

Economic Analysis of Law Review

Innovation Effects on Brazilian Administrative Law. We want to know what they are going to do with the new inventions.¹

Efectos de la innovación en el Derecho Administrativo Brasileño. Queremos saber lo que van a hacer con las nuevas invenciones.

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RESUMEN

Este texto tiene como objetivo analizar cómo las innovaciones tecnológicas influyen en los más diversos institutos del Derecho Administrativo e imponen nuevas soluciones normativas y teóricas. A lo largo de este trabajo, hay un enfoque centrado en tres temas específicos, en los que la innovación tecnológica ejerce (y va a ejercer) fuerte influencia: poder de policía, régimen jurídico de los agentes públicos y control de la Administración Pública.

Palabras clave: innovación, tecnología, poder policial, control

JEL: K21, L49

ABSTRACT

This paper aims to investigate how technological innovations influence the most diverse institutes of Administrative Law and impose new normative and theoretical solutions. Throughout this work, there is an approach focused on three specific topics in which technological innovation exerts (and will exert) a strong influence: police power, regime of public servants and Public Administration control.

Keywords: Innovation, Technology, Police Power, Control

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¹ A piece of a song composed by Gilberto Gil titled "Queremos Saber" and performed by Cássia Eller.

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1. Introduction

In times of fiscal crisis like the one we are experiencing in the state of Rio de Janeiro, innovation is the safest and most intelligent way to overcome difficulties. With the use of innovation, limited financial resources, whether public or private, are not wasted and the state manages to achieve better results in the performance of its functions.

In Brazilian Public Law, we are often faced with thematic waves, topics that were widely disseminated through legal literature and gain, for some years, a passionate predilection of authors. In some cases, they become true tsunamis in Brazil, as has already occurred with the analysis of differences between rules and principles, the study of human dignity, proportionality and the issue of judicialization of public policies.

Nowadays, and we are not making any kind of criticism to this phenomenon, the fashion expressions are disruptive innovation (abrupt change of existing models and systems due to new technologies) and regulatory asymmetry (regulatory diversity to allow coexistence of services and activities with different features). These events create new paradigms and crumble the foundations of secular legal institutes. Disruptive innovations are the ones that enable the entry of new actors in the market, players that present simple answers to existing problems. And, as it is not difficult to find out, this phenomenon messes with a lot of rules and institutions as a revolution does.

Throughout this text, I intend to focus the approach on three specific areas of the Brazilian Administrative Law that are suffering constant impacts of technological innovations: i) police power; ii) public servants, and iii) Public Administration control.

2. Innovation and police power

In our contemporary world, police power is one of the Administrative Law institutes most impacted by innovations and also the one that most requires the doctrine attention, due to technological innovations. In this field, it is clear that our postmodern society has only one certainty: the assurance that there is no certainty. This is the main message of philosophical pragmatism and anti-foundational belief.³

As Professor Gustavo Binenbojm pointed out in his thesis to become a full Professor of the Law faculty of University of the State of Rio de Janeiro (UERJ), published under the title *Power of Police, Ordination, Regulation*, there is an abandonment of the traditional, patrimonialist and bureaucratic notions related to the police power.⁴ The authoritarianism that was inherent to the police power concept is gradually replaced by the social demand that it

³ O termo foi utilizado de forma pioneira pelo filósofo norte-americano Richard Rorty em seu *Philosophy and the Mirror of Nature*. New Jersey: [Princeton University Press](#), 1979.

The term was pioneered by the American philosopher Richard Rorty in his *Philosophy and the Mirror of Nature*. New Jersey: Princeton University Press, 1979.

⁴ BINENBOJM, Gustavo. *Poder de polícia, ordenação, regulação. Transformações político-jurídicas, econômicas e institucionais do direito administrativo ordenador*. Belo Horizonte: Forum, 2016.

generates results capable of making people's lives better. We live in a time where we watch the constant transfer of power to decide over individual freedoms from the state to citizens. The user himself is the one validating and evaluating services quality, not public servants from inside their departments. Booking and Uber are simple examples of activities that depend on the user consent and evaluation. These opinions, by the way, are much more relevant to the success of the business than the certificates and licenses issued by any bureaucratic state. Nowadays, quality certifications are given by those who pay for the services.

