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# Civil servants: tenure, incentives and democracy in the administrative state in Brazil and Latin America

# *Servidores públicos: estabilidade, incentivos e democracia no estado administrativo no Brasil e na América Latina*

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**Abstract**: The present paper aims to investigate the incentives posed by the legal regimen that regulates the civil service in several Latin American countries. The case of Brazil is studied most closely. One of the main features of this system is the existence of broad tenure guarantees which directly affect the way incentives are offered to public officials. The paper discusses the origins and the importance of the tenure system to the administrative state, constitutional democracy and the rule of law in these countries and presents six objectively designed proposals to realign the incentives to which civil servants are subject to without, at least for now, dismantling the tenure system.

**Keywords**: Civil servants. Constitutional democracy. Tenure. Efficiency. Incentives.

**Resumo**: O presente artigo busca investigar os incentivos apresentados pelo regime jurídico da função pública em diversos países da América Latina. O caso do Brasil é analisado com maior profundidade. Uma das principais características deste regime é a existência de amplas garantias de estabilidade que afetam o modo como incentivos são apresentados para servidores públicos. O artigo discute as

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origens e a importância da estabilidade para o estado administrativo, o estado democrático de direito e o império da lei nestes países e apresenta seis propostas objetivas para realinhar incentivos a que funcionários públicos estão sujeitos sem, ao menos por ora, acabar o sistema da estabilidade.

**Palavras-chave**: Servidores públicos. Estado democrático de direito. Estabilidade. Eficiência. Incentivos.

**Contents**: **1** Introduction – **2** The origins of the administrative state and its importance to the rule of law and constitutional democracy in Latin America – **3** Justification for a minimalist approach – **4** The incentives posed to civil servants in Brazil and their importance – **5** Proposals for improving the work environment in the Brazilian public sector – **6** Conclusion – References

## 1 Introduction[1]

Several countries in the civil law tradition adopt, at least to some degree, tenure rules for their civil servants. This means that public officials can only be dismissed in cases of severe misconduct. Even in these cases, the dismissal is subject to the due process of law.

In continental European countries, tenure is usually reserved only for specific categories of civil servants. In certain countries, such as Germany, there are tenured and untenured positions in the civil service, sometimes for people with similar occupations (*e.g.*, professors). On the other hand, nations which follow the French *droit administratif* once offered very broad tenure guarantees, but in recent decades they have enacted reforms that limit these rules to strategic positions (*e.g.*, judges and diplomats).

Despite occasional criticisms, Latin American countries, such as Chile, Argentina and Brazil, still apply tenure rules to the vast majority of their civil servants. Some of these countries are currently conducting studies in order to bring more flexibility to public human resources management.[2] But are they ready to wave tenure securities? This paper aims to discuss the importance of a professional and organized bureaucracy

[1] All the quotations originally in Portuguese and Spanish were freely translated to English by the author.

[2] In Brazil, Professor Carlos Ari Sundfeld, from FGV São Paulo, recently published a short legal column addressing the question. Earlier, he published a newspaper article, along with other public figures, introducing the debate, but few recent legal academic papers dive deep into civil service reforms in the country. There was a broader discussion about the tenure regimen in Brazil during the late 1990s and early 2000s, in the period that followed the Administrative Reform conducted by Constitutional Amendment n. 19/1998. However, these studies eventually faded away as the results of that reform started to present themselves much more limited than initially conceived. The reasons they came up short will not be addressed by this paper, as the purpose is to discuss new reforms in the Latin American civil service. See: SUNDFELD, Carlos Ari. Romper com o direito administrativo estável? Brasília: *Jota*, 2019. Available at: https://www.jota.info/opiniao-e-analise/colunas/publicistas/romper-com-o-direito-administrativo-estavel-17092019. Accessed on: 20 Sep. 2019. See: COSTA, Ana Carla Abrão; FRAGA NETO, Armínio; SUNDFELD, Carlos Ari. Hora de Reformar o RH do Estado. *O Globo*. Economia. 04 Nov. 2018. Available at: https://oglobo.globo.com/economia/hora-de-reformar-rh-do-estado-23209959. Accessed on: 22 Feb. 2019. BRESSER-PEREIRA, Luiz Carlos. Da Administração Pública Burocrática à Gerencial. *Revista do Serviço Público nº 47*. Janeiro-Abril 1996.

to the preservation of the rule of law, dedicating special attention to the advantages of tenure rules in younger democracies.

However, advocating for the protection of tenure rules does not mean ignoring the importance of designing incentives to improve the productivity and the motivation of civil servants. Even inside a tenure system there seems to be room for initiatives designed to create more satisfaction in the public work sector. In order to achieve this objective, the paper will also discuss the incentives currently offered to civil servants and how they can be improved.

These aspects will be considered in four sections. The first section will debate the Weberian origins of the administrative state and the role it plays in the preservation of the rule of law and, more specifically, constitutional democracy in Latin America. The second part will address other arguments that justify a minimalist approach when sensitive and relevant reforms are implemented. Part three will study the incentives currently offered to civil servants in Latin American legal systems and also why the incentives approach matters to the discussion at hand. The fourth and last section will present some concrete proposals in order to improve the work environment in the public sector. The paper will conclude with a short synthesis of the main ideas discussed herein.

## 2 The origins of the administrative state and its importance to the rule of law and constitutional democracy in Latin America

Latin America suffers from deep-rooted political instability and countries here have gone through long undemocratic periods since their independence from Spain and Portugal. During the 20th century, most countries faced military coups followed by violent dictatorships. In Brazil, Uruguay and Argentina redemocratization only took place in the 1980s; in Chile, only in 1990.

Democracy in these countries is still young. Brazil and Chile, in particular, have made important advances since the passing of their current constitutions, especially in regard to the strengthening of their judiciaries and other accountability institutions. This fortification is considered by Melo and Pereira[3] as one of the leading causes of the economic development and political stability experienced by these nations in recent decades. On the other hand, Rose-Ackerman et al. show how the weakness of supervisory agencies undermines the rule of law in Argentina and the Philippines.[4]

[3] MELO, Marcus André; PEREIRA, Carlos. *Making Brazil Work*. Checking the president in a multiparty system. New York: Palgrave Macmillan, 2013, p. 69-96.

[4] ROSE-ACKERMAN, Susan; VALOSIN, Natalia; DESIERTO, Diane. Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines. *Berkeley Journal of International Law*, v. 29, 2011, pp. 246-333.

Melo and Pereira also argue that "a professionalized civil service is also key for checking abuse of power by presidents".[5] A politically impartial bureaucracy also secures technical evaluations of public policies, assures their continuity even when power shifts hands, and helps to protect minorities against current majorities, hence supporting the consolidation of constitutional democracy.

The idea of a professional bureaucracy is not new. In the second half of the 19th century, common law countries, including the USA and the United Kingdom, conducted reforms of their civil service systems designed to enhance political neutrality.[6] In the USA, the implementation of a system of merits in the civil service marked the end of the Gilded Age.[7] German sociologist Max Weber also discussed the pervasive consequences of political patronage in the civil service and the importance of a qualified bureaucracy.[8]

In Latin America, however, the Weberian administration was never fully implemented. Patrimonialism and blurred separation between the public and the private have been present in the continent since the colonial period.[9] The Iberian patrimonialist heritage was never truly overcome, and local leaders and institutions still struggle to internalize notions of impartiality and impersonality in the public administration.[10]

In addition to severe patrimonialism issues, Latin America has historically suffered from endemic levels of corruption. Brazil and Peru, for example, share the rank of 105 out of 180 countries in corruption perception, each obtaining only 35 out of 100 points in transparency consciousness; Colombia ranks 99 out of 180 and Mexico ranks 128 out of 180.[11] The best positioned Latin American countries in the corruption perception rank are Uruguay (23/180), Chile (27/180) and Argentina (85/180).

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5 MELO, Marcus André; PEREIRA, Carlos. *Making Brazil Work*. Checking the president in a multiparty system. New York: Palgrave Macmillan, 2013, p. 11.

6 MORAN, Michael; REIN, Martin; GOODIN, Robert E. *The Oxford Handbook of Public Policy*. New York: Oxford University Press, 2016, p. 61.

7 MASHAW, Jerry L. *Creating the Administrative Constitution*. The lost one hundred years of American Administrative Law. New Haven: Yale University Press, 2012, p. 227-282. VERMEULE, Adrian. *Law's Abnegation.* Cambridge: Harvard University Press, 2016, p. 25.

8 WEBER, Max. *Economia y Sociedad*. México. Fondo de Cultura Econômica, 1964. WEBER, Max. *Law in Economy and Society*. New York: Simon and Schuster, 1954.

9 FAORO, Raymundo. *Os Donos do Poder*: Formação do Patronato Político Brasileiro. 5. ed. São Paulo: Globo, 2012.

10 O'DONNELL, Guillermo. Polyarchies and the (un)rule of law in Latin America. *In*: MÉNDEZ, Juan; O'DONNELL, Guillermo; PINHEIRO, Paulo Sérgio (Org.). *The rule of law and the unprivileged in Latin America*. Notre Dame: University of Notre Dame Press, 1998. ANDREWS, Christina W.; BARIANI, Edson. *Administração Pública no Brasil*: breve história política. São Paulo: Editora UNIFESP, 2010, p. 25.

11 TRANSPARENCY INTERNATIONAL. *2018 Corruption Perception Index*. 2019. Available at: https://www.transparency.org/cpi2018?gclid=CjwKCAiAhp_jBRAxEiwAXbniXZ1KVnK3DbijDR09WBVWLqaq5wPkfkVvY_81jHkuNKg6Qi2YnSJjRoCuYIQAvD_BwE. Accessed on: 16 Feb. 2019.

