

Governance Change: Innovation as a risky task and the need of safely breaking the chain of routine¹

Miguel Ragone de Mattos
Doctoral Candidate in Political Science
Institute of Political Science
University of Brasília

Governance is about how collective decision-making is taken. There is always the temptation, when dealing with governance in the public sector, to identify it strictly with the rule of law or an hierarchical structure. Specially under the Romano-Germanic tradition of law, codes describe the structure of the government and what each branch must perform. From this point of view, the rule of law describes everything and the solution of good governance is simply follow the rules and obey superior orders.

Governance is being considered as a practice undertaken by super beings that are all-seeing and all-knowing, rejecting the idea of bounded rationality. But like real people, even the best state agencies are either omnipotent nor omnipresent. In the words of Eugen Ehrlich, “the art of regulating rivers does not consist in digging a new bed for the river all the way down to its mouth, but in directing the current so that it self-actively creates a new bed for itself. Likewise statutes fulfil their functions only where the great majority of the people obey them in obedience to the promptings of an inner impulse.” More than conforming practices, like a machine performs a programmed movement, rules and other incentives must motivate agents to find good solutions by their own knowledge and good impulses.

In other words, law and command are not sufficient if not aligned with incentives to produce innovation. Governance is a set of incentives for decision-making, including those ones that allow changes when the *status quo* support inefficient or unfair equilibria. Like achieving Nash equilibria or Lewis conventions doesn't mean that a good result have been taken, the stability achieved in a repetition of practices doesn't mean that it is good by itself.

Most of regulations give incentives to public agent to repeat the past. The protection of a routine is taken as a shield against corruption. Innovation is risky and most of the times, because governments are increasing more and more the rules to avoid corruption, failure have been punished, not admitting that risky innovations must be encouraged to support good changes.

The rule of law must allow innovators to take some risk in favor of new and better levels of governance. The system of rules must protect agents of change from the danger of been sanctioned as corrupts or incompetent exactly because they are trying to change the routine to a new and better pattern.

The theoretical discussion about the ways of dissociating the simple noncompliance with rules and the attempt to innovate, may admit, for example, pre-approved projects that allow levels of risks of failure and support the creation of decision-making bodies that protect innovators. In this sense, rules to support innovation inside governance may allow change without inducing people to repeat the past just to protect themselves, instead of innovating, admitting failures and successes, to benefit to the public.

Keywords: Public Governance, Rule of Law, Incentives, Innovation

¹ The author would like to thank the Fundação de Apoio à Pesquisa do Distrito Federal – FAPDF for the financial support provided for the presentation of this paper at the 3rd International Conference on Public Policy.

Introduction

There is always the temptation, when dealing with governance in the public sector, to identify it with the rule of law and the hierarchical structure. Specially under the Romano-Germanic tradition of law, written codes describe the structure of the government and what each branch must perform. From this point of view, the rule of law seems to describe everything and the solution of good governance, in the same way, may be taken simply as a matter of following the rules and obey superior orders.

In practice, the pyramidal structure of the government, formally taken, hides a wide variety of principal-agent relationships involving a unnumbered set of incentives, including the problem of risk allocation. In this environment, any lack of innovation in the public sector are only partially explained by formal rules. In the same sense, the improvement of innovation initiatives are a matter of incentives, including costs, benefits and, for sure, risks.

In a strictly formal perspective, governance is being considered as a practice undertaken by super beings that are all-seeing and all-knowing, ignoring the idea of bounded rationality. Like real people, even the best state agencies are not either omnipotent nor omnipresent. Because of this, rules and centralized order must allow people to achieve the desired goals and not only try to design it, like an instruction manual.

Social performance is a collective creation, in all of its aspects, and not only the complex result of a centralized design. More than conforming practices, like a machine perform a programmed movement, rules and other incentives must motivate agents to find good solutions by their own knowledge and impulses. Rules and commands are inputs, not marionette strings. People react to incentives, including those ones created by rules and commands, but not only, especially when the performance requires creativity or other personal contribution linked to the agent's will.

