NEW LEGAL APPROACHES TO POLICY REFORM IN BRAZIL

// NOVAS PERSPECTIVAS JURÍDICAS SOBRE A REFORMA DE POLÍTICAS PÚBLICAS NO BRASIL

Marcus Faro de Castro

>> ABSTRACT // RESUMO

This article offers a description of recent arguments about the relations between the law and economic development in Brazil which have been conceived as congenial to a new state activism: the Public Capital Management (PCM) approach and the Legal Analysis of Economic Policy (LAEP) approach. Ideas deriving from relevant literature are discussed, as well as their proposed role in the articulation of policies that attempt to promote economic development in line with efforts to enhance the fruition of fundamental and human rights. A stylized account of works by authors engaged in the legal analysis of practices of allocation of financial resources (regulation of the commercial credit market, portfolio investment by a state-controlled development bank and the organization of a cash-transfer program) is provided. The analytical framework of the LAEP approach is also discussed, including its treatment of monetary value transmission in the context of contractual structures that organize different aspects of economic policy. // O presente artigo oferece uma descrição de argumentos recentes sobre as relações entre o direito e o desenvolvimento econômico no Brasil. Tais argumentos têm sido concebidos como apropriados a um novo ativismo estatal. São eles: os da perspectiva descrita como Gestão Pública do Capital (GPC) e o da Análise Jurídica da Política Econômica (AJPE). No trabalho, são discutidas as ideias dessas duas perspectivas, tal como aparecem na literatura relevante, bem como as concepções, igualmente elaboradas em obras recentes, acerca do papel do direito na articulação de políticas públicas que busquem a promoção do desenvolvimento econômico de modo alinhado com os esforços para tornar mais efetiva a fruição de direitos fundamentais e direitos humanos. É oferecida uma descrição estilizada de trabalhos de autores envolvidos com a análise jurídica das práticas de alocação de recursos financeiros (a regulação do mercado de crédito comercial, investimentos de portfólio de um banco de desenvolvimento estatal e a organização de um programa de transferência de renda). É também discutida a estrutura analítica da AJPE, incluindo seu tratamento da transmissão de valores monetários no contexto de estruturas contratuais que organizam diversos aspectos da política econômica.

>> KEYWORDS // PALAVRAS-CHAVE

legal analysis; economic development; economic policy; state activism; human rights; Brazil // análise jurídica; desenvolvimento econômico; política econômica; ativismo estatal; direitos humanos; Brasil

>> ABOUT THE AUTHOR // SOBRE O AUTOR

Full professor, Faculty of Law, University of Brasília. LL.M. (1986) and S.J.D. (1990), Harvard Law School. // Professor Titular da Faculdade de Direito da Universidade de Brasília. Doutor pela Universidade de Harvard.

>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

This article incorporates and elaborates on portions of a paper entitled "Economic Development and the Legal Foundations of Regulation in Brazil", which I presented in the 4th Biennial ECPR Standing Group for Regulatory Governance Conference on 'New Perspectives on Regulation, Governance and Learning' held in Exeter, UK, from 27-29 June 2012. // Tradução do original em inglês por Paulo Soares Sampaio, com revisão do autor. O presente artigo incorpora e amplia algumas partes do trabalho "Economic Development and the Legal Foundations of Regulation in Brazil", que o autor apresentou na 4th Biennial ECPR Standing Group for Regulatory Governance Conference on 'New Perspectives on Regulation, Governance and Learning', realizada em Exeter, Reino Unido, de 27 a 29 de junho de 2012.

1. INTRODUCTION

Discussions about regulation and the relationship between public and private interests in the economy and in the law are taking new twists in the aftermath of the 2007-2008 financial crisis that spread to several markets and affected public finances and policy-making in virtually all countries of the world. Thus, for example, in early 2012 social activists in favor of the renationalization of railway services in England, such as the Bring Back British Rail movement, gained visibility when news spread that significant fare rises were being adopted in the British railway system, with ticket prices for some routes being increased up to 11%, more than double the 4.2% rate of inflation for 2011. In a similar development, public debate about economic policy and regulation surfaced in Brazil in the end of 2011, when the National Confederation of Private Schools (*Confederação Nacional de Estabelecimentos de Ensino*) announced that an increase in school fees in 2012 would be in the range of 10% to 12%, much above the projected 6.5% inflation rate for 2011. And, in a more different setting, responding to concerns of the residents of the township of Phiri, also voiced by the Coalition Against Water Privatization, the High Court of Johannesburg ruled in 2008 that the forced installation of prepaid water meters in that community was unlawful and unconstitutional, although the Constitutional Court of South Africa set aside that decision in the following year.[1]

To these facts may be added what appears to be an increased concern of multilateral organizations, such as the World Bank, regarding the levels of dissatisfaction of public opinion with privatization of formerly state-owned firms in some regions of the world.[2]

The examples above illustrate the fact that unsettling criticism is being brought against official policy and business practices in countries that have, with varying degrees of success, adopted market mechanisms in several or most sectors of their economies. One relevant aspect in the changes involved in such developments is the role that the law – legal doctrines, ideas and practices, legal institutions, grounds and vocabularies – has in propelling or hindering important transformations that affect the way in which the economy, social demands and state institutions become interwoven to form current trends in policy reform.

In the case of Brazil, during most of the 20th century, policy reform relied extensively on "administrative law" doctrine adapted by Brazilian jurists mainly from French legal discourse.[3] In the decades spanning from the 1930s to the 1990s, the evolution of this administrative law provided legal language to policy reform agendas, including investment planning of old-style developmentalism.[4] Subsequently, from the 1990s until the onset of the 2007-2008 global economic crisis, far-reaching pro-market reforms have been carried out[5] with the help of institutional conceptions essentially inspired in American legal ideas and institutions.[6] Yet, alongside administrative law doctrines that were instrumental to the pro-market reforms of the 1990s and early 21st centuty, misgivings about such legal discourse have also grown in Brazil.[7]

More recently, a newer line of legal argument has developed which goes beyond criticisms of previous legal conceptions and seeks *alternatives* to the doctrinal and institutional setup that emerged since the 1990s. This most recent line of doctrinal and analytical elaboration has tended to gain more traction after the eruption in 2007-2008 of a global economic crisis.

This article offers a description of these more recent arguments about the relations between the law, policy reform and economic development in Brazil. Such arguments have been characterized by some of its authors as being congenial to a "new state activism" [8] in the field of economic policy. The main question addressed by the present article is: In the case of Brazil, what are the legal conceptions and strategies of legal analysis that have been developed in support of revived activist policy-making? This article therefore discusses legal ideas and strategies of analysis deployed in the context of the "new state activism" in Brazil,[9] as they appear in relevant legal literature. The work also addresses and explores the possible role of such ideas, arguments and analytical strategies in the articulation of policies and the conceptions they imply about the relationship between the law, economic institutions and policy reform.

