carry out business activities, although it will serve as a basis for the use and/or maintenance of the business model to achieve this end. This finding shows that even if the conditions for direct exploitation of economic activity by the state are met, the use of business vehicles to achieve constitutional purposes is only one option among many others for the public manager, and there is no actual obligation to act in this way.

It is important to emphasize that situations of imperative national security can also be accommodated in the “relevant collective interest” assumption, since concern for national sovereignty is one of the greatest interests, if not the main one, that unites the citizens of a country, which reinforces the view of interpreting the national security assumption as a tautological constitutional passage.

2.2. Context and Link for Identifying “Relevant Collective Interest”

As seen in regards to national security, the Constituent Assembly modified the constitutional assumption that allows the State to directly engage in economic activity. It aimed to limit the actions of the entrepreneurial State to hypotheses qualified by the relevance criterion. However, the following expression’s uncer-

tainty permits its more restrictive or expansive usage, depending on one's desired breadth.

Relevant means having outstanding value, distinguishing itself, or standing out from the rest. In the context of expression, the adjective necessitates giving the collective interest a distinctive expressiveness that sets it apart from the common collective interest, even if the leveling of such interests is unclear.

For this reason, it is essential to provide an objective justification for creating a state-owned enterprise that serves a common interest. The uniqueness and characteristics of this interest must be clearly explained to support the state's involvement in a business venture. Duarte (2015: p. 36) states that Article 173 of the Constituent Assembly requires logical explanations demonstrating the urgent need for the state to capture private sector activities. To clarify sector dynamics and project objectives, studies and justifications must be presented.

The collective interest represents the interest of a multiplicity of people, different from each other but united by the identity of their interest, which may or may not be promoted by the state, depending on its relevance. As a rule, collective interests do not require state action to be satisfied, such as access to food, at least as a rule.

When analyzing Article 173 of the Brazilian Constitution, what is at stake is the need for the State to act in the face of the circumstances that reality imposes, and not the need or convenience of implementing, outside the economic sphere, actions and policies aimed at a given collective interest. The incorporation of this rationale would define the contours of the State's direct entrepreneurial action only when circumstances make its action immediate and necessary to serve a relevant collective interest.

The lack of transparency regarding the constitutional basis for the creation of SOEs in Brazil is a deficiency that exposes the law creating them to the risk of being challenged on the constitutionality of the measure. In a study of the 46 state-owned enterprises under the direct control of the Federal Government, based on the explanatory memorandums of the legislative proposals for their creation, it was possible to verify that, as a rule, there is no explicit reference to the constitutional assumption that supports the creation of the state-owned enterprise, be it the assumptions established in the 1988 Constitution or those established in previous constitutional texts for state-owned enterprises created before 1988. The research carried out shows that the lack of clarity in the reference to the constitutional basis supporting the creation of the company can be avoided by describing the objectives to be pursued by the company, which is information that can be easily verified in absolutely all processes for the creation of a state company.

The pattern identified, consisting in the absence of an explicit reference to the constitutional premise that justified the creation of the public company, but rather to the objectives to be pursued by it, reveals a deficiency in the process of setting up public companies, since one piece of information does not replace the other, both of which are fundamental to ensuring transparency and control of

the entire process of setting up the company, during and after its completion.

Among the effects of this pattern, the main one is the lack of densification of the constitutional assumption that underpinned the state intervention in the economy through the creation of the state company, making it difficult to understand not only what assumption was used, but above all the delimitation of its concept and the extent to which it is fulfilled in the specific case. The omission of its fulfillment in the specific case or the adoption of alternative techniques, such as the emphasis on the activities that the company will carry out, without the corresponding explicit indication of the basis on which it is based, constitute deficiencies that may render the normative act unconstitutional, insofar as it does not provide full transparency of the constitutional requirement that served as a basis for the state's corporate action, thus raising doubts as to whether it complies with any constitutional provision that gives it legal validity.

This lack of transparency cannot be seen as a safeguard to exempt the State from the task of assessing whether the constitutional presuppositions that justified its immersion in the economic field still exist, even if it is not possible to identify the basis on which the state company was created. If there was a defect in the creation process, consisting in the vagueness of the indication of the foundation, this could not lead to subsequent defects. An interpretation to the contrary would create an undesirable incentive to simply fail to indicate the constitutional basis for the establishment of the state enterprise or to densify it in a particular case, so that this defect could be used as a shield at a later date to avoid or make it difficult to assess the persistence of the reason why the state decided to act as an entrepreneur.

At the same time, the systematization of information on the federal state companies in operation is the starting point for checking whether each of them complies with the constitutional text in force.

From this perspective, it should be noted that the Constitution is the current basis of validity of all infra-constitutional legislation, which therefore includes the laws that govern the creation of each of the existing state-owned enterprises, even if they were enacted before the current constitutional text. In other words, even if they were created prior to the constitutional text in force today (as is the case with most of Brazil's state-owned federal enterprises), the normative vehicle used for their creation is constantly subject to analysis for compliance with new constitutional texts. And this is precisely because of the position that the Constitution occupies in the legal system, and especially because of its status as the basis of validity of all infra-constitutional legislation.

