

ROLES OF LAW IN DEVELOPMENT POLICIES:
DECENTRALIZATION AND COORDINATION IN THE *BOLSA FAMÍLIA* PROGRAM

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Abstract

Beginning from the premises that the roles played by legal norms, institutions and processes in development policies deserve consistent examination and that the *Bolsa Família* Program (BFP), a Brazilian conditional cash transfer, is an initiative that in the broad context of a legal and institutional transformation, has introduced policy innovations in the Brazilian Welfare State, this chapter aims to address the following questions: what main legal instruments are being used by BFP? What goals do they pursue? To what extent does the use of these instruments represent a change in the Brazilian historic pattern of regressive, centralized (at the federal level), fragmented (within the federal level), clientelistic and opaque social policies? After presenting the approach used to discuss the relationships between law and development, I summarize the main characteristics of Brazilian social policies between 1930 and 1988. The goal is to contrast them with the post-1988 period, subsequently described as the outset of a constitutional and legal process through which universal social rights have expanded and a non-contributory social assistance system, was conceived, thus paving the way for the current policy implementation, articulation and expansion phases. In this context, two BFP tools - a registry for all vulnerable people (*Cadastro Único*) and a management index (IGD) - are described in their decentralizing and coordinating tasks with the purpose of shedding light on roles played by administrative law in establishing goals, selecting tools and articulating actors. The conclusion argues that in a mutual interaction between policy and law, incentives are being shaped and used in BFP to foster decentralization, align incentives, stimulate behavior, and coordinate institutional functions and responsibilities. Also, it argues that while the question on whether or not Brazil is undergoing a new development cycle remains open, an increasing articulation of universal and decentralized targeted policies aggregates density and complexity to the Brazilian Welfare State while, at the same time, proposes crucial and challenging research agendas for law and development scholars.

1. Introduction

Neri *et al.* propose that the main changes in Brazilian society in the first decade of the 21st century could be called the “decade of income inequality reduction or equalization of outcomes”. The 1990s could be called the “conquest of economic stability” and the 1980s, the “decade of democratization”¹. Indeed, since 2001

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1 Marcelo Neri *et al.* ‘Miséria e a Nova Classe Média na Década da Desigualdade’ (2008) Published by the Center for Social Policies, Brazilian Institute of Economics, Fundação Getulio Vargas. Available at <<http://www.fgv.br/cps/desigualdade>>, accessed on September 14, 2010, p. 13.

improvements in both the rate of poverty and income inequality have been unprecedented. Between 2001 and 2008, incomes of the wealthy grew at a moderate pace, while income gains for the poor increased dramatically, probably for the first time in Brazilian history².

Studies highlight the fact that a significant portion of Brazil's distributive gains achieved in the last decade are the result of a combination of economic and institutional reforms. They include inflation control, changes in labor markets that include unemployment reduction and increases in the minimum wage, pensions and social security improvements and a new generation of social assistance policies, with a remarkable example of these being the *Bolsa Família* Program³ (BFP), created in 2003⁴.

BFP reaches more than 12 million households (approximately 25% of the Brazilian population⁵) and has been considered an economical (its estimated cost is 0.35% of

2 During this period, while the GDP grew by 3.3% per year on average, the income of the poorest 10% grew six times faster than the income of the richest 10%. In 2009, Brazil's Gini coefficient, which was among the highest in the world in the late 1980s (it peaked at 0.63 in 1989) fell to 0.54. Nonetheless, Brazil is still extraordinarily unequal. According to Barros *et. al.* currently (in 2010) "as a result of the high income inequality that still prevails in Brazil, the proportion of the national income appropriated by the poorest is still quite low compared to what is typically observed in countries with similar inequality levels". Ricardo Paes de Barros, Mirela de Carvalho, Samuel Franco and Rosane Mendonça, 'A importância da queda recente da desigualdade na redução da pobreza' (2007). 1256 Text for Discussion IPEA – Brazilian Institute of Applied Economic Research, p. 16 and Sergei S.D. Soares, 'O ritmo da queda da desigualdade no Brasil' (2010) 30 *Revista de Economia Política* 3, p. 368. On the claim that Brazil still has "excessive inequality" compared to other developing countries, see Ricardo Paes de Barros, Mirella de Carvalho and Rosane Mendonça, 'Dimensionando o Programa Bolsa Família' in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 2 (Brasília: IPEA, 2010), p 349.

3 Literally, "Family Grant Program".

4 For Marcelo Neri, "labor income accounts for 66.86% of inequality reduction between 2001 and 2008, then comes the social programs, especially the *Bolsa Família* and *Bolsa Escola*, its predecessor, which account for 17% inequality reduction, while pension benefits account for 15.72% of income de-concentration." Marcelo Cortes Neri (coord). 'A Geografia das Fontes de Renda', Center for Political Sciences — Fundação Getulio Vargas (2010). Lindert *et. al.*, say that the BFP was responsible for around 20-25% of the "impressive" recent inequality reduction in Brazil and 16% of the recent poverty reduction. Kathy Lindert, Anja Linder, Jason Hobbs and Bénédicte de la Briér, 'The Nuts and Bolts of Brazil's Bolsa Família Program: Implementing Conditional Cash Transfers in Decentralized Context' (2007) 0709 *Social Protection Word Bank Paper*, p. 6.

⁵ In terms of number of beneficiaries, BFP is the fourth largest social policy initiative in Brazil. The three largest ones are the public healthcare system (SUS, which in theory covers all Brazilians), the public education system (52 million people) and the social security system (21 million beneficiaries). See Sergei Soares and Natália Sátyro, 'O Programa Bolsa Família: Desenho Institucional e Possibilidades Futuras' in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 1 (Brasília: IPEA, 2010), p 26

GDP)⁶ and effective⁷ policy in fighting poverty and reducing inequality. Studies also show that payments – which are not high in absolute terms - do not create disincentives to work⁸ and that considering its huge scale and administrative complexity BFP's targeting is efficient and effective since 80% of funds reach the poorest 23%⁹. BFP is a conditional cash transfer (CCT) that benefits all of Brazil's extreme poor¹⁰ and households with monthly incomes per person ranging from approximately US\$ 41 to US\$ 82¹¹. The three types of BFP payments are: (1) basic (US\$ 40, paid to households considered extremely poor earning a monthly income of up to US\$ 41 per person, even if they do not include children, adolescents or young people), (2) variable (US\$ 13 paid to poor households earning a monthly income of up to US\$ 82 per person, provided that these include children and adolescents aged up to 15, and each household may be granted up to five variable benefits) and (3) variable tied to the number of adolescents in the household (US\$ 19.50, paid to all BFP-enrolled households with adolescents aged 16 to 17, attending school, and each household may be granted up to two variable adolescent-related benefits).

To receive the payments made through a federal public bank (*Caixa Econômica Federal*), families (mothers preferably) living in poor and very poor households should meet health and education conditionalities. In health, households registered with the BFP commit to vaccinations and monitoring of the growth of children under

6 Serguei Soares, Rafael Perez Ribas and Fabio Veras Soares, 'Targeting and Coverage of the Bolsa Família Programme': why knowing what you measure is important in choosing the numbers', 71 *International Policy Centre for Inclusive Growth (IPC-IG) Working Paper* (2010), p. 5.

7 "(...) BFP is extremely well targeted. The poorest quartile (25%) of the population received 80% of all benefits. Leakages to the "non-poor" (or "non-target group") thus amounted to about a fifth of the program's outlays, though 85% of those leakages went to families in the next poorest quartile, which could be considered "near poor" – and virtually none went to the richest quartile of the population". Lindert *et. al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 46.

⁸ See Marcelo Medeiros, Tatiana Britto e Fábio Soares 'Transferências de renda no Brasil' in 79 *Novos Estudos Cebrap* (2007), p. 14.

9 Fábio Veras Soares, Rafael Perez Ribas and Rafael Guerreiro Osório 'Evaluating the Impact of Brazil's *Bolsa Família*': Cash Transfer Programmes in Comparative Perspective' (2007) 1 *IPC (International Poverty Center) Evaluation Note*. See also Degol Hailu 'What Explains the Decline in Brazil's Inequality?' (2009) 89 *One Pager*, International Policy Centre for Inclusive Growth, p.1.

10 In BFP the extreme poor are those whose declared per capita monthly income is below one-quarter of the minimum wage (the minimum wage is currently US\$ 300 per month). Exchange rate 1US\$ = R\$ 1.7 (December 2010).

11 As many other aspects, BFP cash benefits were adjusted in recent years through presidential decrees. The last adjustment was in the first half of 2009, when benefits increased about 10%. According to Marcelo Medeiros, Tatiana Britto and Fábio Veras Soares, there are no indicators "that the transfers might significantly (and undesirably) affect the participation in the labor market. Much to the contrary, for reasons yet to be studied, such participation is higher among BFP beneficiaries". Marcelo Medeiros, Tatiana Britto and Fábio Veras Soares, 'Targeted Cash Transfer Programmes In Brazil: BCP and the Bolsa Família' (2008), 46 *International Poverty Center Working Paper*, p. 17.

age seven. Women aged 14 to 44 must also seek regular medical care and, those pregnant or breastfeeding should have prenatal testing and healthcare for themselves and their children. In education, all children and adolescents aged between 6 and 15 must be enrolled in school with no more than 15% absenteeism. Students aged between 16 and 17 must have at least 75% school attendance¹².

While BFP is managed by the Ministry of Social Development (MDS), the Brazilian ministries of education and health are co-responsible for the monitoring and compliance of the conditions linked to the BFP, as are municipalities and states, in an innovative and complex inter-sectoral policy coordination and dialogue better explored below. There are no graduation or exit rules in BFP: eligible beneficiaries are entitled to payments, and legislation has mandated that beneficiary recertification must be carried out every two years to determine whether beneficiaries continue to be eligible¹³.

Conditional cash transfers, created in the 1990s in Latin America, are described as a significant policy innovation in social protection¹⁴. They proliferated during the 2000s and are now adopted by various countries worldwide¹⁵. Although they maintain a basic structure (cash transfer, targeting mechanism and conditionality)¹⁶,

12 Furthermore, children and adolescents under 15 years at risk or withdrawn from child labor should enroll in *Serviços de Convivência e Fortalecimento de Vínculos* (Child Life Support and Strengthening of Bonds - SCFV) under PETI (Eradication of Child Labor Program) and have at least 85% school attendance.

13 In 2009 28% of the families that benefited from BFP had their payments suspended for failing to apply for recertification. See <<http://www1.folha.uol.com.br/poder/846473-governo-bloqueia-beneficios-de-quase-400-mil-familias-inscritas-no-bolsa-familia.shtml>>, accessed February 5, 2011.

14 Fábio Veras Soares 'Para onde Caminham os Programas de Transferência de Renda Condicionadas? As Experiências Comparadas do Brasil, México, Chile e Uruguai' in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 2 (Brasília: IPEA, 2010), p 173.

15 According to Mkandawire while "in the 1960s and 1970s, the tendency was toward universalistic policies, since the 1980s, the balance has radically tilted in favor of targeting in both developed and developing countries". Thandika Mkandawire, 23 *UNRISID* (United Nations Research Institute for Social Development) *Paper - Programme on Social Policy and Development* (2005), p. 1. For a comparison of CCTs in Latin America, see Sudhanshu Handa and Benjamin Davis, 'The Experience of Conditional Cash Transfers in Latin America and the Caribbean (2006), 24 *Development Policy Review* 5, pp. 513-536. On the emergence of CCTs in Latin America, see Tatiana Britto, 'Conditional Cash Transfers: why have they become so prominent in recent poverty reduction strategies in Latin America' (2004), 390 *Working Paper Series – Institute of Social Studies (ISS)*.

16 "CCTs share three components in common: a cash transfer, a targeting mechanism, and conditionality. In sum, CCTs pay a transfer to the poor provided they follow a pre-specified course of action", explains Francesca Bastagli, who also provides a complete comparison of CCTs in six Latin American countries. 'From Social Safety Net to Social Policy? The role of Conditional Cash Transfers in Welfare State Development in Latin America', 60 *International Center for Inclusive Growth (IPC)*

each CCT has its own political motivations, features and goals and is implemented in very different ways. An in-depth study released in 2004 showed that, in addition to its extraordinary scale, BFP's most prominent and unique features are its decentralized management, the use of incentive mechanisms for the local level administrative performance, its role as an integrating social policy, and the fact that BFP has been a "natural laboratory of innovation"¹⁷.

On the other hand, non-contributory, targeted and conditional cash-transfers, decentralization, the use of contracts and incentives for performance, integration and coordination of administrative bodies are new terms in Brazilian public law and administrative jargon since, as further discussed, the Brazilian Welfare state has been historically conservative, regressive, centralized and prone to cronyism and clientelism¹⁸. It was only in the late 1980s, with redemocratization and a new constitution, that the country expanded universal policies and initially adopted the approach of designating non-contributory social assistance a state responsibility under a social security system and integrating it with health and social insurance policies¹⁹. And it was only in the 2000s that Brazilian social policy became less opaque, more articulated, and focused on families as psychosocial units instead of on individuals.

Recently, the legal scholar David M. Trubek proposed a research topic in the field of

Working Paper (2009). To Britto, BFP's rationale is "very similar to that of most CCTs in Latin America: to combine the short-term goals of poverty alleviation, through the cash transfers, with the long-term objectives of breaking the intergenerational poverty traps, through the conditionalities on health and education". Tatiana Britto 'Brazil's *Bolsa Família*: understanding its origins and challenges' (2008), in 15 *Poverty in Focus – International Poverty Centre*, p. 6.

17 Lindert *et. al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 2.

18 About the Welfare State in Brazil, marked by the strong role played by the government in the development of capitalist dynamics of late industrialization and regulation of social transformations as a model other than the classic European model of Welfare State arising from bourgeois revolutions, refer to S.M. Draibe, 'Welfare State no Brasil: características e perspectivas' (1993), 8 *Caderno de Pesquisas do Núcleo de Estudos de Políticas Públicas – NEPP*, Universidade Estadual de Campinas, p. 7. For a discussion on the unique features of this Brazilian Welfare State, see L. Aureliano and S. Draibe 'A especificidade do "Welfare State" brasileiro, in MPAS/CEPAL *Economia e desenvolvimento - vol. I: reflexões sobre a natureza do bem-estar* (Brasília: MPAS/ CEPAL, 1989).

19 Luciana Jaccoud, Patrícia Dario El-Moor Hadjab and Juliana Rochet Chaibub, 'The Consolidation of Social Assistance in Brazil and its Challenges – 1988-2008', p.1. The authors also point out that before 1988 non contributory social assistance in Brazil was "a minor policy, supplemented in terms of resources, fragmented in terms of programmes and activities, and unclear about its goals and targeted audiences", p. 3.

law and development²⁰, which considers the possible existence of different and often new roles for law to play in contemporary development strategies and seeks to empirically observe and describe the legal implications of development trajectories. In his words²¹:

“Today, there is a new topic emerging in the field of law and development. This is the possible emergence of a new developmental state (...) and its implications for law. (...). There is evidence that some countries are returning to a more active role in promoting both growth and equity and a new body of theory is emerging which helps account for this development and suggests directions it should take. These changes in theory and practice deserve our attention for they could require rethinking theories of law and development. What we see in some countries is not a simple return to the development policy and legal models of the past, but rather a search for a very different kind of developmental state than the one that prevailed in Asia or Latin America in the 1960s and 1970s. While the new theories stress the value of state intervention, they point to very different forms of intervention that have been practiced by many nations in the past. And the little empirical data that we have suggests that some countries are experimenting with novel types of intervention. Both the new theories and the emerging practices suggest a need for new types of laws and legal processes”.

