Public administration, law and development in Brazil: building legally sustainable public policies for an inclusionary state

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Introduction

The role of the state in the promotion of national development has been the subject of recent debates concerning several political and economic transformations of some developing countries, particularly in the Latin American context. After the failure of neoliberal policies to generate sustainable rates of economic growth, some countries, like Brazil, would be resorting to a more active role of the state in the planning and execution of national strategies of development. In contrast to the "old developmentalism" of the 1950s, 1960s and 1970s, some economists and social scientists speak of a "new developmentalism"[1] or an "inclusionary state activism without statism"[2]. The point is to stress the differences between this new model and both the state-centered Latin American version of the welfare state, better known as developmental state, and the market fundamentalism of neoliberal policies, which dominated the ideological spectrum of the 1990s. The new developmental state would be more pragmatic and market friendly, trying to foster economic growth with social inclusion[3].

The presumed rebirth of "developmentalism" with new colors has a parallel in the literature on Law and Development (L&D), understood as the mix of economic theory, legal ideas and institutional practices that "orients and explains the current practices of those who seek to change legal systems in the name of development, however defined"[4]. The history of L&D is usually divided into three basic "moments": (i) the first one, which corresponds to the classical developmental state, in which law is seen as an instrument for state intervention; (ii) the second one, related to the neoliberal reforms, in which law is seen as a tool to foster private transactions in a free market economy; and (iii) the third and current moment, still under construction, which have elements of the first two moments, as an attempt to combine a pro-market attitude with some degree of state intervention in order to pursue new values such as local participation and poverty reduction[5].

[1] Bresser-Pereira (2011).

[2] Arbix and Martin (2010).

[3] According to Trubek (2010, p. 20): "At an intellectual level, the idea that there is a new developmental state emerges from the work of a group of political economists whose theories point to the continued importance of state intervention while eschewing the kind of state ownership and top down centralized controls favored by past developmental state. And the new model can be glimpsed in the practices of some states like Brazil that show signs of wanting to move beyond neo-liberalism without simply trying to return to the developmental state of the 1950s and 1960s". For an account of the pragmatism and experimentalism of the Brazilian economic policy in the last decade, with its neo-developmentalist features, see Barbosa and Souza (2010) and Saad-Filho and Morais (2011).

[4] Trubek and Santos (2006, p. 3). According to Trubek (2007, p. 1): "'Law and development' is an idea that defines a practice and shapes action. The practice is the self-conscious effort to change law and legal institutions to achieve some goal. The ends sought may be societal: law and development efforts may be designed to foster economic growth, preserve individual freedom, protect private property, guarantee human rights, or foster group emancipation. But the ends might also include such legal values as ensuring due process and equal protection".

[5] Trubek and Santos (2006) and Kennedy (2006). Trubek (2007, p. 7-8) also speaks of a "post-law and development" to acknowledge the current mistrust in abstract and universalistic models of the kind "one size fits all" and to stress the importance of experimentation, discovery and learning for L&D in its search for "emancipation".

The basic idea of L&D in each of its three "moments" is that law can be used as an instrument for development policies, as a tool to promote social change. In the context of the "new developmental" or "inclusionary" state - the "third moment" of L&D - law would serve, therefore, as a means to promote the goal of social inclusion. In a country like Brazil, given its historical and traditional high levels of inequality and concentration of wealth and power, public policies of social inclusion are extremely important and constitutionally mandatory. In the public administration, they are (or at least should be) of great concern for both public sector managers and state lawyers, even if the latters are not always aware of the impact of their activity on the quality of these policies.

Taking into consideration the L&D approach and some useful theoretical insights provided by systems theory[6], the main purpose of this article is to analyse the role of law in general, and state lawyering[7] in particular, in the design and implementation of development policies that promote social inclusion, with special regard to the Brazilian context. Firstly, this role is described as the provision of "legal sustainability" to government decisions and public policies in general. Then, the legal dimensions of some recent inclusionary policies in Brazil are stressed as an attempt to show how the goal of social inclusion can be pursued by means of law, with an active participation of state lawyers. At the end, some light is shed on the limits of the use of law as an instrument to foster development and social change. These limits, however inevitable, do not change the fact that the multiple demands for social inclusion and participation are always to be considered as a matter of juridical justice in its "sociological" sense[8].

The role of law and state lawyering in policy-making

The process of designing and implementing public policies[9] is subjected to a variety of constrains that limit the range of potential decisions available to politicians and policy-makers: the need for consensus and political negotiation, the technical adequacy of the existing means to achieve the promised goals, the sufficient provision of budgetary resources, and last but not least the legal sustainability of the policy itself.