Based on this assumption, it can be concluded that the laws that predate the 1988 Constitution and that provide for the creation of state-owned enterprises are considered to have been accepted by the new constitutional text or are considered to have been repealed due to their incompatibility with the new basis of validity of the legal system. On the other hand, laws that authorize the creation of SOEs and that were enacted after the Constitution are themselves subject to the analysis of unconstitutionality, since they were enacted under the current

constitutional order.

The majority of state-owned federal enterprises in operation were created before the 1988 Constitution. Consequently, the laws governing their establishment must undergo an analysis for conformity with the current constitutional amendments. The acceptance of these laws is contingent on being compatible with constitutional provisions, specifically Article 173, which stipulates the state's obligations as an entrepreneur. If the normative acts are compatible, they are accepted. Otherwise, they are considered repealed. From a practical perspective, the eventual repeal of a law that established a state-owned company would invalidate the basis for the state's presence in the company, requiring the state to withdraw from the business activity.

There is no clear statement from either the Executive Branch or the Judiciary at the federal level indicating that a law which established a specific state-owned company before adoption of the 1988 Constitution has been repealed by it. This fact may prompt inquiries, particularly when taking into account that previous Constitutions did not contain identical language to the current version. A number of currently operating federal SOEs have formally modified their basis of validity when a new constitutional order was established or in some cases, for those created before the last two or more Constitutions.

However, it is crucial to conduct a continuous analysis of the incorporation of prior legislation into the current constitutional text while the legislation remains in effect. This is because constitutional provisions may acquire new meanings despite the text's grammar being unchanged. Hence, evaluating the state-owned company's conformity with constitutional regulations does not ensure identical outcomes in subsequent evaluations, irrespective of the continuity of the normative text paradigm. That is because, besides the formal amendment of the foundation's legitimacy because of the advent of a new constitutional order, it should be recognized that it can be revised without a formal procedure.

In fact, the formation of a state-owned enterprise does not create a presumption that the constitutional assumption used to justify the state-owned enterprise movement will continue to exist indefinitely in the specific case, since the Constitution is a living text that must dialogue with the changes experienced by society. This does not necessarily imply a shift in the understanding of the meaning of the constitutional foundation utilized, but instead suggests the possibility of a novel interpretation of the constitutional provisions, guided by the combination of principles outlined in the text. Alternatively, a more extensive reform may be necessary, accounting for the adaptable nature of society and the characteristics of a democratic state rooted in the rule of law.

3. The Path Dependence of the Brazilian Entrepreneurial State

Based on the research survey and interpretation of article 173's conditions, Brazilian governments have shown a historical lack of initiative in establishing state-owned enterprises (Brazil, 2016). Furthermore, this inertia in creation has

led to a neglect in evaluating and reviewing existing SOEs. This characteristic of the entrepreneurial state—its tendency towards inertia—is only overcome in rare, decisive moments when political forces compete not only in general debates, but also in response to a specific case.

Historically, the term “entrepreneurial state” has sparked intense political and ideological debates, which have inevitably influenced the subject matter. However, these rivalries surrender the constitutional and administrative laws that regulate the economic order, ultimately impeding the evolution that the subject deserves in various dimensions.

A recent example of ideological rivalry is Decree n. 10.263/2020, which evaluated SOEs only to recommend their inclusion in the privatization program. With the change of government, Decree n. 11.478/2023 was issued, excluding several SOEs from the list of possible privatizations without presenting any evidence based on analyses or studies. Thus, in a mere span of three years, punctuated by two presidential elections, opposing decrees were issued, each reflecting the economic strategy of the ruling regime regarding the state’s involvement in direct economic exploitation.

Two inertial movements can be observed regarding the failure to comply with constitutional provisions: the creation of SOEs without a strong foundation and their maintenance or sale without criteria supported by a consistent interpretation of the constitution. This indicates that the decision is made in a specific and systematic manner by the historical path preceding it, following a causal chain relationship between distinct stages of a temporal sequence, with each stage having an impact on the subsequent stage (Hathaway, 2000). This case exhibits path dependence with institutional characteristics as it is managed by state agents who act only in accordance with constitutional norms. This reflects a praxis reinforced in complex social contexts with significant effects on learning, coordination, and adaptive expectations, which limits future decisions that could alter trajectories (North, 2005). As evident from the history of the Brazilian entrepreneurial state, the prevailing practice becomes institutionalized, creating a pattern of legitimacy. In other words, institutions are reproduced because they are perceived as legitimate (Mahoney, 2000). Consequently, institutions naturally resist change.

Silva (2007) discusses the role of praxis and institutional restrictions in politics, illustrating how they pervade the field. One key aspect is the collaborative and strategic nature of politics, whereby an individual’s actions yield consequences that are dependent on those of others. Accordingly, cultivating favorable conditions for collective action and coordination remains the central challenge of political life. The institutional density of politics is the second aspect, since the allocation of political authority is the primary contributor to institutional resilience. This also leads to an increase in power asymmetries. The complexity and opacity of politics poses a challenge, involving the pursuit of various incommensurable objectives and intricate processes that hinder identifying the responsible factors leading to poor performance and potential adjustments to

yield better results.

