ADMINISTRATIVE LAW AND ECONOMIC ANALYSIS OF LAW
A Neo-institutional Perspective for Colombia

DERECHO ADMINISTRATIVO Y ANÁLISIS ECONÓMICO DEL DERECHO
Una perspectiva neo-institucional para Colombia

DIREITO ADMINISTRATIVO E ANÁLISE ECONÔMICA DO DIREITO:
Uma perspectiva neoinstitucional para a Colômbia

María Alexandra Ortiz Cabrera y Mónica Sofía Safar Díaz***

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Abstract

This article examines the justification and contemporary significance of Administrative Law in reaffirming its instrumental role in the construction of a Social and Democratic Rule of Law. Additionally, the paper seeks to explore the role of applied economics–specifically, Economic Analysis of Law–and its methodological foundations. It offers a concise review of the origins and schools of thought within this discipline, with particular emphasis on neo-institutionalism as a framework to align administrative practices and legal institutions towards the optimal utilization of available resources. The analysis also considers how this approach can facilitate the transformation of institutional mechanisms to enhance efficiency. The methodology employed is primarily based on bibliographic review and analysis of relevant literature.

Keywords: Social and democratic Rule of Law; Administration; Legal institutions; Efficiency; Neo-institutionalism

Resumen

Este artículo examina la justificación y la importancia actual del Derecho Administrativo para reafirmar su valor instrumental en la construcción de un Estado Social y Democrático de Derecho. Asimismo, el trabajo busca comprender el papel de la economía aplicada –en particular, el Análisis Económico del Derecho– y su metodología, realizando una breve revisión de sus orígenes y escuelas de pensamiento. Se presta especial atención a la perspectiva del neo-institucionalismo como marco de referencia para acercar la administración y sus instituciones jurídicas al uso óptimo de los recursos disponibles, promoviendo la transformación de sus mecanismos de acción en términos de eficiencia. La metodología se centra en la revisión bibliográfica y el análisis del tema.

Palabras clave: Estado social y democrático de Derecho; Administración; Instituciones jurídicas; Eficiencia; Neo-institucionalismo

* Lawyer and holder of a master's degree in administrative law from the Universidad Externado de Colombia. Currently pursuing a doctoral degree in Law at the same institution. Additionally, in possession of a Graduate Diploma in Economic Analysis of Law and Consumer Law. Presently, serving as a research professor in the Department of Law, Communications, and Information Technologies at Universidad Externado de Colombia. Member of the Board of Directors of the Latin American and Caribbean Association of Law and Economics (ALACDE). Email: maria.ortiz@uexternado.edu.co. ORCID https://orcid.org/0000-0002-2591-0479

** Lawyer and specialist in Administrative Law from Universidad Externado de Colombia. Holds a Master of Arts in Law, Economics, and Public Policy from the José Ortega y Gasset University Research Institute and the Universidad Complutense de Madrid. Additionally, possesses a master's degree in Economic Analysis of Law from the Universidad Complutense de Madrid, as well as a Postgraduate Certificate in International Public Procurement Law and Policy from the University of Nottingham. Currently serving as a research professor in the Department of Administrative Law at Universidad Externado de Colombia. His research interests include Administrative Law, State Contracting, and Economic Analysis of Law. He is also a member of the Board of Directors of the Latin American and Caribbean Association of Law and Economics (ALACDE). Email: monica.safar@uexternado.edu.co. ORCID https://orcid.org/0000-0003-2287-3606

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Resumo

Este artigo analisa a fundamentação e a relevância atual do Direito Administrativo para reafirmar seu valor instrumental na construção de um Estado Social e Democrático de Direito. Além disso, busca compreender o papel da economia aplicada –em especial, a Análise Econômica do Direito– e sua metodologia, por meio de uma breve revisão de suas origens e escolas de pensamento. Dá ênfase à perspectiva do neo-institucionalismo como marco de referência para aproximar a administração e suas instituições jurídicas do uso eficiente dos recursos disponíveis, promovendo a transformação de seus mecanismos de atuação em termos de eficiência. A metodologia adotada é baseada na revisão bibliográfica e na análise do tema.

Palavras-chave: Estado social e democrático de Direito; Administração; Instituições jurídicas; Eficiência; Neo-institucionalismo

INTRODUCTION

We have heard for years that Administrative Law is in crisis, that the phenomenon of flight towards private law is imminent, and that it is increasingly evident that the State must be considered as a common subject, without privileges or differences concerning individuals, as well as that its intervention in the market implies its entire submission to the rules equal for all. It has been said that, perhaps, one of the points of the greatest crisis lies in the fact that administrative law is subordinated to the economy and the market, which substantially distances it from the bases that have justified its existence, that is, the need for a body of rules on organization, substance, and procedure that regulates and limits the power of the public administration in the framework of its relations with private parties.

Therefore, the fundamental premise of the crisis is that the Administrative Law that we know in theory often differs substantially from what is understood and applied in practice in that daily and continuous interaction between the Administration and those who are administered, without being clear about the reason for this reality, and this is particularly important concerning what may happen with other branches of law because the legitimacy of the State and its institutionality, which are the very basis of its existence, are at stake and, in fact, at risk (Balbín 2020).

