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INCONGRUITIES BETWEEN THE ABSTRACT AND THE CONCRETE: ANALYSIS OF THE GREEN ICMS TAXATION FROM ITS NORMATIVE STRUCTURE

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ABSTRACT

The scope of this article is to analyze the public policy of Green ICMS taxation, in the context applied to the State of Pará, pointing out some incongruities observed regarding the normative dictates and the effective application of the referred policy in the scope of Pará municipalities, bringing to light its social, economic and environmental implications. In this sense, the work aims to carry out a study on the criteria used by the normative framework in terms of environmental law in the State of Pará, highlighting its strengths and weaknesses, advantages and disadvantages, potentialities and failures. In addition, it seeks to investigate flaws in the process of transfer of Green ICMS payments and difficulties regarding environmental management in Pará municipalities, making a veritable diagnosis of the implementation of laws and decrees that regulate this

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public policy, as far as the dichotomy between theory and practice is concerned. Through bibliographical-theoretical research, combined with the quantitative analysis of the data obtained, the article concludes that there are many inconsistencies observed in the application of environmental standards, especially those related to the transfer of Green ICMS payments, since Pará suffers from systemic issues that hinder proper environmental management and the effective collection of benefits to which this public policy is intended.

Keywords: Systemic analysis; Environmental Law; Green ICMS; Pará.

INCONGRUÊNCIAS ENTRE O ABSTRATO E O CONCRETO: ANÁLISE DO ICMS VERDE DO PARÁ A PARTIR DE SUA ESTRUTURA NORMATIVA

RESUMO

Este artigo tem como escopo analisar a política pública do ICMS Verde, no contexto aplicado ao estado do Pará, apontando algumas incongruências observadas quanto aos ditames normativos e à efetiva aplicação da referida política pública no âmbito dos municípios paraenses, trazendo à luz suas implicações sociais, econômicas e ambientais. Nesse sentido, o trabalho objetiva realizar um estudo sobre os critérios utilizados pelo arcabouço normativo do estado do Pará em matéria de Direito Ambiental, destacando seus pontos fortes e fracos, vantagens e desvantagens, potencialidades e incapacidades. Além disso, pretende-se investigar falhas no processo de repasse do ICMS Verde e dificuldades dos municípios quanto à gestão ambiental, realizando um verdadeiro diagnóstico acerca da implementação da lei e dos decretos que regulam essa política pública, no que concerne à dicotomia entre teoria e prática. Por intermédio de pesquisa bibliográfico-teórica, combinada à análise quantitativa dos dados obtidos, o artigo conclui que são muitas as incongruências observadas na aplicação das normas ambientais, em especial as relacionadas ao repasse do ICMS Verde, vez que o Pará sofre com problemas sistêmicos que dificultam a adequada gestão ambiental e o efetivo recolhimento dos benefícios a que essa política pública se destina.

Palavras-chave: *análise sistêmica; Direito Ambiental; ICMS Verde; Pará.*

INTRODUCTION

This article points out advances and inconsistencies of an environmental public policy, based on a specific analysis of the adoption of the ICMS Verde (Green ICMS taxation) in the state of Pará, aiming to verify the logical advantages of a systemic analysis of the environmental normative framework and bringing to light the social, economic and environmental implications of its application. In this sense, the article makes use of the theory of complex systems as a methodological tool that allows identifying, analyzing and establishing dialectical relationships between the dimensions that make up a system. It was thereby possible to understand the internal contradictions of the set of laws that make up the Green ICMS, as well as to glimpse all the dimensions of this legal system, from its conception to the consequences of its practical application in the Pará municipalities.

After these initial remarks, this article aims to: (a) analyze the criteria used by the normative framework of Pará in terms of environmental public policy, highlighting some of its strengths and weaknesses, advantages and disadvantages, potentialities and failures; (b) investigate possible failures in the process of transferring ICMS Verde in Pará, as well as the difficulties faced by municipalities in terms of environmental management; and (c) carry out a diagnosis about the implementation of the law and decrees on ICMS Verde, with special emphasis on Pará municipalities, as regards the dichotomy between theory and practice.

In this context, this research work highlights a specific case as a specific source of analysis, namely, the controversies surrounding the application of ICMS Verde in Pará. This is a paradigmatic case, since the Ecological ICMS, in theory, is an important instrument to encourage the protection of a balanced environment; however, in practical terms, it demonstrates inconsistencies in the application of specific laws intended to regulate the aforementioned tax when there is no effective control of its use by responsible bodies, as will be shown.

Regarding the central problem proposed by the article, we started from the following research question: “what inconsistencies are found from a systemic analysis of the ICMS Verde distribution policy in the state of Pará?”. Thus, the study was primarily designed to find answers from the analysis of an integrated system, divided in part by didactic criteria. Then, it starts from the analysis of taxation as a method of state intervention in

the context of the environment to, later, place ICMS Verde in the context of the environmental tax system in Brazil. Finally, a theoretical and practical diagnosis is made about the law and decrees that deal with ICMS Verde in Pará and in its municipalities.