The creation and maintenance of SOEs is a complex issue. However, the practice has been heavily influenced by article 173, which lacks valuation and meaning, ultimately leaving democratic politicians to make choices at their own discretion. Praxis utilizes a compromise in comprehending and defining the boundaries and scope of public interests that can incentivize SOEs (Sundfeld, Rosilho, & Yasser, 2017: p. 48). This compromise challenges the importance of motivating acts as a guarantee for demonstrating a more legitimate and well-supported concrete action aligned with the collective interest due to a lack of consistent and thorough public debate within the legislative sphere.

However, according to the concept of path dependence, political decisions made in the past can set a course of action that is difficult to deviate from over time. This tendency to stick to the initial path can lead to numerous externalities, especially negative ones, such as producing situations of questionable legality, inefficiency, and misalignment with society's true priorities. If we revisit the constitutional assumptions outlined in Article 173, we can conclude that the decision-making process, at a given point in time, on the existence or nonexistence of these assumptions might restrict the state's capacity to review this decision in the future and adjust to a fresh economic, political, or social setting that may necessitate a deviation from the course taken so far.

The procedures for establishing the present federal SOEs illustrate that the ambiguity in elaborating on the constitutional assumption is a prevalent characteristic of these procedures. The Brazilian government lacks tools to establish a new approach and reassess its positions. At best, it conducts infrequent and restricted re-evaluations, not due to breaking away from the effects of path dependency, but rather due to political and ideological influences.

An aggravating factor in this scenario is the cultural tendency for public managers to be evaluated solely based on actions and programs they initiated under their management, without considering other factors. However, it is equally important to evaluate all actions and programs currently underway, even if they are continuations from previous management, as they are now under the current incumbent's management. Hence, evaluations should be conducted on all relevant entities to ensure proper management.

Importing this rationale to the issue of the entrepreneurial state means that the public manager in charge must oversee and be responsible for the performance of all of the state's business assets, not only those that were initiated during their tenure, such as the establishment of a new state-owned company under their administration. The manager must be accountable for all actions taken under their leadership. The management of other state-owned assets is equally significant with no hierarchy of responsibility in managing corporate assets in the state's portfolio.

Restricting the state's ability to react to post-decision variations can endanger the harmonization between the population's actual priorities and the decisions taken by current leadership. Path dependence can create an automaticity in pub-

lic management, leading to the continuation of actions and programs that may no longer align with the changing desires and priorities of society. Failure to re-evaluate certain state actions in the economy can increase the risk of situations that are no longer consistent with the Constitution or do not align with society's interests. These situations can persist with both beneficial and detrimental effects due to a path-dependent system, rather than serving society's interests.

The concept of path dependence describes the condition that entrepreneurial state management finds itself in without the mechanisms and practices necessary for systematically (re)assessing the positions that the state takes in the economic structure.

4. Systematic Interpretation and the Principle of Efficiency in the Constitutional Arrangement for the Entrepreneurial State

The concepts of “imperatives of national security” and “relevant collective interest” require evaluation by the rule interpreter. Their application can lead to doubts, controversy, and require either broad or limited judicial control depending on the circumstances (Binenbojm, 2006: p. 212). This task demands the interpreter to do more than just mechanically apply the rule to the situation. The interpreter must construct the rule's meaning based on the text provided in the provision, which directly pertains to the state's entrepreneurial actions' constitutional conformity.

It is crucial to note that the flexibility of the phrases outlined in Article 173 of the Brazilian Constitution is determined by the text itself, and veering from it would result in deviating from the guidelines established by the Constituent, and would go beyond the constitutional framework established for the matter. Consequently, every element enshrined in the Constitution must be taken into account as a guiding principle in elaborating, construing, and applying the provision in question. Therefore, a systematic approach guided by the parameters extracted from the remaining text is recommended.

In a more focused interpretive approach, Cretella Júnior (1993) and Torres (2001) argue that the drafting of the current constitutional provision has a certain common denominator with previous constitutional texts in terms of delimiting the role of the State in the economy, giving the State a subsidiary role in relation to private individuals in the direct exploitation of economic activity. The constitutional provision is understood as the electorate's decision to limit the state's direct engagement in economic activity to specific circumstances, directing state intervention in the economy, and coordinating the coexistence of the state and private enterprise.

However, according to Souza Neto and Mendonça (2006), subsidiarity is not regarded as a constitutional principle but a postulate connected with economic liberalism. This view acknowledges the constitutional economic order as encompassing not only liberal economic principles but also liberal, social, and nationalist concepts, among others. Consequently, it is not possible to conclude

that there is a predetermined constitutional mandate requiring the state to abstain from entrepreneurial activities.