Acts of corruption have very negative effects on the economy and the population in general. Corruption drains money that could be invested in public policies and pushes away serious investors. On the other hand, every act of public corruption (which, by definition, excludes acts of corruption that take place in private entities and involve only private parties – *e.g.*, a CEO offers to hire a law firm as long as the firm pays a "fee" to a high-ranking executive) involves a public official, even when she refuses the bribe. From a managerial standpoint, corruption schemes also produce toxic workplaces and create dissatisfaction among honest public officials. They disrupt internal equality perceptions, since moral misbehavior not only is not punished but also receives financial compensation and they make truthful civil servants feel used, mislead and thus unmotivated.

On the other hand, people respond to the incentives that institutional design presents to them; therefore, with the right incentives it is possible to reduce engagement in corruption.[12] The existence of a strong civil service, selected by a merit-based system, can reduce acts of corruption, as public officials tend to act more technically than in systems of spoils.

European countries in the French tradition (*e.g.* France, Italy and Portugal) have reformed their legal systems and reserved tenure only for strategic professions, such as judges, diplomats and police officers. For other categories, the government is now allowed to contract workers under the same rules applicable to private employers (contractualization). Even though these reforms do not seem to have undermined the état de droit in Western European countries, it is important to highlight that democracy is more consolidated in these nations than in Latin America.

Common law countries usually do not adopt broad tenure rules for their public servants. However, this does not mean that they do not have an organized and impartial Weberian bureaucracy. In fact, their situation is quite the opposite. Especially in the United States of America, the administrative state has been in the center of a profound debate about the powers of the "fourth branch." While some critics argue that the administrative state is formed by a bureaucratic apparatus which acts beyond and without regard for democratic values,[13] others affirm that civil servants actually act as a counterpoint to the authoritarian tendencies of some elected leaders.[14] The former group considers the administrative state to be

[12] ROSE-ACKERMAN, Susan; PALIFKA, Bonnie. *Corruption and Government*: Causes, Consequences and Reform. Second Edition. New York, NY: Cambridge University Press, 2016, p. 165-204.

[13] MARINI, John. *Unmasking the Administrative State*. The crises of American politics in the twenty-first century. New York: Encounter Books, 2019.

[14] GINSBURG, Tom; HUQ, Aziz Z. *How to Save a Constitutional Democracy*. Chicago; London: The University of Chicago Press, 2018, p. 225.

undemocratic because it curbs the will of directly elected representatives, whereas the latter sees civil servants as important guardians of the rule of law.[15]

Even without broad tenure guarantees, public officials manage to slow controversial actions taken by elected officials in common law nations. One possible explanation for this phenomenon is that the system of merits is so particularly rooted in countries with long democratic histories that the political cost of arbitrary dismissals may sometimes be extremely high, or even unbearable.[16] In addition, particularly in the USA, the directors of executive agencies are appointed to fixed terms, which, in theory, allows the agencies as a whole to be more protected from political influences.

However, as described above, the rule of law is constantly undermined in Latin America by persistent patrimonialism, confusion between public and private spaces, endemic levels of corruption (despite some advances in the past years, including unprecedented criminal convictions and imprisonment of powerful political leaders and wealthy businessmen[17]) and impressive indicators of economic inequality, especially in Brazil, which is considered one of the most unequal countries in the

[15] SUNSTEIN, Cass. Deliberative Democracy in the Trenches. *Daedalus*. Journal of the American Academy of Arts & Sciences. Summer, 2017.

[16] Adrian Vermeule explains the importance of conventions to measure the actual degree of independence of a certain agency, even when they do not count with formal independence mechanisms "recognition of conventions, as context for the interpretation of legal rules, and impermissible direct enforcement of conventions by the judiciary. Suppose that (1) some relevant statute, rightly interpreted, gives the President the power to discharge an agency official at will; (2) an extrajudicial convention of independence and tenure protection has grown up around the agency; (3) the President violates the convention by removing the agency official; and (4) the agency official sues to prevent or remedy the discharge. In this posture, courts will not directly enforce the convention, and will instead respect the legal power of the President to remove the official. The convention must be enforced, if at all, by extrajudicial mechanisms, such as retaliation by Congress or other actors, or blaming, shaming, and electoral sanctions by the political public. However, as in the PCOAB case, the court may recognize the convention indirectly, in a different procedural posture or in the course of interpreting relevant statutes, and such recognition may have a focal-point effect that clarifies the existence of the convention and thus makes political sanctions for a breach more likely" (VERMEULE, Adrian. Conventions of Agency Independence. *Columbia Law Review*. Vol. 113. No. 115. January 31, 2011. pp. 1163-1238, p. 1222). Rose-Ackerman *et al.* also discuss the insufficiency of formal independence instruments and the important of strong agencies to the consolidation of democracy.

[17] In 2012, several Brazilian politicians were criminally convicted by the Supreme Court (*Ação Penal* nº 470) for a corruption scandal of vote-buying known as "*mensalão*" (ROSE-ACKERMAN, Susan; VALOSIN, Natalia; DESIERTO, Diane. Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines. *Berkeley Journal of International Law*, v. 29, 2011, pp. 246-333). One year later, Operation Car-Wash was initiated, leading to the imprisonment of powerful politicians and businessmen, not only in Brazil but in other countries, such as Peru. The operation's credibility and impartiality are currently at the center of great polemics, since journalist Glenn Greenwald released a series of reports containing electronic messages and conversations between the prosecutors and the judge (now former Minister of Justice Sergio Moro) responsible by the operation. For further consideration, check: https://theintercept.com/2019/06/09/brazil-archive-operation-car-wash/. Accessed on: 22 Sep. 2019.

world (Coutinho, 2010).[18] In this scenario, although the American case shows that tenure is not the only path or even enough *per se* to guarantee a strong bureaucracy, Latin America's long history of public-private confusion points out that tenure may be an important part of an independent and impartial civil service.

Furthermore, the état de droit is now under attack by far-right movements such as those in Hungary and Poland. On the opposite end of the political spectrum, Venezuela has experienced an ongoing erosion of democracy since the early 2000s. Though on a smaller scale, Argentina also faces political division and deep economic challenges. The political context of Latin America is, hence, not entirely stable. Dictatorships are not a turned page and democracy is not entirely consolidated.

In this context, waving tenure guarantees can be dangerous to the rule of law in the continent. First, untenured public officials can be more easily dismissed when they refuse to implement authoritarian policies, or even when they point out unconstitutional and undemocratic tendencies of government projects. Second, without tenure it is easier to replace civil servants with people who are more politically and ideologically aligned to the current leaders, jeopardizing the system of merit for the benefit of a system of spoils.

The price to be paid if these threats materialize is extremely high, not only for Latin America itself but for the entire world. Imagine, for example, if the Brazilian President is not worried about the preservation of the Amazon rainforest. In this (not entirely) hypothetical situation, tenured civil servants from an environmental agency can stop the issuance of deforestation licenses with more security than they would have if they were untenured.[19] In spite of the risk of incentive misalignments, tenure can be vital to securing independence in strategic functions, such as (but not limited to) judges, prosecutors and tax and environmental auditors. It also

[18] COUTINHO, Diogo R. Linking Promises to Policies: Law and Development in an Unequal Brazil. *The Law & Development Review*, vol. 3, No. 2. 2010. Available at: http://ssrn.com/abstract=2145830. Accessed on: 22 Feb. 2019. Economic inequality has dropped in Brazil in recent years, but due to economic crises and unemployment is now again on the rise in the country. Profound differences between the rich and the poor contribute to deteriorate democracy and the rise of populist leaderships (MARKOVITS, Daniel. *The Meritocracy Trap*: how America's foundational myth feeds inequality, dismantles the middle-class and devours the elite. New York: Penguin Press, 2019). For data and statistics regarding economic inequality in Brazil, see: https://portal.fgv.br/en/news/study-reveals-rising-poverty-and-inequality-brazil-over-last-four-years and https://en.unesco.org/inclusivepolicylab/sites/default/files/analytics/document/2017/2/chap_21_05.pdf. Accessed on: 22 Sep. 2019.

[19] During the recent crises concerning the Amazon rainforest, the director of the Brazilian Space Institute, who had presented scientific evidence that put in check the government's version that there was not a rise in deforestation indexes in the Amazon region, was fired by far-right President Jair Bolsonaro. Among other vehicles, the fact was reported by the British newspaper The Guardian: https://www.theguardian.com/world/2019/aug/02/brazil-space-institute-director-sacked-in-amazon-deforestation-row. Accessed on: 30 Sep. 2019.

helps the bureaucracy to resist eventual authoritarian tendencies of new leaders and maintain the rule of law.[20]

There are some organizations that do not require a special state authority, such as public education systems, in which people have traditionally advocated for the admissibility of tenure flexibilization or even extinction.[21] Nevertheless, even these may not be safe from authoritarian intrusions. In Brazil, far-right deputies and members of civil society who believe that schools have a left-wing bias have created a movement that promotes "departialisation" in schools. One deputy in particular has publicly encouraged students to film and denounce their teachers to curb political indoctrination.[22]

The current political situation in Latin America is quite delicate, and it does not seem to be a good environment for tenure flexibilization. As Trubek remarked when commenting on the shortcomings of Law and Development, paths and context matter when designing institutional reforms.[23] Latin America has experienced long periods of authoritarianism, and its current context does not reflect a solid democratic age. Accordingly, it is important to conceive incentives for better performance that offer fewer risks to the rule of law in unstable political periods.

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[20] GINSBURG, Tom; HUQ, Aziz Z. *How to Save a Constitutional Democracy*. Chicago; London: The University of Chicago Press, 2018, p. 103. NOU, Jennifer. Civil Servant Disobedience. *Chicago-Kent Law Review*, Vol. 94, No. 2, 2019, p. 373. Available at: https://ssrn.com/abstract=3356006. Accessed on: 30 Mar. 2019. The expression "rule of law" is used in this article as a close synonym to the French expression "État de Droit" or the German expression "*Rechtsstaat*", even though there are subtle differences between their meanings, as pointed out by Loughlin and Sordi (LOUNGHLIN, Martin. *Foundations of Public Law*. New York: The Oxford University Press. 2010, p. 312-341. SORDI, Bernardo. Révolution, Rechtsstaat, and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe. *In*: ROSE-ACKERMAN, Susan; LINDSETH, Peter L. (Org.). *Comparative Administrative Law*. Northampton: Edward Elgar, 2010. pp. 23-36).

