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Linking Promises to Policies: Law and  
Development in an Unequal Brazil

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# Linking Promises to Policies: Law and Development in an Unequal Brazil\*

Diogo R. Coutinho

## Abstract

The 1988 Brazilian Constitution contains a wide variety of social and economic rights and expressly embraces development as a fundamental goal. For the results to be effective, however, constitutional provisions of this type require permanent implementation and articulation of public policies that, in turn, are intensely mediated by the law. Assuming that the legal dimension of social policies ultimately matters for development, the article seeks to identify and discuss the distributive effects caused by some Brazilian welfare institutions and their legal arrangements. After describing the regressive outcomes produced by the tax and pensions systems and arguing that such effects reinforce Brazilian's historically rooted deep inequality, the article discusses *Programa Bolsa Família*, a conditional cash transfer in Brazil, and presents the preliminary findings of an ongoing research project on law and development (the LANDS project).

**KEYWORDS:** law and development, equality, redistribution, social policies, Brazil, *Bolsa Família*

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## I. INTRODUCTION

The 1988 Brazilian Constitution is a progressive and generous one. Nicknamed “the citizens’ constitution” since it was enacted after two decades of military dictatorship (1964-1985), it contains a long detailed charter of justiciable social and economic rights. It expressly includes, as binding norms and policy guidelines, welfare policies such as minimum wage,<sup>1</sup> unemployment insurance,<sup>2</sup> transfers to the elderly and disabled,<sup>3</sup> public pensions<sup>4</sup> and a wide variety of labor rights.<sup>5</sup> Also, it states that property rights, although defined and protected,<sup>6</sup> have a “social task”<sup>7</sup> to perform, that income taxes must be progressive,<sup>8</sup> and that social and regional inequalities must be “reduced” and poverty “eradicated”.<sup>9</sup> It is indeed a detailed and transformative constitution that recognizes poverty and inequality as actual problems that demand active policies.

Most public policies currently implemented in Brazil have been created since 1988, and several are direct products of the constitution itself,<sup>10</sup> which has a long chapter whose title is “The Social Order”. Pensions, healthcare, education, culture, science and technology, sports, children, the elderly, environmental and other policies fall under this broad chapter, which provides guidelines, general principles and structures, as well as substantive policy goals to Brazilian governments.

Public policies designed to achieve developmental goals or implement constitutional provisions require legal solutions that range from the drafting of new legislation and regulation or the amendment of existing ones to the articulation and harmonization of norms, the creation of bodies, and the division and re-division of tasks within the public administration. In summary, they require the design and employment of existing and new legal tools, rationales and institutional arrangements. In other words, such policies permanently generate the

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<sup>1</sup> Article 7, IV.

<sup>2</sup> Article 7, II.

<sup>3</sup> Article 203, V.

<sup>4</sup> Article 201.

<sup>5</sup> Article 7.

<sup>6</sup> Article 5, XXII.

<sup>7</sup> Article 5, XXIII.

<sup>8</sup> Article 153, paragraph 2, I.

<sup>9</sup> Article 3, III.

<sup>10</sup> For a political science discussion on the public policies imprinted in the 1988 Brazilian Constitution, see C.G. Couto and R.B. Arantes, *Constituição, Governo e Democracia no Brasil*, 21 *Revista Brasileira de Ciências Sociais* 61 (2006), 41-62 and C.G. Couto and R.B. Arantes, *Constituição ou políticas públicas? Uma avaliação dos anos FHC* (2002), available at <<http://www.pucsp.br/~claudio.couto/constpolpub.pdf>> accessed 16 November 2009.

need for an administrative and regulatory law able to help transform policy objectives and constitutional “promises” into reality.

While policy goals are usually chosen by politicians who vote and pass legislation in congress and are put into operation by public administrators and career civil servants, they constantly require lawyers,<sup>11</sup> legal argumentation and solutions, as well as innovations. In the technocratic levels of the State<sup>12</sup> various (public) lawyers are assigned multiple tasks involved in the implementation of public policies. There is hence a legal dimension and a wide range of legal tasks to be accomplished behind every public policy – be it self-declared “developmentalist” or not. My claim is that such tasks require a “legal technology” capable of contributing to developmental goals at the end of the day.

In Brazil after more than twenty years since 1988, the consequences of constitutionalizing social and economic rights, developmental objectives and principles of distributive justice are far from being effective. When it comes to poverty and income distribution, despite the fact that important progress has been made, Brazil still is a very unequal country with a large proportion of poor people. From the bureaucracy capacity building point of view, despite several improvements, the country still faces intricate challenges to advance social justice through consistent, cost-effective and accountable arrangements capable of reducing the huge divide between the very rich and the very poor.

In terms of legal culture and education, Brazilian lawyers, legal scholars, judges and public policy staff are, as a rule, trained to think of social justice mainly from a vague and metaphysical perspective. “What is justice?” is a topic discussed only in first year legal philosophy classes in law schools. And “what is social justice in practice?” is not discussed at all. This means that discussing actual distributive effects of public policies – to know their degree of fairness, for example – is not part of Brazilian legal education. This could be a possible explanation for the fact that when taken to the judiciary, social rights are

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<sup>11</sup> Of course many civil servants are lawyers or have a law diploma, but not all of them perform legal duties in the implementation of public policies. For the purposes of this article, thus, I distinguish between the general category of technocrats and the specific group of legal staff within Brazilian ministries and other public bodies.

<sup>12</sup> Judges, sometimes and increasingly, also implement policies in Brazil. The judicial review of public policies is visible, with lower and high courts decisively influencing outcomes of public policies in a judicialization of politics. For the Brazilian case, see L. W. Vianna *et al.*, *A judicialização da política e das relações sociais no Brasil* (Rio de Janeiro: Renavan, 1999) and D. A. Maciel and A. Koerner, *Sentidos da judicialização da política: duas análises*, 57 *Lua Nova* (2002), 113-133. Although they certainly are interesting topics for research, in this article I am not concerned with the roles that legislators and judges, as well as their respective staff, play in the creation and review of public policies. As in many countries where a prominent Executive body is in charge of technical social and economic policies, in Brazil the “public administration”, i.e. the technocracy within the Executive body, is in charge of implementing policy goals. I therefore limit my discussion of the Brazilian case to the government level.

frequently treated as “trumps” by Brazilian judges, who tend to decide cases “generously” with no regard to the economic (expected or unexpected) impacts of their decisions. The Brazilian healthcare sector illustrates this: unfair and regressive outcomes have been produced by judicial decisions reviewing public policies whose justification is based on the discourse of fundamental rights.<sup>13</sup>

Besides that, in Brazil the applied study of public policies and internal legal challenges is also neglected by legal education and training. When they graduate in law Brazilian lawyers are not familiar at all with the legal requirements and challenges that public policies entail. This is also a symptom of a broader and more complicated problem: the weakness (not to say inexistence) of an empirically grounded research agenda in the Brazilian legal field.

Bearing that in mind, this article is an attempt to study the legal dimension of Brazilian social policy. It is also a by-product of a research project,<sup>14</sup> a broader and ongoing investigation to study the roles of law in development policies implemented in selected developing countries in the aftermath of neoliberalism. Its purpose, therefore, is to shed light on the legal elements of the development process as part of a collective research agenda interested in showing how certain policies and practices affect and are affected by the law, and in documenting progressive legal institutions and practices that further developmental goals.<sup>15</sup>

In section II, I describe the economic argument that redistribution of income is increasingly considered not only a powerful antidote to the reduction of poverty, but also a relatively autonomous tool to foster development in the long run. Next, I argue that the lack of effectiveness of social and economic rights in Brazil, as well as its historical and persistent levels of inequality, can be partly explained as the outcome of legal norms and arrangements that privilege the rich at the expense of the poor. In section III, the Brazilian tax and pension systems are briefly presented. Although typically part of a set of welfare institutions and legal arrangements whose task is to redistribute income, Brazilian taxes and pensions are quite regressive and conservative. Rather than transform, they crystallize the *status quo*.

I claim that if it is correct to assume that the legal apparatus, both as an obstacle or as an enabling tool, can cause income transfers and concentration, it is also possible to rely on the premise that the study of the distributive effects

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<sup>13</sup> See O. L. M. Ferraz and F. S. Vieira, *Direito à saúde, recursos escassos e equidade: os riscos da interpretação judicial dominante*, in 52 *Dados* 1 (2009), 223- 251 and V.A. Silva, *O Judiciário e as políticas públicas: entre transformação social e obstáculo à realização dos direitos sociais*, in C. P. de S. Neto and D. Sarmiento, *Direitos sociais: fundamentação, judicialização e direitos sociais em espécies* (Rio de Janeiro: Lumen Juris, 2008), pp. 587-599.

<sup>14</sup> I refer to the project on Law and the New Developmental State (LANDS). For further information, please see <<http://law.wisc.edu/gls/lands.html>>

<sup>15</sup> Another goal pursued by the LANDS project is to facilitate reform of legal education by providing examples of pragmatic, empirically grounded, and progressive scholarship in law.

produced by legislations - comprehending not only legal norms but, particularly, legal institutional arrangements and regulations adopted in the process of implementing State policies - is important in the contemporary development agenda. After all, understood as a regime that deeply influences economic production and distribution, and also shapes macro-economic regulation, the law is everything but a neutral variable when it comes to inequality and poverty levels. In section IV I make a case that the law can ultimately work as a “technology” to promote development by means of providing goals, tools and institutional arrangements to reduce poverty and inequality. Section V presents and preliminarily discusses the initial findings of an ongoing research project on the *Bolsa Família*, a Brazilian cash transfer program, with the purpose of identifying some of its underlying legal aspects.

## **II. DEVELOPMENT, GROWTH AND INEQUALITY**

Inequality, a complex and multi-dimensional phenomenon, is caused by different factors and is linked to gender, culture, space, race, welfare and opportunities. Income inequality, for the limited purposes of this article,<sup>16</sup> is of growing concern in many countries: having increased in the last few decades as a general rule, particularly in transitional and developing economies, it has been more recently detected as a serious obstacle for development.

Indeed, there is more and more evidence that less unequal societies are associated with better growth performances<sup>17</sup> because equality is perceived as an advantageous ingredient for the development process. More equal societies grow in a more sustainable manner compared to unequal ones and by the same token, very unequal countries tend to grow more slowly.<sup>18</sup> Moreover, GDP growth combined with inequality reduction - i.e. a decline in the gap between the rich and

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<sup>16</sup> I am aware of the existence of a classic, ever-evolving, and inevitably controversial debate on what equality is, as a paramount concept in political philosophy. Besides proposing different conceptual views on equality, legal philosophers and social scientists have been discussing the fundamental questions “equality of what?” and “how much redistribution should there be?” and a consensus is far from being achieved. I do not intend, however, to dialogue with the philosophical or legal theory literature on equality. In discussing the roles that law plays in development from a public policy perspective, I simply assume that high levels of income inequality are counter-productive for development, and take for granted the (normative) assumption that a legal system should not be regressive, i.e., should not promote intended or unintended income transfers from the poor to the rich.

