The comparison between Electronic Administration in the USA and Portugal

ADMINISTRATIVE LAW

Manuel Perdigão Neves

DEVELOPED IN COLLLABORATION WITH:

Hank Jenkins
FROM LINCOLN MEMORIAL UNIVERSITY

Table of Contents

Context.

The present academic work, developed in the context of the Administrative Law course, school year of 2021/2022, under the regency of Professor Doutor Vasco Pereira da Silva, aims at comparing the concept of electronic administration in the Portuguese and American model of Administration and was developed in collaboration with Hank Jenkins from Lincoln Memorial University.

We will begin by defining some concepts on and what can be considered as Electronic Administration.

We will then address the necessity of electronic administration. Afterwards, we will compare the current legal standpoint in the USA and Portugal and address specifically the impact of Electronic Administration.

.

1. Electronic Administration

a. What is Electronic Administration?

It is essential that one understands what electronic administration entails, as the discussion of the topic relies on an agreement on what its consequences might be. Well, this is no easy task, as one can define electronic administration in several ways. For instance, there are those who defend that it

> *"means those procedural steps during which the client or the body carrying out of administrative actions makes an electronic statement, or the body carrying out of administrative actions converts the statement made by the client or another administrative body by means other than electronic into an electronic statement and uses during the proceedings"* (Law Insider, 2022).

However, others might describe it as

> *"the form of public administration that uses information and communication technologies (ICT) to carry out its activities, focusing on three fronts: relations with the citizen, internal functioning and relations with other local councils."* (Base-Gestió d'Ingressos, 2022)

As these definitions have completely different consequences, let us see what the legal orders we are comparing define electronic administration as. The United States of America define it as

> *"the use by the Government of web-based Internet applications and other information technologies, combined with processes that implement these technologies to: (A) enhance the access to and delivery of Government information and services to the public, other agencies, and other Government entities; (B) bring about improvements in Government operations that may include effectiveness, efficiency, service quality, or transformation"* (Electronic Government Act, 2002)

Portugal does not specifically define the concept. However, on the Administrative Procedure Code, one can understand what is accepted as electronic administration:

> *"Public Administration bodies and services shall use electronic means in the course of their activity, in order to promote administrative efficiency and transparency and proximity with interested parties" (Administrative Procedural Code, 2015)*

One can see that both countries follow the understanding that electronic administration can be used *"to carry out its activities"*, and not only serve a documenting purpose[1]

b. Automized behaviors and Volition

One can see that electronic administration is, quite often reduced to simple auxiliary means to pursue the administrative action[2], but seldom seen as the mean used to pursue it. The question of volition only becomes relevant when a decision or an action taken by the government (or any administrative entity) can be traced to an automatized decision (relevant to this study: an electronic automized decision, but as authors highlight, mechanical automations also show this issue).

Technology, in this use, must substitute (or to waive) a volition of a person[3]. No one would argue that an object making decisions (that directly impacts human lives) is questionable, at least, and dangerous, at most. We can do it, as Professor Prata Roque states, by knowledge-based foresight and volition foreshadowing (a double anticipation). That is, a person predicts what decision would be made, according to different developments and conditions, and "lends its will" (Prata Roque, 2015).

Despite seeming so abstract, most people use it daily. Ticket-selling machines (for public transportation, for example) is exactly this: A human person predicts the conditions necessary to trigger an administrative action (paying for the ticket causes the emission of said ticket).

Just as any other type of volition demonstrations, these actions can also suffer from legal defects. However, we cannot develop this topic in this study, due to length limitations[4]

2. The Necessity for Administrative Modernization

a. Parallel between technology and administrative principles

It is commonly accepted that technology has changed fundamentally the way of living of many people around the world. In a private sphere, it changed how people connect, spend time, make friends, shop, and learn. *"Information technology is quite literally transforming the way we live, learn, work and play"* (Danziger and Andersen, 2002). It is only natural that it changed how people and governments relate to each other. In many small things, like buying train tickets, and in bigger things such as filling taxes, voting (in some countries) or even how people protest[5,6]. It would not

[1] On that note, we must highlight that the Base-Gestió d'Ingresso is a Spanish entity (in Tarragona, Catalonia, Spain). Which means that Catalonia, at least, does not limit electronic means to documenting purposes. It is important to bring attention to several other studies on the definition of electronic administration, as to realize it is a global topic: *Administração Eletrónica e Autmatização*, by Professor Miguel Prata Roque; *Die Automation und das Verhältnis der Verwaltung zum Bürger*, by Professor Klaus Grimmer; Electronic government and public administration, by Professor David Brown, amongst several others.