This problem, in reality, seems to derive from the excessive normativity (regulation) and the ignorance of this, precisely because of its extension and complexity, which has led to an imposition of custom based on biased interpretations, mainly by bodies controlling the administrative activity, rather than by judges, which has resulted in discredit of the legal regime, and with it the creation of a subsystem that is incompatible with the established legal system, that is, an irregular compliance based on forced interpretations. This situation, of course, generates a favorable scenario for the delegitimization of the discretionary power of the Public Administration by taking it into the realm of arbitrariness, given the reality that, many times, everyone gives their interpretation of the way of applying the rules and their interaction in the use of the prerogatives of public power, leading to inequality in their compliance, which in turn results in loss of reputation and credibility of the institutions.

So, it is undeniable that Administrative Law is currently immersed in a changing economic context, in economic dynamics that directly or indirectly affect its operation. In that case, this motivates us to take a step towards its transformation by reviewing economic elements that help enrich our legal structure. Therefore, this paper will address the current justification of Administrative Law, identifying the points of crisis and the importance of reaffirming its specialty in the Social and Democratic Rule of Law, noting the role of the economy in the complete understanding of the existing phenomenon.

It will then address the essential aspects that make up the methodology of the Economic Analysis of Law, going through a brief review of its origins and schools, to focus, especially, on the aspects of the perspective of new institutionalism as a starting point to bring the

administration and its legal institutions closer to the best use of available resources and the transformation of its mechanisms of action in terms of efficiency, to, based on this, talk about the Economic Analysis of Administrative Law, and the special importance of the neo-institutional school for this branch. We will also address the dynamics of the public administration in Colombia, where progress has been made towards the inclusion of elements that allow a better and more efficient provision of the service to address the deficiencies in the management of the administration itself and solve the needs of the citizens to strengthen trust and the exercise of the administrative function in our territory to, finally, end with some conclusions in this regard.

ADMINISTRATIVE LAW AND IUS-ECONOMIC PERFORMANCE

Without pretending to make a new recapitulation of the origin and evolution of Administrative Law, since there is more than enough doctrine on this subject (Garrido Falla et al.2005, Rebollo and Vera 2023), it is important to remember that this branch of law arises as a response to the conception of the State as a legal person subject to legality and liability, to establish rules in the exercise of power by the Public Administration, through the administrative function, from the legislative and regulatory framework, and on its control by judicial mechanisms. Administrative Law has always been justified by balancing state power with the rights of individuals, especially in contractual, property, and liability matters (Santofimio 2023).

Indeed, the Administrative Law, at its base, had as its object to gather in the concept of administrative function all the activities that mainly fall on the Executive Branch, based on the traditional division of powers, but that, with the same evolution of the State model, have transcended to the legislative and judicial, and even to the individuals themselves, especially regarding the exercise of prerogatives of public power, characterized by the compulsive and compulsory executive vocation of the decisions, without the need for the consent of the addressees or the intervention of the judge for their compliance, denoting the structural inequality existing in the legal relations between the State and the individuals within the framework of concrete interactions, and starting from previously defined substantive and procedural normative assumptions (Gianinni 2023).

However, the very conception of the administrative function as the center and object of Administrative Law, which has gone through the traditional public service, the acts of authority and management, and the public interest as an indeterminate concept, has, in fact, been displaced by the organic criterion of who exercises it, and by the consequent importance of a special and different judge, except in certain cases, in which, ultimately, the exercise of prerogatives of power is not possible and would not be justified (Parejo 2011). To this must be added, at present, that under the conception of a Social and Democratic Rule of Law, social and collective rights come to play an essential role in the duties of the State and its *raison d'être*, along with the obligation to guarantee the essential core of rights as a general premise -and mainly of those of a fundamental nature-, without pretext of the cost that their materialization demands, but, at the same time, with the awareness of the limitation of resources that characterizes it.[1]

Thus, it is indisputable that, today, Administrative Law must seek to regulate the balance between individual and collective rights, being these, ultimately, what justifies in this time the concept of public interest,

1 "One can continue to refer to a public administration in a material sense and consider it as the object of administrative law; we prefer, however, to avoid terminological confusion leading to the same thing, to refer to an administrative function as the object of administrative law. An administrative function that reflects a dynamic of activity to concretize the purposes of the state enshrined in the legal system, and that for this purpose makes use of an administrative or public apparatus in general, but also sometimes private. [...] An administrative function understood then, as a set of particular activities, dissimilar among themselves, but different from those general activities of the state and particular activities of the judicial and legislative functions, which give direct development to the purposes of the state, positively enshrined in the Political Constitution, which can be developed by different subjects of law, authorized to do so, with the respect and compliance of the superior legal order." (Montaña 2010, 123-124) All translations from Spanish to English within this paper have been prepared by the author.

using for this purpose the prerogatives that materialize the inequality in the legal relationship of the State with individuals as an indispensable means for its exercise, with precise substantive and procedural limits defined in the legal system, and with the corresponding judicial control;[2] However, it is also undeniable that, nowadays, the strength demanded by the content of the rules within this branch of law faces a significant challenge considering the predominant conception of (formal) equality, the transcendence of the market within the public administration and the unrestricted access to information through technology, which means both greater knowledge and greater opportunity for deception leading to the opposite, ignorance. This generates a tendency towards more flexible regulations and not only legal and regulatory sources, created not with the participation of individuals, but by individuals, and the entry of non-formal legal sources, resulting, consequently, in an extensive catalog of provisions that is practically impossible to know and apply by legal operators, and even more so by the different agents within the Public Administration (Carvajal 2023).