<sup>17</sup> For a comprehensive analysis of the positive effects equality brings in other realms beyond income, see R. Wilkinson and K. Pickett, *The Spirit Level – Why More Equal Societies Almost Always Do Better* (Allen Lane, 2009).

<sup>18</sup> T. Addison and G.A. Cornia, *Income Distribution Policies For Faster Poverty Reduction*, WIDER Discussion Paper No. 93 (UNU-WIDER, 2001).

the poor - results in more effective poverty mitigation as compared to distributive-neutral growth.

Some development economists like Ortiz<sup>19</sup> argue that poverty and inequality inhibit growth and depress domestic demand and that the persistence of inequality at high levels makes it much more difficult to reduce poverty.<sup>20</sup> “[T]he higher the level of inequality, the less impact economic growth has in reducing poverty - for any rate of economic growth,” explain Cornia and Court<sup>21</sup> and, as put by Birdsall<sup>22</sup>, “where markets are underdeveloped, inequality inhibits growth through economic mechanisms.” In other words, leaving aside the fact that inequality is highly problematic on moral, philosophical and legal grounds, today it also matters for economists for purely instrumental reasons.<sup>23</sup>

In the developed world, the rise in inequality of income was first noticed in the United States and in the UK in the 1970s and, not uniformly, all OECD countries have seen increased income inequality in the last few decades.<sup>24</sup> In the developing world, inequality has risen to various extents in the former Soviet bloc, Latin America, China, East, Southeast and South Asia and Sub-Saharan Africa.<sup>25</sup>

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<sup>19</sup> I. Ortiz, *Social policy*, in The United Nations, *National Development Strategies – Policy Notes*. (New York: United Nations, 2008), pp. 199-267.

<sup>20</sup> Although connected, absolute poverty and inequality are different concepts. Poverty, on one hand, is usually (not without controversies, though) defined as the condition of people who live on an average of US\$ 2 a day, and a person who lives on US\$ 1 a day is considered extremely poor. On the other hand inequality, a relative and multi-dimensional concept, has a broader scope and can be connected to opportunities, preferences, tastes, access to education, health, housing, etc.

<sup>21</sup> G.A. Cornia and J. Court, *Inequality, Growth and Poverty in the Era of Liberalization and Globalization*, WIDER Policy Brief, No. 4 (UNU-WIDER, 2001). Or, as put by Addison and Cornia: “little progress can be made in poverty reduction when inequality is high and rising”. See Addison and Cornia (2001), *supra* note 18.

<sup>22</sup> N. Birdsall, *The World is not Flat: Inequality and Injustice in our Global Economy*, WIDER Annual Lectures 9 (UNU-WIDER, 2005).

<sup>23</sup> Inequality can also be considered problematic from social, political and democratic perspectives, as this quote reveals: “where institutions of government are weak, inequality exacerbates the problems of creating and maintaining accountable governments, increasing the probability of economic and social policies that inhibit growth and poverty reduction, and where institutions are fragile, inequality further discourages the civic and social life that underpins effective collective decision-making that is necessary to the functioning of societies.”. See Birdsall (2005), *supra* note 22.

<sup>24</sup> A. Atkinson, *Is rising inequality inevitable? A critique of the Transatlantic Consensus*, WIDER Annual Lectures 3 (UNU-WIDER, 1999).

<sup>25</sup> See G.A. Cornia and Kiiski, *Trends in Income Distribution in the Post-World War II Period – Evidence and Interpretation*, WIDER Discussion Paper No. 89 (UNU-WIDER, 2001) and H. Dagdeviren, R. van der Hoeven and J. Weeks, *Redistribution Does Matter*, WIDER Discussion Paper No. 5 (UNU-WIDER, 2002).

Nonetheless, inequality has not always been seen as a problem in capitalist societies. In the early days of development policy, as explained by Addison,<sup>26</sup> raising output, in particular increasing overall labor productivity by shifting labor from those sectors in which productivity is low to sectors in which it is high, was the substantive goal to be achieved. In fact, from the 1950s to the 1970s poverty and inequality reduction were considered much more ancillary outcomes than primary objectives, and the famous Kuznets curve explained the growth-inequality relationship.<sup>27</sup>

### **A. From Trickle Down to Redistribution**

The argument that economic growth should be the first priority in any developmental policy and the related idea that inequality can be seen as a previous - perhaps unavoidable - step for development have been prevalent for decades in economic literature as a result of the adoption of a narrow notion of the development process. Underneath the assumption of growth as a previous stage of poverty reduction was the premise that growth benefits will eventually “trickle down to the poor” through mechanisms not always clearly specified.<sup>28</sup>

In spite of this, it is well known that the effects of GDP growth are distributive neutral, i.e. they are not necessarily progressive in causing transfers from the rich to the poor. Growth increases output but does not change its distribution in any pre-determined way. As explained by Medeiros<sup>29</sup>, assuming that increased output is reasonably distributed among the population (which is not always the case, to say the least), it is unsurprising that growth alleviates poverty as a result of a general increase in the output – i.e. the poor will end up benefiting from a larger and richer economy. However, growth rates have to be persistently high for a relatively long period in order to reduce poverty effectively. And there is no guarantee whatsoever that inequality will also decline as a result.

After a short-lived discussion in the literature on poverty reduction and “redistribution with growth”<sup>30</sup> during the Washington Consensus years (the

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<sup>26</sup> T. Addison, *Development Policy – An Introduction to Students*, WIDER Discussion Paper No 9 (UNU-WIDER, 2004), p. 3.

<sup>27</sup> Simon Kuznets’ theory (known as the “Kuznets hypothesis”) sustained that economic inequality increases over time while a country is developing, then after a critical average income is attained, it begins to decrease. At the end of the day, it suggested a trade-off between growth and income distribution, and, from the public policy point of view, it ultimately provided inspiration for developmental strategies that to some extent disregarded distributive aspects.

<sup>28</sup> H. Dagdeviren, R. van der Hoeven and J. Weeks (2002), *supra* note 25, p. 1.

<sup>29</sup> M. Medeiros, *O que faz os ricos ricos? O outro lado da desigualdade brasileira* (Hucitec, 2005), p. 43.

<sup>30</sup> The reference here is H. Chenery, M. S. Ahluwalia, C. L. G. Bell, J. H. Duloy and R. Jolly,

1990s), it was assumed that poverty might be alleviated by targeting basic services to the poor and providing “social safety nets”, but then again, equality and redistributive policies were not part of that agenda. It was not until the mid 1990s that a number of studies and evidence suggested that liberal adjustment programs in the 1990s had had an adverse impact on poverty and inequality and, at best, did not improve the conditions of the poor.<sup>31</sup> In any event, poverty alleviation - not inequality reduction - was an objective discussed by the neoliberal political voices.<sup>32</sup>

Why has inequality been ignored? This is possibly because of tackling of inequality and the forms it takes often require more controversial justifications, political coalitions and, perhaps, legal challenges. Discussing the Brazilian case, Thomas Skidmore explains that measures to eliminate poverty are easier to envision because they focus on a relatively easy identifiable subpopulation. Income inequality, on the other hand, requires attention to the entire population, from the richest to the poorest.<sup>33</sup>

Specifically, when inequality reduction through redistribution of income by transfers is concerned it is clearer that there will be “losers”, whereas when one thinks about fighting poverty, there can be the shared impression that there are “winners only”. When poverty-fighting policies are implemented with public (tax, for instance) funds, the rich, in principle, are not more affected than everyone else. Redistributive measures, on the other hand, typically require more visible and disputable changes in the socio-economic structure, with the rich “losing” for the poor to “win”.

Besides that, is it reasonable to assume that winners and losers should be democratically defined, besides being actually found? “Who are the poor”, “who are the rich” are not easy questions to answer, but “who should lose?” and “who should win?” are even more intricate and controversial ones. To be answered, they necessarily give rise to a debate (and demand a minimum consensus) on the extent and limits of redistribution. “How much redistribution will there be?” is an inevitable associated question. In addition, ideally speaking, fighting inequality more strongly through redistribution requires some sort of “magnetic needle”, i.e., a theory and a sound justification to back up policy measures, be it egalitarian, Marxist,<sup>34</sup> utilitarian<sup>35</sup> or other, while poverty fighting is usually related to more acceptable efforts to pull people above the 2-dollar-a-day poverty line.

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*Redistribution with Growth* (Oxford University Press, 1974).

<sup>31</sup> H. Dagdeviren, R. van der Hoeven and J. Weeks (2002), *supra* note 25, p. 2.

<sup>32</sup> See, for instance, PovertyNet (the World Bank comprehensive webpage on poverty), available at <<http://www.worldbank.org/poverty/>>, accessed 24 October 2009.

<sup>33</sup> T.E. Skidmore, *Brazil's Persistent Income Inequality: Lessons from History*, 46 *Latin American Politics and Society* 2 (2004), 133-150.

<sup>34</sup> Marx famously put it in his *Critique of the Gotha Program* (1875), “from each according to his ability, to each according to his needs”.

In addition, redistributive measures are frequently criticized by orthodox neoclassic economics for causing various adverse effects, as well as a long list of inefficiencies and perverse outcomes such as different types of distortions, information problems, political appropriation, leakage, inclusion and exclusion errors.<sup>36</sup> According to their critics redistributive policies are likely to fail in cost-benefit tests. More palliative, focused and temporary poverty-fighting initiatives, on the other hand, are expected to perform better in terms of cost-effectiveness. Another positive aspect of poverty fighting is related to the fact that it can be combined with market mechanisms and incentives to generate productive assets and human capital.

In a nutshell, redistribution might require more State interventions than poverty alleviation. And the type of interventions redistribution requires varies according to several criteria and uses two main channels, as Lopez-Calva and Lustig explain: directly, through fiscal or budgetary interventions (taxes and transfers) and indirectly, through interventions that affect the determinants of market or primary income. “Government actions through both direct and indirect interventions can affect the level of distribution of assets, returns to those assets, and post-fiscal (after tax transfers) incomes.”<sup>37</sup>

Moreover, one could arguably formulate the statement that designing policies to attack income inequality results in the challenge of maximizing *equity gains* while minimizing *inefficiency losses* at the same time. Maximizing equity gains means achieving, to a maximum extent, the desired *equilizandum*, i.e., the redistributive target. Minimizing inefficiency losses means impeding as much as possible the unexpected and undesirable redistributive effects as well as waste in terms of public spending and public policy implementation.

Today many studies suggest new causalities involving growth and inequality reduction,<sup>38</sup> and the view based on the alleviation of poverty with

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<sup>35</sup> An efficiency-based criterion such as Kaldor-Hicks (the gains of the winners compensate for the loss of the losers), or the wealth maximization goal, for instance.

