
Regulation of Uber in São Paulo: from conflict to regulatory experimentation

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Abstract: This paper presents a case study of the legal tensions and conflicts behind the regulation of Uber, one of the most famous tech firms in the peer-to-peer platform market, in the city of São Paulo, the largest Brazilian city. Covering the period of two years (2014–2016), the paper argues that the legal complexity of the debate became bigger in a short period and involved diverse actors and legal instruments. Based on a socio-legal approach, the paper investigates the mobilisation of resources and legal knowledge in the regulation of this tech firm and how it progressively involved the legislative, judiciary and executive powers. The study organises the regulatory conflict in three periods: ‘trouble arises’, ‘battle of legal opinions’ and ‘experimental regulation’. Finally, it discusses the viability of comparative research in places with similar cultural and legal characteristics.

Keywords: experimental regulation; individual transport; transportation; Uber; peer-to-peer platforms; regulatory process; Brazilian legal system; legal instruments.

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1 Introduction

Uber is a company founded in San Francisco (USA) that offers the consumer an individual transport option with three important innovations:

- 1 race call through global positioning system (GPS)
- 2 payment methods via smartphones
- 3 reputational system where drivers and passengers are evaluated after the race.

In May 2014, the company started its operations in Rio de Janeiro and in June 2014, the company started operating in the city of São Paulo – the biggest city in Brazil, with more than 14 million people. The entry into Brazil occurred in a global scenario of taxi drivers protesting against 'illegal' and 'unfair competition' because Uber is not registered as a transportation firm.¹

Legal responses to the emergency of the so-called 'transportation network companies'² are many and varied because of local legal culture, the power of mobilisation of taxi drivers and policy coordination capacity of new technology companies. The responses also vary from *judicial* – court decisions motivated by petitions and legal battles formalised by lawyers – and *legislative* – regulatory initiatives by lawmakers or transport authorities.

We discuss in this article the specific context of the entry of Uber in the city of São Paulo during the years of 2014 and 2016. We adopt a socio-legal approach to study the legal tensions between the actors involved in the conflict around the legality of new tech firms in the field of transportation. We organised our narrative in three periods. The first is the short period in which taxi drivers and taxi associations mobilised resources to ban Uber at the municipal level. The second period is the moment when legal battles began and both sides (taxi drivers and Uber) hired lawyers to obtain legal opinions to fight at courts. The third period is the one in which the city hall begins experimenting with a new approach on regulation and the legal complexity on the issue increases.

Our study reveals the tensions behind the 'experimental regulation'³ in São Paulo, which was not tested on a small-scale and is not directly inspired by any other regulation around the world. We also show the increasing number of social actors involved with this regulatory process and the growth of legal instruments used to either block or allow this type of firm in Brazil. Finally, we discuss how this methodology can be applied for comparative socio-legal studies and how we might compare the regulatory experience of São Paulo with other major cities around the world.

2 The conflicts around Uber in São Paulo: a narrative of three periods

Our study focuses on the social conflicts around the entry of Uber in the city of São Paulo and how legal tensions changed over time, growing in complexity and involving more

actors. We will not present normative arguments on how Uber should be regulated, as other scholars already did in the field of the sharing economy.⁴ Instead, we will focus on a descriptive analysis of actors, legal instruments and the main issues in three different stages.

We cover a period of two years, from April 2014 to April 2016. In order to understand the legal disputes and the participation of different social actors, we relied on data collected from the media, the Judiciary and the City Hall of São Paulo.

3 First period: Uber arrives and the trouble begins at the city council

In Brazil, one of the central problems of the emergency of transportation network companies is the ‘public character’ of the individual transportation. Historically, municipalities and local governments have controlled the transportation of its citizens inside its jurisdiction. Historical research conducted on the regulation of transportation in the city of São Paulo showed that, since the late nineteenth century, it was characterised as a public service and heavily regulated by the local government, in a social environment of strikes and negotiations with workers.⁵

