The Theory and Practice of Legislation

ISSN: 2050-8840 (Print) 2050-8859 (Online) Journal homepage: https://www.tandfonline.com/loi/rtpl20

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To cite this article: Felipe de Paula (2016) Does Brazil have a Legislative Policy?, The Theory and Practice of Legislation, 4:3, 329-353, DOI: 10.1080/20508840.2016.1242244

To link to this article: https://doi.org/10.1080/20508840.2016.1242244

THE THEORY AND PRACTICE OF LEGISLATION, 2016
VOL. 4, NO. 3, 329–353
http://dx.doi.org/10.1080/20508840.2016.1242244

Routledge
Taylor & Francis Group

Does Brazil have a Legislative Policy?

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ABSTRACT

This article debates Brazilian legislative policy, accepted as a meta policy focused on normative quality and performance, both on formal and substantive aspects. The main object is to show that, despite the fact that the country has a formal policy at least since 2002, there is a wide gap between normative requirements and lawmaking practice. Both recent literature and the perception of high level governmental actors do converge in this direction. One of the central elements of the Brazilian legislative policy – Decree 4,176/2002 – is widely seen as a fictional tool. To confirm this statement, I first bring a short background about institutions and legislative process in Brazil, focusing on some particularities as the crucial role of the Executive branch in the lawmaking process. I then debate the theory and practice of Brazilian lawmaking and rulemaking, with special emphasis on the legislative policy stated by Decree 4,176/2002. The realist dichotomy, *law in books* and *law in action*, will be a theoretical guide here. Then, I discuss the technical aspects that (were expected to) surround the legislative production, particularly the substantive ones. The opinion of important high-level governmental actors that have dealt with drafting and regulation in the last ten years, captured by a semi-structured survey, is then shown. They confirm the idea that Brazilian legislative meta policy has a low impact on the legal elaboration, and is not seen as convenient to the contemporary governmental actions. But they also say there is large room for improvement.

KEYWORDS Legislative policy; regulatory policy; lawmaking; Brazilian lawmaking; legislative elaboration; legislative assessment; Executive decree authority

1. Introduction

Legislative policies or regulatory policies (in a better known expression) can be seen as *meta-policies* focused on normative quality and performance, both on formal and substantive aspects.[1] The main aim is to improve the setting and the assessment of other policies, usually instrumentalised by

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[1]I will use the expression legislative-regulatory policy in place of regulatory policy, even knowing the latter is more commonly used. The option tries to avoid a misunderstanding that, from my point of view, is

legislation, offering common criteria, starting points and better instruments for using evidence and comparing alternatives. These tools are employed in issuing and evaluating, as well as in all other steps of the policy lifecycle. They are not centred on certain sectors; on the contrary, they are horizontal, focused on the structure of the normative-regulatory process.[2]

Legislative-regulatory policies are widespread in developed and in developing countries. Different approaches have been tested and implemented in the last two decades, at least since the OECD warned about the necessity of regulatory quality appraisals.[3] The European Union, for instance, evolved from *Better Lawmaking* to *Better Regulation* and, lately, *Smart Regulation*.[4] Impact Assessment as a genus has surely been a cornerstone both to the EU and to its members at the national level. Appraisal modalities or methodologies such as cost-benefit analysis, cost-effectiveness, risk analysis and, notably in the last few years, the standard-cost model, have been frequently used, in quite different variants. Simplification programmes, fitness checks (REFIT) and a war on red tape in order to foster economic growth characterise the contemporary European *modus operandi* as well.[5]

In the US, these policies are used at least since the end of the 1970s, although their roots can be found in the *Administrative Procedure Act* from

remarkable in the Brazilian literature. There is a common (narrow) link between 'regulation' and 'regulated sectors' that prevents debating regulatory policy (say, legislative policy herein) to legislation in general.

[2]See J. Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1; J. Black, 'Tensions in the Regulatory State' (2007) 58 Public Law, Spring. See C. Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' (2007) 14(2) Journal of European Public Policy 58; C. Radaelli, 'Regulating Rulemaking via Impact Assessment' (2010) 23(1) Governance: an International Journal of Policy, Administration and Institutions 89. See also C. Radaelli and A. Meuwese, 'Better Regulation in Europe: Between Public Management and Regulatory Reform' (2009) 87(3) Public Administration 639.

[3]See OECD, Recommendation on Improving the Quality of Government Regulation (OECD Publishing, Paris 1995). OECD, OECD Report on Regulatory Reform: Synthesis (OECD Publishing, Paris 1997).

[4]It is worth noting European policy still uses Better Regulation as a central label. http://ec.europa.eu/smart-regulation/index_en.htm (accessed 7 March 2016).

[5]See R. Baldwin, M. Lodge and M. Cave, The Oxford Handbook of Regulation (OUP, Oxford 2010, reprinted 2013); M. Lodge and W. Wegrich, Managing Regulation: Regulatory Analysis, Politics and Policy (Palgrave MacMillan, London 2012); A. Meuwese, Impact Assessment in EU Lawmaking (EM Meijers Instituut, Leiden 2008); A. Meuwese and L. Senden, European Impact Assessment and the Choice of Alternative Regulatory Instruments, In J. Verschuuren (ed), The Impact of Legislation: A Critical Analysis of Ex Ante Evaluation (Martinus Nijhoff, Leiden, Boston, 2009 137). See C. Radaelli, 'Diffusion without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment' (2005) 12(5) Journal of European Public Policy 924; C. Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' (2007) 14(2) Journal of European Public Policy 58; C. Radaelli, 'Measuring Policy Learning: Regulatory Impact Assessment in Europe' (2009) 16(8) Journal of European Public Policy 1145; C. Radaelli, 'Regulating Rulemaking via Impact Assessment' (2010) 23(1) Governance: An International Journal of Policy, Administration and Institutions 89. See C. Radaelli and A. Meuwese, 'Better Regulation in Europe: between public Management and Regulatory Reform' (2009) 87(3) Public Administration 639; C. Radaelli and A. Meuwese, 'Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU' (2010) 33(1) West European Politics 136. See J. Wiener, 'Better regulation in Europe' (2006) 59 Current Legal Problems 447; J. Wiener, 'The Diffusion of Regulatory Oversight' in M. Livermore and R. Revesz (eds.) The Globalization of Cost-Benefit Analysis in Environmental Policy (2013), refer to http://www.oup.com/us/catalog/general/subject/Economics/Environmental/?view=usa&ci=9780199934386 (accessed 11 June 2015). Finally, see H. Xanthaki, 'European Union Legislative Quality After the Lisbon Treaty: The Challenges of Smart Regulation' (2013) 35(1) Statute Law Review 66.

1946. They have surely increased in the last years. Executive Order 12,866, of 30 September 1993 (*Regulatory Planning and Review*), and the Executive Order 13,563, of 18 January 2011 (*Improving Regulation and Regulatory Review*), allowed the *Office of Information and Regulatory Affairs* (OIRA) to have oversight over rulemaking within the Administration. Executive Order 13,610, of 10 May 2012 (*Identifying and Reducing Regulatory Burdens*), puts importance on cutting administrative burdens, and a brand new decision from 15 September 2015, created '*The Social and Behavioral Sciences Team* (SBST)' in order to put forward the use of behavioural science insights in regulation.[6] OIRA under Obama's government, particularly whilst headed by Cass Sunstein, has fostered a particular smart regulation approach that has considered *choice architecture*, *nudges* and other behavioural insights as milestones.[7]

Under the influence of the OECD, Brazil did not lag behind. After setting forth an Organic Law (say, Complementary Law 95, from 26 February 1998), intensely addressed to formal aspects of the normative elaboration, in 2002 the federal government issued a presidential decree (Decree 4,176, from 28 March 2002) that, to some extent, set out a legislative policy outline. At that time, its content was really up-to-date, particularly when compared with the OECD requests. However, little attention has been paid to its actual use during the regulatory lifecycle. Is it really observed by governmental actors? Are the guidelines and tools effectively used, or is it all about a bureaucratic ticking-the-box? In sum: does Brazil really have an effective legislative policy?

Answering these questions demands going to the field. It is necessary to observe relationships and patterns regarding Brazilian normative setting, and the proposal's path within the Executive branch. It is important to know and to evaluate the legal framework (*law in books*), but it is also unavoidable to appraise *law in action*, the actual legislative lifecycle, considering the institutional elements that surround it. Yet, it is worth showing the perception of high-level governmental players directly involved in this process, in order to confirm or to repeal theoretical hypotheses.

At the end, I expect to show Brazil does have a formal legislative metapolicy in the federal level. Notwithstanding, it is scarcely followed. Literature

[6]The team is linked to the National Science and Technology Council (NSTC). See https://www.whitehouse.gov/the-press-office/2015/09/15/executive-order-using-behavioral-science-insights-better-serve-american (accessed 1 October 2015). See also R. Hahn and P. Tetlock, 'Has Economic Analysis Improved Regulatory Decisions?' (2008) 22(1) The Journal of Economic Perspectives 67; Cass Sunstein, 'The Office of Information and Regulatory Affairs: Myths and Realities' (2013) 126 Harvard Law Review 1838.