Legal sustainability means, in general terms, the consistency and adequacy of the policy to the constitutional and legal norms that regulate the scope and functioning of government. Consistency and adequacy that are important to provide a certain degree of legal security and stability to the policy, (i) preventing it to be ruled out by the judiciary and others institutions of control and (ii) guaranteeing that it will be properly assimilated by the departments, agencies and other stakeholders responsible for its implementation.

[6] Luhmann (1995b) and Teubner (2009).

[7] The term "state lawyering" refers to the institution that provides judicial representation and legal advice to governments on a regular basis. In Brazil, this role is played by a central organization in each level of government. At the federal level, this role is played by *Advocacia-Geral da União* (Office of the Attorney General of the Union). The main difference in relation to similar institutions of common law systems is that it does not have law enforcement and public prosecution functions, which in Brazil are the responsibility of another institution, *Ministério Público* (Office of the Prosecutor General), that exits also in each level of government.

[8] Teubner (2009).

[9] The reference to both design and implementation is intended to stress the unity of the whole process of policy-making, in which planning, execution and control cannot be properly seen as completely separate moments in time. See Melo and Silva (2000) and Puppim de Oliveira (2005).

In the public administration, the dimension of legal sustainability is perceived as the moment when law and politics enter into direct contact. Legal and political communications begin to compete and sometimes overlap. The initial discretion of politicians and policy-makers is confronted by the legal requirements and formalities said to be mandatory by lawyers – in this case, state lawyers. The political liberty of choice is then faced with the limits imposed by constitutional and administrative rules, whose change is also legally regulated.

The dilemma between discretion and legality in policy-making is at the very heart of the distinction between politics and law, understood as two functionally differentiated social systems made of communication[10]. While law concentrates on the generalization and stabilization of normative expectations of conduct – in this case, the "conduct" of the state – and orients its operations by means of conditional programs of the kind "if/so", politics focus on the making of decisions that are collective binding, being guided by programs of the kind "means/ends"[11].

The important thing is that between law and politics there is a basic differentiation in communication, which can be clearly noticed whenever one has to assess the legal sustainability of any particular decision or policy in the public administration – i.e., the day-to-day activity of state lawyers. It is the moment when political decisions are translated into legal norms and political goals are shaped by legal rules.

In the Brazilian context, the traditional formalism of administrative law and its concept of legality, still committed to old legal positivism, tends to make the "dialogue" between politics and law very tortuous and contentious, sometimes ranging from two extremes: either law completely rules over politics, suffocating the autonomy of the public administration, or instead politics arbitrarily by-passes any legal regulation, turning the exception into a permanent rule[12]. This legal formalism, mixed with a bit of corporatism, has influenced to some extent the self-image of state lawyering and state lawyers in Brazil, who tend to see the scope of their activity somewhat as the "legality control" of the acts and decisions of politicians and policy-makers - a misleading concept of what lawyering, in any case, public of private, is.

This distorted and problematic self-image has serious consequences for the whole process of policy-making. Instead of being used as an instrument or tool that facilitates social and economic development, law is seen much more as a formalistic obstacle to policy-making and institutional experimentation. It is symptomatic that state lawyers, even those who work on a daily basis providing legal advice to public sector managers, usually do not see themselves as truly policy-makers. Insisting in its role as a neutral "legality supervisor", state lawyering misses the point, which is not to create new obstacles and bounds to government decisions, but to show new paths and alternatives for public policies to thrive.

[10] Luhmann (2005, p. 473-505).

[11] On the functional differentiation of politics and law, see Luhmann (1994) and Luhmann (2005).

[12] In Brazilian administrative law, legality, which is a constitutional principle, is usually understood in the sense that the public administration is only authorized to do what was previously defined by law (legislative acts). The formalist and mainstream doctrine tends to interpret this formula in very strict terms: every administrative act should be authorized by law. Nevertheless, the content of this authorization is rather obscure and does not prevent a variety of regulatory and administrative agencies from having a great deal of discretion. For an account of the paradoxical role of the distinction between legality and "discretionality" in the evolution of continental administrative law, see Cassese (2000, p. 41-45).

Therefore, the provision of legal sustainability should not be mistaken as an old fashion "legality control". It goes further and beyond the mere assessment of the policy's adequacy to formal rules and procedures. It focuses on the policy's results with a preventive and pro-active approach. It looks at existing rules, precedents and practices to verify how the policy can be better "translated" into legal norms in order to (i) avoid the risk of its being judged unlawful by the judiciary and other institutions of control and (ii) guarantee that its legal sense will be properly assimilated by the departments, agencies and other stakeholders responsible for its implementation. In a few words: instead of "control", it is better to speak of "translation" (or "legally sustainable translation") as the main role of state lawyering in policy-making[13].