All this situation has caused Administrative Law to be strongly questioned nowadays for not having been able to adequately adapt to the new times and generating serious doubts about its essence and objective within the framework of the Social and Democratic Rule of Law (Schiavi 2024), especially if it is considered that one of its most solid foundations is the principle of legality, which is materialized with the regulatory power of the State duly distributed between the legislative and executive branches, and the rules of control by the judicial branch, is in the process of transformation due to the need for technical and expeditious regulations and the delivery of judicial powers to the Public Administration. There is also a change in the conception of the administered to conceive it as a client or consumer, using market premises to seek greater efficiency and quality in the services of the administration, seeking more optimal control over the results, by which it is evaluated (Cabrillo et al. 2008).

Therefore, to face this new reality that permeates the State model and the understanding of its meaning, there is no doubt that Administrative Law must find in concepts of other sciences, including economics, the foundations to reaffirm its justification as a branch of law that seeks to regulate the balance between individual rights and the prerogatives of power held by the administration due to the need to protect and safeguard, in turn, collective and social rights, using new regulatory techniques, or at least modernizing its conception, under premises of efficiency in terms of cost-benefit ratio, maximization of utility and incentives, that allow to aim at a comprehensive regulation of the matter in accordance with the reality of the moment, based on effective mechanisms of participation and through provisions that guarantee individual freedoms within the social welfare, and that, by the way, help to minimize market failures, both implicit and explicit, betting on the optimal level of regulation, substantial and procedural, in quantity and quality.[3]

Thus, it is possible and useful to start from the premise that social rights must be conceived as public goods since, by definition, there is no rivalry or exclusion in their use so that their protection and materialization inherently correspond to the State in the framework of the Social and Democratic Rule of Law (Monroy 2023). Given the constitutional and legal mandate in this regard, the relationship between the cost of this duty and the benefit of its implementation cannot be analyzed from the Paretian efficiency nor analyzed from a balance between supply and demand, but in attention to the criterion of equity, but this does not exclude the possibility, in any case, of selecting, within the possible options, the

2 "Administrative law, as a law specific to public administrations, is therefore made up of a balance (difficult, of course, but possible) between privileges and guarantees. Ultimately, all legal-administrative problems consist -and this should be kept in mind- of seeking that balance, ensuring it when it has been found and reconstructing it when it has been lost". (García de Enterría and Fernández 2000, 51)

3 "The study of the AD (Administrative Law) has been, to say the least, insufficient. This insufficiency becomes evident when it is noticed that the analysis of the legal norms is not articulated or integrated from the social and political dynamic schemes to which such norms are due. Additionally, such analysis also ignores the social impact that may derive from the application of the rules in question. In the case of the DA, legal norms are not produced in a vacuum and do not interpret themselves. Disregarding the social and political conditions in which legal norms are created and interpreted inevitably leads to a non-integral analytical perspective and partial results in the study of the AD. Therefore, concentrating only on the text of the norms and eluding the institutional, political and individual factors in which the generation and interpretation of legal norms takes place leads to *pure normativism* in the DA. This problem is further exacerbated by the nature of the links regulated by this branch of law, i.e., those between the State and the citizens." (Medina 2012, 240 -241)

alternative that allows its compliance by bringing costs and benefits closer together in the best way, and without this being a conditioning factor for its choice.

Therefore, being public goods a failure of the markets, which is added to the fact that the relations of the State always have a different impact on third parties outside the State, which constitutes a second failure called externalities and a third one that corresponds to the asymmetry of information, Administrative Law must be conceived to minimize these problems for the benefit of the citizens, and this can, and should, be done using economic concepts, without assuming the existence of a market in its traditional sense, or that the specialty of this branch of law should be annulled.[4]

Thus, the concepts of economics are currently vital to justify a dynamic administrative function, in which the prerogative of power must necessarily be the basis, but not to justify the superiority of the State over individuals because of its size or purpose, but because it is the necessary tool for the very respect of legality and the achievement of the specific objectives of protection and materialization of social and individual rights since the binding nature of administrative decisions is what allows the very movement of the State through its function, and what articulates the importance of the participatory construction of the rules that so authorize it, and the judicial control over its correct exercise (Cooter and Gilbert 2022).

ECONOMIC ANALYSIS OF LAW, METHODOLOGY AND ADMINISTRATIVE LAW

The latent need to create bridges that enable a close relationship between Law and Economics to achieve a better understanding of legal, economic, and environmental situations, using the concepts that these two disciplines offer us to understand and guide the behavior and decision-making by individuals towards the achievement of specific purposes with the use of available resources, leads us to highlight the contributions that for more than 60 years the methodology of the Economic Analysis of Law has been building in this sense to face the challenges presented today by the transformation and strengthening of legal institutions as a means to achieve the ends pursued by society in a particular economic context, in other words, to make possible the different relationships between individuals, between States, and between State and individuals with an efficient and equitable distribution of resources for their proper use.