From another perspective, technological evolution made the need for a state consent in order to practice some activities something pointless. Many activities that, in the recent past, could only be provided with state endorsement do not need any consent now. Here I am referring to the dissemination of information through radio or TV. How is it possible to consider the need of a previous state permission or concession to broadcast if you have youtube? The today's most desired job is to become a youtuber.⁵ How to be in favor of the constitutional competence of the Brazilian federal government to establish the indicative character of public entertainment and radio and television programs when you live in a system where you purchase programs on demand? It is a business model that does not allow many heteronomous choices and makes very difficult a practice of content censorship. With the existing technologies, it is no longer acceptable to allow the state to control this kind of activity, albeit in an indicative way, the same way it did in the recent past.

In the works of Professor Martin Eifert (Humboldt University in Berlin) and Professor Wolfgang Hoffman-Riem (Bucerius Law School in Hamburg) on innovation responsibility (*Innovationsverantwortung*) and on innovation and legal regulation,⁶ it becomes crystal clear that, in the digital era, a government must constantly allow and encourage the transfer of power to decide to individuals. And any resistance to what is inevitable is a waste of time.

In this contemporary scenario, authoritarianism is replaced by consensualism. Technological resources already allow civil society to participate more broadly in the police order and make it possible for citizens to act effectively in inspections. And, why should we not accept individuals to collaborate more actively in the exercise of police power? It is well known there is an administrative act presumption of legitimacy. But what is more legitimate? The formal signature of a traffic agent attesting, that a car driver ran the red light, or a video made on a cell phone proving that the event really happened? The Public Administration needs not only to passively receive this information from individuals, but also to stimulate its

⁵ In 2017, Daniel Middleton, a 26-year-old British man, was billed as the highest-paid youtuber in the world. He received 16.5 million US dollars from his youtube channel. Daniel Middleton, of the 'DanTDM' games channel, has won \$ 54 million, shows the ranking of 'Forbes'. A six-year-old boy made R \$ 36 million talking about toys. In the original: *Conheça os youtubers milionários: lista mostra os dez mais bem pagos de 2017. Britânico Daniel Middleton, do canal de games 'DanTDM', ganhou R\$ 54 milhões, mostra ranking da 'Forbes'. Garotinho de seis anos faturou R\$ 36 milhões falando sobre brinquedos.* Available at: <https://g1.globo.com/pop-arte/noticia/conheca-os-youtubers-milionarios-lista-mostra-os-dez-mais-bem-pagos-de-2017.ghtml>. Accessed 17/01/2017.

⁶ EIFERT, [Martin](#) e HOFFMANN-RIEM, Wolfgang (Coordinators). *Innovationsfördernde Regulierung.: Innovation und Recht II*. Auflage: 1. Berlin: Duncker & Humblot; Januar 2009. HOFFMANN-RIEM, Wolfgang (Coordinator) *Innovationen im Recht*. 1. Auflage 2016. Baden-Baden: Nomos, 2016.

sending and to prepare itself technologically for this to happen, so that police power is exercised in the most effective and cheapest way possible.

Administrative Law must incorporate the revolutionary changes technological resources provide. It must detach itself from notions that were relevant in the past, but which no longer make sense in the contemporary fluid world. For instance, instead of proliferating negative sanctions, it should stimulate positive ones. Prizes are always more successful than punishments, and its easy dissemination over the internet has the immediate effect of stimulating state desired behaviors.

In another perspective, the alignment of consensualism with the police power should allow the spread of substitutive sanctions agreements. The Public Administration should encourage agreements that bring more effective results to society than only negative sanctions, the same way we see in the Criminal Law system due to the criminal transaction and plea bargain.