This chapter dialogues with Trubek’s hypothesis - according to which emerging practices in public intervention deserve consistent examination and description because they might be using new types of laws or experimenting with new modes of legal action²² - and aims at addressing the following questions: what legal instruments or means are being used by BFP? What policy goals do they pursue? To

20 “Law and development is an idea that defines a practice and shapes action”, says Trubek. While development goals may be different (e.g., speed up economic growth, preserve the environment, promote democracy or protect human rights, encourage technical and technological innovation, gains in international trade or reduction of poverty and inequality), “[t]he practice is the self-conscious effort to change law and legal institutions to achieve some goal”. David M. Trubek, ‘The Owl and the Pussycat: Is There a Future for Law and Development?’, in 25 *Wisconsin International Law Journal* 235 (2007), p. 235.

21 David M. Trubek, ‘Developmental States and the Legal Order: Towards a New Political Economy of Development and Law’ (2009), 1075 *Legal Studies Research Paper Series*, University of Wisconsin Law School, p. 2.

22 For Trubek “new types of law” can constitute not only literally new tools created for developmental policies, but also adaptations and new uses for existing tools and/or new approaches to implementing existing law. See David M. Trubek, ‘Developmental States and the Legal Order: Towards a New Political Economy of Development and Law’ (2010). Paper presented at the seminar ‘Law and the New Developmental State in Latin America’, available at http://www.cebrap.org.br/v1/upload/pdf/LANDS_Trubek_Developmental_States_and_the_legal_order.pdf, accessed 5 July 2011. p. 2.

what extent do these instruments translate, in the realm of administrative law, to a change in the Brazilian historic pattern of regressive, centralized (at the federal level), fragmented (within the federal level), clientelistic and opaque social policies?

After presenting the framework used to discuss the relationships between law and development (Section 2), the paper summarizes the main characteristics of Brazilian social policies between 1930 and 1988 (Section 3). This was the period in which the country initiated its industrialization process in the context of post-war capitalist internationalization. Intense and disordered urbanization, income and regional inequality and increasing social exclusion are some of the legacies of that process. Based on this, I describe the argument according to which the Brazilian Welfare State was erected on conservative and regressive grounds, and suggest that in such a context public law was conceived and enforced to maintain the *status quo*²³, rather than to transform it. The post-1988 period is then referred to (Section 4) as the outset of a gradual process through which universal social rights and Welfare State institutions were expanded and a non-contributory social assistance system was conceived and paved the way for complex policy implementation, assessment and expansion phases through which BFP, among other initiatives, were conceived and implemented. In this context, BFP is introduced and two of its tools - a registry for all vulnerable people (*Cadastro Único*) and a decentralized management index (IGD) - are then described in their integrating and coordinating tasks (Section 5). Section 6 sheds light on certain roles played by BFP's administrative law in designing goals, shaping tools and assigning institutional tasks within BFP and in the conclusion, I contend that in a mutual interaction between policy and law, incentives are being shaped and used in BFP to foster decentralization, align incentives, stimulate behavior, and coordinate institutional functions and responsibilities. Also, I argue that while the question of whether Brazil is undergoing a new development cycle remains open, an increasing articulation of universal and decentralized targeted policies aggregates density and complexity to the Brazilian Welfare State while, at the same time, it proposes crucial and challenging research agendas for legal scholars.

²³ Soares and Sátyro corroborate this diagnosis arguing that while the post 1930 Brazilian state represented a first effort in establishing a social protection system, it also reproduced pre-existing inequalities in the Brazilian society. "It was urban, contributive, formal and predominantly white", they say. Sergei Soares and Natália Sátyro, 'O Programa Bolsa Família: Desenho Institucional e Possibilidades Futuras', p 27.

2. Roles of law in development policies: functional approach

While development undeniably depends on good political and economic decisions, it is also certainly the product of well-coordinated legal and institutional design and calibration. The law that underpins social and economic policies has played different roles in promoting public goals throughout the history of development trajectories. Experiences in the 20th century illustrate times in which the legal framework has been proactively and extensively employed by the state to promote modernization, growth, industrialization and investment (e.g., in the Latin American import substitution strategy or in the Asian outward-looking development leaps). Also illustrated are periods in which its most important task was to impose limits on the state, protecting individuals, ensuring predictability and fostering efficient markets through liberalization²⁴. At the same time, however, state-centered and pro-market legal regimes, institutions and policies superposed themselves in “geological layers”, thus making it difficult to identify and explain causalities, as well as drawing lessons on the uses of law for developmental purposes from past experiences.

As a result, the study of the relationship between the law and socio-economic development is methodologically intricate and requires efforts to build useful analytical models²⁵. Political, ideological, historical, theoretical and empirical levels easily overlap and juxtapose, and this raises significant research challenges to those interested in observing the uses and effects of legal norms, processes, solutions and arrangements in development trajectories. One element that makes it even harder to address this topic is the fact that while the law can be employed for different political purposes at different historical moments, it can also influence, define, formalize and

24 David Trubek and Alvaro Santos, ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’, in David Trubek and Alvaro Santos. *The New Law and Development – a Critical Appraisal* (New York, Cambridge University Press: 2006).

25 Law, policy and theory form one inseparable whole, says Trubek. “We cannot interpret laws and regulations without understanding the policies they are designed to ‘implement’ and the theories which led to these policies. But, on the other hand, there is no way to say what the ‘policy’ is without studying the law”. David Trubek, ‘Law, Planning and the Development of the Brazilian Capital Market’, 72-73 *Bulletin Yale Law School Studies in Law and Modernization* 3 (1971), p. 9.

institutionalize the purposes for which it serves as a means²⁶. Additionally, the law can be at the same time understood as a requirement and/or a result of the development process, as well as an enabling tool or obstacle to progress.

To accomplish the task of examining the BFP from a perspective that seeks to examine decentralization and coordination roles that the law – mainly administrative law - plays in it, I will refer to categories according to which, from a functional perspective²⁷, the law can be seen as a framework, as a tool, as an institutional arrangement and as a participation channel in development policies. I assume that law works functionally in public policies in the specific and limited sense that it can be used to implement goals and to play structuring, regulating, and coordinating roles.²⁸. But I also acknowledge that the methodological approach I propose here does not touch on several important topics that underlie the debate on the relationships between law, public policies and development trajectories.

Thus, this article does not aim at presenting a full-blown theory of law and development, and instead of looking for gaps between policy goals and policy outcomes or establishing causalities or correlations between legal norms, processes and institutions and development outcomes (be they successful or not), my intention is to identify how policy goals are being translated into administrative law and describe uses and functions assigned to law from that exercise. As further discussed, the underlying proposition is that not only has BFP been adopting new public policy tools, but it is also using new (as compared to the previous historical social policy pattern) legal approaches to implement them.

26 Terence Daintith, 'Law as Policy Instrument: A Comparative Perspective', in Terence Daintith (ed.), *Law as an Instrument of Economic Policies: comparative and critical approaches* (Berlin, New York, Walter de Gruyter, 1987), p. 22.

27 On functional and structural roles of law in the Welfare State see Norberto Bobbio, '*Da Estrutura à Função - novos estudos de teoria do direito*' (Sao Paulo, Manole: 2007). See also Gunther Teubner, 'Juridification: Concepts, Limits, Aspects, Solutions', in Gunther Teubner (ed.) *Jurification of Social Spheres – a comparative analysis in the areas of labor, corporate, antitrust and social welfare law* (Berlin, New York: Walter de Gruyter: 1987).

²⁸ At the same time, I also assume that since law and policies mutually and dynamically affect each other, the relationships between them are difficult to observe and to distinguish. At the limit, the law can be described as the policy itself and this confusion might end up blurring the boundaries between them. Aware of this risk I contend that the functional approach is still helpful to the extent that it allows some room for different angles of observation of the roles played by the legal apparatus in public policies.

2.1. Law as a framework

The purpose of development policies vis-à-vis the law may be regarded from at least two angles. The first one takes them as data, i.e., as products of political choices for which the law or the lawyers - especially those who, in the public sector, will implement them - exert little or no interference. The substantive goals and objectives of development policies should therefore be seen as extra-legally defined in the realm of politics, the law and lawyers assigned playing an eminently instrumental role in helping to fulfill them. The other point of view sees the law itself as a source of definition of the very purposes for which it serves as a means²⁹. Nonetheless, these two views need not be seen as antagonistic or mutually exclusive. The law in fact can be understood both as a substantive element and as a tool or instrument of development policies, depending on the point of view and analysis criteria chosen.

Bearing this in mind, viewing law as a framework of public policies stresses the idea that legal norms crystallize policy goals and, as in the Brazilian and other Latin American cases, prospectively determine values and ends and to be pursued³⁰. In other words, very often without specifying the means, the law translated into legislation (constitutional norms, for instance) formally spells out the scope and the targets to be sought programmatically³¹. This description confers to the law of developmental policies not only an instrumental character, but also a scope-like nature. Rittich further develops this idea, stressing that the creation of certain institutions and the recognition that certain rights play a constitutive role in defining what development is³².

29 Terence Daintith, 'Law as Policy Instrument: A Comparative Perspective', in Terence Daintith (ed.), *Law as an Instrument of Economic Policies: comparative and critical approaches* (Berlin, New York, Walter de Gruyter, 1987), p. 22.

30 Bastagli argues that recent social protection reforms in Brazil explicitly stated BFP administrative goals and were accompanied "by significant efforts at policy reorganization and institutional redesign in a mid-to long – term perspective", Francesca Bastagli, 'From Social Safety Net to Social Policy?' p. 16. Although Bastagli does not establish causalities between the existence of clear goals and consistent policy efforts, it seems reasonable to assume that laws that objectively describe their own policy ends, stress their priorities and offer means for implementation favor the subsequent policy shaping and institutional design.

31 The 1988 Brazilian Constitution, for example, uses the word 'development' dozens of times. In Article 3, II, it sets out that "ensuring national development is one of the fundamental goals of the Federative Republic of Brazil".

32 Kerry Rittich. 'The Future of Law and Development: Second Generation of Reforms and the Incorporation of the Social' (2004) 26 *Michigan Journal of International Law*, pp. 199-243.

2.2. Law as institutional arrangement

As noted by Neil Komesar the emphasis on the finalistic dimension of law is important, but it is not sufficient to fully translate the roles of law in public policies³³. Thus, one complementary way to understand the law as playing a role in the shaping of developmental policies is to assume that legal rules structure their operation, govern their procedures and bear responsibility for ensuring the coordination of stakeholders and actors (public and private) directly and indirectly related to such policies. In other words, public policy goals such as decentralization, integration or inter- and intra-sector coordination³⁴ ultimately depend on the “quality” of the legal framework that shares and manages responsibilities between public stakeholders and between public and private stakeholders. If this is true, the argument goes, an institutional framework whose legal skeleton results in overlaps, gaps, rivalries and other types of mismatches tends to be counterproductive³⁵ and, from a qualitative viewpoint, much worse than an alternative arrangement that avoids such outcomes.

Today it is common sense among economists that institutions play a central role in development. They, among other things, organize public policy administration practices, connect stakeholders, create knowledge, and enable common expectations and principles to be shared. Besides this, institutions redistribute income, coordinate decisions, promote innovation, reduce costs and define rights³⁶. Rodrik and

33 According to Komesar, “[a] link is missing – an assumption overlooked – in analyses that suppose that a given law or public policy result flows from a given social goal. That missing link is institutional choice. Embedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution. (...) Goal choice and institutional choice are both essential for law and public policy. They are inextricably related”. Neil Komesar, *Imperfect Alternatives – Choosing Institutions In Law, Economics And Public Policy* (Chicago, University of Chicago Press, 1994), p 5.

34 Decentralization, concerted efforts, integrated programs and synergies are organizational parameters described as contemporary challenges of Brazilian social policies by Sonia M. Draibe in ‘Uma Nova Institucionalidade das Políticas Públicas? Reflexões a propósito da experiência latino-americana recente de reformas dos programas sociais (1997) 11 *São Paulo em Perspectiva* 4, pp. 3-15.

35 Overlaps here means more than one stakeholder or public authority playing a role that one of them could or should accomplish alone. Gaps refer to situations in which no stakeholder or public authority plays a role that should be performed. Rivalries are situations in which authorities compete (or reject) responsibility for a role that one of them could or should perform alone.

36 Studies on institutions and development are common in the literature of economics, covering a wide range of orthodox and heterodox views. For example: Douglass C. North, ‘Institutions, Institutional Change, and Economic Performance’ (New York, Cambridge University Press: 1990), Daron Acemoglu, Simon Johnson and James A. Robinson, ‘The Colonial Origins of Comparative Development: an empirical investigation’, 7771 *NBER Working Paper* (2000) and Peter Evans, ‘Challenges of the “Institutional Turn”’, in Nee, Victor and Swedberg, Richard (eds.), *The Economic*

Subramanian argue that institutions, in a complex and intriguing causal relationship, are the most important variables that explain the many differences in income between countries and within countries³⁷. For them, unlike the variables associated with the natural endowment of every nation and how they fit into international trade (in terms of increased productivity and income growth), institutions are both a cause and consequence of development. Either because they create markets or fix their flaws, or ensure low inflation rates and protect the economy against financial downturns, or because they redistribute income and ensure social protection, sound institutions may help create other sound institutions, they argue.

This point of view becomes particularly relevant if it is assumed that while BFP plays an integrative role in other social policies (health and education, for instance), it is also part of a larger, interdependent and interconnected institutional picture. To sum it up, when law and institutions are at stake, clarity and consistency in terms of “who does what” are key in development strategies.

2.3. Law as a toolbox for policy implementation

Legal tools have different applications and uses in policies expressly or implicitly associated with development goals. This is why a significant part of policy design activity involves matching policy goals with the ideas formulators hold about the adequate policy means or tools³⁸. Policy tools, in turn, heavily influence (and, at the limit, determine) the effectiveness of a government program. Since different tools have distinct legal features and implications (i.e., they are not perfectly interchangeable), it is difficult to avoid the conclusion that “law matters” in terms of policy tools and instruments for development.

Sociology of Capitalism (New Jersey: Princeton Press, 2005) and Ha-Joon Chang, ‘Understanding the Relationship between Institutions and Economic Development – Some Key Theoretical Issues. UNU World Institute for Development Economics Research’ (2006) 2001/93 (*UNU-WIDER*). *WIDER Discussion Paper*.

³⁷ Dani Rodrik and Arvind Subramanian, ‘The Primacy of Institutions (and what this does and does not mean), (2003), 40 *Finance and Development* (IMF), 2.

³⁸ Michael Howlett, *Designing Public Policies – Principles and Instruments* (London and New York, Routledge, 2011), p 41.

Describing law as a toolbox for development policies implementation sheds light on the choice of legal means to be employed in the pursuit of implementing pre-defined goals, in a certain institutional arrangement³⁹. Thus, choosing between different types of norms based on, for example, generality, flexibility, revisability, hierarchy and enforceability criteria, as well as designing rewards, inducing behavior, aligning incentives and rewards and signaling penalties with greater or smaller punitive content, are examples of issues that arise when the law is seen as a toolbox that performs assignments connected to certain objectives in a more or less effective manner, depending partially on the appropriateness of the tools chosen.