[7]See D. Kahnemann, Thinking, Fast and Slow (Farraz, Straus and Giroux, New York 2011). See Cass Sunstein, Simpler: The Future of the Government (Simon & Schuster, New York 2013); Cass Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities (2013) 126 Harvard Law Review 1838. See R. Thaler and Cass Sunstein, Nudge: Improving Decisions about Health, Wealth and Happiness (Yale University Press, New Haven, London 2008). A choice architect is someone responsible for organising the context in which people make choices. 'Nudges' can be conceptualised as 'any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives' (Thaler and Sunstein 2008, 6).

and recent data converge to the recognition that there is, to some extent, a good pattern of formal requirements' obedience; however, regarding substantive aspects, there is a striking lack of knowledge and an appalling very low level of compliance.

The article is structured as follows. Next, there is a short background about institutions and legislative process in Brazil, focusing on some particularities. I then describe the theory and practice of Brazilian lawmaking and rulemaking, with special emphasis on the legislative policy stated by the Decree 4,176/2002. The technical approach to formal and substantive aspects will be deeply debated. The opinion of important high-level governmental actors that have dealt with drafting and regulation, captured by a semi-structured survey, is then given. The article ends with conclusions on the real existence of a legislative meta-policy in Brazil.

2. A background: lawmaking and rulemaking in brazil

According to the 1988 Brazilian Federal Constitution (CF/88), Brazil is a federal republic with a presidential system and a bicameral Parliament (the Chambers of Deputies and the Senate). There is also a very fragmented multiparty political scenario.[8] In a short, simple and rough presentation, the CF/88 allows every representative, senator, and the President of Republic to issue a draft of an ordinary law.[9]

As happens in many different countries, the role of the Presidency in lawmaking is increasing, with prominence. Notwithstanding this, the legislative setting in Brazil is even more crucial, assuming not only legal but especially political and institutional features.

From a political-institutional perspective, the concept of *coalitional presidentialism*[10] is largely accepted. In general terms, the explanatory model assumes the President would virtually never be elected with a parliamentary majority, given the dual democratic legitimacy (President and Congress), the inherent multiplicity of the political parties framework and the volatility of their ideological basis. So, the Chief of Government needs to build a robust parliamentary coalition in order to have political support within the Congress, dealing with very fragmented and unstable political actors, jeopardising his political plans.

[8]In the beginning of 2016, Brazil had 35 duly registered political parties. Refer to http://www.tse.jus.br/partidos/partidos-politicos/registrados-no-tse (accessed 6 February 2016).

[9]In some themes regarding, for instance, to public administration and civil service (art. 61, §1) the President has exclusive jurisdiction, and in others different actors are required to set a bill. To the Brazilian Constitution (CF/88), specially art. 59–69, see http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm (accessed 3 October 2015).

[10]The expression was first used by S. Abranches, but quickly gained autonomy. See S. Abranches, Presidencialismo de coalizão: o dilema institucional brasileiro (1988) 31(1) Dados 5.

Considering this dilemma, political blockages were theoretically expected at the very beginning of Brazilian new constitutional history.[11] Practice has shown, however, that this political arrangement has been adequately kept, at least over the last 20 years, using different strategies and instruments that have permitted fostering the political, economic and social agenda.[12]

Agenda setting, meaning herein the ability of controlling the political-legislative picture and pushing the governmental agenda forward, is a mighty and dominant explanatory aspect.[13] It is surely one of the strongest elements that is in the *Presidential Executive toolbox* suggested by T. Power and his co-authors, a set of five key tools available to the Chief of Government to keep his/her support basis and, consequently, governability.[14]

If agenda setting is a core element of the Brazilian Executive toolbox, it is conveyed mostly by presidential decree power authority. It is conceived as a legislative option available to the Executive, legally valid, to be used during (extra)ordinary moments, with no need to attain the prior Parliament approval to start producing its effects.[15]

Presidential decrees in Brazil are done by what is known as Provisional Measures (MPVs).[16] In constitutional terms, Brazilian MPV is a normative act issued by the President, 'with the strength of law' since its enactment. It is sent to the Parliament which can amend, refute or accept it in a pre-defined period of time (60 plus 60 days).[17]

[11] See B. Lamounier, 'Estrutura Institucional e Governabilidade na Década de 90' in J.P. dos Reis Velloso (org), O Brasil e as Reformas Políticas (Rio de Janeiro, José Olympio 1992); B. Lamounier, 'A democracia brasileira de 1985 à década de 90: a síndrome da paralisia hiperativa' in J. P. dos Reis Velloso (org), Governabilidade, sistema político e violência urbana (Rio de Janeiro, José Olympio 1994). See J. Linz, 'The Perils of Presidentialism' (1990) 1 Journal of Democracy 51; J. Linz, 'Presidential or Parliamentary Democracy: Does it Make a Difference?' in J. Linz and A. Valenzuela (eds.) The Failure of Presidential Democracy (Johns Hopkins University Press, Baltimore 1994) 3. See S. Mainwaring, 'Presidentialism, Multipartism and Democracy: The Difficult Combination' (1993) 26(2) Comparative Political Studies 198; S. Mainwaring and M. Shugart (eds.), Presidentialism and Democracy in Latin America (CUP, Cambridge 1997).

[12] Even political crises, like the current one (2016), can be attributed to misunderstandings of the coalitional presidentialism by political actors.

[13] See J. Carey and M. Shugart, Executive Decree Authority: Calling Out the Tanks or Filling Out the Forms? (CUP, New York 1998). A. Figueiredo and F. Limongi, Executivo e Legislativo na Nova Ordem Constitucional (FGV, Rio de Janeiro 1999); A. Figueiredo and F. Limongi, 'Presidential Power, Legislative Organization, and Party Behavior in Brazil' (2000) 32(2) Comparative Politics 151. F. Limongi, 'A Democracia no Brasil: Presidencialismo, Coalizão Partidária e Processo Decisório' (2006) 76 Novos Estudos – CEBRAP 17; G. Negretto, 'Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina' (2004) 37 Comparative Political Studies 531; M. Shugart and J. Carey, Presidents and Assemblies: Constitutional Design and Electoral Dynamics (CUP, Cambridge 1992).

[14] See P. Chaisty, N. Cheeseman and T. Power, 'Rethinking the "presidentialism Debate": Conceptualizing Coalitional Politics in Cross- Regional Perspective' (2014) 27(1) Democratization 72; E. Raile, C. Pereira and T. Power, 'The Executive Toolbox: Building Legislative Support in a Multiparty Presidential Regime' (2011) 64(2) Political Research Quarterly 323. The five key tools used to construct and to maintain legislative coalitions are agenda power, budgetary authority, cabinet management, partisan powers, and informal institutions.

[15] See J. Carey and M. Shugart, Executive Decree Authority: Calling Out the Tanks or Filling Out the Forms? (CUP, New York 1998); M. Shugart and J. Carey, Presidents and Assemblies: Constitutional Design and Electoral Dynamics (CUP, New York 1992).

[16] MPV is the Portuguese acronym used by the Brazilian Parliament for Provisional Measures.

[17] See CF/88, art. 62.

It is important to note that, in practice, MPVs are not used just in extraordinary moments. On the contrary, they are issued as a frequent governmental instrument. They are useful to foster the governmental agenda and to deploy public policies. More than 5000 MPVs were published between 1988 and 2001,[18] and even after the Constitutional Amendment 32, dated 11 September 2001, that altered some issuing conditions, at least another 700 were sent to the National Congress until the end of 2015.[19] Economic plans, social programmes and substantive changes in the Public Administration were conveyed through MPVs.

Although some legal scholars still depict them as an authoritarian instrument, the vast majority of contemporary academics do not exam MPVs as a constitutional aberration. There are (ab)uses that must be assessed, but they are surely an important instrument of governability and development of presidential regimes. Moreover, they are widely adopted and accepted, not just in Brazil.[20] Cooperative patterns between Executive and Legislative can be clearly seen, supplanting the traditional idea of usurpation of powers.[21]

[18]Re-editions are considered here. The number of original provisional measures in the period corresponds to somewhat more than 10% of the total. Refer to, with some differences, A. Figueiredo and F. Limongi, Executivo e Legislativo na Nova Ordem Constitucional (Ed. FGV, Rio de Janeiro 1999); F. Gomes, 'Cooperação, Liderança e Impasse entre o Legislativo e o Executivo na Produção Legislativa do Congresso Nacional do Brasil' (2012) 55(4) Dados 911; G. Negretto, 'Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina' (2004) 37 Comparative Political Studies 531; C. Pereira, T. Power and L. Renoó, 'Agenda Power, Executive Decree Authority, and the Mixed Results of Reform in the Brazilian Congress' (2008) 33(1) Legislative Studies Quarterly 5. To important elements on re-editions, see P. Abramovay, Separação de Poderes e Medidas Provisórias (Campus Elsevier, Rio de Janeiro 2012); J. L. M do Amaral Jr, Medida Provisória e sua Conversão em Lei (RT, São Paulo 2004); F. de Paula, 'Executive Decree Authority and Lawmaking Environment in Brazil: A Broader View of Provisional Measures' (2015) 36 Statute Law Review 233.