The Economic Analysis of Law emerges as that perspective, that method that identifies and recognizes certain economic elements in legal institutions through the use of cost-benefit analysis to understand and explain the behavior and impact derived from established legal situations (regulations or procedures in force, judicial decisions, administrative decisions, to name a few), or situations that require attention from the law (legislative and executive processes, regulatory projects at all levels, intervention mechanisms, among others, to provide more appropriate solutions, administrative decisions, to mention a few), or situations that require attention by the law (legislative and executive processes, regulatory projects at all levels, intervention mechanisms, among others), to provide more appropriate solutions or more adapted to the reality aimed at solving problems in terms of efficiency.

Although, at first, the methodology has been limited to present the methodology as one that only accounts for the malfunctioning or inefficient operation of legal institutions or their distance from reality, which makes them obsolete in solving the problems that arise adequately and that added to this, the analysis is focused on judging their little or no effectiveness,

4 "[T]he transition from a paradigm in crisis to a new one from which a new tradition of normal science may emerge is far from being a process of accumulation, arrived at through an articulation or an extension of the old paradigm. It is rather a reconstruction of the field through new foundations, a reconstruction that changes some of the more elementary theoretical generalizations of the field, as well as many of the methods and applications of the paradigm." (Kuhn 1971, 139)

this is because the methodology initially accounts for the costs, externalities, and inefficiencies against the low benefit that arises from the legal structure under review. However, this limited vision of the methodology obscures the opportunities that the legal structure has from this first diagnosis, not only to understand the obstacles it must overcome but also to motivate its transformations. It must be understood, then, as a tool that makes a better allocation of these in the decision-making in any field possible at the point of scarcity of resources.

This is how Professor Bullard describes it: "ELA is nothing more than trying to provide the lawyer with tools to better design his "operation" by predicting its outcome and to be able, after 'operating on the patient', to measure whether it was successful" (2003, 67). Once the result has been measured, the aim is to generate corrective or improvement actions to continue treating the patient until he recovers.

The purpose of this analysis is to strengthen the law, the legal institutions that make it possible for the duty to permeate reality and pave the way for the materialization of social goals and transformations by reviewing the impact, in this case economic, of the decision-making in the regulatory intervention and in the substantial and procedural application of the rule to the specific case. Thus, it is of special value to understand individual behavior from an economic perspective, which, according to Gary Becker, is established under three assumptions: maximizing behavior, market equilibrium, and stable preferences (Becker 1976).

The advantage of observing the interaction of these assumptions lies in the possibility of predicting individuals' choice of one option over another based on the cost-benefit analysis of the behavior present in any decision-making process since it makes it possible to identify the incentives and preferences that make one option better than another. In turn, it makes it possible to evaluate the relevance of incentives to motivate informed decision-making, develop models, and determine trends, which can provide relevant information and support the construction of an efficient legal structure.

The Economic Analysis of Law originated around 1960 in the United States with the so-called Chicago School; Its main precursors are, on the one hand, the Nobel Prize winner in economics Ronald Coase (1992), who contributed the conceptual pillar of the methodology known as transaction cost and its incidence in legal relations, and simultaneously Guido Calabressi (1984), who contributed the economic vision in the study of tort liability and the determination of costs in the event of a claim and to whom should be added Professors Richard Posner (2013) and Steven Shavel (2016) in the theoretical construction and practical application of the methodology mentioned above , which seeks to ensure that the Law can be observed under the magnifying glass of economic concepts, to diagnose its level of efficiency and that it can operate at optimum efficiency levels.

Thus, the term efficiency takes on special relevance in the methodology of economic analysis of law. Based on the cost-benefit diagnosis identified in different legal situations, it is possible to attack those variables that generate inefficiency and, consequently, make it possible for legal institutions to achieve their objectives or transform their functioning in the real world.

The methodology contemplates several approaches to efficiency to provide a more significant margin of observation. Thus, in terms of Pareto, efficiency is achieved when a behavior or a decision improves the situation of an individual without worsening another individual's situation, and due to the efficiency exercise described above, it is expected that with such decisions, taking the general context as a framework, an improvement in social welfare is obtained, that is, the optimum possible for a given situation (*Pareto optimum*) is achieved since an adequate distribution of available resources has been completed.

However, given the impossibility of always obtaining real-world results of an individual's improvement without worsening another individual's situation, *Kaldor-Hick's* efficiency criterion appears, allowing the solution of compensating the individual who improves his situation against the individual who deteriorates due to that decision (Cooter 1998).

Another essential element for the analysis, under this methodology, is the so-called transaction costs, defined as all those costs incurred by the individual in the different interactions, negotiations, and decision-making that arise in the market, and from this initial concept derives one of the most relevant interpretations of the methodology known as the Coase Theorem, which is simplified in the postulate that, once the transaction costs in a given situation have been identified, the existence of a legal structure will depend on whether these costs are greater than zero since the law will have to bring them closer to zero to achieve efficiency in the relationships of individuals.

Now, legal institutions (i.e., rules or norms in force) affect the determination of transaction costs, and their strength or weakness determines their impact in a specific economic environment. In this regard, Yeung states:

> When the state decides to apply a new law, or the judiciary decides to rule one way or another, these new normative rules become incentives for rational agents, who decide how they will behave in response to this new norm. This logic fully explains the relationship between the legal world and the behavior of a rational agent […]. Otherwise, laws and the law as a whole would be harmless in human societies. (2024, 56)

Another essential element accompanying the methodology is the so-called externalities, understood as external factors that directly influence situations or decision-making to solve the problems caused by them. Their identification allows the law to act in a concrete and efficient manner.