The principle of state subsidiarity in the economy is a highly disputed topic, likely stemming from the attribution of a principled nature to the notion of subsidiarity and its consequential instrumentalization. Objective analysis is necessary to fully understand this issue. In the ruling of Declaratory Action of Unconstitutionality No. 5624 on June 6, 2019 (p. 163-164), the Brazilian Supreme Court compared the concept of state subsidiarity in the economy with statistics on the quantity of SOEs in the nation: “Article 173 [...] erected the existence of a constitutional principle of subsidiarity, according to which direct state interventions in the economic sphere would constitute the *ultima ratio* in the Brazilian legal-constitutional system, which, however, is contradicted by the Brazilian empirical reality, due to the fact that Brazil has a greater number of state-owned enterprises compared to the 36 member nations of the OECD”.

The key takeaway from this analysis is the need to clarify and define the vague concepts outlined in Article 173 of the Constitution. This can be achieved by implementing measures that enable the assessment and monitoring of adherence to constitutional assumptions, which effectively embody these elusive concepts.

To determine the optimal framework for state entrepreneurialism, we propose a methodical analysis that upholds the constitutional principle of unity, which [Grau \(2012: p.181\)](#) conveys succinctly and proverbially: the Constitution should not be “interpreted in strips, in pieces.” This statement affirms that the provisions of the Constitution cannot be interpreted in isolation as they are interconnected and must maintain logical coherence. It is important to view the Constitution as a comprehensive system to avoid a biased interpretation.

According to [Hesse \(2004\)](#), the provisions of the Constitution establish the structure and shape of both the state and society. Thus, they mustn’t be understood in isolation. In search of an interpretation that combines the meanings of different provisions, systematic interpretation aims to emphasize the logical connections that meet collective and individual needs. Changes in social and economic contexts may prompt the review of constitutional text, and new interpretations can maintain its relevance without altering its language. The Constitution’s capacity to adapt does not diminish its normative power.

In this sense, the Constitution stipulates the conditions for the state to act as an entrepreneur and establishes obedience to the principle of efficiency as a pillar of administrative activity, as outlined in article 37. Compliance with this command requires public administrators to effectively manage public affairs by utilizing available resources optimally and adopting best management practices. This is done with the goal of maximizing benefits for citizens, promoting improved social results, and reducing costs. Additionally, administrators should consider the aspect of economy, which is directly derived from the principle of efficiency.

The principle of efficiency was incorporated into the Brazilian Constitution through Constitutional Amendment 19/98. [Lanius, Junior and Straiotto \(2018: p.](#)

111) argue that the explicit mention of the efficiency principle in Article 37 of the Constitution is justified by the necessity for the state apparatus to generate more benefits. This will promote the expansion and improvement of public services for citizens in the face of limited resources and unlimited social needs. In a regulatory context where citizens demand various services from the state, the efficiency filter serves as a vital tool for assessing public management. This mechanism enables the assessment of the administration's results vis-à-vis society's genuine and pressing needs. Thus, objective evaluations remain key in this process.

Efficiency can be achieved by setting goals that reflect the community's priorities and are accomplished at a reasonable cost, without squandering public resources. Due to the scarcity of public resources, managers confront a delicate balancing act when considering different courses of action across a wide range of state activities. It is the responsibility of governing officials to identify the priorities of citizens and construct public policies to accomplish them, while staying within the budget and acknowledging the outcomes of their decisions. Here, the discussions on difficult choices occur. These choices are classified as the decisions made by those in authority to allocate funds towards certain public objectives at the cost of other significant goals.

Therefore, it can be said that the densification of the constitutional assumptions that authorize the State to act as an entrepreneur must be guided by the principle of efficiency, which requires an assessment of the benefits and losses resulting from a given decision or, in other words, the result of the actions promoted by the State in the economic field.

In practice, to ensure efficiency in the state's entrepreneurial decision-making process, it is necessary to consider the costs of state involvement in the economy alongside its benefits. Furthermore, the priorities of the population and externalities relevant to each decision should also be taken into account. This analysis is particularly significant for SOEs that receive funding from their controlling entity for staff expenses, general costs, or capital expenses, with the exception of those related to an increase in shareholdings.

As the classification nomenclature implies, SOEs that depend on external financial support from the controlling entity to meet basic operational expenses, such as personnel and general costs, are included in the Fiscal and Social Security Budgets. These are the same budgets that provide appropriations for health, social security, and the powers of the federal entity. Being alongside these budget allocations underscores the significance of public managers emphasizing ongoing self-reflection, in the context of ensuring efficiency, across all avenues of action, even those of the state as an enterprising entity. Directing resources towards this aim may result in sacrificing other equally significant goals, making it crucial to employ this filter to evaluate whether and when the state's economic actions are justified.

This assessment is especially vital as it aligns public managers' actions with the actual priorities of the population. It is important to note that a government's le-

gitimacy is not solely determined by elections; rather, it is equally imperative that the ruler's actions implemented throughout their term align with the main priorities of the population. Utilizing efficiency as a guide serves as an invitation for public managers to make decisions that closely reflect the real needs of the population (Souza, 2017).