As long as law itself cannot provide the concrete achievement of the policy's goals, the best it can do is to "translate" them in a way that reduces the legal obstacles to its implementation, be they internal (from government bodies and other actors) or external (tribunals, audit courts, etc.) to the political system, system in which the organizations of the public administration responsible for policy-making play a central role[14].

In its attempt to provide legal sustainability by means of "translation" and legal advice, state lawyering opens the "doors" of law to the political system. Political decisions and public policies are thus faced with its possible (or probable) consequences and effects in the legal system in terms of how law will react to new laws, regulations and administrative acts: assimilating them as new legal expectations or ruling them out because of its potential inadequacy and inconsistency with the law itself (existing rules, procedures, etc.).

To a certain extent, this translation is always a bet: a bet that the legal system will understand what politics meant. And this bet can be risky. Politicians and policy-makers are usually well aware of the legal risks of their own decisions being ineffective or being ruled unlawful, especially when dealing with new and controverted issues for which law has not yet a clear and steady response.

In positivist legal theory, given the influence of the "linguistic turn" in philosophy at the first half of the last century, this uncertainty is usually described as the "structural indeterminacy of law" or "law's open texture" to acknowledge the creative role of interpretation in legal decisions of any kind[15]. In systems theory terms, this "indeterminacy" or "open texture" is better described as a paradox, a paradox that has to do with time.

The legal system processes and generalizes normative expectations about the future, being usually associated with the task of providing some degree of predictability to future events. If things go different from what was normatively expected, one can always "counterfactually" appeal to law for correction and compensation.

[13] The role of state lawyering as a kind of "translation" between law and politics and the critical appraisal of the predominant self-image of state lawyers as "legality supervisors" in the Brazilian context were developed more deeply in Guimarães (2011). On the role of the Brazilian federal state lawyering institution ("*Advocacia-Geral da União – AGU"*) to provide legal sustainability to public policies, see also Vieira Junior (2009).

[14] On the internal differentiation of the political system into (i) politics in its narrow sense, (ii) administration and (iii) the "public", see Luhmann (1994).

[15] Kelsen (2006) and Hart (2005). For an account of the influence of Wittgenstein's philosophy of language and its "linguistic turn" in the theories of Kelsen and Hart, see Simon (2006).

Nevertheless, in modern conditions, not only law is inherently changeable, which is the essence of "positivity", but legal decisions themselves can never be completely predicted – even the most deep-rooted precedent can be changed by means of the regular interpretation of the courts. In this sense, predictability and legal certainty are, to some extent, illusions. One can only be tautologically sure that in the future law itself will say what is lawful and what is unlawful, whatever the content of the decision may be. A paradoxical certainty of an uncertain treatment in the future[16].

Considering the role of state lawyering, every legal advice about the risks and consequences of a given policy is doomed to be risky too. The legal system is a historic machine. Its history and its structures prevent it from being totally arbitrary - there is no "anything goes" here. A court can change a precedent by interpreting it in a different way, but not all precedents at the same time. So, state lawyers can always research the "memory" of the system (its precedents, rules and practices) and try to establish the possible legal effects of any given political or administrative decision in the future, showing more or less "secure" paths for policy-making. But as "the future cannot begin"[17], the reasoning, arguments and prospects of any legal opinion remain always in the realm of possibilities that may or may not be realized.

In this sense, politics and law are both "black boxes" to each other. Even if structurally coupled, they remain operatively closed[18]. So, neither can law completely regulate politics - that is the exact meaning of administrative "discretionality" as relative political liberty of choice from law - nor can politics use law to achieve its own political goals - fostering development, for example - without taking the risk that law itself can give its own and independent legal interpretations about the meaning and the effects of policy-makers's "good intentions".

As long as policies are based on norms and also translated into norms, the metaphor of state lawyering as "translation" between politics and law is useful to shed some light on the importance of state lawyering as a public institution for the whole process of designing and implementing public policies and also on the impact of its activities on the quality of these same policies. In very simplistic terms: the better the translation, the better the implementation.

From the point of view of the public administration, understood as the multitude of organizations with policy-making mandates inside the political system, this role of translation can be analyzed from two different perspectives, as already advanced above: (i) one "external" to politics and directed to the center of the legal system (basically, the judiciary and other institutions of control) and (ii) the other "internal" to the political system and directed to the periphery of law (departments, agencies and other actors that use law as a medium of communication and coordination in the policy-making process)[19].

From the external perspective, the most important is the policy's adequacy to legal rules and

[16] Luhmann (1985).

[17] Luhmann (1982).

[18] Luhmann (2005, p. 473-505).

