The Brazilian federal government public policy regulation governance: an analysis of executive-branch policy decision-making

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Abstract: The Brazilian governance of federal executive-branch policy regulation process is legally founded on article 59 of the Constitution, Complementary Law 95/98, Decrees 4.176/02 and 9.191/17, which established its principles, rules, and goals. Since 2002, these norms have been pushing forward a mandatory governance framework of policy regulation standards which affectivity is under evaluation and discuss at this research paper.

This legal framework established a clear set of indicators for designing policy regulation that must have been observed by executive-branch bureaucracy (managers and lawyers). According to this, the federal decision-making policy regulation process must be oriented toward transparency, participatory and performance-based principles, well-registered in legal documents produced throughout all the policy regulation design stages by the bureaucracy. Nevertheless, all these years, there has never been an analysis of the effectiveness of this framework in providing real guidance and orientation in favor of a better democratic policy regulation results.

This research aims contribute to fulfill this hard and innovative task by investigating the actual results reached by the implementation of this general legal framework of policy regulation for Brazilian federal executive-branch of government. For this purpose, interviews were carried out with high-ranked bureaucrats in presidency and ministries offices, and a sample of 47 policy regulation presidential decrees, enacted between years 2009 and 2016, were detailed evaluated according to these legal set standards.

The results evidenced that actually less than 15% of these indicators of good policy regulation, required by the framework, were really considered during these decree’s process approval. Issues like cost-benefit analysis are mentioned in less than 12% of these evaluated processes and possible alternatives for policy problems in less than 6%. Moreover, interviews show off an even less structured process of policy regulation - barely transparent and participative – putting at risk the performance-based orientation foreseen by the national legal framework and the international best practices.

Keywords: better regulation. regulatory impact analysis. democratic governance.

Introduction
How is the policy regulation process within the Brazilian federal executive branch of government? To what extent does the policy decision-making process, institutionalized through Presidential Decrees, observe the best policy regulation practices? The international literature dedicated to better regulation is rich in studies about the improvement of policy regulation, from conception, processing and implementation, to the evaluation of its effectiveness. However, the process of legal construction of public policies - the legal translation of political decisions, especially within the executive branch - is not yet a traditional object of study in Brazil, a situation that hinders an empirically substantiated response to this problem.

In Brazil, research focuses on the formal analysis of laws - the primary normative act - and is usually limited to the analysis of the decision-making process that occurs within the
Legislative Branch of Government. For this reason, there is a great lack of knowledge regarding the relevant role of secondary legal acts (like Presidential Decrees) in the process of construction of public policies and government programs. This lack of knowledge about the nature and quality of secondary normative production produces a gap in our understanding of the quality of policy regulation, especially those produced within the Federal Executive Branch. All of this is institutional features of greater relevance and social impact in the country.

In order to overcome these challenges this research proceeded to the qualitative analysis of the Brazilian legislation and 66 interviews - conducted with high-level Brazilian federal public managers and lawyers - undertaken by the Institute for Applied Economic Research (IPEA), during the years 2013-2014 (IPEA 2014). Moreover, to assessing compliance with the minimum policy regulation standards established by Decree No. 4,176/02, this research proceeded to the verification, based on a qualitative analysis, of the legal and merit opinions of a random sample of 47 Presidential Decrees, enacted between years 2009 and 2016. Thus, the results contribute to a description of the policy decision making process within the Brazilian federal executive branch of government and an analysis about the quality of its regulation (the Presidential Decrees). It is expected to allowing overcoming the current state of misunderstood on the subject, contributing to identify the main challenges to improve the public policies decision-making process and regulation in Brazil.

Part 1. Framework

The contemporary public management is a complex process-oriented for solving public problems in searching for the best possible policy performance. It is a rational, political and technical, an enterprise which begins with the correct identification of a public problem and continues with a decision-making process which rests at a new policy regulation act (which takes the feature of a law, a decree or any other kind of regulation). Policy regulation is about the rule-making process of policy decision and its translation into a legal act.¹ The rulemaking process, oriented by good governance regulatory principles, has been the mean by which the most far-reaching government policies have been implemented for enhancing democratic community development.