As highlighted, the economic analysis of Law allows the evaluation of legal situations from a broader perspective. It can be said that it contributes to the legal structure's better functioning in each context because it understands and addresses the environmental aspects and allows more appropriate solutions for these. The methodology also has different points of view, called schools or perspectives of approach, which, based on the essential economic elements, seek to analyze the behavior of the individual regarding its legal structure and propose opportunities for improvement that each can provide in terms of efficiency.

It is in this way, then, that we find the traditional school, as the first approach of the methodology, promoting the cost-benefit analysis of the legal structures that intend to regulate market situations (quantifiable) or outside the market (not quantifiable but susceptible of valuation) (Roemer 1994); establishes the approaches of economic analysis, on the one hand, from a *positive* view, focused on explaining what is or is not, and on the other hand, from a *normative* view, focused on identifying the possibilities of improving the present situation, so that, taking as a starting point for the analysis that individuals are rational beings maximizing wealth, they will seek the greatest benefit in terms of efficiency. In the words of Professor Roemer: "Analytical techniques involving microeconomics, mathematics, operations research, systems analysis and statistical tests enable the legal analyst to determine which law and/or regulation is the most meritorious for society" (1994, 23).

Public choice is another perspective of the Economic Analysis of Law, which focuses its efforts on the understanding from the economic point of view of political science and the rules of politics, and specifically on the review of behavior and decision-making in terms of the electoral and political process under the lens of the maximization of wealth pursued by each individual, sharing with the traditional school the positive and normative vision of the analysis (Roemer 1994).

On the other hand, in the neo-institutional vision, the methodology concentrates its study on the relevance of legal institutions and their economic valuation within the analysis based on concepts of property rights and transaction costs. Here, decision-making by an individual within an organization under established rules of behavior must be analyzed from his condition of wealth maximizer with limited rationality and opportunistic behavior. Therefore, the definition of property rights within the organization and the identification of transaction costs are essential in the search for efficiency within a restrictive framework (Roemer 1994).

In the Colombian case, for example, the National Planning Department (DNP) has made progress in

implementing mechanisms and methodologies that encourage the public administration to transform and improve its activity and mission in terms of efficiency and measurement of cost-benefit impacts. We observed this by enacting the 2014 regulatory improvement policy and consolidating the regulatory improvement line from the DNP's Directorate of Government, Human Rights and Peace.

Finally, the new and recent perspective of the methodology known as behaviorism focuses its analysis on those behaviors that, from the classical point of view of the economic analysis of law and economics, are determined as unconscious or irrational, which are not isolated or sporadic, and that are recognized as cognitive problems that are part of real human behavior and that directly influence individuals' decision-making (Jolls 1998).

In summary, cost-benefit analysis allows the review, from different points of view, of the effects derived from the interaction of legal and economic elements in certain situations and, because of this measurement, provides the inputs to manage an adequate allocation of resources and, thus, an efficient interaction of these elements for the benefit of the individual and society.

COST-BENEFIT ANALYSIS AND ADMINISTRATIVE LAW

Under the scenario described above, the law and legal institutions are recognized as key actors in efficiently solving situations with high transaction costs.[5] In this order of ideas and in orienting our object of study, administrative law is a fundamental piece in efficiently channeling the relations between the state, the market, and individuals (Cortés 2017).[6]

Incorporating cost-benefit analysis in the exercise of administration is an objective that should be pursued. To this end, the neo-institutional approach can open the way to this objective since it highlights the value institutions have when facing the various transaction costs present in decision-making for the State, the market, or individuals.

In Williamson's words, "transaction cost economics adopts a microanalytical approach to studying economic organization. It focuses attention on the transactions and economization efforts that take place in the organization concerned" (2009, 13), and Chavance stresses in this regard that "[i]n fact, the minimization of transaction costs implies a logic of maximization (in a broad sense): the idea of economizing resource" (2018, 72).

Although the transaction cost theory of new institutionalism is close to neoclassical economics, through the adjustment of governance structures to transactions with the aim of economizing resources, its differentiating factor lies in the relevance of institutions and their importance in the definition and management of transaction costs; in this respect, Chavance (2018) emphasizes that "[b]oth ideologies and institutions can be considered shared mental models".

5 "Both the discretion with which rules are attributed, deconcentrated or delegated, as well as their interpretation and implementation depend on the institutional role of the administrative entities, and not taking this into account presupposes that such role does not matter. Ultimately, keeping in mind the considerations mentioned here would allow a better understanding of how the administration works and would allow judges to be better arbitrators of the administration". (Palacios Lleras 2009, 21)

6 It should be noted that the AEDA (Economic Analysis of Administrative Law), by revealing the factors that enter tension in each regulation, can also show that certain legal norms have an "inefficient content, biased in favor of certain positions". It is important to differentiate two fundamental types of economic analysis of law: positive analysis and normative analysis. The first one focuses on the analysis of people's actual reaction to a given rule, its costs and benefits as well as the way in which certain real circumstances influence the content and form of certain legal decisions. The second, the so-called normative analysis, attempts to determine "the optimal design of the State from the perspective of the decisions, costs, and benefits that can be taken by the various entities within it. From this perspective, the object of study consists of determining aspects such as the degree of discretion that should be given to administrative entities when certain functions are attributed or delegated to them, as well as the type of adequate control that should be exercised to ensure that such discretion is used appropriately". In a similar vein, it has been said that this analysis "is concerned with studying what the agents (the legislator, the Administration, the courts, the contracting parties, etc.) in view of the expected consequences of their various alternatives for action, should do, what decisions they should adopt, what rules they should eventually establish, in order to maximize the satisfaction of certain preferences". (Cortés 2017, 191-221)

Thus, in situations of strong uncertainty, the individual confronted with choices learns with the help of a mental model, and then communication between individuals creates shared mental models that lead to "the creation of ideologies and institutions in the process of coevolution" (Chavance 2018, 86), and that is why individuals recognize in institutions an adequate means to reach expected levels of satisfaction (maximization) in their continuous interaction with the State, the market and the individuals themselves.