The regulatory design created in 1960 for individual transportation remained virtually unchanged in structural terms (competent authority, entry control and tariff) in Brazil, focusing on taxi services. In São Paulo, the municipal law for regulation of individual transportation was approved in 1969 (Law no. 7329/1969) and it is still in force today. This law established a kind of ‘medallion system’ – first created in the United States during the 1930s – in which there is a limited number of licenses for taxi drivers, creating an artificial entry barrier in this market.⁶

In the current model, created in the 1960s in São Paulo, there are a limited number of permits that are issued by the government. Drivers who wish to offer the taxi service (considered public transport and local public service) must obtain such a license through a highly bureaucratic procedure. In this sense, the taxi industry was configured in Brazil as a closed market, where regulation is characterised, in the foreground, “by barriers to entry and exit from the market and by tariff policy.”⁷

The authorisation dependence through license and legalised procedures turned taxi service a local public interest service. In Brazilian law and literature, the taxi was characterised as one kind of public transport. Federal Law no. 9503/1997 (Brazilian Traffic Code) also determined that “the rental vehicles, intended for individual transport and collective passenger regular lines or used in any paid service for registration, licensing and its commercial feature license plate, should be properly authorised by the granting government” (Art. 135) – strengthening state control over this activity.

During the first government of President Dilma Rousseff (2011–2014), two major changes have occurred with respect to the regulation of individual transportation. The first was the introduction of the ‘law of the taxi drivers’ (Federal Law no. 12468/2011), which regulates the profession of taxi drivers. Such legislation established that “it is prerogative of professional taxi drivers the use of motor vehicle, own or third parties for individual public transport paying passengers” (Art. 2). The second change was the approval of Federal Law no. 12587/2012, which established the guidelines of the National Urban Mobility Policy.⁸ This legal norm sets the definition of individual public transport as “remunerated service transport open to public through rental of vehicles for

the realisation of individualised travel” and private motorised transport as “motorised means of passenger transport used to carry out individualised trips intermediate of private vehicles” (Art. 4). Uber started its activities in Brazil in 2014 under this legal framework, mainly established by the federal rules.

The arrival of this new business model in São Paulo, similarly to what happened in other cities of the world, caused an uproar and led to major taxi drivers’ protests. The speech of the actors involved was quite polarised, focused on either the legality or the illegality of the activities of Uber. On the one hand, representatives of taxi drivers argued that:

- 1 Uber operates without regulation, providing an ‘illegal service’
- 2 Uber promotes clandestine service and implies the “illegal exercise of the profession of taxi driver”, since Uber drivers are not allowed to engage in this activity.

Uber, in turn, argued that:

- 1 is a technology company and not a transportation company
- 2 it facilitates the provision of individual private transport (and not ‘individual public transport’, as defined by Law 12468/2011).⁹

Specifically in the case of São Paulo – which we take as an example for a concrete regulatory discussion – the main legal instrument used by the taxi drivers at this first period was the proposal of bills at the local level. In a complex scenario of a *tangle of legal rules* from different historical periods, the bills proposed by city council representing the interests of taxi drivers sought to modify the regulatory framework to expressly prohibit Uber’s newly introduced business model.

Table 1 summarises the first period scenario.

Table 1 First period scenario

<i>Actors</i>	<i>Legal instruments</i>	<i>Main issues</i>
Uber	Bills (municipal level)	Legal or illegal?
Taxi drivers		For or against?
City councilmen		

Note: Trouble arises.

We will use these three elements (actors, legal instruments and issues disputed) to show the growing legal complexity of this case and how it increasingly involved more legal actors and more complex legal instruments. We believe that this general socio-legal framework can also be used to study other cities and compare how the legal issues vary from one place to another – opening the field for comparative socio-legal studies about the social conflicts around the regulation of Uber in other cities.

4 Second period: judiciary and executive powers come into play

In late April 2015, the discursive conflict reached the Judiciary. On April 29, 2015, Judge Luiz Roberto Corcioli Filho, of the 12th Civil Court of São Paulo, ordered the suspension of Uber’s activities for not having “authorisation nor permission from the

competent public authorities.” Motivated by the request of the *Sindicato dos Motoristas nas Empresas de Táxis no Estado de São Paulo* (Simtetaxi-SP), the judge also determined the removal of Uber appstores and the imposition of a fine in the amount of \$100,000.00 in case of non compliance.