[19]Data can be attained in the Legislation Portal of the Presidency of the Republic. Refer to http://www4.planalto.gov.br/legislacao (accessed 4 October 2015).

[20]It is possible to find similar instruments in Italy, Spain, Portugal, France, Chile, Peru, Ecuador, and Argentina, where it was built by the Judiciary branch. For the latter, see G. Negretto, 'Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina' (2004) 37 Comparative Political Studies 531. Chaisty, Cheeseman and Power also show the instrument is important for the executive toolbox in sub-Saharan Africa and in the post-soviet regimes. See P. Chaisty, N. Cheeseman and T. Power, 'Rethinking the "Presidentialism Debate": Conceptualizing Coalitional Politics in Cross-Regional Perspective' (2014) 21(1) Democratization 72. Finally, it is possible to insert here the North-American debate about the limits of executive orders. See: J. Carey and M. Shugart, Executive Decree Authority: Calling Out the Tanks or Filling Out the Forms? (CUP, New York 1998); C. Coglianese, 'Presidential Control of Administrative Agencies: A Debate over Law or Politics?' (2009) 12(2) Journal of Constitutional Law 637; V Chu and T. Garvey, 'Executive Orders: Issuance, Modification and Revocation' (2014) Congressional Research Service 7.5700 RS 20846, accessed at https://www.fas.org/sgp/crs/misc/RS20846.pdf; F. Limongi, 'A Democracia no Brasil: Presidencialismo, Coalizão Partidária e Processo Decisório' (2006) 76 Novos Estudos – CEBRAP 17; S. Morgenstern, J. Polga-hecimovich and S, Shair-Rosenfeld, 'Tall, Grande, or Venti: Presidential Powers in the United States and Latin America' (2013) 5(2) Journal of Politics in Latin America 37; C. Pereira, T. Power and L. Renoó, 'Agenda Power, Executive Decree Authority, and the Mixed Results of Reform in the Brazilian Congress' (2008) 33(1) Legislative Studies Quarterly 5; M.A. Sampaio, A Medida Provisória no Presidencialismo Brasileiro (Saraiva, São Paulo 2007).

[21]See A. Figueiredo and F. Limongi, Executivo e Legislativo na Nova Ordem Constitucional (FGV, Rio de Janeiro 1999); A. Figueiredo and F. Limongi, 'Presidential Power, Legislative Organization, and Party Behavior in Brazil' (2000) 32(2) Comparative Politics 151. F. Limongi, 'A Democracia no Brasil: Presidencialismo, Coalizão Partidária e Processo Decisório' (2006) 76 Novos Estudos CEBRAP 17; G. Negretto,

It is not the case to develop these ideas here. There is a large literature about decree power authority and, particularly, Brazilian MPVs.[22] For this article, the core element to be absorbed is that dealing with lawmaking in the contemporary Brazilian framework is dealing substantially with the Executive legislative production. This does not mean that Parliament is out of the game, particularly if one considers the cooperative pattern mentioned above and the extent provisional measures are evaluated and amended; but it does mean that, to a large part of the Brazilian body of legislation, Executive internal legal work is an extremely important source.

Thus, speaking about legislative policy in Brazil requires paying attention to the internal process of the Executive lawmaking itself. But, with few exceptions,[23] this internal process of lawmaking is not really observed by academics, as well as its core structuring moments and checkpoints. The same can be seen regarding the rules that steer the task. These are the topics that will be in the spotlight from now on.

3. Legislative policy normative basis – *law in books*

The 1988 Brazilian Federal Constitution set forth, in the sole paragraph of its art. 59: 'A complementary [organic] law shall provide for the preparation, drafting, amendment and consolidation of laws.' After almost 10 years of processing of the draft, the Complementary Law 95, from 26 February 1998, was finally enacted. The statute is addressed to formal aspects (drafting), with specific rules on writing and articulation techniques of a legal act's units (the article as the basic unit subdivided into paragraphs, items, sub-items, etc.).[24]

The Complementary Law 95/98 was initially regulated by the Decree 2,954/1999. It duplicated a good part of the LC 95/98 formal norms, but included some interesting substantive provision such as rules related to results

'Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina' (2004) 37 Comparative Political Studies 531; M.A. Sampaio, A Medida Provisória no Presidencialismo Brasileiro (Saraiva, São Paulo 2007); to some extent, C.C. Lois, 'Delimitação das Atribuições entre os Poderes Executivo e Legislativo no Tocante à Regulamentação sobre Organização e Funcionamento da Administração Pública Federal' (art. 84, VI c/c art. 61, 1, II, e): iniciativa privativa do Presidente, decreto autônomo e emendas parlamentares em questão (Ministério da Justiça / PNUD, Brasilia 2009 - Série Pensando o Direito 14).

[22]For recent developments, see P. Chaisty, N. Cheeseman and T. Power, 'Rethinking the "Presidentialism Debat"': Conceptualizing Coalitional Politics in Cross- Regional Perspective' (2014) 21(1) Democratization 72; F. de Paula, 'Executive Decree Authority and Lawmaking Environment in Brazil: A Broader View of Provisional Measures' (2015) 36 Statute Law Review 233.

[23]See C. Haber, 'A Relação entre o Direito e a Política no Processo Legislativo Penal' (PhD Thesis, Sao Paulo University 2011). F. Meneguim, 'Avaliação de Impacto Legislativo no Brasil' (Centro de Estudos da Consultoria do Senado – textos para discussão 70, mar 2010); N. Salinas, 'Avaliação Legislativa no Brasil: Um Estudo de Caso sobre as Normas de Controle das Transferências Voluntárias de Recursos Públicos para Entidades do Terceiro Setor' (Masters Dissertation, Sao Paulo University 2008); 'Legislação e Políticas Públicas: a lei enquanto instrumento de ação governamental' (PhD Thesis, Sao Paulo University 2012).

[24]An exception is art. 7, which refers to the content of the norm. Observe, for example, art. 7, II: 'The law will not contain subject matter strange to its object or not connected to it by affinity, pertinence or connection' (author's translation).

assessment in 'drafts addressing technical or technological complex matters (art. 7)'.[25] It also included rules related to forwarding of proposals within the Federal Executive branch (art. 25).

Decree 2,954/1999 was expressly revoked by Decree 4,176/2002, which is still valid.[26] In practice, it serves as the basis to the lawmaking and rule-making process within the Executive. Decree 4,176/2002 reproduces and develops formal rules as well. However, in its Heading II, it defines a system for proposition and examination of normative acts. It set forth procedures and tasks – clearly distinguishing content and legal assessment – and items that necessarily shall be observed when submitting a proposal.

It also provides two important attachments which, following international experiences, frame a checklist prior to the normative elaboration. There is a script of questions that proved to be very encompassing at the time of its edition, mainly when compared with similar acts and suggestions valid until then, such as the OECD.[27]

Attachment I brings a long list of 'questions that must be analysed when drafting normative acts within the range of the Executive branch' (author's translation), setting forth substantive and legal parameters. From the substantive perspective, it requires, for example:

(i) appointing of the verified faults and distortions (1.4);
(ii) social and legal-economic reverberations created by the problem (1.5);
(iii) the set of addressees of the rule (1.6);
(iv) causes of the problem and the available alternatives (2.1, 2.2);
(v) checking of the intelligibility of the proposed rule (10);
(vi) practicability of the proposed rule, mainly considering compliance aspects (11.6, 11.7;
(vii) cost-benefit checking, with an express reference to the cost-benefit analysis (12, 12.1, 12.4).

From the legal perspective, the questioning calls attention to some important elements:

[25] In verbis: 'Art. 7. The draft bills governing complex technical or technological matters must include a way to verify the results, considering the necessary adjustment of the law to the new situations, to the technological development or to the development of de facto and de jure relations.

Sole Paragraph. In the draft bills that demand systematic results assessment, it must be included clause related to the elaboration of "experience reports" to be periodically submitted to an entity of the Executive or Legislative.' (Author's translation.)

[26] The regulation was born under the excuse of adjusting the text to the changes provided by the Constitutional Amendment 32, dated 11 September 2001, which amended the provisional measures regime and expressed the figure of the autonomous decree in the Federal Constitution, as well as to the changes made to the Complementary Law 95/98 by the Complementary Law 107, dated 26 April 2001.

[27] See OECD, Recommendation on Improving the Quality of Government Regulation (OECD Publishing, Paris 1995). OECD, OECD Report on Regulatory Reform: Synthesis (OECD Publishing, Paris 1997).