[2] As stated by Professor Miguel Prata Roque, in *Administração Eletrónica e automatização: Contributos para uma reformulação da teoria geral das atuações administrativas*.

[3] In this case, the holder of the administrative position.

[4] Professor Prata Roque's *Administração Eletrónica e Automatização*, however, explains this topic in detail, despite its obvious focus on the Portuguese legal order.

[5] In 2020, many tiktok users spread the idea of registering for tickets for a Trump rally, with no intention of attending. Although "over 1 million people" sought tickets, only about 6 200 ended up showing. (Silverstein, 2020)

[6] "Social media radically simplified organizing and coordinating large groups (…) social media is enabling new kind of protests" (Ovide, 2020)

make much sense for it to not be adopted by administrative entities, as it helps to be faster, simpler and more efficient.

> *"Not only have they [technology means] been used to relieve the administrative burden – through restructuring of human resources needs – but also lead to a profound change in day-to-day life of administrative employees and public services"* (Prata Roque, 2018)

Of course, not all change can be attributed to the will of governments to keep in touch with the times. In reality, large changes in population (such as in the US, where it grew from 190 million people in 1960, to 330 million in 2020) left the administrations with the problem of having to store and process large amounts of information[7], coupled with the risk of information loss due to fire, floods or any other event. Although population growth can be seen worldwide[8], developing countries seem to be falling in electronic government adoption. (Liu and Yuan, 2015)

b. Decentralization and Technology

An electronic administration is easier to reach for those who have an internet connection. While on big cities, access to governments and administrative procedures were hardly difficult, in small towns, this access faced many difficulties. With e-governments, it has become easier for every citizen to have its rightful access to the administration from anywhere. Well, almost. While an internet connection can be more common now, administrations cannot leave behind those who have not yet adapted to this new way of living (the digital excluded). Yes, it is rather simple filling taxes in a computer, in the comfort of one's home. But those who can't? Firstly, we have older generations who did not became digital users (around 79% of non-users). Secondly, many disabled people find themselves digitally excluded, too. Lastly, the financially disadvantaged are also a big group of digital excludes (Burton, 2021). In reality, "nearly half of those seeking help with tax and tax credits did not have access to a computer" (Sharpe, 2012).

It is the administration's responsibility to be accessible to its citizens, not the other way around. As such, governments must find solutions to integrate the digital excluded into this new world, at least, through keeping both digital and physical access to the administration operational.

Furthermore, this problem of the digital excluded can start to gain unprecedent proportions in a near future.[9]

> *"Released provocatively this July 4th , the book presents Srinivasan-s case for a new model of digital statehood run and managed in the cloud. A network state, as he describes it, is basically a group of people who get together on the internet and decide that they're going to start a country. With a social network to connect them, a leader to unite them, and a cryptocurrency to protect their assets, Srinivasan says a country can be born with laws, social services and all. (...) In a world where billionaires can run companies larger than countries, Srinivasan asks, could such a state achieve recognition from the United Nations?"* (Venis, 2022)[10]

[7] Commonly known as "big data"
[8] We must underline that while it took thousands of years for the population to reach 5 billion (only in 1986), it took under 40 years for it to change to almost 8 billion (as it is currently).
[9] Ironically, on the day that the United States celebrates their independence.
[10] This proposal raises a number of issues that will not be addressed in this study, of course, but many of them can highlight the shortcomings (or successes) of our current systems.

The solution proposed by this author is a reaction to various social problems such as political polarization, surveillance capitalism or conflict amongst great powers[11] (Venis, 2022).

Nevertheless, Srinivasan's proposal is not but the maximum point of decentralization, where the government (whatever form shall be taken under this new utopian regime) can only contact its citizens online but can be accessed from virtually everywhere.