Two main formulations of the more recent alternative views about the relationship between the law, economic institutions and policy reform are covered in the present article. The first formulation is an approach that bears significant relationship to the so-called "New Law and Development" perspective, which emerged in recent transnational academic work.[10] It is nonetheless distinct in that it tries to explore the potential of building regulatory policy around the legal crafting of *financial flows* while having also a clear doctrinal concern with respect to their economic and social *consequences*. This first kind of doctrinal elaboration and mode of legal analysis can be called the "public capital management" (PCM) approach[11] prime examples of which are found in Schapiro (2010-a), Schapiro (2010-b), Fabiani (2011) and Coutinho (2010).

The second perspective that seeks to advance towards alternative views about the law, policy reform and development is called the "legal analysis of economic policy" (LAEP)[12], which has been advanced in Castro (2007), Castro (2009), Castro (2010) and Castro (2011). The LAEP approach also focuses on the importance of the legal crafting of *financial flows* and on their economic and social *consequences*, but proposes to organize legal ideas around the notions of "contractual aggregates" and of "rights-in-fruition", as applied to human and fundamental rights, including the rights that relate to consumption and those that are at the core of the activities of economic production and commercial exchange.

Section 2 offers a stylized account of works by authors engaged in the legal analysis of practices of allocation of financial resources, namely, the practices concerning (i) the regulation of the commercial credit market, (ii) portfolio investment by a state-controlled development bank and (iii) the organization of a cash-transfer program. The analytical framework of the "legal analysis of economic policy" approach – including its treatment of monetary value transmission in the context of

contractual structures that organize different aspects of economic policy – is discussed in Section 3. Final remarks are offered in section 4.

2. THE 'PUBLIC CAPITAL MANAGEMENT' (PCM) APPROACH

As indicated above, legal scholars have developed a new analytical approach that seeks to respond to a revived "state activism" which has emerged in recent years in Brazil. These scholars intend to address activities of policy reform arising in such context. Much of the work elaborated by authors of this line of legal analysis falls under what can be characterized as the Public Capital Management (PCM) approach. One of the distinct traits of this approach is that it attempts to bring to the fore the importance of the structure of *financial flows* to the realization of legal ends by groups and individuals, thereby promoting both freedom and development.

2.1. DECONSTRUCTING THE REGULATION OF COMMERCIAL CREDIT

Fabiani's work, for instance, sheds light on legal rules and principles that organize credit markets in Brazil, in which commercial banks are central players. According to Fabiani, the credit market in Brazil is an attractive topic of legal research given the fact that it is the "chief source of finance to individuals and legal persons", and yet has offered extremely insufficient and very expensive credit.[13] It is implied that a low volume of credit and high bank spreads bar individuals and groups from seeking to accomplish cherished goals. Thus, due to their influence on both the volume and price of credit offered by commercial banks in Brazil, the structure of the legal rules and principles that support the existence of that market is seen as crucial to the realization of the aspirations of society. Reorganization of the credit market, by means of reforms of the legal rules and principles upon which it relies, is therefore considered a premise of social well-being and economic development. Regulation broadly conceived thus must include a concern with the structure and legal characteristics of the credit market. Also, an upfront concern with outcomes – in this case, effective expansion of credit in tandem with a significant contraction of bank spreads – and their relation to the law is very visible in the approach.

The thrust of Fabiani's work is his careful description and minute analytical deconstruction of the arguments that were offered as the rationale of reforms that have been carried out in the laws of commercial bank credit relations in Brazil, from 1999 to 2006, under the aegis of World Bank recommendations.[14] As Fabiani demonstrates, such recommendations were themselves based on analyses and prescriptions offered by the so-called "legal origins" literature.[15] Fabiani demolishes the whole set of ideas that was used by the World Bank to formulate recommendations, and subsequently by Brazilian monetary authorities to set up and implement reforms from 1999 to 2007. Important criticisms articulated by Fabiani,[16] some of which draw on Milhaupt and Pistor (2008), attack the

following features and justifications of the policy reform implemented under World Bank auspices:

- The building of special protection of creditor rights, including an overhaul of the law of bankruptcy, premised on the thesis (taken from the flawed "legal origins" literature) that such enhanced protection is part of a fixed "legal endowment" posited as necessary to promote economic growth.
- The thesis (also derived from the "legal origins" literature) of institutional convergence of the legal endowment of all market societies.
- The fact that the "legal origins" literature relies on a narrow basis of empirical data, neglecting relevant research according to which civil law jurisdictions may have more developed capital markets than common law jurisdictions.
- The depoliticization of the implementation of reforms, which were treated by policy makers as merely technical.
- The effort to shield policy implementation from judicial scrutiny, which included the drafting of several legislative bills aimed at expanding alternative dispute resolution mechanisms.
- The technical training of judges and attorneys, sponsored by a "technical assistance loan" provided by the World Bank, to insure "correct" implementation of the new bankruptcy law.
- The reductionist view which attaches to certain institutional variables single, necessary outcomes, without considering either (i) that such variables may, in different environments, yield diverse results, or (ii) that a given variable may produce unforeseen results.
- The flawed thesis that there is a necessary, fixed legal "endowment" for market economies, which presupposes that such endowment is "external" to, and never "constitutive" of, markets.
- The lack of attention to the role of informal institutions that in different contexts may exist, as opposed to formal ones, and affect the governance structure of markets.

Fabiani's arguments, therefore, lead him to suggest that the reform of the credit market in Brazil, implemented from 1999 to 2006, had a dimension that has not been openly recognized by Brazilian governments nor by the World Bank. Indeed, Fabiani suggests that it is not farfetched to consider that the World Bank's activity in influencing the reform of the credit market in Brazil was undue political interference, which is prohibited by the bank's own Articles of Agreement. In his comment on the technical assistance loans made by the World Bank in support of the reforms of the Brazilian credit market, Fabiani stresses that "the technicalist transference of legal know-how is intended to bypass the ban on political interference by the [bank] and to legitimize requirements for the granting of loans (...)".[17] The fact that the 1999-2006 reform of the credit market – an area that is crucial to promote the well-being and development of society – came as a result of undue political interference by the World Bank is therefore denounced as being based on slanted and restrictive notions about the role of law in the economy.

2.2. THE LEGAL SIGNIFICANCE OF PORTFOLIO INVESTMENT BY A STATE-CONTROLLED DEVELOPMENT BANK

The works by Schapiro[18] also illustrate the new kind of legal scholarship of the PCM approach. The importance of the analysis of the legal foundations of procedural arrangements that organize certain *financial flows*, and also a concern for the *consequences* of the structure of such flows upon economic and social development, are conspicuous characteristics of his works.