Based on the methodological focus, the article is guided by a qualitative approach, and can be partly classified as a bibliographic-documentary review, since a literature review was carried out on relevant topics for developing the research. Furthermore, the choice for the qualitative method was also due to the need for theoretical deepening around the theme that involves the ICMS tax application in Pará, so that one can understand how the theory effectively corresponds to the practice observed in the scope of the municipalities. Finally, a quantitative methodology was used, represented by data obtained from analysis by the Municipal Court of Auditors (TCM-PA), as well as those presented by the Brazilian Institute of Geography and Statistics (IBGE).

Finally, the article concludes that Pará suffers from serious structural problems that hinder both the proper application of the norms related to ICMS Verde in the municipalities and the effective collection of the benefits to which the referred institute is destined, because, as observed *in loco*, Pará ended up benefiting all the municipalities of Pará with the values related to ICMS Verde without distinction, just for political reasons. Furthermore, it was found, as will be demonstrated in the course of the work, that the municipalities of Pará, to a large extent, do not have the necessary conditions to carry out the environmental management required by law, which causes a problem in the structural bases of that public policy. Therefore, the work will analyze some inconsistencies found in the practical scope of ICMS Verde policy implementation in Pará and, in the end, some possible solutions to the presented problem will be proposed.

1 TAXATION AS A METHOD OF STATE INTERVENTION IN THE ENVIRONMENT

State intervention in the legal-environmental sphere is a highly relevant topic of contemporary discussion in the theoretical and practical scenario of Brazilian Environmental Law, since, as Tupiassu (2016) explains, the use of taxes is a requirement for the realization of the right to a healthy environment, relating to the need to ensure the compatibility of budgetary policies with the systematic interpretation of constitutional norms. Thus, it

is argued that certain tax, economic or market instruments were developed with the aim of dealing with public environmental policies, so that the role of the State would not be an imposition of a positive or negative nature, but rather a stimulus or discouragement. of certain behaviors.

As regards the investigation about the need for State intervention in the environmental sphere, it is important to understand how these forms are closely related and, from then on, to extract some observations from the set of responses to the aforementioned questioning and their respective intersections. In this sense, the starting point is the protection of the environmental good, since this discussion would not even be possible if the environment, natural or artificial, no longer existed on the factual level. This time, the protection of the environment becomes a true objective of a legal system concerned not only with the present, but also with the future.

According to Benjamin (2005), who starts from a prescriptive vision of the future, it is necessary for the legal system to become more efficient in order to effectively maintain the quality of life and, therefore, the environment as a projection of the human condition.

> The ethical commitment not to impoverish the Earth and its biodiversity, with the aim of maintaining the options of future generations and guaranteeing the very survival of species and their habitat. […] the property right is invited to be updated, aiming to make it more receptive to the protection of the environment, that is, to rewrite it under the guidance of sustainability. […] there is a clear option for open, transparent, well-informed and democratic decision-making processes, structured around a due environmental process. […] Finally, there is a clear concern with implementation, aiming to prevent the higher norm (but also the infraconstitutional one) from taking on a rhetorical feature – beautiful from a distance and irrelevant in practice (BENJAMIN, 2008, p. 40-41).

From these ethical principles, the ideal arises that Environmental Law should guide not only public policies, but also private actions, adopting environmental protection as a basic principle, which is directly related to the protection of human life. In this sense, the need to preserve the environment is reaffirmed not only through laws (theoretical scope), but also through positive and negative stimuli (practical scope).

Tôrres (2005) states that it is imperative to coordinate means and make efforts to give effect to the constitutional commandments regarding the attributions of the Government and society in the effective preservation, guarantee and maintenance of the environment. Thus, it is important to order both governmental actions and societal actions themselves, which

gives rise to State intervention in the environmental sphere, regulating activities that, directly or indirectly, have the potential to "act" effectively for the realization of the healthy environment. The verb "to act", in this sense, translates the idea that, by both improving and harming, the agent is acting on the environment, being responsible for the consequences of its actions. Thus, actions, both public and private, must be regulated so that those who reduce environmental potentials must pay for such a loss, and those who improve the environment in which they live must benefit.

Therefore, state intervention in the environmental sphere is of great importance, since environmental preservation is a criterion for the maintenance of other fundamental rights, not only binding the Government and society, positively or negatively, but also demanding the defense and satisfaction of fundamental rights. With the intention of regulating this set of actions, the State can make use of Tax Law, since this branch of Law can assume not only an encouraging facet (when it stimulates certain practices), but also an inhibiting one (when there is a disincentive through the increase of a certain tax).