Still discussing the influence of the principle of efficiency on the theme of the entrepreneurial state, Cyrino (2016: p. 20) made significant contributions by conducting an economic analysis of the incentives that SOEs and their managers and controllers face. The initial standard presented is, actually, a challenge to the economic analysis of the law that can be deduced from the aforementioned statements: as the state's comparative advantage decreases, the interpretation of article 173 should become more limited. We contend that it falls under the economist's responsibility to evaluate scenarios in which even a flawed market may yield superior outcomes. If the state lacks the ability to effectively operate in a sector that demands innovation and competitiveness not promoted by state-owned enterprises, the interventionist approach should be a secondary option. Alternatively, a greater burden of justification would be necessary to counterbalance the economic drawbacks of such a decision. At this point, two additional standards are suggested which pertain to the degree of collective interest necessary to legitimize and increase direct state intervention. In this vein, it can be argued synthetically that the interpretation of the zones of uncertainty in article 173 becomes more flexible with an increase in democratic clamor for a given intervention. Additionally, with the intended assignment of an essential activity to a state company, direct state action in the economy becomes more viable.

The formulated standards appear to have been shaped by economic analysis of law and pragmatic considerations, guided by the principle of efficiency. This is evident in the central focus on evaluating the state's comparative advantage and potential constraints in operating within particular sectors.

The ability or inability of the state to undertake the exploitation of a particular economic activity should not be ignored in favor of the agendas of current leaders. The state's evaluation of its ability to undertake a specific business niche, including its organizational, financial, and technical capacity, aligns with the principle of efficiency. This reinforces the obligation to assess the capacity based on objective standards and to present it transparently when making decisions regarding the matter.

If a specific economic activity requires state-of-the-art technology and significant human and financial resources that surpass the state's current capabilities, decisions regarding state intervention in the economy, guided by the principle of efficiency, should consider this condition and other factors requiring assessment. These factors include the level of public demand for intervention and the necessity of state involvement for the advancement of a particular business market.

The state's ability to act as an entrepreneur in accordance with the constitution relies on a continuous evaluation of the constitutional prerequisites and

their continuity over time. In this regard, it should be noted that the Brazilian Supreme Court has previously held that it is the duty of the Executive Branch to interpret constitutional mandates based on its comprehensive understanding of the population's priorities and the state's business interests. Meanwhile, the Legislative Branch is responsible for evaluating the legislation allowing the establishment of a specific state-owned enterprise, rather than the Judiciary.

To fulfill their duty, government officials ought to abide by all of the principles outlined in article 37 of the Constitution, with efficiency being of utmost importance. It follows that any interpretation solely based on the constitutional expressions derived from article 173 would conflict with the effective management practices that a results-oriented public administration is obligated to uphold.

5. Public Governance as a Consolidation of the Constitutional Filter

Given the clear link between the presumptions laid out in Article 173 and the principle of efficiency in Article 37, it is vital that the constitutional filter applied to the entrepreneurial state is a continuous process that offers clear guidance, support, and clarification of precepts to those making decisions. This approach ensures that the filter steers clear of a narrow and inflexible interpretation of the Constitution, thereby providing decision-makers with much-needed direction and coherence. There is no legal support for a position that submits the ability of the entrepreneurial state to be governed to the automatic effects of path dependence. This is likely to lead to state action in the economy that is not in accordance with the Constitution and not aligned with the current interests of society.

Part of the decision-making process involves verifying the existence of alternative approaches to achieve the desired outcome. For instance, determining whether the state's role as a regulator may suffice to accomplish the goal instead of directly exploiting economic activity. This assessment must consider the principle of efficiency and meet the conditions outlined in the constitutional text for the specific scenario. This comparative analysis of various state interventions in the economy, including their respective advantages and disadvantages, serves the best interest of the public. It follows the principle of efficiency by integrating the weighing of potential economic and social outcomes of all technically and legally feasible options for intervention, including nonintervention, into the decision-making process.

The best approach to implementing the constitutional filter is to establish a public governance system for the entrepreneurial state. This paper argues that governance, which derives from the private economy in which shareholders delegate the power to manage assets and investments from a distance to a third party, has a key role to play. This notion has been widely adopted by publicly traded companies with the goal of directing, monitoring, and promoting companies to follow good practices that benefit their shareholders, thus giving rise to the term corporate governance. Throughout these experiences, transparency,

fairness, accountability, and corporate responsibility have become established as the fundamental principles of corporate governance.

The concept of adapting governance to the public sector emerged during the economic and fiscal crisis of the 1980s, a period that widely promoted new political and economic arrangements in pursuit of efficiency. Public governance encompasses the exercise of power in administering a country's social and economic resources, with the goal of development and implicating the government's ability to plan, formulate, implement policies, and fulfill its functions (World Bank, 2008).

This concept encompasses a range of interpretations and issues regarding the state and public administration. Public governance focuses on the state's ability to act decisively and effectively in addressing social problems from both political and administrative perspectives (Peters & Pierre, 2016). Consequently, its objective is to promote the assessment of outcomes and conformity to established criteria or benchmarks (Bovaird, 2005), with particular emphasis on contemporary constitutional interpretation. Governance has the ability to stimulate the discovery of opportunities and innovation, while reducing obstacles to enhance service to society. This enhances organizational performance by reflecting the constitutional principle of efficiency, ultimately generating value for society.