Law and command are not sufficient if not aligned with incentives to produce innovation. Governance is a broad set of incentives for decision-making, including those ones that allow desired changes, when the *status quo* support inefficient or unfair equilibria. The achievement of stable results, Nash equilibria or Lewis conventions, doesn't mean that a good result have been taken, the stability achieved in a repetition of practices doesn't mean that it is

good by itself. The openness to change, at least a door opened to innovation is something good in order to allow shifts to better achievable equilibria.

Most of regulations give incentives to public agent to repeat the past. Institutions constraints human behavior and restrains it to prescribed formal and informal rules. Those rules limit the ways of performance and standardize practices. It makes possible to people do things without keeping in mind all the parameters necessary to decide each step in their daily life. Given rules and the habit to follow them allow people to keep focus on a reasonable amount of problems to solve. Avoiding thinking in all the things we do, making them for inertia, makes the routine a necessary instrument to keep human minds healthy.

Institutions exist to reduce the uncertainties involved in human interaction. These uncertainties arise as a consequence of both the complexity of the problems to be solved and the problem-solving software (to use a computer analogy) possessed by the individual. There is nothing in the above statement that implies that the institutions are efficient (North, 1990, p. 25).

People use routine as a protection in the way that worked in the past probably will work today and in the future. In another perspective, follow habits, keep things in the way they are is safe. If someone wants to keep a low risk of doing things, a good way is to do in the way it always been done.

In government, rules give safety to agents. Who proceeds under the prescribed rules, keep their actions safe. It allows to avoid answering the reasons of doing something based on other reasons but following the rule. Do what the norm says explains the reason by itself because adopts the reasons why the rule itself exists. Follow the rule is a reason to do something. It is a kind of formal justification.

Innovation, on the other hand, requires substantive reasons. And most of the time, not only reasons to justify something to the agent himself, but it has to be strong enough to convince the people that somehow in charge of some kind of supervision. The boss, the colleagues and specially the auditing staff must be convinced, must agree, that something out of the rule, not necessarily against it, is acceptable. If not, the responsibility is all of the agent that decided to do something different, out of the rules, the used procedures, unusual, not aligned to the given institutions.

When rules are taken as remedy against corruption, the consequent framing of the behavior of the agents constrains the innovation initiatives. The protection of predictable routine is usually taken as a shield against corruption what creates incentives to keep habits and discourage creativity and desirable boldness. In this environment, innovation becomes risky most of the times if governments increase the control rules because it is not easy to separate failure from corruption and the fear to be punished makes civil servants more and more concerned with risky innovations, discouraging good changes.

The rule of law must allow innovators to accept some risk in favor of new and better levels of governance. The system of rules must protect agents of change from the danger of been sanctioned as corrupts or incompetent specially because what they are trying to do is to change the routine to a new and better pattern. It can be achieved allocating risk to the beneficiaries of changes, what means the government by itself or the public, in the end, but never the agents in charge of innovation. If it is necessary to keep some level of risk to civil servants, it must be only in the level sufficiently to avoid moral hazard, not more than that.

The theoretical discussion about the ways of dissociating the simple noncompliance with rules and the attempt to innovate, may admit, for example, pre-approved projects that allow levels of risks of failure and support the creation of decision-making bodies that protect innovators. In this sense, rules to support innovation inside governance may allow change instead of inducing people to repeat the past just to protect themselves, admitting failures and successes, to benefit to the public with arisen innovation.

This paper tries to discuss, in theory, the reasons why innovation are not so well achieved in public governance even becoming a regular guideline in all the government organizations in the recent years. Guidelines do improve innovation can arise from this discussion, but the target of the present paper is to make a theoretical discussion, offering ideas of sharing the risk of innovation with the organizations as a role, reducing discouraging of innovation caused by the fear of innovators to be confused with incompetent or corrupt civil servants.

During the discussion, some references about Brazil will be made. The idea of this paper, even more theoretical than practical, came from the observation of the practice in the Brazilian federal government. There is a perception that even innovation being a recurrent direction of the government, there is a lack of development in this field in Brazil.