Based on these considerations and on the studies by Oliveira and Périllier (2009), it is possible to situate the fiscal and extrafiscal functions of the tax. The fiscal function is related to obtaining public revenue to meet the ordinary expenses of the State; in turn, the extrafiscal function of the tax is linked to political and social purposes. Also in this sense, according to Sebastião[4] (2006), the fiscal purpose is the one that is most commonly associated with taxes, as it is necessary for the purpose of strengthening financial resources, so that the State can put its typical activities into practice.

This approach presented on Tax Law as a means of guidance and rational use of the environmental good gives rise to the notion of Environmental Tax Law as a valid alternative for the State to intervene in the legal-environmental sphere. Environmental Tax Law finds an adequate concept in the study by Tôrres (2005, p. 102):

> The branch of Tax Law science that aims to study tax legal rules developed in competition with the exercise of environmental competences, to determine the use of tax in the instrumental function of guaranteeing, promoting or preserving environmental goods.

4 The author argues that extra fiscality occurs when the main purpose of the tax is not the collection itself, but the inductive effect of behavior that affects the taxpayer, so as to encourage him to adopt, or not, a certain conduct (SEBASTIÃO, 2006).

From this point on, it is important to understand how this branch of law can act as a means to preserve the environment, through the adoption of limits imposed by both environmental principles and tax principles. Environmental Tax Law borrows from the 1988 Federal Constitution a constitutional reason[5], understood as a different purpose from that adopted by Tax Law as public revenue. On the contrary, this branch only welcomes the facet of legitimacy incorporated by the former, when it requires the adequacy of tax rules to its elements (materiality, calculation basis and taxpayer). It becomes, therefore, a branch of Tax Law with its own purpose of environmental protection.

According to Tupiassu (2016), extrafiscal taxation is a type of taxation that allows the appreciation of the taxpayer's freedom, who must choose between increasing their tax burden or changing their behavior. The author also emphasizes that it is necessary to recognize the importance of its use as an instrument for the execution of public policies, including, notably, the policies of protection and improvement of environmental quality.

In this sense, the Green ICMS (a kind of Ecological ICMS) can be considered a public policy aimed at compensating municipalities for restrictions on land use, since they have protected areas in their territory, in addition to encouraging those whose good environmental practices are directly related to the dictates expressed in the general norms of the Brazilian legal system, in which the aforementioned public policy finds its justification. As highlighted by Scaff and Tupiassu (2004, p. 171-172):

> The Ecological ICMS has its origin related to the search for alternatives for public financing in municipalities whose restrictions on land use are strong obstacles to the development of classic economic activities. The institute brings surprising results capable of giving a new face to all national environmental policies. […] This incentive represents a strong extrafiscal economic instrument with a view to achieving a constitutional purpose of preservation, promoting fiscal justice, and influencing voluntary action of the municipalities that seek an increase in revenue, in the search for a better quality of life for their populations.

In this way, it is possible to perceive that the Ecological ICMS is, in fact, an instrument to encourage environmental protection, and can be used beyond a purely collection bias by the municipalities, as a means of promoting and increasing the population's quality of life. Thus, through all the characteristics presented above, it is possible to highlight again how environmental taxation through public policies can be understood as a source

5 This concept of "constitutional reason" granted to Environmental Tax Law is taken from Tôrres (2005).

of energy/input, whose interactions are far beyond merely fiscal and tax issues. It is therefore possible to understand the Ecological ICMS beyond the simple sums of its parts, a fact that demonstrates the adaptation of each entity to comply with its legal obligations.

2 THE GREEN ICMS IN AN ENVIRONMENTAL TAX CONTEXT

After the advent of the Federal Constitution of 1988, the issue involving the Ecological ICMS started to gain relevance. Even so, however, after more than 30 years since the promulgation of the Magna Carta, it is still in the implementation phase in some Brazilian states. An example is the state of Amazonas, in the North region, which has not yet succeeded in effectively implementing such a public policy.

ICMS, as explained by Tupiassu, Bastos and Gros-Désormeaux (2017), is considered a tax that the states are responsible for under their own legislation, in accordance with the general rules established by the 1988 Federal Constitution; however, although ICMS is created and collected by each state, a part of this revenue obtained must be transferred to the municipalities, according to legally established criteria. The 1988 Federal Constitution, in its art. 155, II, determines the competence of states to impose taxes on operations related to the circulation of goods, as well as on the rendering of interstate, intermunicipal and communication services, even when financial negotiations and services provision begin outside the country.

As taught by Carrazza (2009, p. 36):

> The acronym "ICMS" includes at least five different taxes: tax on mercantile operations; tax on interstate and intermunicipal transportation services; communication services tax; tax on the production, import, circulation, distribution or consumption of lubricants and liquid and gaseous fuels and electricity; and tax on the extraction, circulation, distribution or consumption of minerals.