<sup>36</sup> See, for example, the classic arguments from B. de Jouvenel, *The Ethics of Redistribution* (Indianapolis: Liberty Fund, 1990); and F.A. Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (The University of Chicago Press, 1976).

<sup>37</sup> See L.F. Lopez-Calva, and N. Lustig, *The recent decline of inequality in Latin America: Argentina, Brazil, Mexico and Peru*, ECINEQ Working Paper 2009, No. 140 (2009), p. 6.

<sup>38</sup> In a broad survey on inequality and economic performance, Francisco Ferreira presents the argument that “income and wealth distributions can no longer be seen as mere *outcomes* of the general equilibrium of an economy. The central processes that determine resource allocation – through capital markets, through the political system, and through social circumstances – are influenced by the distribution of wealth in important ways. More unequal societies tend to develop larger groups of people who are excluded from opportunities others enjoy – be they a better education, access to loans, or to insurance – and who therefore do not develop their full productive potentials. Both theory and empirical evidence suggest that these incomplete realizations of economic potential are not of concern only to those who care about equity per se. They also affect

emphasis on market mechanisms and signals is being criticized as insufficient, and is increasingly combined with the assumption that structural social policies are a primary function of the state, and that they are more than a limited set of safety nets and services to correct market outcomes. Markets simply do not promote social justice and, as explained by Ortiz,<sup>39</sup> “well-designed and implemented social policies can powerfully shape countries, foster employment and development, eradicate marginalization and overcome conflict.”

Another argument in favor of policies that reduce inequality through redistribution is related to the marginal propensity to save and consume. As economists explain, the rich are keener to save any additional income they get compared to the poor. In turn, the poor save less and consume more, and therefore have a higher marginal propensity to spend. As explained by Galor and Moav,<sup>40</sup> the so-called classic economic approach, formulated originally by Adam Smith and further interpreted and developed by Keynes, Kaldor and others, suggests that inequality stimulates capital accumulation and thus promotes economic growth. And since saving rates are an increasing function of wealth, “inequality channels resources towards individuals whose marginal propensity to save is higher, increasing aggregate savings and capital accumulation and enhancing the process of development.”

Today, however, this approach has little empirical support. Addison and Cornia, for example, contend that an econometric analysis of budget surveys in developing countries shows that marginal propensity to save “is only weakly influenced by income level”, and that “rural families consistently show higher propensities to save than their urban counterparts. “Moreover,” they continue, “small and medium-scale farmers have high savings as a result of their options of increasing choice to increase existing capital stock in their savings decisions.”<sup>41</sup>

In view of that, redistributive policies are increasingly considered not only adequate to reduce poverty, but also relatively autonomous tools to fight inequality and boost development. They are not considered “doomed” to be inefficient<sup>42</sup> and have been substantially studied in the last years. Moreover, such

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aggregate economic potential, and therefore aggregate output and its rate of growth”. See F. Ferreira, *Inequality and Economic Performance - A Brief Overview to Theories of Growth and Distribution* (World Bank, 1999), available at:

<<http://www.worldbank.org/poverty/inequal/index.ht.htm>>, accessed 24 October 2009.

<sup>39</sup> I. Ortiz, *Social Policy*, in The United Nations (2008), *supra* note 19, pp. 201.

<sup>40</sup> O. Galor and O Moav, *From Physical to Human Capital Accumulation: Inequality in the Process of Development*, Brown University Working Paper No. 99-27 (2002), p. 1.

<sup>41</sup> T. Addison and G.A. Cornia, *Income Distribution Policies For Faster Poverty Reduction*, *supra* note 18, p. 7.

<sup>42</sup> The argument appeared in F. Bourguignon, *Distribution, redistribution and development: Where Do We Stand?*, DELTA Working Papers (1998), pp. 98-111

policies, which reduce inequality and poverty simultaneously,<sup>43</sup> can, when *combined* with growth, significantly strengthen a development trajectory. As Dagdeviren et al. summarize it:<sup>44</sup>

Perhaps the most important is the growing consensus in literature that countries with an “initial condition” of relatively egalitarian distribution of assets and income tend to grow faster than countries with high initial inequality. For our purposes this is an extremely important conclusion because it means that reducing inequality ‘cuts both ways’. On the one hand, a growth path characterized by greater equality at the margin directly benefits the poor in the short run. On the other, the resulting decrease in equality creates in each period an ‘initial condition’ for the future which is growth enhancing. Thus, any growth path that reduces inequality deals poverty a double blow: through redistribution, and through ‘trickle down’.

## **B. Brazil: Deeply Rooted and Persistent Inequality**

Brazil is a country with many poor<sup>45</sup> and the origin of its poverty is not related to scarcity of resources, either absolute or relative.<sup>46</sup> The explanation of Brazilian poverty is directly linked to its stable level of inequality. After having peaked in the past (reaching 0.63, a worldwide record), Brazil’s Gini coefficient is still very high: 0.552.<sup>47</sup>

Skidmore sees Brazilian inequality as the result of both modern-day and historical causes. Modern-day causes stem from the nature of the world economy, and the first main feature is the gap between skilled and unskilled workers resulting from the industrialization process.<sup>48</sup> The second factor that explains the

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<sup>43</sup> Inequality reductions are associated with poverty reduction because the poor receive income that makes them less poor. The other way around is not necessarily true since poverty reduction can take place with no changes in the income distribution.

<sup>44</sup> H. Dagdeviren, R. van der Hoeven and J. Weeks, *Redistribution Does Matter* (2002), *supra* note 25, p. 8.

<sup>45</sup> According to a survey released in 2008 based on available data in 2003 by the Brazilian Geography and Statistics Institute (IBGE), 61,4 million people (36,5% of the population) are poor in Brazil, with the Northeast part of the country the poorest one, with poverty in 76,8% of municipalities affecting at least 50% of the population. For more information, see IBGE, *Mapa da Pobreza e Desigualdade*, available at <<http://www/ibge.gov.br>> accessed 25 October 2009.

<sup>46</sup> R. P de Barros, R. Henriques and R. Mendonça, Rosane, *Estabilidade Inaceitável: desigualdade e pobreza no Brasil*, Texto para Discussão IPEA No 800 (2001).

<sup>47</sup> Lopez-Calva and Lustig (2009), *supra* note 37, p. 12.

<sup>48</sup> Which is, in turn, “necessarily capital – rather than labor-intensive, and industry therefore can afford to pay wages well above those of less prosperous employers. Because the productivity gains from industrialization tend to go disproportionately to the owners of capital, this further suppresses

modern-day causes of Brazilian inequality is the way in which the country is inserted into the global economy: it is still heavily dependent on the exports of primary product, which means that Brazil is not gaining proportionately from international trade. A third factor is: since there is a labor surplus in the country, wages paid in the primary product sector remain low.<sup>49</sup>

Historical reasons described to explain inequality in Brazil are related to the elite's power to influence government policy – taxes and benefits – to its economic advantage. Three successful examples, amongst many others, of the elite's defense of self-interest in Brazil are access to higher education<sup>50</sup>, the government pension system and the tax system (income tax, for example). These historical origins, explain Skidmore, are part of the cultural legacy resulting from the Portuguese patrimonial and personalistic settlement in the early 16th century. "Nothing could be more anti-egalitarian," he concludes.<sup>51</sup>

Inequality is more intensely felt in rural areas, where a low number of large landowners coexist with millions of small landowners, landless workers and rural workers living in precarious conditions. The gap between the rich and the poor can also be clearly observed in urban areas, where over 80% of all Brazilians live today.<sup>52</sup> Summing it up, in the case of Brazil (which is also the case of various developing countries), traditional and new sources of inequality simultaneously apply and are deeply rooted in social, political and economic relations.

Medeiros explains that unequal distribution of income in Brazil has a peculiar feature. The population is visibly split into two groups: a homogeneous

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the labor share of national income, contributing to the wage gap". Skidmore, *Brazil's Persistent Income Inequality: Lessons from History* (2004), *supra* note 33, p. 135.

<sup>49</sup> *Ibid.*, p. 136.

<sup>50</sup> As a rule in Brazil the poor who manage to graduate attend private universities whereas the economic elite and part of the upper middle-class get their diplomas for free in public institutions.

<sup>51</sup> At the time of Brazilian settlement, explains Skidmore, "Portugal was a kingdom caught in transition between the late medieval and the early modern eras. Its society was strictly hierarchical, peopled by an aristocracy exercising power under a hereditary monarch (...). The most important social unit was the family, and second to the family came one's network of friends. Such a culture is essentially not oriented toward the reward of merit; instead, it prizes familial relationships and personal friendships over work-related credentials. The Portuguese colonists transferred the personalistic culture to the New World. This cultural carryover, which was transformed into modern societies in most of the rest of Western Europe, has reinforced the power of the Brazilian elite and helped to maintain the non-elites in a deferential and obedient state", Skidmore, *Brazil's* (2004), *supra* note 33, p. 138. For comprehensive studies on personalism and patrimonialism as Brazilian Portuguese legacies, see the classics S.B. de Hollanda, *Raízes do Brasil* (Luso Brazilian Books, 1997) and R. Faoro, *Os Donos do Poder: a formação do patronato político brasileiro* (Globo, 2001).

<sup>52</sup> N. Beghin, *Notes on Inequality and Poverty in Brazil: Current Situation and Challenges*, available at:

<[http://www.oxfam.org.uk/resources/downloads/FP2P/FP2P\\_Brazil\\_Inequality\\_Poverty\\_BP\\_ENGLISH.pdf](http://www.oxfam.org.uk/resources/downloads/FP2P/FP2P_Brazil_Inequality_Poverty_BP_ENGLISH.pdf)> accessed 17 November 2009.

one of many poor people and a small number of very rich economic elite. Also, Brazilian society is highly hierarchical, and one in which, as a result of subtle and explicit social norms, clearly defined roles determine what people are supposed to do or not. This means that in Brazil, the rich control the political means that could possibly alter the income distribution.<sup>53</sup> In other words, Brazil could be considered a case of “inequality trap”, i.e., in a situation where persistent differences in power, wealth and status between socio-economic groups, which are sustained over time by economic, political and socio-cultural mechanisms and institutions,<sup>54</sup> permanently reinforce inequality.

### C. A Recent Equity Gain

During the process of modernization and industrialization that took place during the second part of the 20<sup>th</sup> century until the 1930s<sup>55</sup> Brazil was almost entirely agrarian – economic growth was probably the sole factor responsible for the very small number of experiences in which poverty actually decreased. In the last few decades, the country has experienced a few periods in which either economic growth or economic stability (i.e. inflation under control) have reduced poverty. The first period is the early 1970s (known as the “economic miracle”), when GDP growth rates peaked (reaching 12% a year) and as result of that, poverty was reduced by 50%.<sup>56</sup> Such a gain, however, came with a no less important negative outcome: while the GDP was rapidly increasing, inequality became rampant. This was typically the case in which the increase in wealth clearly favored the rich at the expense of the poor.<sup>57</sup>

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<sup>53</sup> M. Medeiros (2005), *supra* note 29, pp. 15-20.