It is important to distinguish between public governance and management, as the former provides direction, while the latter is responsible for implementation. According to the Federal Court of Accounts, "Governance is also concerned with the quality of the decision-making process and its effectiveness [...] Management, in turn, bases itself on the assumption that there is already a direction handed down and that public officials are responsible for ensuring that this is executed in the best way possible in terms of efficiency." (Brazil, 2014: p. 32)

According to the Basic Governance Reference Guide for Public Sector Organizations (Brazil, 2014: p. 30), public governance encompasses three types of activities: "a) evaluate the environment, scenarios, performance, and future and current results; b) direct and guide the preparation, articulation and coordination of policies and plans, aligning organizational functions with stakeholders' needs (users of services, citizens and society in general) and ensuring that objectives are met; and c) monitor results, performance and compliance with policies and plans, checking them against the targets set and the expectations of stakeholders."

Thus, we observe certain characteristics that may be present in the broad process of creating, maintaining, and selling or deconstructing state-owned enterprises. This process is developed in the form of a public governance system based on a systematic interpretation of the Constitution, conformity with the "relevant collective interest" focus and the principle of efficiency, all of which guide the decisions and management of these economic activities. This is applicable to both the Executive Branch, which has the initiative to create and manage business activities, and the Legislative Branch, which must assess and demand accountability for such state activity.

It is worth mentioning that establishing public governance for the entrepreneurial state can be a fitting public policy objective. Many actions and incentives, including ex ante and ex post evaluations, have already been undertaken at the national level, demonstrating the relevance of evidence-based diagnoses and prognoses that provide the public manager with the necessary information for effective decision-making. All of this can be achieved without compromising the government's freedom to execute actions and programs aligned with their respective government programs.

Thus, a public governance model is essential to evaluate, monitor and direct the state's actions perpetually as an entrepreneur. This kind of framework positions the state in the field of economics, in accordance with the constitutional text and its systematic vision. The incorporation of public governance in the entrepreneurial state serves to verify the decision to allow for state intervention in a particular economic niche or to modify the way in which it intervenes. This is significant for various reasons, including the necessity to assess the validity of the decision's premises, as well as their ongoing relevance over time.

Certain elements are essential to the success of a public governance system for an entrepreneurial state:

- 1) Building effective regulations for extensive transparency, adhering to the principle of publicity, and qualifying public discussions on the subject are essential. This will guarantee the densification of the constitutional assumption that will serve as the foundation for creating each state-owned company and the expected outcomes of each, to ensure that their creation is preceded by pre-planning and clearly establishes the binding element (constitutional assumption) and the analysis framework for future evaluations.

- 2) Implement mechanisms for continuous monitoring and evaluation based on evidence of the performance, results, and corresponding costs of SOEs. This will prevent path dependency from adversely affecting the management of the entrepreneurial state.

- 3) The state should periodically evaluate its position as an entrepreneur, relying on evidence, to facilitate decisions on creating new companies and assessing existing state-owned ones. Assessment of the latter should be guided by evidence and criteria measuring promotion of the objective(s) underpinning each company's creation.

- 4) Implement tools to require the state to regularly reveal the planned trajectory for each individual SOE, including their goals and expected outcomes, while adhering to the specific legal boundaries established for each state-owned company.

- 5) Assign responsibility to one or more bodies to coordinate the public governance of the entrepreneurial state. This ensures accountability for the work undertaken and seeks to safeguard minimum functional autonomy. Decision-making processes should encourage greater social participation, while avoiding the risk of capture by political majorities in government.

Establishment of a governance system for continuous evaluation, monitoring, and direction of the state's actions as an entrepreneur, according to the aforementioned characteristics, potentially provides a viable approach to break away from the inertial practice of mindless compliance with previously established procedures in managing an issue and eventually forming the phenomenon of path dependence. Reducing the chances of producing questionable legal outcomes, inefficiencies, and misalignments with society can break the inertial effect that impedes desirable course reversals. Automatic continuity should not dictate the state of affairs.

The process of making constitutional presumptions in specific instances will be conducted through a clear and transparent method to clarify the rationale behind the establishment of a particular state-owned enterprise, in line with the underlying concept of state actions. This will also serve as the groundwork for assessing the state's use of economic activities and its conformity to the Constitution, over time. The state's routine evaluation of its actions as an entrepreneur is a key aspect of the governance model. Its aim is to enhance the management of state-owned assets.

The key objective is to emphasize the criticality of establishing a regular evaluation system to counter the inertia of re-examining the state's positions in the economic order. This is a suitable mechanism for ensuring the consistent alignment of the state's actions as an entrepreneur with the constitutional parameter. More crucial than the insights a public governance model can offer on whether the state should continue to exploit economic activity is the establishment of a firm groundwork for integrating a monitoring and evaluation system into the management of the state's business assets. This guarantees their constitutional compliance and alignment with society's interests on a permanent basis. Promoting progress is crucial, especially given the phenomenon of path dependence discussed earlier.