The central focus of the discussions in Schapiro[19] is the study of the relationships between law and finance in comparative perspective with the aim of exploring relatively recent institutional arrangements of financial flows oriented to promote investment and development in Brazil. Schapiro relies partly on the frame of reference established by Hall and Soskice,[20] and also by Gershenkron[21], to highlight relevant institutional differences in financial organization and governance of industrial capital in countries such as the United States, Japan, Germany and Brazil in the second postwar period of the 20th-century. Schapiro also draws on works that explore the evolution of patterns of industrial organization, in particular the shift from a fordist to a post-fordist knowledge-based pattern of industrial development. He points to comparisons of that transition in countries of the global North with the shift from developmentalist to a post-developmentalist style of industrial policy-making in less developed countries. Schapiro is particularly interested in providing legal arguments for the justification, specifically in the Brazilian case, of financial arrangements that serve a post-fordist, post-developmentalist type of industrial organization, described as typical of a knowledge-based economy oriented to "flexible specialization".

Schapiro[22] is then led to articulate legal-economic arguments that uphold certain financial practices chosen by policy-makers in Brazil in the last fifty years in order to boost industrial development policies. Those financial practices in the fields of finance and governance of industrial capital are presented as adequate to local "post-developmentalist" industrial organization. And, as shown by Schapiro, they do not fit orthodoxies prescribed by multilateral institutions which are typically articulated with theoretical backing of the "legal origins" (or "Law and Finance") literature. The innovations adopted since the 1970s and 1980s in Brazil in the areas indicated above involved the special role of the National Development Bank of Brazil (Banco Nacional de Desenvolvimento – BNDE) and were able to offer new ways to provide credit, assess risks and support industrial development. Schapiro sees such innovations as suitable to many developing countries. In his words:[23]

> *Once the narrow criteria of the Law and Finance approach are put aside, the development bank and the financial activity of the state cease to be seen as deviant [practices] and come to be perceived as (...) legal-institutional solution[s], capable of filling the gaps of the private credit market or of the erratic oscillations of the capital market, especially in developing countries.*

In Brazil, the new financial practices included basically institutions of *forced savings* as a source of funding to a powerful national development bank (the BNDE), as well as certain financial innovations that have characterized the strategies adopted by that bank to bolster industrial development since the 1970s. Such strategies are different modalities of credit provision and, above all, of *portfolio investment* and *portfolio management* which have constituted a distinct source of finance and development policies for several industries in Brazil in the last decades.

Therefore, Schapiro criticizes the so-called "institutional convergence" thesis[24] as much as does Fabiani. Moreover, in Schapiro, the refutation of the "institutional convergence thesis" extends to a rejection of the complementary "end of history thesis", applied to corporate law.[25] As explained by Schapiro, "the Brazilian example corroborates another thesis, that of the persistence and of path-dependency of institutional trajectories – which disprove bets on uniformization".[26] According to Schapiro, in the case of Brazil, path-dependence has led to the persistence of the financial innovations mentioned above, as part of a "dense institutional web" of policies that are mutually reinforcing and distinctly favorable to industrial growth.

Schapiro[27] also incorporates insights from Brian Tamanaha[28] and other scholars to add that the "dense institutional web" that influences the economy is the outcome of the multi-faceted processes deriving from the *social embeddedness* of institutions. Thus, Schapiro ends up replacing the notion of a necessary and fixed "legal endowment" of market economies, typically employed in top-down reforms, with the idea that policy-makers should engage in bottom-up institutional experimentation that involves *learning*. This would correspond to a process of change in which reformers would attempt to learn from the evolving relationship between legal institutions and the elements that emerge from their social embeddedness. These elements themselves are considered to result from the mutual influence occurring between the law and "other normative orders", including "cultural patterns, behavioral attributes" and so on.[29]

2.3. ANALYSIS OF A CASH-TRANSFER PROGRAM TO FIGHT POVERTY

Another set of legal ideas developed in the PCM perspective is found in Coutinho.[30] This author is interested in elaborating legal arguments that account for a legal apparatus – or what he calls "legal technology" – which he sees as a necessary mean to overcome high levels of inequality and poverty in Brazil. This "legal technology", according to Coutinho, must exist for any policy. As he puts it, "there is (...) a legal dimension and a wide range of legal tasks to be accomplished behind every public policy".[31] But he chose to explore, as an empirical example, the "legal technology" demanded by the design and implementation of a vast program of conditional cash transfers run by the federal government of Brazil, called *Programa Bolsa Família* (Family Stipend Program) – hereinafter PBF.[32] Coutinho's concern has to do with his claim that the law can be understood as a "regime" that "deeply influences economic production and

distribution, and also shapes macro-economic regulation". Therefore, in his view, the law "is everything but a neutral variable when it comes to inequality and poverty levels."[33]

Coutinho is intent on finding out how to avoid that the institutions and legal norms which comprise the "legal technology" of the PBF remain in practice a "straitjacket that replicates development barriers both from the perspectives of equity and efficiency". [34] The author indicates that building effectiveness of policy requires the ability of jurists to think of, and assess, broader outcomes of reforms carried out in the details of institutions. In order to overcome inequality "embedded" in the pension system, for example, he points to the importance of the re-design of caps, compensations, incentives, procedures etc. oriented to enhance effectiveness of efforts to promote equality. Thus, as much as Fabiani and Schapiro, Coutinho views the law not only as an instrument but also as a "constitutive element" of economic change and of development. But Coutinho offers a broader typology of the roles of law in distributive policies such as PBF.[35] His typology includes the following roles of the law: (i) law as a goal, (ii) law as a tool, and (iii) law as an institutional arrangement.[36]

The first notion ("law as a goal") requires that the jurist engage in the task of identifying qualitative and quantitative goals, explicit values, political economy conceptions and perspectives of development for a given policy. On the other hand, the role of law inherent in the "law as a tool" has to do with the way of determining the legal means which are to be used in the pursuit of goals. Coutinho stresses the fact that in Brazil laws establishing public policies do not always indicate the mechanisms by which they are to be implemented. Thus, he adds jurists have to provide answers to questions about the available possibilities of articulating such mechanisms, the best legal instruments and the most cost-effective solutions regarding the implementation of policies.

Finally, the idea of "law as an institutional arrangement" refers to the function of law in the context of reform of institutions accomplished by the state resulting in a process of organizational change. This implies the building of legal-institutional frameworks which lead to forms of collaboration between public and private actors, and also to intersectoral coordination. Coutinho elaborates on Ha-Joon Chang's views[37] about the functions of institutions in promoting development to suggest that development policies must be legally "managed" so as to ensure that goals become "actions through tools", avoiding overlaps, gaps and rivalries that may frustrate the attainment of legal and economic ends.[38]

2.4. GENERAL CHARACTERISTICS OF THE PCM APPROACH

In sum, Coutinho's view about the relations between law, the economy and development has much in common with those of Schapiro and Fabiani (see above). In thinking about the law and its connections to development, all these authors highlight the importance of the analysis of *financial flows* – be it in the market of short-term credit provided by commercial banks, in policies of incomes transfer to fight poverty

and inequality, or in longer-term industrial credit and industrial capital management and corporate governance arrangements. The three authors are also concerned with the economic and social *consequences* of the legally determined structure of financial flows. Furthermore, all three authors not only admit the instrumental dimension of the law in its relationship to development, but also stress the "constitutive" role of the law in the organization and reform of markets. Finally, they all point to multiple open-ended possibilities of experimentation with institutional reform crafted by legal analysis in the different policy fields they chose to address.