1. Governance

Governance is about how collective decision-making is done. It is not about how to decide in any case, but in arrangements in which decision is the outcome of the relationship of a plurality of actors, which can be persons or organizations. (Chhotray and Stoker, 2010, p. 03)

Governance is how decisions are taken, is the process of decision-making. The rules applied on how to decide in a complex social environment are decisive for the quality of the decision outcome. The way decisions are made influence which decisions are taken. In this sense, if you want to influence the decisions profile you want, you must design governance in order to achieve it.

The construction of governance regimes matters to the well-being of our societies. (...) there is much intervention and policy premised on the idea that the performance of public services, for example, could be enhanced by better governance arrangements within and between the agencies involved. (Chhotray and Stoker, 2010, p. 05)

Those arrangements, in which governance is taken as a set of decision rules, statutes, written norms, among other institutional inputs, must be sufficient to build a stable body of decision production. In large and complex environments where many stakeholders try to influence public decisions with arguments, strategic behavior and other instruments, governance is an important issue to keep the struggle of interests productive and useful.

The Condorcet Paradox, only to mention a well-known discussion about preference aggregating challenges, is an example on how governance arrangements, the rules of how to decide, can be central in the decision-making. When dealing with institutions, and how governance arrangements are designed, especially when talking about public procedures within governments and bureaucrats behavior, formal rules, written statutes does matter. And specially how formal rules are designed have a relevant impact on how bureaucrats behave and consequently the outcomes arisen from decision making.

2. Romano-Germanic tradition and the rule of law

While common law systems have their juridical systems based on judge-made law, Romano-Germanic tradition, which is mostly associated to the law in the continental Europe, is based on statutes, on written rules. Mainly when talking about administrative law, written rules become a more important issue, even when talking about common law tradition because regulations are the main anchor to keep public interest as the north of performance of public sector and most of the rules are prescriptive. Most of administrative law does not pretend to judge what have been done, but tries to conform future behavior. What a rule towards to government structures usually pretend is to conform a behavior, and not judge it *ex post*.

Dicey² defined rule of Law as the “*absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of prerogatives or even wide discretionary power on the part of government*”. (Ranjan, 2010, p. 03) It is a try to define what is right or wrong *ex ante*, avoiding the discussion *ex post* on what should be done, what is always uncertain and especially risky when this debate includes public authority with all the power of punishment it has.

Since the action of the government must be kept inside the tracks of public interest, the control of the behavior of civil servants based on the rule of law, or what we can call simply as a control of legality, is the main instrument to control the government behavior.

The rule of law is central theme to all democratic and civilized society of this world. The concept forms the basic framework of all legal system. It is one of the tools by which the unfettered power of executive is kept under control through supremacy of Courts. (Ranjan, 2010, p. 18)

Government actions are subject to the control of Courts and what civil servants do is framed by the possibility of judicial exam and sanctions may be imposed if the behavior of an agent is considered unlawful. In Administrative Law, accountability has a legal basis, a more strict meaning than the usual notion of accountability in politics.

²Albert Ven Dicey is a British constitutional theorist and his principles written in the nineteenth century are part of the British constitution.

Rule of law anchors the relationship between state and society around an accepted set of political, social and economic rules. It is the foundation, and the result, of political settlement. (Domingo, 2009)

Under Romano-Germanic tradition, where the rule of law is rooted in the tradition of the renaissance of the Roman Law in first European universities, and not in framing law under the power of authority, statutes intend to describe good behavior and predict all the possible concrete cases. I makes it using abstract and opened prescriptions embracing all the possibilities, imposing fair and logical consequence to each hypothesis, always guaranteed and enforced by a state body.

Under the modern world conditions, and also because of philosophical and political reasons, it is now generally considered, in the Romano-Germanic family countries, that the best way of achieving solutions of justice, which the law imposes, consists, for jurists, to seek support under law's provisions. This trend obtained decisive success in the nineteenth century, when almost all the Roman-Germanic member states published their codes and supplied themselves with written constitutions. In our time, it is still reinforced by the triumph of interventionist ideas and the extension of the spheres of the role of the State. (David, 1996, p. 93)³

The Brazilian law, that is part of the Romano-Germanic tradition, separates two kinds of rule of law. One applied to citizens in general that says that anyone can do anything that is not forbidden by law. The other one is applied to the civil service and it says that public agents are allowed to do only what is authorized by law. In the words of a judge of the Brazilian supreme court in book of Brazilian administrative law:

So, the principle of (administrative) legality is the complete submission of the Administration to the law. It does have not only to obey it, but fulfill it, put them in practice. The activity of all of its agents, since the one that occupies it top, this is, the President of the Republic, to the most humble, can be only of the docile, reverent and obsequious complying of the

³ Free translation from the Brazilian edition, written in Portuguese.

general statements settled by the Legislative, because that is the position arisen from the Brazilian law. (Mello, 2001, p. 72)⁴

In the same way, in the word of another judge of the Brazilian supreme court in a book about Brazilian constitutional law:

The traditional principal of legality (...) applies in its more strict and specific way, because the public administrator only can do what is expressly authorized by law and the other normative species, not existing his own will because in public administration is only allowed to do what the law authorizes. (Moraes, 2000, p. 298)⁵

What we can see is that in Civil Law countries, the rule of law has a central role. Especially when dealing with the control of government, and it is the same of saying control of public authorities, the strict submission to law is a guarantee for citizens. Keep the power of the state under control means keep people safe from public abuse.

3. Written rules and hierarchy are insufficient

But there is a problem, among others, that limits the idea of a perfect system for creation and application of good rules in real life. We are not talking about machines, but about humanly created, interpreted and applied systems. Humans are present in all levels, being the provider, the consumer and the structure, the raw material, of governance.

Rules exist because people are different of each other, value things in different manners and would decide in different ways even facing the same situation the same variables. Rules are socially desired because it allows a centralized body to control undesired deviant behaviors and keep the results of people behavior minimally predictable. But even this centralized bodies, including governments, are made of human beings, facing the same problems and behaving in different ways even when facing the same variables, including fixed and written rules.

⁴ Judge Celso de Mello is currently the longest-serving member of the Supreme Court.

⁵ Judge Alexandre de Moraes is the most recently appointed member of the Supreme Court.

People are submitted to bounded rationality. It means that, even if it is true that in principle rational agents try to achieve the best results given the information available, they have limits in achieving it. There are limits not only on the information access, but there is a problem of attention and computational limits. Even being rational, each person has limits in their physical capacities, what includes their own brains. The result is that people use more a kind of heuristic procedures than rational calculus. In the words of Simon, 1997: *the ways in which people actually make decisions, and how their decision-making process are molded by limits on their knowledge and computational capabilities (bounded rationality)*.

3.1. Written rules and stability

When a certain profile of governance is stated by a set of rules, what we have is not necessarily a good outcome, but a given equilibrium. It doesn't mean that is something positive in any sense, but only that is, presumably, a stable result. It can last for a period of time, but it may be changed if the equilibrium is broken by a new struggle of political forces.

If any player has the perspective of achieving another available point better for himself, taking into account the possible movements of the other in response to his move, he will probably make a move. If he does not, it means that he can't see a better point to be achieved considering his movement among the reaction of the others. When it is true to any of the players, we can say that is achieved a Nash equilibrium.

One such n -tuple counters another if the strategy of each player in the countering n -tuple yields the highest obtainable expectation for its player against the $n-1$ strategies of the other players in the countered n -tuple. A self-countering n -tuple is called an equilibrium point.
(Nash, 1950)

A Nash equilibrium does not mean that there are no other ones and that it is the best point available. In this sense, rules of behavior in civil service, established in rules as the result of disputes in the political arena does not mean that they create good governance or even that it is the best possible choice. It means only that it is an equilibrium. A point of stability, in some extent, in the tension between different visions and interests involved.

Even if we think about a kind of coordination, instead of dispute, stability doesn't seem to be a good result by itself, but only the outcome of an agreement. Of course, like the idea of an agent trying to change a Nash equilibrium in his own interest, conventions arise when the members of a group express their common interest in order to support a set of acceptable rules.

When this common sense of interest is mutually expressed and is known to both, it produces a suitable resolution and behavior. And this may properly enough be called a convention or agreement betwixt us, though without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are performed upon the supposition that something is to be performed on the other part. (Lewis, 2002, p. 04)

Governance creates a path, or equilibria between possible options. So, even admitting that governance is the organization of the natural struggle of conflicted interests, or a mutual tacit agreement, it must allow the rise of stable equilibria. Governance must create an environment in which all the agents must pursue the best point for themselves, knowing that it will be an acceptable one for the others at the same time. It is not the description of a prescribed root of behavior, but the establishment of rules able to make the actors to achieve a desirable equilibrium in their effort to be better, among the same effort of the others.