In a rational manner, it all begins with the identification of a public problem which demands a cooperative action for its solution (a demand for public policy). Once included in the governmental agenda, a policy must be politically formulated and legally enacted. This process will be guided by principles that emphasize the reach of high policy performance and the respect of democratic values (participation, transparency, and accountability). The

¹ In this paper, it is called policy regulation, and not rulemaking, because its scope principles are far beyond the government and could be shared with other State partners (actors from the private or the social sectors).
democratic governance of the policy regulation is a central pillar of governmental institutional arrangement. A fundamental process to promote a high-performance public management associated with a democratic-oriented government. The public policy regulation governance merges technical and political goals at the very mind of the State.

For all of these reasons, since 1995, the Organization for Economic Co-operation and Development (OECD) has been disseminating and promoting guiding principles for regulatory quality and performance. The *OECD Recommendations* established that a good regulation should: i) serve clearly identified policy goals, and be effective in achieving those goals; ii) have a sound legal and empirical basis; iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account; iv) minimize costs and market distortions; v) promote innovation through market incentives and goal-based approaches; vi) be clear, simple, and practical for users; vii) be consistent with other regulations and policies; and viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels (OECD, 1995).

Moreover, OECD currently gives an additional emphasis on risk-based approaches to the design of regulation and compliance strategies that could improve the welfare of citizens by providing better protection from hazards, more efficient government services and reduced costs for business. Its recommendations were the first international instrument to address regulatory policy, management and governance as a whole-of-government activity that can and should be addressed by sectorial ministries, regulatory and competition agencies (OECD, 2018). The OECD principles and guides in promoting good policy regulation are well established in following documents: Recommendation of the Council on Improving the Quality of Government Regulation (1995); OECD Report to Ministers (1997); OECD Guiding Principles for Regulatory Quality and Performance (2005); Recommendation of the Council of the OECD on Regulatory Policy and Governance (2012); The Governance of Regulators (2014).

In Brazil, the debate around the quality of rule-making shows up with the problems that occurred during the Fernando Collor de Mello government. In 1991, the first edition of the Presidency of the Republic’s Redaction Manual was published by a commission established by the General Secretariat of the Presidency of the Republic, under the chairmanship of the current Supreme Court minister, Gilmar Mendes. The second part of this document reserves observations on the legislative technique of normative acts (FAILLACE NETO, 2007). In 1992, Decree 468/92 was enacted for "Establish rules for the drafting of normative acts in the Executive Power and provides for the processing of documents subject to the approval of the President of the Republic". This Decree were revoked and updated by Decree 1,937/96 which "Establishes rules for the drafting of normative acts of the Executive
Branch subject to the approval of the President of the Republic" (BRASIL, 1992, 1996). In 1998, the National Congress issued Complementary Law 95/98, in compliance with the sole paragraph of art. 59 of the Federal Constitution of 1988, but only in 2002, this law were regulated by Decree 4.176/02 (FAILLACE NETO, 2007; PIRES, 2007; BRASIL, 1998). This Decree established principles and rules set out in the Complementary Law, describing aspects of legal and substantive policy regulation that should be observed for rule-makers inside the Brazilian federal executive branch of government. An analytical checklist was added at its Annex (FAILLACE NETO, 2007; SOARES, 2007). This orientation were slightly changed in 2017, by Decree 9.191/17, which altered the rules and guidelines for drafting, amending, consolidating and send proposals of policy regulation to the President of the Republic by the Ministers of State (BRASIL, 2017a). This new orientation was accompanied by Decree 9.203/17, which established general principles for public governance underlining the continuous regulatory quality and improvement (BRASIL, 2017b).

According to SALINAS (2012, p. 36), the structure of a typical Brazilian law that disciplines public policies is divided into six parts: i) principles and guidelines of politics; ii) policy objectives; iii) composition of the bodies and authorities involved in the implementation of a given policy and generic description of their competencies and responsibilities; iv) role of definitions, including the characterization of actors affected by the policy; v) instruments, vaguely and generically considered, to control the administrative action; and, vi) penalties and responsibilities for non-compliance with legal provisions. SALINAS (2012) verified that our legislative pattern of policy regulation is characterized by giving a high level of discretion to the public manager, from both a procedural and a substantive point of view. From the procedural point of view, Brazilian laws tend to be significantly more generic in specifying the administrative decision-making procedures that will guide the policy implementation process (they neglected the enforcement instruments aimed at ensuring compliance with the rules). From a substantive perspective, Brazilian law does not provide a sufficiently number of standards that set, for instance, the conduct that should be observed by the recipients of public policy.