3. Electronic Administration legislation

a. United States

The United States were one of the first countries to initiate and implement the concept of e-government. Although the discussions for the use of information technologies began as early as the 1970s, they were so theoretical that they only started doing so in the early 1990s. The first attempt to regulate the use of information technologies was in 1993, with "Technology for America's Economy Growth, a New Direction to Build Economic Strength: Executive Office of the President".

The current legal document applicable to electronic administration is the E-Government Act of 2002. This act not only establishes the Office of Electronic Government, who *"develops and provides direction in the use of Internet-based technologies to make it easier for citizens and businesses to interact with the Federal Government, save taxpayer dollar, and streamline citizen participation"*[12], but also establishes a fund, authorizes the Federal Information Security Management Act, therefore strengthening information security and formalizes the Federal Chief Information Officers Council.

With large amounts of information being processed and stored in e-government, this act provides for Privacy Impact Assessments (PIA), "to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic government". Privacy Impact Assessments are imposed to every agency that *"develops or procures information technology that collects, maintains, or disseminates information that is in an identifiable form"* (E-government Act, Section 208). After conducting PIA, agencies must ("*if practicable*") *"make PIA publicly available, through the website of the agency, publication in the Federal Register, or other means"*.

According to this section, a PIA must address some topics, such as "what information is to be collected"; "why is it being collected"; "with whom the information will be shared"; "how the information will be secured"

b. Portugal

The electronic administration is embedded in Portugal's administrative *status quo*, as it is (as of 2015) recognized by law, in article 14 of the Administrative Procedural Code. The Portuguese legal order *"recognizes, for the first time, the extreme and growing relevance of regulation in automated behaviors"* (Prata Roque, 2015). This professor, however, criticizes two aspects of this solution: Firstly, it only focuses on electronic automations; secondly, it insists in dealing with electronic

[11] We shall see the importance of this issues *infra*.
[12] https://www.whitehouse.gov/omb/management/egov/

administration as an instrument of communication between governments and individuals, not as a new administrative way to act[13].

Article 14, number 3 states that *"general principles of administrative activity"* shall be applicable to electronic administration. One of the main arguments against the use of electronic administration is that it harms the citizens' safeguards. In other words, (as mentioned before) it creates a gap between those digitally aware and the digitally excluded. Or, at least, creates a dual regime: one for those who can access the digital world and one for those who can't.

The legal order is not unempathetic to this issue, imposing that it is of the Administration's responsibility to make sure that the administrative services provided electronically are offered (and accessible) to interested parties *"such as in to express their claims, obtaining and providing information, querying, presenting allegations, complete payments and contest administrative acts"*. Not only that, but article 61, number 3, b) imposes the providing of "necessary instruments" for the communication with the Administration, when digital means are used in a pre-trial phase.

This new Code brought other changes too, such as presenting application. Now, it can be submitted by "electronic transmission" (article 104º, number 1, c)). Despite the problems electronic administration brings, few would dispute that this clause brings some very positive changes. For instance, it brings permanence to the government, as people can send applications *"any day, no matter opening and closing hours of the services*" (article 104, number 2). This not only brings citizens and administration closer, but also widens the access to the administrative bodies.

It does not come without its flaws, of course. When one accepts the use of electronic means to submit applications, one must wonder: What happens when the applications does not *"follow the pre-defined format"* imposed on number 5 of article 104? Some defend its invalidity, while others believe it to be a case of irregularity. In this study, we shall follow the second line of reasoning, as one of the principles of administrative procedure is the principle of utilization of the administrative act. Article 108 explains very efficiently this principle: "If the initial application does not follow the rules of article 102, the applicant shall be asked to suppress its existing deficiencies".

The system proposed by the new code also brought the recognition of some already existing practices: Electronic use for administrative communications. Although not provided for in the previous administrative procedure code (of 1991), some administrative personnel already used technology to communicate both internal and external communications. With articles 63 and 112 of the new code, electronic communication no longer is an exception, but a valid solution to effectiveness and simplicity criteria (Prata Roque, 2015).

4. The impacts of electronic use by the administrative authorities

In order to analyze the topic of e-government, we must face how it impacts the relationships between administration and its citizens. Some believed that Information Technology *"might be an usher in an era of digital direct democracy"* (Danzinger and Andersen, 2002). However, there are those who argue that

[13] As can be seen by our interpretation of article 14, number 1, one can see that this is not a view we share. Article 14 seems to be broad enough to allow automations to be used in any way, as long as it promotes efficiency, transparency and proximity with the interested parties.