It is essential to implement governance to promote the constitutional filter of the entrepreneurial state, ensuring that the motives that formed the basis of a previous decision remain relevant. Time may impact the rationale for a particular decision. Simply put, a decision made by the state at a particular time, regardless of the direction it took, may not align with present conditions. Therefore, it is vital to reassess and scrutinize the underlying notions that influenced the decision, considering current insights and opportunities. This process involves overcoming the constraints that path dependence imposes to some degree on public management's daily operations, specifically presumptions, assumptions, and barriers.

Similarly, the Organization for Economic Cooperation and Development (OECD) emphasizes in its guidelines on corporate governance of SOEs the need for governments to ensure the efficiency, transparency, and accountability of these enterprises. These guidelines represent the internationally recognized standard on how governments should execute the function of state ownership. According to the [OECD \(2015: p. 19\)](#), state ownership of SOEs must serve the pub-

lic interest. Therefore, the state should thoroughly assess and disclose the objectives that warrant state ownership and subject them to continuous scrutiny. The chief aim of state-owned enterprise ownership must be to optimize societal benefits by efficiently allocating resources.

By stating that state ownership should be subject to a “permanent critique,” the OECD corporate governance guidelines for SOEs emphasize the significance of implementing established rules and processes for regularly evaluating the relevance of the state’s actions as an entrepreneur. The OECD’s proposal aims to prevent negative consequences arising from government bureaucracy in managing its business assets, mainly potential disparities with society’s genuine priorities and improper allocation of scarce public resources.

It is essential, according to the OECD recommendation, to ensure good governance of the management of the state’s business assets as a whole, and its role in achieving the desired practical results through proper procedures. Furthermore, the recommendation posits that state ownership of state-owned enterprises should be carried out in the interest of the general public. This serves as the foundation for the subsequent guidelines, which broadly outline the responsibilities and obligations related to the matter, including the efficient allocation of public resources and proper accountability. The perspective outlined in the OECD guide emphasizes the crucial role of establishing public governance for the entrepreneurial state. It makes clear that any mishandling of the state’s business assets would adversely affect the general public interest.

It is noteworthy that the corporate governance approach is already in place in various SOEs, particularly those that are publicly traded. As previously indicated, this is a crucial measure to ensure shareholder rights and stimulate interest from potential investors. Nevertheless, the pursuit of sound corporate governance practices, which are already focused on efficiency, provides a strong impetus to effectively guide companies’ objectives, especially in terms of aligning them with the public interest. The lack of a solid framework for public governance at large is a major issue as it involves decisions pertaining to the commencement and conclusion of the government’s involvement in various economic sectors, independent of the actions taken by individual companies.

The state’s ownership of SOEs is exercised on behalf of society, which ultimately owns what belongs to the state. This ownership is intrinsically related to the representation of society’s interests by those in charge of managing public affairs. Therefore, it is fundamental to implement public governance over the management of the state’s business assets, responsibly managing the matter with transparency, rendering accounts of the actions carried out, and being accountable for them to the general public.

By doing this, the state guarantees diligent and professional administration of business assets and fulfills its duty to appropriately manage state assets. Additionally, it reduces any ideological burden surrounding the issue and provides transparency to the management of the matter. The absence of governance on the matter significantly compromises its management transparency.

The periodic and ongoing assessment of the actions taken by the entrepreneurial state, in alignment with an established system of public governance, may or may not lead to modifications in the chosen direction of a decision, and there is no causation between the evaluation and a specific outcome. To determine whether or not a change in the current course of action is necessary, an analysis based on the established governance system is essential. In other words, the implementation of public governance for the entrepreneurial state aims to guarantee constitutional compliance in the economy and proper management of state business assets.

Such public governance allows for unrestricted analysis, avoiding limitations and standards that limit expansion due to path dependency as observed earlier. The uncritical repetition of outdated notions can restrict the government's capacity to respond to the actual needs of society and comply with the Constitution's efficiency principle. This increases the likelihood of actions that do not align with the constitutional text.

If there is a departure or discrepancy from the previous fulfillment of a constitutional requirement, corrective actions are necessary to align the state's actions as a business with the established norm, namely, the Constitution. In this situation, the optimal approach would be for the state to withdraw from direct involvement in economic activity once it has been confirmed by a public governance system. Alternatively, the state could consider changing their intervention method to one that does not involve direct exploitation. The decision regarding withdrawal or change should be based on technical criteria that determine the most effective solution.

It is possible to consider the risk of supervening unconstitutionality of the law that authorized the creation of the state-owned company, resulting from the equally unconstitutional omission of the state to reassess its actions as a businessman. Unconstitutional omission is often referred to as when the state neglects to implement normative measures to regulate rules of limited functionality, which it is required to do so under the Constitution. This concept is not applicable here. However, the perspective considers the possibility of an act conflicting with the constitutional text due to the state's failure to adjust or amend it, resulting in a state of supervening unconstitutionality regarding the law authorizing the state's formation.