[19] The center is the "space" where the taking of decisions about what is lawful and what is unlawful is mandatory because of the prohibition of *non liquet*: the "no decision" is not allowed. The periphery is the "space" in which communication "runs freely" and normative expectations are generated, constituting also the boundaries of the legal system in relation to other social systems (politics, economy, etc.). For the distinction center/periphery and the position of courts in the center of the legal system, see Luhmann (2005, p. 359-399).

procedures, mainly administrative and constitutional ones. What is at stake here is the possibility of keeping the policy working even in case of judicial review. The legal support in direct litigation is thus important to the stability and continuity of the policy, which are essential to the effective achievement of its goals.

But state lawyering is not only about litigation, it is also about legal advice[20]. In providing legal advice to politicians and public sector managers, state lawyers adopt (or at least should adopt) a more preventive and pro-active approach. The important thing here is to shed light on the limits of political and administrative discretion, the liberty of choice allowed by law, and to analyze the possible (or probable) legal effects of any particular decision or policy in terms of how the legal system will react to them (risks of litigation and judicial review, eventual conflicts with audit courts, impact on vested interests and rights, precedents that will be created, etc.).

In this sense, legal advice plays a reassuring or tranquilizing role in order to counterbalance or compensate for law's inherent uncertainty and unpredictability. In its attempt to anticipate legal consequences and evaluate and assess legal risks, legal advice prepares politics for the "surprises" law may produce in the future. In a few words: legal advice is about uncertainty absorption. The absorption of legal uncertainty is usually condensed in legal opinions rendered by state lawyers, in which the techniques and strategies of legal argumentation play an important role in managing the effect of surprise of any given decision and providing legal grounds that can be later used to justify the decision in case of litigation[21].

From the internal perspective, the most important is the policy's legal consistency, which means its capacity to give uniform treatment to similar situations, in order to avoid internal "noises" and misunderstandings and also provide for the coordination of expectations of different organizations and actors responsible for the policy's implementation. The main focus is not on the risks of litigation and judicial review, in which the consistency of law in general also plays an important role - the concepts of juridical justice and equality usually means treating like cases alike and unlike cases unlike[22]. What is at stake here is the communicative or coordination function of law in a broader sense, mainly administrative law.

Administrative law is usually ascribed to the role of putting limits on the public administration and

[20] The provision of legal advice is the most controversial aspect of state lawyering, at least in the Brazilian context. If in litigation the role of state lawyers are rather obvious (represent and defend the state in courts, like any other plaintiff or defendant), in legal consulting their role sometimes is not that clear. They are exposed to a political and technical language with which they are not so familiar, at least in comparison to the legal jargon of judicial and administrative procedures. This is probably one of the reasons, together with the formalism of mainstream administrative law and its concept of legality, why the misleading self-image of "legality supervisors" is prominent among Brazilian state lawyers.

[21] In sociological terms, legal argumentation can be described as an operation of self-observation inside the legal system that works with the distinction variety/redundancy. From the point of view of the political or administrative decision that has to be legally grounded, legal argumentation may work in to different ways. On one hand, legal argumentation reduces the effect of surprise of the decision by providing legal grounds and justifications that connect it to previous decisions, to alternatives that have been already tried and may thus be repeated without any fear regarding its consequences. On the other hand, it can also offer the case for taking a new and innovative decision, whose consequences are not yet totally clear, even if they may be partially anticipated by means of comparison with similar situations. For more details, see Luhmann (1995a) and Luhmann (2005, p. 401-471).

[22] Luhmann (2005, p. 275-299) and Teubner (2009).

guaranteeing its accountability to the parliament and the judiciary in order to protect the rights of the citizens. Nevertheless, beyond this limitative or regulative function, administrative law is also important to coordinate the internal functioning of government and the whole process of policy-making[23]. It does so by defining the scope of departments and agencies, distributing tasks and resources, regulating channels of communication and establishing rules and procedures for decision-making and policy implementation.

When activated here[24], legal communication operates in the "periphery" of law, in its "boundaries" with the political system. Problematic and controverted legal issues of policy-making (who does what and how shall this "what" be done?) are frequently discussed, but hardly ever end in courts. Problems are usually solved with "superior" decisions, which means that politics can deal with the problem without having to resort to law – even if this alternative remains open in cases where no mutual understanding (or political compromise) can be achieved[25].

In this coordination function, the role of state lawyering and legal advice is much more pro-active than merely preventive. The translation of policies into norms is aimed at coordinating the expectations of the multiple organizations and actors involved in the policy's implementation. Even if the prospects of judicialization are relatively low, state lawyers contribute (or can contribute) to clarify duties and procedures, untying bureaucratic "knots" that create internal "noises" and misunderstandings. In other words, they can help organizations and actors to "speak the same language" about the rules and procedures in which the policy is translated in order do improve the policy's own consistency – that is to say, the uniform treatment of similar situations – which is a necessary steep to guarantee its effectiveness.