Reviewing the existing institutions and rules in administrative law is necessary, as it enables the identification of barriers to citizens' access to the administration. Barriers that, in most cases, lead to the slowdown of processes, excessive procedural measures that increase the complexity of administrative actions, and poor experiences for citizens in their interactions with authorities, which impacts the low reputational level of the administration. All this obscures the institutions' intention to promote clear and agile rules and procedures for accessing the services made available to citizens, resulting in the desired levels of effectiveness and efficiency, and for that Neo-institutionalism invites us to rethink the dynamics, functioning, and purpose of institutions to formulate solutions that address the various issues in the efficient provision of goods and services by the administration, with a focus on the needs of the population.

Initially, determining transaction costs in the relationship between public administration and citizens enables concrete processes of regulatory simplification to ensure more timely and appropriate services (for example, the elimination of obsolete regulations). Secondly, generating normative governance processes enables the implementation of regulatory impact analyses that inform cost-benefit reviews in institutional decision-making.

The progress made in our country to include elements of an economic nature in the resolution of situations that present high transaction costs in a specific point referred to the organization and management of the administration (relationship of the State with its citizens) has not been alien or minor; these efforts have been concentrated, at first, in the intention of simplifying procedures that are directly linked to the assumption of high transaction costs for the administered (OECD & IDB 2020, 40)[7]. Simplification produces benefits for citizens and generates social welfare. Still, this mechanism should be used with the objective of bringing the citizens closer to understanding the dynamics of the administration, establishing legal structures that accompany its operation, and participating in the transformations required for such structures.

In addition to simplification, we find the incorporation of regulatory impact analysis as a tool that allows the State to make more informed and appropriate decisions for its citizens when intervening and issuing regulations since it is not only about imposing certain rules of conduct, but this imposition pursues individual welfare and collective welfare to provide an adequate and efficient gear. Public management and legal management allow the use of the tools of the Economic Analysis of Law to project reforms and generate corrective measures in the face of situations that are not efficient or not efficient at all, and These instruments aim to update the regulatory framework of administrative law to meet the needs of an evidence-based environment and to enable the modernization of the state to reflect the new dynamics of society.

In a much more concrete manner, in Colombia, the implementation of public policy for regulatory improvement serves as an instrument that produces significant institutional changes for the effectiveness and efficiency of administration. The National Council for Economic and Social Policy (CONPES) issued document CONPES 3816 (2014)[8], which promotes the implementation of mechanisms and methodologies aimed at transforming the functioning of the administration, dismantling and demystifying its authoritarian role, but maintaining its hierarchical role, which allows bringing the legal institutions of the administration closer to the service of the citizen efficiently.

7 "The administrative burden, also known in Latin America as red tape, reduces the efficiency of public service delivery and contributes to the distrust of citizens and entrepreneurs of public service delivery and contributes to distrust among citizens and entrepreneurs […], as well as incentivizing them to pay bribes to speed up such processes."

8 https://colaboracion.dnp.gov.co/CDT/Conpes/Econ%C3%B3micos/3816.pdf

To develop the postulates of the public policy document, and in harmonization with the guiding principles of the Organization for Economic Cooperation and Development (OECD) of which Colombia is part, 2016 the Methodological Guide for Regulatory Impact Analysis was issued (OECD 2016), within the framework of the project "Incorporating the use of Regulatory Impact Analysis in the Colombian Decision Making Process", to integrate cost-benefit measurement tools that improve regulatory quality, and that in that sense can bring the administration, the Executive in general, the citizen, their needs and the reality of their actions.

Thus, five strategies aimed at strengthening the economic and social efficiency of the rule are proposed: (i) the establishment of the required institutional framework, which applies both to the set of rules and to the agencies that will be responsible for articulating them; (ii) the generation and strengthening of management capacities, since it is evident that the rule does not generate efficiency by itself, if the agent in charge of applying and operating it lacks the adequate, expeditious means and mechanisms with national and territorial coverage to make it available to those administered; (iii) the implementation of regulatory impact analysis tools through a pilot program, introducing in a concrete manner the economic measurement based on the essential elements of the economic analysis of the law, such as cost-benefit analysis (transaction costs, externalities, incentives, efficiency); (iv) the establishment of guidelines and directives that determine and detail the scope, the different application alternatives and the expected benefits in the application of the analysis and; (v) the dissemination of mechanisms and tools for the administration and rationalization of the regulatory inventory, due to the identification of a significant number of norms that intervene in the operation of the Administration and the difficulty of harmonizing regulations at the national and territorial levels.