> *"IT has largely been adapted to and reinforced existing behaviors and practices. (…) IT is merely one more resource, albeit a powerful and protean one, in the arsenal of politics-as-usual"*

We shall not follow up with this question, in this study. Although very interesting, it is very complex philosophically. "*What is the human nature*" and if it can be changed with external stimuli is not something that this study can entertain, due to its focus and limitations. Besides, if direct democracy is true democracy would also have to be debated, which would lead us to even more philosophical questionings. As such, we raise this couple of issues, to highlight the importance of a holistic study of Administrative Law, Technology and, in the area where both cross paths, E-governments.

Professors Danziger and Andersen conducted a study of empirical research on the impacts of technology. They found that *"the impacts have generally been positive"*. This study focused on a few points, where the impacts were measured and evaluated.

Firstly, the information quality. If there is something the electronic administration must bring is an improvement of quality in communication, storage, and processing. Computer and technology do not have the ability to add, lose or modify data without human volition of catastrophic events that can be otherwise prevented by further technology. As a result, information kept by those technologies should, theoretically, remain unchanged (and, therefore, improve the quality of the information held by the Administration). It is what the study seems to show.

> *"40% of the total impacts of IT on the capabilities of the political system are reported in the area of information quality"*

The quality improvement was predicted. However, the persistence of quality improvements at such level is quite notable, as Professors Danziger and Andersen point out.

Nevertheless, this benefit seems to have some negative consequences, too.

> *"There does seem to be a tendency for some of these citizen information systems to be modified over time in ways that reduce citizen involvement and mobilization, suggesting that political actors can introduce obstacles which counter the democratizing effects of the technology"*

In other words, electronic governments can be developed in such a way that its democratic capabilities (and the first effect of bringing citizens and the administration closer) can, not only be slowed and stopped, but also reversed.

The second area where these professors search for impacts is efficiency. They study it based on a "four phenomena" approach. They dissect efficiency into four categories: Productivity gains, staff reductions, managerial control of subordinate and processes, and time-savings. *"The research is unambiguous in concluding that IT has enhanced efficiency"*. Well, it seems rather transparent that technology, with its capability to process more information, faster, would bring efficiency consequences. Not only that, but to be adopted by the Administration, it should be efficient, as one of the principles of Administrative Law is efficiency. It would not make sense to adopt technology into the Administration if it meant to jeopardize efficiency.

What might come as surprising is that staff-reductions were not very common (*"only two empirically grounded studies identifying staff reductions"*). The jump from cost savings and personnel reduction passes by statutory and organizational culture changes, regarding hiring and firing of public employees (Danziger and Andersen, 2002)

In the Swedish social and health services, these professors tell us, the use of technology allowed an increase of cases that an employee can analyze, while helping in frequent regulatory changes.

One of the most improved areas of efficiency is managerial control. One can understand that technology allowing the administration to have (easier) access to more information and faster, would result in managers being able to interpret and more easily control their staff and operations.

E-government also impacted the interactions of the Administration. *"The substantial majority of the documented impacts on interactions are related to changes in the internal operations of a governmental unit*". Through the study, these professors allow us to see improvements in coordination, cooperation, organizational control and power, citizen-public sector interactions, amongst others. As one of the main goals of technology (and internet) is to connect people, an improvement in interactions is not unforeseen, but it is, however, a good sign. The Public Administration must be in contact with its citizens, seeing how it is its main goal to resolve public necessities. As such, more interaction is not only positive, but efficient and something to hold on to.

Lastly, the last improvement is on the use of quantitative data. The growing role of IT lead the governments to pursue more extensively the use of quantitative data. 89% of the findings find that this emphasis on quantitative data facilitates useful comparisons and more accurate calculations, benefiting overall the administration.

Despite all the benefits stated before, there is some criteria in which the use of technology has brought negative impact: Health, safety, and well-being; Protection and improvement of the individual's sphere; and, finally, protection of legal rights. The common use of personal data by some administrative entities (law enforcement, social services, amongst others) can be seen as undesirable, as they diminish the citizens' private sphere.

