Linking principles to policies: the legal dimension of inequality in Brazil[1]

(draft – please do not quote or circulate)

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Abstract

The 1988 Brazilian Constitution foresees a wide variety of social and economic rights. To have an effective result, however, constitutional provisions of this type require the permanent use of legal tools and arrangements in public policies created to implement goals. Assuming that the design of the legal apparatus significantly matters for development, I seek to identify specific roles for the law. After highlighting the current debate on the importance of equality for development, I briefly describe Brazil as a case of an "inequality trap" and present the examples of taxation and pensions as policies that paradoxically produce regressive effects. Next, I suggest some finalistic, instrumental and institutional roles played by the law in social policies and apply them to *Bolsa Família*, a cash transfer social policy currently being implemented in Brazil.

Key words: law and development, redistribution, social policies, Brazil, *Bolsa Família*

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 and detailed chart of justiciable social and economic rights. It expressly foresees welfare policies such as minimum wages[3], unemployment insurance[4], transfers to the elderly and disabled[5], public pensions[6] and a wide variety of labor rights[7]. Also, it states that property rights, although defined and protected[8], have a "social task"[9] to perform, that income taxes are progressive[10], and that social

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[3] Article 7, IV.
[4] Article 7, II.
[5] Article 203, V.
[6] Article 201.
[7] Article 7.
[8] Article 5, XXII.
[9] Article 5, XXIII.
[10] Article 153, paragraph 2, I.

and regional inequalities must be "reduced" and poverty "eradicated"[11]. It is indeed a transformative constitution that recognizes poverty and inequality as actual problems that require active polices that, pragmatically speaking, demand the simultaneous implementation of complementary and synergic measures within the public administration.

The consequences of constitutionalizing social and economic rights, developmental objectives and principles of distributive justice are, however, far from being effective and fair in Brazil, still a very unequal country with many poor, which faces intricate challenges to advance social justice through consistent, cost-effective and accountable public policies that, in turn, heavily depend on the legal apparatus.

Departing from the assumption that redistribution of income is increasingly considered not only a powerful antidote to poverty reduction, but also a relatively autonomous tool to fight inequality and foster development in the long run, I argue that the lack of effectiveness of social and economic rights in Brazil, as well as its 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.

If it is correct to assume that the legal apparatus, as a means in public policies, can both concentrate income and promote progressive transfers, it is also possible to rely on the premise that the study of the distributive effects produced by the law is relevant in the contemporary development agenda. Law, understood as a regime that deeply influence economic production and distribution, and also shape macro-economic regulation, is everything but a neutral variable when it comes to inequality and poverty levels.

Another assumption is that in Brazil legal scholars, judges and public officials are trained to think of social justice mainly from a vague metaphysical perspective, while the study of concrete policies and their actual distributive effects are mostly neglected. In other words, I suppose that Brazilian legal professionals are not entirely familiar with the legal requirements and challenges that distributive policies demand, which is a symptom of a broader and more complicated problem: the weakness of an empirically-grounded and applied research agenda in the Brazilian public legal field.

In the first section I briefly discuss the relations between poverty, inequality and growth with the purpose of highlighting the fact that after being disregarded by development economists for decades, inequality has recently acquired a great deal of importance. I also argue that while there are historical, social, economic and cultural sources of inequality in Brazil, it can also be explained as a consequence of the way the legal system is designed and put into action. In this context, I suggest that the legal apparatus can obstruct development to the extent that it induces regressive transfers and/or crystallizes the unequal *status quo*. To illustrate that point, I discuss two Brazilian key institutions - the tax and pension systems – that nonsensically concentrate income instead of distributing it.

On the other hand, I also make a case that the law can play a distributive role and ultimately work as a "technology" to promote development by means of providing

[11] Article 3, III.

goals, tools and institutional arrangements to reduce poverty and inequality. Bearing that in mind, I present a tentative typology of roles of law in socio-economic development and discuss the *Bolsa Família* Brazilian cash transfer program as a distributive policy with the purpose of identifying 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. Money inequality, for the limited purposes of this article,[12] is of growing concern in many countries: having increased in the last few decades as a general rule, particularly in transition and developing economies, it has been more recently detected as a serious obstacle for development.