The decision was reversed the next day by the same judge, on the grounds that another Judicial Court held prior jurisdiction over the matter. This is because in a previous process Judge Fernanda Camacho, of the 19th Civil Court of São Paulo, had dismissed a similar case filed by another association of taxi drivers (Associação Boa Vista de Táxi), as the judge considered the association was not entitled to represent the interests of all taxi drivers. According to the judge, a public prosecutor should have filed the case.¹⁰

Interestingly, the analysis in the judiciary, at this point, did not discuss whether or not Uber brings benefits to society. The decision to suspend the service was based on existing laws for the regulation of individual public transport – some of them dating back to 1960s – that would be inconsistent with the company’s business model. This conflict has brought other key issues into the Brazilian debate: what legal categories are necessary to regulate these new business models? What should be regulated? What are the regulation’s purposes and which instruments can be used to achieve them? Is it necessary to establish a specific law for individual transport companies like Uber? Is it possible to regulate new vehicle sharing arrangements (e.g., carsharing, carpooling, transportation and drivers) with only a legislative instrument?

Some renowned jurists were consulted by taxi drivers, Uber and other stakeholders and presented legal opinions seeking to answer these questions.¹¹ Daniel Sarmento, Professor of constitutional law at the State University of Rio de Janeiro, rendered an opinion in favour of Uber, arguing in essence that:

- 1 the activities performed by Uber’s partners drivers characterise *private* individual passenger transportation, which is different from taxi drivers
- 2 individual passenger transportation is not a public service, but rather an economic activity
- 3 the activities carried out by Uber’s drivers do not depend on prior regulation/authorisation, due to the constitutional principle of free enterprise;
- 4 the Federal Government has exclusive authority to legislate on transport matters (Article 22, XI, cf.)
- 5 the rulemakers do not enjoy unrestricted freedom to establish public services.¹²

José Joaquim Gomes Canotilho presented a legal opinion with similar reasoning. According to him the prohibition of Uber’s activity by local law would violate the principle of free enterprise, the principle of freedom of work and the principle of free competition, all established by Brazilian Constitution. Moreover, he argued that the city counsel had no authority to regulate on matters such as civil law, information technology, guidelines of the national transportation policy, traffic and conditions for the exercise of professions, as well as alleged violation of Art. 3, VIII of the ‘Marco Civil da Internet’ (Brazilian Internet Bill of Rights), which guarantees freedom of business models on the internet.¹³

Uber also hired law professors, Carlos Affonso Souza and Ronaldo Lemos, from the State University of Rio de Janeiro, both with experience in internet regulation. The legal opinion offered by them, unlike the others, was not restricted to analysing legal provisions, but also included an evaluation of the effects intermediation transport platform would have in Brazil. The opinion emphasised that the economic activity of intermediation drivers and passengers should not be confused with the activity of promoting individual public transport of passengers. In addition, both the Constitution and the Marco Civil da Internet favour the freedom of economic agents to structure their business models. In the opinion of the professors, the prohibition of Uber in Brazil would overlook the need to adapt the rules to the new scenario of technological innovation and expansion of the sharing economy, as well as the possible social benefits that an alternative for urban mobility could bring. In this sense, the ban would serve solely to the maintenance of market reserve that serves the interests of certain agents, averse to changes in the traditional model.¹⁴

On the other hand, Public Law Professor Celso Antonio Bandeira de Melo claimed the opposite, at the request of the *Associação Brasileira das Associações e Cooperativas de Motoristas de Táxi* (ABRACOMTAXI), another taxi drivers' association. The legal opinion was based on constitutional and infra-constitutional norms and argued that individual transport by drivers through the Uber app was equivalent to that provided by taxi drivers, and therefore, it would be required municipal authorisation – finding no support in the principles of free enterprise and free competition. The fact that the request of the race was made by electronic means, according to the law professor, do not decharacterise the individual transport of passengers, which is exclusive of taxi drivers.¹⁵