3.2. The limits of written rules

The idea of the rule of law governing how human organizations simplifies the understanding on how things should be. Taking institutions as a simply matter of organization engineering is a way of understanding that rules are bad or the problem is that people are not following them. In the first case a rule design problem and in the second an enforcement issue, what is the same of saying that it is rule design problem, again. In this vision, in any case good governance is a problem of juridical design instead of a complex matter of incentive scheme.

Written rules are powerful incentives for *ex ante* prescribed performance, but has its efficacy mitigated by its limits. It is not possible to admit that people obey like robots under a software program. Applying this idea to real people must assume a complete set of

rules, offering an exact action prescribed to each possible situation, a perfect monitoring and compliance system. In summary, a hundred percent level of enforcement.

But even the best state agencies are neither omnipotent nor omnipresent. If a statute is being obeyed only where the agencies of the states compel the people to do so, not much more has been achieved than the noisy creaking of the official mill. The art of regulating rivers does not consist in digging a new bed for the river all the way down to its mouth, but in directing the current so that it self-actively creates a new bed for itself. Likewise statutes fulfil their functions only where the great majority of the people obey them in obedience to the promptings of an inner impulse.
(Ehrlich, 2009, p. 367)

Rules are formal institutions. They also matters but they are not enough to induce impose compliance. The latter is more a matter of inducing, in most of the cases, than determining behavior, because asymmetric information and principal agent problem are present in organizations as a symptom of their complexity.

As an example, we have a recent recommendation of the Conselho de Desenvolvimento Econômico e Social – CDES. The Council for Social and Economic Development⁶ is formed by 85 distinguished representatives of society, whose function is to advise the President of the Republic of Brazil on matters of public policy. Recently, it issued a formal recommendation about a kind of citizen's good faith presumption. Concerned with the well-known number of requirements that government agents ask for the citizens in order to grant rights like licenses, tax benefits and others, the council issued a formal recommendation asking the President to give a formal order to make public authorities assume the good faith of citizens when they give information about themselves. The recommendation was to review a presidential decree making explicit the assumption of citizens good faith when authorities are checking information in order to assure that all the requirements for granting a benefit is fulfilled.

This recommendation assumes that a there is a kind of a suspicion on citizens, without any reason, from public authorities when implementing public policy. Apparently, the case is not a problem based on the personality of authorities in Brazil, but a problem based on the rules imposed on authorities. They usually have to check a wide range of conditions

⁶ This is a free translation of the name of the council, originally in Portuguese.

imposed by law and if a benefit is given to someone not eligible, who allowed it to happen is punished. Given the risk of being liable for granting a benefit to someone not eligible, probably a change in the presidential decree will have no effect on authorities behavior. The trend of authorities to be conservative and avoid any personal risk, given the systematic civil servant liability rules in Brazil apparently will keep things exactly like they are. We will see no change, no innovation, in this example.

3.3. Written rules are incomplete

Under the Law and Economics theories of contracts, the incompleteness of rules are broadly accepted (Shavell, 2004. p. 292). It is not possible to foresee all the possible events that would arise from a deal, what makes, in the same extension, impossible for a contract to pre-establish consequences for each potential event related to performance. In this sense, contracts are incomplete and in the same way, we can say that all the written rules also are. This problem comes directly from the fact that detailing rules are costly. It means that the precision of a statute depends on the number of prescribed situations and sanctions and depending on the issue is virtually impossible to foresee all the possible situations and its consequences.

The greater the degree of precision, the greater will be the costs of formulating legal commands and applying them in adjudication and of parties interpreting them for purposes of deciding how to conform behavior to the law. (Kaplow, 1999, p. 503)

But differently to contracts, where the first decision to be made is to engage or not, sign it or not, law is applied to many issues in which the government cannot avoid to interfere. In Law, even taking statutes as incomplete, there is no empty space. And it is in this environment of uncertainty where civil servants must be able to fulfill gaps in the rule of law that most of the time they are assumed as all-seeing and all-knowing people, absorbing almost all the risks of failure in public performance. And like any other rational agent, when the risk is allocated over the someone, they react in order to manage it.