For improving the rule-making capacities of regulatory agencies (Brazilian Electricity Regulatory Agency, National Health Surveillance Agency, etc.), the Brazilian federal government created the Program for Strengthening Institutional Capacity for Management in Regulation (PRO-REG), enacted through Decree No. 6,062/07, amended by Decree No. 8,760/16 (BRASIL, 2007; 2016). The program was conceived through a partnership between the Inter-American Development Bank (IDB) and the Federal Government, through the Civil House of the Presidency of the Republic. The goal of PRO-REG is to improve the quality of regulation exercised within the federal government by strengthening the regulatory system, in order to facilitate the full exercise of functions by all actors and to improve coordination
among participating institutions, mechanisms of accountability, participation, and monitoring by civil society (BRASIL, 2018).

Particularly after 2013, the program started to achieve and promote the adoption and systematization of the best national and international practices. To this end, PRO-REG officially stated that has carried out the following actions: dissemination of regulatory quality in the federal public administration; promotion and dissemination of regulatory initiatives among the various institutions to improve the strategic approach to public and regulatory policy decisions; consolidation and expansion of the use of Regulatory Impact Analysis (AIR); dissemination of actions to manage the regulatory stock, mechanisms for transparency, social control and accountability in the scope of the regulatory process; expansion of the dialogue on regulatory quality with different actors of the regulatory system; realization of training and qualification programs on regulatory quality for relevant actors in the regulatory process (BRASIL, 2018).

For the first time, in the begging of 2018, the Brazilian federal government published, within the limited scope of PRO-REG, the General Guidelines and Guidance for the preparation of Regulatory Impact Analysis – RIA. Both documents were formulated by the Sub-office of Government Policies Analysis and Monitoring of the Presidency (SAG/CC) in partnership with the Federal Regulatory Agencies and the Ministries of Finance and Planning, Development and Management. In its presentation, the office states that the main focus of the guidelines has been turned to regulatory agencies, but they can “be perfectly applied by any other institution that acts with potential to change rights or create obligations to third parties” (BRASIL, 2018).

Internationally, the policy regulatory studies became part of the developed countries’ policy agenda from the 1970s onwards. The post-Cold War period, with the creation of the European Union, strengthened Europe’s need for a public administration based on planning, with the adoption of governmental measures of efficiency that helped to qualify the Welfare State. In the Anglo-Saxon liberal countries, such as the United Kingdom, the United States and Canada the main propulsion factor for policy regulation development has been the promotion of economic efficiency. These countries started to institutionalize methods with the objective of improving the production quality of their economic, social and administrative policy regulations (OECD, 2008; SOARES, 2007). In the 1970s, the United Kingdom, the United States, and Canada already had legislative referral guides. In the 1980s, Germany developed tools for analyzing the impact of normative acts to ensure their effectiveness, assessing costs and benefits, and predicting possible obstacles during the implementation of their actions. In the same period, Italy created a permanent commission that examines and evaluates the quality of draft laws and normative acts coming from the executive branch (SOARES, 2007).
In the United States, pioneers of regulatory impact analysis (RIA), since 1981 Executive Order 12,291, issued by Ronald Reagan, mandates that government agencies submit the most important regulatory standards to a cost-benefit analysis. The purpose was to reduce the burden of regulation, increase accountability, promote better agency performance, and improve the quality of decisions (technically justifying them). The Office of Management and Budget (OMB), which is directly linked to the White House, is responsible for assessing and reviewing RIAs carried out by government agencies (Executive Order 12.866/93). According to this legal act, any significant regulatory action must be submitted to RIA. In the United Kingdom, RIA began with the government of Margaret Thatcher in order to eliminate the high regulatory costs on private enterprise through deregulation. In 1997, deregulation gave way to better regulation that emphasized the need to improve the quality of regulation imposed on citizens. The 2001 reform required that all regulatory agencies, as well as specialized government departments, should conduct RIA. In 2005, this initially decentralized structure was replaced by a unit located in the structure of the Prime Minister's office (Better Regulation Executive). Another key body in this arrangement is the National Audit Office (NAO), equivalent to the Brazilian Court of Audit, which plays a central role in assessing the quality of regulatory activity and AIR studies. Since 2007, the United Kingdom experience has been a paradigm, demonstrating the importance of constant investment in learning and institutional development. Since 2007, the whole process of decision-making, economic and social regulation (regulatory policy), even the drafting of laws (public policies), required the carrying out of RIA (VALENTE, 2013).