> *"Clement concludes that there are demonstrable negative impacts of IT on the work environment of particular classes of workers, such as women in clerical positions. IT causes some public employees to report lowered job satisfaction as it increases the time pressure on completing tasks. The absence of IT skills, especially given the frequent changes of information systems-in-use, generates job anxieties for some end users"* (Danziger and Andersen, 2006)

This is a topic that must be discussed: How can employees keep up with technological advancements, changes in regulations and overall evolution of the Administration? With its may benefits, technology also brings a sense of rush, immediatism and impatience. This is not a healthy work environment and, therefore, not efficient.

5. A view of the Future for the Electronic Administration

5.1. Digital Countries

The topic brought *supra* about digital countries must be discussed. While comparing current systems and current technology uses, the future is not very relevant. However, if one can learn anything in the past decades is that the way we live changes rapidly. 20 years ago, touch phones were not in use. Now, everyone carries one in their pocket. 20 years ago, the way we travelled was completely different. Not only the cars, but the access to internet allowed us to have maps in our phones. 20 years ago, a conference through computers was no easy task. For the better part of the last 2 years, it was the norm.

Discussing a topic without thinking of its consequences for the future is leaving an important part of the issue out of the table. What is relevant to discuss, in order to understand the problems we must face in the future? Firstly, how much can technology decide?

In other words, allowing machines to sell tickets, with the condition of paying a price is something most of us are willing to concede. But can machines fine people? Through security cameras, can a machine (alone) determine if a fine is applicable? And if we go further, can machines detect probable causes for warrants? For arrests? How much power are we willing to give technology?

Not only that, but one must also bear in mind that, unlike humans, technology can store information indefinitely. How will that information be used in the "decisions" of that machine? Can the Administration program (or predict its volition) on sanctions? Can a machine trace a profile of a citizen, determining if they are more inclined to try to enter a train without a ticket?

Returning to the digital country, what concerns Administrative Law is the fact that every single action in a digital country will be electronic actions. Be that of communication or decision. How can the law adapt itself to somewhere that defies everything that we know? For one, there is no territory. The immediate consequence is that to be a part of this country, the person must accept its conditions. As such, Locke's, Hobbe's and Rousseau's idea of social contract gains a whole new perspective. In fact, through digital countries, we can eliminate the idea of a tacit social contract. People can, in fact, refuse to be a part of a community, with little to no difficulty.

Lastly, how can this impact the current countries? Can someone be a national of an internet country, without any bounds to a physical one? Surely not, but how does the Administration guarantee the rights of those who refuse to identify as a member of that community? How can citizen-to-citizen relations hold on, if everyone can be a part of a different group, with nothing in common?

5.2. People in Administration

Allowing the idea of a fully technological Administration, where, hypothetically, there could be fully electronic actions, triggered by machines, where do the people fit in? After predicting scenarios, to apply rules to, people would have a secondary role in the relations between Government and its citizens?

Can the direct contact between citizen and Administration be solely based on technology? While, technically, one can see that a direct approach to technology allows for administrative bodies to process more information about the citizens, the lack of human contact makes the citizens feel less connected to the Administration. We cannot simply cut out all human contacts to the Administration, at the risk of creating the idea of a dehumanized Administration. Human contact is essential, we are a social animal, after all. Now, can people accept that we evolved to families, to cities, to nations, just to have no contact between us and the governing bodies?

If not, how can technology be used to help improve the Administration? And if not, can we truly accept a principle of efficiency? Is it efficient to not replace all human (fallible) contact? Is timesaving, cost reducing, managerial control, truly the only way to define and qualify the efficiency of the Public Administration?

Of course, this problem has two very different perspectives for each of the countries we're comparing. The federal system of the United States already creates a distance between the Federal government and the citizens. The size of the country allows people to understand that the federal administration may not be in direct contact with them. However, do Americans expect state-governments to be? Is there a duality that the United States must balance, in achieving electronic administration? Which brings another question: Can some states have a strong electronic administration, while others have none? Can the federal government govern efficiently if different states can give different kinds of information? While some states would be able to handle large amounts of information, others would still be bound to current limitations. Can a federal system survive if there is a big enough discrepancy?