Therefore, ICMS will be due whenever legal operations[6] transport goods from production to consumption, for profit. After tax collection, carried out by the state, it must be divided in part with the municipalities, under the terms of art. 158 of the 1988 Federal Constitution:

6 Note that this reflects the fact that only goods, by legal definition, can be framed as products subject to the aforementioned tax.

> Art. 158 – The following shall be assigned to the municipalities:: […]
> **IV – Twenty-five per cent of the proceeds from the collection of the state tax on transactions regarding the circulation of goods and on rendering of interstate and intermunicipal**
> **transportation services and services of communication.**
> Sole paragraph. The revenue portions assigned to the municipalities, as mentioned in item IV, shall be credited in accordance with the following criteria:
> I – At least three-fourths, in proportion to the value added in the transactions regarding the circulation of goods and the rendering of services carried out in the territory of the municipalities;
> **II – up to one-quarter, in accordance with the provisions of a state law or, in the case of the territories, of a federal law** (BRASIL, 1988, emphasis added).

As mentioned above, it can be seen that, in item II of the sole paragraph of art. 158 of the 1988 Federal Constitution, the embryo of what would become the Ecological ICMS emerges, given that it is on the 25% (twenty-five percent) that state law can apply to give a differentiated destination to the revenue in which this logic is inserted. In the case of Pará, this percentage is allocated, in part, to Green ICMS.

It is worth mentioning that the 1989 Constitution of the State of Pará, in its art. 225, IV, already matched this term with the aforementioned definition, given that 25% (twenty five percent) of the ICMS product would be destined to the municipalities of the state, according to the aforementioned legal provision. Another important legal provision is the one contained in art. 225, § 2 of the Constitution of Pará, which provides that municipalities that had part of their territories in environmental conservation units would have special treatment regarding the credit of the revenue portions referenced in art. 158, IV and Sole Paragraph, II, of the 1988 Federal Constitution, without prejudice to the collection of other revenues, in accordance with the law.

Even so, it was only in the state of Paraná, through State Law No. 9,491, of December 21, 1990, in conjunction with Complementary Law No. 59, of October 1, 1991, later amended by Complementary Law No. 67, of January 8, 1993, as well as through Decree No. 2,791, of December 27, 1996, that the Ecological ICMS was first implemented in the Brazilian legal system. With the success of public policy in Paraná, there was an encouraging impulse that was manifested by its diffusion in other states of Brazil.

In this sense, to better exemplify the issue, Loureiro (2002) informs that the Paraná Ecological ICMS Law had as practical objectives, when

it was implemented: (a) to provide an increase in the number and surface of environmental conservation units, as well as in other protection areas; (b) promote regularization, planning, implementation and the pursuit of sustainability in its protected areas; (c) encourage the construction of ecological corridors, by seeking to connect plant fragments; (d) provide for adoption, development and institutional consolidation, on state and municipal levels, with a view to conserving biodiversity; and (e) promote fiscal justice through environmental conservation.

In turn, in the context of Pará, the scenario was a little different, given that the institution of ICMS Verde is more recent, having been instituted only in July 2012 through State Law No. 7,638, regulated by Decree No. 775 of 2013 and later by Decree No. 1,696 of 2017. This law was responsible for changing the wording of art. 3, II, of Law No. 5,645, of January 11, 1991, starting to provide for criteria, deadlines and transfer of the quota share of the ICMS portions and other taxes collected by the state and received by the state, belonging to the municipalities, and arts. 1, 3, II, and 4-A. In this sense, of the 25% (twenty-five percent) allocated to distribution among the municipalities of Pará, it is necessary to highlight how the proper distribution is carried out, since this is not destined for Green ICMS only, as shown in Table 1.

Table 1 – Division of ICMS portions according to the annex of Law No. 7,638/2012.

Criteria	2011	2012	2013	2014	2015
Added Tax Value	75%	75%	75%	75%	75%
Proportion of municipal population	5%	5%	5%	5%	5%
Proportion of municipal area	5%	5%	5%	5%	5%
Same as all municipalities	15%	13%	11%	9%	7%
Environmental Criterion/ Green ICMS	**0%**	**2%**	**4%**	**6%**	**8%**
Total	100%	100%	100%	100%	100%

Source: adapted from Pará (2012).

After this brief explanation about the ICMS collected by the states and its proper distribution among the municipalities, the question of the law and decrees of Pará mentioned in a later topic will be specifically addressed.

3 OF THE LAW AND DECREES ON THE GREEN ICMS IN THE STATE OF PARÁ: BETWEEN THEORY AND PRACTICE

In order to make it more understandable to the reader, Box 1 establishes a comparison with the contents covered, both in Law No. 7.638/2012 and in Decree No. 775/2013 (revoked) and Decree No. 1,696/2017. When this comparison is not possible, the term "unparalleled" was established in order to indicate the absence of similar content. It is also worth mentioning that Decree No. 1,696/2017 revoked the provisions to the contrary, especially those contained in the previous Decree No. 775/2013, and it is relevant to show a parallel between both legislations.