In the European Union, the initial actions of the member states were coordinated in 2001 by the High Level Consultative Group which aimed to formulate a strategy for improving the quality of regulation - legislation and regulation at Community and local level - called the Mandelkern Group. At the time a report was prepared proposing measures for a good regulation: a) adoption of the impact assessment (ex ante and ex post); b) analysis and evaluation of alternatives to public policies; c) public consultations; d) simplification of the policy formulation process; e) publicizing access to legislation and regulation; f) establishment of an effective regulatory structure that includes a quality control unit (MANDELKERN GROUP, 2001). In the European Union, policies and programs in environmental, economic or social issues are preceded by the RIA, as well as spending programs and international negotiations. The body responsible for conducting RIAs is the Impact Assessment Board (IAB), which is linked to the President of the European Commission. Since the role of the contemporary state is fundamentally regulatory, better policy regulation has become an object of great interest in our time (MORAN, 2002).

These efforts to improve the quality of regulation / regulation crossed borders and were incorporated by multilateral organizations such as the European Union and the OECD.
In the European Union, the Lisbon agenda has openly supported the adoption of RIA initiatives as an indispensable tool for recovering the competitiveness of the European economy. The OECD, in turn, developed regulatory quality indicators used to compare countries and design improvement strategies, which resulted in expanding the debate for developing countries such as Brazil (OECD, 2002).

In sum, the various modes of policy regulation - motivated by economic analysis, legal prescriptions or political processes - emerged internationally from a process of interaction between theory and practice, based on a learning process, slowly accumulated by errors and correctness. All of this to perfect the process of solving public problems by advancing the institutionalization of policy government intelligence by the improvement of the decision-making process and its legal instruments.

**Part 2. Method**

In order to better describe the Brazilian federal public policy regulation governance process, this research adopted a combined *quali-quanti* mix-method strategy. First, I have made an exploratory qualitative comparative analysis of the new Decree 9.191/17 in face of the old Decree 4.176/02 (both responsible for establish the principles, rules and guidelines for drafting, amending, consolidating and present new proposals of policy regulation to the President of the Republic by the Ministers of State) to highlight its main differences and improvements compared to the international good practices of policy regulation.

Second, I have made a qualitative analysis of a pool of 66 interviews conducted with high-level Brazilian federal public managers and lawyers, by the Institute for Applied Economic Research (IPEA), during the years 2013-2014 (IPEA 2014). The purpose of this initial analysis is to describe the process of policy regulation in the Brazilian federal executive branch of government by its own members, during the finishing of the last presidential mandate and beginning of the current presidential mandate. All interviews were transcript and received a code that does not allow identification of the interviewee.

**Table 1. Sample of respondents**

<table>
<thead>
<tr>
<th>Role</th>
<th>Number</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advisor</td>
<td>7</td>
<td>10.60</td>
</tr>
<tr>
<td>Legal consulting</td>
<td>24</td>
<td>36.36</td>
</tr>
<tr>
<td>Public manager (Director or Coordinator)</td>
<td>30</td>
<td>45.45</td>
</tr>
<tr>
<td>Public manager (Executive-Secretary)</td>
<td>5</td>
<td>7.57</td>
</tr>
<tr>
<td>TOTAL</td>
<td>66</td>
<td>100</td>
</tr>
</tbody>
</table>


Finally, in order to evaluate the effective policy regulation quality in the Federal Executive Branch, I have sampled 47 Presidential Decrees, enacted between 2009 and 2016, with substantive policy content (related to the formulation of public policies or governmental programs). This Decreed were evaluated according to the policy good
regulation criteria established by Annex I, of Decree No. 4,176/02, in effect during years 2009 to 2016 (BRASIL, 2002).

The construction of the sample began with the Decrees ‘search at the Civil House of the Presidency website (portal da legislação). The purpose of this procedure was to identify the enacted Decrees that regulated public policies or governmental programs. Once the interested Decrees were identified, the legal and merit opinions, issued by SAG/CC (Sub-office of Government Policies Analysis and Monitoring of the Presidency) and SAJ/CC (Sub-office of Legal Affairs of the Presidency), were requested through the federal government information access website. 

This procedure results in a sample of 47 Decrees enacted between 2009 and 2016 with substantive policy content. This sample should result in 94 documents (one legal and one merit opinions for each Decree) carried out by SAG/CC and SAJ/CC. However, opinions for only 37 (thirty-seven) of the 47 (forty-seven) Decrees of this sample were made available (78% of the population of Decrees of interest in this research). It is important to point out that in several decrees, the opinion of SAJ or SAG was simple lacking. In addition, many files sent by the Civil House were absolutely irrelevant, and non-related with the requested information. In many cases, it was necessary to appeal to the first and second recursional instance of the Citizen Information Office of the General Comptroller Ministry (SIC/C CGU), due to non-observance of access to information right by the Presidency of the Republic.