<sup>54</sup> “The poor are poor because the rich are rich”, explains Vijayendra Rao, the economist who coined the term “inequality trap”. See V. Rao, *On ‘inequality traps’ and development policy* (Development Outreach, February 2006). As explained by Bourguignon, “[i]nequality traps describe situations where the entire distribution is stable because the various dimensions of inequality (in wealth, power, and social status) interact to protect the rich from downward mobility, and to prevent the poor from being upwardly mobile”. See F. Bourguignon, F. Ferreira, and M. Walton, *Equity, efficiency and inequality traps: A research agenda*, 5 *Journal of Economic Inequality* 2 (2007), 235–256.

<sup>55</sup> Attempts to measure the trend in income inequality must use data from 1960 as the starting point, because that was the first year in which a Brazilian census collected data on income distribution. From 1960 on, every census has shown a highly uneven distribution of income by any of numerous measures Cf. Skidmore (2004), *supra* note 33, p. 134.

<sup>56</sup> R.P. de Barros, M de Carvalho, S. Franco and R. Mendonça, Rosane, *A importância da queda recente da desigualdade na redução da pobreza*, Texto para Discussão IPEA No. 1256 (IPEA, 2007).

<sup>57</sup> “Policies for sharing growth can also stimulate growth”. This is one of the conclusions drawn by Birdsall, Ross and Sabot in a study that compared the economic performance (growth and income

In 1994,<sup>58</sup> when the *Real* stabilization plan was launched, poverty declined by 10% basically because having inflation (and its regressive impacts) under control positively affected some of those who were below the poverty line.<sup>59</sup> But the economic performance was poor: although the economy grew in the first two years after the plan was launched, the average growth rate per year between 1994 and 2000 was near to the ground: roughly 3%. No inequality reduction was recorded in that period.

But since 2001, a different cause explaining poverty reduction was detected: a small inequality decrease.<sup>60</sup> In the 2001-2005 period the Brazilian Gini<sup>61</sup> coefficient declined 4.6% and the national income grew only 0.9% a year (average). That means that, considering the low growth rate, income effectively changed hands in a progressive direction, i.e., in such a way that the rich lost (probably for the first time in Brazilian history) and the poor won in a redistributive dynamic, which could certainly have been better if growth had been

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concentration) of East Asian economies and others like the Brazilian economy. The authors explain that Asian countries have experienced rapid growth over decades, with relatively low levels of income inequality. Emphasizing high-quality basic education and increasing the demand for labor, policies to reduce inequality and poverty also stimulated growth. "Closing two virtuous circles, rapid growth and reduced inequality led to higher demand for, and supply of, education. Moreover, low levels of income inequality may have directly stimulated growth." See N. Birdsall, D. Ross, and R. Sabot, *Inequality and Growth Reconsidered: Lessons from East Asia*, The World Bank Economic Review, Vol. 9, No. 3 (World Bank, 1995), pp. 477-508. For a description on Brazilian social policy during from the 1960s the 1990s see E. Fagnani. *Política Social e Pactos Conservadores no Brasil: 1964/1992*, 21 Cadernos FUNDAP (1997), pp. 183-238. For a synthesis of the Fernando Henrique Cardoso years, see S. Draibe, *A Política Social nos Anos FHC e o Sistema de Proteção Social*, 15 Tempo Social 2 (2003), 63-101.

<sup>58</sup> In 1986 the *Cruzado* plan (Brazil adopted several inflation stabilization plans in the late 20th century) also managed to reduce the number of poor, but since this effect did not last long, it will not be discussed here.

<sup>59</sup> Rocha points out other reasons for that poverty reduction in 1994: the combined effect of a good agricultural performance, trade liberalization and an increase in non-tradable prices. See S. Rocha, *Pobreza e Desigualdade no Brasil: o esgotamento dos efeitos distributivos do Plano Real*, Texto para Discussão IPEA No. 721 (IPEA, 2000).

<sup>60</sup> "...[T]he degree of income inequality in Brazil declined sharply and continuously, reaching in 2005 the lowest level in the last 30 years. The Gini coefficient declined by almost 5%, and the ratio between the richest 20% and the poorest 20% declined more than 20%. This reduction in income inequality contributed substantially to reducing poverty and to improving the standard of living of the poorest, even in a period of relative per capita income stagnation. In spite of this decline, the degree of inequality in the country is still extremely high. Therefore, it is essential that steps which are favorable to inequality reduction may be continued" (R.P. de Barros, M de Carvalho, S. Franco and R. Mendonça, Rosane (2007), *supra* note 56, p. 7.

<sup>61</sup> The Gini coefficient is a measure of inequality of income distribution. It is defined as a ratio with values between 0 and 1: a low Gini coefficient indicates more equal income or wealth distribution, while a high Gini coefficient indicates more unequal distribution. 0 corresponds to perfect equality (everyone having exactly the same income) and 1 corresponds to perfect inequality (where one person has all the income, while everyone else has zero income).

higher. It also implies that inequality reduction (not growth) was the main factor responsible for poverty reduction in the period analyzed – between 70% and 90% of poverty reduction can be credited to the simultaneous lowering in inequality, according to Barros et al.

To stress the importance of the equity gains described above, the same authors explain that if the 4.6% Gini decline was to be achieved through distributive neutral growth, Brazil would have had to grow 11% per year in the period and estimate that a 1% inequality reduction corresponds to 2.4% GDP growth. That means, the arguments goes, that if the poor had to choose between a 1% Gini reduction and 2.4% distributive-neutral growth, they would prefer the “less inequality” alternative, and the extremely poor would prefer it even more, since in this case growth of 18% in the GDP would have been necessary to obtain the same (4.6%) Gini decrease (the inequality reduction/growth ratio here is 1 to 4).

More recent statistics from IBGE<sup>62</sup> – the official Brazilian statistics bureau – show that inequality has fallen for the sixth consecutive year. At the same time, the average income (per worker) has increased and unemployment decreased. Regardless of the pace of growth (which has accelerated), this represents a general improvement in which the poor have benefited more than the rich.

The reasons for optimism, however, decrease when one observes more carefully other Brazilian institutions and legal arrangements that have been playing the “anti-Robin Hood” for quite a long time. If, on the one hand, equality gains observed since 2001 are the result of the interplay of different factors such as rises in the minimum wage, inflation control, social spending - including targeted social programs such as the *Bolsa Família* and *Benefício de Prestação Continuada* (BPC)<sup>63</sup>, then on the other hand, classic Welfare State institutions such as taxes and pensions have failed contribute to inequality reduction. On the contrary, they have contributed to the expansion of the gap between the rich and the poor and produced quite regressive outcomes. In the next section I will discuss these examples and start exploring the legal dimension underlying them.

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<sup>62</sup>See the 2008 PNAD available at:

<<http://www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2008/default.shtm>> accessed 24 October 2009.

<sup>63</sup> BPC is an unconditional cash transfer program focused on the elderly and handicapped. It is foreseen in the Brazilian 1988 Constitution (article 203, V) and corresponds to a transfer of one minimum wage (approximately US\$ 300) to the handicapped and the elderly that cannot afford to make their livings.

### **III. LAW, DEVELOPMENT AND EQUALITY IN BRAZIL**

#### **A. Progressive Promises, Regressive Outcomes**

As contended above, effectiveness of social and economic rights require successful policies. Without well-structured, implemented and assessed social policies, constitutional principles embracing distributive goals end up as empty promises or, what is worse, generate regressive and unfair outcomes. As also suggested above, public policies are, in turn, heavily dependent on the law as a consequence of the wide range of tools, administrative measures and institutional arrangements required from the legal technocratic apparatus and its staff to implement abstract distributive goals.

If these premises are true, having a progressive charter of open-textured social and economic rights is certainly not enough if they are not adequately structured by legislation and regulations and implemented by a consistent public law framework and management. Similarly, it seems clearly problematic when well-intentioned provisions end up generating misallocation of scarce resources, waste of public funds and unintended effects. And if either the legislation or the administrative process necessary to put it into practice end up in one way or another irrational or regressive - or even neutral, considering the transformative spirit of the Brazilian constitution - social rights remain frustratingly ineffective. That is when a set of key institutions governed by legal norms and procedures reinforce the inequality trap, a vicious circle that creates obstacles to development. That is when the administrative law governing policies works not as a pragmatic solution for development goals, but rather as a straitjacket that replicates development barriers both from the perspectives of equity and efficiency.

I will briefly describe some of these examples to stress the point that alongside political decisions and guidelines, the law has important roles to play in developmental policies, with one of them being the shaping of appropriate policies and institutions to distribute income.

#### **B. Pensions**

In Brazil the pension system benefits those who contribute by working in the private and public sectors, and also channels pecuniary benefits to rural populations who could not contribute, and to the elderly and disabled. Although it is structured and conceived on an egalitarian basis in a specific constitutional provision, currently it is running on a huge deficit; it sustains fiscal imbalances, faces unnecessary high efficiency costs, low coverage of funded schemes and,

more importantly for the purposes of my argument, it is clearly regressive as a result of flawed choices in defining winners and losers. Quantitatively speaking, pensions are the second most important source of income for rich Brazilian families and, as a fraction of public spending, derive mainly from public funding sources and are operated through direct transfers.

According to Medeiros, 20% of all Brazilian pensions are channeled to the 60% poorest, while roughly 50% of the total pensions are diverted to the rich. Not surprisingly, in Brazil, pensions play a secondary role for the rich – only 20% of the rich make a living out of them and, among the non-rich (middle class and poor), 60% of the beneficiaries have pensions as their main source of maintenance (and 30% have pensions as their only source of subsistence). For the 20% richest beneficiaries, pensions represent less than 10% of their total income, and the 2% richest beneficiaries receive almost the same as what the 60% poorest have to share.

Ferreira and Souza<sup>64</sup> confirm the regressive trend and assert that in Brazil retirement and pension income significantly contribute to the increase of inequality in income distribution. They also point out that the political criteria adopted to grant pensions and retirements – both for private sector and public employees – and also the caps defined by legislation and regulations that limit the benefits are poorly calibrated and regressive because they favor the upper middle class.<sup>65</sup> Hoffman<sup>66</sup> reached similar findings and stresses that in Brazil “pensions contribute to increasing overall inequality in Brazil, particularly in the metropolitan regions”. Given the aging of the population, he continues, “without any change in the pension rules, the contribution of pensions to increasing inequality will be even stronger in the future”.