The legal debate also involved other companies that work as intermediaries between passengers and drivers. The company '99Taxis', which connects users to taxi drivers, requested the opinion of the lawyer Fernando Dias Menezes de Almeida, Professor at the University of São Paulo School of Law, questioning the legal regime applicable to individual transport activity, which is open to the public. The opinion makes a distinction between what he calls the organisation of e-services supply on the one hand and material services whose supply is organised on the other. According to Menezes de Almeida, the first would be a private and free economic activity, while the latter could be defined by the legislation of each municipality as a public service, or as an economic activity. Thus, what should be discussed would be the legality of the individual passenger transport service, according to the legal system of each municipality. Also according to the professor, the legislation in force in São Paulo establishes that individual transport is a public service and that this economic activity depends on government permission – otherwise it would be considered unlawful. The lawful transportation service by taxi could also be lawfully brokered by online platform, which is the case of 99Taxis.¹⁶

Another stakeholder involved in the dispute was the National Services Confederation (CNS), which on October 14, 2015 filed before the São Paulo Court of Justice a especial type of lawsuit (*ação direta de inconstitucionalidade*), claiming that a prohibitive Municipal Law was against the Constitution of the State of São Paulo. The CNS argued incompatibility of the approved law with the principles of free enterprise and freedom of work, which are both protected by the State Constitution. Moreover, it claimed lack of municipal authority to legislate on transport and informatics matters – because the Federal Government has exclusive authority to regulate those matters – as well as restrict on the right of consumer choice. The basis of the piece explored the distinction between

public individual transport, which is exclusive of taxi drivers and private individual transport, one provided by the drivers of Uber.

This ‘war of legal opinions’ shows an interesting feature of the Brazilian legal system, which is the power of ‘dogmatics’ and legal doctrine. To use Pierre Bourdieu’s terminology, this clash shows a clear tension in the *field* of public law in Brazil and a struggle of actors that fight to have the power to ‘say what the law is’ or to provide the ‘right interpretation of the law’ based on their positions and the legal capital that these lawyers have previously built.¹⁷ This might not be the case in countries of the common law tradition where the legal doctrine – produced by legal scholars – is not so powerful.

Alongside the legal dispute, the case was taken to the *Conselho Administrativo de Defesa Econômica* (CADE), Brazilian competition authority, in a representation of the students’ Association of UNICEUB (a private university) and of the students’ Association of University of Brasilia (UNB), in which it alleged that the strategy adopted by taxi drivers’ associations against Uber could be characterised as *sham litigation* – when lawsuits are “used offensively by corporations to harm competitors and to protect monopoly power.”¹⁸ The competition authority established then a preparatory procedure of an administrative investigation to determine whether there was a violation of the economic order. It was then recommended that an administrative proceeding be established with regard to:

- 1 use of violence and serious threat
- 2 anticompetitive sham litigation, by representatives of taxi drivers.

The General Superintendent of CADE accepted the recommendations and established the administrative proceeding for imposing administrative penalties due to violations of economic order, pursuant to Law no. 12.529/2011 (Brazilian Competition Law).

Table 2 Second period scenario

<i>Actors</i>	<i>Legal instruments</i>	<i>Main issues</i>
Uber	Bills (municipal level)	What makes the individual transport <i>public</i> ?
Taxi drivers	Judicial petitions	
City councilmen	Court decisions	What is the legal regime that must be applied?
Law professors	Legal opinions	
Lawyers	Public hearings called by the legislative power	
City hall		
Competition authority		
Research centres		

Note: Battle of legal opinions.

In São Paulo, following the approval of the Bill 349/2014 by the Legislative Assembly and the sanctioning of Law no. 16279/2015 by the Mayor Fernando Haddad (Workers’ Party), the executive sought to regulate these new tech firms and began developing a strategy, conducted by its legal staff, to regulate Uber based on an Executive Decree. Amid a troubled legislative scenario, the City of São Paulo began discussions with stakeholders and research centres dedicated to studying the subject, in pursuit of a regulatory solution that would settle the interests at stake.

Table 2 summarises the scenario of the second period.