The criteria used to evaluate the opinions are those established by Annex I, Decree No. 4,176/02, which: Estabelece normas e diretrizes para a elaboração, a redação, a alteração, a consolidação e o encaminhamento ao Presidente da República de projetos de atos normativos de competência dos órgãos do Poder Executivo Federal e dá outras providências (BRASIL, 2002).

In summary, Annex I addresses nine (9) categories, in a total of 131 (one hundred and thirty one) items, as presented in the table (2), in order to guide the production of normative regulations and instruct the orientation of their opinions, underpinning and subsidizing the best decision-making, according to the principles of Brazilian federal better policy regulation.

Table 2 – Annex I items

<table>
<thead>
<tr>
<th>Category</th>
<th>Issue</th>
<th>Items</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Identification and Situational Analysis of the Problem</td>
<td>1 a 1.7 e 7 a 7.2</td>
</tr>
<tr>
<td>B</td>
<td>Identification and Analysis of Solving Action</td>
<td>2 a 2.3</td>
</tr>
<tr>
<td>C</td>
<td>Identification of Competent Power by the Initiative</td>
<td>3 a 3.5</td>
</tr>
</tbody>
</table>

2 Available at: http://www4.planalto.gov.br/legislacao
3 Available at: http://www.acessoainformacao.gov.br
4 It establishes norms and guidelines for drafting, drafting, altering, consolidating and forwarding to the President of the Republic of projects of normative acts of competence of the organs of the Federal Executive Power and other measures (BRASIL, 2002).
Thus, in order to assess compliance with the requirements of the legislation and evaluate the legal quality of the sample Decrees, a conference of these items (indicators) was carried out in the merit and legal opinions wrote by SAG/CC and SAJ/CC. It was made by a descriptive, comparative, qualitative-quantitative research technique. First, I carried out a qualitative analysis of the opinions, seeking to measure the correspondence with the indicators. After this qualitative analysis, the data were quantified (zero value being attributed to non-occurrence of item and value 1 (one) to occurrence). This quantification allowed the counting of the occurrence of each of these items, making its comparison and analysis straightforward.

**Part 3. Results**

**Legislation**

The main policy regulatory standards of Brazilian federal executive branch of government were recently changed through the enactment of Decree 9.191/17 which impose modifications from Decree 4,176/02 (in effect between 2002 to 2017). These changes are compared by six features: competency; structure; process; public consultation; sanction, veto and other provisions; and indicators.

**Table 3. General features compared**

<table>
<thead>
<tr>
<th>Features</th>
<th>2002 and 2017 Decrees (comparative analysis)</th>
</tr>
</thead>
<tbody>
<tr>
<td>legal competency</td>
<td>The new Decree fixed a perceptible change of competencies widening the prerogatives of the Civil House of Presidency (art. 1/17). The Sub-office of Legal Affairs of the Presidency improve its competencies especially for coordinating the policy regulatory process between Presidency and Ministries (art. 27/17). The Sub-office of Government Policies Analysis and Monitoring of the Presidency maintained its competencies for analyzing the political and technical merit of policy (art. 24/17). Publication of legislative proposals by the Civil House is no longer compulsory (art. 55-56/02).</td>
</tr>
<tr>
<td>structure</td>
<td>About the structure of the legal act (Law, Decree, etc), there was minor changes at rules for numeration, structure of presentation, object of regulation, format, effect and modification. The new Decree made improvements on formal structure of regulation acts (art. 2-25/17).</td>
</tr>
<tr>
<td>process</td>
<td>The proposed rule write by Ministries may be electronically sent to Civil House with an explanatory statement (art. 26-30/17). This document contained the proposal of regulation, a legal opinion, a merit opinion, and its complementary documents (art. 31-32/17).</td>
</tr>
<tr>
<td>public consultation</td>
<td>Adoption of public consultation is more regulated in new Decree. According to it, the proposal regulation under public consultation must be sent to Civil House for previous analysis and forthcoming consultation</td>
</tr>
</tbody>
</table>
sanction, veto and other provisions

Most of articles about these features of 2002 Decree were maintained in the 2017 Decree. No substantive changes were made.

indicators (check list)
The new Decree sustained a check list of indicators that must be observed by the proponents of policy regulation (annex I/17). Only four items were revoked from the last Decree, thirty eight new items were added and nineteen sections reorganized them in a different manner. New items are related with cost analysis, legislative simplification, and results assessment.