In short, the pension system example reveals that inequality is embedded in the norms that operate the system in Brazil. And while corrective distributive measures require strong coalitions and a great deal of political consensus on who is going to gain and who is going to lose, they are always carried out through the *medium* – the law. Thus, the re-design of caps, benefits, standards, compensations, schemes, incentives, procedures, funding and regulations is of central importance

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<sup>64</sup> C.R. Ferreira, S.C.I. Souza, *Previdência Social e Desigualdade: a participação das aposentadorias e pensões na distribuição de renda no Brasil – 1981 a 2001* (2004), p. 16, available at <<http://www.anpec.org.br/encontro2004/artigos/A04A139.pdf>>, accessed 24 October 2009.

<sup>65</sup> Although regressive when it comes to defining the transfer caps, the Brazilian pension system also plays an indirect distributive role when one looks at the bottom transfers, which are aligned with the minimum wage. Since the minimum wage has been increasing continuously since 1994, the poor end up benefiting. This gain, however, does not seem to be a deliberate goal and could certainly be much more substantial if the caps were not regressive.

<sup>66</sup> R. Hoffmann, *Inequality in Brazil: the contribution of pensions*, 57 *Rev. Bras. Econ.* 4 (2003), 755-773.

for equality to be effectively achieved. This is the reason why legal measures and the associated know how and “technology” they demand are as important as political willingness to cause changes in the *status quo*.

### C. Taxes

Immervoll et al. analyzed the Brazilian tax benefit system and concluded that “despite raising an amount of taxes equivalent to 35 per cent of the country’s GDP<sup>67</sup> and spending about seventy per cent of that on social programs – close to the OECD average spending, as a proportion of GDP, and well above the average in other Latin American countries – the Brazilian government has not been able to significantly alleviate inequality and poverty.”<sup>68</sup>

Based on IBGE data, IPEA, a federal government think tank, recently estimated that the tax burden in Brazil is unevenly distributed between the poor and the rich: the former spend roughly 54% of their income on taxes and the rich, defined as those earning more than 30 minimum wages per month,<sup>69</sup> spend only 29%.<sup>70</sup>

In Brazil, the ICMS (tax on circulation of goods and services) burdens the poor three times more than the rich. Generally speaking, taxes on goods correspond to 40% (the highest part) of the total wealth taxed in Brazil, and tend to be rather regressive because such goods are both consumed and taxed at the same rates for the poor and the rich. Taxes on income and property timidly correspond to 26.6% of the total tax raised, decisions on a “tax on big fortunes”<sup>71</sup> have been postponed for years and taxes related to manufacturing and production correspond to only 3.8%.

Rocha found that the distributive impact of the individual’s income tax in Brazil is null and that the deductions foreseen by the tax law framework are actually regressive.<sup>72</sup> Needless to say, this is clearly at odds with the

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<sup>67</sup> More recent figures from IPEA (Institute of Applied Economic Research) updated the figure, now currently corresponding to 36,2% of the country’s GDP.

<sup>68</sup> H. Immervoll, H. Lev, J.R. Nogueira, C. O’Donoghue and R Siqueira, *The Impact of Brazil’s Tax-Benefit System on Inequality and Poverty* (2006), available at: <<http://www2.vwl.wiso.uni-goettingen.de/ibero/papers/DB117.pdf>>.

<sup>69</sup> Corresponding to approximately US\$ 9,000 per month.

<sup>70</sup> For a summary of the argument see IPEA, *Pobreza, Desigualdade e Políticas Públicas* (2010), available at:

<[http://www.ipea.gov.br/sites/000/2/comunicado\\_presidencia/100112Comunicado38.pdf](http://www.ipea.gov.br/sites/000/2/comunicado_presidencia/100112Comunicado38.pdf)> accessed 14 January 2010.

<sup>71</sup> Established in the Brazilian Constitution by article 153, VII.

<sup>72</sup> S. Rocha, *Pobreza e Desigualdade no Brasil: o esgotamento dos efeitos distributivos do Plano Real* (2000), *supra* note 59.

Constitutional provision according to which the income tax is “informed by the principles of generality, universality and progressivity.”<sup>73</sup>

Finally, in a comparison with South Africa, Di John shows that the Brazilian state tax system is much more regressive and is characterized by a more adversarial (as opposed to cooperative) relationship between the state and upper-income groups. “As such, the Brazilian state collects less than one-third of the South African rate of income tax and relies on a series of inefficient and regressive indirect taxes ...”<sup>74</sup>

As in the pensions case, correcting the regressive bias behind the Brazilian tax system requires not only political coalitions but also legal solutions and arrangements that function as key ingredients of public policies. In this context, the law helps in shaping corrections, fixing distortions and adjusting caps and tax aliquots that otherwise reinforce inequality.

#### **IV. WHAT HAS THE LAW GOT TO DO?**

What are, after all, the roles of the law in developmental policies devoted to social goals? My aim is to confront that question based on a research on the *Bolsa Família* program, which I have been studying in a broader context.<sup>75</sup> Differently from the taxation and pension examples, there are some reasons to believe that the *Bolsa Família*, a direct cash transfer based on behavioral conditions, ultimately works as a tool to enable development, despite the limitations and challenges it certainly faces. As discussed below, this large-scale cash transfer program has

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<sup>73</sup> Article 153, Paragraph 2, I.

<sup>74</sup> J. Di John, *The Political Economy of Taxation and Tax Reform in Developing Countries*. WIDER Research Paper 74 (UNU-WIDER, 2006).

<sup>75</sup> Social policy is one of the topics being studied in the LANDS project, which departs from the assumption that many developing nations are exploring ways that the state can and should promote both growth and equity. It also assumes that “new” developmental states will employ different strategies and tools from those that prevailed in earlier periods of state intervention (roughly, the classic developmental and the neoliberal periods). Another assumption is that “new developmental states” may adopt innovative strategies that favor public-private collaboration, foster innovation and global competitiveness, promote exports, and develop programs to fight inequality, alleviate poverty and promote human rights. All these and other possible policy innovations associated with new developmental states have implications for the law and vice-versa. Bearing that in mind, LANDS studies a variety of public policies and legal changes in Latin American nations (Brazil, Mexico, Colombia, Argentina and Venezuela) to determine the extent to which new legal strategies and instruments are being employed and institutions transformed. Our ultimate goal is to find out what works and what does not, and communicate such experiences to a broad audience of policy makers, legal scholars, public interest advocates and social scientists in the region and elsewhere.

been reducing poverty and inequality in Brazil's poorest areas during the first decade of this century.<sup>76</sup>

As explained by Trubek and Santos<sup>77</sup> there have been numerous theories about the role of law in economic development and models for reform. The "law and development" movement of the 1960s emphasized the role of public law as the support, a tool and an institutional framework for the classic developmental state, as well as a *medium* of economic transformation. It was followed by a neo-liberal period, which stressed the importance of private law for the operation of markets and courts as forces to restrain the state.<sup>78</sup> As put by Trubek in a recent paper:<sup>79</sup>

Both the law and development movement and neo-liberal thinkers focused on the relationship between state and law, but they came to opposite conclusions about both. For the law and development doctrine, the state was central to effective development and law should be its sword. For Neo-liberalism, state efforts to promote growth were likely to prove counterproductive, so the law should be a shield against the state". In recent years other models have emerged, ranging from what might be called a "chastened neo-liberalism" to interest in a new role for the state in the economy and thus for law.

One aspect of the current debate is the effort by some countries to move beyond neo-liberalism without simply trying to return to the developmental state of the 1950s and 1960s.<sup>80</sup> While the proponents of such efforts accept the proposition that state intervention is a *sine qua non* condition to stimulate growth

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<sup>76</sup> That does not mean, of course, that the *Bolsa Família* should by any means be regarded as a substitute for the tax and pension systems - these three policies are completely different in terms of scope. My intention, therefore, is not to compare them as alternatives or to assess which one is better as a redistributive means. Similarly, it is important to stress that my purpose here is not to discuss what should be done to fix distortions affecting taxes and pensions. This effort, however, is urgently necessary in Brazil and requires, from the legal aspect, an applied type of investigation and diagnosis. What I intend primarily in this article is to do develop initial methodological tools and criteria of analysis to observe them from a legal perspective to better understand how these policies and practices affect and are affected by the law.

<sup>77</sup> D. Trubek and A. Santos (eds.), *The New Law and Development – A Critical Appraisal* (Cambridge University Press, 2006).

<sup>78</sup> For a comprehensive intellectual history of the law and development theories, practices and legal assistance experiences, see D. Kennedy *The Rule of Law, Political Choices, and Development Common Sense*", in D. Trubek and A. Santos, *The New Law and Development – a Critical Appraisal*, *supra* note 77, pp. 95-173.

<sup>79</sup> D. Trubek, *The Political Economy of the Rule of Law: The Challenge of the New Developmental State*, 1 *Hague Journal on the Rule of Law* 1 (2009), 28-32.

<sup>80</sup> D. Trubek, *Law and the New Developmental State*. Paper given at the LANDS (Law and the New Developmental State) launching seminar, Cebrap, Brazilian Center for Analysis and Planning (Sao Paul, December 2007).

and ensure social protection, they are looking for new ways in which this intervention can be carried out. Rather than seeking to revive the projects and policies favored by the classical development state, they are developing approaches and forging new tools.<sup>81</sup>

At this point I think it is necessary to make a caveat: the word “law” can be rather imprecise when used in the context of the relations between law and development. Different authors have defined and refined their own meanings and their uses of “the law” in the study of development.<sup>82</sup> Law, for instance, can possibly be linked to what judges do when they decide cases but also with what politicians do when they pass laws, and with what bureaucrats do in their everyday jobs as regulators and policy specialists. Law can also refer to the Rule of Law as an ideal of political and legal organization – a case in which “to develop” would be associated with erecting strong institutions such as an independent judiciary, human rights and strengthening democracy. Thus, law can be seen not only as an instrument, but also as a constitutive element of development. As put by Rittich,<sup>83</sup> “the respect for the rule of law, the implementation of particular institutions and the recognition of certain legal rights have become definitional to the achievement of development itself.” Still according to Rittich, law plays three types of roles in social policies: discursive and ideological, distributive and constitutive.<sup>84</sup>

More problematically, from a public policy viewpoint, the legal element or legal solution can be confused with the policy itself. This raises the problem of

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<sup>81</sup> For that reason, the LANDS research project assumes it is possible to speak of a “new” developmental state. Whether or not it exists in real life is an empirical question that depends upon a significant number of studies to perhaps mature as a consistent theory. Once again, what I would like to stress here is the assumption that law is a crucial element to the design, implementation and assessment of social policies and institutions that, in turn, are connected to development.

<sup>82</sup> See generally Trubek and Santos (eds.) (2006), *supra* note 77; K. Davis and M. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, in American Journal of Comparative Law; Public Law & Legal Theory Research Paper Series, Working Paper No. 08-14; Law and Economics Research Paper Series, Working Paper No. 08-24 (New York University School of Law, 2008).

<sup>83</sup> K. Rittich, *The Future of Law and Development: Second Generation of Reforms and the Incorporation of the Social*, 26 Michigan Journal of International Law 199 (2004).