As it can be seen, the main issues changed. The question was not a binary one (is it legal or illegal?) but rather reflexive and conceptual (why should the service of taxi driver be considered a public one?). The conflict also got increasingly bigger and involved more actors. In this second period, law professors, lawyers, the mayor, competition authority and research centres – they all came into play. The legal instruments also became more complex: courts got involved and the ‘battle of legal opinions’ took place.

5 Third period: designing a regulatory alternative

At this stage, the debate on prohibition on the one hand and permission on the other hand lost protagonism before the conscience of many regulators about the uncontrollable expansion of transport services mediated by smartphones, as well as urban impacts of such a market, i.e., environmental protection, traffic management and management systems of urban mobility as a whole, integrating the individual transport to other modes and urban dynamics.

In December 2015, the City of São Paulo opened for public consultation the *Decreto de Regulação da Exploração Econômica do Uso Intensivo do Viário Urbano*, a Municipal Decree which creates a new individual transportation model and seeks to balance the new services and technologies with the old regulatory structure for taxi drivers. The draft decree, which received comments, contributions and suggestions until January 27, 2016, is quite sophisticated and created a regulatory framework for ‘accredited transport operators’ (herein called, OTC because of the name in Portuguese, *Operadora de Transporte Credenciada*), defined as “technology operators responsible for intermediation between providers drivers service and its users.”¹⁹

The City of São Paulo presented a new regulatory strategy which was different from the rules created in large cities such as New York (USA), Mexico City (Mexico) and Bogota (Colombia). As noticed by one researcher from the World Bank, the idea is that any registered OTC could bid in an online public auction to purchase credits periodically and with certain limitations to ensure competition. This would create a market for these credits and would allow the city to receive a fee from OTCs for “the commercial use of its public road infrastructure, which can be used to better manage and maintain it.”²⁰ An interesting aspect is that these credits will serve as a regulatory tool to control the use of public space and the exploration of urban road, according to the municipal public policies.

Furthermore, the use of credits by the OTCs may be varied depending on the time of the race, start and ending sites or the type of car used. Thus, it would be possible to stimulate behaviours of agents, charging less for racing on the outskirts, off-peak hours, or in cars adapted for users with disabilities and reduced mobility, for instance.

Another interesting novelty of the model is the data-sharing obligations between the OTCs and the city, which will be centered on technology and protocols Laboratory for Urban Mobility – the Mobilab. Thus, the OTCs should supply the government with important data for the control and regulation of urban mobility policies, such as length of races, maps of the paths and evaluation of services. This is a crucial point to think about the regulation of ‘smart cities’ and the dependence of the government on data and information produced and controlled by private firms.

According to the project presented, the individual transport regulation by OTCs will be the responsibility of the Department of Urban and Infrastructure Works (Siurb) of São Paulo's City Hall. This allocation of authority also helps to distinguish the OTCs model from traditional taxi services, whose regulation authority lies with the transport secretariat (SPTrans). If, on the one hand, the separation of powers seems to be interesting in view of the different regulatory purposes pursued with the proposed regulation, on the other, the intimate relationship between OTCs and the taxi service could cause some mismatches due to duplication of regulatory authority.

In this sense, São Paulo's public consultation is representative of the improvement of the regulatory debate in Brazil, bringing significant innovations into the regulatory model of these technology companies in the country. In addition to creating a new legal category – similar to what has happened in the United States with the creation of the 'Transportation Network Company'²¹ by the California Public Utility Commission – and the flexibility of the credit purchase system for use of the road, São Paulo's regulation also provides for an incentive to sharing (online platforms must allow you to share a ride if you are using the app) and encouraging to the participation of women in transportation activities.²²

As observed by the comparative research conducted by InternetLab, the experimental regulation of São Paulo is quite unique when compared to other big cities of developing countries like Mexico City and New Delhi.²³

On February 4, 2016, the Secretariat for Economic Monitoring of the Brazilian Ministry of Finance (SEAE/MF) entered the debate with a technical note presenting the impacts that the introduction of the Uber app caused in competition among the relevant market for individual transport of passengers.²⁴ According to the secretariat, the technological innovation in this segment led to market expansion, to reach consumers who previously did not use this kind of service. In this sense, it recommends that the government should not adopt any measure that could prevent or hinder the operation of private individual transport platforms and that any future regulation of the sector should seek to preserve the currently existing business models, encouraging innovation and to ensure freedom of entry and pricing.