Concerning the police power legitimacy, it is necessary to emphasize that, in the contemporary world and due to technological innovations, it largely depends on the: (i) expansion of popular participation instruments; (ii) reinforcement of the need for motivation, and (iii) Administration's action focused on transparency. We must recognize that technology made it much easier to meet all those requirements. And, if the Public Administration does not genuinely care about the legitimacy of its acts, the ones affected by the police power will not hesitate to question the state, when it acts limiting their freedom and property.

In an innovation world, Public Administration may not also afford to overlook the police power economic impacts. The economic analysis of regulatory impacts is a topic that tends to gain strength in the future. In fact, the regulation study demands the analysis of better regulation and smart regulation, which primarily focus on the simplification and efficiency in ordering economic activities by means of the police power. This is another subject ready to be studied in Brazilian Administrative Law.

3. Impact of innovation on the legal regime of public servants

Considering the currently available technology, the legal regime of any Brazilian public servant considers some premises that do not make any sense. For instance, legislation disregards, with rare exceptions, the possibility of a public servant to work outside the workplace.⁷

Despite the advantages of a result-oriented control, there are not so many initiatives of the Brazilian Public Administration aimed to replace the old-fashioned logic of work control focused on the number of the servant work hours. The first, much more efficient, allows a full and adequate evaluation of the worker performance, regardless of where he is working. In the

⁷ In the scope of the Brazilian Public Prosecutor's Office and the CNMP (National Council of Brazilian Prosecutors), telecommuting was disciplined by Resolution 157/2017, normative text that, as a member of the Board, I presented to the CNMP Plenary and was approved in session of 01/31/2017. In TCU (Federal Audit Court), teleworking is regulated by Portaria-TCU number 139 of March 9th, 2009. In the Federal Attorney's Office, members telework is regulated by Portaria nº 45, dated December 7th, 2016. In the scope of the Brazilian Judicial Branch, telework is regulated by Res. number 227, of June 15th, 2016.

United States, for example, since 2010 there is already legislation on telecommuting that allows federal public servants to work from home.⁸

Result-oriented control, which is fully feasible when the server is out of the workplace, and even out of the country, is still seen as a bold move that would facilitate/encourage laziness. This is a poorly explored area in the public service: the use of technology to stimulate remote work and to encourage expenses reduction in the Public Administration. Besides, the Administrative Law doctrine has not developed much on this subject.

Scientific studies indicate that remote labor increases worker productivity, reduces company expenses as well as turnover, maximizing worker satisfaction.⁹

Still in relation to the impacts of technological advances on the public servant law system, we must remember that the technological revolution in medicine allows people to live and work longer. In the Brazilian public service, the age for compulsory retirement is 75 years old, and no more 70.¹⁰ This new conjuncture, coupled with the absence of an effective parity system¹¹ during retirement, mainly due to the increase of *pro labore faciendo* benefits which are not paid to retirees, is producing a significantly larger number of elderly civil servants in active employment. Being a server at age 75 is becoming commonplace.

And the legal regime of Brazilian public servants does not adopt any kind of human resources policy that allows a senior agent to continue to have a reasonable productivity. There is no training, and not even a stimulus to the improvement of the older workers. And the problems, which compromise the public service quality, are emerging: the increase of medical leave and the increment of disciplinary punishments caused by low productivity are just examples.

In the United States, federal judges mentioned in article 3 of the US Constitution (the so called “article 3 federal judges”), who serve a lifetime mandate,¹² may benefit from a workload reduction policy, when they reach 65 years old and a certain period of work as magistrate.¹³ In Germany, professors with the right to retire on the basis of age and working time and meet the requirements for *Emeritierung*, become Emeritus Professors and can choose to continue to work with a reduced workload. In Brazil, we still have nothing in the same sense.

⁸ Telework Enhancement Act (TEA) of 2010.