[21] BRESSER-PEREIRA, Luiz Carlos. Da Administração Pública Burocrática à Gerencial. *Revista do Serviço Público*, nº 47. Janeiro-Abril 1996.

[22] This fact was reported by several Brazilian newspapers and international media vehicles at the time, such as the British newspaper The Guardian. See: https://www.theguardian.com/world/2019/may/03/brazil-schools-teachers-indoctrination-jair-bolsonaro and https://oglobo.globo.com/sociedade/educacao/deputada-eleita-por-partido-de-bolsonaro-cria-polemica-ao-pedir-que-estudantes-denunciem-professores-23195716. Accessed on: 15 Sep. 2019.

[23] "All of the law and development schemes, from state led-growth through neo-liberalism, have been tried, but none remains robust. We can look back on them with a certain disdain but also with nostalgia. Their great appeal – and their greatest weakness – was their universalism and their simplicity. These ideas subordinated law to one big idea about development and the best way to achieve it, whether through the state or the market, via socialism or capitalism. They told us what was important and what was not; what needed to be changed and what could be left alone. Their message and their guidance were universal: each scheme produced recipes that could be used anywhere so that to practice law and development one did not have to master all the complexity and heterogeneity of dozens of distinct legal systems. There was no shortage of general formulas to apply, best practices to diffuse, prepackaged reforms to transplant" (TRUBEK, David M. The Owl and the Pussycat: is there a future for "Law and Development"? *Wisconsin International Law Journal*, vol. 25, p. 235-242, 2007, p. 237-238).

## 3 Justification for a minimalist approach

Despite its relevance in securing political neutrality in the administrative state, it cannot be denied that tenure has its own vicissitudes. Some public officials hide behind these protections in order to perform poorly, be frequently late or absent, or to labor recklessly. Others, after witnessing the heedless attitude of some colleagues, may not have enough motivation to act diligently. The purpose of this paper is to discuss the incentives presented to civil servants and how they can be improved beyond imposing tenure restrictions. The desire to maintain tenure guarantees for the time being is not merely contingent. In addition to contextual concerns, other arguments can be presented to advocate for simpler proposals.

First, minimalist approaches to institutional design innovations have been recommended for a long time and by several authors.[24] Experimenting with institutions offers inherent risks. Implementing untested proposals requires wariness and close monitoring in order to evaluate the intended and unintended consequences, systemic effects and correct deviances. Stephenson demonstrates that minimalist premises also apply to fight against corruption and that it is also possible that malfeasance decreases as a result of simple initiatives that combine to build a new culture of integrity.[25]

The idea is similar to the now-in-fashion regulatory sandboxes technique through which new technologies and forms of regulation are gradually introduced and tested in minor and controlled scales before they are broadly expanded. Minimalist reforms offer fewer risks than big-bang approaches and can be matured and internalized by the affected persons before a possible future expansion.[26]

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[24] DEWEY, John. *The Public and its Problems*. New York: Swallow Press, 1927. ACKERMAN, Bruce; ALSTOTT, Anne. *The Stakeholder Society*. Cambridge: Yale University Press, 2000. SUNSTEIN, Cass. *After the rights revolution*. Cambridge: Harvard University Press, 1990. SABEL, Charles; SIMON, William. Minimalism and Experimentalism in the Administrative State. *Columbia Public Law Research Paper n. 10*, p. 53-93. 2011. SABEL, Charles; ZEITLIN, Jonathan. Experimentalist Governance. *In*: LEVI-FAUR, Davi. *The Oxford Handbook of Governance*. Oxford: Oxford University Press, 2012, p. 169-185. UNGER, Roberto Mangabeira. A constituição do experimentalismo democrático. *Revista de Direito Administrativo*, v. 257, p. 57-72, 2011.

[25] STEPHENSON, Matthew. *Corruption as a Self-Reinforcing Trap*: Implications for Reform Strategies. October, 2018. Available at: http://cienciassociales.edu.uy/departamentodeeconomia/wp-content/uploads/sites/2/2014/10/Self-Reinforcing-Corruption-October-2018.pdf. Accessed on: 22 Feb. 2019.

[26] Sandboxes are usually applied in financial technologies regulation, but the concept of gradual introduction, followed by close monitoring and cautious expansion of new rules can be useful in any market or even institutions in which large systemic risks are involved. Further consideration on regulatory sandboxes can be found in Zetzsche *et al*. (ZETZSCHE, Dirk; ANDREAS; Buckley; ROSS, P.; ARNER, Douglas W.; BARBERIS, Janos Nathan. Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation. *23 Fordham Journal of Corporate and Financial Law*, pp. 31-103. 2017. Available at: https://ssrn.com/abstract=3018534. Accessed on: 20 Sep. 2019).

Furthermore, civil servants constitute an extremely organized interest group in Brazil.[27] Their strength has increased over time, and can be observed by simply reading the 1988 Federal Constitution, which presents several articles which grant rights to public officials that are not provided to private employees. Some of them are discussed in this paper, such as tenure rules (article 41), but there are others which are not discussed here, such as special retirement rules (article 40).[28] Civil servants have prominent unions that lobby against bills and proposed constitutional amendments[29] that affect their interests, which increases the political costs of approving these proposals. Any proposal to abolish or even make tenure rules more flexible would find great resistance from civil servants and their associations, and very broad reforms in the civil service will probably never see daylight. Therefore, minimalist proposals are not only more cautious but also, from a pragmatic standpoint, more realistic.

The political strength of the bureaucracy as an organized interest group expands principal-agent conflicts in the public administration. In government structures, when the interests of the agents (public officials) are misaligned with the interests of the principals (elected chiefs), the former usually use their political toolkit to undermine initiatives from the latter and safeguard their preferences.[30] The principal-agent

[27] Further considerations on the interest group theory can be found in Farber and Frickey. The authors comment specifically on the relations between public choice theory and public law, including an example directly connected to one species of public officials: "Some readers may wonder why the social science literature about interest groups is relevant to law. If you think of judges as simply applying existing legal rules, the judges' political worldview doesn't seem very relevant. But legal rules are often unclear and conflicting, thus requiring judges to take a more creative role. A basic issue in 'hardcases' is how much judges should defer to other branches of government rather than trying to solve problems themselves. Their willingness to defer to the legislature or the executive may depend on how they perceive those branches" (FARBER, Daniel A.; FRICKEY, Philip P. *Law and public choice*. A critical introduction. Chicago: University of Chicago Press, 1991, p. 13). The topic is also addressed by Mashaw (MASHAW, Jerry L. *Greed, Chaos and Governance*. Using Public Choice to Improve Public Law. New Haven: Yale University Press, 1997, p. 203).

[28] Other prerogatives are granted by ordinary laws, such as generous rules regarding service leave (*e.g.,* longer paternity leave, breastfeeding leave, studies leave) and subsidies for health support and childcare. Stronger careers come with additional privileges. For example, judges and prosecutors are entitled to sixty days of time off annually, whereas private employees and even the vast majority of public servants can take only thirty days per year.

[29] Even though the 1988 Brazilian Constitution establishes a qualified quorum for approval of amendments (3/5 of deputies and senators and a two-round voting), it is relatively common for its text to be altered or expanded. In thirty-one years, the Constitution has already been altered 101 times. The amendments can be found at: http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/quadro_emc.htm. Accessed on: 15 Sep. 2019.

[30] In Gary Miller's words "Principal-agency theory (PAT) is one modeling technique that specifically addresses various manifestations of Weber's asymmetry. Like Weber, PAT assumes a relationship in which the agent has an informational advantage over the principal and takes actions that impact both players' payoffs. The principal has the formal authority, but in PAT, the attention is on a particular form of formal authority: the authority to impose incentives on the agent. Unlike Weber, PAT focuses on the leverage that these incentives give the informationally disadvantaged principal. In particular, the question is whether the principal can induce the more expert agent to take those actions that the principal would take if the principal had the same information as the agent. By manipulating the agent's incentives, the principal seeks to minimize shirking, or agency costs – the losses imposed on the principal by an inability to align

theory tries to realign the incentives presented to the agents in order to reduce these conflicts.[31]

## 4 The incentives posed to civil servants in Brazil and their importance[32]

Institutional Economics studies the role of institutional design and incentives in the functioning of institutions, defined by North as "the humanly devised constraints that structure human interaction. They are made up of formal constraints (*e.g.*, rules, statutes, constitutions), informal constraints (*e.g.*, norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics. Together, they define the incentive structure of societies and specifically economies".[33]

In this sense, the civil service legal regimen, established by a web of constitutional, statutory and secondary rules, represents an institution, or a set of constraints that designs human behavior and interaction. Understanding the incentives offered by the institution is crucial for improving the quality of public administration and public utilities rendered to the population.[34]

One of the major complaints of citizens in general when dealing with the government is the poor quality of its activities. A study conducted in 2014 asked Brazilians to rate the nation's public utilities, and the results were grades of under

the agent's self-interest with that of the principal. This is the motivational question for the mathematical analysis of what PAT calls 'the principal's problem'" (MILLER, Gary. The Political Evolution of Principal-Agent Models. *Annual Review of Political Science*, v. 8, p.203-225, 2005, p. 203-204).

31 SHAPIRO, Susan P. Agency Theory. *Annual Review of Sociology*. V. 31, 2005, pp. 263-284, p. 271-272.

32 Sections III and IV take into account the peculiarities of the Brazilian legal regimen. Nonetheless, many of the considerations and proposals presented can be applied to other Latin American countries, as they also adopt similar tenure rules to their civil servants.