Indeed, there is a growing consensus that less unequal societies are associated with better growth performances because equality is being perceived as an advantageous ingredient for the development process. More equal societies grow in a more sustainable manner as compared to unequal ones and, by the same token, very unequal countries tend to grow more slowly[13]. Moreover, GDP growth combined with inequality reduction - i.e., a decline in the gap between the rich and the poor - results in more effective poverty mitigation as compared to a distributive-neutral growth.

Some development economists like Ortiz[14] 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.[15] "[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[16] and, as put by Birdsall[17], "where

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[12] Money inequality corresponds to inequality of income, consumption or wealth. 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 money 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 rich to the poor.

[13] T. Addison and G.A. Cornia. *Income Distribution Policies For Faster Poverty Reduction*. WIDER Discussion Paper, No. 93. UNU-WIDER (2001).

[14] I. Ortiz, *Social policy*, in *National Development Strategies – Policy Notes*. (New York: United Nations, 2008), pp. 199-267.

[15] Although connected, 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 US$ 2 a day, and extremely poor a person who lives on US$ 1 a day. 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.

[16] G.A. Cornia and J. Court, *Inequality, Growth and Poverty in the Era of Liberalization and Globalization*. WIDER Policy Brief, Number 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 13.

[17] N. Birdsall, *The World is not Flat: Inequality and Injustice in our Global Economy*. WIDER Annual Lectures 9, UNU-WIDER (2005).

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.[18]

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.[19] 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.[20]

Nonetheless, inequality has not always been seen as a problem in capitalist societies. In the early days of development policy, as explained by Addison[21], raising output, in particular increasing overall labor productivity by shifting labor from those sectors in which productivity is low to sectors to 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 rather than primary objectives, and the famous Kuznets curve explained the growth-inequality relationship.[22]

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 is a previous - or 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. Behind 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[23].

In spite of this, 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 the output but does not change its distribution in any pre-determined way.

[18] Inequality is also considered problematic from social, political and democratic perspectives: "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 N. Birdsall, *The World is not Flat: Inequality and Injustice in our Global Economy*, *supra* note 17.

[19] A. Atkinson, *Is rising inequality inevitable? A critique of the Transatlantic Consensus*. WIDER Annual Lectures 3, UNU-WIDER (1999).

[20] See G.A. Cornia & 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).

[21] T. Addison, *Development Policy – An Introdution to Students*. WIDER Discussion Paper No 9, UNU-WIDER (2004), p. 3.

[22] 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 the basis for developmental strategies that to some extent disregarded distributive aspects.

[23] H. Dagdeviren, R. van der Hoeven and J. Weeks (2002), *supra* note 20, p. 1.

As explained by Medeiros[24], assuming that increased output is reasonably distributed among the population (which is not always the case), 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 focus of literature on poverty reduction and "redistribution with growth"[25], in the Washington Consensus years (the 1990s), poverty was assumed to be possibly alleviated through the targeting of basic services to the poor and "social safety nets".[26] Crudely put, that is equivalent to assuming that poverty should be tackled with analgesic and sporadic (rather than constant and structural) measures. 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 adjustment programs had adverse impacts on poverty and inequality and, at best, did not improve the conditions of the poor[27]. In any event, poverty alleviation - not inequality reduction - was an objective discussed by neoliberal discourse and policies during the 1990s, with the World Bank playing an important role in that.[28]

Why has inequality been ignored? Possibly because the forms of tackling it require more difficult justifications and political coalitions. 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.[29]

Specifically, when inequality reduction through redistribution of income is at stake in the public policy agenda it is clearer that there will be losers, whereas when one thinks about poverty fighting, there is the impression that there are "winners only". When poverty-fighting policies are implemented with public (tax, for instance) funds, the rich are not more affected than everyone else. Progressive 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.