Written rules try to set up what the agents must do in order to achieve a desired performance, like a manual. But even being incomplete, what is a natural characteristic of any

group of rules, it predicts and prescribes some consequences of misaligned behavior to keep an acceptable level of performance. The problem of this system is that you create rules and agents adapt their behavior in order to achieve the performance prescribed or to seem that their trying to do it in order to protect themselves. It may happen whatever if the rules are based on prescribed actions, with no room for deviance of behavior, or if you use prescribed goals to be achieved by the agent according to his or her judgement. In any case, in the presence of risk, and especially when the risk is not manageable, people tend to repeat what worked out in the past, instead of innovating, in order to be conservative and preserve themselves.

3.4. The limits of hierarchy rules

In some extension, the limits of conforming agent behavior in an organization can be complemented with the use of hierarchy rules. This kind of expectation usually arise from not only by the idea that governance is a practice undertaken by super beings that are all-seeing and all-knowing. They admit that people may not know how to act perfectly in all the situations, but it falls on another simplified idea. Sometimes we admit that regular people are not all-knowing, but at least they can be guided by super-leaders that are all-seeing and all-knowing.

But even hierarchy strict rules doesn't eliminate the dimness of written rules. The first reason is that hierarchy enforcement depends on the effect of the rules over the bosses. It can be easier to achieve behavior alignment to the rules of the bosses, and make them to enforce it over the structure, if the problem is control. In this case you have to take care of the alignment of a few people, the commanders, instead of doing it over the hole staff. So, you keep bosses under control and leave to them the job of controlling the rest of the staff. If bosses are not submitted incentives other than the organization formal rules, or at least if they are submitted to a smaller amount of other incentives, and you can control them simply because they are a smaller number of people, they will not work as a point of inflexion over the expected behavior, as we expect in a very large and without monitoring staff. Even in this case, it will work if bosses are able to control they employees better than directly order given to the staff, or the problem will only be pressed forward.

What we are considering is that even in a pyramidal hierarchical structure, asymmetric information is a problem to be taken into account. Even if the bosses behave in an aligned way, they have limits in the power to widespread his position over the structure. The power of enforcement from the top to the bottom presumes a level of information about the behavior of the agents, including the possibility of doing things, what people do and the amount of effort to do it.

The idea of the hierarchical control only reproduces the idea that only command matters and the execution is something apart from the will and initiative of the implementation agents. In the same way we concluded in the discussion of the insufficiency of good rules, a well framed pyramidal structure may be insufficient to guarantee good governance.

Many writers have noticed that within government people presumably in authority have trouble seeing their preferences carried into effect. Presidents find they cannot order that something be done and expect it to be done. Member of Congress discover that passage of a law does not guarantee its implementation according to legislative intent. (Kingdom, 2011, p. 43)

A good governance is a matter of incentives. It can come from a good rule and hierarchical structure, in the sense that they also constitute incentives in the system, but they are not sufficient. If it would, organizational engineering would be the solution to any performance problem, not considering pathologic personnel problems. It is necessary to go deeper, to generate more sophisticated and personalized incentive arrangements.

4. Governance and innovation

If innovation is something to be stimulated it is insufficient to set a rule that the organization staff must innovate or tell them, directly or throw a manager, to innovate. Innovation is always something linked to engagement, to making people think, care about processes and performance. It doesn't mean that formal rules and commands doesn't matter, but only that it is not sufficient to assure good performance.

Rules and hierarchy matters, and maybe it is easier to understand how if we pay attention in a different direction, or more precisely in the opposite direction. Written imposed rules and hierarchical control by itself cannot guarantee innovation, but on the other way, it can certainly embarrass it.

Because rules are usually designed to conform behavior, their main goal is to keep things uniformed. Rules are not actually innovation friendly because it is more associated to the idea of doing something always in the same way. Usually to something well tested and accepted, in a certain way, is linked to the past. Rules makes people avoid making waves, making them follow the crowd, by definition rules makes people do things “by the book”. Rules are “the book” and they are set because there is the expectation that it will be strictly followed.