The opinion of the technical employees of the Ministry of Finance is different from the staff of the City Hall of São Paulo. One side advocated for deregulation and equal level playing field for old players (taxi drivers) and new players (Uber drivers). The other side recognised that both players must be regulated and that the public interested leads to different regulatory instruments. Uber, for instance, makes money from using the public roads and by offering transportation for the consumers of its app. They also contribute for environmental damage, traffic jam and the use of public roads (that must be preserved and have costs for the government). Therefore, according to staff of the mayor, Uber must be regulated and must pay for the costs and negative externalities that they generate for society at the local level.

The scenario of the third period can be summarised in Table 3.

The third period is much more complex than the first and the second ones. As shown in Table 3, the number of actors grew and the city hall (executive power) had a major role in defining the regulatory strategy to protect the interests of the citizens of São Paulo. The legal instruments also became more complex and involved public hearings, public consultations and instruments for social participation and consensus building. The questions also changed. In the third period, the main legal issue was not the legality or

illegality of Uber. The main issue was *why regulate this economic activity and how it should be regulated*. In theoretical terms, this means a change from a binary rationale (legal/illegal) to a more complex legal thinking in terms of regulation and how to use law to promote welfare and social justice through economic regulation.²⁵

Table 3 Third period scenario

<i>Actors</i>	<i>Legal instruments</i>	<i>Main issues</i>
Uber	Bills (municipal and federal level)	How to regulate new firms that operate at the transportation sector?
Taxi drivers		
City councilmen	Public hearings	How to achieve balance in the market with the entry of new players?
Law professors	Public consultations	
Lawyers	Technical notes (executive)	
City hall	Decrees	
Competition authority		How to regulate Uber in order to achieve public policies goals?
Research centres		
City hall business secretariat		
City hall infrastructure secretariat		

Note: Experimental regulation.

6 Conclusions

On a general level, it can be said that the regulation of individual transport is dynamic and rooted in historical contexts, material conditions and political factors. The entry of tech firms in this sector is another chapter in the long history of regulation of this economic activity (transportation of individuals in small groups). There are issues of ‘public interest’ in this sector, not always clearly identified, which serve to protect consumer interest and to ensure the very existence of the services market. Our research about the regulation of individual transport in São Paulo shows that an extreme discourse of deregulation is not feasible and not consistent with the history of this market in historical perspective, at least in Brazil.

Until now, major cities in the world offered different legal approaches to the regulation of Uber and other transportation network companies. As noticed by researchers like Ranchordás²⁶ and Haldeweg²⁷, regulators around the world are in a very peculiar time of understanding the changes taking place in recent years and the identification of collective interests that need to be protected by law. It is time of experimental regulation in this field.

Brazil is an interesting country for doing research about how foreign tech firms are regulated in traditional sectors like transportation. Our study shows that, in the case of São Paulo, the legal complexity of the debate became bigger in a short period and involved more actors and more legal instruments, mobilising resources, legal knowledge and all state powers (executive, legislative and judiciary). There is a chance that the three periods described in our paper – ‘trouble arises’, the ‘battle of legal opinions’ and ‘experimental regulation’ – can also be observed in other cities, especially in those countries with legal systems more connected to the civil law tradition.

This could be an opportunity for comparative socio-legal research. Case studies like the one we attempted to do in São Paulo can also provide a more detailed picture about the battles around experimental regulation and the struggles of innovative firms to operate in markets already regulated by legal norms. This is an opportunity to understand the transformation of law and the mobilisation of legal actors in the field. It is also a chance to test contemporary theories of ‘institutional transplantation’²⁸ and how regulatory ideas travel from rich countries to poor ones or how regulatory approaches are mobilised by technical elites and think tanks.

The regulatory strategy created in São Paulo is unique up to date, but it can soon spread to other major cities inside and outside Brazil. In order to understand how this might happen we need more empirical research.

Notes

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