Inequality reduction is also more complex for practical reasons: winners and losers should be democratically defined and – this can be very difficult – found. "Who are

[24] M. Medeiros, *O que faz os ricos ricos? O outro lado da desigualdade brasileira*, (Ed. Hucitec, 2005), p. 43.
[25] H. Chenery, M. S. Ahluwalia, C. L. G. Bell, J. H. Duloy and R. Jolly, *Redistribution with Growth* (Oxford University Press, 1974).
[26] One of the recommendations by John Williamson, the economist who proposed the recipes for developing countries, after nicknamed the Washington Consensus, was the redirection of public spending from indiscriminate subsidies toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment. Redistribution of assets from the rich to the poor was not part of that strategy.
[27] H. Dagdeviren, R. van der Hoeven and J. Weeks (2002), *supra* note 20, p. 2.
[28] See the World Bank comprehensive webpage on poverty (PovertyNet): <http://www.worldbank.org/poverty/>, accessed 24 October 24 2009.
[29] T.E. Skidmore, *Brazil's Persistent Income Inequality: Lessons from History*, 46 Latin American Politics and Society 2 (2004), pp. 133-150.

the poor", "who are the rich", "who should lose" and "who should win" are not easy questions to answer, and sometimes involve high costs. Finally, fighting inequality more strongly through redistribution requires some sort of sophisticated "magnetic needle", i.e., a normative justification, be it egalitarian (Rawlsian, for instance), Marxist[30], utilitarian[31] or other, while poverty fighting is usually related to more universal efforts to pull people above the 2-dollar-a-day poverty line.

Anyway, today many studies suggest new causalities involving growth and inequality reduction[32] and the view based on the alleviation of poverty is being criticized and 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 do not promote social justice and, as explained by Ortiz[33], "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 as compared to the poor. The poor, in turn, save less and consume more, having therefore a higher marginal propensity to spend. As explained by Galor & Moav[34], 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 contend that 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

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[30] Marx famously put it in his *Critique of the Gotha Program* (1875), "from each according to his ability, to each according to his needs".

[31] An efficiency-based criterion such as Kaldor-Hicks (the gains of the winners compensate the loss of the losers), or the wealth maximization goal, for instance.

[32] 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 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.

[33] I. Ortiz, *Social Policy*, in *National Development Strategies – Policy Notes*, *supra* note 14, pp. 201.

[34] 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.

savings" as a results of their (options of increasing) choice to increase existing capital stock in their savings decisions".[35]

In this context, redistributive policies are increasingly considered not only adequate to reduce poverty, but also relatively autonomous tools to fight inequality and boost development. Besides, such policies, which reduce inequality and poverty simultaneously, can, when combined with growth, significantly strengthen a development trajectory. As Dagdeviren et. al. summarize it[36]:

> "Perhaps the most important is the growing consensus in the literature that countries with an "initial condition" of relatively egalitarian distribution of asserts 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[37] and the origin of its poverty is not related to scarcity of resources, either absolute or relative[38]. The explanation of Brazilian poverty is directly linked to its stable level of inequality.

Skidmore sees Brazilian inequality as the result of both modern-day and cultural and historical contexts. 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[39]. The second factor that explains the 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 remained low.[40]

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

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[35] T. Addison and G.A. Cornia. *Income Distribution Policies For Faster Poverty Reduction*, *supra* note 13, p. 7.

[36] H. Dagdeviren, R. van der Hoeven and J. Weeks, *Redistribution Does Matter*, *supra* note 20, p. 8.

[37] 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's *Mapa da Pobreza e Desigualdade* at http://www/ibge.gov.br, accessed 25 October 2009.

[38] R. P de Barros, R. Henriques and R. Mendonça, Rosane, *Estabilizade Inaceitável: desigualdade e pobreza no Brasil*. Texto para Discussão IPEA No 800 (IPEA, 2001).

[39] 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 the labor share of national income, contributing to the wage gap". T.E. Skidmore, *Brazil's Persistent Income Inequality: Lessons from History*, *supra* note 29, p. 135.

[40] T.E. Skidmore, *Brazil's Persistent Income Inequality: Lessons from History*, *supra* note 29, p. 136.

advantage. Three successful examples, amongst many others, of elite's defense of self-interest in Brazil are the government pension system and the tax system (income tax, for example). These historical origins 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," says Skidmore.[41]

Inequality is keenly 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 (Beghin, 2008).

Until very recently, the important debate in Brazil has been about eliminating poverty, not reducing inequality. In the case of Brazil (which is also the case of several developing countries), traditional and new sources of inequality simultaneously apply and are deeply rooted in social, political and economic relations.