So, when talking about innovation in a complex organization, we must focus on rule change. But here we face what can be seen as a paradox. Rules are based on past well tested practices, what is good for the safety of foreseeability of procedures, but it avoids new procedures to be tested, even the better ones. Because do something different from the rule is seen as a deviation, agents under the rules are conducted to follow the rules in order to not being seen as an insubordinate, avoiding risk for themselves.

So, the rules, and as a consequence, the manager that controls the obedience to rules, must open, inside then system, room for questioning the rules itself. And more than that, open room for testing changing rules. It because some of the changes, to no say almost all of them, are not rational-comprehensive, but requires incremental testing in order to not underestimate the need for safety, keeping the reliability of the system.

If bureaucrats find a program is not going well in some particular, that recognition might feed into a policy change. But even in that case, there is some incentive to protect the existing program rather than to open it up to criticism and a possible pandora's box of changes. (Kingdom, 2011, p. 31)

5. Rules: stable but not everlasting

The initiative of setting a rule is usually based on the idea that something is right, if we are talking about binary right or wrong choices, or at least the best option available to be taken. This idea is becoming more clearly tricky as we see that society is changing faster every day. Values and circumstances related to public policy are changing more and more quickly. In this social environment, public governance faces challenges in keeping stability. In this way, it seems to be more and more reasonable, instead of trying to keep things stable, to create mechanisms of identifying the need for change, change it in the most adequate way and try to keep stability by quickly adequacy. It is more a problem of adapting rules to reality, than, like until now, trying to conform reality to the rule by force.

Because of the assumption that the rule establishes what is definitely right, or better, all new rules bring the idea of a concluding point achieved, a smell of definite solution to a given problem. That idea is completely against the notion of evolution that innovation is dependent on. Innovation presumes that rules, like everything around, evolves over time, and because of this, it must keep a window opened to allow changes over itself.

The rules, any kind of rules, must be opened to change, at least opened to mechanisms of reviewing itself. Always follow the rule, and especially when you keep this strict following by imposing severe sanctions against any kind of deviant agents, allow an artificial homeostasis of the systems, keeping them closed to innovation. And even being easy to see that rules does not exist for themselves, but are created to interfere in aspects of everyday life, the idea of perennality of the rules and that any kind of deviance is bad, and in the limit some kind of corruption, has a strong effect over the agents evolved.

Since in the civil service the outcomes of performance are publicly absorbed and taking that rules are considered a perfect pathway for performance, most of the risk over changes in conduct has been imposed to civil servants. The risks of rule breach allocated to civil servants, the ones responsible for following the given rules, protects the public against bad decisions against the rules, but avoid them form the benefits of the good decisions no aligned to the same rules. It has an effect of keeping everything in government as it always have been.

Conclusion

Society changes faster nowadays than in the past. It makes innovation a constant need in any organization and process. It is not an accessory value in public policy, but an essential element. Formal institutions must take into account, in this environment, that people tend to seek stability in order to deal with unmanageable risk. Traditionally we use well-known and trusted routines in order to be sure that the future will be safe like the past was, because it have been tested and can be taken as a good *proxy* of a good behavior.

... our lives are made up of routines in which the matter of choices appears to be regular, repetitive, and clearly evident, so that 90 percent of our actions in a day do not require much reflection. But in fact, it is the existence of an imbedded set of institutions that has made it possible for us not to have to think about problems or to make such choices. We take them for granted, because the structure of exchange has been institutionalized in such a way as to reduce uncertainty. (North, 1990)

Institutions are part of human nature, the way we work to keep stability and feel safe in a complex world, full of decisions to be taken. To achieve innovation on old and well tested processes, especially those protected by the rule of law, institutions must incorporate and give positive incentives to innovators. There is no innovation if new processes can't be tested and become new rules giving some safeguards to the agents if a reasonable failure occurs.