<sup>84</sup> The discursive component is related to the fact that claims about the rule of law and the nature and content of good governance can be used to legitimize attention to particular social objectives such as human rights and gender equality. In other words, the right language can strengthen or weaken economic reforms, working as a strong ideological component of the developmental process. The distributive element is related to the fact that “legal rules and institutions are means of allocating power and resources to different social groups” and “the form and content of legal reforms can be crucially important to the question of who benefits and who loses in the course of reforms.” The third, constitutive, element is described by Rittich as legal rules and institutions playing a role in constructing and reconstructing the very subjects and activities that they are often imagined to merely regulate. See K. Rittich (2004), *supra* note 83.

identifying distinctive and unique legal aspects and tasks in a necessarily interdisciplinary and complex public administration effort. Similarly, lawyers can be confused with civil servants generically speaking – and this seems to indicate that the same type of lack of clarity in terminology applies when the word “law” is replaced by “lawyers”. In short, it can be very difficult to identify the specificity of the law and its autonomous features in the study of its relationships with development. To do that consistently, a further methodological basis has to be achieved and this is also part of the LANDS future research agenda.

Let me now present a very incipient approach to analyze the roles of law in distributive policies. The different roles the law plays in a specific social policy (the Brazilian *Bolsa Família*) are presented to illustrate how the law can be seen as a goal, a tool or an institutional arrangement in distributive strategies aiming at reducing inequalities. The underlying objective is to avoid the risk of employing the terms “law” and “roles of law” as a catch-all and therefore meaningless phrases in developmental jargon. In fact, as mentioned above, ideas such as “law promoting development”, “law redistributing income”, “law shaping institutions” can be puzzling in a sense that they mix up “law” with “state”, “politics” and “policy”.

Perceiving law as a *goal* – or, maybe differently, the goal of law – means identifying the “targets” of development policies stated in the law in force, that is to say, their intended concrete results and the way such expected results are envisaged, as in the Brazilian case, in constitutional provisions or other norms. This means recognizing goals (quantitative and qualitative), explicit values, political economy conceptions and perspectives of development and dealing with questions such as “what is this law designed for?”, “what are its declared objectives?” and “how much redistribution is it supposed to generate?”, if redistributive objectives are in play.

Perceiving law as a *tool* is a way of identifying the legal means used to achieve these pre-established goals. The choice between varying legal rationales and strategies for state action in the economy, the selection of specific instruments taking into account their pros and cons, the choice of strategies for inducing behavior, as well as the devising of penalties and rewards are grouped on the assumption that the law not only indicates goals, but also establishes the operational and instrumental conditions for development policies. Ideally, laws setting public policies also establish minimal mechanisms for its own implementation, but this is not the case in Brazil. Questions such as “what are the available legal possibilities to properly implement the goal?” and “what is the best legal instrument?” or “what legal solution is more cost-effective” arise and require consistent answers from lawyers within the public administration.

Perceiving the law as an *institutional arrangement* leads to the view that structuring of development is partly an effort by the State and legal apparatus to

shape institutions and policies according to a process of organizational change. It assumes the need for a legal-institutional framework which entails, among other things, the sharing of responsibilities between (and among) public and private actors and the intersectoral articulation of public policies. This suggests that implicit in development strategies, there is (or there should be) a legal “organizational road map” to guide the action of the organs responsible for implementing them as well to ensure consistency among them. In other words, managing development requires structures capable of ensuring that goals become actions through tools, and that there are no overlaps, gaps or rivalries hindering the efficacy of the policies within the State. Institutions shaped by the law entrench policies<sup>85</sup> and their management practices, connect actors, create shared common meanings and expectations about actions, and organize and guide them. Law also plays an important role in coordinating and ensuring interaction between different programs within the public administration, as well as in making room for community participation and accountability mechanisms. The question “who does what in terms of implementation?”, “how does this policy relate to the other policies?” and “how does the body in charge of this policy relate with other bodies?” perhaps illustrate the idea.

The table below broadly summarizes the ideas above in the case of redistributive policies as follows:

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<sup>85</sup> From the political economy angles, Ha-Joon Chang identified three key functions of institutions in promoting economic development: coordination and administration, learning and innovation and income redistribution and social cohesion. His view is openly opposed the neoclassic institutional view according to which institutions are pro-development when they (i) protect and enforce property rights, (ii) enforce contracts and (iii) promote competition and rivalry between economic agents. In Chang’s view, the roles of law are clearly connected to the assumption that development has to do with institutional capacity building and proactive State action through public policies. See H-J. Chang, *Understanding the Relationship between Institutions and Economic Development - Some Key Theoretical Issues*. WIDER Discussion Paper No. 93 (UNU-WIDER, 2001).

	<b>Law as a goal</b>	<b>Law as a tool</b>	<b>Law as an institutional arrangement</b>
<b>Concept</b>	Finalistic definition and analysis of legislation defining the redistributive role of the legislation and corresponding policy arrangement.	Choosing legal tools to implement goals	Defining tasks, structuring missions and competences
<b>Key questions in social policies</b>	What are the goals? How much redistribution? Who should win, who should lose?	What are the most suitable means considering underlying goals, costs and benefits?	Who does what? How can the distributive strategy be structured and functionalized? How can consistency between different redistributive policies be ensured?
<b>Main objectives</b>	Reducing inequality and poverty and reinforcing social protection	Using the legal “toolbox” to effectively achieve the intended goals	Dividing jurisdiction and policy tasks, avoiding gaps, overlaps and disputes inside government

## V. THE *BOLSA FAMÍLIA* PROGRAM

### A. Description

Like many developing countries,<sup>86</sup> Brazil has adopted cash transfers as a solution in the context of a severe economic crisis that hit Latin America in the 1980s. Cash transfers such as *Programa Bolsa Família* (PBF) were adopted, explains Bastagli,<sup>87</sup> as a reaction to the inadequacy of the existing welfare arrangements associated to the safety nets approach. Cash transfers with conditionalities (Conditional Cash Transfers or CCTs) are now popular and have been widely adopted in the region by more than twenty countries in the last fifteen years. They

<sup>86</sup> For some case studies see F. Bastagli, *From Social Safety Net to Social Policy? The Role of Conditional Cash Transfers in Welfare State Development in Latin America*, International Policy Centre for Inclusive Growth Working Paper Number 60 (International Poverty Centre, 2009). See also the report *Cash Transfers: Lessons from Africa and Latin America*, Poverty in Focus No. 15 (International Poverty Centre, 2008) and S. Draibe, *Programas de Transferencias Condicionadas*, in F.H. Cardoso, and A. Foxley, *A Medio Camino: Nuevos desafios de La Democracia y Del Desarrollo en América Latina* (Uqbar Editores, 2009), pp. 445-486.

<sup>87</sup> F. Bastagli (2009), *supra* note 86, p. 2

are considered by many to be adaptable, quick to operate, easy to implement and flexible enough to be assessed, revised and adapted during the implementation process.<sup>88</sup> Not surprisingly, CCTs have suited different types of welfare states and legal environments in Latin America.<sup>89</sup> Nor is it surprising that they are described as something relatively “new” in terms of social policy.

As mentioned above, in recent years an overall reduction in inequality was observed in Brazil, and the gap between the rich and the poor decreased at a pace of 1.2% per year between 2001 and 2007. In this period, the Brazilian Gini fell from 0.593 to 0.552, the lowest ever achieved. Specialists explain that this is due to a combination of different factors: increases in the minimum wage,<sup>90</sup> an increase in the social security coverage, formal job creation, inflation control and targeted social programs, mainly PBF.<sup>91</sup>

The effectiveness of income transfers resulting from State actions depends on the amounts paid, coverage levels and actual impact on the target population. According to a IPEA study of 2006, there are three main types of public transfers in Brazil: public pensions, the BPC<sup>92</sup> and CCTs, mainly PBF. Together, these three forms of government transfers contributed to one-third of the inequality reduction. Although similar in terms of weight (each type of transfer roughly corresponds to 10% of the inequality reduction), they are quite different in terms of cost. IPEA estimates that the cost of expanding pensions was, again according to the study, considered four times higher than the expansion cost of CCTs. “The more sensitive to the worst-off the measure is, the more important the contribution of the PBF and BPC”, it concludes.<sup>93</sup>

Bearing that in mind, let me propose the following question: can the PBF be hypothetically considered a policy innovation featuring a “new” Brazilian developmental state when it comes to social policy? I believe that answer could be “yes”, i.e., within the limits of a research hypothesis (that, as such, will be submitted to consistent tests), it is possible to assume that PBF represents, in Brazil, a “new” public policy approach towards spending, income redistribution and equality-enhancing growth.<sup>94</sup>

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<sup>88</sup> See S. Draibe, *Programas de Transferencias Condicionadas*, in F.H. Cardoso, and A. Foxley (2009), *supra* note 86, p. 447.

<sup>89</sup> *Ibid.*

<sup>90</sup> Of approximately US\$50.00 in 1995 to US\$205.00 in 2007, reaching US\$300.00 in early 2010.

<sup>91</sup> See R. P. Barros, Carvalho, Mirela de, S. Franco, and R. Mendonça, *Determinantes Imediatos da Queda da Desigualdade de Renda Brasileiro*, Texto para Discussão Número 1253 (IPEA, 2007).

<sup>92</sup> See *supra* note 63.

<sup>93</sup> See IPEA, *Sobre a Recente Queda da Desigualdade de Renda no Brasil*, Nota Técnica (IPEA, 2006), p. 6.

<sup>94</sup> In February 7, 2008 the magazine *The Economist* has referred to PBF in a story whose title was “An anti-poverty scheme invented in Latin America is winning converts worldwide”. Here are some selected parts: “[take] Brazil’s *Bolsa* (...) anti-poverty scheme, the largest of its kind in the

I also assume that the PBF is worth studying as a “new” form of legal structure because the innovations it (arguably) adopted are very likely to require legal solutions<sup>95</sup> and adaptations in terms of tools and institutional arrangements. That’s the reason why PBF is being tested as a characteristic of a new development model in Brazil in the context of the LANDS research. Next, let me present preliminary findings of this ongoing research. Overall, they correspond to the first round of interviews.<sup>96</sup> Most importantly for now, they are an attempt to use the idea of law as goals, tools and institutional arrangements.<sup>97</sup>

The declared objective, among others, of Brazil’s *Programa Bolsa Família*,<sup>98</sup> under the institutional responsibility of the Ministry for Social Development and Combat against Hunger (hereinafter MDS) is to combat hunger and to promote the supply of food and nutrients for the immediate relief of poverty. Another explicit goal is to fight future (inter-generational) poverty through investments in human capital with emphasis on the younger members of the enrolled families.

According to the officials interviewed,<sup>99</sup> PBF aimed to put in practice the aim of material equality, included in the 1988 Constitution. In fact, although mainly described as a poverty fighting policy in the short term, PBF, as seen above, is also reducing inequality and this makes it a relevant case for public policy and legal analysis. While its medium and long-term goals (those regarding inter-generational gains and positive spillovers) still cannot be assessed, its potential and actual impacts in efficiently reducing inequality are now visible.