Box 1 – Comparison between the Green ICMS Law and its decrees in Pará

	Law No. 7,638/2012	**Decree No. 775/2013 (revoked)**	**Decree No. 1,696/2017**
Comparison of contents covered in the law and decrees, according to thematic relevance	Art. 1	Art. 1	Art. 1
	Art. 2	Unparalleled	Unparalleled
	Art. 3	Art. 7	Art. 11
	Art. 4	Art. 8	Art. 12
	Art. 5	Art. 9	Art. 13
	Art. 6	Art. 4; Art. 5; and Art. 6	Art. 4; Art. 5; Art. 6; Art. 7; and Art. 8
	Art. 7; Art. 8; and Art. 9	Art. 3	Art. 3
	Art. 10	Unparalleled	Unparalleled
	Art. 11	Art. 13	Art. 18
	Unparalleled	Art. 2nd	Art. 2
	Unparalleled	Unparalleled	Art. 5
	Unparalleled	Art. 10	Art. 14
	Unparalleled	Art. 11	Art. 15
	Unparalleled	Art. 12	Art. 16

Source: Prepared by the authors based on Pará state legislation.

The comparison in Box 1 is intended to facilitate the understanding of the law and decrees, as it is the premise of this article to democratize the understanding of the Green ICMS policy. Thus, by way of example, Law No. 7.638/2012, in its art. 6, defines general parameters for the choice of technical criteria and indexes; whereas Decrees No. 775/2013 and No. 1,696/2017, in turn, regulate such criteria and indexes as highlighted in

Box 1. This time, the comparison seeks to direct the novice reader on how and where the points highlighted in law and defined in the decrees are related.

Regarding the aforementioned Decrees, a parallel will be made between both, since they basically deal with the same subject and are, as far as possible, updates of each other. As an example, art. 1 and 2 of both Decrees, No. 775/2013 and No. 1,696/2017, are identical. Art. 3 finds its first point of differentiation between the two Decrees, however without direct expression to the study of incongruities.

It is worth mentioning, initially, that not all articles of Law No. 7.638/2012 will be useful for the intended analysis, as there are merely procedural provisions in the legal field, such as art. 10 of the aforementioned legislation, which does not bring significant content to the intended analysis.

Art. 1 of the aforementioned law determines the inputs of Green ICMS and defines that the revenue portions referred to in § 2 of art. 225 of the Constitution of the State of Pará will be credited according to the ecological criterion, without prejudice to those established in other laws – thus destining the ICMS transfer from an ecological/environmental perspective. Also in this sense, art. 2 of Law No. 7,638/2012 defines the structural border to be analyzed, so that the so-called "Green ICMS border" is the one composed of Pará municipalities that house conservation units and other protected areas in their territory, as well as participate in their implementation and management, requirements that make up the ecological criterion.

Art. 3, in turn, defines a condition for the enjoyment of the special treatment defined by the legislation. According to the provision, each municipality must organize and maintain its own Municipal Environmental System. It is worth highlighting this specific point, because, when defining a structuring condition, an obligation arises for the elements of this set to follow that parameter.

> Art. 3. In order to enjoy the special treatment provided for in this Law, **each municipality must organize and maintain its own Municipal Environment System,** which favors participation and is composed, at least, of:
>
> I – Municipal Environment Council, of a deliberative nature and socially equal composition;
>
> II – Municipal Environmental Fund;
>
> III – Public administrative body executing the Municipal Environmental Policy, endowed with adequate and sufficient human, material and financial resources to perform its functions, in particular, the implementation of the planning process and

> the Municipal Environmental Plan, aiming to consolidate the Agenda 21 Location; IV – other public and participatory policy instruments necessary for the full implementation of the Municipal Environmental Policy (PARÁ, 2012, emphasis added).

The importance of art. 3 is directly related to the problem addressed in this work, that is, the inconsistencies found in the application of Green ICMS in Pará, so that it will gain prominence as the first relevant point for the approach addressed, as well as for the result obtained by this work.

In this context, in order to carry out a survey of the Municipal Environmental Councils existing in Brazil, IBGE (2015) carried out a national study, in the period between 2001 and 2012, based on the use of Basic Municipal Information Research (MUNIC). In this study, published in 2015, an affirmative answer was obtained from the representative of the environmental agency, or from another qualified person from each of the Brazilian municipalities as a means of validity (IBGE, 2015), in order to evaluate those councils that acted at least once in a twelve-month period. Thus, according to IBGE (2015), the growth of Municipal Environmental Councils was as shown in Figure 1.