On the other hand, Portugal wouldn't be able to impose a dehumanized Administration. As a small country, people expect to have some contact to its governing bodies. Although it depends on the geographic placement, most Portuguese people have a close access to its administration.

Another difference that can influence is the type of State each country has. While the United States has a state concerned about preserving fundamental rights, Portugal has a welfare state, meaning not only fundamental, but social rights are a responsibility of the government. That leads to a necessity to be closer to its population.

6. Conclusion

The notion of electronic administration is very similar between Portugal and the United States; however, the implementation of the same concept is widely different. While the Portuguese legislation focuses on how to apply administrative rules to this new concept and way of relating to its citizens, the United States focuses on how to protect data on these relations. Which is not surprising, in fact, as the United States shows more distrust for the government, than Portugal. Moreover, in Portugal, personal data is already guaranteed but the Constitution.

Throughout the study of both systems, one can understand how underdeveloped this part of Administrative Law really is. Although technology has had an exponential growth so far and, as far as we can tell, it will continue to, its use in the Public Administration doesn't seem to be a discussed topic within academics or legislators. The last legislative act on it, from the United States is 20 years old. Portugal's Administrative Procedure Code is only 7 years old but has not contemplated technology use in its full capacity. Will this choice of leaving the topic to the background hurt future administrations? Will this evolution to E-government simply not happen, or happen in a very limited way? Is there any way to know?

This topic, and the new political systems that technology seems to offer, are very complex, asking for knowledge of law, politics, philosophy, technology, psychology. However, it seems to be becoming increasingly more difficult to not do it. Technological evolution does not give any signs of slowing down. For instance, there are already those studying 7G mobile technologies. And yet, our administrative systems were made in the past, without consideration for the unexpected evolution, and do not show signs of change.

7. Bibliography

António, Isa. 2020. *Manual Teórico-Prático de Direito Administrativo.* 2. Coimbra : Almedina, 2020.

Freitas do Amaral, Diogo. 2018. *Curso de Direito Administrativo.* 4. Coimbra : Almedina, 2018. Vol. I.

Silva, Vasco Pereira da. 2016. *Em Busca do Acto Administrativo Perdido.* Coimbra : Almedina, 2016.

Base Gestió d'Ingerssos, https://www.base.cat/web/en/ens/Informat/AdministracioElectronica/AdministracioElectronica/AdministracioElectronica.html, last accessed on July 11th, 2022.

Prata Roque, Miguel, *Administração eletrónica e automatização: Contributos para uma reformulação da teoria geral das atuações administrativas*, in *Estudos em Homenagem a Rui Machete, Almedina, 2015, pp. 755-795*

Prata Roque, Miguel, *O Procedimento Administrativo Eletrónico*, in *Comentários ao Novo Código do Procedimento Administrativo*, 2018

Silverstein, Jason, *How tiktok users trolled the Trump campaign into expecting a Tulsa rally crowd that never came*, CBS news, 2020, https://www.cbsnews.com/news/trump-rally-tiktok-crowds-tulsa/, last accessed on July 11th 2022.

Ovide, Shira, *How social media has changed Civil Rights Protests*, 2020, https://www.nytimes.com/2020/06/18/technology/social-media-protests.html, last accessed on July 11th 2022

Sharpe, Lee, *Digital Exclusion – HMRC IS leaving People Behind Despite Government Assureances, says LITRG*, 2012, https://www.taxationweb.co.uk/tax-news/hmrc-administration-practice-and-methods/digital-exclusion-hmrc-is-leaving-people-behind-despite-government-promises-says-litrg.html, last accessed July 11th 2022

Venis, Sam, *Could new countries be founded – on the internet?*, 2022, https://www.theguardian.com/commentisfree/2022/jul/05/could-new-countries-be-founded-on-the-internet, last accessed July 11th 2022

a. Legislation

Administrative Procedure Code, https://dre.pt/dre/legislacao-consolidada/decreto-lei/2015-105602322

The Portuguese Constitution, https://dre.pt/dre/legislacao-consolidada/decreto-aprovacao-constituicao/1976-34520775

Electronic Government Act, https://www.govinfo.gov/content/pkg/PLAW-107publ347/pdf/PLAW-107publ347.pdf