(viii) if the matter bears federal jurisdiction (3);
(ix) if it is subject to the principle of strict legality (4.1);
(x) if it can and must be treated by provisional measure (6);
(xi) if human rights are being somehow affected (9).[28]

Attachment II, in its turn, sets a summary of the former. It presents a mandatory form that must necessarily accompany the normative proposal, with requisites such as:

(i) summary of the problem that claims for measures;
(ii) proposed solution;
(iii) existing and assessed alternatives;
(iv) costs;
(v) environmental impact; and
(vi) summary of the legal opinion.

The decree also includes the electronic submitting of proposals to the Civil Cabinet of the Presidency of the Republic (art. 37). The Official Documents Generation and Process System (SIDOF) was created, and the Civil Cabinet was later defined as the central entity and the system manager.[29]

Any ministry or entity of the Presidency of the Republic can submit a draft to the Civil Cabinet. In a common picture, the proposal is originated in the technical area and, after that, it is discussed and developed by those who are interested in it – entities or departments, mainly intra-ministerial secretariats. If coordination or mediation is necessary, the task frequently falls to the Executive Secretariat of each Ministry. Then, the legal department renders opinion (usually the Legal Consultancy unit), and the proposal is uploaded in the SIDOF through electronic signature of the utmost proponent authority.

In case the act substantially affects other portfolios' jurisdictions, these portfolios have to be necessarily indicated as co-authors. It means they will electronically receive the text entered in the SIDOF right after the first signature. Co-authors set their expert opinions through the SIDOF as well, sometimes asking for changes and adjustments. The final opinion towards the draft continuity is made in a binary design of all-or-nothing: if the co-author has a favourable opinion, the legislative act follows; if the co-author has a negative one, the bill is blocked (time for a new round of negotiations). The draft reaches the Civil Cabinet after being signed by all the co-authors. Upon detecting the absence of some relevant participant, the central entity can

[28]The numerical indications correspond to the numbering of the item as set forth in the Decree. For the complete roll of requirements, refer to http://www.planalto.gov.br/ccivil_03/decreto/2002/D4176.htm (accessed 11 June 2015).
[29]Decree 4,522/2002, art. 1.

send the proposal back to the proponent, in order to have the hearing session occurring correctly.

4. Legislative policy and the practice of lawmaking – *law in action*

Regarding Brazilian legislative policy, the aphorism that states 'in practice, theory is different' is applicable. The image of a Minister or a high-level group of civil servants working over an idea and later reducing it to a concatenated normative document, or even the image of a technical group evaluating available data and, based on an accurate diagnosis, suggesting a board range of legislative-regulatory alternatives, do not correspond to reality.

A lot of internal and external elements are clearly imbricated here. And they are not necessarily subject to control. There are procedural and substantial variables that assign huge complexity to the activity. There is a sequential flow of acts that is determined by legislation; however, there are countless factors that, in practice, strongly influence the decision-making.

4.1. Decision, elaboration and rationales

Agenda setting and final normative decision – whether a totally new act, whether an adjustment to an existing legal provision – may derive from an endless roll of factors and occurrences, and may follow a vast variety of tracks. Internal inputs such as authorities' orders, inner policy evaluation and the detection of technical-legal problems do exist. However, it is also usual that normative proposals germinate from external inputs such as public debates and hearings, political and lobbyist pressure, popular claims and media calls.

Additionally, the demand for a new statute may also come from the activity of other Republic branches. A draft in course within the Parliament, not supported by the government, may lead to the production of a rival governmental bill, confronting the one in progress. Repeated higher courts' decisions can demand legislative adjustments, when evidencing flaws with severe financial-budgetary effects.

Regarding motives and rationales, there is also a large array of options. A legislative issue or an amendment can be fully transformative, but can also be smooth or incremental. Some bear a strong substantive nature, aiming at significant practical impacts; others are merely symbolic, explicit or implied, in order to sooth political noises or to sign a certain guideline to interested parties. In this sense, the different law functions proposed by Voermans also apply here, as well the different legislative-regulatory goals that underlie a normative decision.[30]

[30]See W. Voermans, 'Concern About the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?' (2009) 21(1), Erasmus Law Review 59; M. Lodge and W. Wegrich, *Managing Regulation:*

Taking procedures into account, some drafts are yet prepared behind closed doors, with few hands. Others come from intra-ministerial rounds of negotiation, or even inter-ministerial ones. Some proposals derive from working groups – purely governmental, or with external participation. Others arise, in an increasingly more consolidated movement, with the effective participation of engaged third parties: beneficiaries, organised civil society and citizens, by onsite or electronic attendance, statically or dynamically.[31]

Note that the SIDOF operates, not rarely, as a mere repository of previously established decisions. As the mechanisms for blocking a certain proposal are somewhat simple – a department may disagree with a certain proposition and 'turn it down in the system', or even, what is more frequent, put it into 'sleeping mode', since proposals only reaches the Civil Cabinet when all co-authors manifest – the mere inclusion of a draft into the SIDOF is very risky. Nothing will guarantee its progress or its analysis by the peers.

Hence, relevant proposals require previous strategy, which involves persuasion regarding the importance of the policy and of its creating or modifying normative act, as well as of the convenience and correction of the suggested measures. It involves preparatory contacts and visiting, in order to assign more strength to what will be included into the SIDOF.[32] This strategy brings negotiation back to the real life: it forces peers' contact and enables points of disagreement to be previously mapped, discussed and eventually resolved.

It is worth stating that all the coordination difficulties of decision-making inherent in complex and multiform organisations such as the Brazilian administration can be found herein. From the hierarchical coordination perspective, informational asymmetries are hopelessly present, especially in the transmission belts between governmental centre and periphery; there is selective intervention combined, depending on the topic and the sector, to excessive centralisation. From the negotiated coordination perspective, one can see the inherent negotiation dilemmas, as well as the limits of numerous actors' games.

Regulatory Analysis, Politics and Policy (Palgrave Macmillan, London 2012); B. Morgan and K. Yeung, An Introduction to Law and Regulation (CUP, Cambridge 2007).

[31] Based on a proposal suggested by Almeida, I qualify as 'static' the model of pubic consultation by which the citizen addresses the public authority, usually by email, in a direct and two-sided relation, with no opportunity to discuss other eventually presented proposals and suggestions. That was the Federal Government's basic practice at least until the end of the last decade, although it is possible to verify some former examples that defined somewhat different procedures. As for the 'dynamic' model, adopted in the discussion of the Brazilian Internet Civil Rights Framework, it allows interaction across all the concerned parties, qualifying the accomplished results and, to a certain extent, facilitating the task of the suggestions consolidation by the public authority. See G.A. de Almeida, 'Marco Civil da Internet: antecedentes, formulação colaborativa e resultados alcançados in G. Artese (org), Marco Civil da Internet: análise jurídica sob uma perspectiva empresarial (Quartier Latin, São Paulo 2015 19).

[32] I am not taking into account, by methodological reasons, the relationship with non-governmental players.

Especially regarding the relationship between different subunits, events of positive coordination – in which different departments seek to maximise the efficiency and effectiveness of the policy given the alternatives – and, crucially, events of negative coordination – in which the units protect their own interests and established politics from the interference of the new state action – cohabit.[33]

Finally, in an important element to this article, note that in practice the 'legal activity' practiced by legal consulting advisors is not made, as a rule, along the entire process of policymaking. It is common to observe a detachment between the technical development of a policy packed in a statute and the legal assessment of the statute itself.

This condition leads to effective hindrances. First, non-transposable legal barriers may emerge in the very end of the policy lifecycle, blocking the whole previous work. Second, in the opposed sense, former legal experiences are not considered, whether being positive or negative, which indicates a lack of legal-strategic approach. Third, such frequent 'unfamiliarity' foments deep and unjustified airs of 'technicality' to both. Jurists do not participate in the 'technical matters' that involve the creation of a public policy; managers and politicians do not participate in the 'specialised activity' that involves the statute's legal finalisation.

4.2. The role of the Civil Cabinet of the Presidency of the Republic

The normative proposal reaches the Civil Cabinet when inserted in the SIDOF by the proponent and after attaining consent from all the other co-authors (if needed). It must necessarily be instructed with the draft, its exposition of reasons and the attachment II of decree 4,176/2002 filled in, besides technical and legal expert reports substantiating it. According to legislation, the Civil Cabinet is responsible for coordinating the activities.[34]

Civil Cabinet has the duty 'for examining the constitutionality, legality, merit, opportunity and political convenience of the proposals of normative act project' (Decree 4176/2002, art. 34, I) (author's translation). It is done mainly through two of its Sub-Chief Departments (Secretariats): the Secretariat for Assessment and Monitoring of Governmental Policies (SAG) and the Secretariat for Legal Affairs (SAJ).

[33] As stated by F. Scharpf, 'Positive coordination is an attempt to maximize the overall effectiveness and efficiency of government policy by exploring and utilizing the joint strategy options of several ministerial portfolios'; and 'negative coordination, by contrast, is associated with more limited aspirations. Its goal is to ensure that any new policy initiative designed by a specialized subunit within the ministerial organization will not interfere with the established policies and the interests of other ministerial units' ('Games Real Actors Could Play: Positive and Negative Coordination in Embedded Negotiations' 1994 6(1) Journal of Theoretical Politics 27, 38). According to the author, negative coordination follows Pareto's logic, while positive coordination follows Kaldor-Hicks' model.