Closely related to the view that considers law a tool in development policies are the central issues of discovery, learning incorporation and experimentalism⁴⁰. This is so because instrumental legal norms and processes employed in these policies constantly face challenges of combining flexibility (the possibility of simultaneously introducing experimental changes and adjustments to implementation) and stability (demands of predictability and immutability). To strike the necessary balance between these (and other) key variables, such policies and processes can have more or less appropriate internal calibrating mechanisms that stimulate structural and incremental corrections and facilitate the incorporation of acquired knowledge, even when such knowledge is transplanted or emulated from other contexts or policies.

39 A fairly plausible criticism concerning the “roles of law” approach adopted here is that institutional arrangements can also be described as development policy instruments. Accepting this argument would undermine the distinction I made between law as an institutional arrangement and law as a tool. I acknowledge this critique upfront, but contend that while institutions can be broadly described as “legally-shaped tools for development”, such description does not pay enough attention to specific legal means, instruments and solutions designed (very often innovatively) to make a policy goal operational. As explained before, I should stress that the categories I present here just represent different emphasis, perspectives or angles of observation of law, rather than a full-blown method or scientific approach to law and development relations and, in doing so, I must also acknowledge that they are hardly useful on purely speculative and theoretical grounds - in other words, they need to pass the “reality test”, i.e., they have to prove useful in illuminating case studies and aggregating clarity to the study of the relations between law and development.

⁴⁰ On the issues of learning, experimentation and flexibility in new governance regimes see Charles Sabel and Sanjay G. Reddy, ‘Learning to Learn: Undoing the Gordian Knot of Development Today’, 308 *Columbia Law and Economics Working Paper* (2003) and Charles Sabel, ‘Beyond Principal-agent Governance: Experimentalist Organizations, Learning and Accountability’, in Ewald Engelen and Monika Sie Dhian Ho (ed.) *De Staat Van De Democratie. Democratie Voorbij De Staat*. WRR Verkenning 3. Amsterdam: Amsterdam University Press. For a discussion on “new governance” and its combination with conventional forms of regulation (mainly command-and-control) forming hybrid regimes, see David M. Trubek and Louise G. Trubek ‘New Governance and Legal Regulation: Complementarity, Rivalry or Transformation’, 13 *Columbia Journal of European Law* 539 (2007).

In other words, policies should possess legal means that allow them to adjust themselves and assimilate experience, while at the same time remaining sufficiently stable. While the optimum mix of key legal tools can be very difficult (or impossible) to achieve even after repeated learning experiences and rich documentation, it seems correct to assume that there are qualitative issues at stake when it comes to the self-conscious effort of selecting and combining the available (and new) administrative law to pursue policy goals.

2.4. Law as participation and accountability channels

Describing the law as a participation channel in development policies entails accepting the assumption that reasonable and practical decisions should be made through coherent arguments combined with documents subject to public scrutiny. In other words, it must also ensure the participation of all relevant stakeholders in adjusting, implementing or evaluating the policy. That is, ultimately, legal rules can provide or prevent - as was the case for an extensive period of Brazil's history - mechanisms for deliberation, mobilization, participation, consultation, social control, collaboration and joint decision ensuring that they be practical and permeable to the less organized stakeholders, which are usually also the poorest. The law in public policies in short, can be seen as having the role of ensuring that they do not escape the mechanisms of participation and democratic accountability. Therefore, the legal framework may ultimately make development policies more democratic or legitimate, so long as, by means of procedural rules, such a framework allows input from a multiplicity of stakeholders, and determines that those responsible for their operation be held accountable and publically provide explanations for their decisions.

BFP's federal law (Law 5209, 2004) provides that social control and social participation should be carried out locally by a council formally constituted by city representatives, respecting the parity between government and society. Council members are required to be from the fields of social welfare, health, education and food security. Councils shall monitor, assess and support the program's supervision at the local level, as well as monitor and encourage the integration and offer other public policies and programs for BFP households. Among other tasks, they shall also monitor the effectiveness of local government services deemed necessary to fulfill

conditionalities, as well as encourage community participation in the program control.

In the BFP, social control is intended to be carried out by social control agencies (ICS), which were created to enable community participation in planning, implementation, evaluation monitoring, and support of program's supervision. In order to monitor the BFP locally, the cities should create an ICS, which assists in registering eligible social policies, managing benefits, administering conditionalities, and supervising the development of household capabilities⁴¹.

The table below schematically summarizes the four roles of law in policies oriented to developmental ends:

	Law as framework	Law as institutional arrangement	Law as a toolbox	Law as participation and accountability channels
Basic idea	Law crystallizes and formalizes political decisions thus limiting the range of policy options and providing general and specific guidelines	Law defines tasks and competences and articulates intra and inter-sectoral coordination within the public sector and between the public and private sectors	Law works as a toolbox and offers distinct instruments for implementing goals. It also contributes to policy experimentation and learning	Law ensures participation, accountability and mobilization

41 Although I am aware that BFP deserves an in-depth consistent study from the accountability, participatory and mobilization perspectives, it is not my intention to do so here. This article will primarily focus on the points of view according to which law can be seen as a framework, a toolbox and an institutional arrangement. For more information on ICSs, there is a guide prepared by MDS at <<http://servicosocialbrasileiro.blogspot.com/2010/07/guia-de-atuacao-das-instancias-de.html>>, accessed 20 June 2011, and for a recent analysis of the lack of due attention to the role of ICSs in BFP, see ICSs, see José Graziano da Silva and Lucas Tavares, 'Sobre o Futuro do Bolsa Família' in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 2 (Brasília: IPEA, 2010), p. 243.

	Law as framework	Law as institutional arrangement	Law as a toolbox	Law as participation and accountability channels
Key-questions	What are the public policy goals? What priorities do they reveal?	Who does what? How to articulate institutional mandates? How to legally connect and coordinate actors, policies and sectors?	What are the adequate legal means given the pre-defined goals? How can they be revised and adjusted without jeopardizing stability?	Who are relevant stakeholders? How can their voice, participation and mobilization be ensured? How can authorities be held accountable?
Perspective	Substantive	Structural	Instrumental	Participatory

A final remark on methodology: in order to identify these main legal elements and roles of law throughout the project, a few public officials and researchers directly involved in the BFP were interviewed. During the course of the interviews, they were asked to describe BFP’s legal framework, identify the roles of the law (and lawyers), as well as its legal bottlenecks, limits and novelties. Whenever their opinions – which are not to be taken institutionally – are referred to, a footnote indicates the source⁴².

Next I describe some features of social policy in Brazil from 1930 to 1988. The purpose of this short narrative is to highlight the fact that during this period the Brazilian Welfare State was socially inclusive and redistributive in a very limited way. Namely, to avoid political instability and boost growth, it regressively tended to favor elites and the urban middle-working class at the expense of the poor. Another purpose of the narrative is to permit a comparison with the pattern of social policy that emerged after 1988 and, in doing so, explore BFP’s *Cadastro Único* and IGP from the angle of their legal features.

42 The first series of interviews with MDS officials involved in the BFP occurred on July 17 and 26, 2008 in Brasília. The second series of interviews with MDS officials involved in the BFP occurred on July 30 and March 31, 2010, also in Brasília. The public officials interviewed, whom I thank for spelling out their ideas on BFP and for the kindness of having taken their time to be interviewed, are Carolina Stuchi, Bruno Câmara (the latter, in both interview series), Luziele Tapajós, and Lúcia Modesto. The researchers are Marcelo Medeiros and Fábio Veras Soares, from the former Poverty Center (currently the International Policy Center for Inclusive Growth – IPC-IG). I am also grateful to three skilled research assistants who helped me in the interviews: André Vereta Nahoum, in the first interview series, and Álvaro Pereira and Flávia Annenberg, in the second interview series.

3. Social policy in Brazil from 1930 to 1988

As Birdsall and Szekely put it, Latin America, as the most unequal region in the world, is embroiled in a vicious cycle in which “low growth contributes to the persistence of poverty, especially given the high inequality level, while high levels of poverty and inequality contribute to low growth”⁴³. In practice, the UNDP recently acknowledged, “inequality is hereditary in that region”⁴⁴.

Social policies - especially contributory social security arrangements targeting duly registered workers - have been implemented in Latin America since Brazilian development strategies based on import substitution began trying to transform agrarian and dualistic countries⁴⁵ with unlimited supply of labour. It is well known, however, that Latin American social policy initiatives did not preclude contributory social security arrangements from serving the interests of political elites, or from especially benefiting urban citizens already incorporated into the world of labor⁴⁶,

43 N. Birdsall and M. Szekely, ‘Bootstraps, not Band-Aids: Poverty, Equity and Social Policy’, 24 *Center for Global Development Working Paper*, p. 4. This description refers to the idea of “inequality trap”, coined by Vijayendra Rao. In a situation where there is an inequality trap of “the poor are poor because the rich are rich,” says Rao. It is a vicious cycle whereby inequality is perpetuated perversely or, as François Bourguignon explains, a situation in which “the entire distribution is stable because the various dimensions of inequality (wealth, power and social status) interact to protect the rich from “going down” and prevent the poor from rising up.” See V. Rao, ‘On “inequality traps” and development policy’ (2006) *Development Outreach*, February and F. Bourguignon, F. Ferreira, and M. Walton, ‘Equity, efficiency and inequality traps: a research agenda’ (2007) 5 *Journal of Economic Inequality*, pp. 235–256.

44 UNDP (United Nations Development Programme), ‘Actuar sobre el futuro: romper la transmisión intergeneracional de la desigualdad’ (2010), Regional Newsletter on Desarrollo Humano para América Latina y el Caribe.

45 Dualism theories, explains Frithjof Kuhnen, “assume a split of economic and social structures of different sectors so that they differ in organization, level of development, and goal structures. Usually, the concept of economic dualism differentiates between two sectors of economy: the traditional subsistence sector consists of small-scale agriculture, handicraft and petty trade, has a high degree of labour intensity but low capital intensity and little division of labour; the modern sector of capital-intensive industry and plantation agriculture produces for the world market with a capital-intensive mode of production with a high division of labour. The two sectors have little relation and interdependence and develop each according to its own pattern”. Frithjof Kuhnen ‘Causes of Underdevelopment and Concepts for Development – an introduction to development theories’. Available at <<http://www.professor-frithjof-kuhnen.de/publications/causes-of-underdevelopment/1-1.htm>>, accessed on May 23, 2011. For a discussion on dualism applied to the Brazilian case see Francisco de Oliveira, ‘*Crítica à razão dualista/O Ornitórrinco*’, (Sao Paulo, Boitempo, 2003).

46 Wanderley Guilherme dos Santos, a Brazilian political scientist, has famously coined the term “regulated citizenship” to describe the very peculiar type of citizenship produced by Brazilian social policies between 1930 and 1988. For Santos, regulated citizenship is a citizenship whose roots are not grounded on a political values code. They are rather subject to a labor and occupational system in which “citizens” are those community members whose occupations are formally *recognized* by state

and from deepening the dualism that opposes the urban and rural, modern and archaic, formal and informal categories. Besides this, import substitution as a rule caused dramatic income concentration and has adversely affected incentives for governments, businesses and workers to invest more heavily in education⁴⁷.

In Brazil, the starting point for structuring a domestically articulated and state-regulated welfare system was 1930, when Brazil ushered in its industrialization, urbanization and construction of a state technocracy⁴⁸. In 1931, the Brazilian Ministry of Labor was established to consolidate the Retirement and Pension Funds (created in 1923), giving rise to the so-called Institutes of Retirement and Pension (IAPs), each of which focused on an occupational organization or category⁴⁹. In the social arena, when president Getulio Vargas was inaugurated, the country witnessed the establishment of an essentially corporatist state model and a populist structure of organization and regulation of labor and social security relations, especially for the urban layers.

In 1938, Vargas created the Brazilian Council for Social Work (CNSS). Comprised of leading figures of the Brazilian cultural society and elite, the CNSS was an advisory authority whose activities were marked by cronyism-oriented relations in which “social rights” were actually considered philanthropy and charity. In 1942, Vargas’s wife Darcy Vargas created the Brazilian Legion of Assistance (LBA). Since then, it was chaired by the wives of Brazilian presidents, until its demise in 1995. Strictly speaking, LBA was a charitable institution targeting households devoid of social security, based on the moral precepts of good will.

From the viewpoint of political institutions and federal relations, clientelism became increasingly widespread through the so-called “over-the-counter policy”, a practice

law. In such a scenario, extending citizenship means regulating new professions and occupations by means of an increase in the scope or rights attached to them. See Wanderley Guilherme dos Santos, *Cidadania e Justiça: a política social na ordem brasileira*, (Rio de Janeiro, Campus: 1979), p 75.

47 Stephen Haggard and Robert R. Kaufman, *Development, Democracy, and Welfare States* (Princeton University Press, 2008), p. 9.

48 S.M. Draibe, ‘*Welfare State no Brasil: características e perspectivas*’, p. 19.

49 The Institute for Social Security and Assistance to State Employees (IPASE) was created in February 1938, and after 1945, the Institutes of Retirement and Pension expanded their scope. See the dossier of the Center for Research and Documentation on Contemporary History of Brazil (CPDOC) ‘A Era Vargas: dos anos 20 a 1945’, available on the Internet at <http://cpdoc.fgv.br/producao/dossies.AEraVargas1/apresentacao>>, accessed on September 9, 2010.

through which local political leaders competed for federal funding to meet the emergency needs of people in their constituency. As a result, social policies produced very limited results accompanied by rampant corruption and fraud at the local level and perpetuating ties of dependence and cronyism of recipients in relation to local mayors. As explained by Leonardo Avritzer, a Brazilian political scientist, clientelism in Brazil had two main consequences. The first was to disempower social actors from requesting resources grounded in their rights as citizens. The second consequence is the extreme inefficiency of social policies and government spending, which accentuates the already extreme inequality in the distribution of revenues in the country⁵⁰.

The main legal and institutional structures were launched in the 1930s and continued until 1964, when a new cycle emerged for the fields of health, education and, to a lesser extent, housing. The brief diagnosis of the period, according to Draibe⁵¹, is that social policy followed a pattern of selective, heterogeneous and fragmented incorporation, since social expansion and coverage did not occur fully and simultaneously across all areas to which they were applied in relation to social groups that they benefited and in relation to the funding mechanisms. For Fiori, this was a period in which “the basic rule that organized the relationship between the state and private capital along with the workforce was repression, either replaced or supplemented intermittently by various forms of populist cooptation, particularly of urban workers.” This pattern of relationship between the state, private capital and employees, viewed in a broader context of nationalization and politicization of distributive conflicts, remained little changed in subsequent periods, despite the radical changes produced by the process of industrialization⁵². For this reason, Fiori uses the expression “conservative pact” to characterize the process of Brazilian development since the 1930s.

50 Leonardo Avritzer, ‘Public deliberation at the local level: participatory budgeting in Brazil’ (2000) Paper delivered at the “Experiments for Deliberative Democracy Conference”, University of Wisconsin, Madison, p.8.