Although the application of regulatory impact analysis has been slow and costly, the way is being paved to generate quality standards to strengthen the State's capacity to enforce them through strategies that promote the dissemination, the use of best practices, and the appropriation of these tools by public officials. We agree that an entity with technical capacities is required to be responsible for supervising regulatory quality (OECD 2018),[9] and that a robust institutional framework is needed to advance in this work (OECD, 2018),[10] but without this deviating the distribution and use of resources by the Administration in the fulfillment of its functions, and without harming the purpose of administrative law to ensure access to the administration in terms of justice and equality, since we reiterate that administrative law harmonizes the relationship between institutions and citizens also in terms of efficiency. The regulatory impact analysis consists of 7 stages as shown in Graph 1.

In addition to these efforts, the National Agency for the Legal Defense of the State manages the fiscal impact of lawsuits against the Colombian State to provide a technical, adequate, and efficient defense in litigation in which the State is a party. In compliance with this objective, the Agency takes on institutional importance not only in the legal but also in the economic sphere, and it is essential that its evolution and transformation also be analyzed from an economic perspective (Lozano Rodríguez 2016).[11] Thus, the identification of costs and externalities associated with the fulfillment of goals and the exercise of institutions allows decisions to be made that lead to their better performance, in the specific case of the protection of the interests and finances not only of the State but also of the citizens who benefit from this good administration.

9 "[P]ublic administration reforms focus on the quality, timeliness and inclusiveness of services provided to citizens and businesses, and on increasing the optimization and efficiency of administrative processes. Public administration strengthens the internal workings of the public sector, as well as its relationship with society, and as such constitutes a central element of good governance." (OECD 2018, 44)

10 "[T]he implementation of laws and regulations is a necessary element to prevent impunity in society, guarantee the credibility and legitimacy of institutions, ensure justice and access to services for citizens, and generate a level playing field among economic actors". (OECD 2018, 65)

11 "One of the most interesting currents or perspectives in the economic analysis of law is new institutionalism, where the identification, understanding and efficient implementation of legal institutions of economic significance is a determining factor for good economic performance. It is important to point out, however, that both the rules of the game that inform the actions of the legal system and its organizational aspects are the institutions to which new institutionalism refers". (Lozano Rodríguez 2016, 276)

Graphic 1: AIN Complete

Source: Manual de la Política de Mejora Normativa, DNP, 2023.
Elaborated by the author.

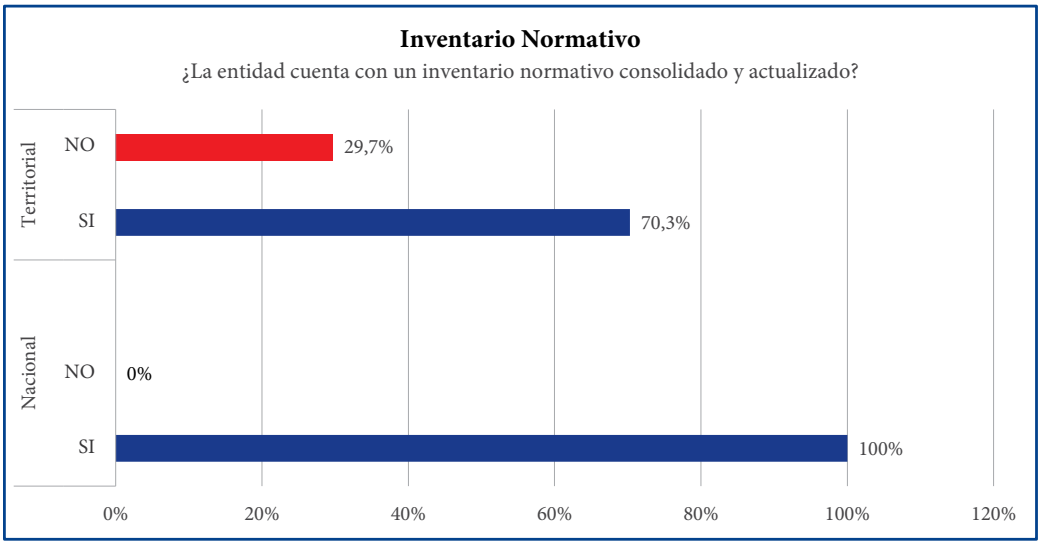
Therefore, the Economic Analysis of Law in general, but the neo-institutional in particular, contributes decisively to the study, construction, and remodeling of Administrative Law since the context of regulation, whatever it may be, is essentially based on the understanding of public administration from its institutions, being indispensable its efficient structuring, under the right incentives and with adequate use of regulatory power, identifying the most optimal level possible in terms of quantity and quality of regulation to ensure its effective compliance and, with it, the necessary and sufficient reputation for the achievement of the objectives of the administrative authority (OECD & IDB 2020).[12]

It stands out in this regard in Colombia, the creation and updating of the regulatory inventory that since 2014 has been administered by the Ministry of Justice and Law, following the provisions of Decree 1427 of 2017, and in addition to this implementation, the issuance of 20 single sectoral regulatory decrees that incorporate the methodology of regulatory simplification is reached by

12 "[I]n particular, institutional weaknesses in several dimensions of public governance may explain the vulnerability of many countries in the region to inefficiencies caused by waste, misuse, and capture by interest groups, as well as to shocks caused by waste, misuse and capture by interest groups, as well as in the face of exogenous economic shocks. […] Second, even when the right policies are introduced, their implementation often remains superficial, and they fail to translate into practice and generate change. The causes may be informal rules that counterbalance formal institutions, weak administrative capacity, resistance to effective implementation, solutions copied from another country without considering the context, or lack of adequately trained manpower or leadership". (OECD & IDB 2020, 25)

2015 (DNP 2022).[13] The graph highlights the significant percentage of entities of the national and territorial order that include the inventory, according to the data of the DNP survey for the year 2022 (DNP 2022):

Graphic 2: Normative Inventory



Source: Encuesta competencias regulatorias (ECR) y Encueta Inventarios Normativos (EIN), DNP, 2022. Created by the author.