⁹ DI MARTINO, Vittorio, e WIRTH, Linda. *Telework: a new way of working and living*. International Labour Review. Vol. 129, 1990 n. 5. Págs. 529-554. WRIGHT, Aliah D. Study: *Teleworkers More Productive—Even When Sick*. Available at: <https://www.shrm.org/ResourcesAndTools/hr-topics/technology/Pages/Teleworkers-More-Productive-Even-When-Sick.aspx>. Accessed on: 18/01/2018.

¹⁰ Constitutional Amendment Number 88, known as the “Walking Stick Amendment” (May 7, 2015), allowed the age increase of public servant compulsory retirement from 70 to 75 years. That rule came into force with the approval of Complementary Law 152 of 2015.

¹¹ In Brazil, there used to be a parity system, a system that assures pension is paid in the same amount as the salary previous to retirement.

¹² In the the American constitutional text, the expression used is “as long as they hold their Offices during good Behavior”.

¹³ The assignment of “Senior Status” to a US federal magistrate allows the reduction of his workload. This qualification depends on fulfilling two requirements: age and working time as a magistrate. By observing the Rule of 80, a magistrate can obtain the “Senior Status”. When you reach the minimum age of 65, the sum of your age with working time as a magistrate must reach 80. For example, if you are 69 years old, you will be required to work as a federal judge for 11 years to obtain the “Senior Status”.

It is not fair to demand from those who are much older the same productivity (quantitative, by the way) of those who have just joined the public service. It is common sense that the ones who arrived earlier have a greater resistance to technological innovations, what can compromise the efficiency in the work and also the public service quality. On the other hand, those who arrived earlier have an unparalleled experience that could be passed on to the younger ones by the means of a reduced workload.

In this context, it is reasonable to think that there is enough room for an evolution of the Brazilian public servants legal regime, including changes at the constitutional level, in order to allow the workload decrease of those who, for example, reach 70 years of age.

The technological innovations we are witnessing in the contemporary world, which only tend to increase, also influence the way public servants act. When they are faced with many paths to choose, and there is no more distinctness as to which one of them should be followed from a legal point of view, public servants become more fearful and avoid taking courageous positions; they dodge vanguard decisions.

One of the greatest current problems of the Brazilian Public Administration is the lack of courage and commitment of those who need to decide. In Brazil there is a mantra that the worker who denies sleeps peacefully. And this circumstance arises from the explosive mixture of an environment of fluid modernity permeated by innovations with the various possibilities of punishment of those who decide (disciplinary punishment, punishment for committing administrative improbity, sanctions applied by the Court of Auditors and also in the civil sphere). And besides those conditions, we have an overly principiological approach of the interpreter who deals with the Brazilian sanctioning right. Offense allegations of the principles of morality, proportionality and efficiency are commonplace and end up providing extreme legal uncertainty when sanctions are not properly substantiated. There is no public servant who wants to take risks in this scenario.

The Brazilian legal system needs to be urgently changed to empower public servants, removing the accountability fear. Only this way large projects that require more complex structuring will become feasible at the national level.

In October 2017, PL (Law Project) 7.448/2017 was approved in a commission (CCJC)¹⁴ of the federal Chamber of Deputies.¹⁵ This bill, which amends the Act of Introduction to the Rules of Law, includes 11 articles on legal certainty and efficiency related to the creation and application of public law.¹⁶ It is a great law project that proposes a national and general act on public law, focused on legal security and efficiency of state action as a whole.

The above mentioned law project adopts as a premise the idea that judges and controllers share, to some extent, with the Public Administration the concrete construction of the public interest. And it, too, prevents the trivialization of the public servant's responsibility.

In case it is approved by Congress, we will have more efficient mechanisms for the public policies management and a performance of the public administrator that focuses on the

¹⁴ Commission of Constitution and Justice and Citizenship.

¹⁵ Na data em que este texto foi escrito, o PL 7.448/2017 estava aguardando deliberação do Recurso interposto na Mesa Diretora da Câmara dos Deputados. The date this text was written, PL 7.448/2017 was awaiting the decision of the Appeal brought before the Board of Directors of the federal Chamber of Deputies.