Medeiros explains that in Brazil, unequal distribution of income has a peculiar feature. The population is visibly split into two groups: a homogeneous group of many poor people and a reduced 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 are rich not only because they possess most of the wealth, but also because the rich also control the political means that could eventually alter the income distribution.[42] In other words, Brazil finds itself in an "inequality trap", i.e., in a situation in which 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[43], permanently reinforce inequality.

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[41] 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" T.E. Skidmore, *Brazil's Persistent Income Inequality: Lessons from History*, *supra* note 29, 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 politico brasileiro*, (Ed. Globo, 2001).

[42] M. Medeiros, *O que faz os ricos ricos? O outro lado da desigualdade brasileira*, *supra* note 24, pp. 15-20.

[43] "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*, in 5 Journal of Economic Inequality 2 (Springer Netherlands, 2007), pp. 235–256.

C. A recent equity gain

During the process of modernization and industrialization – until the 1930s[44] Brazil was almost entirely agrarian – economic growth was probably the sole factor responsible for the small number of experiences in which poverty actually decreased. More recently, 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 - i.e., as a consequence of a distributive neutral GDP growth - poverty was reduced (in) by 50%.[45] Such an equity gain came with a no less important negative outcome: while GDP was rapidly increasing, inequality became rampant. Typically this was a case in which the increase in wealth clearly favored the rich at the expense of the poor.[46]

In 1994[47], 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[48]. 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 in the 2001-2005 period, a different cause explaining poverty reduction was detected: a small inequality decrease.[49] In that period the Brazilian Gini[50] coefficient

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[44] 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. T. Skidmore, *supra* note 29, p. 134.

[45] 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).

[46] "Policies for sharing growth can also stimulate growth". This is one of the conclusions by Birdsall, Ross and Sabot in a study that compared the economic performance (growth and income concentration) of East Asian economies and others like the Brazilian economy, also covering the 1970s. The authors explain that (the) Asian countries have experienced rapid growth over decades, with relatively low levels of income inequality, and appear to have also achieved reductions in 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.

[47] 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 is not going to be discussed here.

[48] 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).

[49] "…[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

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, by the way, if growth had been higher. It also implies that inequality reduction (not growth) is 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.[51]

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 growth, Brazil would have had to grow 11% per year in the period and also conclude that a1% 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 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[52] – 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. This represents a general improvement in which the poor have benefited more than the rich, a desirable win-win scenario.

The reasons for optimism, however, decrease when one observes more carefully other Brazilian institutions that have been playing the "anti-Robin Hood" for a long time. While the equity gains observed since 2001 are the result of the interplay of different factors such as rises in the minimum wage, inflation control and conditional targeted social programs such as the *Bolsa Família* and *Benefício de Prestação Continuada* (BPC)[53], classic welfare state institutions such as taxes and pensions did not contribute to inequality reduction. On the contrary, they have produced quite regressive outcomes. In the next section I will discuss these examples and explore the legal dimension underlying them.

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to inequality reduction may be continued" (R.P. de Barros, M de Carvalho, S. Franco and R. Mendonça, Rosane, *A importância da queda recente da desigualdade na redução da pobreza*, *supra* note 44, p. 7.

[50] 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).

[51] *Supra* note 44.

[52]See the 2008 PNAD at http://www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2008/default.shtm accessed 24 October 2009.

[53] BPC is an unconditional cash transfer program focused on the elderly and handicapped.

III. LAW, DEVELOPMENT AND EQUALITY IN BRAZIL

A. Progressive principles, regressive outcomes

Social and economic rights require successful policies, with the latter crucial pre-requisites for the effectiveness of the former. Without well-structured, implemented and assessed social policies, constitutional principles crystallizing distributive goals can generate regressive and unfair outcomes. Social policies, in turn, are heavily dependent on the law because the wide range of tools and institutions designed by the legal apparatus "instrumentalize" and "operationalize" abstract distributive goals.

If this is true, having a progressive chart 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 regressive - or even neutral, considering the transformative spirit of the Brazilian constitution - social rights end up frustratingly ineffective.

That is when a regressive set of key legal institutions governed by rules and regulation reinforce the inequality trap, in a vicious circle that severely hinders development. That is when the law governing policies works not as a pragmatic solution for development goals, but rather as a straitjacket that replicates development barriers both from the equity and efficiency perspectives.