Although the scrubbing has been a fundamental step, the centralization and operation of a public inventory for the country is still pending. However, in terms of regulatory impact analysis, more significant institutional consolidation of the methodology is required to achieve concrete progress in regulatory frameworks that respond to the needs of the environment in each sector and promote inter-institutional exchanges of good practices (DNP 2024).[14] According to the OECD report, Colombia's lag in the implementation of ex-post evaluations in the legal framework is evident (DNP 2024).

CONCLUSIONS

Today, Administrative Law is fundamentally justified by the role of the State as the representative of its constituents' interests, primarily manifested through social and collective rights enshrined in its institutions. These rights generate legal situations that directly impact citizens, necessitating that the rules governing them be clear from their inception to facilitate effective intervention and oversight, with the binding authority required to ensure compliance. To substantiate this foundational principle, the application of Economic Analysis of Law offers a valuable framework for re-evaluating Administrative Law—not to transform it

13 "On the other hand, in order to compile and facilitate the search for and compliance with the decrees that regulate the sectors of the Public Administration in the development of the Regulatory Simplification Policy, in 2015, the Government managed to issue 20 sectoral Single Regulatory Decrees (DUR) with the participation of administrative departments and ministries, in which all the regulatory standards in force by sector are incorporated into a single regulatory body and have eliminated nearly 10,000 scattered standards that were in force." (DNP 2022, 4)

14 "To carry out a solid analysis of the impacts of the regulatory framework in Colombia, it is necessary to encourage ex-post evaluation exercises in the different territorial entities, which allows them to strengthen decision-making, as well as reduce costs and create learning in terms of regulation within them. The experiences that the different territorial entities can obtain in the preparation of ex-post evaluations can facilitate the exchange of knowledge between them and the formation of communities of good practices." (DNP 2024, 11)

into a market or to justify it solely through market principles, but to understand how, through economic reasoning, optimal regulation can be achieved given the unique nature of administrative activities. In our view, this analytical tool is an indispensable pillar for the reconstruction, or rather the reaffirmation, of Administrative Law (Medina Romero 2012),[15] especially considering that its structure is largely founded upon the division of institutional powers.

Thus, Administrative Law is an institution that, within the legal structure, brings the individual and the State together in a decisive manner, and its organization responds to complex levels of interaction that require more than one agent for its operation, at substantive and procedural normative levels of equal complexity. It is for this reason that the economic vision from the neo-institutional perspective is necessary. The identification of the transaction costs embedded in the functioning of the Administration serves as a foundational step aimed at illuminating the obstacles or inefficiencies that may, in some cases, be mitigated through the application of regulatory simplification tools. Such measures can streamline procedures and enhance transparency in the Administration's interactions with citizens. In other instances, this process facilitates the identification of obstacles or inefficiencies that can be addressed by proposing alternative regulatory approaches designed to improve the overall functioning of the Administration. Furthermore, it enables the implementation of regulatory impact assessment methodologies that not only evaluate the cost-benefit balance of interventions but also actively promote citizen participation in the decision-making process.

Within this mechanism, Administrative Law plays a determining role in the distribution and use of available resources for its own operation and decision-making for the benefit of individuals. Therefore, it is up to this institution to strengthen and transform its legal structure so that it can achieve desirable economic impacts such as the reduction of transaction costs in the State-individual relationship, the determination of incentives that seek regulatory quality, the reduction of information asymmetries to achieve optimal levels of transparency for the Administration (Baena 2018).

We reiterate that constructing a robust institutional framework drives the transformation of Administrative Law, as it harmonizes the relationship between institutions and citizens in terms of quality and efficiency (Lozano Rodríguez 2016).[16] Considering the above, the challenge for transforming Administrative Law from the contributions of the economic analysis of Law, in general terms and for the Colombian case, lies in the appropriation and systematic application of the regulatory governance cycle to bring the regulatory framework of public administration closer to the dynamics and needs of the territory and the institutionality for its operation.

15 "A proper understanding of the context of the emergence and interpretation of the norms would provide new elements for a proper assimilation of the DA and its function within society. In such a task, the AED, as an option of analytical perspective different from the traditional ones, can allow us to advance the way". (Medina Romero 2012, 241).

16 "[A]s such, the efficiency pursued by neo institutionalists is "adaptive" in nature, which, according to North, is concerned with "the particular rules that shape the way the economy evolves over time" and, also, "a society's inclination to acquire knowledge, and to learn, to induce innovation, to take risks, and to sustain creative activity of all kinds, as well as to solve problems and bottlenecks over time." (Lozano Rodríguez 2016, 279)

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