51 S.M. Draibe, ‘*Welfare State no Brasil: características e perspectivas*’, p. 20.

52 Then, as Fiori puts it, the state’s ongoing involvement in labor relations was defined by means of constraining or repressing labor union activities in an industrialization with “low wages” and extensive and alternating use of a work force whose qualification has never been recognized as an important piece in the development of micro-economic competitiveness. See José Luis Fiori, ‘O nó cego do desenvolvimentismo brasileiro’ (1994) 40 *Novos Estudos Cebrap*, p. 131.

At onset of the authoritarian military period in Brazil (1964-1985), national state systems were organized to provide social goods and services, such as health, education, social security and housing⁵³. This process initiated a trend towards the universalization of social policies through mainstream programs with relatively broad coverage. At the same time, yet in an exclusionary and asymmetric manner, the system then incorporated rural workers.

During the period of military rule, one of the most significant initiatives in the field of policies and social laws was probably the extension of non-contributory pensions to rural workers and their dependents through the Program for Assistance to Rural Workers (*Prorural*, established by Complementary Law nr. 11, 1971). Such programs provided retirement benefits for senior citizens and permanent disability, pensions, funeral grants, as well as health and social services to farm workers. This program was funded by *Funrural* (assistance funds for rural workers), under the Ministry of Labor and Social Security⁵⁴.

From the standpoint of the federative organization of the institutional social policy framework, there was considerable consolidation and concentration at the federal level while, at the same time, a fragmented proliferation of (federal) authorities responsible for enforcing policies through bureaucratic procedures impervious to public input flourished. This was the period in which, still in a regressive and inadequate manner, national social policies in Brazil were expanded and partially consolidated.

According to Fagnani, the period after 1964 was essentially a recess in which Brazilian social policy acquired structural features of maintenance centralization, public space privatization and financing regressivity, and lost its reduced distributive character. Diluted in a broader macroeconomic context and directed by the goal of promoting GDP growth, social and welfare policies were not viewed as integrated

53 The description of this period follows the characterization of Draibe, '*Welfare State in Brazil: características e perspectivas*', p. 20 et seq.

54 According to Haggard and Kaufman, the *Funrural* served the political purpose of preventing riots and political mobilization in the countryside, and generally followed Vargas' corporatist patterns. In addition, the *Funrural* is claimed to have served as a source of political domination relations by *Arena*, the right-wing party that represented the interests of the military regime in the Brazilian congress. Stephen Haggard and Robert R. Kaufman, *Development, Democracy, and Welfare States*, p. 103.

systems, nor was intergration a priority in the broader overriding goals of “modernizing” economic management tools and expanding the bases for financing the economy and the public sector with the primary goal of expanding infrastructure⁵⁵. The decision making process became more intensely centralized and technocratic but, at the same time, also fragmented within the executive branch, with no institutional dialogue and no social control tools or participatory channels. Besides this, there were no specific concerns with the integration and coordination of federal actions at state and local levels⁵⁶.

Maria Hermínia Tavares de Almeida describes the main features of Brazilian social policy during the period as centralized (both in financing and decision-making) at the federal level and, at the same time, fragmented because of the fact that states and municipalities, in very heterogeneous and erratic manners, implemented their own (local) social policies through non-governmental charity institutions with no links to national strategies. Almeida also refers to the fact that it was not until 1988 that Brazil had a unified poverty reduction policy. Up until then, the ministries of the “social area” (health, education, agriculture, social security) had their own patchy poverty approaches⁵⁷.

The regressive element of social policy measures acquired during the military period manifests clearly in the current pattern of funding of basic sanitation and housing sectors, which comprise the core of social security systems (social security, social work, and health), and in education. The private sector and the economically privileged classes have taken control of a significant portion of social provisions, in a flagrantly elitist welfare state with reduced capacity to have a progressive

55 Eduardo Fagnani, ‘Política Social no Brasil (1964-2002): entre cidadania a caridade’, doctoral thesis submitted to the institute of economics at Unicamp — Universidade Estadual de Campinas (2005), p. 43.

56 Marta Arretche explains that the Brazilian centralized pattern of social policy management has two origins: the facts that the main tax resources were increasingly channeled to the federal government (financial centralization) and that the federal level was the one that underwent a successful process of administrative expansion, which led to establishing bodies and entities able to technically conceive of economic development strategies and innovations in social policy. Marta Arretche, *Estado Federativo e Políticas Sociais: determinantes da descentralização* (São Paulo, Fapesp e Revan: 2000), p. 26.

57 See Maria Hermínia Tavares de Almeida, ‘Federalismo e Proteção Social: a experiência brasileira em perspectiva comparada’ (2000), p. 7. In this paper, the author depicts what she defines as centralized federalism in Brazil. Unlike the cooperative type of federalism (a “marble cake” in which every government level significantly participate in the government), centralized federalism is marked by the transformation of state and local governments in administrative agents of the federal government, which has the resources and authority to take decisions (p. 13).

redistributive impact. It was a period of “conservative modernization,” as Fagnani sums it up⁵⁸.

From 1964 to mid-1980s, the Brazilian developmental state was successful in boosting industrialization, but, according to Draibe, it was not inclusive and was “barely modern” in the incorporation of popular sectors. Until recently, this model gave scant attention to rights and expansion of citizenship. Thus, it can be said, in short, that from a law-as-a-framework viewpoint the Brazilian “social law” has fundamentally served a system of corporatist and elitist privileges, and “patrimonialist” and cronyism-based relations politically controlled by the central government. Also, it embodied a vision according to which social law is, practically speaking, identified with charity and “assistencialism”, fostering a disempowering passivity among the recipients.

From the point of view of law an institutional arrangement, the 1930-1980 period corresponds to the construction of a centralized administrative governance of social policies, with the federal level implementing them with no significant cooperation or articulation with the local and state levels. Transparency and accountability mechanisms were very weak and the administrative law instruments employed were basically based on a top-down approach.

Since the early 1980s, the “conservative strategy” began to show signs of exhaustion, against the backdrop of the international financial downturn and the recessionary adjustment that it brought to Brazil⁵⁹. Politically, the military regime was losing force and society began to push for participatory and redistributive measures. To complete

58 In the late 1970s, over 90% of the Brazilian population had acquired some formal guarantee of social protection and access to healthcare, which in Brazil still has a remedial bias, rather than a preventive one. While this has produced positive distributional effects, transfers and benefits to farm workers and self-employed workers were minimal compared to those awarded to registered workers, government employees and military officials. In education, the military governments clearly prioritized university education, which was supported by the wealthier classes. Stephen Haggard and Robert R. Kaufman, *Development, Democracy, and Welfare States*, p. 102.

59 Eduardo Fagnani, ‘Política Social e Pactos Conservadores no Brasil: 1964/1992’, 21 *Cadernos FUNDAP* (1997), p. 80.

this critical scenario, mechanisms for financing social security, infrastructure, health, transport, and education began to dwindle⁶⁰.

In 1984, the democratic transition brought with it the so-called “New Republic”, and the debate on the Welfare State in Brazil acquired renewed importance, arousing criticisms of the standards of regressivity, cronyism and financial and institutional centralization and fragmentation that had stricken the preceding periods, combined with recession and high inflation. Topics such as land reform,⁶¹ unemployment insurance and other social rights are discussed, and among a new constitutional assembly in 1986, debates on core issues related to the economic and social life in Brazil arose⁶².

4. Brazilian Welfare State after 1988: universalism and targeting

The 1988 Brazilian Constitution is a legal and political document that reflects the aspirations of a developing and quickly changing society. It acknowledges that the reality it aims to overcome is unequal and plagued by poverty and aims at transformation, assuming that the *status quo* must be changed due to the existence — explicitly recognized — of pre-existing social setbacks. It is also a type of constitution that prospectively determines several developmental goals to be achieved (similar to what happens in Latin American countries). As a result, the 1988 constitution is itself a major source of public policies whose complex conception and implementation processes are ultimately decisive for social and economic and rights to be effective⁶³.

60 While during the “economic miracle” (1969-1973), the cyclical sensitivity of the funding sources of social policies served to institutionalize an authoritarian strategy, in this phase, it contributed to its depletion, explains Eduardo Fagnani, ‘Política Social e Pactos Conservadores no Brasil: 1964/1992’, p. 80.

61 It was only in 1985 that a Ministry of Land Reform and Development was created.

62 Eduardo Fagnani, ‘Política Social e Pactos Conservadores no Brasil: 1964/1992’, p. 84.

63 I argued elsewhere that distributive policies are key to the effectiveness of social and economic rights, although they can end up paradoxically promoting counterproductive and regressive effects, such as the examples of Brazilian tax, education and pension systems demonstrate. Hence, since the law can play both obstructing and facilitating roles in development programs that aim at achieving constitutional goals, it cannot be considered a neutral component of public policies. At the occasion I have also presented preliminary findings on the roles played by the law in BFP. See Diogo R. Coutinho, ‘Linking Promises to Policies: Law and Development in an Unequal Brazil’, in 3 *The Law and Development Review* 2 (2010).

One of the features of the 1988 constitution was the inclusion of prospective (also known as programmatic) norms that outlined the goal of creating a social security system (added by articles 194 and 195), which hitherto had existed neither in fact nor in Brazilian statutes⁶⁴. It also enshrined new principles and guidelines for restructuring the system of social policies. Among them, it foresaw a non-contributory social security (distinct from contributive insurance) and, at the organizational level, stated the goals of decentralization and social participation⁶⁵.

Despite the good intentions and laudable goals that underpin constitutional norms of this type, soon afterwards, between 1990 and 1992, president Collor de Mello redesigned federal programs, and much more due to inaction than action, he weakened such programs by relegating them intermediaries of cronyism-related interests⁶⁶. In the early 1990s, the ministry of social action of this time adopted highly fragmented programs with no consistent planning or monitoring mechanisms, with

⁶⁴ According to Barrientos, during the last decade or so developing, countries in general have been expanding their social assistance programs (which are different - and sometimes institutionally autonomous - from pension, unemployment and health schemes) and in these countries there is a common trend towards direct transfers for vulnerable people, both in cash or in kind. Armando Barrientos, 'A Assistência Social no Mundo Pós-Crise', in Maria Francisca Pinheiro Coelho, Luziele Maria de Souza Tapajós and Monica Rodrigues (org.) *Políticas Sociais para o Desenvolvimento - superar a pobreza e promover a inclusão* (Unesco, UNDP, MDS, 2010), p. 281.

⁶⁵ Sonia Miriam Draibe, 'A política social no período FHC e o sistema de proteção social', p. 72. For Fagnani, in a similar vein "[t]he introduction of the chapter on social security was hailed as one of the greatest achievements of the Brazilian social law. Covering 'an integrated set of actions to secure rights to health, social security and Social Assistance, security should be organized by the Government, based on the following objectives: universal coverage and services, uniform and equivalent benefits and services to urban and rural populations, selectivity and distributivity in the provision of benefits and services; an irreducible amount of benefits, equal share in funding, a diverse funding base; and a democratic and decentralized character of administrative management". Eduardo Fagnani, 'Política Social e Pactos Conservadores no Brasil: 1964/1992', p. 85. Jaccoud *et. al.* describe what they see as four potential improvements introduced by the new constitution: "The first is the integration of social assistance into a broader principle of social protection identified as social security. The second is ensuring care for those who need it, regardless of social security contributions. Social assistance is thus affirmed as a non-contributory policy, with right of access to services and benefits. The third matter is the institution of a non-contributory monetary benefit targeted at the elderly and the disabled in extreme poverty and, in the case of the disabled, those who cannot live an independent life due to disability. A fourth innovation concerns the institutional rules, whereby programme implementation is decentralised, the private sector helps provide social services, and there is social participation in policymaking and accountability". Luciana Jaccoud, Patricia Dario El-Moor Haddad and Juliana Rochet Chaibub, 'The Consolidation of Social Assistance in Brazil and its Challenges - 1988-2008', p. 4. It is worth noticing that the Brazilian 1988 constitution assigned an active and steering role to the federal level when it comes to social assistance. In article 204, I it establishes that political and administrative decentralization are guidelines (*diretrizes*) to be followed and that the federal level is in charge of coordinating actions and enacting general norms. The execution, in turn, of social assistance policies is a task assigned to states, municipalities and social assistance charities.

⁶⁶ Eduardo Fagnani, 'Política Social e Pactos Conservadores no Brasil: 1964/1992', p. 90.

loosely assigned funds.

In 1993 a general social assistance law (Law Nr. 8742), known as “LOAS”, was passed, which outlines social assistance as a “citizen’s right and state’s duty” and generically determines that the policy designed to implement it will provide “minimum social standards”. What is noteworthy and distinguishing feature of LOAS is its non-contributory nature compared to the Brazilian previous pattern of policies, whereby the right to social protection, as a rule, included the recipients’ contribution as a regressive requirement. As seen below, LOAS is a statute aiming to achieve distributive goals through both universal and targeted policies that, on the other hand, faces implementation, funding, monitoring and enforcement challenges similar to those resulting from programmatic constitutional norms. LOAS broadly defines goals of social assistance policy in Brazil: protecting households, mothers, children, adolescents and the elderly, assisting underprivileged children and adolescents, promoting their integration into the labor market, training and rehabilitating persons with disabilities, and promoting their integration into the community life. This law also stipulates - which is noteworthy in the Brazilian case - that social assistance should be *integrated* with other policies. Its provisions also set out the political and administrative decentralization and popular participation through representative organizations.

LOAS also attempts to articulate social assistance with universal policies⁶⁷ and regulates the *Benefício de Prestação Continuada* (Unconditional Continuous Cash Transfer — BPC), a means-tested senior citizen pension and disability grant seeking to provide a right guaranteed by Article 203 of the Brazilian constitution. BPC provides one minimum monthly wage⁶⁸ to the elderly and disabled people of any age, incapable of working and living an independent life, so long as they can prove they are unable to earn a living, or have it provided by their family. In both cases, it is necessary that their gross monthly per capita income be less than one-quarter of the

⁶⁷ According to section 4 of LOAS social assistance is, among others, guided by the principle of universal social rights “with the purpose of making the beneficiary of social assistance attainable by the other public policies”.

⁶⁸ Currently equivalent to R\$ 510 (US\$ 300).

current minimum wage⁶⁹.

Finally, the LOAS law also represents a step towards decentralization and integration of social policies in Brazil: it stipulates a division of roles between the federal, state and city levels. The federal government is assigned the task of coordinating and promoting the actions covered by the Brazilian social assistance policy, providing technical advice and financial incentives to states, cities and welfare entities and organizations. The states must transfer certain funds to municipalities, provide them with technical support and stimulate the collective rendering of social services. Municipalities must, among other things, execute social assistance and poverty fighting policies, which includes the possibility of establishing partnerships with civil society organizations.

Although the 1988 Constitution (and later LOAS) formally introduced a decentralized and complementary federalist model, conspicuously expanding the duties of cities⁷⁰, the type of decentralization resulting from the new frameworks is conducive to well-known longstanding problems associated with social policies implemented in a federal structure. According to Marta Arretche, overlaps between different levels (municipal, state and federal) and territorial inequalities in service provision persist and represent a very complex challenge. Moreover, the federal level still remains the most important funding, as well as a major regulatory source for a multitude of public projects, with municipalities' administrative capacities and enforcement abilities being greatly reduced. Consequently, says Arretche, most coordination problems persist and although decentralization has been formally adopted by the post-1988 law, little has changed in practical terms⁷¹ regarding institutional arrangements for social

69 The Ministry of Social Development and Fight Against Hunger (MDS) estimates that in 2010, it will benefit over 3 million people with BPC by investing roughly R\$ 20.1 billion (US\$ 11.8 billion). Refer to: <<http://www.mds.gov.br/assistenciasocial/beneficiosassistenciais/bpc>, accessed on October 10, 2010. A recent report concluded that both BPC and BFP are "quite well targeted" since "74% of BPC reported income and 80% of *Bolsa Familia* reported income goes to families living below the poverty line". It also states that BPC and BFP were jointly responsible for 28% of fall in the inequality Gini between 1995 and 2004. See Fabio Veras Soares, Sergei Soares, Marcelo Medeiros and Rafael Guerreiro Osório, 'Cash Transfers in Brazil: impacts on inequality and poverty', 21 *International Poverty Centre Working Paper* (2006), p. 28.