33 NORTH, Douglass C. Economic Performance Through Time. *84 The American Economy Review*, 359. 1994, p. 360.

34 Stearns presents a curious illustration of the civil service legal regimen as an institution and how institutional design can impact in the institution's operation: "As an example of the importance of institutions in motivating individual behavior, consider the relative difference in 'independence' that judges have in various institutional settings. In the United States, federal judges have a high degree of independence. Article III judges are appointed for life rather than elected for a term of years and serve during 'good behavior'. This has been interpreted to permit removal only for corruption or malfeasance, rather than for the substantive content, or popularity, of their ruling or written opinions. In contrast, many states have various forms of elected judiciaries. In some states, judicial candidates run for office in standard partisan elections. Imagine two otherwise identical candidates for judgeships, one of whom is appointed to a federal court and the other of whom is elected to a state court form a term of years. Notwithstanding their similar ideologies and common philosophy concerning the proper judicial role, it is reasonable to predict that each will behave differently based upon the incentives associated with the two differing institutional settings. Few would deny that federal judges care about how their rulings and opinions are received. We can predict, however, that in contrast with state judges who face reelection pressure, Article III judges are less likely to respond directly to the pressures of popular opinion and are more likely to adhere to their preexisting judicial philosophy, including, perhaps, indulging their personal ideological vies even if those vies are unpopular with the general public" (STEARNS, Maxwell L.; ZYWICKI, Todd J. *Public choice concepts and applications in law*. St. Paul, Thompson Reuters, 2009, p. 11-12).

4 (on a scale of 1 to 10) for most of the services, including public education, health care, transportation and security.[35] Especially in developing countries, the poor results of public utilities can be explained by multiple factors. Some of them are completely unrelated to public officials, such as limited budgets paired with great demand, limited availability of technology, equipment and resources in general, and out of date and confusing regulations that reduce efficiency.

Other reasons, though, are directly connected to civil servants and the legal regimen to which they are subject. Critics often cite an insufficient number of staff members, low productivity, unmotivated teams and disincentives to innovate ("*things have always been this way*" is an accurate synthesis of the status quo bias commonly found in the corridors of public buildings[36]) that paint an untrustworthy portrait of the civil service.[37] Even public officials usually endorse this criticism: it is not unusual for them to feel unmotivated and dissatisfied themselves.[38]

On the other hand, recent research points out that in 2018 Brazil applied 28% of its GDP to the salaries of civil servants and members of the military, including retired and active employees from the three government levels.[39] When one takes into account only the expenditures on active officials – both civil and military – the expenditures reach 10% of Brazil's GDP. In absolute numbers this means that in 2018, the country spent around 196 billion dollars on the wages of public servants.[40] Although the country proportionally spends more on its public officials than other similar economies, like Chile, or even developed nations, like France and the USA, the expenditures have not resulted in a high-quality public services.[41]

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[35] The study is available at: http://atarde.uol.com.br/brasil/noticias/1586440-brasileiro-se-diz-insatisfeito-com-servicos-publicos. Accessed on: 22 Feb. 2019.

[36] The same diagnosis is presented by Tosta: "(...) There are cultural obstacles to innovation. There are elements in our culture that serve as counterparts to experimentation in public institutions, many of which are related to the perception of a distance between the government and the citizens. The logics of 'things have always been this way' and 'someone else will deal with this problem' are the rule in the Brazilian bureaucracy, Kafkian in essence; the new is seen with resistance, as an additional unnecessary chore, an energy waste; the old, as safe and peaceful" (TOSTA, André Ribeiro. Instituições e o Direito Público: empirismo, inovação e um roteiro de análise. Rio de Janeiro: Lumen Juris, 2019, p. 146-147).

[37] RIBEIRO, Leonardo Coelho. O direito administrativo como caixa de ferramentas e suas estratégias. *RDA – Revista de Direito Administrativo*, Rio de Janeiro, v. 272, pp. 209-249, maio/ago. 2016, p. 230-231.

[38] KLEIN, Fabio Alvim; MASCARENHAS, André Ofenheim. Motivação, satisfação profissional e evasão no serviço público: o caso da carreira de especialistas de políticas públicas e gestão governamental. *Revista Brasileira de Administração Pública*. Rio de Janeiro. Vol. 50. Jan./fev. 2016. pp. 17-39.

[39] See:https://oglobo.globo.com/economia/arminio-brasil-gasta-28-do-pib-com-salarios-de-servidores-ativos-aposentadorias-23447002. Accessed on: 17 Feb. 2019.

[40] See: https://oglobo.globo.com/economia/brasil-ja-gasta-10-do-pib-com-salarios-de-servidores-ou-725-bilhoes-por-ano-23313405. Accessed on: 17 Feb. 2019.

[41] WORLD BANK. *A Fair Adjustment: Efficiency and Equity of Public Spending in Brazil*. 2017. Available at: http://documents.worldbank.org/curated/en/643471520429223428/Volume-1-Overview. Accessed on: 17 Feb. 2019. OECD. *Avaliação da Gestão de Recursos Humanos no Governo*. Brasil. 2010. Available at: https://www.oecd-ilibrary.org/avaliacao-da-gestao-de-recursos-humanos-no-governo-relatorio-da-ocde-brasil_5kmhb2f4t546.pdf?itemId=%2Fcontent%2Fpublication%2F9789264086098-pt&mimeType=pdf. Accessed on: 17 Feb. 2019.

The dissatisfaction of both the public and of civil servants themselves reveals that, even though the country is expending considerable funds on human resources, there is room to improve the quality of its expenditures. As observed by Delfgaauw and Dur, most of the distortions this text refers to seem to be, in fact, a symptom of a bigger problem: the reversed incentives in public employment.[42]

Incentives analysis is a typical economic approach. Lawyers are not used to operating in this system, particularly in Latin America where law schools still favor pure normativism and interpretation of legal statutes.[43] Although Law and Economics has experienced large growth over the last decade, particularly in Brazil, a significant number of the articles and studies involving Economic Analysis of Law ("EAL") perspectives of administrative law focus exclusively on economic analysis of procurement and public contracts. Only a small number of papers previously published apply Law and Economics concepts to other administrative law institutes, such as the civil service. To address this gap, this paper intends to use the incentives approach, typical in EAL, to investigate the hypothesis that the statutes to which public officials are submitted at present actually reduce incentives to innovate and be more productive and present alternatives that may successfully increase their motivation.[44]

The recruitment of public officials is mostly carried out through difficult, impartial and broadly open[45] written (and, for some careers, oral) examinations,[46] which tend to select well-prepared candidates.[47] The system is not perfect, as appointments exclusively determined by examination results may produce adverse selection by choosing candidates who are able to perform well on tests but are not necessarily suited to the daily activities of the public service.[48]

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42 DELFGAAUW, Josse; DUR, Robert. Incentives and Workers' Motivation in the Public Sector. *Tinbergen Institute Discussion Paper No. 04-060/1*. 2004. Available at: https://ssrn.com/abstract=555062. Accessed on: 31 Mar. 2019.

43 JORDÃO, Eduardo. The Three Dimensions of Administrative Law. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 19, n. 75, jan./mar. 2019. p. 21-38, p. 31. Available at: https://www.researchgate.net/publication/333721974_The_Three_Dimensions_of_Administrative_Law. Accessed on: 20 Sep. 2019.

44 CALSAMIGLIA. Albert. Eficiencia y Derecho. *Doxa*, Cuadernos de Filosofia del Derecho, 1987. Vol. 4, p. 284.

45 Even though participation is broad, interested parties must sometimes fulfill objective requirements compatible to the position in question. For example, to apply for a position as a public physician, the candidate must present a valid medical school diploma.

46 The system of examinations in Brazil is similar to the one adopted for centuries in China Further considerations on the Chinese system can be found in Ohnesorge (OHNESORGE, John. Administrative Law in East Asia: A Comparative-Historical Analysis. *In*: ROSE-ACKERMAN, Susan; LINDSETH, Peter L. (Org.). *Comparative Administrative Law*. Northampton: Edward Elgar, 2010).

47 GOODIN, Robert E. (Ed.). *The Theory of Institutional Design*. Cambridge: Cambridge University Press, 1998, p. 193.

48 MENDONÇA, José Vicente Santos de. *O Concurso Público e o Algoritmo pouco Sofisticado do Direito Administrativo*. 2019. Available at: https://www.jota.info/opiniao-e-analise/artigos/o-concurso-publico-e-o-algoritmo-pouco-sofisticado-do-direito-administrativo-16022019. Accessed on: 17 Feb. 2019.

Nevertheless, the method usually ensures transparency and impartiality in the selection processes.[49] Objective selections are still preferable to free nominations, especially in legal systems with a long patrimonialist history, such as those in Latin America. Eventual mischoices can be corrected, or at least minimized, through periodic performance evaluations, as will be discussed in the following pages.

Another common criticism of hiring civil servants based on test results is the perpetuance of elitistic patterns and economic inequality, since candidates that come from wealthier environments tend to have more educational opportunities and perform better on these tests.[50] Notwithstanding the undeniable existence of room for improvements, affirmative actions in recent years have brought more diversity to the public employment environment.

For civil servants selected through examinations,[51] the problem appears to be less the choosing mechanisms and more the absence of effective supervision of their quality of work once they are appointed to their positions. The Brazilian Federal Constitution statutes that civil servants only acquire tenure after they have worked for three years in a position. After three years of service, the public official should be evaluated by a special commission and, if approved, attain tenure that lasts until she retires (it can be said, therefore, that civil servants in Brazil have life tenure guarantees).[52] If not approved during the evaluation, the person should be dismissed from the civil service.

The problem here lies not in theory, but in practice. Even though the Constitution expressly obliges an evaluation before the civil servant is tenured, in practice many careers do not do it or perform a mere *pro forma* measurement – especially considering that it is rendered by a person's own colleagues, which may give space for corporativist behaviors.