[34] Law 10,683/2003 (art. 2), Decree 4,176/2002 (mainly art. 34 to 36), Decree 4,522/2002 and Decree 5,135/2004 (mainly art. 15 and 16).

Other Ministries perform relevant role in this process, by historical, circumstantial or legal reasons. Ministry of Finance (MF), Ministry of Planning, Budget and Management (MPOG) and, to a certain extent, the Federal Attorney-General Office (AGU), given the range of their jurisdiction, are the most frequent partners of the Civil Cabinet upon proposals' analysis.[35] They have been frequently consulted if they had not been yet through the SIDOF, and effectively participate in the conclusion of relevant bills.

The draft is simultaneously distributed to SAG and SAJ. Both have a basic internal division that meets similar substantive criteria. There are internal expert groups, such as the economic, social or infrastructure nucleus. SAG would be responsible for assessing costs, benefits, alternatives, compatibility with other governmental actions and coherence towards the government purposes. SAJ would be responsible for assessing what is conventionally named as 'legality, legal adequacy and constitutionality', as well as for technical aspects regarding final drafting. In theory, a normative draft positively assessed by both is suitable for higher appreciation.[36] In practice, likewise in the elaboration phase, such streamlining is not really verified.

As stated above, not all the problems are solved through SIDOF. Agreements between co-authors might assume the commitment of unlocking important divergences at a later instance, say, at the Civil Cabinet assessment. Furthermore, although some legal acts are simple and recurrent, and do not pose additional difficulties, a large part of legal proposals present burrs that must be cut out, divergences to be considered and defined. It requires coordination by the Civil Cabinet and, many times, endless rounds of (re) negotiation.

Moreover, on some occasions, depending on the political context, the relationship between sectorial departments and core government is similar to the one between pressure groups and deciders. A bill can be sent to the Civil Cabinet by the Ministry as a way of pushing a certain subject forward into the governmental agenda. The subterfuge does not solve the question, but at least displaces the location of the discussion.

In addition, in complex cases it is very hard to see a clear distinction between what refers to the content and what refers to the legal shaping of a normative act. As stated, policy decisions impact the legal outlining, like legal matters change the policy design therein defined. Hence, there is a certain overlapping between the SAG and SAJ routine activities, mainly when considering the substance of normative proposals. This can be seen

[35]It is also central, although participating less in formulation and more in the procedure of sanctioning and vetoing of the Executive Authority, the Ministry of Justice (MJ).

[36]C. Sunstein call this phase 'elevation' (The Office of Information and Regulatory Affairs: Myths and Realities 2013, 126 HLR 1838, 1855).

in the frequently inaccurate conduction – sometimes parallel, sometimes joint – of the coordination activities.[37]

Finally, given the existing legal ground, in a typical regulatory scheme this would be the moment to mobilise an important part of the efforts of an effective legislative policy. SAJ would be responsible for drafting elements, legal risk analysis and final review. SAG would have the duty for presenting or requesting assessment elements, ex ante or ex post, producing them by its own means or examining information received. Both would be responsible, together with the proponents and considering the original proposal, for aiming at regulatory simplification, normative effectiveness and behavioural steering through legislative and non-legislative alternatives. They would have the duty for choosing regulatory modalities apart from the traditional command and control mechanisms, as well as for proposing legislative tests, temporary laws, etc. However, as shall be seen below, those tasks are performed in a much reduced manner.

4.3. Political filter and legislative strategies

Once the bill is technically approved, it undergoes the political analysis, regarding convenience and opportunity. Notwithstanding, recognising here lies the discretion space offered to the administrator for choosing between legally acceptable alternatives is not enough. There are strong temporal, budgetary and political constraints permeating the decision.

From the temporal perspective, for instance, the moment of issuing a new bill matters. There is a perception that strong and corrective measures, with a negative impact on public opinion, should usually be taken at the beginning of mandates, when the popular support is still highly verified. In addition, even years in Brazil are plagued by electoral periods, bringing along important debate contamination by political party components, which has to be taken into account. Finally, checking the political agenda and the impact that might be caused by issuing a new draft is crucial. One bill can affect another's approval, and vice versa.

Regarding the players, it is important to know in advance whether political and social agents involved with the legislative measure are mobilised, and what is the level of support or contradiction. The lawmaking procedure – more or less opened, more or less participative – has a special influence here: proper prior action reduces eventual negative effects derived from legislative adjustments, or gathers support for public discussion.

[37] I do believe this overlap cannot be explained just with reference to difficulties in institutional design or, eventually, agency problems. Considering the development of finalistic-instrumental features of the contemporary legislation, accepted essentially by what it does and by the effects of the public policy it frames, the matter seems to be deeper. It is not enough to state that substantive decisions impact the normative conformation and vice versa; to a certain extent, they are confounded. Today, a technical-legal decision seems to be a substantive one.

Finally, in brief parenthesis, note that the level of the norm's clarity, openness and certainty may also vary according to the political check. These legal provisions' features have additional variables. Consider, for instance, the level of specificity: greater conviction about the legislative choice usually leads to thorough and detailed documents. Openness also varies according to the level of discretion intended for bureaucracy or deciders.[38] Finally, clarity can be steered by the level of public commitment reached: ambiguity is a usual escape for political conflicts, as well as the use of deferral or non-decision strategies.[39]

In summary, there is a long question list involving the decision-making process, both in substantive and formal aspects. Legislative strategy is actually important, and influences the legislative-regulatory formatting (and vice versa). But this does not mean that all the ingredients are duly systematised, weighted and assessed. Images of well-developed and pre-framed strategies, predicting several stages ahead of the political-legislative enchaining, do not precisely outline the complex flow. Processes are, most of the times, chaotic, full of mazes, with all the inherent ambiguities related to collective actions and to different coordination arrangements.

5. The technical approach

It is time to focus on the technical facets that involve – or could involve – the lawmaking process within the Brazilian Executive branch. As pointed out in the introduction, literature and practice bring numerous instruments, methods, modalities and categories that fit legislative policies and which could be used or applied herein. It would be possible to consider internal aspects of the bill (drafting elements, etc.), legislative-regulatory mechanical aspects (regulatory modalities, behavioural tools, etc.), methodological aspects (cost-benefit analysis, cost-effectiveness analysis, risk assessment, etc.), or even participatory aspects (crowdsourcing tools, stakeholders participation, etc.).

For the purposes of this article, the targets are the traditional figures of formal and substantive assessment, as well as the categories already stated in the legislation, since those are the tools used within the Federal Executive branch.

As seen, the present legislation sets forth several rules and guidelines, both indicative and mandatory, which configure a basic outline of a legislative

[38]See N. Salinas, 'Avaliação Legislativa no Brasil: Um Estudo de Caso sobre as Normas de Controle das Transferências Voluntárias de Recursos Públicos para Entidades do Terceiro Setor' (Masters Dissertation, Sao Paulo University 2008); 'Legislação e Políticas Públicas: a lei enquanto instrumento de ação governamental' (PhD Thesis, Sao Paulo University 2012).

[39]See R. Dixon and T. Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design' (2011) 9 ICON – International Journal of Constitutional Law 636.

policy. Both Complementary Law 95/98 and Decree 4176/2002 provide formal and substantive elements and, mainly, a previous checklist to the lawmaking. The 'questions that have to be analysed for elaboration of normative acts within the Executive authority' (author's translation) of Attachment I set out the parameters to be observed.

5.1. Formal aspects

The biggest concern of the scarce doctrine that deals with lawmaking process in Brazil can be surely found in the legislative technique (drafting). It is still comprised mainly by players directly engaged with the legislative process, as legislative consultants, civil servants and advisors of parliament houses. As stated by Haber, 'it is more common to observe concern towards the formal aspects of the law than proposals for assessment of its content'.[40]

As a rule, formal elements are properly observed at the federal level. Legal advisories have on the mentioned legislation their daily work instrument, which grants the original texts, in a significant part of the cases, good writing aspect. In addition, SAJ's experience of reviewing drafts assign coherence to definitions and provisions issued in time.

Definitions and interpretations are incrementally adjusted and internally diffused regarding diversified aspects, such as foreword and docket elaboration, treatment related to numbering, reference to other provisions, citing of administrative units and departments, etc. There is a special care in managing revoking provisions (explicit clauses are always preferable to general revoking).[41] The basic units of a statute's articulation (articles, paragraphs, items, sub-items) and their grouping into sections, chapters, headings, etc., follow a strong standard aimed at assigning simplicity and readability to the bill. The same applies for clarity, accuracy and uniformity of verb tense requirements (Decree 4,176/2002, art. 23 and 24).

On the other hand, legislative consolidation has not advanced yet, despite the occurrence of some initiatives in this sense. The integration of norms pertaining to the same matter in a single statute, with formal adaptations in order to avoid divergences or overlapping, without changing or interrupting the validity of the consolidated provisions, is expressly set forth in the Brazilian legislation. This task is well developed in other jurisdictions such as the European Union, the United Kingdom (both by the parliaments and the various Law Commissions within the UK) and United States of America (US Code, under the responsibility of the Office of the Law Revision Counsel).