I briefly describe some of these examples to make the case that the law has important roles to play in developmental policies, with one of them the shaping of appropriate institutions to distribute income.[54] That is when the law plays "Robin Hood", employing legitimate means to "take" from the rich to "give" to the poor and, in doing this, fosters development.

B. Pensions

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. In Brazil the pension system benefits those who contributed by working in the private and public sectors, and also channels pecuniary benefits to rural populations who could not contribute, to the elderly and disabled. But although it is structured and conceived on an egalitarian basis in a specific constitutional provision, currently it is running a huge deficit, sustains fiscal

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[54] From the institutionalist and political economy angles, Chang identified three key functions of institutions in promoting economic development: (i) coordination and administration; (ii) learning and innovation; and (iii) income redistribution and social cohesion. Chang is openly opposing 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. See H-J. Chang, *Understanding the Relationship between Institutions and Economic Development - Some Key Theoretical Issues*. WIDER Discussion Paper No. 93 (UNU-WIDER, 2001).

imbalances, faces unnecessary high efficiency costs, low coverage of funded schemes and, more importantly for the purposes of my argument, is clearly regressive as a result of flawed choices in defining winners and losers.

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 get almost the same as the 60% poorest have to share.

Ferreira and Souza[55] 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 criteria adopted to grant pensions and retirements – both for private sector and public employees – and the caps defined by legislation that limit the benefits are poorly calibrated and regressive because they favor the upper middle class.[56] Hoffman[57] 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 change in the pension rules, the contribution of pensions to increasing inequality will be even stronger in the future".

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 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".[58]

Rocha found that the distributive impact of the individual's income tax in Brazil is null and that the deductions it foresees are actually regressive[59]. In a comparison with South Africa, Di John shows that the Brazilian state tax system is much more

[55] C.R. Ferreira, S.CI. 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.

[56] 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 substantive if the caps were not regressive.

[57] R. Hoffmann, *Inequality in Brazil: the contribution of pensions*, in 57 Rev. Bras. Econ. 4 (2003), pp. 755-773.

[58] 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 the internet at: http://www2.vwl.wiso.uni-goettingen.de/ibero/papers/DB117.pdf, accessed 24 October 2009.

[59] S. Rocha, *Pobreza e Desigualdade no Brasil: o esgotamento dos efeitos distributivos do Plano Real*, *supra* note 47.

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 the South African rate of income tax and relies on a series of inefficient and regressive indirect taxes such as multi-tiered VAT, and financial transaction taxes".[60]

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 pretty 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 and taxes related to manufacturing and production correspond to only 3,8%. To sum up in general terms, the legal system – in this case, the tax system - is unfair to the extent that it clearly privileges the better off.

IV. THE ROLES OF LAW IN DEVELOPMENT

What are, after all and practically speaking, the roles of law in developmental policies devoted to social goals? I will try to partially answer that question based on the *Bolsa Família* program example, which I have studied in the broader context of the LANDS – Law and the New Developmental State – research project.[61] Differently from the taxation and pension examples, there are good reasons to believe that *Bolsa Família* works as an enabling tool to development. As discussed below, this large-scale cash transfer program has been reducing poverty and fighting inequality in Brazil's poorest areas.[62]

As explained by Trubek and Santos[63] 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 both a support for the classic developmental state and a tool 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[64]. As put by Trubek[65]:

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[60] J. Di John, *The Political Economy of Taxation and Tax Reform in Developing Countries*. WIDER Research Paper 74 (UNU-WIDER, 2006).

[61] I am grateful to the comments and criticism received from the LANDS team (David Trubek, Paulo Todescan L. Mattos, Alvaro Santos, Helena Alviar Garcia, Shunko Rojas and Hani Sayed) on the Bolsa Família preliminary report I prepared with the invaluable research assistance of André Nahoum.

[62] That does not mean, of course, that Bolsa Família should 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. What I intend to do is analyze them from a legal perspective to understand their redistributive potential and, moreover, the roles the legal apparatus plays in each of them.

[63] D. Trubek and A. Santos (eds.), *The New Law and Development – a Critical Appraisal* (Cambridge University Press, 2006).

[64] 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 62, pp. 95-173.

[65] 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), pp. 28-32.