3. THE 'LEGAL ANALYSIS OF ECONOMIC POLICY' (LAEP)

3.1. CONSUMPTION RIGHTS, PRODUCTION RIGHTS AND OTHER NEW LEGAL IDEAS

The characteristics of the law as conceived by the PCM approach and the conceptions about the relation of legal structures to economic outcomes are also present in the LAEP approach. But this latter perspective has also its own distinguishing formulations.

The LAEP approach proposes that all market economies can be legally analyzed as different combinations of "contractual aggregates" that organize production, exchange and consumption. While the economy is viewed as a set of practices by means of which these three kinds of economic activity are structured, economic policy is understood to be the set of legally instituted rules and principles that organize many crucial aspects of such practices.[39] Even if some portions of economic institutions result from private negotiations and contracts, according to the LAEP approach they interact with, and to varying degrees depend on, the existence of norms and organizations shared by the wider community under the form of legal rules and principles that reflect the wider public interest. Moreover, under the LAEP perspective, public interest may generate legal prescriptions that are added to private contracts by means of the legal process, as will be discussed below.

In the LAEP perspective, contractual aggregates are analytical tools, not fixed, unchanging facts. As much as lawyers specializing in antitrust law can refer to "relevant markets" [40] as analytical constructs, jurists engaged in the legal analysis of economic policy may consider legally and economically relevant "contractual aggregates". Moreover, under the LAEP approach it becomes important for regulation to describe and manage intellectually what is conceived as "contractual architectonics" and its social and economic impacts in given empirical contexts. Intercontractual relations, being selected by reference to the definition of an empirical field of economic activity which the jurist chooses to examine, become relevant to the legal analysis of regulation.

The LAEP approach also rejects notions of rights taken either as metaphysical entities (e.g., natural rights) or as normative conceptions

definitely established by positive law. Neither does the LAEP approach accept as useful any notion of abstract, decontextualized right. The LAEP view develops, instead, a special focus on "rights-in-fruition", a term which refers to the enjoyment of rights as an experience occurring in a specific context. Rights-in-fruition, therefore, always presuppose different patterns of contextualized social and institutional relations, many of which in the form of contractual interaction. This does not mean that the LAEP approach addresses only forms of small-scale, communal economy, for the "context" of economic action and rights enjoyment may vary from a small village to cross-border institutional platforms (such as international regimes) and even the cyberspace. In the latter case, the "context" would imply choice of information architecture, internet governance and so on.

According to the LAEP perspective, economic production and commercial exchange revolve around the enjoyment, by economic actors, of "production rights", which refer to rights as legal footholds of activities related to economic production and exchange. "Consumption rights", on the other hand, are a legal reference for practices that acquire meaning (cultural, moral, religious etc.) from the activities by which actors *expend*, and are not purposefully engaged in the production or commercial exchange of, economic goods and services. Thus "production rights" are always equivalent to some form of "commercial property", whereas "consumption rights" may take the form of several kinds of noncommercial (individual or shared) property and also of what are often called "social rights" or "economic, social and cultural rights" (ESCRs). Both production rights and consumption rights, of course, are forms of fundamental and human rights addressed by national constitutions and international treaties.

Two main analytical strategies are developed by the LAEP approach. The first is called "positional analysis" and refers to the empirical analysis of "rights-in-fruition" in a given empirical context. The second analytical strategy is the "new contractual analysis". In what follows, positional analysis will be described. Subsequently, an account will be given of the "new contractual analysis" and some of its implications with respect to the role of legal analysis in different legal fields.

3.2. POSITIONAL ANALYSIS

As mentioned above, "positional analysis" aims at characterizing and assessing the enjoyment of a legal right in a circumscribed empirical context. Positional analysis therefore addresses what the LAEP approach calls "rights-in-fruition". As already noted, this term designates the empirical experience of the enjoyment of rights. Rights-in-fruition come into existence in intersections of more or less stabilized patterns of social and institutional action performed by individuals, groups and authorities crisscrossing over one another. Such patterns of social and institutional action are legally expressed in contractual aggregates, which are analytical constructs designed by the jurist in light of a defined research

interest. A contractual aggregate is also typically complemented by a "social compact", which articulates commitments by governments to implement a certain policy reform agenda.[41] Examples would be the reform of the public health system, the overhaul of a tax system or the reform of financial regulation. In democracies, social compacts express several aspects of the public interest, articulate political trust and are often an ingredient of general social cooperation.

A "position" is an intersection of social and institutional action where the enjoyment of a right is brought into existence, or is partially or completely impeded. Property is itself a "position" where the enjoyment of a right is in some measure experienced. In so far as it enables economic action, a right-in-fruition involves the enjoyment of either a production right or of a consumption right. One such right must be chosen by the jurist as an analytical target. Positional analysis proceeds by accomplishing several analytical tasks that are described as follows:[42]

(1) *Referring public policies to rights as their legal renderings.* Health policy, for example, may be referred to the "right to health" (a consumption right), and/or to the right of intellectual property (such as a patent, which is a production right), that may underlie the provision of certain health services. Similarly, a housing policy may and should be legally connected to the "right to housing" (a consumption right) and/or to the "right of property" of real estate developers (a production right). Depending on the analytical interest of the jurist, he or she will select which connections to make between "rights" and "policies"[43] in light of a defined research interest.

(2) *Analytical breakdown of the relational contents of rights.* In this analytical task, the jurist is called upon to indicate what relevant patterns of social and institutional action are deemed necessary to the effective enjoyment of a right. In the case of the "right to housing", for example, the provision by the community or by the state (or even by hired private businesses) of security, public utilities infrastructure (energy, water/sewage, telecommunications), the monitoring of local environmental and sanitary conditions, and maintenance of roads and bridges near to one's dwelling – in sum, the provision of several combined services – may be considered essential to the enjoyment of the right by an individual or family or residents of a city district. In deciding what should be counted as actions or services deemed necessary for the enjoyment of a right, the jurist may work with a community of right holders and/or look for guidance in legal materials, including relevant judicial argument[44] and documents drawn from the international law of human rights.[45]