[40]See 'A Relação entre o Direito e a Política no Processo Legislativo Penal' (PhD Thesis, Sao Paulo University 2011 131) (author's translation).

[41]It means avoiding the clause 'The contrary provisions are hereby revoked', which generates doubts towards what has been accomplished and impedes a reliable work for systematization.

However, it has not yet attained a central character in the Brazilian normative elaboration process.[42]

5.2. Substantive aspects

The field of substantive legistics is surely the place one can have the most interesting discoveries. Despite some initial, pilot or local experiences, it is possible to state there is a lack of knowledge and attention herein.

It must be acknowledged that, at the federal level, there are important initiatives such as the Programme for Strengthening of the Institutional Capacity for Management in Regulation (PRO-REG),[43] or even the action of regulatory agencies that, for their activities, increasingly use instruments such as regulatory impact analyses and methodologies such as cost-benefit or cost-effectiveness assessment.[44] Nonetheless, these experiments are particularly sector-oriented, and do not fully match the idea of meta-policy

[42]For history, simplification modalities (collection, consolidation, coding), techniques and methods, refer to R.N. Rizek Jr, 'O Processo de Consolidação e Organização Legislativ' (PhD Thesis, Sao Paulo University, 2009). For the English Law Commission, independent technical body created in 1965, refer to http://lawcommission.justice.gov.uk/ (accessed 21 June 2015). For the North-American experience, based on compilation of the US Code and on the work of the Office of the Law Revision Counsel, refer to http://uscode.house.gov/ (accessed 21 June 2015). In Brazil, consolidation tasks were never successful. With the publication of the Complementary Law 95/98 and the Decree 4,176/2002, the Civil Cabinet organised a Consolidation Commission and sent some consolidation projects to the Parliament; however, the task was not completely ended. The Congress also created the Law Consolidation Working Group, in 1997, actually operating only as of 2007, with no greater results.

[43]The PRO-REG is a programme aimed at contributing to the improvement of the regulatory system, coordination among the institutions of the federal government and the mechanisms for accountability and participation. According to institutional documents, there are four axes of action: (i) promoting strengthening of the institutional mechanisms for management in regulation; (ii) providing conditions to improve quality of the regulation; (iii) consolidating the decision autonomy of the federal regulatory agencies; and (iv) enhancing social supervision and control instruments. The lines of action are clear: (i) training and development of agents, mainly of regulatory agencies, with strong reference to external knowledge; (ii) agreements for technical cooperation and narrowing of international bonds, mainly with the United Kingdom; (iii) fomenting of pilot-projects within the range of the regulatory agencies; (iv) contracting of specialised consulting companies on subject matters of regulation and implementation and use of the Regulatory Impact Analysis (AIR) tool. Refer to, for example, PRO-REG Newsletter for the first half of 2013: http://www.regulacao.gov.br/boletim-pro-reg/boletim-pro-reg-1o-semestre-de-2013 (accessed 26 February 2015). Also refer to J. Proença, P. Costa and P. Montagner, Desafios da Regulação no Brasil (ENAP, Brasilia 2009); P.I. Ramalho, Regulação e Agências Reguladoras: governança e análise de impado regulatório (ANVISA, Brasília 2009).

[44]Brazilian Health Surveillance Agency (ANVISA) is, probably, one of the good exceptions. There, a clear regulatory agenda is defined, and RIA is already being consistently used. See http://portal.anvisa.gov.br/wps/portal/anvisa/anvisa/regulacaosanitaria (accessed 13 October 2015). Refer also to C.M. Castro, 'Some Aspects of Implementing Regulatory Impact Analysis in Brazil' (2014) 48(2) Revista de Administração Pública 323; A. Peci, 'Avaliação do Impacto Regulatório e sua Difusão no Contexto Brasileiro' (2011) 51(4) Revista de Administração de Empresas; 'Desenho de uma estratégia de implantação e institucionalização da Análise do Impacto Regulatório' (2009), retrieved from http://www.regulacao.gov.br/acompanhe-o-pro-reg/trabalhos-de-consultoria/desenho-de-uma-estrategia-de-implantacao-e-institucionalizacao-da-analise-do-impacto-regulatorio/view. See also P. Sampaio, Questões Relevantes ao Desenho do Marco Normativo Adequado à Implantação da Análise de Impacto Regulatório em Âmbito Federal, Relatório de Trabalho PRO-REG - 2010, retrieved from http://www.regulacao.gov.br/acompanhe-o-pro-reg/trabalhos-de-consultoria/proposta-de-atos-normativos-para-implantacao-da-analise-de-impacto-regulatorio; P. Valente, Análise de Impacto Regulatório: uma ferramenta à disposição do Estado (Masters Dissertation, Sao Paulo University 2010).

offered above. Moreover, PRO-REG has its difficulties and failings, and is not able to spread the regulatory agenda.[45]

Nevertheless, Brazilian normative lifecycle does not yet encompass a systematic approach related to quality of law from a substantive point of view. References to regulatory alternatives are not familiar to the legislative debate – whether the traditional command and control or other legal modality or mechanism, such as economic incentives, information disclosure or even self-regulation. Non-legislative alternatives, the adoption of the so-called 'zero option' (the non-intervention option), or appraisals regarding net benefits are far from the mainstream activity.

Except for specific units such as, for instance, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the structured assessment of allocative efficiency aspects or of distributional effects, as well as other social, economic and environmental analyses, is not usual. The choice of the most appropriate legislative-regulatory instrument for a particular purpose, the evaluation and the gathering of compliance or enforcement difficulties are hardly taken into account.

Meneguim already observed that, concerning substantive assessment provisions, Decree 4,176/2002 is not carefully observed. Salinas also expressed what is seen and felt in the intra-governmental routine: the use of attachment I and the completion of attachment II of the Decree 4,176/2002 are automatic.[46] This is just box-ticking, a mere compliance with a nonsense bureaucratic requirement. In sum, there is very low influence in the real lawmaking:

> The practice reveals that the referred checklist has been answered in an eminently bureaucratic manner, where not rarely the normative proposal author limits himself to answering all the questions with a negative answer – stating, for instance, that there are no other alternatives to solve the problem which the statute proposes to resolve, or that the statute has no environmental impact – without, however, substantiating those answers.[47]

[45]Castro (2014) states the fragmented actions in the independent agencies would evidence lack of policy coherence, as minimum action guidelines or uniform standards have not yet been presented. The actual emphasis on training and agencies' activities, to the detriment of the ministries, would also emphasise such heterogeneity. In addition, the discussion about the need of having a central oversight body, which is frequently presented and which was originally foreseen, has not produced results up to this instance. Finally, debates over RIA implementation suggest some degree of isomorphic emulation of international proposals. See C. Radaelli, 'Measuring Policy Learning: Regulatory Impact Assessment in Europe' (2009) 16(8) Journal of European Public Policy 1145. For developing countries, see C. Kirkpatrick, D. Parker and Y. Zhang, 'Regulatory Impact Assessment in Developing and Transition Economies: A Survey of Current Practice' (2004) 24(5) Public Money & Management 291.

[46]See F. Meneguim, 'Avaliação de Impacto Legislativo no Brasil' (2010) Centro de Estudos da Consultoria do Senado – textos para discussão 70; N. Salinas, 'Avaliação Legislativa no Brasil: Um Estudo de Caso sobre as Normas de Controle das Transferências Voluntárias de Recursos Públicos para Entidades do Terceiro Setor' (Masters Dissertation, Sao Paulo University 2008); 'Legislação e Políticas Públicas: a lei enquanto instrumento de ação governamental' (PhD Thesis, Sao Paulo University 2012).

[47]N. Salinas, 'Avaliação Legislativa no Brasil: Um Estudo de Caso sobre as Normas de Controle das Transferências Voluntárias de Recursos Públicos para Entidades do Terceiro Setor' (Masters Dissertation, Sao Paulo University 2008) 67 author's translation).

It is true that such pro-forma approach is not a Brazilian peculiarity.[48] Notwithstanding, in Brazil it clearly symbolises a broader question, namely the lack of systematic treatment of legislation as a whole, regarding substantive aspects. It reveals the low level of attention dedicated to the qualitative elements, a fragile institutionalisation of nucleus aimed at assessing legislative quality and, of course, a reduced binding power of the formally valid meta-policy.

6. The perception of the main players

The literature explicitly indicates the fragile use of substantive elements in the normative elaboration process in Brazil. Even so, it is important to validate that perception somehow. Considering the tools and information available, the choice is to consider herein the view of relevant players in the lawmaking process within the Federal Executive branch, during the period of 2007–2014.