¹⁶ In the Senate, the text has already been approved through the Senate's PL 349/15.

practical consequences of its decisions. In this sense, they are rules in compliance with a current and pragmatic view of public law.

The Administrative Law of the future must pay attention to the fact that its norms need, as Carlos Ari Sundfeld says, to be "*thought for the set of Autonomous Constitutional Powers and Organs, unlike the Process Codes, which discipline the performance of Justice alone*". In this context, one of the main roles of the Public Administrator and of the Administrative Law scholars is to narrow the gap between reality and legal rules, avoiding excessive detachment that may lead to legal disregard and to choices to be filtered by other alternative means of society organization, not always as qualified or safe as the rule of law.¹⁷

4. Repercussion of technological innovations on the Public Administration control

Concerning the Public Administration control in Brazil, there are also news and trends. One change that has already been perceived is the participation increase of the state control organs before many administrative decisions take place. Of course, Court of Auditors may not subject the signature of an administrative contract to its prior consent. And neither this is proposed here. Who is elected to be in office is the one to decide which contracts are to be signed and what kind of administrative acts will be created. However, the insistence on a purely *a posteriori* control model can lead to severe problems. Correcting something that has already occurred can provoke disorders that would be avoided, if the blessing of the control organ was prior to the controlled act or contract.

The current model of control, where courts of accounts make their review after the administrative acts publication, has not been satisfactory. It is necessary to stimulate the previous and concomitant control. And more than that: control should be exercised by means of certifications and focused on specific areas. In this line of reasoning, the audit court role in the control of public servants retirement benefits cannot receive the same attention as the control of large and complex state projects. Those matters should be in different waiting lines. That is why we must praise the TCU's initiative to create, in January 2016, the Special Secretariat for Special Operations in Infrastructure (SeinfraOperações), a control unit focused on infrastructure.¹⁸

The control activity also needs to honor the information collected in society and should organize the received data. Technology already allows this kind of control. With the

¹⁷ On the subject, it is valuable to read the following books: i) LEAL, Fernando and MENDONÇA, José Vicente Santos de (Orgs.). *Transformações do direito administrativo: consequencialismo e estratégias regulatórias*. (Transformations of administrative law: consequentialism and regulatory strategies). FGV Law: Rio, 2016; Available at: <http://bibliotecadigital.fgv.br/dspace/handle/10438/18009>. Accessed on: 01/19/2018; ii) PEREIRA, Flávio Henrique Unes. *SEGURANÇA JURÍDICA E QUALIDADE DAS DECISÕES PÚBLICAS: desafios de uma sociedade democrática. Estudos sobre o Projeto de Lei nº 349/2015, que inclui, na Lei de Introdução às Normas do Direito Brasileiro, disposições para aumentar a segurança jurídica e a eficiência na aplicação do direito público*. (LEGAL SECURITY AND QUALITY OF PUBLIC DECISIONS: challenges of a democratic society. Studies on Bill 349/2015, which includes, in the Act on Introduction to the Rules of Brazilian Law, provisions to increase legal certainty and efficiency in the application of public law). Senado: Brasília, 2015.

¹⁸ Federal Court of Audit (TCU). *Nova unidade do TCU priorizará combate a fraudes em infraestrutura*. (The new TCU unit will prioritize the fight against infrastructure fraud). Available at: <http://www.eufiscalizo.gov.br/2016/02/nova-unidade-do-tcu-priorizara-combate.html>. Accessed on: 01/19/2018.

use of business intelligence (BI) tools, for instance, an electronic panel was developed within TCU to publish the risks inherent to administrative contracts for the execution of road works. For this specific purpose, public data were cross-checked with a matrix that considers the sources of risks in road works.¹⁹

The TCU also uses satellite images and unmanned aerial vehicles (VANTS) for the monitoring of public works, in order to check the work stage. And the use of these technologies yields a large number of benefits, such as the increase of inspection efficiency by reducing travel days and costs related to work trips. There is, moreover, a spread tendency of new technologies use by the most diverse state control organs, which can greatly contribute to the dissemination of a proper social control. Why not use technology to encourage civil society to exercise greater control over Public Administration?