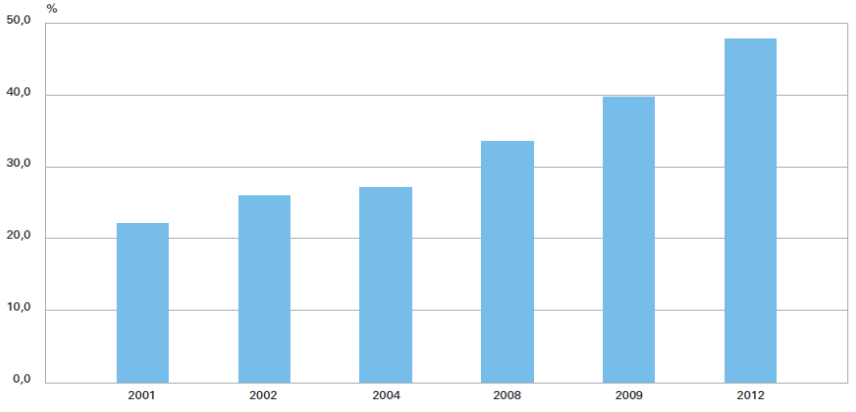

Figure 1 – Graph of the proportion of municipalities with an active Municipal Environmental Council in Brazil from 2001 to 2012.

Source: IBGE (2015).

According to the aforementioned study, when comparing the data by region of Brazil, it is possible to observe the behavior by state, a fact that allows highlighting the North Region of the country as being the one whose rates are lower than the Brazilian average (Figure 2).

Thus, taking into account the growth forecast made from the highlighted data, with the help of the Microsoft Excel 2016 forecasting tool, the perspective regarding the percentage of Environmental Councils, in 2017, is about 57.47%. Applying the reality of Pará, this forecast would result in about 83 municipalities with active councils – the first step towards enabling municipal environmental management, in accordance with state law. It is worth mentioning that this reality contrasts with that presented by the Green Municipalities Program (PMV)[7] in 2017, when it attests that about 33 municipalities did not inform whether they have the capacity to carry out environmental management, leaving one hundred and eleven qualified municipalities[8].

In this way, the conditioning factor for the existence and maintenance of a Municipal Environmental System, described as an obstacle to the receipt of Green ICMS, was never an object of appreciation by any municipality, since there is no evidence of challenge of this specific point[9]. As the first condition to be obeyed by all municipalities that wish to collect the amounts referring to the transfer of the Green ICMS share, this was not even the object of a formal complaint, bringing at least three logical conclusions: (a) all municipalities comply with the conditions imposed by art. 3; (b) no municipality meets this condition; or, still, (c) there are as many municipalities that comply with it as there are those that do not. However, there is absolutely no questioning, of a practical nature, of the former about these.

Therefore, it is possible to deduce, in theory, that there is not enough knowledge on the part of municipal environmental agents regarding the

7 PMV is a program that aims to combat deforestation in the State of Pará, strengthen sustainable rural production through strategic environmental and land management actions, as well as environmental management, focusing on local pacts, monitoring deforestation, implementation of the Rural Environmental Registry (CAR) and the structuring of environmental management in the participating municipalities.

8 To reach this value, it is necessary to issue a report at http://www.municipiosverdes.pa.gov.br/relatorios/comparativo/gestao_ambiental/municipios and select all. Art. 8 of the Resolution of the State Environmental Council of the State of Pará (COEMA) No. 120, of October 28, 2015, which defines criteria for the municipality to exercise local Environmental Management, is the basis used by PMV to reach that highlighted number.

9 Since the implementation of ICMS Verde, there has not been any challenge in relation to this fact. There are, however, only two challenges referring to the indexes, one published in the Diário Oficial do Estado do Pará No. 32,946, of August 10, 2015, referring to the municipality of Benevides/PA, and another published in DOE No. 32,703, of August 11, 2014, referring to the municipality of Itaituba/PA. Such information was obtained through a survey with the state SEMAS and consultation of the electronic publications system, Diário Oficial do Estado do Pará, between the periods of June 2012 to July 2017.

possibility of challenging the measurement of those who do not comply with what is established by law. Furthermore, still in relation to art. 3 of Law No. 7.638/2012, when it defines as a requirement that the municipality has a Municipal Environmental Fund, applying it in conjunction with art. 4 of the same law, such a device does so by defining the destination of the revenue received by the municipality through ICMS. However, as the tax binding is prohibited by the 1988 Federal Constitution, under the terms of art. 167, IV and IX, there would be the risk of entering an obscure path, given the possibility of there being a factor that prevents the state from allocating the revenue received by the municipalities for a certain purpose.