"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. (Trubek, 2008:5)

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[66]. While the proponents of such efforts accept the proposition that state intervention is both necessary and desirable to stimulate growth and ensure social protection, they are looking for new ways that such 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. For that reason, the LANDS research project assumes it is possible to speak of a "new" developmental state (NDS). Whether or not a NDS exists in real life is an empirical question that depends upon further studies to eventually mature as a consistent theory. What I would like to develop 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.

In this scenario, law can be seen not only as an instrument, but also as a constitutive element of development. As put by Rittich[67] "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[68].

I propose a different, and perhaps more pragmatic, approach to analyze the roles of law in distributive policies. Different roles law plays in a specific social policy (the Brazilian *Bolsa Família*) are presented to illustrate how 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 term "roles of law" as a catch-all and therefore meaningless phrase in developmental jargon. In fact, ideas such as "law promoting development", "law redistributing

[66] 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).

[67] K. Rittich, Kerry, *The Future of Law and Development: Second Generation of Reforms and the Incorporation of the Social*, 26 Michigan Journal of International Law, pp. 199-243.

[68] 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 strong ideological components 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, Kerry, *The Future of Law and Development: Second Generation of Reforms and the Incorporation of the Social*, *supra* note 67.

income”, “law shaping institutions” can be puzzling in a sense that they mix up “law” with “state” and “politics”. Trying to avoid this terminological confusion, I suggest that there are three basic roles law plays in developmental strategies and then apply them to the *Bolsa Família* program.

Perceiving law as a *goal* – or, maybe more precisely, the goal of law – means identifying the “targets” of development policies, that is to say, their intended concrete results and the way such expected results are foreseen in constitutional provisions and other norms, the political rendering of such policies and their connected administrative measures. It also means identifying values, goals (quantitative and qualitative), targets of political economy, strategic perspectives on development and underlying notions of state, government and market in statutes and regulations, which support such policies.

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 means taking into account their pros and cons, the choice of strategies for inducing behavior, as well as the devising of penalties and rewards have been grouped on the assumption that law not only indicates goals, but also builds up the operational and instrumental conditions for development policies.

Perceiving law as an *institutional arrangement* means identifying the structuring of development as an effort by the state to implement goals according to means and a legal-institutional framework which entails, among other things, the sharing of responsibilities between (and among) public and private actors. 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. In other words, managing development requires structures capable of ensuring that goals become actions through tools, and that there is no overlap, gaps or rivalries hindering the efficiency of the policies within the state. Institutions entrench policies and their management practices, connect actors, create shared common meanings and expectations about actions, organizing and guiding them. Law also plays an important role in coordinating and ensuring interaction between different programs within the public administration, as well as in fostering community participation and accountability mechanisms.

The table below summarizes the roles the law plays in social development policies as follows:

	Law as a goal	**Law as a tool**	**Law as an institutional arrangement**
Concept	Finalistic legislation defining the redistributive role of the state and legal designing of incentives	Choosing legal tools to implement goals	Defining tasks, structuring missions and competences
Key-questions in social policies	Who should win, who should loose?	What are the most suitable means considering underlying goals, costs and benefits?	Who does what? How to structure and functionalize the distributive strategy?
Main objectives	Reducing inequality and poverty and reinforcing social protection	Using the toolbox to effectively achieve the intended goals	Rationalizing resources, avoiding gaps, overlaps and disputes inside government

V –THE *BOLSA FAMÍLIA* PROGRAM

A. Description

The declared objective, among others, of the *Programa Bolsa Família*[69] (hereinafter PBF), under the responsibility of the Ministry for Social Development and Combat against Hunger (hereinafter MDS) is to battle hunger and to promote the supply of food and nutrients for the immediate relief of poverty.

As discussed above, Brazil is one of the most unequal countries in the world, both in terms of concentration of income and wealth and in terms of access to opportunities. In recent years (overall,) it has seen an overall reduction in inequality 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 recorded in Brazilian history. This is due, explain specialists, to a combination of three factors: inflationary control (inflation has been stable since 1994 with the *Plano Real* stabilization package), increases in the minimum wage (of approximately US$ 50.00 in 1995 to roughly US$ 205.00 in 2007) and targeted social programs, mainly the PBF.