(3) *Quantification of empirical rights-in-fruition in a narrowly circumscribed empirical situation.* Overall, quantification can profit from recent discussions on the measurement of human rights compliance and further innovations brought to this field.[46] Here some hypothetical examples of exercises in quantification are offered. Again, in a situation involving the "right to housing" in a given

neighborhood, empirical research can measure the provision to the right holder of services of security, public utilities, maintenance of roads etc. In order to accomplish this part of the analysis, the jurist may produce original data by direct measurement and/or may cooperate with government agencies or civil society or professional organizations[47] to use existing data and databases. A quantified "index" of empirical effectiveness (IEE) referring to the enjoyment of a legal right may then be generated. Castro[48] suggests a hypothetical example of an IEE for the right to housing in Brazil that would factor in the measured provision of clean water, energy, sewage, security services and the like.[49] The formal representation of such index could be

$$H = \frac{3S + 2W + X + Y + Z}{8}$$

where H refers to the right to housing, S stands for security services, W stands for the supply of clean water, X, Y and Z represent any other services focused by the research (such as the supply of energy, sewage etc.). The formal representation of each service may be weighted (as can be seen in the above example), with the weights being derived from recorded perceptions of rights holders. It may also be convenient that the IEE be elaborated as a composite, resulting from the aggregation of sub-indices. Thus in the example above, H would be a composite of other measurements expressed in formal representations such as

$$S = \frac{P + O + I + S + C}{U}$$

where S stands for "security services", P represents the number of police stations in a defined city area, O stands for the number of police officers working in the service, I stands for the quantity and quality of information technology infrastructure of the police in the city area covered by the research, W represents the average wage paid to each police officer (again, in the city area covered by the research), C stands for the number of police cars employed by the police and U represents the number of residential and business units covered (or the population served) by the security services in question. Similar detailed measurements of water and energy supply etc. (indicating amounts and quality of supply per household and per business unit) could be elaborated in order to generate the final composite index H.

(4) *Quantitative definition of a "right fruition benchmark" (RFB)*. Such definition results from incorporation of rights-holders' claims and opinions about shortfalls in the enjoyment of a legal right under a participatory research project or and under an experimentalist governance arrangement.[50] The RFB elaborated as part

of the exercise of legal analysis may also be developed from benchmark indications contained in statutes or other legal or technical materials,[51] including those produced by international bodies. IEEs generated in comparative empirical research conducted in different districts of a city, and indicating drastic inequalities between districts in the fruition of a right, may also provide the basis for the elaboration of an RFB designed to diminish or suppress such inequality.

(5) *Elaboration of mutually complementary policy reform proposals.* If there is significant discrepancy between the RFB and the IEE in a given, narrowly circumscribed situation, the jurist must propose reforms to the legal framework that underlies the relevant policies, aiming at insuring the effectiveness (empirical fruition) of the analytically targeted legal right. This would be equivalent to the production of what Coutinho[52] would call an appropriate "legal technology". Since reforms are aimed at insuring rights effectiveness in the specific sense of empirical fruition, which always occurs locally, they must be planned from the bottom-up and may offer a chain of projected reforms at "higher" levels of normative references. Thus, for example, reform of a local statute intended to ensure the empirical fruition of the right to health, or the right of commercial property underlying the economic activities of small enterprises, may entail reform of a central government statute, a different interpretation of the national constitution, and even require amendments to international trade law. Similarly, the reform of a local law aimed at securing the effectiveness of the right to food in a circumscribed community may require the reform of laws and regulations adopted by the central government, and even of rules and principles regarding international cooperation in the area of financial regulation. The latter situation would be one in which food prices in consumer markets are affected by swings of prices of financial assets. This would be the case, for example, of international cooperation regarding schemes such as the World Bank's Agriculture Price Risk Management (APRM).[53]

Positional analysis, comprising the analytical steps described above, is intended to generate a picture of "shortfalls" in the enjoyment of fundamental and human rights by individuals and groups. However, the "mutually complementary policy reform proposals" (step 5 above) taken as an outcome of the analysis certainly benefits from, and should incorporate, insights generated by the "new contractual analysis", also developed by the LAEP approach.

3.3. THE NEW CONTRACTUAL ANALYSIS

Indeed, the second major analytical strategy of the LAEP approach is called the "new contractual analysis".[54] Whereas conventional contractual analysis tends to focus on the adherence of a given transaction to the "law of

contracts", jurists engaging in the new contractual analysis will be interested above all in intercontractual relations and in analyzing "contractual architectonics" formed within or among analytically selected contractual aggregates. The main concern of the jurists working in the LAEP perspective will be with the social and economic *consequences* of the current structure or architecture of contractual aggregates, including impacts that tend to "freeze" certain individuals or groups – or, for that matter, the inhabitants of whole regions – into certain "positions" within the national or the global economy. The freezing of individuals or groups into unwanted "positions" is viewed as an outcome – perhaps an unintended consequence – of "shortfalls" in the enjoyments of legal rights. Therefore, those contractual architectures that offer special incentives to certain disadvantaged social or economic groups are a matter of interest to jurists working under the LAEP approach, in so far as such incentives are aimed at securing the fruition of fundamental and human rights in light of a proposed RFB. And this must take into account both real-economy and monetary contractual contents, as explained in the paragraphs below.

The new contractual analysis proposes that jurists must concentrate on the description of the mix of contractual contents present in contractual aggregates, as revealed by resort to an ideal-typical set of contractual clauses used as an analytical tool. This means to say that, under the LAEP approach, economically relevant contracts are deemed to combine two kinds of contractual clauses that are treated as ideal-typical:

- the utility clause (U clause), and
- the monetary clause (M clause).

The content of the U clause refers to goods or services produced in the real economy, while the content of the M clause will always be an amount of money or financial asset transacted in consideration of the content of the U clause. Moreover, the difference between real-economy contracts and financial contracts lies in that, in the latter type of contract, the content of the U clause will not be real-economy goods or services, but will be transacted money or a transacted financial asset. Thus, for example, a real-economy contract by means of which a gallon of milk is sold to a consumer, the milk itself is the U content, whereas the price paid for that good is an M content. But in a *financial* contract whereby money is lent by a bank to a borrower, the M content is the interest (plus other possible fees) charged to the borrower, while the sum of money lent (not a real-economy good or service) is the U content.

Another feature of the new contractual analysis is the distinction between private interest contents and public interest contents of both the U clause and the M clause. Private interest contents are those chosen by contracting parties through private bargaining. Public interest contents, by contrast, are those established by institutionalized "negotiations" legally required to follow procedures that intrinsically promote broad publicity of all aspects of content determination. Such public procedures are typically those of the legislative process, the judicial process and the administrative and regulatory processes. Thus, any economically relevant contract and contractual aggregate may be analyzed by reference to

the template of Figure 1 (see below), where U' and M' are "public-interest contents" of the general U clause and the general M clause respectively.[55]

	U CLAUSE	M CLAUSE
Private interest	U	M
Public Interest	U'	M'

Figure 1: The new contractual analysis
Source: Castro, 2011: 42

Now, it is a contention of the LAEP approach that all contemporary market economies are mixed economies, since a vast majority of contracts combine both private-interest and public-interest contents in both the general U clause and in the general M clause.[56] Indeed, in contemporary market economies no business can produce or sell, say, pharmaceutical drugs, automobiles, smart phones or television sets without a host of regulations (in areas such as public health, environmental protection, consumer protection and so on) coming into play. All such policies add public-interest contents to the U clause of contracts. They are therefore U' contents and can only be suppressed or modified by means of public procedures subject to public legal oversight: they cannot be changed or cancelled by means of private contractual bargaining.