70 Maria Herminia Tavares de Almeida 'A política social no governo Lula', in 70 *Novos Estudos Cebrap* (2004), p. 9.

71 An exception is the health care sector: article 198 of the 1988 Constitution set forth the creation of a unified health system with institutional features of decentralization. Later, through the enactment of the general health law (law 8080, 1990), the Unified Health System (Brazil's government-funded

policies since the great majority of more than five thousand Brazilian municipalities are still highly dependent on the federal level to implement social policy⁷².

5. *Bolsa Família* and its decentralization and coordination tools

The period from 1994 to 2002 can be summarized as a phase in which poverty-fighting programs based on cash transfers (either conditional or not) were added to social policy in Brazil. Thus, an important shift in this period was the fact that the universalistic aspect of social policies was complemented, as Draibe explains, by the weight that began to be assigned to cash transfers and poverty-fighting programs both targeted and transient in nature. In other words, the current setting of Brazilian social policies — that combine universal programs with targeted programs — begin to be outlined through a major legal, institutional and policy construction effort⁷³.

As of 1994, the first experiences of CCTs were introduced in Brazil, initially at a local level and then at a federal level⁷⁴. As a rule, Brazilian “first-generation” targeted cash transfers required the cities to be entrusted with certain tasks, following federal guidelines. On the other hand, long-established coordination problems have been detected, such as overlapping and concurrent purposes and target audiences among federal, state and local programs, lack of general coordination between programs,

healthcare system - SUS) was established and since then being erected. Based on principles such as universality, comprehensiveness, equity, decentralization, regionalization, public participation, among others, the SUS introduced in Brazil an elaborate and entirely new system of government actions at different federal levels, which has forged an institutional architecture that would later inspire *Bolsa Família* and, more broadly, a national social assistance system (SUAS).

72 See Marta Arretche, ‘Federalismo e Políticas Sociais no Brasil: problemas de coordenação e autonomia’, in 18 *São Paulo em Perspectiva* 2 (2004), p. 24 and Marta Arretche ‘Políticas sociais no Brasil: descentralização em um Estado federativo’, in 14 *Revista Brasileira de Ciências Sociais* 40 [online] (1999), p. 133.

73 The field of social assistance and poverty reduction was further institutionally strengthened with the creation in 1991 of the Brazilian Council for Social Assistance (CONANDA) and the Brazilian Fund for Social Assistance (1996) with the participation of state and local councils and funds. Soon after the establishment of the Fund for Poverty Reduction (2000), the programs *Bolsa-Alimentação* (related to nutritional health), *Agente Jovem* (linked to the Department of Social Assistance), and the *Auxílio-gás* were created. These programs joined other cash transfer programs that had previously been created — the *Bolsa-Escola*, funded by the federal government, and the Program for Eradication of Child Labor (PETI) — delivering a network of social programs called the Brazilian Network of Social Protection (*Rede Brasileira de Proteção Social*). This also included the *Comunidade Solidária* Program (Solidarity Community program), created by Law nr. 1366, 1995.

74 The *Bolsa Escola* program as launched in Brasilia, Federal District, on January 3, and January 6, 1995, the city of Campinas (São Paulo) launched the Program *Garantia de Renda Familiar Mínima* (Minimum Household Income Program — PGRFM). After this, several cities have adopted the model of CCTs inspired by these two local level pioneering experiences.

lack of managerial planning and dispersed command among ministries and limitations in reaching the target audience according to eligibility criteria⁷⁵.

It is relevant to mention the *Bolsa Escola* Program, implemented at the federal level after Law 10219 of 2001 was enacted. *Bolsa Escola* aimed to increase access to education and thereby reduce poverty in the long run, reduce poverty in the short term by transferring cash to impoverished households, reduce child labor and serve as a social protection network. Inspired by successful experiences at the local level, the federal *Bolsa Escola* program reached more than 5 million families in Brazil when, in 2003, it was incorporated into the BFP. *Bolsa Escola* was a kind of CCT that provided some requirements for households to be granted approximately US\$ 9 per month per child (limited to a maximum of three children). These requirements included school enrollment and minimum attendance rate of 85%. In addition to this, households must be registered in the Unified Register for Social Programs (*Cadastro Único*)⁷⁶. In addition, they must earn a monthly per capita income not exceeding R\$ 90 (about US\$ 52). Each household registered in *Cadastro Único*, receives a social identification number (NIS), and the allowance can be withdrawn at a branch of *Caixa Econômica Federal*, the federal savings bank.

Launched in October 2003, BFP is the largest CCT in the world⁷⁷. It stems from a consolidation of four pre-existing social programs (*Bolsa Escola*, *Auxílio Gás*, *Cartão Alimentação* and PETI)⁷⁸. Its ambitious goals, as defined by the main federal

75 Maria Ozanira da Silva e Silva, 'O Bolsa Família: problematizando questões centrais na política de transferência de renda no Brasil' (2007), in 12 *Ciência e Saúde Coletiva* 6, pp. 1433.

76 As discussed below, *Cadastro Único*, which was restructured later and currently plays a key role in BFP, which permanently relies on an adequate update by the municipalities charged with registering the families.

77 Despite BFP's recent increases in expenditures, it is not the largest social assistance program. "This honor goes to the BPC-LOAS constitutionally-guaranteed cash assistance benefits for the poor elderly and disabled. It is also dwarfed by public spending on regressive social insurance (mainly social security and unemployment insurance) benefits". Lindert *et. al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 19.

78 BFP, therefore, is itself the product of a legal and institutional re-organization whose goal is to take advantage of economies of scale and scope and to avoid overlaps, disputes and inefficient effort duplication within the Brazilian federal government. As some Brazilian commentators explain, "[b]efore the unification under the BFP, each of the above programmes had its own implementing agency, information system and financing source. There was little communication or cooperation, and sometimes considerable animosity, between the managers of the different programmes. (...). The BFP unified the inclusion and exclusion criteria, the transfer amounts, the implementing agency and, perhaps most importantly, the information system". Serguei Soares, Rafael Perez Ribas and Fábio Veras Soares, 'Targeting and Coverage of the Bolsa Família Programme', 71 *International Policy*

law that structures it, are to promote access to all public services, particularly health, education and social assistance, reduce hunger and promote food and nutritional security, foster sustained emancipation of households living in poverty and extreme poverty, reduce poverty and promote government-sponsored actions across all sectors in a complementary and synergistic fashion⁷⁹.

BFP is managed by MDS⁸⁰, which was established in early 2004 as another institution critical to the gradual process of institutional change of Brazilian social policy⁸¹. BFP is also part of the broader “Zero Hunger Program”⁸², created in 2003 to replace another program (*Comunidade Solidária*). BFP grants are funded by the federal government (national treasury) through *Caixa Econômica Federal*. While the general management of BFP is under MDS’s responsibility, its operation is decentralized and shared both vertically (i.e., between federal, state and local governments), and horizontally (between various authorities at the federal level, including ministries, *Caixa* and other federal entities). As discussed below, this

Centre for Inclusive Growth (IPC-IG) Working Paper (2010), p. 2. In the same vein, Soares and Sátyro explain that the scenario describing the Brazilian conditional cash transfers until 2003 was chaotic: “each program had its managerial agency and coordination between them was minimal. These program’s information systems were separated and did communicate to each other” in a way that a family could get up to four benefits and another living in similar conditions, could get no transfer at all. Sergei Soares and Natália Sátyro ‘Programa Bolsa Família’, p. 30.

79 Pursuant to Article 4 of Law 5209, 2004. When this law establishing the BFP was passed, another law (10835, 2004) establishing the rights of all citizens to a minimum “citizen” income was enacted. According to Lindert *et. al.*, since fiscal space was pending, “the BFP was viewed as the first step in implementing this minimum citizen income by extending universal coverage for the poor – and the secretariat which houses the BFP was symbolically named “Secretariat Income” (*Secretaria Nacional de Renda de Cidadania*, SENARC)”. Lindert *et. al.* ‘The Nuts and Bolts of Brazil’s Bolsa Família Program’, p. 14.

80 MDS has approximately 1,500 employees and six internal offices in charge of social assistance, food and nutritional security, productive inclusion, information assessment and management and. SENARC is the main internal office of the MDS in charge of the BFP. It oversees the overall program and its important tool (*Cadastro Único*) and is in charge of interaction with municipalities, beneficiary selection, payment authorization, administering consequences for non-compliance of conditionalities, monitoring of the program, and training municipal managers.

81 MDS, whose implementation process began after BFP was launched, is also the product of an institutional and legal re-arrangement. Its current organization stems from three former governmental structures: the Ministry for Food and Nutritional Security (MESA), Ministry of Social Assistance (MAS) and the Executive Office of the Interministerial Managing Council of the *Bolsa Família* Program. MDS is also responsible for national policies on social development, food and nutritional security, social assistance and basic income guarantee in Brazil. It also manages the Brazilian Fund for Social Assistance (FNAS).

82 The Zero Hunger Program (*Fome Zero*) consists of more than 30 complementary programs devoted to fighting the immediate and underlying causes of hunger and food insecurity. It was structured in the first term of Lula’s administration in 2003, shortly before the approval of Law 10835 of 2004, which established the Basic Income Guarantee. For a critical reading of the Zero Hunger program, see Maria Hermínia Tavares de Almeida ‘A política social no governo Lula’, in *70 Novos Estudos Cebrap* (2004), p. 11.

represents an important feature since BFP's functioning – more than any other social policy implemented in the country – essentially depends on the decentralization, coordination and inter-sectoral integration between different entities.

According to specialists⁸³, BFP has undergone at least three phases since 2003. The 2003-2004 period was characterized by significant political and operational difficulties and criticism from the left and right wing political forces in Brazil. The task of simultaneously implementing a new policy and managing old ones until they could be merged, incorporated or terminated, and the challenges behind the consolidation and updating of *Cadastro Único* illustrate initial troubles that exposed BFP to initial criticism.

The 2005-2006 period was characterized by the efforts to complete and strengthen BFP's legal framework: during those years a large number of norms of different types – most of them ordinances⁸⁴ – have been enacted to regulate conditionalities and the relationships between MDS and the health and education ministries. This is the period in which BFP was intensely “juridified” and MDS strengthened and institutionalized tasks and co-shared responsibilities with ministries of health and education, as well as with municipalities and states.

In 2007-2008 BFP was a consolidation period in which the “next steps” started to be discussed, as well as the need for “exit doors”, the idea according to which BFP should create graduation measures for those who became ineligible as a result of an increase in income was reinforced by the notion according to which cash transfers are efficient if (and only if) they are provisional, not permanent. Indeed, the discussion on “exit doors” for poverty and for the program was referred to, at the time, as the “new frontier” of the BFP⁸⁵ and has also spawned an important debate on a possible

⁸³ Tereza Cristina Cotta and Luis Henrique Paiva, ‘O programa Bolsa Família e a Proteção Social no Brasil’ in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 1 (Brasília: IPEA, 2010), p. 63.

⁸⁴ Specific types of Brazilian administrative law are: decrees (*decretos*), normative instructions (*instruções normativas*), operational instructions (*instruções operacionais*), ordinances (*portarias*), resolutions (*resoluções*), executive orders (*medidas provisórias*) and statutes (*leis*).

⁸⁵ Lindert *et al.* ‘The Nuts and Bolts of Brazil’s Bolsa Família Program: Implementing Conditional Cash Transfers in Decentralized Context’ (2007) 0709 *Social Protection World Bank Paper*, p. 91.

“culture of dependence”⁸⁶. But between 2009 and 2010 the vision according to which “exit doors” should be created to pull beneficiaries out of the program as soon as possible seems to have lost appeal and the proposition that BFP must create job qualifications and other opportunities for beneficiaries as their income increases and stabilizes and gains force⁸⁷. “Instead of showing the poor where the exit is”, Cotta and Paiva in a 2010 article surmise that, “the challenge is to allow them to access the benefits and services to which they are entitled and to ensure that they get such benefits and services for the necessary time”⁸⁸. As a result, more than 1.6 million

86 Medeiros *et al.* refuse the idea that BFP is creating a culture of dependence: “[c]ash transfers increase the purchasing power of families as long as they receive the benefit. Obviously, if the transfers are interrupted, this power is immediately curbed. At least in the short run, the families that escape poverty thanks to the transfers depend on them to keep up their consumption level. This has triggered criticism that cash transfers are not a satisfactory solution for the poverty problem because they are not emancipatory. The argument here is that *Bolsa Família* was designed in such a way that it opens entrance doors, but it does not signal any exit doors. In other words, beneficiaries would become dependent on the programme and would stick around indefinitely, while the ideal situation would be for *Bolsa Família* to be a temporary mechanism for poverty alleviation, the final solution being a regular job for the poverty-stricken’. The same authors, however, stress that, ‘There is much confusion and conflict of values in the debate about solutions for poverty. In this debate, a somewhat naive moralism thrives, which bestows to the poor themselves the responsibility for the solution of the poverty problem, streamlined in the assumption that work would be the only adequate exit door from extreme poverty. Following this line of thought, the most important would be ‘not to give the fish, but to teach how to fish’, and the keys to the exit doors from poverty would essentially be education and credit (...). Nevertheless, these changes do not consolidate overnight. There are structural aspects that simply cannot be altered in a matter of a few years. Education is a long-term investment (...). This suggests that long-term actions, especially ones related to education and income generation among the poor should necessarily be complemented with short and medium-term actions (...). Taking the proposal to eradicate poverty in Brazil seriously requires dealing with the idea of having families participate in cash transfer programmes for a long time”. See Marcelo Medeiros, Tatiana Britto and Fábio Veras Soares, ‘Targeted Cash Transfer Programmes In Brazil: BCP and the Bolsa Família’ (2008), 46 *International Poverty Center Working Paper*, p. 14. individuals and households appear to be increasingly dependent on federal transfers, including on CCTs”. For a different perception, see Anthony Hall, ‘Brazil’s Bolsa Família: a Double-Edged Sword?’ (2008), 39 *Development and Change* 5, p. 814.

⁸⁷ “It is not always desirable that a family be withdrawn from a cash transfer programme due to exceeding the income threshold used to select beneficiaries. The risk of disincentives to work is a clear example of that. Members of a family subject to programme exclusion, in case their income increases, will only be motivated to work if the additional income from this work is higher than the transfers received. In this case, the programme should have an exit income threshold higher than the entrance one and a phasing out scheme. In similar cases, it is necessary to take into account the sustainability of the new incomes. The programme ensures income stability, whereas most jobs do not. When choosing whether or not to accept a new job, people must take into consideration, among other things, the risk of trading the steady transfers of the programme for the unstable earnings of low quality jobs. In these situations it would not be advisable to cease the benefits, since exclusion rules of this kind might discourage labour market participation”. Marcelo Medeiros, Tatiana Britto and Fábio Veras Soares, ‘Targeted Cash Transfer Programmes In Brazil: BCP and the Bolsa Família’ (2008), 46 *International Poverty Center Working Paper*, p. 5.