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world. Known in development jargon as a “conditional cash transfer” programme, it was modeled partly on a similar scheme in Mexico. (...) “Governments all over the world are looking at this programme,” says Kathy Lindert of the World Bank’s office in Brasília, who is about to begin work on similar schemes for Eastern Europe. As well as providing immediate help to the poor, *Bolsa Família* aims in the long run to break this culture of dependency by ensuring that children get a better education than their parents. There are some encouraging signs (...). The scheme has also helped to push the rate of economic growth in the poor north-east above the national average. This has helped to reduce income inequality in Brazil”. Available at:

<[http://www.economist.com/world/americas/displaystory.cfm?story\\_id=10650663&source=login\\_payBarrier](http://www.economist.com/world/americas/displaystory.cfm?story_id=10650663&source=login_payBarrier)>, accessed 17 November 2009.

<sup>95</sup> I. e., solutions that did not exist either in the classic developmental state of the second half of the 20<sup>th</sup> Century or during the neoliberal years, mainly the 1970s and 1980s.

<sup>96</sup> Conducted with the assistance of André Naouhm.

<sup>97</sup> These preliminary findings have been presented and discussed as a *pilot* research report Paulo Mattos an I prepared for the November, 2008 LANDS meeting at the Wisconsin Law School, Madison, USA at <<http://law.wisc.edu/gls/landsworkshop08.html>> accessed November 17, 2009). Since the LANDS project is still on course, another round of interviews will be conducted in 2010. Apart from double-checking the information already obtained from the public policy staff, there research planning includes interviews with PBF critics.

<sup>98</sup> “Family Scholarship Program” in English.

<sup>99</sup> The qualitative interviews have been conducted with public officials at MDS.

Encountering difficulties since its creation less than a decade ago, PBF needs to constantly use a legal framework, reform and adapt it when necessary and also come up with solutions which had previously not existed. Some observed legal dimensions of PBF will now be described to identify, according to the terminology proposed above, the roles the law plays in a development policy such as this one.

The PBF is a program for the direct transfer of funds with conditions (conditional cash transfer), which forms part of a larger social policy named *Fome Zero* (Zero Hunger) and is regulated by Law 10,836/2004 and by various normative acts issued by the executive power, particularly the Development and Anti-Famine Ministry (MDS). As mentioned, its objectives<sup>100</sup> are the combat of hunger and the promotion of safety in food and nutrition, the immediate relief of poverty by means of a direct cash transfer, arresting the cycle of poverty between generations by means of exercising basic social rights in the areas of health, education, social assistance, and the sustained emancipation of families in poverty via other complementary programs. The cash transfer is received by 11 million families with an investment of approximately US\$4.3 billion, according to data from the MDS.<sup>101</sup>

The criteria for eligibility to receive the benefit are a household monthly income of up to US\$30.00<sup>102</sup> per capita or US\$60.00 if the family contains pregnant women, children up to 15 years old or adolescents up to 17 years old.<sup>103</sup> The corresponding benefits vary from around US\$10.00 to US\$90.00, according to the monthly income per person in the family, the number of children and adolescents up to 17 years old. It is paid directly to the families via cash transfers.<sup>104</sup>

The PBF is subject to conditionalities,<sup>105</sup> which must be met in order to receive the benefit. The main conditionalities are: school attendance for children and adolescents from 6 to 15 years old, with a minimum attendance of 75%, not to put children to work, to take part in pre-natal exams and other accompanying

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<sup>100</sup> Cf. art. 4° of Decree 5.209 of 17th September 2004.

<sup>101</sup> The MDS estimates that the 2010 budget for PBF will increase and reach US\$6 billion. See <<http://www.fomezero.gov.br/noticias/relator-do-orcamento-aumenta-recursos-para-o-bolsa-familia-e-para-o-pac>> accessed 26 January 2010.

<sup>102</sup> US\$ 1.00 equals approximately BR\$ 2.00.

<sup>103</sup> The income of a family is calculated from the total of all its incomings (salaries and pensions) of all the members of the household, excluding the incomes from official programs of cash transfer cf. o Article 2, § 1, III of Law 10,836/2004.

<sup>104</sup> For more information on benefits and criteria or eligibility, see <[http://www.mds.gov.br/bolsafamilia/o\\_programa\\_bolsa\\_familia/beneficios-e-contrapartidas](http://www.mds.gov.br/bolsafamilia/o_programa_bolsa_familia/beneficios-e-contrapartidas)>, accessed 24 October 2009.

<sup>105</sup> Stipulated by Law 10,836/2004 and regulations for Administrative Order GM/MDS N° 551, of the 9th of November of 2005.

educational activities relating to nutrition during pregnancy and promotion of healthy eating offered by the health visitors, to apply vaccinations on offer for children under 7 years old, and to take children under 7 to health centers for nutritional support and other actions relating to health.

The Ministry of Education and the Ministry of Health are responsible for the monitoring of, and compliance with the conditions linked to PBF, as are municipalities and states, in a federal institutional interaction for the division of tasks, as better explained below.<sup>106</sup>

The beneficiaries should be registered in the Single Register for Social Programs (*Cadastro Único*). This registrar is fed with information from municipalities adhering voluntarily (but attracted with financial incentives, as seen below) to the program, which should identify families in a vulnerable position and complement federal databases with estimates of poverty calculated with a methodology pre-defined by the MDS.

The payment of benefits is made from resources from the federal government and carried out by the *Caixa Econômica Federal* savings bank (a federal public bank), the operating agent for the program, directly to the families, preferably to women, by means of a swipe card. The beneficiary has 90 days to withdraw the funds. After this period, if the funds are not withdrawn, they are taken back into the program. After three incidents of non-withdrawal, the benefit is suspended.

## **B. Legal Aspects - Goals**

According to the interviews so far conducted, for a long period and generally even today the Brazilian model of social assistance has been closely connected to cronyism, “clientelism” and local politics. The actions of social assistance in the country have been, as a rule, limited and based on the transfer of federal resources for the purchase of basic foodstuffs and other aid for people in positions of extreme vulnerability. As explained by technicians from MDS interviewed, until a short time ago these social policies were confused with charity and philanthropy, and social assistance was considered an ancillary and secondary function of the state, whose management was relegated in many Brazilian governments to presidential bodies managed by the first lady, and wives of governors and mayors.

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<sup>106</sup> This monitoring follows a previously stipulated schedule which considers the time needed to gather the information and register it in the system. It is measured bi-annually for health and food safety and bi-monthly for education and social assistance. The application of sanctions deriving from non-compliance with conditions of PBF is gradual and the responsibility of the National Secretary for Citizens Income (SENARC).

In this context, PBF was described as one of the outcomes of a social state model within the Constitution of 1988<sup>107</sup> and is placed with the other social assistance policies and specifically the programs for income transfer from the federal government. The PBF aims to implement, according to those responsible for such, a logic which reduces populist politics in which political leaders fight over sporadic resources from the federal government (“voluntary transfers”) to meet the emergency needs of populations under their influence. This policy produces only marginal results and represents in reality, the maintenance of the dependence of the beneficiaries on local political leaders.

According to MDS technicians, the transfer of funds through PBF represents a rise in autonomy as it allows the beneficiaries to choose where and how it will be spent.<sup>108</sup> Moreover, unlike individual benefits in the past, the PBF is claimed to relate to a “new” view of social assistance in which the family is protected as one psycho-social unit and not only as individuals within the family.

The benefit received is supposed to be deliberately insufficient to substitute income from work and for this reason does not allow members of the family to leave their jobs. The maximum a family can receive (US\$75.00) is in fact not sufficient to live either in cities, where the cost of living is higher, or in the countryside where families are larger in size. This value was calculated, according to those interviewed, to be an addition to income from work. From a legal point of view, defined in a broad sense, this objective seems to somehow translate into a vision of distributive justice, individual autonomy as a right and incentives to work as regulated by a certain type of legal norm.

A further stated objective is to integrate the family of programs and social benefits by means of a cash transfer and not to restrict the rights or to punish the beneficiaries who break the conditions of the program.<sup>109</sup> Therefore, the

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<sup>107</sup> Cf. Article 203: “Social assistance will be given to whoever requires it, independent of contributions to social security, and has as its aims: I – Protection of the family, maternity, children, adolescents and the elderly; II – refuge for children and adolescents in need; III –the promotion of the integration of the labor market; IV – the housing and re-housing of those with disabilities and the promotion of their integration into community life V – the guarantee of a minimum wage and monthly benefits for those with disabilities and for the elderly who demonstrate that they do not have means for their own upkeep or cannot be supported by their families, in accordance with the legal provisions”.

<sup>108</sup> The way of deciding what to do with the beneficiary is homogenous for the whole country. Behind this is the view in which the benefit is considered a right for those in a vulnerable social situation and not (as) a political favor. Thus it does not require as much intensity and intervention by local leaders or the constant renewal of political bargaining.

<sup>109</sup> Due to this, in view of non-compliance of the imposed conditions, it was stated that the objective of the program is not to deregister the beneficiary, but to look for ways to refocus the exercise of rights. So far there have been more than 65,000 cases of deregistration due to breaking of conditions.

acknowledgement of conditions as a way to guarantee the exercise of rights was considered a main objective of the program.

### **C. Legal Aspects - Tools**

From the point of view of implementation by means of instruments, the conditions of PBF are the object of thorough regulation. In the case of the conditionality linked to education, there is more intense regulation and its monitoring is more thorough, according to information from the interviewees. The program already has information on the attendance of 87% of the students from families receiving the benefit, and five stages were established if the conditions are not fulfilled.<sup>110</sup>

In the area of health, the regulatory problems and challenges are greater and the control-monitoring tools lesser. There are political disputes within the Ministry of Health which hinder an objective definition of conditionality. Furthermore, the most significant area of conditionality, that of pre-natal control, demands a wide monitoring regime of pregnant women whose ages range from 12 to 49. For these reasons, only 56% of the beneficiary families have their health monitored.

Also in terms of a policy instrument, PBF is tied to the establishment of a single register, already mentioned, which is supposed to allow for a reduction of errors and improvements in the targeting of the program. The Single Register for Social Programs<sup>111</sup> was adopted, by means of regulation, as a public administration instrument to gather data and information to identify all low-income families in the country. This register, however, permanently relies on an adequate update by the municipalities charged with registering the families.

In short, differently from the conventional administrative law solutions based on the pre-determination of outcomes, the managing conditionalities and the single registration updating in PBF raise challenges - to be further studied - in terms of stability and permanence combined with flexibility, interactivity, revisability and reversibility.