The material nonconformity of the law creating the state-owned company with the current interpretation of the constitutional text is the cause of unconstitutionality in this case. This issue arose due to an administrative omission to regulate the framework within which the state directly explores economic activity. The state's failure to continually evaluate its actions as a business entity poses a risk of an unconstitutional state of affairs through omission. This is exemplified by the state's ongoing business activities that contradict the Constitution.

6. Conclusion

This article aims to avoid the ideological constraints surrounding the role of the

entrepreneurial state by proposing a systematic constitutional interpretation that aligns with the intertemporal nature of the relevant public interest and the principle of efficiency. This proposal can provide better guidance for decision-making. Next, we aimed to connect this interpretation by implementing a constitutional filter of foundational principles for constructing a public governance system. The primary objective of this system is to enhance the management of the entrepreneurial state and thus support the entirety of decisions involved in this venture.

At the same time, the aim was to shift discussions towards a different perspective instead of the one that revolves around the state's role in the economy as afforded by the present constitutional text. Although important, debates of this nature must maintain objectivity, and thus subjective evaluations must be excluded unless marked as such. Our focus is on investigating how the Constitution can be interpreted to establish a more consistent and intertemporal approach regarding the direct involvement of the state in economic activities.

Deficiencies in the processes for establishing SOEs were observed when faced with this question. These include difficulties obtaining documents related to their constitution, uncertainty about the constitutional assumption used, and the absence of clear objectives or expected impact on society with their establishment. These deficiencies pose a risk to several aspects, including the transparency of administrative procedures regarding the establishment of a state-owned enterprise, the assessment of the legality of the company's operations from an entrepreneurial state's standpoint, the clarity of the state's intentions concerning the state-owned enterprise, and the monitoring and evaluation by the state itself regarding the relevance of continuing its entrepreneurial activities or the advantages of modifying the form of economic intervention. It also leads to an undesired legal ambiguity regarding how the state handles its commercial sector, as there is no way to anticipate the state's conduct due to the unpredictability of the rulers' volition in this domain.

In this scenario, no provisions were found in the legal system or administrative practices to regulate the management of the entrepreneurial state. The absence of a framework on the matter leads to political interference. In practice, it seems that the current government has total discretion in the management of the state's business holdings, the only limitation being the legal concepts used in the constitutional text, the interpretation of which would hardly respect the principle of unity. This is because flaws in the process of setting up SOEs, along with the lack of a routine for evaluating, monitoring, and directing the entrepreneurial state, weaken the normative force of the Constitution regarding the state's authorization to undertake such actions.

The management focus of the state as an entrepreneur is concentrated in just two acts—the establishment of a company and its eventual privatization. This approach lacks a necessary permanent evaluation, monitoring, and direction by the state itself over the business holdings it possesses. As a result, it is indicative of how the management of the entrepreneurial state is passive and disconnected

from evidence, efficiency, legality, and societal interests.

Just as compromising the principle of efficiency could be detrimental in a public governance-lacking scenario, the state acting as an entrepreneur and no longer having the constitutional assumption that once validated it poses a significant risk. As previously discussed, the justifications for the state to establish companies, such as “relevant collective interest” and “imperative of national security,” are not absolute and instead reflect society’s current sensitivity and relevance when creating such state-owned entities. The interpretation of relevant collective interest can change over time, and what may not be in the public interest currently could shift in the future. The state must monitor its positions and reposition them, when necessary, guided by legality, efficiency, and societal interests. The direction of repositioning is immaterial; the key is for the state to make informed and timely adjustments.

Political influences will not be disregarded in the management of the entrepreneurial state. They will remain an integral part of public decision-making concerning the entrepreneurial state out of respect for the democratic processes that govern government functioning. This allows the winning party to implement their program’s guidelines on the state’s role in the economy. The issue is the absence of a comprehensive system to evaluate, monitor, and direct the state’s economic activity exploitation efforts.

The proposal puts forth a public governance system as a solution to address the management shortcomings of the entrepreneurial state from various perspectives, encompassing legal aspects, efficiency in public management, and alignment with societal interests for legitimacy.

Several countries and institutions aiming to spread good governance practices share the concern of implementing governance in vital decision-making processes. There is a rising trend of internalizing policies, manuals, or even rules to enhance the regulation of state-owned companies’ ownership exercised by the state.

The aim of this article is to bolster the decision-making process for the establishment of a state-owned company and its subsequent management or privatization through evidence-based elements. This goal is to be achieved while avoiding partisan disputes which tend to shift over time. It is crucial for further research to focus on designing a system that integrates the constitutional principles of the entrepreneurial state in a clear and concise manner. This system should connect governance principles with a competent government structure that operates transparently, inclusively, and impartially in relation to the roles of each branch of government.

Leaving the management of the entrepreneurial state without clear guidelines for political decision-making within our democracy and simply observing the harmful effects of an entrenched praxis is not an option for a public administration. State-owned enterprises are public assets and, as such, must be managed with a view to maximizing their value and aligning them with the interests of society, as well as in accordance with constitutional provisions, aspects that, if not

accompanied by more robust deliberation, end up being overshadowed or even ignored.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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