⁸⁸ Tereza Cristina Cotta and Luis Henrique Paiva, ‘O programa Bolsa Família e a Proteção Social no Brasil’ p. 63. In addition to that view, recent studies have found that income is volatile for the majority of those who receive BFP’s benefit – i.e. they face high insecurity levels when it comes to future earnings. See Sergei Soares. ‘Volatilidade de Renda e Cobertura do Programa Bolsa Família’ in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 1 (Brasília: IPEA, 2010), p. 313.

families have entered BFP in 2009 and 2010⁸⁹ and, as explained below, 16 million extreme poor citizens are expected to be included in BFP from 2011 onwards as a result of the recent launching of a complementary program (*Brasil Sem Miséria*).

Let me now discuss how some BFP features described in the social policy literature as policy innovations are implemented in the program. To do this I concentrate on BFPs' decentralized and integrative management by stressing the roles played by *Cadastro Único* and IGD, an index that rewards decentralized administrative⁹⁰. The categories of analysis presented above (functional roles of law in development policies) will be referred to with the purpose of illuminating the BFP case study.

5.1. *Cadastro Único*: decentralized targeting and management

All BFP recipient households must be enrolled in the *Cadastro Único*⁹¹, the national social policy registry whose main goal is to catalog all vulnerable populations in the country⁹². *Cadastro Único* has made an original contribution to BFP⁹³ regarding

⁸⁹ The same authors mention the fact that the 2009-2010 period was also characterized by information management gains: a solution designed to better integrate the different operational systems (SigPBF) was created together with new procedures to beneficiary family monitoring at the local level. Tereza Cristina Cotta and Luis Henrique Paiva, 'O programa Bolsa Família e a Proteção Social no Brasil' p. 64.

⁹⁰ To Soares and others "[f]ar from being a radical novelty on Brazil's social policy scene, the BFP was more of an excellent managerial initiative whose goal was to unify initially four, and eventually five, pre-existing targeted cash transfer programmes". Serguei Soares, Rafael Perez Ribas and Fábio Veras Soares, 'Targeting and Coverage of the Bolsa Família Programme', p. 2.

⁹¹ To describe *Cadastro Único* in this section I rely fundamentally on Joana Mostafa and Kátia Cristina da Silva, 'Brazil's Single Registry Experience: a tool for pro-poor social policies' (2007), available at

<http://www.ipcundp.org/doc_africa_brazil/Webpage/missao/Artigos/CadastroUnicoJoanaMostafa.pdf>, accessed January 29, 2011, and on Lindert *et. al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 34-45.

⁹² *Cadastro Único* is an autonomous and constantly updated social registry, which was conceived, designed and improved since federal *Bolsa Escola* was created. It can be used for different policies and, in BFP's case, as explained here, works as a crucial targeting tool. "There are several advantages of having a single national database for determining and monitoring eligibility for social transfer programs, including *inter alia*: (a) preventing or reducing duplication of benefits (e.g., people receiving benefits from more than one municipality or program); (b) reducing duplication of administrative costs across programs; and (c) monitoring time limits and graduation criteria. The *Cadastro Único* represents a major step forward in advancing these goals". Lindert *et. al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 35.

⁹³ As explained by Lindert *et al. al.*, the "MDS – and the Bolsa Família Program – inherited the *Cadastro Único* registry from the pre-reform programs. The *Cadastro Único* was originally established in July 2001, as the federal government launched a major effort to construct a single beneficiary registry database to serve its many social assistance programs. Until that time, each of the pre-reform programs operated their own system for targeting beneficiaries. (...) The creation of a unique database (*Cadastro Único*) and a unique social identification number (NIS) was an initial attempt to respond to

decentralized policy implementation and management. Since municipalities enrolled with *Cadastro Único* have the obligation to collect and update key variables via decentralized data entry (to identify the poor and the very poor) it also has been crucial in determining targeting and eligibility in BFP.

As mentioned, in BFP the task of obtaining information for *Cadastro Único* is the responsibility of municipal officials (at the local level, therefore), rather than the federal managers⁹⁴. Data collection is based on self-reported income, and municipal social workers perform an onsite collection of information every two years (by filling out a questionnaire prepared by MDS), which is sent to *Caixa Econômica Federal*. *Caixa* consolidates the figures and sends them to the MDS (a “hub” ministry), which decides who is eligible. This list is then returned to the *Caixa Econômica Federal*, which makes the payments⁹⁵. In this interaction, *Cadastro Único* plays a central role in articulating a dynamic and interdependent institutional dialogue and information flow between the mentioned public bodies.

In addition, management agreements (*termos de adesão*)⁹⁶ have been signed by MDS and Brazilian municipalities to formalize municipal implementation roles and responsibilities and establish minimum standards for program operation. Entering

the need to improve efficiency and coordination and reduce duplication of administrative costs across the numerous safety net programs”. Lindert *et. al.* ‘The Nuts and Bolts of Brazil’s Bolsa Família Program’, p. 35.

94 Municipalities are basically responsible for maintaining a local coordinator for the program, registering potential beneficiaries in the *Cadastro Único*, monitoring health and education conditionalities and consolidating associated information, prioritizing BFP beneficiaries for other complementary services, and establishing social control councils.

95 Besides consolidating and managing *Cadastro Único*, *Caixa* assigns registered individuals a unique Social Identification Number (NIS), and makes payments directly, crediting beneficiaries’ electronic benefit cards on a monthly basis through its extensive banking network. *Caixa* also designed and operates the software currently used by the Ministry of Education (MEC) for consolidating the information resulting from the monitoring of compliance with conditionalities. Lindert *et. al.* ‘The Nuts and Bolts of Brazil’s Bolsa Família Program’, p. 21.

96 In May 2005, the MDS issued an ordinance (*portaria*) calling on all municipalities to sign joint management agreements by September 2005. These agreements follow a standard template designed by MDS and serve two key functions in establishing the overall framework for decentralized implementation: (1) they clarify roles and responsibilities for implementation of the program with the federal level clearly playing a steering role; and (2) they establish minimum institutional standards for program operation at the municipal level. The mentioned ordinance (MG/MDS 246, May 2005) states that the fulfilling of the goals of the Brazilian Republic (in a reference to article 3, III of the Brazilian 1988 constitution) fundamentally depends upon the sharing of responsibilities, cooperation and coordination of the *união* (federal level), *estados* (states) and *municípios* (municipalities 2004). It also affirms that the financial resources transferred to BFP beneficiaries represent an instrument for the recuperation and dynamization of local economies. See also Lindert *et. al.* ‘The Nuts and Bolts of Brazil’s Bolsa Família Program’, p. 25.

into these agreements is also a prerequisite for receiving federal financial stimulus funding by municipalities and states. Audits under the supervision and control network also cover the activities of municipalities⁹⁷.

Considering its gigantic scale, the targeting of BFP (defined as the share of total benefits received by specific groups of the population) has been considered “exemplary, outperforming other social assistance programs in both Brazil and internationally”⁹⁸, and this can be credited to a great deal to *Cadastro Único*. Since decentralization is taking place in such a way that the federal level centrally processes the data, the current design of *Cadastro Único* can be compared to a “magnifying glass” that reduces potential inclusion errors and, moreover, exclusion errors. *Cadastro Único* can be thus described both as an operative tool and as an institutional arrangement articulated by administrative law norms and processes. While it plays the functional role of accurately registering eligible Brazilian BFP beneficiaries and provides an objective understanding of the particularities of the vulnerable citizens, it is also one of the instruments used to coordinate different federal levels.

Another relevant issue related to *Cadastro Único* is that it is the result of a cumulative process of policy learning. Currently in its seventh version and containing information on more than 20 million Brazilian families, *Cadastro Único* has been redesigned and adapted to increase accuracy and to remain permanently updated. As an interviewee⁹⁹ said, when *Cadastro Único* was initially tested in 2001 the federal government imposed a mandatory obligation to municipalities to register their poor.

97 As explained by Joana Mostafa and Kátia da Silva: “MDS is helped by a system of internal and external audit institutions from the public sector such as (*Rede Pública de Fiscalização*), which has enhanced the surveillance power over municipalities’ activities. MDS also has a toll-free telephone number and a whole system for resolution of complaints, at the general public’s disposal”. Joana Mostafa and Kátia da Silva, ‘Brazil’s Single Registry Experience’, p. 11. On the monitoring and accountability roles played by the Office of the Controller General (*Controladoria Geral da União - CGU*), the Brazilian The Brazilian Court of Audit (*Tribunal de Contas da União - TCU*) and Public Prosecutor (*Ministério Público - MP*) in BFP see <<http://www.mds.gov.br/bolsafamilia/fiscalizacao/rede-publica-de-fiscalizacao> >, accessed 20 June 2011.

98 See Lindert *et. al.* ‘The Nuts and Bolts of Brazil’s Bolsa Família Program’, p. 45. The same authors mention that the poorest quartile (25%) of the population received 80% of all benefits (...). Leakages to the “non-poor” (or “non-target group”) thus amounted to about a fifth of the program’s outlays, though 85% of those leakages went to families in the next poorest quartile, which could be considered “near poor” – and virtually none went to the richest quartile of the population” (p. 46).

99 Sergei Soares and Natália Sátyro, ‘O Programa Bolsa Família: Desenho Institucional e Possibilidades Futuras’ in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 1 (Brasília: IPEA, 2010), p. 48.

This proved to be a red-tape bureaucratic measure that did not work well enough to keep the register updated, which is why financial incentives were designed later to stimulate cities¹⁰⁰.

It is also reported that *Caixa* was mainly in charge of operating *Cadastro Único* but more and more MDS has been providing inputs that rendered it a more sophisticated tool¹⁰¹. In summary, there is little doubt that *Cadastro Único* playing a new role in combining federal steering and coordination¹⁰² by MDS, with heavy technological investments and operation by *Caixa*¹⁰³ and local information collection by cities. On the one hand, as mentioned, as a targeting tool for BFP, *Cadastro Único* faces the constant challenge of remaining updated so that eligible families are found and registered¹⁰⁴.

5.2. IGD: use of incentive mechanisms for administrative performance

The Decentralized Management Index (IGD), an indicator that measures the quality of BFP management at the local and state levels and guarantees monthly payment of funds by the federal government to Brazilian states and thousands of cities, was created in 2006, during BFP's implementation process, and complements *Cadastro Único* in fostering decentralization and policy coordination. Local IGD is based on four variables: coverage rate of registrations, rate of entries and updates, information on rate of children's school attendance and rate of households monitored for health conditionalities¹⁰⁵.

¹⁰⁰ Mr. Bruno Câmara (MDS official), in an interview on March 30, 2010. See also Tereza Cristina Cotta and Luis Henrique Paiva, 'O programa Bolsa Família e a Proteção Social no Brasil', p. 59.

¹⁰¹ Sergei Soares and Natália Sátyro, 'O Programa Bolsa Família: Desenho Institucional e Possibilidades Futuras', p. 48.

¹⁰² In recent years, inform Mostafa and da Silva, the MDS has invested in capacity building, as part of a wider strategy of empowering the social assistance structures in the municipalities. As far as the single registry is concerned, since 2005, thousands of municipalities were coached in the concepts, regulations and procedures of *CadÚnico*. "A great deal of training material has been elaborated and handed out, with special attention given to the ongoing process of both awareness and revision of the *CadÚnico* handbooks (questionnaire guidelines and software training)". Joana Mostafa and Kátia da Silva, 'Brazil's Single Registry Experience', p. 13.

¹⁰³ Arguably, those technological investments reduce the likelihood that social policy transfers will be diluted in transaction costs, clientelistic politics and corruption.

¹⁰⁴ MDS estimates that approximately 230,000 impoverished families are not registered with *Cadastro Único*. See <<http://www.estadao.com.br/noticias/nacional,mais-de-40-dos-beneficiarios-do-bolsa-familia-continuam-miseraveis,649882,0.htm>>, accessed February 5, 2011.

¹⁰⁵ BFP conditionalities are monitored and enforced according to Ordinance (*portaria*) 321, September 2008. Such ordinance assigns SENARC several tasks related to the fostering of inter-sectoral

IGD aims to encourage these cities to deliver effective performance, employing funds to reward those who ensure dependable and quality information for which they are responsible, while maintaining updated data in the *Cadastro Único*, and providing information on health and education conditionalities. In addition, among the contractual duties they must fulfill for enrollment and continuance in the BFP, the cities have the task of setting up local agencies of social control and participation¹⁰⁶.

IGD provides a ranking on a scale of zero to one to assess information quality and timeliness registered in *Cadastro Único*, as well as to assess the timely entry and integrity of information on the conditionalities fulfilled by the recipients for the areas of education and health¹⁰⁷. It is intended to assess the quality of the BFP management (and specifically *Cadastro Único*'s operation on a monthly basis in each city and, from the results identified, offer financial support for the cities to improve their management)¹⁰⁸. Based on this incentive-based indicator and information provider, MDS transfers funds to the cities in order to encourage improved management of BFP at a local level and to help cities fulfill their social policy duties.

The municipalities are paid with IGD funds exclusively to support the BFP management and develop activities with recipient households, including managing conditionalities and benefits, monitoring recipient households, registering new households, updating and reviewing data, implementing complementary programs for

articulation and institutional support for conditionalities to be managed. Also, it establishes that SENARC must supply the ministries of health and education with information on the target populations, consolidate data and enforce non-compliance of conditionalities. The ministries of education and health, in turn, take the necessary actions to supply the target population with education and healthcare services.

¹⁰⁶ The Brazilian System of Social Assistance (SUAS) has established local agencies in 99.5% of Brazilian cities. CRAS and CREAS, the two types of local agencies, are managed locally and co-funded by the federal government. In the CRAs basic social protection services are rendered to vulnerable families, adolescents, children and elderly and the CREAS render complex social protection services to those who had their rights violated as a result of abandonment, sexual abuse and offenses, as well as to those who face drug addiction problems. Currently there are 7,600 CRAS and 2,100 CREAS offices in Brazil.

¹⁰⁷ The minimum IGD score needed to access funds is 0.55.

¹⁰⁸ IGD has been described by MDS as follows; " (...) in a strategy to support local management of the *Bolsa Família* Program, the IGD is an index that measures cities' performance in managing the program and CadÚnico, considering the quality of household registrations (validity and update[d] entries) and the monitoring of conditionalities of health and education. Based on the results obtained through the IGD, the cities that perform well receive monthly funds to invest in activities related to the *Bolsa Família* management. See the MDS, 'Handbook on the BFP Decentralized Management Index' — IGD, available at http://bolsafamilia.datasus.gov.br/documentos_bfa/IGD.pdf, p.1

basic adult literacy, providing occupational training, creating jobs and income, stimulating regional development and strengthening social control of BFP in the city¹⁰⁹.