Overall, the first round of interviews conducted in the context of the LANDS research revealed that the PBF adopted legally-based tools and frameworks in the supposition that neither the free market nor GDP growth alone would be able to achieve the desired distributional objectives. From a public policy viewpoint, according to the officials interviewed, the PBF aimed to put in practice the aim of material equality, forecast in the 1988 Constitution.

Encountering difficulties since its creation less than a decade ago, the PBF has had to employ the available legal framework, reforming it and adapting it when necessary and also coming up with solutions, which previously had not existed. Some legal

[69] "Family Scholarship Program" in English.

dimensions of each of PBF will now be described to identify, according to the tentative terminology proposed above, the roles 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 MDS. Its objectives[70] are the combat of hunger and the promotion of security in food and nutrition, the immediate relief of poverty by means of a direct cash transfer, to arrest the cycle of poverty between generations by means of exercising basic social rights in the areas of health, education, social assistance and the stimulation and sustained emancipation of families in poverty via other complementary programs. The PBF is received by 11 million families with an investment of 8.6 billion, according to data from the MDS.

The criteria for eligibility to receive the benefit are a household monthly income of up to US$30.00[71] per head or US$60.00 if the family contains pregnant women, children up to 15 years old or adolescents up to 17 years old[72]. 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. [73]

The PBF is subject to conditions[74], which must be met in order to receive the benefit. The main conditions 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 ante-natal exams and other accompanying educational activities offered by the health visitors relating to) nutrition during pregnancy and promotion of healthy eating, the application of 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 the PBF, as are municipalities and states, in a federal interaction for the division of tasks, as better explained below[75].

The beneficiaries should be registered in the Single Register for Social Programs.

[70] Cf. art. 4° of Decree 5.209 of 17th September 2004.
[71] US$ 1.00 equals approximately BR$ 2.00.
[72] 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.
[73] For more information on benefits and criteria or elegibility, see <http://www.mds.gov.br/bolsafamilia/o_programa_bolsa_familia/beneficios-e-contrapartidas> accesssed 24 October 2009.
[74] Stipulated by Law 10,836/2004 and regulations for Administrative Order GM/MDS Nº 551, of the 9th of November of 2005.
[75] This monitoring follows a previously stipulated schedule which considers the time needed to gather the information and register it in the system. Measured bi-annually for health and food safety (responsibility of the Ministry of Health and bi-monthly for education and social assistance. The application of sanctions deriving from non-compliance of conditions of the PBF is gradual and the responsibility of the National Secretary for Citizens Income (SENARC).

This registration is fed with information from municipalities adhering voluntarily 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 (presumed to be more responsible than men in managing the budget) , by means of a swipe card. The beneficiary has 90 days in which 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

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 are, 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 during the first phase of the LANDS research project, 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.

In this context, the PBF can be interpreted as one of the outcomes of a social state model within the Constitution of 1988[76] 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 dependency ties of the beneficiaries on local political leaders.

According to MDS technicians, the transfer of funds through the PBF represents a rise in autonomy as it allows the beneficiaries to choose where and how it will be spent[77]. Moreover, unlike the individual benefits in the past, PBF is claimed to relate to a new

[76] 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 can be supported by their families, in accordance with the legal provisions".

[77] 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.

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 to 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 and punish the beneficiaries who break the conditions of the program[78]. Therefore, the 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 employment by means of instruments, the conditions of the PBF are the object of 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 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.[79].

In the area of health, the regulatory problems are greater and the control-monitoring issues 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 ante-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, the PBF is tied to the building of a single registration, 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[80] was adopted as an instrument to gather data and information to identify all

[78] Due to this, facing 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. Until now there have been 65,000 cases of deregistration due to breaking of conditions.

[79] 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 benefit is suspended, the fourth phase is a second suspension and the fifth a 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.

[80] Regulated by Decree N° 6,135, 2007.

low-income families in the country. This register, however, permanently relies on an adequate update by the municipalities charged with registering the families.

The legal incentives to create the register and keep it updated suggest, besides the discussion about the "macro outcomes" of social policies shaped by the law, a necessary reflection about the level of efficiency of the policies being implemented in a narrower focus. This means that the study of the roles of law in social policies has to consider the fact that there are at least two possible approaches: (i) measuring (net, for instance) distributive effects among those who are supposed to benefit from them and/or (ii) assessing the cost-benefit of the policy itself, in a narrower perspective. In both cases – say, the equity and efficiency perspectives – the law remains a central variable.