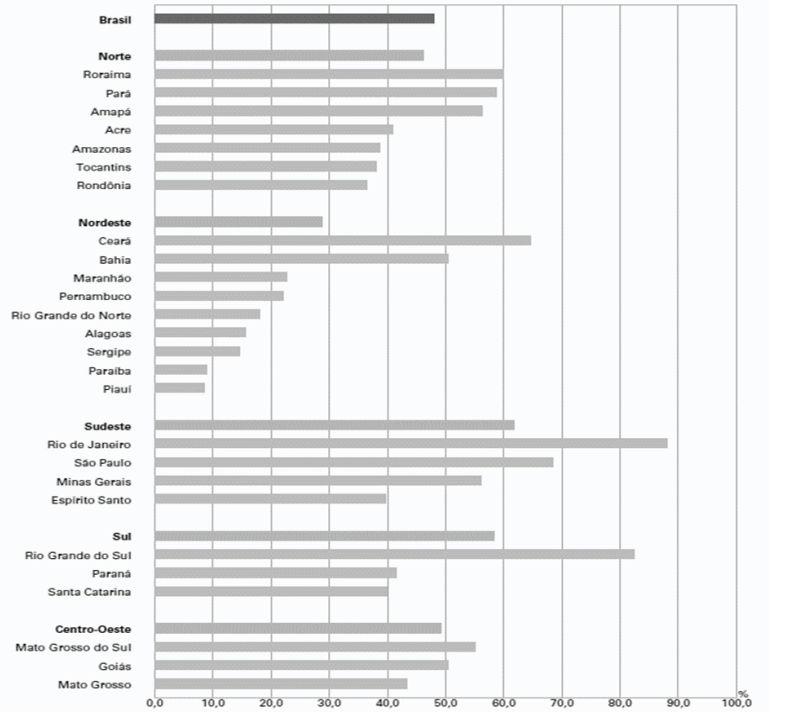

Figure 2 – Proportion of municipalities with an active Municipal Environment Council, according to major regions and federation units in 2012.

Source: IBGE (2015).

Finally, it is important to highlight that, despite the constitutional prohibition mentioned, it is impossible for the state to define the use of the revenue by those federated entities, and the linkage for the use of revenue from taxes received from the state may, through a law of its own, indeed

occur. This is how the following judgment of the Federal Supreme Court argues[10]:

> AGREEMENT – DEBIT – ICMS – MUNICIPALITY PARTICIPATION. There is no offense to item IV of article 167 of the Federal Constitution, in which the product of the municipality's participation in the ICMS is used for debt settlement. **The link prohibited by the Constitutional Text is related to taxes of their own** (BRASIL, 2001, emphasis added).

The suggested way out is the development of specific municipal legislation, whose purpose is to make the use of the resource viable by the federated entities, in order to establish financial means to achieve the purposes for which Green ICMS is intended. A practical example to the one described is Law No. 161, of April 18, 2013, prepared by the municipality of Brasil Novo (PA), part of the southwestern mesoregion of Pará, which created the Municipal Fund for Development, Protection and Defense of the Environment (FMMA). The aforementioned law aims to finance actions aimed at the rational and sustainable use of the natural resources of that municipality, as well as their inspection, defense and recovery – as defined in art. 2 of Law No. 161/2013 (BRASIL NOVO, 2013) – and defines which resources are part of the FMMA. Nevertheless, there is no express provision in law about the allocation of Green ICMS to the Fund, and it is up to the public authority to interpret it and define the destination of such resource[11].

Also in this sense, art. 5 of the Green ICMS Law can serve as an external element capable of acting in the structural cohesion of the environmental policy, since it allows the action of programs supportive of municipalities, which aim to integrate them into the special treatment provided for by the law. As an example, there is the Green Municipalities Program of the State of Pará, created through Decree No. 54 of March 30, 2011, which was developed in partnership with municipalities, civil society and the private sector, together with IBAMA and the Federal Public Ministry (MPF).

Another incongruity pointed out in the ICMS Verde Law in Pará is present in its art. 6, as shown below:

> Art. 6 The technical criteria for resource allocation and the percentage indexes related to each municipality will be defined and calculated by the state environmental agency.

10 The majority understanding by the STF is that the constitutional prohibition applies only to taxes of their own. In this vein, the highlighted judgment alludes to the homogenization of the jurisprudence of that court.

11 It should be noted that this point can cause problems in the specific case, since there are conflicts of interest in the use of ICMS revenue destined for the Municipalities.

> § 1 – The determination of the percentage indexes to be distributed to each municipality will consider the existence and level of environmental **quality** and conservation of each protected area and its surroundings, existing in the municipal territory, as well as the participation and improvement of the **quality** of life of traditional populations, through the support given by the municipality to their sustainable development.
> § 2 – The percentage indexes per municipality related to the ecological criterion will be calculated, annually, according to the quantitative environmental changes of the protected areas, which meet the technical definitions established in regulations of the Executive Branch (PARÁ, 2012, emphasis added).