The incentives are even more reversed after public officials acquire tenure. According to the Federal Constitution, they should be periodically evaluated and

[49] STEPHENSON, Matthew. To Combat Corruption, Argentina Must Insist on Meritocratic Hiring in the Civil Service. 2019. Available at: https://globalanticorruptionblog.com/author/mstephen404/. Accessed on: 22 Feb. 2019.

[50] For further considerations regarding the elitistic patterns of these examinations in Brazil, see Fontainha *et al.* (FONTAINHA, Fernando de Castro *et al. Processos seletivos para a contratação de servidores públicos*. Brasil, o país dos concursos? Rio de Janeiro: FGV Direito Rio, 2014. Available at: https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11929/Processos%20seletivos%20para%20a%20contrata%C3%A7%C3%A3o%20de%20servidores%20p%C3%BAblicos%20-%20Brasil%2C%20o%20pa%C3%ADs%20dos%20concursos.pdf. Accessed on: 21 Sep. 2019).

[51] In Brazil, the tenure system is reserved only for public servants recruited through open examinations. In addition to tenured civil servants, the public sector also offers positions of trust, which can be freely fulfilled by public authorities. However, the scope of this article resides only in tenured workers.

[52] After the civil servant acquires tenure, she can only be dismissed in four cases: administrative procedure with due process guarantees, final judicial decision, periodic performance evaluation and inevitability of public finances' restructuration (Brazilian Federal Constitution, articles 41, §1º and 169, §4º).

could be subject to dismissal in case of insufficient grades.[53] To date, however, this has never been put in practice, since Article 41, §1, III demands a complementary law to set the boundaries of these evaluations and this statute has never been approved (which demonstrates the strength of the civil servants' interest group in the legislative branch).

In addition to the tenure system mentioned above, the civil service in Brazil is characterized by features such as criteria for promotions that favor service time, small gaps between starting and finishing salaries, and small or non-existent productivity bonuses. It is common for public careers to have similar initial and final wages. For most civil servants, the initial wage is already considerably higher than the average; but for others, in addition to a low initial salary, the final remuneration is also not robust. This small gap results in little space for promotions and wage increases, which also reduces the room for monetary performance incentives.

Even within the limited space available for promotions and career progressions another prevalent problem appears. Some careers only offer seniority promotions, while others combine seniority and merit-based promotions, but do not offer objective criteria for promotions based on performance. Exclusive seniority-based promotions are problematic because they offer no incentives for good quality work, while merit-based promotions without objective rules lead to personal favoritism (and to *vendettas* as well).

A similar logic can also be applied to the definition of the position that the civil servant will occupy inside an institution. In some careers these choices are exclusively based on seniority, disregarding personal preferences and abilities. Others offer some or even full freedom for directors and chiefs to pick where their subordinates will be allocated, which on the one hand may permit the assessment of work positions in accordance with the person's actual vocation, but on the other hand they also create considerable room for supervisors to act without impartiality.

[53] This tool was not present in the original text of the Constitution. In Brazil, the largest public employment reform since the nation's redemocratization took place in 1998, ten years after the passing of the 1988 Brazilian Constitution. The reform, promoted by the 19th Amendment to the 1988 Constitution, tried to incorporate some of the New Public Management ideals (for example, the periodic evaluations mentioned above). Similar movements occurred during the 1980s and 1990s in other Latin American countries, such as Chile, Argentina and Peru, which conducted reforms of their civil servants' legal rules inspired by the Washington Consensus policies and NPM ideas. See: BRESSER-PEREIRA, Luiz Cartos. New Public Management Reform: Now in Latin America, and Yet. *Programa de Estudos Políticos UERJ*. 2001. Available at: https://pesquisa-eaesp.fgv.br/sites/gvpesquisa.fgv.br/files/arquivos/bresser_-new publicmgmtreform.pg_.pdf. Accessed on: 17 Feb. 2019. SHAPIRO, Mario G. Repensando a Relação entre Estado, Direito e Desenvolvimento: os Limites do Paradigma *rule of law* e a Relevância das Alternativas Institucionais. *Rev. Direito GV*, vol. 6, nº 1. São Paulo Jan./June 2010. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322010000100011. Accessed on: 22 Feb. 2019. SHAPIRO, Mario G. Repensando a Relação entre Estado, Direito e Desenvolvimento: os Limites do Paradigma *rule of law* e a Relevância das Alternativas Institucionais. *Rev. Direito GV*, vol. 6, nº 1. São Paulo Jan./June 2010. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322010000100011. Accessed on: 22 Feb. 2019.

The picture outlined in the above paragraphs aims to demonstrate the central argument of this section: that the incentives in the public sector environment are misaligned. This diagnosis is especially relevant, since, as Ariely points out, most people are not fully intrinsically motivated, but rather they act according to their environment.[54] As a result, with the right incentives, civil servants can perform better, adopt more trustful behaviors, feel more motivated, and render better public services.[55]

Employee motivation can be both intrinsic and extrinsic.[56] Intrinsic motivation refers to a sense of purpose, meaning and pleasure that a person finds in her work, and extrinsic motivation is connected to material issues, such as their wage policy and their work environment.[57] Motivation is also influenced by equality perceptions. People tend to pursue other employment opportunities when they feel

[54] ARIELY, Dan. *The* (*Honest*) *Truth About Dishonesty*. Harper. International Edition, 2013.

[55] Half of the people who choose to leave their occupations make this decision based on personal dissatisfaction. Motivation is, therefore, one of the cornerstones of employees' gratification, which advocates the importance of a more fulfilling work environment, including in the public administration. (KLEIN, Fabio Alvim; MASCARENHAS, André Ofenheim. Motivação, satisfação profissional e evasão no serviço público: o caso da carreira de especialistas de políticas públicas e gestão governamental. *Revista Brasileira de Administração Pública*. Rio de Janeiro. Vol. 50. Jan./fev. 2016. pp. 17-39, p. 22).

[56] The division of motivation in intrinsic and extrinsic has its origin in the area of Psychology. Originally it was thought that investments in extrinsic motivation could suffocate the intrinsic counterpart. More recently, however, this knowledge has been reviewed under the idea that both species of encouragement can walk side by side. Rigolizzo and Amabile affirm that "Intrinsic and extrinsic motivation are often considered opposite constructs, with extrinsic motivation undermining intrinsic. Indeed, decades of research in psychology, organizational behavior, and economics suggest that intrinsic motivation and complex performance (like creativity) diminish when people are focused primarily on extrinsic goals, such as tangible rewards and deadlines, or extrinsic constraints, such as restrictions on how a task may be done (Deci & Ryan, 1980; Frey & Palacios-Huerta, 1997; Lepper & Greene, 1978; see Deci et al., 1999, for a review). However, an accumulating body of research supports a much more nuanced view (Amabile, 1993, 1996; Amabile & Kramer, 2011). It is true that extrinsic forces that lead individuals to feel controlled generate nonsynergistic extrinsic motivation, which does undermine the intrinsic desire to tackle a problem for its own sake. But extrinsic forces that support individuals' ability to engage in problem solving or opportunity identification, such as rewards that provide resources or recognition that confirms competence, can create the synergistic extrinsic motivation that actually adds to intrinsic motivation. Whether this type of extrinsic motivation will support creativity depends on the stage of the creative process; this is the concept of stage-appropriate motivation mentioned earlier" (RIGOLIZZO, Michele; AMABILE, Teresa. Entrepreneurial Creativity: the role of learning processes and work environment supports. *In*: SHALLEY, Christina E.; HITT, Michael A.; ZHOU, Zing (Ed.). *The Oxford Handbook of Creativity, Innovation and Entrepreneurship*. New York: Oxford University Press, 2015, p. 65-66).

[57] Rigolizzo and Amabile explain that "task motivation can be either intrinsic or extrinsic (or, more, likely, some combination of the two). Intrinsic motivation is the drive to engage in a task because it is interesting, enjoyable, personally challenging, or satisfying in some way; this form of motivation is most conducive to creativity. Extrinsic motivation is the drive to engage in a task for some reason outside the task itself – for example, to gain a reward, win a competition, or earn a positive evaluation. Extrinsic motivation can undermine intrinsic motivation (*e.g.*, Deci, Koestner, & Ryan, 1999), and thus creativity, if it is perceived by the individual as controlling or constraining. However, "synergistic extrinsic motivation," which is the use of externally derived incentives to enhance existing intrinsic motivation, can be a powerful tool (Amabile, 1993). For example, informational feedback that provides direction on how to make progress or improve performance can support intrinsic engagement in the task" (RIGOLIZZO, Michele; AMABILE, Teresa. Entrepreneurial Creativity: the role of learning processes and work environment supports. *In*: SHALLEY, Christina E.; HITT, Michael A.; ZHOU, Zing (Ed.). *The Oxford Handbook of Creativity, Innovation and Entrepreneurship*. New York: Oxford University Press, 2015, p. 62).

that the environment where they are is not equally fair. Internal equality refers to the compatibility between the wages paid to the employees and the quality of their work, whereas external equality is related to the compatibility between the wages paid by a certain employer and the employment market in general.

Studies show that civil servants tend to be sensitive to intrinsic motivation, even though personal fulfillment is not enough to prevent employees from leaving the civil service if it is not accompanied by matching remuneration policies. The best scenario is naturally a combination of intrinsic and extrinsic motivation, which tends not only to retain the civil servant but also to guarantee her satisfaction. The second best is extrinsic over intrinsic motivation, which also tends to maintain most of the staff, even if they lack personal fulfillment. Intrinsic motivation alone tends to generate some increase in attrition and the absolute absence of both types of encouragement tends to greatly increase rates of attrition.[58]

Taking these guidelines into account, this paper presents a set of six proposals that combine actions directed to increase the intrinsic and extrinsic motivation of civil servants in addition to fulfilling the public interest. In accordance with the empirical evidence already mentioned that extrinsic motivation plays a major role in preventing attrition and intrinsic motivation is significant to personal gratification, the proposals combine financial and psychological insights in order to bring about the best-case scenario of not simply keeping the current workforce in the public sector but also (and especially) creating an environment that enhances the quality of the public administration.

