The policy rulemaking governance inside the Brazilian executive branch of government

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Research Question & Framework

> To what extent does the policy regulation process, institutionalized through Presidential Decrees, observe the best policy regulation practices?

> What causes explain the current stage of development of the policy rulemaking governance in the Brazilian federal executive branch of government?

**Empirical & Theoretical Framework**

OECD (*Recommendations / 2008 regulatory assessment*)

Best practices: USA / UK / EU - Better regulation


Method

Mix-Method with two stages.

1st: to assess good policy regulation practices in the government:
> quali-quanti analysis of legal and merit opinions with a sample of 47 Presidential Decrees (E.O.);
# unit of analysis: policy regulation Decrees that enact public policies or governamental programmes;
# period: from 2009 to 2016;
# criteria: policy good regulation criteria established by Annex I of Decree 4,176/02 & 9.191/2017 - (analysis of 131 different indicators (items), grouped into 9 general categories);
# technique: simple count of items occurrence in the legal and merit opinions (frequencies).

2nd: “to explain” the posible causes of the results:
> quali analysis of legal documents & 66 interview with high-ranked public managers and lawyers;
# source: 2014’s IPEA survey about “legal perceptions of public lawyers and managers”;
# categories of analysis: structural, craft and culture (investigate possible flaws in some of the dimensions of public management – HILL; LYNN, 2015)
Method

Sample of respondents

<table>
<thead>
<tr>
<th>ROLE</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advisors</td>
<td>7</td>
<td>10,6</td>
</tr>
<tr>
<td>Public Lawyers (AGU)</td>
<td>24</td>
<td>36,3</td>
</tr>
<tr>
<td>Public managers (Directors or Coordinators)</td>
<td>30</td>
<td>45,4</td>
</tr>
<tr>
<td>Public managers (Executive Secretary)</td>
<td>5</td>
<td>7,5</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>66</td>
<td>100</td>
</tr>
</tbody>
</table>
Results

1st: to assess good policy regulation practices in the government:

Table 3. 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 Legal Competencies</td>
<td>54</td>
<td>222</td>
<td>24%</td>
</tr>
<tr>
<td>D</td>
<td>Legal Analysis of the Policy 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>TOTAL</td>
<td></td>
<td>540</td>
<td>4847</td>
<td>11%</td>
</tr>
</tbody>
</table>

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

Source: author
Results

1st: to assess good policy regulation practices in the government:

Results evidenced that 40% of the items (53 of 131 items) do not appear in any legal or merit opinion.

Among these neglected items are elementary features of legal and merit analysis like:

a) efficacy analysis (precision, degree of probability of attainment of the intended goal);

b) legal risks analysis (judicial reversal by the courts, for instance);

c) imposition of fines or penalties analysis;

d) conflicts of interest analysis.

2 Decrees had an examination of possible cost/benefits of the policy regulation;

3 Decrees had a discussion of possible alternatives to the public problem addressed by the policy regulation.

More than 50% of the sampled Decrees do not have legal & merit opinions (only one or none).

(despite the transparency law, access to opinions is hampered by the Civil House – caused the imposition of a Writ of Mandamus against the minister)
Results

2nd: “to explain” the possible causes of the results

Legal Framework

<table>
<thead>
<tr>
<th>International Best Practices</th>
<th>Brazilian Regulation (applied to the Executive Branch of Federal Government)</th>
<th>Enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Transparency</td>
<td>Public access to information Law (Law 12.527/2011 &amp; Decree 7.724/2012.)</td>
<td>Mandatory</td>
</tr>
<tr>
<td>Regulatory Impact Analysis</td>
<td>Decree 9.191/2017 (Art. 32, VI)</td>
<td>Optional*</td>
</tr>
<tr>
<td>Public Consultation</td>
<td>Decree 9.191/2017 (Chapter VI)</td>
<td>Optional</td>
</tr>
<tr>
<td>Legal Risk Assessment</td>
<td>Decree 9.191/2017 (Art. 31, II and III)</td>
<td>Optional*</td>
</tr>
<tr>
<td>Public Policy Evaluation</td>
<td>Interministerial Ordinance 102/2016, Decree 9.191/2017 (Annex - items 16 and 19), and Decree 9.203/2017</td>
<td>Optional</td>
</tr>
</tbody>
</table>
Results

2nd: “to explain” the possible causes of the results

Managerial Framework

It is possible to conclude that, policy regulation governance, despite increasing efforts of improvement, is marked by:

a) a **lack of technical perspective and routine of procedures**, due to an unbalanced prevalence of political dimension in policy decision making and subsequent rulemaking;
b) an extremely **high public management risk aversion and lack of leadership**, caused by **internal and external controls perceived as disproportionate by public managers** (sometimes deepened by the lack of capacities of some personnel inside ministries).
Results

2nd: “to explain” the possible causes of the results

Cultural Framework

It is possible to conclude that, policy regulation governance is marked by:

a) an absence of entrepreneurial approach, based on a legal and managerial risk assessment, because of a restrictive “legalistic” perception of legal & public management (less committed with a public value achievement, formal policy risks and consequences);

b) a misguided attempt to use legal opinions as a shield against possible external control sanctions imposed over public management personnel.
Conclusion remarks

1) Policy decision-making and regulation are not evidence-based, neither adopt a risk-based approach;

2) Better policy regulation is not a problem of “lack of law”;
   # Approval of the new “Law of Introduction to the Norms of Brazilian Law” (Law n. 13.655/2018);
   # introduction of a consequentialist ethical principle to public management.

3) There is a “gap of implementation” caused by managerial and cultural features of our P.A.
   # coalition government (political factor);
   # lack of formality, register and transparency in policy decision-making;
   # “human factor” (aligning principles/standards, lack of leadership, training and motivation).