Finally, the Public Administration control in Brazil is still exercised in a very diffuse and inefficient way. In practice, our federation model is not of a cooperation type, but a federation of overlapping demands, without any commitment to the country development. Therefore, it is imperative to create fast track mechanisms to make the decision-making control process more cohesive and simplified in Brazil. Excessive control, especially when you do not have an environment of consistency and coherence, only discourages entrepreneurship and drives quality investments away from the country.

5. Conclusions

Technology can bring civil society closer to the state and avoid the waste of public resources by focusing on achieving better results. And, by the means of an intelligent incorporation of technological innovations, Administrative Law can, especially, contribute to solve some of the serious problems of Brazilian society, such as the ones related to the current unprecedented fiscal crisis. Thus, contemporary (and future) Administrative Law must quickly detach itself from some notions that have been important in the past, but which no longer make any sense in the contemporary fluid world.

Disruptive innovation and regulatory asymmetry are the fashion expressions and need to be well studied by Administrative Law researchers, especially because they destroy secular legal models without building a bridge to connect with what is new. The novelty appears in a chaotic scenario in which the old ceases to exist in record time.

In turn, innovation within the scope of police power allows its inherent authoritarianism to be properly replaced by the social demand that police power generate results that can make people's lives better. Authoritarianism is replaced by consensualism, insofar as technology already allows society to participate more effectively in public choices. The Public Administration needs not only to passively receive this information from individuals, but also to stimulate its sending and to prepare itself technologically for this to happen, so that police power is exercised in the most effective and cheap way possible. We are experiencing a historical time where we have a transfer increase of the power to decide on individual freedoms

¹⁹ Federal Court of Audit (TCU). *Inovações contribuem para o aprimoramento de fiscalização de obras públicas*. (Innovations contribute to the improvement of inspection of public works). Available at: http://www.eufiscalizo.gov.br/2016/05/inovacoes-contribuem-para-o_16.html. Accessed on: 01/20/2018.

from the state to citizens. Who is going to validate and evaluate the quality of services is the user himself, not public servants in their departments.

The technology advances make meaningless the need for a state consent to the practice of a large variety of activities. Much of what the state was able to control in terms of freedom is now no longer acceptable with the existing technologies. And the resistance to what is inevitable is a waste of time.

In respect of the police power, technological innovations favor its legitimation, since they expand the existing instruments of popular participation, foment the knowledge about the administrative acts reasons, encourage the increase of the Public Administration transparent performance and allow a better knowledge of the police power exercise economic impacts.

Concerning the public servants, technological innovations give rise to uncertainties as to the paths that can be taken, and, in many situations, they avoid courageous behaviors. Doubts of what is new make vanguard decisions rare events in the public service. And one of the biggest problems of the Brazilian Public Administration is the lack of courage and commitment of those who need to decide. An environment of fluid modernity permeated by innovations is the perfect match for unduly justifying fear and the role of Administrative Law is to fight to reverse this logic. Brave and exempt action must be encouraged and the public servant should be inspired to make decisions without any risk of liability trivialization. Without this logic, the country will be doomed to only develop small projects or works that never end properly. Nothing of greater complexity is realized without the assumption of risks.

Still on the subject of Public Administration control activity, technological innovations have a strong influence on the good prioritization of a previous or concurrent control instead of *a posteriori* one. The correction of something that has already occurred can cause disorders that would be avoided, if the blessing of the control organ were prior to the administrative act publication. In this sense, control organs need to have the understanding that they are also responsible for the country development. And state organs that accomplish the control activity must give a proper relevance to the technological innovations, in a way that honor information gathered in the society and that organize the data received, what can be done with the tools of business intelligence.

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