Upon using semi-structured survey forms, consultations were made to the heads of high-level governmental areas (DAS 5, DAS 6 or Special Nature positions – NE).[49] National Secretaries, National Sub-Chiefs, Deputy Secretaries and Deputy Sub-Chiefs were heard. They had worked at the following federal government ministries or departments: Civil Cabinet of the Presidency of the Republic (SAG, SAJ); Secretariat of Institutional Affairs (ASPAR/SRI);[50] Ministry of Justice (SAL/MJ); Federal Attorney-General Office (DENOR/AGU), Ministry of Budget, Planning and Management (SE/MPOG) and Ministry of Finance (SE/MF).[51]

Identical forms were structured into six thematic groups. Answers were provided in an incremental and pre-defined scale from 1 to 5. There were open comment fields at the end of each group, allowing notes which the interviewed party deemed to be relevant. Hence, criticisms and considerations could be exposed. The applicants were previously contacted and they were assured of the secrecy of the individualised data and anonymity in the answers.

The questions, of course, were not intended at detecting facts, but solely perceptions. They aimed at capturing, specifically, how decree 4,176/2002 had been seen and used by the actors of the high-level governmental sphere engaged with this process. They also targeted their perception about the

[48]The box-ticking is recurrent in the international literature. Refer to M. Lodge and W. Wegrich, Managing Regulation: Regulatory Analysis, Politics and Policy (Palgrave Macmillan, London 2012) chap. X.

[49]The DAS acronym for 'high management position and superior advisory' refers to the positions verified in the Federal Public Administration. The DAS follow a scale from 1 to 6, in which the DAS 6 is the highest title of the standard (as a rule, they are held by National Secretaries). From that, there are the 'special nature' (NEs) positions, usually aimed at National Executive Secretaries. They are the ones that replace the Ministers in eventual absences.

[50]SRI was extinguished in 2015. Its functions are exerted now by the Secretariat of Government.

[51]The resource to Deputy Secretaries occurred only at two instances: when there was no return from the chief of the area or when there was just one response from there.

effective influence in lawmaking of the provisions set forth in attachments I and II. The purpose was to become aware of their experience towards diagnoses, objectives and alternatives presented during the flow, as well as towards eventual assessment tools and measuring methods. Finally, they aimed at gathering personal understanding about the effectiveness of the measures that are intended to qualify legislation, and about the impact of its adoption for the government and society.

It is important to clarify that a specific universe of players has been defined and, so, this is not a sample for statistical purposes. Results should not be accepted, therefore, as representative of the whole federal public administration. Yet, as the *N* is very low, the relative position among the impressions related to each subject is more important than the final numbers.[52] The purpose is to merely present, in general, an additional and exploratory perception, to assign relevance or to call into question the ideas described above.

The answers seem to beef up the literature perception expressed above. In general, formal aspects circumscribing the lawmaking process are better known and used than substantive ones. First, observe the average of answers related to knowledge and use of the Decree 4,176/2002 rules (Figures 1 and 2).

On a scale from 1 to 5, the high-level governmental actors affirmed to know decree 4,176/2002 (3.59), mainly the formal (4.06) and the jurisdictional and procedural aspects (4.29). However, there was low knowledge regarding substantive elements (2.88). Some indicated that high workload and the jurisdiction expansion of the Civil Cabinet of the Presidency of Republic (mainly of SAJ) had made it infeasible to intensify the team's knowledge about subject matters.[53] Others alleged insufficient time for the analysis and low access to reliable data in the Public Administration itself, besides the chaotic decision-making process.[54]

The figure related to the rules usage follows the same standard, with a small but relevant difference: a reduction in absolute numbers. The Decree was seen as effectively used (3.17), mainly in the formal (4.06) and procedural (3.94) aspects; however, the substantive elements observance was lower (2.76).

Additional results ask for attention. First, low relevance was assigned to Decree 4,176/2002's attachments I and II (*checklist*), which provide the legislative policy basis, during statutes elaboration (2.23). As observed, 'the

[52]Between March and June of 2015, 22 forms were distributed. With periodical reinforcements, 17 answers were attained, in a return or response rate of 77.27%. At least two high-level answers for each cited area were guaranteed, except for SE/MPOG, where just one answer was attained.

[53]In the words of a surveyed party: 'Considering the high work load of the legal advisory of the Civil Cabinet and the actual expansion of its jurisdiction as of 2011, few opportunities have been granted to invest in the deepening of the team's knowledge in relation to the 4176/2002' (author's translation).

[54]'The deficiency in the dimensioning of the consequences of the acts derives many times from the absence of reliable data that allow verifying such data. In addition, the political relations and the absence of a clear design of the decision model, as well as of its times, impair such ascertainment, even when the databases are available' (author's translation).

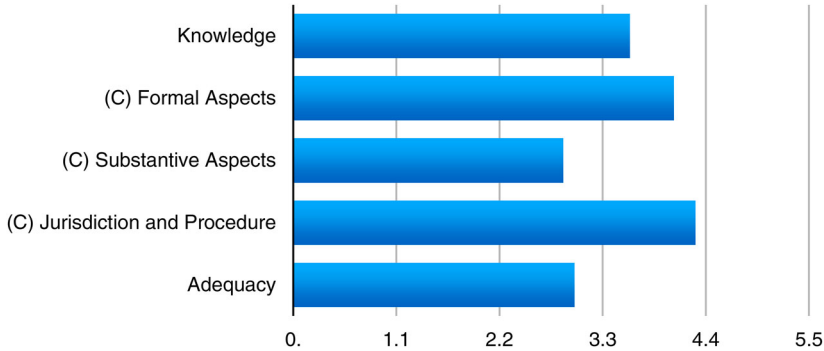

Figure 1. Knowledge and overall perception.

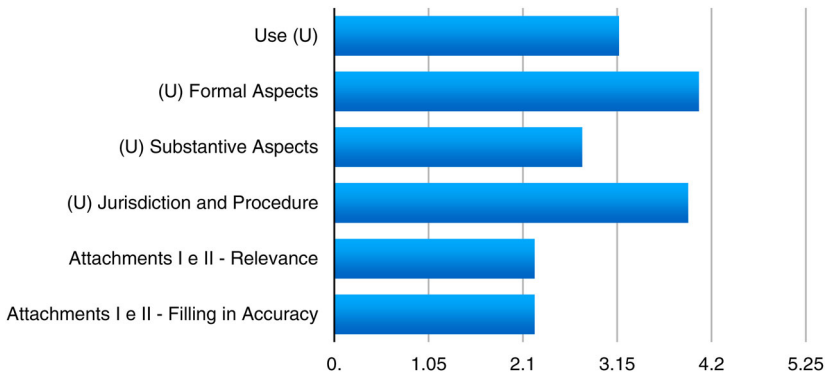

Figure 2. Effective use.

questions referred in Attachment I are ignored almost to the entirety in the process of normative elaboration; the pragmatism prevails, the very short term view and the urgency' (author's translation). The same low index was obtained when they were asked about the accuracy assigned to its completion (2.23). In the words of one interviewed party, 'the attachment II is seen as a bureaucratic task that must be observed; usually in the most resumed and vague possible manner' (author's translation). Finally, when questioned about the level of adequacy of the requisites set forth in the decree towards the real possibilities of usage and completion by public managers, the rules were not seen as totally adapted (3.00).

Observe now two other figures, which refer to legislative policy tools and legislative assessment itself (Figures 3 and 4).

Considering just the amount of statutes that, according specifically to the players, could be subject to assessment (assessable acts), they were questioned about their experience towards presentation of clear and empirically grounded diagnoses, of legal and non-legal alternatives, of specific and

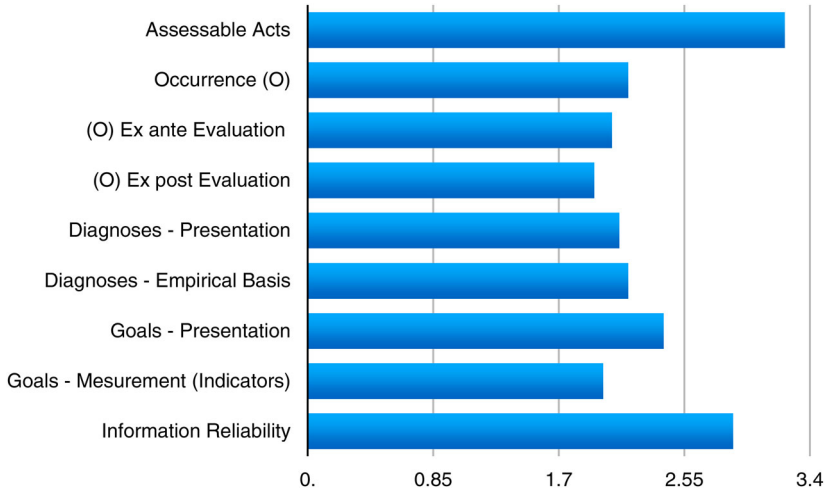

Figure 3. Legislative assessment - diagnoses and goals.