Both external and internal perspectives should be taken into consideration if state lawyering is really to play an important role in development policies. In providing legal sustainability for public policies by means of this complex work of translation, it may help in the shaping of law for development purposes. In any case, state lawyering should avoid at any cost the self-image of "legality supervisor"[26]. It should take a more pro-active role in the whole process of policy-making, focusing on the results and the effectiveness of public policies. In this sense, it may be able to provide "maps" of legally sustainable trajectories for the implementation of development policies that promote social inclusion, as will be briefly exemplified in the next section.

Law, development and social inclusion: some examples from Brazil

[23] There is a parallel here with the two traditional roles of public law in general, and constitutions in particular: protect the citizens by means of fundamental rights and regulate the organization and functioning of government. For a sociological analysis of the constitution as a mechanism of structural coupling between politics and law, see Luhmann (1996) and Corsi (2001).

[24] That is to say: when the question about the lawfulness or unlawfulness of any particular decision or situation arises.

[25] In the Brazilian context, conflicts about budgetary issues are usually addressed this way. The dialogue between the legislative and the executive branch is often tortuous and contentious, but rarely judicialized.

[26] This also entails the need for a more adequate concept of legality that overcomes the positivist narrow, simplistic and tautological view that the public administration shall only do what law says it can do. On the need for a legal methodology in the Brazilian administrative law to orient the whole process of policy-making, see Bucci (2006). For a functional approach to the roles of law in development policies and its importance to the legitimacy and efficiency of these policies, with a concrete analysis of the *Bolsa Família* Program (BFP) - a Brazilian conditional cash transfer program, which will also be briefly analyzed in the next section - see Coutinho (2010).

The Brazilian Constitution of 1988, which is the symbol of the re-democratization of the country after more than two decades of military dictatorship (1964-1985), has introduced a lot of innovations in the design, financing and universalization of social policies, especially in the fields of education, health and social security[27].

After the macroeconomic stabilization of the 1990s, Brazil has been experiencing since the beginning of this century a period of both economic growth and relative distribution of wealth - the official slogan is "growth with inclusion" - which opens new spaces for the implementation of the constitutional "promises" in terms of social inclusion and participation[28].

This section aims at briefly stressing the legal aspects of three recent examples of social policies in Brazil, as an attempt to exemplify how law and state lawyering can contribute to fostering development and social inclusion: (i) the *Bolsa Família* Program (BFP), (ii) the Pre-Salt Social Fund (PSSF) and (iii) the affirmative action programs adopted by some Brazilian universities, especially the University of Brasilia (UnB).

The *Bolsa Família* Program (BFP)[29] was launched in October 2003 as a consolidation of four pre-existing social programs. It is a conditional cash transfer program that targets poor families in vulnerable situation. The conditionalities are related to health and education duties - among others, vaccination, enrollment in schools and minimum rate of attendance at classes for children. Basically, the institutional design is the following: the Ministry of Social Development (MDS) coordinates and finances the most part of the program, local governments are responsible for the registration of families and the monitoring of conditionalities and a federal owned bank (*Caixa Econômica Federal*) provides for the cash transfers.

In less than ten years, BFP has achieved great results in terms of poverty reduction, with significant low rates of corruption and deviation. It is actually the largest conditional cash transfer program in the world and its success has been drawing the attention of policy-makers and social scientist all over the world. One important aspect is that its decentralizing and transparent management and implementation represent a relevant change in relation to the Brazilian old pattern of centralized, regressive, fragmented and clientelistic social policies[30].

To deal with the complex challenges of coordination and decentralization, two main legal instruments

[27] For an account of the historical process that led to the 1988 Constitution and the great commitment and participation from civil society in is formulation and approval, see Barbosa and Paixão (2008) and Barbosa (2009).

[28] Some recent Brazilian development policies are the subject of a growing interest by Law and Development scholars. See the research projects (i) "Law and the New Developmental State (LANDS)" [http://law.wisc.edu/gls/lands.html] and (ii) "Law and Development in the BRISCS (BRICSLAW)" [http://www.law.wisc.edu/gls/bricslaw.html], both co-sponsored, among other institutions, by the Global Legal Studies Center of the University of Wisconsin (GLS) and the Law School of Fundação Getúlio Vargas in São Paulo (Direito GV).

[29] This topic follows the deep and detailed analysis of Coutinho (2010).