6. Roles of law in *Bolsa Família*

Despite the fact that the 1988 Brazilian constitution transformed social assistance into a justiciable right – in a sense that in theory Brazilians can appear in court and claim that they have a “right to” social assistance based on constitutional and statutory grounds, BFP (which is not provided for in the Brazilian constitution) is described as a policy shaped to benefit the poor so long as they remain poor. In other words, BFP is not supposed to grant a vested or permanent right to the benefits it allocates and, contrary to BPC (*Benefício de Prestação Continuada* - the constitutional means-tested senior citizen pension and disability grant), it intends to tackle poverty as a transitory status¹¹⁰.

This does not prevent us, nonetheless, from analyzing BFP from a legal perspective. This is so because the topic concerning the roles of law in development policies extends far beyond the debates on judicial review and on the justiciability of social and economic rights in developing countries. In other words, in addition to creating justiciable rights, the law that underpins development policies also “sews together” and underpins their internal structure.

109 MDS, ‘Handbook on the BFP Decentralized Management Index’ — IGD, p. 8.

¹¹⁰ BFP’s main federal statute states that “the granting of the benefits under the *Bolsa Família* Program is temporary and does not generate any vested right, and the eligibility of households to receive such benefits shall be reviewed every two years” (Law 5209, 2004, article 21). A possible question would be: ‘can someone go to a court and demand enrollment in BFP based on the eligibility criteria?’ This would shed light on the possibility of accessing the Judiciary to obtain enrollment, not to receive the benefit indefinitely as a potential problem. However, although after 1988 claims involving socio and economic rights have been regularly and increasingly taken to the courts, there is no evidence that BFP is being subject to the increasing process of “policy judicialization”. Although I do not intend to discuss this, a possible explanation could be the fact that the BFP recipients are too poor to go to court or that, more optimistically, BFP is actively seeking to register them. On the literature on policy judicialization in Brazil, see L. W. Vianna, *et al.* ‘*A judicialização da política e das relações sociais no Brasil*’ (Rio de Janeiro, Renavan: 1999), José Eduardo Faria Faria, ‘Direito e Justiça no século XXI: a crise da justiça no Brasil’, paper presented at the seminar “Direito e Justiça no Século XI”, Coimbra, Portugal, Centro de Estudos Sociais. Available at <<http://opj.ces.uc.pt/portugues/novidds/comunica/JoseEduarFaria.pdf>>. accessed 17 Dezembro de 2010 and Virgílio Afonso da Silva and Fernanda Terrazas, ‘Claiming the Right to Health in Brazilian Courts: The exclusion of the Already Excluded?’, 36 *Law & Social Inquiry* 36 (2011).

Indeed, a wide range of legal norms and regulations structure and guide BFP within the public administration realm, and this unveils an important (although often overlooked by Brazilian scholars¹¹¹) legal dimension of public development policies. A rough and merely quantitative estimate made from the MDS website shows that it is directly regulated by dozens of norms, not to mention those indirectly affecting it. These norms are of different origins and hierarchies and have diverse characteristics in terms of degrees of specificity/generality, intra/inter-sectorality, flexibility/rigidity, punitive/reward features¹¹².

In public policies, the features mentioned above deserve closer examination because they can make a qualitative difference in terms of policy (and rights) efficacy and effectiveness: well-calibrated policies can (from a legal viewpoint) ultimately promote developmental goals more intensely by promoting decentralization and articulation, thus reducing implementation costs and litigation rates before courts. But they can produce the reverse effects as well, if disarticulated, poorly calibrated or if not calibrated at all. More specifically, the administrative law can provide better or worse incentives, functional or dysfunctional institutional articulation, productive or counter-productive inter-sectoral coordination, rich or poor dialogue, strong or weak legitimacy for the policies it disciplines. This is not to say, however, that the law only plays a purely instrumental role in developmental policies (in a sense that it mechanically pursues goals pre-defined in the realm of politics).

In any event, because law can be, in a nutshell, seen as a “technology” or a *medium* for development policies, there are good reasons to study efforts to improve the legal apparatus that underpins public policies such as BFP. In the field of social and welfare policies, as David Kennedy suggests, a “development strategy requires a detailed examination of the distributional choices affected by various legal rules and

¹¹¹ Brazilian administrative law is, as a rule, still formalistic and doctrinal. Very much influenced by French 19th Century administrative law, it has not been able to keep up with the transformations and metamorphosis caused by the emergence of the Welfare State and its correspondent “jurification” process. For a critique of the inability of Brazilian public law to deal with dynamic policy issues from a functional viewpoint, see Maria Paula Dallari Bucci, ‘Notas para uma metodologia jurídica de análise de políticas públicas’, in Cristiana Fortini, Júlio César dos Santos Esteves e Maria Teresa Fonseca Dias (org.) *Políticas públicas: possibilidades e limites* (Belo Horizonte: Fórum, 2008).

¹¹² See <<http://www.mds.gov.br/sobreministerio/legislacao/bolsafamilia>>, accessed on October 12, 2010.

regimes to determine, as best one can, their likely impact on growth and development”¹¹³.

To discuss the roles played by the law in BFP – especially in *Cadastro Único* and IGD – I will resort to the typology previously presented, according to which law plays substantive, structural, instrumental and participatory roles in developmental policies. The goal is to illuminate BFP’s analysis so that defensible inferences¹¹⁴ can be drawn in the conclusion.

6.1 – Law as a framework

From the viewpoint of law-as-a-framework, BFP was conceived to translate redistributive policy choices and guidelines. As seen, goals related to administrative decentralization and coordination have also been stated by the 1988 Constitution and by further legislation that regulates social assistance in Brazil and BFP in particular. Bearing this in mind, it is possible to consider the post-1988 period as a phase in which the law – a positive, man-made law conferred by act of legislation – crystallized and formalized new policy goals to be implemented through new welfare policies. In this sense, the complex whole of legislative and regulatory provisions and measures paved the way for a complex implementation phase, under way.

It is also possible to suppose that BFP and the entire Brazilian social assistance system currently being erected complement, rather than replace, universal social policies such as healthcare, housing and education. Thus, still from a law-as-a-framework perspective, two welfare state systems (universal and targeted) are being increasingly articulated, and this in turn means that Brazilian social policy is

¹¹³ David Kennedy, ‘The “Rule of Law”, Political Choices and Development Common Sense’ (2006), in David Trubek and Alvaro Santos. *The New Law and Development – a Critical Appraisal* (New York, Cambridge University Press: 2006).

¹¹⁴ On the notion of defensible inferences, see John K. Ohnesorge, ‘Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience’, 28 *University of Pennsylvania Journal of International Law* 2 (2007), p. 226. Ohnesorge, referring to the ideas proposed by Alice Amsden, suggests that a more sound approach to making a theoretical contribution to the debate on law and development is inductively (rather than deductively), studying recent historical examples of economic successes and failures, drawing defensible inferences underpinned by what may be observed in the operation of law in these events. Such an approach is opposed to the construction of a model based on abstract assumptions aimed at explaining theoretically the process of development or construction of the policies associated with it.

becoming increasingly dense and complex, but with several challenges ahead.

In terms of policy goals, BFP has been officially described as a tool to reduce poverty in the short run and inequality in the long run, as well as to promote decentralization and coordination. This reveals the fact that the goals it pursues are manifold, although the legal and administrative apparatus chosen to implement them is a single one. If we consider the fact that the historical pattern of state intervention in the social realm in Brazil was centralized, clientelistic and unable to interrupt the inter-generational trend of inequality reproduction, this arguably denotes an unprecedented use of law to advance multiple policy innovations.

One of the novelties is the rationale based on incentives to stimulate behavior and foster conditionality compliance. As an official interviewed said, “BFP works primarily with incentives rather than punishments¹¹⁵”. In other words, the management of BFP’s conditionalities is not primarily intended to promote the exclusion of those beneficiaries who do not meet all the requirements of the BFP. As another respondent explained: “in the BFP, compliance with conditionalities is intended to strengthen rights, rather than restricting access to the benefit, which is a distinguishing feature of Brazil’s program compared to other conditional cash transfer programs¹¹⁶”. Ordinance GM/MDS 321/2008 states that conditionality penalties for non-compliance should be imposed gradually¹¹⁷, as shown below¹¹⁸:

115 Mr. Bruno Câmara (MDS official), in an interview on March 30, 2010.

116 Mrs. Lúcia Modesto, in an interview held on March 31, 2010.

117 This is the content of Article 3 of the said ordinance: “The effects of failure to comply with the BFP conditionalities are graded and applied according to the breaches identified in the household’s history. Sole Paragraph. For purposes of this Ordinance, the household’s history addressed in the introduction to this Article is the set of successive breaches of conditionalities and gradual effects applied to recipient households.” In all cases, a period between one event of breach and the following is considered shorter or equal to 18 months. If greater, the prior record is disregarded.

118 A household is not considered in breach of a conditionality in two specific situations: where a specific service is not offered, or in the event of *force majeure*, and due to illness or other social reasons recognized by the MDS, MEC (Ministry of Education), and MS (Ministry of Health). Operating Instruction Nr. 36 SENARC/MDS, 2010 sets forth the reasons that do not produce any effects on households’ financial benefit for conditionalities related to education, to wit: student’s absence due to health problems, illness/death of a relative, lack of provision of educational services, events that prevent them from commuting to school, lack of educational service to people with disabilities, among others. In addition, the following events generate consequences with respect to the receipt of benefit: pregnancy, begging, parental neglect, child labor, violence, discrimination or aggression in school, exploitation or sexual abuse, domestic violence, lack of interest or motivation to attend school, school dropout, need to care for family members.

Record of non-compliance with a conditionality	Sanction
1 st	Notice to the household concerned
2 nd	Benefit is blocked for one month
3 rd	Benefit is suspended for two months
4 th	Benefit is suspended for two months
5 th	Benefit is canceled

This shows the way sanctions are designed and applied progressively in time and the way suspension and cancellation of payment are viewed (cancellation as a last resort, preceded by a series of prior notices)¹¹⁹.

The focus on families rather than on individuals, the use of incentives to stimulate behavior, the fact that social assistance is non-contributory, the creation of MDS as a hub ministry in charge of social assistance in Brazil and the increasing juxtaposition of universal and targeted polices are also elements that, from a law-as-a-framework perspective, suggest that the post-1988 law is considerably different from the prevailing model that lasted until the early 1990s.

6.2 – Law as institutional arrangement

As affirmed above, BFP is a multifaceted network of norms, processes and administrative bodies. A series of regulations¹²⁰ govern institutional relations, explicitly assigning tasks, inducing certain behaviors and creating information and communication supply and flow routines, thereby increasing the level of synergy of various Brazilian public authorities in charge of the social policy.

From the law-as-institutional-arrangement perspective, the fact that administrative law – or the way it has been used – strengthens coordination between public entities (that probably would otherwise fail to interact in an effective manner), stimulates institutional dialogue between them; shares burdens and public recognition; and

119 It is worth noting that an administrative appeal should be filed in order to review the effects arising from failure to fulfill the conditionalities, which must be filed by the household head to the city program manager. The manager, in turn, assesses the justifications presented, and detects, for example, errors in the record of conditionality and, depending on the finding, asks SENARC to disregard the last record of breach, and annul the effects of these errors on the benefits.

120 For example: Operating Instruction SENARC/MDS Nr. 1., Ordinance SENARC/MDS Nr. 1, Ordinance MDS Nr. 660, Ministry Directive MS/MDS Nr. 2.509, Ordinance GM/MDS Nr. 246, and various cooperation agreements signed by various authorities since the beginning of the BFP operation.

promotes decentralization through incentives (without sacrificing the federal level managerial capacity and *Caixa*'s technological and financial features) suggest that the law has been used to define institutional tasks in a more complex and synergetic fashion, with *Cadastro Único* and IGD being good examples of this.

Cadastro Único is mainly regulated by Decree 6.135, of 2007, which explicitly defines managing responsibilities of each federal level and requires that periodic monitoring procedures be established to keep the database updated. Differing from previous top-down and centralizing social policy patterns pursued in Brazil before 1988, such regulation relies on a contractual-based and a financially stimulated decentralization scheme that articulates responsibilities and rewards between the different federal entities (the federal level, states and municipalities). Legislation structuring the *Cadastro Único* is federal as the Brazilian federal level (*União*) is the one that has developed its managerial and administrative capacity the most¹²¹. According to Mostafa and Silva¹²²:

“as a result of the division of tasks between municipalities, Caixa and MDS, *Cadastro Único* was able to ‘materialize’ the combination of national coverage and policies’ articulation with local accuracy and targeting. This was possible because, even though MDS is a relatively new institution, the truly tricky implementation parts are being carried out by strong and traditional structures, and in the case of municipalities, with a fairly good knowledge of the social needs faced by local people”.

The IGD, initially established by Ordinance 148, 2006, had its legal status changed to “provisional measure”¹²³ MP 462, 2009 by which it became federal law (Law 12.058,

121 MDS has invested in capacity building, as part of a wider strategy of empowering the social assistance structures in the municipalities. As far as the single registry is concerned, explain Mostafa and da Silva, thousands of municipalities “were coached and drilled in the concepts, regulations and procedures of *CadÚnico*. A great deal of training material has been elaborated and handed out, with special attention given to the ongoing process of both awareness and revision of the *CadÚnico* handbooks (questionnaire guidelines and software training). Joana Mostafa and Kátia da Silva, ‘Brazil’s Single Registry Experience, p. 13.

122 Joana Mostafa and Kátia da Silva, ‘Brazil’s Single Registry Experience, p. 11.

¹²³ Equivalent to a US executive order.

2009)¹²⁴. Described as a means of supporting cities in BFP's management actions, it can be viewed as an institutional coordination element that serves to help cover the costs of implementing the BFP at a local level and also introduces incentive and reward mechanisms based on administrative performance. According to Lindert *et al.*, the performance-based incentives provided by IGD are important "carrots" in solving the "principal-agent" dilemma of third-party responsibilities for implementation in a decentralized context¹²⁵.

Despite its inability to assess the quality of information disclosed and its failure to measure other substantive aspects of the program, IGD is, like *Cadastro Único*, a key component of a legal and governance structure that defines and orchestrates "who does what" through mechanisms based on behavioral stimulus (as opposed to punitive or on clientelistic relationships between municipalities and their mayors) and federal ministries or legislators. In an initial, preliminary assessment, its impact has been considered positive, although it still lacks empirical evidence to evaluate outcomes more accurately¹²⁶. Nonetheless, IGD suggests that the calibrated use of financial stimulus can boost decentralization, foster capacity building and human resources and align incentives for municipalities to precisely pursue their duties in BFP¹²⁷. It has also been described as a "fire alarm"¹²⁸, i.e., an instrument designed to

¹²⁴ Transforming IGD in federal law was an important step since as a result of this, transfers to municipalities that meet the requirements became mandatory at the federal level. This arguably reduces distortions and discretion caused by political disputes and partisan antagonism.

¹²⁵ See Lindert *et al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 31.

¹²⁶ "From an empirical perspective, however, further research is needed to evaluate the impact of these management tools on the quality of implementation of the BFP. Preliminary qualitative evidence from an on-going study of five municipalities of differing IGD scores in the state of Minas Gerais does suggest that the IGD and associated financial incentives have had a positive impact on encouraging 'lagging' municipalities to invest in strengthening their administrative capabilities for implementing the BFP (rather than an exclusionary impact biased against weaker, poorer municipalities)". Lindert *et al.* 'The Nuts and Bolts of Brazil's Bolsa Família Program', p. 26.