Source: author

Table (3) shows that little incremental changes were made since the 2002 first regulation of policy rulemaking process inside Brazilian federal executive branch of government. The inclusion of new items in the legal and merit opinions that should accompanied the proposal regulation (sent by Ministries to Civil House or initiated at the own Presidency) emphasize the analysis of costs (items 16), management simplification (items 17), administrative adaptation (item 18) and results assessment (item 19).

Under this legal perspective, the respect of all of these items during the proposal of policy regulation acts, inside the Brazilian federal executive branch of government, would comply with most of the best practices of described by OECD. Despite the fact that, that there is no obligation of a formal regulatory impact assessment (RIA), a cost-benefit analysis (CBA) or a public consultation, all of this tools has already been regulated and available to proponents of policy regulation at least since 2002 (Ministries and Presidency).

Interviews

During the year 2013 to 2014, researchers of the Institute for Applied Economic Research (IPEA) conducted interviews with high level bureaucrats, public managers and lawyers, of Brazilian federal executive government (IPEA, 2014). A qualitative analysis of these data allows inferring some general remarks about: i) management of policy regulation; ii) culture of policy regulation; iii) bureaucrats legality idea.

Table 4. Interview general remarks

<table>
<thead>
<tr>
<th>Feature</th>
<th>General remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>management</td>
<td>policy decision based on subjective opinion (lacking evidence); prevalence of informal practices and communication; absence of policy decision-making records; variable coordination models (according to ministries political influence and personality);</td>
</tr>
<tr>
<td>culture</td>
<td>predominance of a political, not technical, rationale of decision; lack of managerial risk appetite (over fear of control sanctions); less commitment with public value and more with procedures;</td>
</tr>
<tr>
<td>legal conception</td>
<td>legal control as a shield to defend the bureaucrat from managerial risks;</td>
</tr>
</tbody>
</table>

Source: author

The transcripts of selected excerpts evidenced some of the above arguments.

Management:

Interviewee 59: Minha avaliação é que boa parte das decisões aqui são tomadas sem conteúdo, as decisões da administração pública em geral são tomadas com pouco conteúdo, após seguir um "processinho formal". (2014, p.8)Cada situação é diferente e depende totalmente da pessoa interessada
do Ministério, e para a gente aqui é frustrante porque como nós não temos controle, nós temos orientação de não intervir [...]. As pessoas gostam muito de fazer reuniões, normalmente às reuniões são marcadas em cima da hora sem envio de material prévio, sem preparação. Normalmente participantes da reunião não sabem o que vai ser discutido, mas elas são feitas porque há uma cultura de que você não pode ir tocando sem falar com as outras pessoas e então se eu estava na reunião pelo menos eu vi. Só que, embora isso procedimentalmente tenha incluído os outros, na prática você acaba tendo reuniões com muito pouco conteúdo, com muita repetição de assuntos, e esta forma como a interação entre Ministérios normalmente acaba acontecendo. [...] vai depender muito da pessoa, que está assumindo e então, se vai ter mais reuniões, quem ele vai avisar, com quem ele vai conversar mais, se ele vai tentar, vai passar alguém para falar com o Ministro, mas sem muita homogeneidade entre um caso concreto e outro. (2014, p. 6-7)

Interviewee 64: ENTREVISTADOR: Existe alguma preocupação do ministério com análise de impacto regulatório, por exemplo? ENTREVISTADO: Não, isso a gente deixa para a [nome da agência reguladora].

Culture:

Interviewee 59: Eu acho que há um espaço enorme para otimização do funcionamento como uma preocupação maior em resultado e dados. Só que isso envolve quebrar bastante a cultura de procedimento, e envolve criar habilidades, competências que você frequentemente não encontra da administração pública e [...] eu acho que em pouquíssimas, pouquíssimas reuniões alguém citou um dado. Normalmente quando alguém quer mencionar que algo vai funcionar, ou não, eles puxam da experiência pessoal e usam bastante adjetivos, mas quase toda as decisões políticas, de alto nível e aqui pensando [nome do ministério] são tomadas sem termos os dados concretos que ilustrariam a real situação. (2014, p. 03) Eu acho que fazer isso é o resultado de uma cultura que preza muito seguir o procedimento, agora não funciona se você quer realmente resolver o problema. (2014, p. 05)