The provisions of this article define that the state environmental agency is responsible for allocating the necessary resources, through technical criteria and indices, attributing to the Secretary of Environment and Sustainability (SEMAS) the discretionary power to establish, with respect to legal limits, the way in which each municipality should receive its share of revenue from Green ICMS.

Furthermore, art. 6 of the aforementioned State Law is also responsible for pre-defining how the criteria and indices for apportioning the Green ICMS would be established across the municipalities, which establishes that environmental *quality*, conservation of the area and its surroundings, as well as improvement in *quality of life* of traditional populations, would be the bases for the establishment of criteria and distribution indices.

However, art. 4 of Decree 775/2013[12], in turn, defines only *quantitative criteria* for the division of Green ICMS across municipalities. This time, there is an absence of aligned parameters in relation to the way in which the indices and criteria should have been calculated, since the law (hierarchically superior norm) assigned the term "quality" as a basis for the division, while the decree amends the parameter from "quality" to "quantity", which configures incongruity between the devices.

Another relevant point concerns the use of the word *quality*, which is related to what meaning this word is linked to, given that, although this term can be found in several national legislations of an environmental nature[13], there is no definition of which *quality* is meant. It is, therefore, an abstract concept that gives rise to different understandings, with the public manager being responsible for defining parameters about this "quality" in each case[14].

12 This article defines the transfer of Green ICMS to municipalities during the years 2014, 2015 and 2016, according to specific criteria defined by law.

13 The term "quality" is found in legal provisions such as the Federal Constitution of 1988; the National Environmental Policy Act of 1981; the National Solid Waste Policy Law; as well as Law no. 12,305/2010, which defines national guidelines for basic sanitation, among others.

14 Such discussion, without a doubt, could be the subject of a specific topic, deserving to be better debated, since the quality of life of the population tends to vary between locations, periods of time,

Finally, one last incongruity found in Law No. 7.638/2012 can be explained by comparing its arts. 7, 8 and 9 in parallel to art. 3 of Decree No. 775/2013, as well as art. 3 of Decree No. 1,696/2017. In this case, the legislative confusion is due to the progression of successive, annual and progressive percentages, to which the referred law relates. According to Table 1, highlighted in the previous topic, the percentages have always evolved in the amount of 2% (two percent) each year, rather than 1% (one percent) per year, as established by law. Such incongruity can be defined as mere material error, possibly caused by non-spontaneous failure of the final drafter of the law.

CONCLUSION

This work analyzed, through a practical and normative approach, some incongruities found in the application of the Green ICMS policy in the state of Pará, whose existence directly causes perceived results in the political sphere, in a global perception.

At first, the incapacity for adequate environmental management, perceived in some municipalities in Pará, was addressed. Green ICMS Law of Pará imposes, as a condition for the receipt of the portion by the municipalities, the existence of a minimum structure capable of managing the values and exercising, in fact, a decentralized environmental public administration. In this sense, Pará, in the impetus of adopting the Green ICMS collection policy, ended up benefiting all municipalities just for a political reason, since these, to a large extent, do not have the necessary conditions to carry out the alleged environmental management. Therefore, the Green ICMS collection policy and the effective implementation of its benefits cannot be observed so clearly and, in some cases, suffer from structural problems.

Although there is a relevant number of municipalities in Pará that declare themselves capable of exercising the local management of environmental conservation policies, this statement lacks reliability, insofar as both municipal environmental councils and municipal funds need not only a formal structure as provided by law, but also a human structure with specific knowledge about the various issues involving municipal environmental management. Therefore, one of the main inconsistencies observed

origin, history of relationship with the environment. It would not be fair to compare the quality of life defined by a particular indigenous population, far from modern social life, to that defined by essentially urban populations.

from the research carried out is precisely the permissibility that made some municipalities in Pará receive the amounts related to Green ICMS without actually carrying out the appropriate local environmental management required by law.

Green ICMS is a public policy of payment for restriction of land use and compensation for environmental preservation, so it is expected that the increase in revenue provided by it is in fact linked to a concrete improvement in both aspects on which the legislation is based. Once these two assumptions are left aside and replaced by mere quantitative factors, it is possible that injustices occur that, in the long run, will lead to problems for the community.

The contribution of this work lies in an analysis of public policy as a whole, analyzing a heterogeneous scenario and providing a clearer and more coherent understanding. Furthermore, the work sought to point out solutions to the problems observed to correct the incongruities pointed out; however, it is first necessary to implement a feedback system from mechanisms that are able to guide and understand the changes that occur in the system. In this sense, a possible correction would be the work of the TCM with SEMAS and PMV, helping to inspect the destination given to public money that comes from the transfer of Green ICMS- related amounts. Finally, it was observed that, although the TCM already has this prerogative, the absence of dialogue between state and municipal bodies in Pará is an important obstacle to be overcome for the effective application and collection of satisfactory results of the Green ICMS public policy.

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