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<sup>110</sup> In the first place, a notification is sent to the beneficiary with the bi-monthly data. If the student does not improve his or her performance in the second semester, a second measure consists of sending a letter to the municipal coordinator to define the causes and the blocking of the benefit, if in the two following bi-monthly sets of data the student continues not to comply with the rules. The following phase is a second suspension and the next one is de-registration from the program. In all cases the reasons should be notified by the municipal coordinator so that the problems relating to access to education and health care can be dealt with.

<sup>111</sup> Regulated by Decree N° 6,135, 2007.

#### **D. Legal Aspects - Institutional Arrangements**

From the legal and institutional point of view, one of the observed characteristics of PBF is the effort to integrate and articulate social assistance with other social policies, such as education and health, and with other social assistance policies. In this way, the logic of programs for conditional transfer of income in Brazil condition the receiving of such social benefits upon health and education, and transferred income is understood as an incentive to strengthen citizens' rights among the population's most vulnerable people.

Another element of the legal-institutional plan that I considered important in the interviews is the quality of the coordination at a federal level. In the implementation process of PBF, the federal government faces difficulties in bringing together federal actors, especially from more than 5,000 Brazilian municipalities. The government, in this context, was slow to understand what was needed to make agreements to obtain information for a single register and for carrying out the municipal program.

However, from the first moment of the embryonic plans for the program in 2001, the government of President Fernando Henrique Cardoso (President Lula's predecessor) determined, by way of mandatory decree, that municipalities must include every family, even those receiving half a minimum salary, in the single register by means of a national form. *Caixa Econômica Federal* (a federal savings bank) was given the task of handing out information about beneficiaries. The way in which this was done was so poor that it not only produced a registration process with errors of inclusion and exclusion, but also failed to encourage the municipalities to keep it constantly updated. The register was useless for policy management, giving rise to the need for the construction of a new one. With the imposition proving inefficient, it was necessary to find other incentives and legal solutions for municipal adhesion. In its second attempt, the government substituted the obligation for financial incentives, beginning payment for including families in the register and permanently updating of it.

The case reveals that the implementation of federal policies and the administration of assistance requires intense and continual cooperation with local authorities, and a proper way of allocating functions between the federal government, the states and the municipalities. It was in this manner that PBF was built with clear inspiration from the Unified Health System (SUS<sup>112</sup>), basing itself on an agreement, as well as on the offer of financial incentives. Municipal participation is, in this context, considered indispensable to build and update the

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<sup>112</sup> The SUS exists on the three federal levels, each one with its own command and its own attributes. Working directly with the Federal government, municipalities have taken on a more important role when providing and managing health services. This model, considered a success, has inspired PBF in its federative set up.

register. And legal forms of regulation and financial incentives have been combined to promote a more consistent institutional arrangement.

Due to the visibility and political capital associated with the program, the incentive for municipal performance, according to those interviewed, has a virtuous effect, promoting increased competition between municipalities for federal funds and strong mobilization, even of the poorest municipalities, to fulfill program adhesion requirements and execution. This represents a gain for the municipal administration of social assistance, with the building of technical groups, which goes beyond PBF. To complement this incentive, the federal government is negotiating the offer of training and capacity to municipal administrators provided by states.

Agreement is not only present in the adhesion of municipalities, but also in the construction and regulation of the program itself. However, as it is inspired by the SUS (health sector), the majority of normative production and the regulating norms have been the fruits of agreements between administrators from the National Council of Social Assistance, responsible for the regulation of actions. In this way, the norms are, and this was emphasized as an innovative legal feature, the product of a deliberative legitimizing process that minimizes questioning of federal bodies and of society, which took part in the process of normative construction.

## **E. Challenges Ahead**

According to those interviewed, PBF represents a composition of institutional innovations legally shaped, such as the cooperative model of intra-federal relations, the decentralization of execution, the conditionality approach to the exercise of rights, the breaking of links based on cronyism, and the possibility of interaction and articulation between agencies of social promotion in the course of operating the single register.

Also, the creation and settlement of the MDS itself seems to represent an autonomous administrative gain in the area of social assistance. A construction of social policy specialist bureaucracy consolidates the new model and the importance of assistance in the country's general social policy environment. Furthermore, according to those interviewed PBF represents a gain for the local and social economy, and, linked to policies, retains the potential to emancipate.

The challenge underscored by the MDS is the consolidation and legislative reform of social assistance policies and the question of how they could be crystallized. The ministry wants federal transfers of social assistance benefits to be considered legal transfers integrated into the social security budget and incorporated into municipal budgets (currently, federal transfers are voluntary,

with low legal support). Besides this, there are bills aimed at the permanent implementation of policies. The first of these is PL 3,077/2008 (draft legislation), which seeks to give legal outlines to the role of the state in social assistance, putting public bodies side by side with private ones in the sphere of the country's social assistance, and denominating the area of the Unified Social Assistance Service (SUAS).<sup>113</sup>

The municipal attempt to build and add records comes up against the absence of professional technicians in many municipalities. It was noted throughout the interviews that the federal coordination of the program, attempted to use multiple instruments to promote the qualification of municipal administrators, could be considered slightly intrusive. In the first place, the federal government prepares qualification processes and recommends professional managers to municipalities.<sup>114</sup> In the second place, the government is currently negotiating with the states for incentives to set up teams and qualify municipalities to administer the register. In the third place, the formula for revising federal funds includes targets for information collection on beneficiaries and compliance with conditionality, as well as the improvement of administration. Should a municipality not revise all the information, it will receive less federal funds.

The single register also represents a tool for organs and policies. According to those interviewed, its information has given rise to institutional partnerships and the integration of different programs in areas for education, food safety, health and the eradication of child labor.

There is also the challenge of ensuring the sustainability of programs and social assistance created by the current government. This attempt to regulate involves the following difficulty, according to those interviewed (all of them working at MDS): bills suffer legislative interference that changes the way the program was intended to work, creating new eligibility criteria or new conditionalities.

For this reason, issuing administrative orders is quite often given preference (regulating norms issued by the executive branch as opposed to ordinary legislation passed by congress) when putting together a normative regulation for PBF because this instrument is considered more flexible and revisable and less costly. In this way, many practices and successful operational processes were

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<sup>113</sup> The bill also creates the concept of "social vigilance" that defines situations of social risk and creates forecasting tools and basic public assistance units. The project also defines a minimum infrastructure for the social assistance councils and seeks to guarantee funds for the formation of a physical structure, materials and minimum staff.

<sup>114</sup> Participating municipalities must create a municipal council to work in conjunction with PBF or approve a Municipal Social Assistance Council, both composed of an equal number of members of government and civil society.

related as negotiated experiences (that is, not regulated by command-and-control, in a unilateral manner by the federal government<sup>115</sup>) and later they were made into a decree. These decrees are supposedly more permanent and do not demand adaptation. Other practices, however, demand constant revision of the programs' regulatory decrees, which poses a challenge and risk to enforcement and compliance.<sup>116</sup>

## VI. CONCLUSION

In an attempt to identify the roles the legal apparatus plays in development, I tried to use an incipient typology – law as goals, law as tools and law as institutional arrangements – to look at the *Bolsa Família* social policy currently being implemented in Brazil. I assumed that this is a worthwhile exercise, not only because *Bolsa Família* is considered, to a significant extent, “new” in terms of social policy and responsible for the recent decrease in inequality in Brazil, but also because I assume as a premise that the law plays an important – and at first sight not very clear – role in developmental policies. In other words, it is worth trying to identify the roles the law plays in social policies as a condition to assess, adjust, improve or criticize them. If well “calibrated” in terms of goals, tools and arrangements, the argument goes, such policies can maximize equity gains and minimize efficiency losses. Law, after all, is all but a neutral variable: both as an enabling tool and as an obstacle, it definitely matters in development strategies.

To elaborate on that, firstly I argued that since inequality and poverty are bad for development, they can, to some extent, be tackled from the legal viewpoint. In doing this, I tried to show how Brazilian tax and pension systems are regressive (i.e., poorly calibrated) as a result of political and legal variables that have been perpetuating inequalities in an “inequality trap”. If the law can fossilize inequalities it can also break deadlocks in development by means of progressive arrangements so that the vagueness of constitutional principles can find concreteness through polices that effectively ensure social and economic rights.

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<sup>115</sup> For some interesting insights on the flexibility, interactivity, revisability and learning-by-doing processes in developmental policies see C. Sabel. *Bootstrapping Development: Rethinking the Role of Public Intervention in Promoting Growth* (2005), available at: <<http://www.law.wisc.edu/gls/lands.html>>, accessed 21 April 2009.

<sup>116</sup> There are still challenges of an administrative or technical nature. PBF operations agent, as previously explained, is the *Caixa Econômica Federal*, with which relations are difficult. This public bank holds a monopoly in the distribution of benefits, guaranteeing it enormous negotiating power over tasks offering it little incentive to be efficient. Besides this, there is the technological challenge of widening the unique database register and keeping it permanently updated, which requires the cooperation of the municipalities.

This is equivalent to suggesting that the legal apparatus can be somehow seen as a good (or bad) “technology” to promote development and ensure the effectiveness of rights. If it manages to organize, coordinate, calibrate and operationalize the necessary framework to link well-intentioned promises to effective policies, it contributes to the developmental process as a key variable and, concretely speaking, as a “transmission belt” linking abstract principles to concrete outcomes. Besides that, if it is flexible, adjustable and cost-effective, it is likely to minimize some inefficiencies. Last but not least: if it is transparent and participatory, it ensures that distributive policies will be scrutinized by accountability mechanisms.

The test of such hypothesis, however, requires much more empirical research to better understand the impacts which legal changes can have, what can be done, what works and what does not. Specifically, much more applied study is necessary to test the assumption properly according to which PBF is, from a legal point of view, “new” in some sense.

Finally, despite the early success of the PBF, there are several topics subject to criticism: possible frauds, the challenge of designing “exit doors” and including those who are eligible but still do not get the transfer, insufficient information on actual functioning of conditionalities (Are children going to school? Are people seeing the doctor? Are positive spillovers being generated? What will be the impacts on the next generations?), and the risks of it ending up as a permanent feature of Brazilian society or being equated with straightforward vote-buying. That is why a thorough survey of the criticisms of the PBF<sup>117</sup> is necessary. The ideas described here, however, are no more than a first attempt and require additional steps.

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<sup>117</sup> PBF has increasingly been subject to a variety of studies whose goal it to assess it in different ways. In most of them one or more concerns arise. Anthony Hall mentions some critiques on PBF at A. Hall. *Brazil's Bolsa Família: a Double-Edged Sword?*, 39 *Development and Change* 5 (Institute of Social Studies, 2008), 799-822. See more critical perspectives in M. Medeiros, T. Britto and F. Soares, *Transferência de Renda no Brasil*, *Novo Estudos Cebrap* 79 (2007); in S. Rocha, *Transferências de Renda Federais: focalização e impactos sobre a pobreza e desigualdade*, 12 *Revista de Economia Contemporânea* 1 (2008), 67-96; and in S. Draibe (2009), *supra* note 86.

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