[..] ninguém quer arriscar mexer neste sistema porque politicamente pode ser problemático. (2014, p.7)

Legal conception:

Interviewee 67: Essa cultura de que a lei pode ser mudada também não é uma coisa óbvia na administração pública. “Ah, isso pode, isso não pode”, não, você quer fazer isso? Do jeito que está não pode, mas se a gente alterar isso, desta outra maneira, pode. Então, muito do porque de eu ter vindo era buscar alternativas porque a consultoria jurídica se negava a esse papel. (2014, p. 17) Geralmente se produz na “Secretaria Finalística”, manda para a CONJUR, daí a CONJUR dá ok e vai direto para o gabinete do ministro. (64, 2014, p. 7)

Interviewee 59: Eu acho que o papel do advogado aqui dentro do... Ele deveria se assemelhar um pouco mais do que o papel que um advogado de empresa tem com seu cliente. Ele não toma a decisão final sobre se... Deve-se comprar A ou B, agora ele é o cara que vai dizer: “Olha, você tem os riscos aqui, você tem que considerar que você fizer isso você vai ter um gasto tal e vai ter uma consequência tal no futuro”. Eu acho que ele deve ser a pessoa que administra os círculos e orienta, mas nunca ser a pessoa que tenda se arrogar fiscal da lei, ou brigar com o gestor, tentar dizer: “Isso não pode”. Ele deve dizer quais são as dificuldades e apontar soluções. É indicar para o gestor quais são os riscos associados a cada solução. (2014, p. 5)

Decrees’ analysis
The legal and merit opinions were analyzed quantitatively from the categories set out in Table (3), which organized the indicators described in Annex I, of Decree No. 4,176/02, in nine (9) categories (BRASIL, 2002). Table (5) describes the results achieved in each of the categories of analysis, comparing the total number of occurrences in the sample in relation to the total possible and indicating the percentage variation.

Table 5. Occurrence of categories

<table>
<thead>
<tr>
<th>Category</th>
<th>Issue</th>
<th>Sample^a</th>
<th>Total^b</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Identification and Situational Analysis of the Problem</td>
<td>157</td>
<td>407</td>
<td>38%</td>
</tr>
<tr>
<td>B</td>
<td>Identification and Analysis of Solving Action</td>
<td>54</td>
<td>407</td>
<td>13%</td>
</tr>
<tr>
<td>C</td>
<td>Identification of Competent Power by the Initiative</td>
<td>54</td>
<td>222</td>
<td>24%</td>
</tr>
<tr>
<td>D</td>
<td>Analysis of the Legality of the Regulation</td>
<td>116</td>
<td>666</td>
<td>17%</td>
</tr>
<tr>
<td>E</td>
<td>Analysis of the Content of the Regulation</td>
<td>54</td>
<td>333</td>
<td>16%</td>
</tr>
<tr>
<td>F</td>
<td>Analysis of the Impact on Fundamental Rights</td>
<td>26</td>
<td>1554</td>
<td>1%</td>
</tr>
<tr>
<td>G</td>
<td>Analysis of the Public Interest</td>
<td>12</td>
<td>444</td>
<td>2%</td>
</tr>
<tr>
<td>H</td>
<td>Analysis of Feasibility</td>
<td>44</td>
<td>592</td>
<td>7%</td>
</tr>
<tr>
<td>I</td>
<td>Cost-Benefit Analysis</td>
<td>23</td>
<td>222</td>
<td>10%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>540</strong></td>
<td><strong>4847</strong></td>
<td><strong>11%</strong></td>
</tr>
</tbody>
</table>

^a: occurrence in the sample  
^b: total possibility of occurrence (37 [cases] x maximum number of occurrences)  
Source: author

The results show that, on average, the legal and merit opinions are considering approximately 11% of the items of good policy regulation required by Decree No. 4,176/02. Although there is an average occurrence of 38% in the category of "Situational Identification and Analysis of the Problem" (category A), the analysis of the content and legal risk of the regulation is on average 16% and 17% (categories D and E), except for an analysis of the legal risk on fundamental rights (legal certainty, rights of freedom and equality) of an average of 1%. Likewise, the average occurrence of the categories related to the Regulatory Impact Analysis (RIA) are below 10% (categories G, H, I).

Table (6), set forth in Appendix (A), describes the occurrence of all items of Decree 4.176/02, at least in one of the opinions (legal or merit) analysed by the sample (BRASIL, 2002). These data show that in all the opinions are described the objectives sought with the policy regulation (100%) and, in the great majority, it is also described: the reasons for the initiative (89%); the duty of the Union to take action (81%); the matter is subject to a Decree and not another legal act (70%); the body that must assume responsibility for the issue (65%).