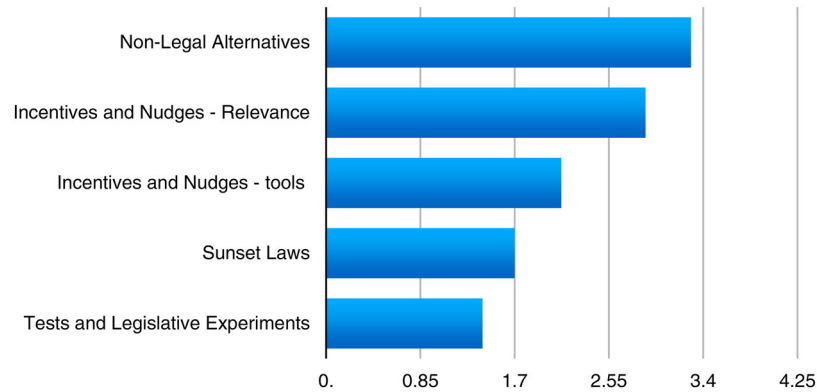

Figure 4. Legislative policy - other elements.

measurable objectives. They were also asked about the actual existence of *ex ante* and *ex post* assessments, as well as about alternatives such as temporary laws and legislative tests.

The results are impressive. It is remarkable how low are the averages attained. On a scale from 1 to 5, the performance or the mere receipt of assessments, whether ex ante or ex post, were said to be almost null (2.00). The same applies for performance or mere receipt of diagnosis, their empirical ground or of indicators related to specific objectives.[55]

[55]There are some exceptions that express very restricted and individualised actions, such as the previous assessment made by the Secretariat of Economic Monitoring of the Ministry of Finances – SEAE in regulatory norms, and the ex post assessment of tax incentives presented by the same Ministry.

The same standard is followed by answers regarding other legislative policy elements. Although accepting the existence of non-legislative alternatives (3.29), the knowledge and the usage of alternatives and incentive that depart from the traditional command and control were seen as very low, as well as the references to ideas of temporary or experimental legislation. There were two interesting perceptions depicted here. First, the legislative option – usually in a command and control format – is always preferred when debate involves the Parliament. Second, the ease to change legislation through parliamentary amending ends up dismissing legislative tests – it is easier to amend or abandon a certain statute than to voluntarily test it.[56]

The last two figures ended up detecting the high-level federal bureaucracy players' perception about the actual existence of a legislative policy in Brazil, as well as of its results. They also intended to verify if there was a room for adjustments, projecting its impacts (Figures 5 and 6):

Once again using the scale from 1 to 5, the results show the existence of an effective legislative policy was not clear (2.70), and neither that it was materialised by Decree 4,176/2002 (2.65). According to the surveyed actors, there was no systematic use of legislative quality tools (2.35). In addition, there was an emphasis on the divergence between form and substance: the formal quality of the Brazilian law, not necessarily seen as high (3.17), was superior to its content aspects (2.76).[57]

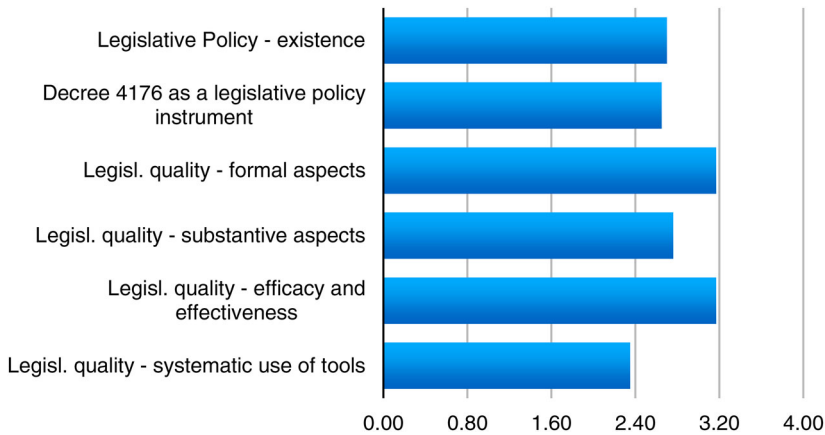

Figure 5. Legislative policy - consciousness.

[56]'The use of sunset legislation is extremely rare. Due to the facilities of modification of statutes by provisional measures, […] it is more worth to "abandon" the law that did not work right, or taking a "hike" in a provisional measure to amend or revoke what is necessary'(author's translation).

[57]Note an exception related to the bills that flow through the Legislative: the regular regime of amendments and draft changes is capable of depriving it from its features, dismissing them from the precepts of legislative quality: 'It is important to differentiate the normative act edited by the Executive Authority, under its competence, and the ones prepared by this Authority and submitted to the National Congress. The projects submitted to the Legislative Authority, most of the times, suffer great amendment. The

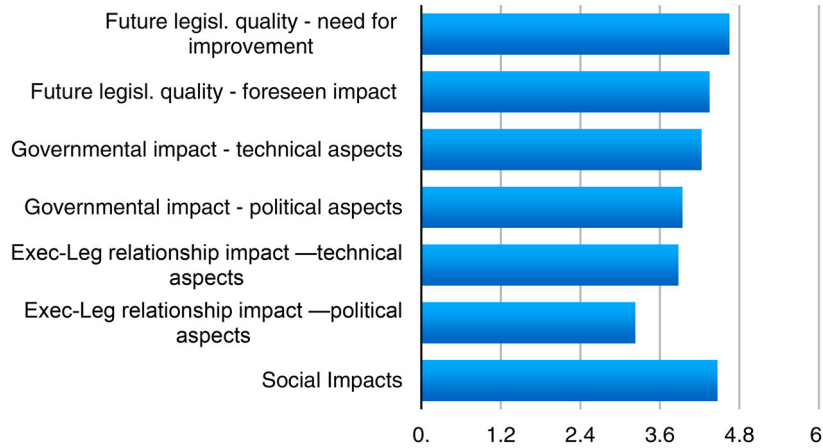

Figure 6. Legislative policy - impact.

Finally, the large room for the Brazilian legislative policy improvement became clear. The interviewed parties argued that there is a large need for quality increment (4.65), and that the systematic use of tools and methodologies could significantly qualify the legislation (4.35). Concerning the impacts that could be generated by a new legislative policy, results were also positive. Informed that in the scale from 1 to 5, number 3 would indicate a neutral response, all the impacts were seen as positive or slightly positive, mainly for the Government. However, it is important to highlight the political sensitiveness verified here (refer to the political impact in the figure), as well as the existence of huge mistrust of the interviewed parties towards its application.

To sum it up, the views of high-level governmental bureaucrats of central rulemaking and lawmaking units of the Brazilian federal Executive branch emphasises what has already been described. Decree 4,176/2002 is well known, but not exactly as an instrument of legislative policy. It is used in its formal and procedural rules; however, it produces little effect in encouraging debates about alternatives, mainly in the substantive range. According to them, attachments I and II are filled in recklessly, by ticking-the-box, with low relevance for the final result.

The basic elements and tools of a legislative quality programme aren't very apparent for the players. Diagnoses, measurement indicators and non-

regular legislative process, in this case, enables a large part of the norms of the Complementary Law no. 95, from 1998, edited pursuant to the Constitution, not to be observed. It is important to indicate that the very constitutional system allows such result. The sanction or its veto and the power of the parliamentary amendment, when exercised, enable non-observance of the norms of legislative elaboration and consolidation. Hence, even if it has properly used the Decree, the edited law shall not necessarily have observed its rules' (author's translation).

traditional alternatives such as temporary laws or legislative tests are out of the game. Notwithstanding, a very important element is the perception that a more adequate policy could improve the quality of the statutes produced by the Executive. It would generate beneficial impacts for the government, for the political relations and, fundamentally, for society.

7. Conclusion

Legislative-regulatory policies are widespread, especially in OECD countries, which does not mean this policy diffusion is convergent. Brazil does have a formal legislative-regulatory meta policy in the federal level as well, at least since 2002. However, observing the complex patterns regarding the Brazilian normative setting, the institutional constraints, and internal and external elements that are clearly imbricated in the workflow within the Executive branch, it is worth saying Brazilian practice does not coincide with what was legally expected.

Literature and recent data converge: the elements stated by the Decree 4,176/2002, which foster the policy, are not strongly obeyed, namely the substantive ones – cost and benefits evaluation, assessing alternatives besides command and control, etc. They have low impact on the legal construction and, in essence, they are not seen as convenient to the contemporary governmental actions.

According to high-level governmental actors, it is reasonable to consider that Brazilian Federal Executive branch lawmaking commonly starts from bad or even non-existent diagnoses, or from poorly supported empirical data. There is little discussion about legislative and non-legislative alternatives. There are not well-defined and not-measurable purposes, and objectives are projected without clear cuts of space and time. To some extent, there is lack of substantive concern.

To sum up, the situation is far behind what has been set forth in the Brazilian legislative policy for more than a decade. The positive aspect is on the clear room for improvement, detected even by the high-level governmental actors. Despite some mistrust and reservations about actual political chances, maybe it is time to get a move on.

Disclosure statement

No potential conflict of interest was reported by the author.