Additionally, the proposals are designed to form a carrot-and-stick incentives policy,[59] with rewards for good civil servants (*e.g.*, productivity bonuses and merit-based promotions) and punishments to those who perform poorly (*e.g.*, period evaluations that may result in dismissal from the civil service in cases of insufficient grades).

# 5 Proposals for improving the work environment in the Brazilian public sector

## 5.1 Performance Evaluations

The absence of objective criteria for periodic evaluations, career progression and worker placement creates several principal-agent conflicts. Since there are no impartially prerequisites that officials must fulfill in order to apply for a promotion or

[58] KLEIN, Fabio Alvim; MASCARENHAS, André Ofenheim. Motivação, satisfação profissional e evasão no serviço público: o caso da carreira de especialistas de políticas públicas e gestão governamental. *Revista Brasileira de Administração Pública*. Rio de Janeiro. Vol. 50. Jan./fev. 2016. pp. 17-39.

[59] SABEL, Charles; SIMON, William. Minimalism and Experimentalism in the Administrative State. *Columbia Public Law Research Paper n. 10*, pp. 53-93. 2011, p. 81.

a new position inside their organization, many servants may act not to achieve the public interest (the principal in this case), but instead to satisfy their own personal and professional interests, such as obtaining a promotion or a different position.

In this context, the first proposal we present is to regulate and detail the rules for periodic performance evaluations and defining the situations that constitute reasonable justification for the dismissal of civil servants. Especially in Brazil, it is urgent to enact a complementary law that will create a circumstance where it is possible to implement period performance evaluations.

Among other provisions, this statute should describe mostly objective performance criteria to be measured during evaluations, in order to realign incentives for civil servants according to the public interest (the agent in the public sector). However, it is impossible to conceive a one-size-fits-all solution to measure the quality of the services rendered by the entire civil service, given that the nature of the activities performed in each position may be entirely different. The best legal technique here would be a minimalist law which poses common guiding principles, but at the same time allows local rules to detail the evaluations to be conducted in each position.

Some possible general and objective guidelines are attendance, punctuality, and the existence of disciplinary actions and sanctions against the employee. Nevertheless, they have to be combined with specific criteria applicable to the position in question, as well as peer and supervisor evaluations. Although these assessments may have objective rules, it is inevitable and even desirable that they allow some minor subjective input, in order to avoid public officials working strictly for the sake of excelling in formalistic by-the-book evaluations, and having no real motivation to innovate and evolve.

It is also important that this complementary law establishes mechanisms to avoid the use of the statute as a tool for political retaliation against civil servants who are not aligned with current governments. In order to diminish this risk two precautions must be taken: the first, already mentioned, is setting mostly objective criteria; the second is creating due process rules for the evaluation and the dismissal procedure that can be utilized after an insufficient grade is received.

Procedure guarantees are usually held in high esteem in common law countries, but only recently have they become a bigger concern in most civil law systems,[60] the traditions of which tend to focus on substantive rights. Clear procedural rules can secure (or at least increase) transparency and impartiality. This is why the evaluation

[60] SORDI, Bernardo. Révolution, Rechtsstaat, and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe. *In*: ROSE-ACKERMAN, Susan; LINDSETH, Peter L. (Org.). *Comparative Administrative Law*. Northampton: Edward Elgar, 2010, pp. 23-36.

and dismissal process must assure the employee a fair hearing and demand that the administration's decisions be duly motivated.

## 5.2 Promotions Criteria

Another possible institutional transformation is to expand and create objective criteria for merit-based promotions. Many public positions currently do not have neutral pre-established rules for merit promotions, which are now conducted exclusively according to seniority or by combining personal affinities and seniority. This practice reduces motivation, since the public official does not feel that her effort and commitment at work will be properly compensated. This could be diminished if prerequisites the person must fulfill to apply for a promotion are created.

On the other hand, the standards must be completely objective in order to avoid the use of promotions as a tool to favor friends and political allies and punish personal and political opponents. A multicriteria evaluation could capture the complexity involved in choosing the person who is going to be promoted by combining previous work quality, seniority, academic qualifications and other attributes considered to be relevant in a determined position (*e.g.*, brave acts for police officers and firefighters, student grades on official tests for school teachers).[61]

Furthermore, it is just as relevant that the promotion process be transparent, participatory and duly motivated, so that the public official understands the choices of her peers. Attention must be paid to the necessity of broad and heterogenous formation of the branch responsible for promotions, assuring that different career stages have voting rights and that its meetings are open to the participation of all interested persons.

The same considerations posed regarding periodic performance evaluations must be considered here: even if they are given less weight than the evaluations, some space for subjective assessment inputs is desirable, for it will help to avoid strictly formalistic judgments that may not capture the actual quality of the work presented by the civil servant. In both cases, the establishment of procedure guarantees and the possibility of judicial review may function as correctors of misjudgments.[62]

[61] As a counterargument to the idea that complex evaluations may be excessively prolonged and expensive, we stress that in spite of the initial acquisition costs artificial intelligence mechanisms may assist to calculate the evaluations' final results more rapidly and economically.

[62] Judicial review, of course, has its own hazards, especially when made without any criteria and with absolute lack of deference to the administrative procedure. The limits and possibilities of judicial review are extremely complex and their study is not part of this article's scope. For our purposes it is enough to punctuate that the judiciary, in spite of its own imperfections, may serve as a *locus* for debating possible misevaluations. Mashaw synthesizes the judiciaries' limitations: "While some commentators argue that some courts are simply too strict with respect to some agencies in reviewing their rules, most seem to argue that the real impediment creates by judicial review is uncertainty. Because the courts are relatively uninformed about what is important among the many issues thrown up by parties seeking review of a rule, and because they

## 5.3 Career Levels and Wage Policies

Another possible institutional design change is to create more career levels, so that public officials who are more productive and do high quality work can be promoted more frequently. In many countries, the gap between junior and senior salaries in the public sector is fairly small, which reduces performance incentives. Creating more career levels, with progressive wage increases, can bring more balance to the scale.

However, the development of these levels cannot fall into the simplistic but prevalent idea that reforms should begin simply by peering their earnings with those offered by private employers, especially their initial salaries.

Although it can be argued that public servants in Brazil usually have higher salaries than their private counterparts,[63] public officials are not a homogeneous mass in which all workers receive similar wages. In fact, there are countless categories of public servants and the heterogeneity of the public sector is particularly evident when we consider federal, state and local levels of government, since each of them has a completely different reality. The wage of an elementary school teacher is extremely different from the earnings of a judge, for example. In Brazil, for example, while a public-school teacher earns only about 1,000 USD a month,[64] a judge's wage is estimated to be about 13,000 USD a month.[65]

In federal systems the problem is amplified because the budgetary reality of each level of government is different. The salary that the federal government offers to a teacher or a doctor, for example, is considerably higher than the one a

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are technically and scientifically unsophisticated in analyzing the issues that they perceive to be critical to a rule's 'reasonableness', the perception in the agencies is that anything can happen. This produces defensive rulemaking, if not abandonment of the rulemaking process" (MASHAW, Jerry L. *Greed, Chaos and Governance*. Using Public Choice to Improve Public Law. New Haven: Yale University Press, 1997, p. 165).

For an institutionalist approach to the judiciary's role, please see: SUNSTEIN, Cass; VERMEULE, Adrian. Interpretations and Institutions. *John M. Olin Program in Law and Economics*. Working Paper n. 156, 2002.

63 Tosta refers to studies which show that civil servants earn 67% more than their private counterparts. It is also important to remember that civil servants are subject to a particular legal regimen, such as tenure and special retirement rules. More "prestigious" careers have additional privileges, such as extended annual vacation, as mentioned above, in supranote 28 (TOSTA, André Ribeiro. *Instituições e o Direito Público*: empirismo, inovação e um roteiro de análise. Rio de Janeiro: Lumen Juris, 2019, p. 172). Similar considerations are presented by Ribeiro (RIBEIRO, Leonardo Coelho. O direito administrativo como caixa de ferramentas e suas estratégias. *RDA – Revista de Direito Administrativo*, Rio de Janeiro, v. 272, p. 209-249, maio/ago. 2016, p. 231).

64 See: http://portal.mec.gov.br/ultimas-noticias/222-537011943/50471-inep-divulga-estudo-sobre-salario-de-professor-da-educacao-basica. Accessed on: 18 Feb. 2019.

65 CNJ. *Justiça em Números 2018*. Ano-Base 2017. 2018. Available at: http://www.cnj.jus.br/files/conteudo/arquivo/2018/08/44b7368ec6f888b383f6c3de40c32167.pdf. Accessed on: 22 Feb. 2019. CNJ. *Justiça em Números 2017*. Ano-Base 2016. 2017. Available at: http://www.cnj.jus.br/files/conteudo/arquivo/2017/12/b60a659e5d5cb79337945c1dd137496c.pdf. Accessed on: 22 Feb. 2019. In addition to the month wage, every employee in Brazil, both in the public and the private sector, is entitled to a thirteenth salary (*décimo terceiro salário*), usually paid in December, and one additional third to the month salary on their thirty-days annual vacation (*terço de férias*).

local government can afford. In the same way, each independent power (executive, legislative, judiciary and also autonomous organisms, such as the Brazilian *Ministério Público*) has its own budget and also offers different wages for similar positions.

Simply matching public officials' salaries to those of private-sector employees is not a universal solution either. Some public functions do indeed have peers in the private sector. In such cases, private wages can work as a guideline when establishing an ideal public wage, favoring external equality perceptions; although not as a definite number, for both the budgetary reality and demand for workers is considerably different when we analyze public and private employers. A state government needs thousands of teachers, while a private school only hires a few dozen.