¹²⁷ Lindert *et al.* describe the advantages of IGD: "[t]hey are basically (a) its role as a tool for monitoring quality of some of the key aspects of the basic architecture of the BFP, (b) its use as a tool for awarding performance-based financial incentives, (c) its administrative simplicity as a measurable indicator: it is established based on centralized data (on status of *Cadastro Único* and transmittal of information on conditionalities compliance) that is readily available to BFP managers in MDS on a regular basis and (d) its transparency". On the internal composition of IGD there is a potential (legal) debate related to requirements imposed on municipalities. This has to do with IGD's calibration of incentives and sanctions since half of IGD is a function of the local ability to collect information (targeting) and the other half is a function of BFP conditionalities and information monitoring. "For those who consider BFP essential social protection, the weight given to conditionalities monitoring (50%) is excessive. To those who assign BFP an important role in human capital, IGD's composition is adequate and reflects the fact that the goal of fostering human capital is as important as the goal of offering social protection".). See Sergei Soares and Natália Sátyro, 'O Programa Bolsa Família: Desenho Institucional e Possibilidades Futuras', p. 41.

better detect and assist underfunded municipalities that lag behind. In other words, cities with low IGD would be able to garner specific attention, training and support for capacity building from the federal level.

6.3 – Law as a toolbox for policy implementation

If seen as a set of tools (or a toolbox), the law behind BFP is complex but it is not new in the sense that it did not exist before. Rather, it represents new uses and approaches to existing legal norms and rationales. Examples of new uses and approaches include the use of incentives in administrative contracts involving the federal level and municipalities, cash transfer conditionalities that use soft (as opposed to punitive) sanctions for beneficiaries, and the use of financial rewards to steer behaviors of cities. None of these tools (contractually designed incentives, financial stimulus and behavioral steering) are unknown or unfamiliar to Brazilian law. However, they were not implemented in the Brazilian social policy the way they currently are in BFP.

BFP can also be perceived – from the perspective of law as a toolbox for policy implementation - as an initiative through which experimentations are put into practice in such a way that some lessons and improvements are not only occasional by-products, but also self-conscious efforts and explicit outcomes of policy learning. The example of *Cadastro Único* arguably illustrates this. Originally launched in 2001 as a major effort to construct a single beneficiary registry database, *Cadastro Único* has been criticized for being unable to accurately identify the poor¹²⁹, and, as mentioned, subsequently improved and elaborated through specific regulatory norms that later

128 “In Brazil, the conditionalities are intended to help cities provide essential services to the population, and act as a warning sign of social problems preventing the recipients from fulfilling them,” Bruno Câmara said in an interview on March 30, 2010. Lindert *et. al.* address this role in *The Nuts and Bolts of Brazil’s Bolsa Família Program*, p. 55. In other words, conditionalities play the role of “warning mechanisms” in the sense that their breach could reveal the absence of essential public services, which, in turn, would lead the ministries of health and education to address such a gap faster than it would otherwise occur. This role of a warning stems, in procedural terms, from an institutional interaction mediated by legal norms - in particular Ordinance GM/MDS 321, 2008, which sets forth the procedures by which the different ministries involved in controlling the conditionalities, as well as the cities, are connected, so that records of lack of basic infrastructure of health and education are reported and remediated.

129 Bénédicte de la Brière and Kathy Lindert (2005), ‘Reforming Brazil’s *Cadastro Único* to Improve the Targeting of the Bolsa Família Program’, 0527 *World Bank Social Protection Discussion Paper Series*’.

lead to IGD. The transformations *Cadastro Único* underwent were possibly facilitated due to the fact that it was originally established from an ordinance (*portaria*). Ordinances tend to be more flexible and revisable than statutes – and this practically means that they can be adapted and corrected more easily. Although this might reveal a complex trade-off between flexibility and stability, it also sheds light on the fact that there is a learning process to be perceived and incorporated by the lawyers and officials that structure and study policies.

Another example related to policy learning is, as a public official declared in an interview, the efforts involved in drafting legal rules behind the BFP are the result of agreements between management entities in the Brazilian Council of Social Assistance (CNAS). According to Article 18, II of LOAS, this council is responsible for regulating actions and the provision of public and private services in the field of social work. Hence, the rules (at least partially) were described as resulting from a deliberative process that, supposedly, minimizes further questions raised by governmental authorities and the civil society, which participate in the process of drafting legal rules¹³⁰. Such a form of drafting legal rules stands out because it opposes a top-down format and draws attention due to the fact that it potentially reduces dissent and controversy. This is, however, certainly a topic requiring further research and empirical investigation.

In IGD, the use of financial “carrots” as a strategy to align and steer cities and states is also worth noting as an example of using incentive tools (rather than punishments) to induce behavior. The stimulus articulated by IGD can be therefore be seen as a mechanism that plays a role in developing a whole system of social assistance in which “different actors and institutions involved in the system feel they are participants (active partners with rights and duties) and in which all benefit from results and share costs”¹³¹. In other words, the fact that different federal, state and local bodies are, as co-responsible, interacting and doing tasks clearly defined by the law can possibly mean that principal-agent known problems are mitigated with no

¹³⁰ Interview given by Mrs. Carolina Stuchi (MDS official) on July 17, 2008.

¹³¹ Simone Cecchini and Rodrigo Martínez, *Protección social inclusive en América Latina – Una Mirada integral, un enfoque de derechos* (Santiago: CEPAL, 2011). For more on the idea as a “whole system” of social assistance (*sistema integral de protección social*) see Fabián Repetto, ‘Protección Social en América Latina: la búsqueda de una integralidad con enfoque de derechos’, 47 *Revista del 6.5CLAD Reforma y Democracia* (Caracas, 2010), p. 1-24.

need to enact severe punitive sanctions and their enforcement because the possibility of public “naming and shaming” as a result of a failure in delivering certain tasks can itself be a source of efficacy to the system.

7. Concluding remarks

Interactions between law and policy in development trajectories are mutual and dynamic. Because the way law is used to forge and implement policy goals associated with development, outcomes can make a substantive difference when it comes to designing tools, defining tasks and ensuring participation and accountability; therefore, it is worth engaging (to use David Trubek’s words) in a self-conscious effort to study the ways law and legal institutions can be changed and shaped to achieve a development goal.

Recently some Brazilian scholars have suggested that even with persistent inequality rates, Brazil has been experiencing a growth cycle combined with decreasing inequality (a “pro-poor growth”). Such a cycle, in turn, would structurally transform the Brazilian Welfare State by means of an “expansion of the social frontier”¹³². More optimistically, others have argued that increased education spending, increases in the minimum wage, investment in labor training, microcredit programs, changes in the mechanisms of social security contribution, the combination of government transfers targeted to universal programs, stability, low inflation and the possibility of expanding the domestic market and competitive inclusion would be, they say, attributes of a new development standard characterized by social inclusion concurrent with growth. It has also been suggested that this cycle is substantively different from the developmental period of import substitution, as it does not bring with it certain negative traits of “statism”¹³³.

132 Renato Boschi ‘Estado Desenvolvimentista no Brasil: continuidades e incertidumbres’ (2010), 2 *Ponto de Vista*, p. 24.

133 The “new state activism”, as opposed to its overly interventionist predecessor, is marked by decentralized political structures, which provide freedom of action to the regional and local levels. In addition, in this new pattern of public action, relationships with the private sector are no longer required to follow government-imposed competitive strategies for the private sector. Through an ongoing public-private and cooperative dialogue sectors related to innovation and new technologies are encouraged and induced. Last but not least, in the field of social policy, an intervention pattern marked by cronyism, which earmarked consumption funds to investment efforts, is allegedly being replaced. A new type of social policy that favors the poor without compromising economic performance or causing major tax impacts is being designed, according to Glauco Arbix and Scott

The extent to which Brazil is in fact undergoing a new development cycle or a new type of development process that confirms Trubek's hypothesis according to which there is evidence that some countries are returning to a more active role in promoting both growth and equity remains an open, empirical and controversial¹³⁴ question whose answer this chapter does not intend to provide. On the other hand, if in fact something "new" is going on in Brazilian social policy, the strategy of combining and articulating targeting with universal policies is probably part of the formula, with law being a key element in such a combination.

In this article I argued that the law is being used in BFP to foster decentralization, align incentives, stimulate behavior and define institutional functions and responsibilities. As also seen, through *Cadastro Único* and IGD, two new policy tools in the Brazilian Welfare State, BFP has been able to orchestrate different federal entities in a decentralized institutional arrangement in which the administrative law has been used to strengthen coordination, stimulate information flows and foster decentralization. Finally, I have tried to show how some processes in BFP have served as laboratories to adapt and make the internal legal structure of policy initiatives more sophisticated.

The future of BFP is currently being discussed¹³⁵. Should it be expanded to cover

Martin, 'Beyond Developmentalism and Market Fundamentalism in Brazil: Inclusionary State Activism without Statism' (2010), paper presented at the Workshop on "States, Development, and Global Governance" Global Legal Studies Center and the Center for World Affairs and the Global Economy (WAGE) University of Wisconsin-Madison. Drawing on structuralist theories, Bresser-Pereira, a Brazilian economist, has recently defined core elements that characterize what he sees as a "new developmentalism" for Latin America - a national development strategy that competes with conventional orthodoxy. Luiz Carlos Bresser-Pereira 'From Old to New Developmentalism in Latin America, p. 3.

¹³⁴ In 2009 Luiz Gonzaga Belluzzo, another Brazilian economist, answered the question "is there a new developmental state in Brazil?" negatively. According to him, compared to China and to the Brazilian 1930-1960 period, contemporary Brazil does not have a strong national developmental state. For Belluzzo, the Brazilian state is overwhelmed by "irresponsible and uncontrolled bureaucracies" and is failing in the pragmatic task of articulating public and private decisions towards developmental strategies. See Luiz Gonzaga Belluzzo 'Pós-neoliberalismo – um novo Estado desenvolvimentista?' in 3 *Le Monde Diplomatique Brasil* 27 (2009).

¹³⁵ See Graziano da Silva and Lucas Tavares, 'Sobre o Futuro do Bolsa', Amélia Cohn, 'O PBF e seu potencial como política de Estado' in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 2 (Brasília: IPEA, 2010), p. 217; Ana Cleusa Serra Mesquita, Luciana de Barros Jaccoud, Maria Paula G. Santos 'Perspectivas para o Programa Bolsa Família e o Sistema de Garantia de Renda Brasileiro', in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 2 (Brasília: IPEA, 2010), p 307 and Ricardo

eligible beneficiaries who are still not being covered? Should it be phased out as poverty decreases? Should it be improved and more intensely connected with other social policies, be they targeted or universal? Should it gradually become a basic income initiative or a policy designed to promote productive and sustainable inclusion? No consensus has been reached but the BFP has been evolving substantially since 2005. It faces the complex future challenge of being able to simultaneously revise and assess itself as a whole and as a sum of articulated parts¹³⁶, and to endure as a stable enterprise until the conditions that justify its existence eventually disappear. This, in turn, demands further legal instruments that ensure that a balance is struck between flexibility and stability and lessons are incorporated, and that the acquired knowledge can be applied in other development policies (social or not) that, as the BFP, heavily rely on decentralization and coordination.

In June 2011 president Dilma Rousseff launched the *Brasil Sem Miséria*¹³⁷ program, designed to extricate 16.2 million people from extreme poverty¹³⁸, 59% of whom live in the Northeast region of the country. *Brasil sem Miséria* has been presented as a combination of complementary rural and urban sectoral actions in the fields of productive insertion, income transfer, access to public services, education, health, social assistance, water and sewage and involves the creation of new initiatives and the re-conception of existing ones. This program aims to find and register (using *Cadastro Único*¹³⁹) extremely poor families and integrate them into different programs according to data supplied by the Brazilian Statistics Office (IBGE). It has

Paes de Barros, Mirela de Carvalho and Rosane Mendonça 'Redimensionando o Bolsa Família', in , in Jorge Abrahão de Castro and Lucia Modesto (org.) *Bolsa Família 2003-2010: avanços e desafios*, vol. 2 (Brasília: IPEA, 2010), p 355

¹³⁶ For example, it is well known that the institutional dialogue between MDS and the ministry of education and, moreover, the ministry of health have to be improved to overcome "intersectorality deficits". As Curralero *et al.* reckon, inter-sectoral articulation and policy integration remain as major challenges to be tackled.

¹³⁷ "Brazil Without Indigence".

¹³⁸ According to the presidential decree that establishes *Brasil sem Miséria*, destitute populations are those families who live with less than approximately US\$ 41 per month. See article 2, sole paragraph of Decree 7492/2011. In its article 3, the decree also provides for the articulation of actions to ensure income guarantee to the extremely poor and presents transparency and integration among administrative bodies at the federal, state and local level as guidelines.

¹³⁹ On the thesis that *Cadastro Único* should be considered an independent tool to pursue goals that have not been originally assigned to BFP (such as productive inclusion, employment opportunities, and training) see Jorge Abrahão de Castro, Natália Sátyro, José Aparecido Ribeiro and Sergei Soares 'Desafios para a Inclusão Produtiva das Famílias Vulneráveis', 1486 *Texto para Discussão IPEA*, 2010.

been announced¹⁴⁰ that there will be an “active search” to locate these people, and this presupposes an exceedingly rigorous effort to find them in remote areas, as well as providing public services and determining job qualification. The program is also supposed to include, interconnect, and complement BFP and BPC, since one of its goals is to find the “invisible” poor¹⁴¹.

In another recent development, in 2011 SUAS, the Brazilian the Social Assistance Unified System, was institutionalized and formalized as a federal statute. SUAS, which existed since 2005, thanks to a decree issued by CNAS¹⁴², is coordinated by MDS but its functioning is based on the work of councils in which the federal level, states and cities co-decide the use of funds in a decentralized and participatory manner. Municipalities adhere to SUAS voluntarily (almost all cities in Brazil do so)¹⁴³.

The post-1988 legal and institutional apparatus increasingly add density and complexity to a welfare state in permanent construction. If BFP and the several policies that are under the umbrella of *Brasil Sem Miséria* label are supposed to intertwine and dialogue effectively through a national system (SUAS), and if this social policy is itself supposed to be articulated with macroeconomic, labor and other policies, then the degree of legal complexity (as well as the quantity of norms) will increase and this proposes crucial challenges for legal scholars interested in the relationships between law and development. In light of this, further studies that intentionally aim at discussing this topic in greater detail and drawing lessons and insights from this exercise are welcome and needed.

8. References

140 See, for instance: <http://www.mds.gov.br/saladeimprensa/noticias/2011/junho/brasil-sem-miseria-vai-localizar-e-incluir-em-seus-programas-16-2-milhoes-pessoas-em-situacao-de-extrema-pobreza>, accessed 18 June 2011.

¹⁴¹ Also, *Brasil sem Miséria* also changed the number of children and adolescents who can obtain the BFP benefit – now up to five (it used to be three).

¹⁴² The Brazilian Council for Social Assistance — CNAS was established as the decision-making body responsible for coordinating the Brazilian Policy of Social Assistance. The CNAS has 18 members, according to the following criteria: nine government representatives, one state representative and one local representative, and nine representatives chosen by the local population.

¹⁴³ SUAS is clearly inspired by SUS (Brazilian healthcare national system), originally established by the 1988 Constitution. Like SUS, SUAS aims at orchestrating federal entities in a coordinated way so that macro management and funds come from the federal level and services are rendered locally.

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