But there are M' contents as well. Indeed, another crucial aspect of market economies, shown by the new contractual analysis, is that taxes and interest rates must appear as M', which is distributed – sometimes quite randomly, but ideally they should follow an overall policy plan – across contractual aggregates. Assessing such distribution of M' contents in terms of their impact on the ability of rights holders to effectively enjoy their rights thus becomes a matter of interest to jurists working under the LAEP approach. Hence such jurists must develop an analysis of the distribution of M', including what may called "strategic M' contents", throughout relevant contractual aggregates, as will be described below.

In fact, under the LAEP approach, it becomes easy to understand that, in principle, all economically relevant contracts carry an interest rate (the so-called base rate) as M'.[57] Since, in their ordinary operation, banks engage in transactions in the interbank market and decide where to allocate funds – whether in government securities carrying a given interest rate or some other asset, such as short-term interbank debt etc. – the base rate is contractually transmitted to all other contracts banks engage in and thus to consumer credit, corporate credit and so on. In practice, of course, the base rate ends up being gobbled up into the price expressed as M in virtually all contracts, including financial contracts and real-economy contracts, but it must be analytically set apart.

In a manner similar to the analytical treatment of interest rates, tax charges and tax credits must also be regarded as M' contents. Moreover, it must be expected that the magnitude of such tax-related M' contents will vary from contract to contract depending on tax policy. It is tax policy that attaches tax charges or tax credits to what may otherwise be characterized as the enjoyment of a right. As in the case of interest rates, tax charges and tax credits are scattered throughout contractual aggregates. Moreover, as also occurs in the case of interest rates, due to business practices, tax charges usually end up being incorporated into the price (M) of contracts and are intercontractually transmitted, but for purposes of legal analysis they must be indicated separately so that possible policy reforms may benefit from accurate accounts of allocation of financial resources and M' liabilities, as well as their impacts in terms of fundamental "rights fruition" in the context of given contractual architectures.

Major exceptions to this structural condition of contracts, by which the base interest rate and tax charges are intercontractually transmitted throughout contractual aggregates, can be found in two instances that are also constant features of contemporary market economies. The first exception has to do with interest rate transmission in those contractual transactions that are benefited by contracts carrying "strategic" interest rates, such as in the case of industrial or agricultural policies, below-market interest rates offered by export-credit agencies and many other instances. Strategic interest rates, of course, offer special incentives to production, exchange or consumption by groups that otherwise would not be able to enjoy important (in some cases, fundamental) rights, resulting in a situation of economic injustice. From the standpoint of rights fruition, the adoption by the government of strategic tax incentives or disincentives (e.g., tax breaks or surcharges etc.) has consequences analogous to those of intercontractually transmitted interest rates.

The second major exception to the structural condition of contracts, mentioned above, is the fact that, in some markets – most prominently in labor markets and in consumer markets – the game of incorporating M' contents into the price (M) of contracts is relatively or completely obstructed. This happens either because of slanted legal rules that allocate more power to one type of stakeholder (e.g., the employer vis a vis the employee in determining how the cost structure – including wage costs – of investment is to be organized) or because of the fact that the interest in consumption, rather than in exchange, defines a closure point to price signals transmission in a given contractual aggregate.

In the latter case, which is that of final consumption, consumers cannot carry M' over to M contents of whatever further contracts they engage in, since the goods or services consumed are *expended*, not exchanged. In fact, the ordinary final consumer can only attempt to incorporate M' into the M content of one kind of contract: his or her employment or labor contract, since labor is the only commodity an ordinary final consumer is able to sell. However, as already noted, legal rules in labor markets tend to be slanted in ways that will enable employers in many instances to effectively resist wage increases. The laws of collective

bargaining, as is well known, tend mitigate this structural disadvantage of workers in many contemporary market economies. Wage earners typically engage in collective bargaining in order to attempt to transform part of the M content of their employment contract in an M' content (they also often seek to establish U' contents of their liking). The so-called minimum wage (an M' content in employment contracts), in turn, typically results from demands channeled directly through the legislative process of democracies and cannot be bargained down privately.

3.4. CONSEQUENCES FOR THE ANALYSIS OF DIFFERENT LEGAL AND ECONOMIC FIELDS

The development of both the positional analysis and the new contractual analysis, briefly described above, allow for the formation heightened awareness of the legal significance of facts and circumstances in diverse fields of law and economic policy, including exchange rate policies, different kinds of financial regulation, antitrust law and international trade law.

Thus, for example, the influence of exchange rate fluctuations on different contracts of the economy will become clear under the new contractual analysis. An important focus of legal analysis in this case will have to do with choices made by public finance policy-makers in the crafting of regulations bearing on foreign exchange contracts (i.e., contracts by which foreign currencies are bought and sold). Therefore, exchange rate-based policies that promote certain interests become visible. Hedges against exchange rate volatility in certain contracts, which may in some cases be mandated by law, may begin to be perceived as a "strategic" financial policy, depending on the general goals in light of which such policy comes to be developed.

On the other hand, financial regulations (U' in financial contracts) affecting different kinds of real-economy contracts and more generally the impacts of such regulations on prices of financial contracts – e.g., the impact of the so-called "capital requirements" of the Basel Accords[58] on bank spreads in different financial environments, as well as the possible "procyclicality" of the adopted Accord rules[59] – all become subject matters of great interest to jurists concerned both with development and human rights effectiveness, since U' in financial contracts can positively or adversely affect the ability of individuals or groups to negotiate, through contractual bargaining, their way out of unwanted positions within the economy. In themselves, unwanted positions, in which individuals or groups may become economically "trapped" or into which they may become "frozen", can be analyzed by means of "positional analysis" and usually are an indication of "defective" enjoyment of fundamental and human rights by affected right holders.

The LAEP approach also has implications for legal analysis in the fields of antitrust law and competition policy. Indeed what is conspicuously absent from the dominant style of antitrust law analysis are concerns with equity resulting from regulation of business. Equity in

this case can be understood as the quality of a set of policies that enables a right holder, given his or her current "position" within relevant contractual aggregates, to "move" into other preferred positions, merely by means of contractual bargaining.

In should not be neglected that, in its late 19th-century context, antitrust law was developed in the United States against a background of debates that opposed Jeffersonian and Hamiltonian views of society and economy.[60] Included in the concerns addressed by policy makers in that context were distributional and equity considerations bearing on the effects of economic concentration.[61] Subsequently, antitrust analysis influenced by microeconomic analysis has by and large marginalized what was called above "intercontractual relations" connecting U' and M' contents within and among contractual aggregates. The point is that, given its adherence to microeconomic premises, the dominant analytical style in competition policy tends to exclude the possibility of explicitly associating this policy with industrial policy, development policy or social policy and their relation to fundamental and human rights fruition. Competition policy and antitrust law therefore tend to miss opportunities to articulate the promotion of *fair business practices* with policy reforms that enhance the enjoyment of fundamental and human rights, including both production rights and consumption rights. These would be the kinds of policy reform that could result from the LAEP approach to the relationship between law and the different mixed economies existing in the world.