Legal traditions does matter when talking about incentives in public policy. The discussion between the effects of the rule of law and the judicial precedents in common law countries and Romano-Germanic ones still have a lack of systematic studies on public policy (Araral and Amri, 2016, p. 83). But we can say that if most of the risk is allocated to public authorities, they tend to be more conservative and to repeat the past. If the confidence in the rule of law is exaggerated, incompleteness creates uncertainty, and the result is the disincentive to innovation.

If civil servants, like any individuals in large organizations, feel that change on well established procedures is risky, they won't change anything, unless they are extreme risk

lovers. But in bureaucracies controlled by strict rules, with heavy sanctions on deviators, even risk lovers require higher payoffs, proportional to the risk assumed.

So, why people don't not change rules first? Because it requires rational-comprehensive solutions. Those solutions must be designed *ex-ante*, what depend on the possibility to foresee all the possible future situations and prescribe a good answer for each occurrence. And again, it is an idea opposed to the notion of bounded rationality. Completely untested solutions are risky and if it is possible to introduce them incrementally, the change will be safer.

To change institution tested in experiences accumulated in time, people must innovate, test it again in a different way. This dynamic is naturally subject to failure, but innovators must not be accountable for trying, with reasonable intelligence. The various levels of the administration must engage in changing processes, including supervisors, keeping processes of innovation controlled in order to guarantee that changes are being conducted in good faith, and not to extract value of breaching the rules.

The key of improving innovation in processes controlled by the rule of law is manage the risk of failure and protect innovators from being considered corrupts or incompetent professionals based on deviation by itself. Personal punishment must be restricted to cases that deviators have benefits associated to bribery or other unlawful personal gains.

If it is possible to keep a test of innovation highlighted, with everybody in the organization knowing and understanding that it is a process of testing a change, you protect innovators allow a specific control and a proper evaluations of the change. Give benefits as good reputation, money or good opportunities to innovators, keeping them motivated and willing to do things better, even not being risk lovers or irrational agents, is a better way of improving innovation than creating more and more rules just giving orders to people to innovate.

References

ARARAL, Eduardo and Mulya Amri. Institutions and the Policy Process 2.0: Implications of the IAD Framework. In Peters, B. Guy e Phillipe Zittoun. *Contemporary Approaches to Public Policy: Theories, Controversies and Perspectives*. London: Palgrave Macmillan, 2016.

CHHOTRAY, Vasuda and Gerry Stoker. *Gvoenrance Theory and Practice: a cross-disciplinary approach*. Palgrave Macmilan.

DAVID, René. *Os grandes sistemas do direito contemporâneo*, 3th edition. São Paulo: Martins Fontes, 1996.

DOMINGO, Pilar. Why Rule of Law Matters for Development, Overseas Development Institute, May, 2009. Available at: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4192.pdf>

EHRICH, Eugen. *Fundamental Principles of Sociology of Law*. London: Transaction Publishers, 2009 (First published in 1936).

HANJAN, Rule of Law and Modern Administrative Law. 2010. Available at SSRN: <https://ssrn.com/abstract=1761506> or <http://dx.doi.org/10.2139/ssrn.1761506>.

KAPLOW, Louis. General Characteristics of Rules. *Encyclopedia of Law and Economics, Literature Review* n° 9000. Available at <http://reference.findlaw.com/lawandeconomics/9000-general-characteristics-of-rules.pdf>

KINGDOM, Jonh W. *Agendas, Alternatives and Public Policies*. 2nd edition. Harlow: Pearson, 2014.

LEWIS, David. *Convention: A Philosophical Study*. Oxford: Blakwell, 2002.

MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*, 13th edition. São Paulo: Malheiros, 2001.

MORAES, Alexandre de. *Direito Constitucional*, 8th edition. São Paulo: Atlas, 2000.

NASH, J. F. Equilibrium points in n-person games. *Proc. Natl Acad. Sci.*, 1950, USA, 36, 48 – 49.

NORTH, Douglass C.. Institutions, institutional change and economic performance. Cambridge, Cambridge university, 1990.

SHAVELL, Steven. Foundations of Economic Analysis of Law. Cambridge: The Belknap Press of Harvard University Press, 2004.

SIMON, Hebert A.. Administrative behavior: a study of decision-making processes in administrative organizations. Nova Iorque: The Free Press, 1997.