Table (6) shows that 53 (fifty-three) of the 131 (one hundred and thirty-one) items, contained in Decree No. 4,176/02, were not treated in any of the sample opinions. This represents 40% of the total number of items aimed at ensuring the good legal quality of
Decrees. Among the neglected items are elementary legal aspects: a) efficacy (precision, degree of probability of attainment of the intended goal); b) effects on the legal order and targets already established; c) possibility of challenge in the Judiciary; d) imposition of fines and penalties; e) with what conflicts of interest can one predict that the executor of the measures will be confronted?

In fact, it is worth mentioning that, out of the 37 (thirty seven) analysed Decrees, only 02 (two) present an explanation of the possible costs and benefits of the policy regulation and 03 (three) discuss possible alternatives to the public problem addressed by the policy regulation. Only in the analysis opinions of 1 (one) Decree did mention possible threat to legal certainty (basis of legal risk analysis). It should be emphasized that the evidence obtained in this analysis needs to be complemented by an evaluation of the technical quality of opinions from the point of view of merit. This research analysis corresponds to a simple verification of compliance with the items set forth in Decree No. 4,176/02 (a simple mention of the item), without any judgment on the quality of the analysis performed by the reviewers or the formal structure of the regulation. A simple mention of the item in the opinion might not be a sufficient information for subsidize the governmental decision-making process.

Conclusions

The study sought to describe the policy regulation process and evaluate the adoption of policy regulation best practices within the Brazilian federal executive branch of government. The results show that despite a recent improvement on the legal framework, responsible for authorizing the public managers to adopt the policy regulation best practices, adversarial managerial practices and cultural values are imposing difficulties for its advancement.

First, it is possible to observe that a significant amount of information relevant to policy regulation improvement, as determined by Decree 4.176/02, is simply not mentioned in the legal or merit opinions. Important information on possible effects on the legal order, the possibility of legal challenges and the eventual impact on fundamental rights, for example, were absolutely neglected in all the opinions of the sample. These results indicate a severe risk on the quality of governmental decision-making process, besides a violation of the principles of national public administration.

Second, an analysis of merit and legal risk appear in less than 15% of the sample, evidencing the reduced importance of this information for the governmental decision-making process on public policies. From this result, it is possible to formulate a hypothesis that the main criteria for the currently governmental decision making are not really technical, but fundamentally political (disregarding the possibility of political corruption). In this way, an opportunity is opened for the inefficiency of governmental decisions on public policies,
limiting the quality of government solutions for public problems (losing rationality on governmental decisions).

Third, many opinions have not even been made available (or even formulated by proponents of policy regulation). The information related to ten of forty-seven Decrees of the sample was not delivered. Even the appeal to superior courts was insufficient to grant access to information guaranteed by the recently enacted Brazilian law on access to public information. The guarantee of transparency is still not fully assured. In addition, many Decrees of the sample did not have any legal or merit opinion associated with it in a clear violation of the motivation principle of public administration. The transparency and motivation of policy regulations are basic principles in a democratic government. This elementary democratic institutional structure seems to be just in process of construction in the country.

Finally, there is no rule that imposes to governmental proponents the obligation for regulatory impact analysis (or even ex post policy evaluation), cost-benefit analysis or risk assessment. This lack of legal enforcement gives to ministries and Presidency a great discretionary power over policy regulation. A constitutional reform in article 59 of the Federal Constitution and a complete reformulation of Complementary Law 95/98 would be needed to promote a real change in this situation. On that opportunity the Brazilian legislative branch of government would institutionalized, as it happens in other advanced democracy countries: i) a democratic control over the decisions of public policies (reversing the current situation of prevalence of the Executive); ii) standards for the management and quality of public services (in compliance with the constitutional principle of efficiency); and (iii) mechanisms for enhancing the governmental decision-making process (making it more transparent, technically qualified and politically inclusive).

References


__________. Decreto n° 8.760, de 10 de maio de 2016 (Altera o Decreto n° 8.578, de 26 de novembro de 2015, para remanejar cargos em comissão e dispor sobre a Assessoria de Assuntos Estratégicos, o Decreto n° 8.693, de 16 de março de 2016, para transferir a Secretaria do Programa de Aceleração do Crescimento da Casa Civil da Presidência da