Finally, some public functions do not have parallels in the private sector. What would be the private equivalent to a prosecutor or a police person, for example? The comparison is not simply to a lawyer or a bodyguard, because of the peculiarities of the activities conducted by these public servants. In this scenario, private wages do not work even as a guideline and, therefore, the importance of the activity in each case and the available public budget must be taken into consideration.

Any serious reform must take into account the medium earnings of the specific careers involved and the budgetary reality of the public entities involved. Once again, the solution is not unified. We can attempt to increase salary gaps and create space for more promotions, but working with the fixed objectives of reducing initial wages or increasing final salaries can be tricky. As seen above, some careers (*e.g.*, school teachers, police officers, nurses) may already have low initial wages, so increasing their final salary after taking into account the budgetary reality of the entity in question seems to be a better way to stimulate employees. On the other hand, there are careers in which the initial salary is already too high (*e.g.*, judges, prosecutors, auditors); in these cases, reducing the starting wage seems to be more efficient.

One difficulty to be balanced is connected to the fact that during the transition years between the current remuneration system and the beginning of a new system, civil servants approved for the same position in a relatively small space of time will have different remunerations. For careers whose initial salary should be increased, this human resources' problem can be mitigated with the approval of a new career plan that contemplates the entire class, although this may not be so simple from a budgetary point of view. On the other hand, augmenting only the initial salary for new entrants without proportional compensation to more senior officials may violate basic equality principles and hence worsen the work environment – not to mention its dubious constitutionality.

The question is even more tempestuous when dealing with careers in which the initial salary is diminished in comparison with its previous level. The problem

here is both managerial and legal.[66] From a managerial perspective, new entrants may feel disincentivized to deliver good services when they work side-by-side with colleagues who perform similar tasks and receive greater compensation. And from a legal perspective there should be considered the risk of younger employees filing legal complaints related to the violation of internal equality. One possible solution to alleviate the problem is a gradual reduction of the starting wage so that the discrepancy between the entrants' compensation is not so evident over time.

The legal problem in both cases may be connected to the fact that the Brazilian Constitution expressly grants wage irreducibility guarantees to civil servants (as well as to private employees). It is not clear whether this only prohibits the reduction of salaries of public officials who already work in the civil service, or whether it bans disparities in wages of people working at the same time. Is it possible to raise the initial salary only for new entrants and maintain the old legal regimen for those already inside the civil service? On the other hand, is it possible to reduce the initial wage and sustain the previous rules for those who joined the civil service under the old regimen?

These questions would probably be presented to the Brazilian Supreme Court.[67] Notwithstanding its precedents of granting broad interpretation for wage irreducibility guarantees,[68] the court also has a firm understanding regarding the non-applicability of wage-peering policies affecting public officials.[69] It seems to indicate that the Brazilian courts understand that the wage irreducibility guarantee only forbids the

[66] Eduardo Jordão advocates the existence of three dimensions in administrative law: legal, managerial and political. The legal dimension is related to rights and responsibility promotion; the managerial, to efficiency and performance; the political, to accountability and transparency. Every legal institute has the ability to promote or strangle one or more of these dimensions. In the civil service legal regimen, all three dimensions are profoundly imbricated, as political neutrality usually imposes trade-offs on managerial efficiency. However, it does not mean that they are not necessary to the preservation of the rule of law, as discussed in item II (JORDÃO, Eduardo. The Three Dimensions of Administrative Law. *A&C – Revista de Direito Administrativo & Constitucional*. Belo Horizonte, ano 19, n. 75, jan./ mar. 2019. p. 21-38. Available at: https://www.researchgate.net/publication/333721974_The_Three_Dimensions_of_Administrative_Law. Accessed on: 20 Sep. 2019). Eberhard Schmidt-Assmann presents a similar idea (SCHMIDT-ASSMANN, Eberhard. *La Teoría General del Derecho Administrativo como Sistema*. Traducción: Mariano Bacigalupo *et al*. Madrid: Marcial Pons, 2003, p. 5-10).

[67] The combination of a long Constitution, broad access to superior courts and an activist judiciary in Brazil results in nearly every important decision in public policy being rediscussed at the Supreme Court. The problems of judicial activism are debated in supranote 63. Considerations regarding judicial activism in Brazil can be found in Taylor (TAYLOR, Matthew M. The Judiciary and Public Policy in Brazil. *Revista de Ciências Sociais*, v. 50, n. 2, pp. 229-257, 2007).

[68] It can be noted in the judgment of ADI nº 2238, in which the Court rules unconstitutional the reducing of the salaries of public officials in times of government financial crisis, even if the reductions were temporary and accompanied by proportional reduction of work hours. On the other hand, the Court has already ruled that it is constitutional to reduce civil servants' salaries in order to follow the limitations imposed by the Federal Constitution to public officials' earnings (RE nº 609.381).

[69] Private employees in Brazil are entitled to wage-peering rights, which means that one employee who performs the same activities as her co-worker cannot receive a different wage. This guarantee, however, does not apply to civil servants, as stated by jurisprudential orientation (*Orientação Jurisprudencial*) nº 297 from the Superior Labor Court and binding precedent (*Súmula Vinculante*) nº 37 from the Supreme Court.

reduction of a civil servant's remuneration in particular, allowing for more career mobility to flourish.

## 5.4 Collective and Individual Goals

The establishment of collective and individual goals, combined with wage bonuses, may also help to realign public human resources management incentives, both from the extrinsic and intrinsic perspectives.

Collective goals, applicable to the entire sector, create a sense of community and cooperation, and hence contribute to the growth of purposeful feelings and intrinsic motivation. Additionally, they induce public officials to verify whether their peers are performing below the expected level and for workers to evaluate each other. Overall, this helps various members of the team to motivate each other.

Meanwhile, individual goals established for each employee strengthen the particular motivation of each employee and guarantee more parity between the actual performance of the public official and the bonus she will receive, thus solidifying her sense of internal equality. The final bonus destined to each civil servant should be an average calculation of the percentage of collective and individual goals actually achieved.

Once again, we stress the importance of using objective and pre-established goals in order to avoid surprises and reduce the space for subjectiveness, and also periodical assessment of whether goals have been accomplished, so that civil servants may follow their evolution and know which points they need to strengthen.

The goals to be achieved will vary from position to position according to each one's own objectives, and it is desirable that they be designed to ensure that better public services are rendered to the population. For example, one goal for a doctor or a nurse could be reducing patient mortality in the public hospital where they perform their activities; for a school teacher, an adequate goal could be increasing her students' grades on official tests; for an office bureaucrat, analyzing a certain number of requests and procedures, and so on.

It is not enough that the goals be related to the position's activities. They must be designed to promote better public services – not to worsen the utilities rendered to the population. The Brazilian Supreme Court, for example, judged unconstitutional the creation of productivity bonuses for tax auditors based on the number of infringement notices issued, as the parameter contributed not to better performance, but in fact to arbitrary assessments.[70]

[70] *Mandados de Segurança* nºs 35490, 35494, 35498 and 35500. Injunctions granted by Justice Alexandre de Moraes on February 7th, 2018. The final requests in the writs have not yet been appreciated by the house plenary. The bonuses in question were created by Federal Law 13,464/20127.

## 5.5 Regulating Patronage Appointments

In addition to proposals devoted to improving the tenure system itself, it is also important to curb institutional bypasses in the civil service legal regimen, which is considered by certain politicians as mere red tape.[71]

The Brazilian Federal Constitution allows the creation of positions of trust appointed by executive authorities, such as the President, governors, mayors, secretaries and directors of public companies and entities. According to the Constitution, these nominations may only include strategic positions of directors, supervisors, and direct advisors. Furthermore, a law should be enacted to establish both the total percentage of these positions in the public administration and the percentage of tenured civil servants to be appointed to them.

Even though the Constitution dates from more than thirty years ago, this statute has not yet been enacted, which in practice prevents nominations for these positions from being subjected to clear boundaries. On the one hand, this instrument can be used to offer more political stability to the government, since the Brazilian multiparty political system demands that the President and other Executive Chiefs (governors and mayors) form alliances with other political parties in order to secure governability. It should be noted that patronage appointments are an important mechanism to obtain support from the other political parties and form a governing coalition.[72]

On the other, the absence of percentage or absolute limits for the creation and objective criteria for patronage appointments can create pervasive problems regarding both the necessary impartiality of the administrative state and the quality of the services rendered by these workers. Without technical rules for the appointments, there is no guarantee that the authorities are going to choose people duly qualified for the involved positions, nor that the patronage appointments will not be used as an institutional bypass to the guarantees of the civil service tenure regimen.

For state-owned enterprises, some boundaries are set by Federal Law 13303/2016 (the State-Owned Enterprises Act), which demands professional experience and academic qualifications compatible to the position, and bans

[71] MOTA PRADO, Mariana; DA MATTA CHASIN, Ana Carolina. How Innovative Was the Poupatempo Experience in Brazil? Institutional Bypass as a New Form of Institutional Change. *Brazilian Political Science Review*, vol. 5, n. 1, 2011, pp. 11-34.

[72] Brazilian political scientist Sergio Abranches created the expression "coalition presidentialism" to refer to the system established by the 1988 Constitution, characterized by a rare combination of a President invested with great individual powers and a multiparty system which obliges him to form coalitions with other political parties in order to obtain a parliament majority. The main instruments used by Presidents to consolidate these alliances are budgetary amendments (pork barrel policies), cabinet formation and nomination of patronage appointees in the public administration. See: ABRANCHES, Sérgio. Presidencialismo de coalizão: o dilema institucional brasileiro. *Revista de Ciências Sociais*, Rio de Janeiro, vol. 31, nº 1, 1988 and MELO, Marcus André; PEREIRA, Carlos. *Making Brazil work*. Checking the president in a multiparty system. New York: Palgrave Macmillan, 2013, p. 51-68.

nominations of political parties' directors, campaign coordinators and persons in conflicts of interest. In the federal executive branch, recently enacted Decree 9727/2019 establishes technical requirements for appointees, such as professional experience and academic qualifications compatible to the position and a clean criminal record.