[30] On this old pattern of social policies, see Coutinho (2010, p. 17-23). It is important to stress that BFP is actually being broadened to reach people and families in situation of extreme poverty, as a part of a new complementary program launched by the federal government in June 2011 - *Brasil Sem Miséria* (Brazil Without Indigence).

are being used by BFP: the Unified Registry for Federal Social Programs (*Cadastro Único para Programas Sociais do Governo Federal - CADÚnico*) and the Decentralized Management Index (*Índice de Gestão Decentralizada - IGP*). *CADÚnico* is a national registry for the whole population in vulnerable situation and it is used to collect data about people eligible to BFP and the particularities that may influence in the compliance with the conditionalities, playing and important role in the decentralized targeting of potential beneficiaries[31]. IGD is an index that measures the quality of the decentralized management based on the updated information about the beneficiaries and the compliance with the conditionalities, employing funds to reward local governments responsible for the quality and integrity of this information[32].

Both *CADÚnico* and IGD are complementary tools translated into administrative law norms that are being used "to foster decentralization, align incentives, stimulate behavior and define institutional functions and responsibilities"[33].

The extent and relevance of the norms and regulations that have been produced for the management and implementation of BFP, together with the recognized success of the policy itself, are strong indications of the importance of administrative law for the whole process of policy-making, considering the "internal perspective" suggested above. These norms and regulations were certainly analyzed by the Legal Office of the Ministry of Social Development, who had the opportunity to take part in the process of designing and implementing this inclusionary policy that has achieved such great results. This positive example should stimulate state lawyering and state lawyers to take a more pro-active role in policy-making, given the direct impact of their work of "translation" on the quality and effectiveness of development policies in general[34].

The Pre-Salt Social Fund (PSSF) is a budgetary and financial facility created by the Brazilian Federal

[31] "*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" (Coutinho, 2010, p. 34).

[32] "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 health. 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). 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" (Coutinho, 2010, p. 36).

[33] Coutinho (2010, p. 47). According to Coutinho (2010, p. 47): "(…) 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".

[34] According to Coutinho (2010, p. 38): "(…) 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-sectorial coordination, rich or poor dialogue, strong or weak legitimacy for the policies it disciplines".

Law 12.351, enacted on December 22nd 2010, which also established the new legal regime for oil exploration in the areas of pre-salt oil recently discovered on the continental shelves off the Brazilian southeastern coast[35].

The fund was created as a kind of sovereign wealth fund to concentrate all the federal resources provided by the exploration of pre-salt oil, among other sources of revenue. Its main purposes are to mitigate the fluctuations in income and prices generated by the exploration of oil - an important measure to avoid the so-called "oil curse" - and to provide long-term public savings for the financing of development policies in the areas of education, culture, sports, public health, science and technology and environmental protection[36].

In the whole process of designing the new model for oil exploration, the PSSF included, there was an active participation of state lawyering, represented mainly by state lawyers of the Legal Office of the Ministry of Mines and Energy. Not only did they provide direct and constant legal advice for politicians and public sector managers involved in the process, but they also took effective part in the writing of the new laws that where later enacted by parliament - a role quite different from the common self-image of "legality supervisors" criticized above.

Considering the prospects of the huge wealth that will be generated by the exploration of these new oil fields[37], the PSSF is thought to be a significant source of resources for poverty reduction and sustainable growth. However, even if it represents an important legal and financial tool that may be used to support the economic and social development of the country, the fund is only the first step in the setting of new social policies and the broadening of the already existing ones.

The future challenges will be related to the coordination of the expectations regarding the capitalization of the Fund and the application of its resources. The extent of money involved suggests that there will be a great deal of conflict among federal departments and agencies, local governments and organizations from civil society about the better way to spend the new revenues[38]. New rules and procedures may be needed to improve the accountability of its management and also to guarantee some degree of institutionalized participation and control from civil society. This means that law and state lawyering still have an important role to play in the design and implementation of development policies that are expected to be funded by the PSSF.

The affirmative action program adopted by the University of Brasilia (UnB) has been recently ruled lawful by the Brazilian Federal Supreme Court in a unanimous and historic decision.

Ten of the eleven judges considered the program to be in conformity with the constitutional principle

[35] For an account of these recent discoveries of pre-salt oil and the rules of the new legal regime for exploring them, see the website of Brazilian state-owned oil company *Petrobrás*: http://www.petrobras.com.br/minisite/presal/en.

[36] On the legal and governance aspects of the PSSF, see Franca (2012).

[37] *Petrobrás* itself estimates that there will be an increase of up to 70% in the national production of oil. Just one of the blocks, *Tupi*, has recoverable volumes estimated at 5 to 8 billions of barrels of oil and gas, which represent approximately 50% of the current reserves (15 billion barrels): See http://www.petrobras.com.br/minisite/presal/en/a-new-frontier.