D. Legal aspects - institutional arrangements

From the legal-institutional point of view, one of the characteristics of the PBF is the effort to integrate 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 subject the receiving of such social benefits to 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 consider important is the quality of the coordination at a federal level. In the implementation process of the 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 registration and for carrying out the municipal program.

However, from the first moment of the (program's) embryonic plans for the program in 2001, the government of 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 sole register by way of a national form. *Caixa Econômica Federal* (the national 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 for municipal adhesion. In its second attempt, the government substituted the obligation for financial incentives, beginning payment for inclusion of families in the register and the permanent updating of it.

The case reveals that the implementation of federal policies and of assistance requires working with local authorities, and a way of distributing functions between the federal government, states and municipalities. It is in this manner that the PBF was built with clear inspiration from the Unified Health System (SUS[81]) and based on agreement, as

[81] 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

well as on the offer of incentives. Municipal participation is, in this context, considered indispensable to build and update the 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 the PBF. To complement this incentive, the federal government is negotiating the offer of training and capacity to municipal administrators from 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 agreement 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 (civil) society, which took part in the process of normative construction.

E. Challenges ahead

According to those interviewed the PBF represents a composition of legal and institutional innovations, 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 between agencies of social promotion, by means of the situation that the single register offers.

Also, the creation of the Development and Anti-Hunger Ministry (MDS) seems to represent an autonomous administrative gain in the area of social assistance. A construction of specialist bureaucracy consolidates the new model and the importance of assistance in the country's general social policy environment. Furthermore, according to those interviewed the 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 how to crystallize them. 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

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when providing and managing health services. This model, considered a success, has inspired the PBF in its federative set up.

country's social assistance, and denominating the area of the Unified Social Assistance Service (SUAS)[82].

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 federal coordination of the program attempted to promote the qualification of municipal administrators using multiple instruments that could be considered slightly intrusive. In the first place, the federal government prepares qualification processes and recommends professional managers to municipalities[83]. 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 conditionality, as well as the improvement of administration. Should a municipality not revise all the information, it will receive less federal funds[84].

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 were experts from the MDS: bills suffer legislative interference that changes the way the program was intended to work, creating new eligibility criteria or new conditionality. For this reason, quite often issuing administrative orders is given preference (regulating norms issued by the executive branch as opposed to ordinary legislation passed by congress) when putting together a normative regulation for the PBF because this instrument is considered more flexible and less costly. In this way, many practices and successful operational processes were related as negotiated experiences (that is, not regulated by command-and-control, in a unilateral manner by the federal government) 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[85].

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[82] 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.

[83] Participating municipalities must create a municipal council to work in conjunction with the PBF or approve a Municipal Social Assistance Council, both composed of an equal number of members of government and civil society.

[85] There are still challenges of an administrative or technical nature. The PBF operations agent, as previously explained, is the *Caixa Econômica Federal*, with which relations are difficult. This public bank holds monopoly position 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.

VI. Conclusion

In an attempt to identify the roles the legal apparatus plays in development, I tried to use a 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, responsible for the recent decrease in inequality in Brazil, but also because I assume as a premise that law plays an important – and at first sight not very clear – role in developmental policies. In other words, my assumption here is that it is worth trying to identify the roles law plays in developmental policies as a condition to assess, adjust, improve or criticize them. Law, therefore, is not a neutral variable: both as an enabling tool and as an obstacle it definitely matters in development strategies. More importantly, the legal arrangements, rationales and tools differ in quality, both from the equity and efficiency perspectives.

But before that, I also tried to argue 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 as a result of political and legal arrangements and regulations that have been perpetuating inequalities in an "inequality trap". If the law can fossilize inequalities, the argument goes, 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 rights.

I also suggested 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 correctly organize the necessary framework to link well-intentioned principles to effective policies, it contributes to the developmental process as a key-variable and, concretely speaking, as a transmission belt linking abstract principles to specific policies. Such a task, however, requires further empirical and applied research to better understand what can be done, what works and what does not. The ideas described here are no more than a first attempt – a pilot study - and certainly deserve additional steps.

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