Similarly, in the field of international trade law, the LAEP approach yields some general and unorthodox perceptions. They have to do with the fact that international trade law, as developed on the basis of the General Agreement on Tariffs and Trade of 1947, has grown around the so-called "principle of non-discrimination".[62] Such principle, being projected in the "most favored nation principle" and in the "national treatment principle", mandates that economic agents be treated equally even when they are radically unequal. Indeed, less developed countries often have less capacity to foster technological innovation, have little or no access to international credit, lack institutions or a culture adequate to promote the growth of capital markets and so on. They are, in short, not equal to the rich and more developed countries. In reality, many less developed countries are unwillingly cornered into unwanted "positions" within contractual aggregates. The laws of international trade, therefore, should not be built on the principle of non-discrimination, which sidetracks notions such as "special and differential treatment", relegating them to the status of mere exceptions to the core principle of the normative system governing international trade relations. By giving a central role to the requirement that economic policy must be organized so as to promote the enjoyment of both consumption rights and productions rights, positional analysis combined with the new contractual analysis could help policy makers view many trade policy issues in a new light.

The LAEP perspective also has some bearing on what can be envisaged as legal aspects social policy design and interest rate setting. Indeed,

according to the LAEP perspective, given the existence of growing international competition and increasing cross-border capital flows, the adoption of RFBs for "consumption rights" in countries eager to promote social justice by drastically and quickly expanding the enjoyment of ESCRs may take a toll on the ability of the local economy to compete internationally.[63] Thus reforms in the policy areas concerning "production rights" should require that the M' component of RFBs must be pegged to an interest rate index that compounds selected yields of financial markets (e.g., markets for financial derivatives) and capital markets (stock exchanges).[64] This results from the fact that, in the context of open economies, a persistent lag between the return to productive investment and interest rates may negatively affect capital formation and even cause disinvestment and capital flight. According to the LAEP approach, the contractual architectonics of the national economy must "balance" the protection of consumption rights with the ability of commercial property holders to keep a competitive edge in the global economy. For this reason, an index or "basket" of interest rates taken from the most important financial markets around the world must remain an important reference for the formulation of RFBs applied to the enjoyment of "production rights" and for the conduct of international commercial or monetary cooperation. Moreover, in the reform efforts oriented to enhance the protection of consumption rights, interest rates prevailing in relevant public finance arrangements attendant to such reforms must also be considered in legal analysis.

The upshot is that, in elaborating RFBs applied to the enjoyment of "consumption rights", jurists must not neglect macroeconomic relations between consumption and production. However, in doing so, jurists do not need to – they certainly had better not – rely on existing macroeconomic models. After all, such models cannot accurately anticipate what the aspirations and strategies are of people acting through contractual aggregates. Nor are such models able to represent intellectually the potentially infinite possibilities of reform and revision of private-interest and public-interest contractual contents. Jurists working in the LAEP perspective therefore accept the post-Keynesian view according to which expectations matter and the future cannot be fully anticipated.[65]

Nonetheless, for jurists working under the LAEP approach, some relations between statistical data representing economic facts are worth paying attention to. An important example is that of international differentials among base interest rates. Indeed, under the LAEP perspective, large international disparities among base interest rates become a prominent topic of legal research and debate since such disparities are indications that the capability of businesses in high-interest rate economies to compete internationally is impaired by the inability of local investors to enjoy "production rights" with M' contents of local contractual aggregates that are commensurate with M' contents of foreign contractual aggregates. Thus disparities as those that prevailed in 2011 among the interest rates of countries such as Brazil (11%), Argentina (9.98%), South Africa (5.5%), the Euro Area (1.75%), the United Kingdom

(0.52%) and the United States (0.12%)[66] are not legally acceptable and must be criticized.

All this leads to the view that "good" regulation does not have to do with whether there is "more" or "less" state intervention in the economy. In the LAEP perspective, good regulation is not a matter of *quantity* of state intervention, but of the legally determined *quality* of policy design, as reflected in the structure public-interest contents (U' and M') of contractual aggregates. It is the legally appropriate mix of U, M, U' and M' contents in contractual aggregates, leading to balanced and full enjoyment of both production and consumption rights, that yield "good" regulation and thus also "fair" policy reform.

In sum, the work carried out under the LAEP approach must combine both "positional analysis" and the "new contractual analysis" in order to assess regulatory frameworks and propose reforms that may promote overall improvements in the balanced and effective enjoyment of consumption rights and production rights in a given sector or even in a national or regional economy. The LAEP approach also provides new legal language that may be useful in raising issues that are relevant both for legal and economic (including macroeconomic) aspects of the regulatory process. Finally, work developed under the LAEP approach also offers new legal ideas and analytical arguments that may be useful in negotiations taking place in several international bodies and policy network.

4. FINAL REMARKS

In the last few years, new legal conceptions have emerged in Brazil. They came in a context of a far-reaching global economic crisis that has affected many economies, but somewhat less the so-called emerging markets. Although they stress the need for the state to have an active role in the provision of legal means of development, the new arguments and analytical strategies in recent Brazilian legal discourse are realistic enough to recognize the utter limitations of the doctrinal constructs that provided legal grounds to the old developmetalist style of policy-making. In a world of international capital mobility and fluctuating exchange rates, the gist of the old developmentalism – its emphasis on the virtues of investment planning, as exemplified in the II National Development Plan launched in the late 1970s – no longer makes sense. The old developmentalism also expected too much from technocratic knowledge, which excluded the possibility of dealing with the unknown and trying out new policy and governance arrangements. The more recent legal discourse in Brazil is working to develop new ideas and analytical strategies in the field of law and its connections to economic outcomes in contexts about which complete knowledge is not possible, given that fact that the motivations and actions of individuals and groups cannot be fully anticipated.

On the other hand, in contrast to the bodies of legal literature that came in support of the pro-market reforms of the 1990s and early 21st-century in Brazil, the more recent formulations are concerned with

developing analytical means for assessing both the economic structure and the outcomes of policy reform. The most influential legal literature that came is support of pro-market reforms of the 1900s and early 2000s in Brazil was formalist. It never developed a consistent concern for empirically verifiable economic and social consequences of policy reform.

The new legal perspectives – the PCM and the LAEP approaches – are resolutely consequentialist and have an interest in incorporating empirical analysis into the work legal analysis. They seek to shed light on the development consequences of the legal organization of public and private finance. Both look at how the legal foundations (rules and principles) of public and private finance may offer new ways to shape policies that may serve production and exchange under normative frameworks that prod international competitiveness of local economies while also legally safeguarding forms and levels of consumption resulting in enhanced "social inclusion".