[38] In fact, the debates are already taking place in parliament about the division of the royalties of the pre-salt oil among the different levels of government, a subject that was not tackled by the recently enacted federal laws that regulated different aspects of the new regime for oil exploration.

of equality - one judge did not take part in the judgment because he had previously participated in the defence of the policy while he was the Attorney General of the Union (*Advogado-Geral da União*)[39].

The UnB's affirmative action program was adopted in June 2004 - similar programs were later adopted by other public universities in Brazil. Since then, twenty percent of all posts in the university are spared for students of African descent and ten posts are spared every semester for students of indigenous descent. It is basically a transitory policy aimed at increasing the number of black and indigenous students in the university. It as part of a broader strategy of empowerment and social inclusion of historically excluded minorities and also a recognition of the need to change a concrete situation of racial inequality in which the vast majority of the university students in Brazil are white[40].

This policy too had to be translated into administrative law norms, which established its main guidelines, the criteria and requirements for eligibility, the rules for the selection of candidates, the procedures for reviewing particular decisions, among other aspects. Again, law was used to shape a policy aimed at promoting development by means of social inclusion.

The risk of the policy's being challenged in the judiciary already existed from the very beginning, but it did not prevent the policy's implementation, because there were also strong legal arguments capable of "sustaining" the policy on solid constitutional grounds - sustainability that was later confirmed by an unanimous decision of the highest court of the country.

In this case of a relevant inclusionary policy that was challenged in the judiciary, state lawyering played an important role from the very beginning of the legal proceedings, advising the university and other organizations that were later admitted to act as *amicus curiae* on the better strategy to defend the policy. Later on, it took an active part in the oral debates that preceded the final judgment. Legal advice and judicial defence were articulated with a view to guaranteeing the continuity and stability of the policy, focusing on its results. One interesting example of the roles of law and state lawyering in the promotion of social inclusion.

Conclusion: the limits of law and the matter of justice

The three examples briefly analyzed above illustrate how law and state lawyering play (or can play) an important role in the whole process of policy-making. In a work of "translation" between politics and law by means of legal advice and judicial representation, state lawyering can take an active part in the provision of legal sustainability for public policies that aim at promoting social inclusion, which is something very different from the misleading common place of "legality control" still prominent in Brazil.

Given the "neo-developmentalist" or "inclusionary" features of the Brazilian contemporary state, the

[39] The action (ADPF 186) was brought against UnB directly in the Supreme Court by the Democrats Party (DEM), a right wing political party. The decision was rendered on April 26th 2012. For more information, see the website of the Brazilian Federal Supreme Court: http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=186&classe=ADPF&origem=AP&recurso=0&tipoJulgamento=M.

[40] For more information about the UnB's affirmative action program, see the website of the university: http://www.unb.br/estude_na_unb/sistema_de_cotas. On the constitutional adequacy of this kind of policy in the Brazilian context, see Azevedo (2007).

L&D approach is useful to stress the importance of law and state lawyering for the effectiveness of development policies. According to this view, law should be seen as a relevant instrument to foster development and not only as an obstacle to the efficient functioning of the public administration. In the same way, state lawyers should be seen (also by themselves) as truly policy-makers, who should focus on the results of the policies they help implement, and not as "legality supervisors" that only worry about formal rules and procedures.

Nevertheless, from the point of view of systems theory, some questions remain: can law be really used, in a "self-conscious effort", to achieve development and social change? Is it a true "medium" or "technology" that shapes policies in order to provide for (or, otherwise, to prevent) the participation and inclusion of people? May people be included in the "mysterious" world of routines, formalities and distinctions that are constantly reproduced by legal communications? What does law itself "think" of all of that?

To answer these questions, it may be useful to follow the sociological advice: observe the observer![41]

The basic premise of L&D is that law can either facilitate or obstruct development, as an instrument that either fosters or prevents social change (or legally geared social change). In a broader sense, this has to do with the more general question about the function of law: conservation or transformation of the structures of society, obstruction or facilitation of social change?

If law is considered as one functionally differentiated subsystem of the general system of communication that constitutes what is usually called "society", it follows from here that there is no law "and" society. There is only the law "of" the society, because law is society reconstructed (or functionally differentiated) from one particular perspective, from the point of view of one of its internal and partial rationalities[42].

So, the answer to the question of whether law can conserve or change society is a paradox: law does both things and none of them at the same time. In other words, law cannot change or develop neither society as a whole nor any of its particular subsystems, it can only change itself. Law cannot see beyond its own communicative boundaries, it cannot "touch", "develop" or "include" its environment, which is made of people, nature and other social subsystems (politics, economy, science, health, education, religion, etc.). In second order cybernetics terms[43], the best it can do is to "irritate" them (and this "irritation" ironically have a literary sense too), providing external "stimuli" that have to be internally reconstructed by each of them in a complex and rather unpredictable process that hardly bears any similarity to classical causality.