However, state and local administrations still lack these specific rules and are only subject to the general prohibition against nepotism established by the Supreme Court in a binding precedent (*Súmula Vinculante nº 13*). Even at the federal level discussions regarding nominations to political positions (such as ministers and ambassadors[73]) persist. Additionally, the absence of a statute – as commanded by the Federal Constitution – also prevents the fixation of absolute and percentage limits to the creation of positions of trust in the public administration.[74]

It is important that a broader legal regulation, which includes all the three levels of government, be approved in order to set rules that prevent the nomination of relatives, friends and political allies who lack the experience and qualifications for a given position. Professionalization of the public service as a whole – including high officials and their direct assistants – is a necessary measure to increase public integrity and increase the quality of public utilities.

## 5.6 Motivation Beyond Wage

Although the proposals presented above are permeated by intrinsic motivation and equality objectives, their primary focus is increasing the financial satisfaction of civil servants. This choice was made based on the fact that empirical research shows that salary is the main factor that influences the permanence of civil servants in their positions.

Nonetheless, studies also show that meaningful motivation is a central component of their general satisfaction. For this reason, we consider that wage policies should be combined with other actions that improve the sense of gratification in public officials. It is true that feelings of purpose and belonging are difficult

[73] The Brazilian legal community is currently debating whether the nomination of the President's son to the position of ambassador to the United States of America would be considered an act of nepotism, because the literal formulation of the Supreme Court precedent (*Súmula Vinculante nº 13*) does not automatically consider appointments of family members to political positions as nepotism. Several short legal texts about the subject were published on the Brazilian legal website *Jota*. See: https://www.jota.info/tudo-sobre/eduardo-bolsonaro. Accessed on: 18 Sep. 2019.

[74] Despite the absence of a formal law regulating the subject, the Brazilian Supreme Court has a precedent declaring unconstitutional the abusive creation of positions of trust. The precedent in question involved a state law that created more free-nomination appointees than there were regular civil service positions in the state administration level (*Ação Direta de Inconstitucionalidade* nº 4125). The main argument used by the Justices is that, if the Constitution commands that patronage appointments include directors, chiefs and direct advisors, it violates the principle of proportionality that there are more "commanders" than "commanded" in the public administration.

to be explained and apprehended, but a simple initiative is to create permanent communication channels that the employee can use to submit suggestions and personal complaints and receive actual responses for her contributions.

*Status quo* bias can be especially strong in tenure systems, since workers feel comfortable and safe where they are.[75] They have very few natural incentives to conceive and implement changes, even when the transformation could ameliorate and update the work environment. However, overcoming this cognitive bias is of crucial importance if we want intrinsic motivation and personal satisfaction to flourish, while giving a voice to the civil servants can bring new perspectives to the table.

Intrinsic motivation is also directly connected to the perception that change is feasible. When actual change in their work environment seems unlikely, people tend to lack enough motivation to perform well. North and Black point out that new formal rules are not always enough to create institutional changes, because informal constraints, such as the local practices, can remain unaltered, hence preventing change from actually being implemented.[76]

As mentioned above, high levels of corruption perception between the civil servants themselves are another source of deep intrinsic demotivation. Institutions can create an environment that is more or less favorable for corrupt practices[77] and this naturally includes public entities, which are mostly made up of civil servants. When it comes to the problem of corruption and how public officials deal with it, special protection for civil servants who act as whistleblowers could lead the way to more reports and awake a sense of duty fulfilment.[78]

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[75] NICHOLSON-CROTTY, Sean; NICHOLSON-CROTTY, Jill; WEBECK, Sean. Are public managers more risk averse? Framing effects and status quo bias across the sectors. *Journal of Behavioral Public Administration*, Vol 2(1), p. 1-14. 2019.

[76] In North's (1990) words: "Perhaps most important of all, the formal rules change, but the informal constraints do not. In consequence, there develops an ongoing tension between informal constraints and the new formal rules, as many are inconsistent with each other. The informal constraints had gradually evolved as extensions of previous formal rules. An immediate tendency, as has been described, is to have new formal rules supplant the persisting informal constraints. Such change is sometimes possible, in particular in a partial equilibrium context, but it ignores the deep-seated cultural inheritance that underlies many informal constraints. Although a wholesale change in the formal rules may take place, at the same time there will be many informal constraints that have great survival tenacity because they still resolve basic exchange problems among the participants, be they social, political, or economic. The result over time tends to be a restructuring of the overall constraints – in both directions – to produce a new equilibrium that is far less revolutionary" (NORTH, Douglass C. *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press, 1990, p. 91). See also: BLACK, Julia. New Institutionalism and Naturalism in Socio-Legal Analysis: institutionalist approaches to regulatory decision making. *Law and Policy*, v. 19, n. 1, pp. 51-93. 1997, p. 81-82).

[77] DIMANT, Eugen; SCHULTE, Torben. The Nature of Corruption: An Interdisciplinary Perspective. *German Law Journal 01*. 2016, p. 68. Available at: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b9128ab6aa60c971d60b31/1454969484150/PDF_Vol_17_No_01_05_Dimant%26Schulte_FINAL.pdf. Accessed on: 22 Feb. 2019.

[78] VAUGHN, Robert. *Whistleblower Protection and the Challenge to Public Employment Law*. American University, WCL Research Paper No. 09-02; American University, WCL Research Paper No. 09-02. p. 174. 2007. Available at: https://ssrn.com/abstract=1346058. Accessed on: 16 Feb. 2019.

A proper regulation has the virtue of creating a more favorable environment for public officials to report corrupt practices that come to their attention, since they will feel that they are going to be protected against possible threats or retaliations. It reduces the space for collusion among officials interested in offering corrupt arrangements to their colleagues. For example, it is desirable to establish a rule that prohibits unjustified transfer or dismissal of whistleblowers. At the same time, it is also important that this regulation discourages untruthful reports and imposes sanctions on public servants who intentionally make denunciations later proven to be mendacious.[79]

However, in order to increase motivation in the civil service, it is vital to focus not only on enacting new formal rules, but also on transforming the entire culture around the public sector. Courage and willingness to innovate matter, and so do monitoring the implementation of new rules, listening to public officials' suggestions and creating spaces for them to develop and cultivate a new mentality towards their role in society, such as conferences and talks. The creation and the strengthening of an ombudsman and whistleblowers' protection play a special role in listening public officials and the public in general.

## 6 Conclusion

Although Brazil proportionally spends more on its public officials than similar economies, like Chile, or even developed nations, like France and the USA, the expenditures have not resulted in high quality public services. As already mentioned, the country has serious problems regarding dissatisfaction among citizens and civil servants, and high levels of corruption perception.

These numbers undoubtedly point to the necessity of reforms in the civil servants' regimen. In this context, it is expected that reformers would turn their attention to the most prominent characteristic of the Brazilian public service: the tenure guarantee. Nevertheless, is it just as pertinent to comprehend that this protection exists in order to assure the political neutrality of the administrative state and to allow the bureaucracy to resist authoritarian tendencies. Especially in younger democracies, tenure seems to play an important role in the preservation of constitutional democracy; hence, excessive flexibilization of these rules can lead to catastrophic results.

The six proposals mentioned above suggest that it is possible to rethink incentives and institutional designs outside of the tenure box. During turbulent

[79] SOREIDE, Tina; ROSE-ACKERMAN, Susan. Corruption in State Administration. The Research Handbook on Corporate Crime and Financial Misdealing, edited by Jennifer Arlen, Forthcoming. *Yale Law & Economics Research Paper No. 529*. 2015, p. 10-11. Available at: https://ssrn.com/abstract=2639141

political periods, decreasing impartiality guarantees in the civil service system may be dangerous for democracy and the rule of law. In these moments, productivity initiatives that still favor professionalism and impartiality in the administrative state seem to be the best road to follow. In addition, conceiving better incentives inside the tenure system is in accordance with minimalist and experimentalist approaches to regulation and institutional design. It is also more realistic, considering the strength of civil servants as an organized interest group.

Increasing the gap between starting and finishing salaries and restructuring the criteria for promotion could allow the creation of more career levels and, consequently, expand the number of possible merit promotions during a public servant's personal career. This would incentivize more engagement from the employee. The creation of individual and collective productivity bonuses also operates in the same way, as does the enlargement of awards given to people in senior positions.

Conversely, the absence or inefficiency of supervisory tools incentivizes poor quality work, as it causes civil servants to think that they will not suffer an actual punishment for presenting mediocre (or even bad) work. The fortification of internal communication and monitoring organs, such as ombudsman and whistleblower protection, breaks this logic and creates incentives to deliver better public services. Also, the approval of statutes that establish objective criteria for periodical performance evaluations and set boundaries for the creation and nomination of patronage appointees is more than overdue.

Nonetheless, the proposals made in this paper are just an illustration of the incentives approach. The intention is not to offer a definite and unique formula to improve the quality of public services and utilities. Each society and every public position have their own peculiarities and it is probable that any *prêt-à-porter* solution would not be effective in all of them. Other initiatives depend on the particular characteristics of each level of government (especially the available budget) and each public occupation. For example, reducing or increasing initial earnings is subject to both of these variables; reviewing the stability system hinges on the nature of the activities performed and the responsibilities of the position at stake (and, additionally, demands a constitutional amendment).

How the reforms are going to be steered may be a contingent factor, but the common denominator – and central idea presented here – is the demand for a reorganization of the Brazilian civil service. Our hope is to contribute to the establishment of a path towards better and more efficient public utilities and a more virtuous environment.

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