This sociological observation of the observer - in this case, Law and Development theory - points at the limits of any instrumental view of law, even a moderated one.

The "self-conscious effort to change law and legal institutions to achieve some goal"[44] always entails

[41] On the concept of second order observation, see Luhmann (2002).

[42] Luhmann (2005).

[43] Foerster (1981).

[44] Trubek (2007, p. 1).

other efforts and effects that cannot be "consciously" steered by law itself[45]. Courts, corporations and administrative agencies have their own way of interpreting these "consciously" planned goals and the necessary means to achieve it, following "functionally differentiated" paths that are not congruent among each other[46].

The fact that law cannot be used to directly change or develop society in the traditional sense does not mean that words such as "inclusion" and "participation" have no meaning to law. From a sociological perspective, these are matters of juridical justice, which can be defined, in a rather unusual way, as "adequate complexity of consistent decision making"[47]. Consistent decision-making, as already mentioned above, means the ability of law to treat like cases alike and unlike cases unlike. The element of "adequate complexity", on the other side, goes beyond the mere internal consistency of legal operations and asks for law's "ecological adequacy", which means its capacity to meet the complex demands put forward in its environment (people, nature and other social systems). In other words, justice is law's "contingency formula". By showing the gap between internal consistency and ecological demands, justice stresses the contingency of every legal operation in order to subvert (or self-subvert) law's inherent tendency to conservation and self-repetition:

> "Neither natural law nor legal positivism. Instead, justice is sabotaging legal decisions. Against law's relentless desire for certainty, juridical justice creates a vast space of uncertainty and indeterminacy. Justice re-opens the space that has been closed by the routine of legal decisions and asks obstinately whether in the light of external demands on the law the case needs to be decided differently. Justice works as an internal subversive force with which the law protests against itself. Justice protests against law's natural tendencies to stare decisis, to routine, security, stability, authority and tradition. Against law's inbuilt tendencies to orderly self-continuation it infuses into the legal order a tendency towards disorder, revolt, deviation, variability and change. It protests in the name of society, people and nature but does so from within the law. Subversive justice stirs up the law. The mutiny on the bounty – this is what sociology tells about juridical justice"[48].

What was initially excluded from law because of its operative closure "demands relentlessly to be let in, as a matter of justice"[49]. The demand for the inclusion of the excluded puts a great pressure on law for self-renovation, but this pressure can only be dealt with by law itself and it is never a perfect justice that is so achieved, it is always a contingent one - maybe, an "impossible" one[50], like the "open gate" before the law in Kafka's *The Trial*.

In terms of public administration and state lawyering, the demands for social inclusion and participation could be interpreted somewhat as an utopian need for "breaking the routine": stop a little

[45] Notwithstanding their insistence on this view of law as an instrument, L&D scholars seam to be conscious of the inherently limits of the instrumental approach, as shown in their actual mistrust of universal and abstract models and also in their acknowledgement of the importance of learning and experimentation in development policy-making. See Trubek (2007, p. 7-8).

[46] On the problems and limits of the use of law and money as main instruments of intervention in the context of the welfare state, see Luhmann (1994) and Luhmann (1997).

[47] Luhmann (2005, p. 275-299).

[48] Teubner (2009, p. 12).

[49] Teubner (2009, p. 16).

[50] Derrida (2007). On the "impossibility of justice" in Derrida as an exigency of law's self-transcendence, see Teubner (2009, p. 15-19).

bit, observe (or self-observe) yourself and look for new and more complex alternatives for dealing with the paradoxical problem of the inclusion of the excluded. In a few words: new forms of translation and new policies for development.

However, it is important to stress the fact that state lawyering is not some kind of legal "guide" that could show the "ways to heaven" in the public administration. It may be just as "blind" as any other institution, in the sense that sometimes (or rather often) not even state lawyers are able to "speak the same language". And as long as law and politics constitute functionally differentiated mediums of communication, there will always be a lot of risks, difficulties and shortcomings in any attempt of translation. Nevertheless, state lawyers and other civil servants who deal with law and development in the realm of the public administration could listen to the advice of Marco Polo to the Emperor Kublai Kahn in Italo Calvino's *Invisible Cities*, and maybe could try harder to open new spaces in the day-to-day "hell" of administration and bureaucracy:

> "Hell, if there be such a thing, is not tomorrow. Hell is right here, and today we live in it; together we make it up. There are only two ways to avoid suffering in this Hell. The first way out is easy for most people: Let Hell be, live it up, and stop noticing it. The second way is risky. It demands constant attentive curiosity to find out who and what in the midst of this Hell is not part of it, so as to make it last by giving space to it."

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