Ultimately, both the PCM and the LAEP approaches refuse to take as a valid analytical category an abstract concept of "market", which is widely used by economists. The PCM and the LAEP approaches instead take the law with its richness of principles, rules, procedures, institutions, to be a constitutive element of economic relations. They also adamantly reject the notion that only those institutions that serve markets abstractly conceived should be deemed legally valid. As is revealed by the criticism leveled by the PCM approach against the "legal endowment" thesis propagated by international legal literature, and as is clear from the insistence of the LAEP approach on the idea that "potentially an infinite number of different 'market economies' may be made to exist at will"[67] – both of the newer perspectives of legal analysis view legal institutions and ideas being essentially conventional, pliable, provisional. The corollary of this view of legal institutions and ideas is that, given their extreme plasticity, such institutions and ideas should unhesitatingly be molded by the desire of the human spirit to be free.

>> ENDNOTES

[1] See *The Guardian*, 2012, Jan 2, "Rail fare rises take effect"; Clark, N., "Help fight fare rises and push for railway renationalization". *In*: *The Guardian* (2012a), Jan 2; Bom Dia Brasil (2011), "Aumento da mensalidade escolar ultrapassa índice da inflação"; *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, Case CCT 39/09, 2009.

[2] See Bonnet *et al.* , 2012.

[3] On the French origins of Brazilian administrative law, see Castro, 2012:174-177 and Castro (forthcoming 2013).

[4] For an example of the view that Brazilian administrative law must be oriented to aid investment planning and economic development, see the lecture on the transformations of legal education originally published by Caio Tácito in 1970 and republished in Tácito, 2007.

[5] For a comprehensive description of such reforms, see Organisation for Economic Co-Operation and Development (OECD), 2008. For an analysis of the political process underlying such reforms, see Castro/Carvalho, 2003: 478-482.

[6] Cf. Schapiro/Trubek, 2012: 36. See also Nunes *et al*., 2007: 20-49.

[7] See, for example, Faria, 1993; Grau, 2002; Nusdeo, 2002; Coutinho, 2002; Salomão Filho, 2002; Faria, 2008; Aranha, 2010; Carvalho, 2010.

[8] Trubek/Coutinho/Schapiro, 2013.

[9] Sometimes such new state activism is called neodevelomentalism. See, e.g., Morais/ Saad-Filho, 2011.

[10] The main reference here are the works published in Trubek/ Santos, 2006. See also works published in Schapiro/ Trubek, 2012. For an overview of the Law and Development literature, see Prado, 2010.

[11] The appellation "public capital management" is not in the literature. It is a descriptive shorthand used in the present article.

[12] Castro, 2007; Castro 2009; Castro 2010; Castro, 2011.

[13] Fabiani, 2011: 17-18.

[14] Fabiani, 2011: 97-124.

[15] The "legal origins" literature (also called "Law and Finance" literature) emerged since the 1990s. One of the basic tenets of that body of literature has been that common law jurisdictions are more market-friendly than civil law jurisdictions, being the latter characterized as inherently prone to more interventionist forms of economic governance. For a summary of the literature, its main arguments and empirical work, see LaPorta/Lopes-de-Silanes/Schleifer, 2008. For a critical appraisal, see Roe, 2006. The arguments of the "legal origins" literature have been relied upon by the World bank to justify some of its policies. Cf. Santos, 2006: n. 90/280.

[16] Fabiani, 2011: 97-124.

[17] Fabiani, 2011: 117-118. Unless otherwise indicated, translations appearing in the text and taken from works originally published in Portuguese are mine.

[18] Schapiro, 2010-a and Schapiro, 2010-b.

[19] See Schapiro, 2010-a

[20] See Hall/Soskice, 2001.

[21] See Gerschenkron, 1962.

[22] See Schapiro, 2010-a: 169 *et seq*.

[23] Schapiro, 2010: 264.

[24] See Schapiro, 2010-a: 281-290.

[25] See Schapiro, 2010-a: 282-284. The "end of history thesis" applied to corporate law can be found in Hansmann/ Kraakman, 2004.

[26] See Schapiro, 2010-a: 286.

[27] See Schapiro, 2010-b.

[28] Tamanaha, 1995.

[29] See Schapiro, 2010-b: 241.

[30] Coutinho, 2010.

[31] Coutinho, 2010: 4.

[32] The *Programa Bolsa Família* was instituted by a 2004 statute, the Law no. 10836/2004, which revamped, and consolidated several previously existing incomes transfer programs.

[33] Coutinho, 2010: 6.

[34] Coutinho, 2010: 17.

[35] Coutinho draws on Rittich, 2004, to elaborate his typology of the roles of the law.

[36] See Coutinho, 2010: 23-24.

[37] See Chang (2001). Understanding the Relationship between Institutions and Economic Development - Some Key Theoretical Issues. WIDER Discussion Paper No. 93, UNUWIDER. This work has been republished as Chang, 2007.

[38] See Coutinho, 2010: 23-24.

[39] See Castro, 2007 and Castro, 2009.

[40] About which see Pitofsky, 1990.

[41] See Castro, 2009: 34-40.

[42] The analytical tasks are specified in Castro, 2009.

[43] Establishing analytically relevant linkages between public policies and legal rights may be commonplace in common law jurisdictions, but it is not so in civil law jurisdictions, where the categories of policy analysis, surprisingly until the present day, tend to remain quite separate from legal discourse. This separation is so strong that it has justified special but still limited efforts by jurists to overcome it. An example of such effort to explicitly establish a "legal concept" of public policy in Brazil can be found in Bucci, 2006. See also Bucci, 2002.

[44] The Constitutional Court of South Africa, for example, in its landmark *Grootboom* case, considered the provision of services such as sewage and refuse removal as part of the "right to housing". In the language of the court, "housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling." See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

[45] An example in the area of the "right to housing" would be U.N. Doc. E/1992/23, annex III at 114 (1991). As indicated therein, "both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: 'Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost'".

[46] For an overview of relevant debates, see Rosga/Satterthwaite, 2009. See also United Nations Development Program, 2006 and Landman/ Carvalho, 2009.

[47] Examples in point would be: the Federation of Women Lawyers – Fida-Kenya, in the Republic of Kenya, British Nepal Medical Trust and the Women's Global Network on Reproductive Rights (WGNRR) acting in the Netherlands. These three organizations have engaged in the

practice of Human Rights Impact Assessment (HRIA) related to health rights of women in local contexts. See Bakker *et al*., 2009.

[48] Castro, 2009.

[49] Examples in point would be: the Federation of Women Lawyers – Fida-Kenya, in the Republic of Kenya, British Nepal Medical Trust and the Women's Global Network on Reproductive Rights (WGNRR) acting in the Netherlands. These three organizations have Human Rights Impact Assessment (HRIA) related to health rights of women in local contexts. See Bakker *et al*., 2009.

[50] See, e.g.„ experiences of policy reform described in Sabel/Zeitlin, 2012.

[51] In Brazil, for example, the National Education Plan, introduced in 2001 by a federal statute (Law no. 10172/2001) established a goal that placed all public schools under the formal obligation to have its internal bodies approve, in a period of three years, a detailed "Pedagogical Plan". See Castro, 2009: 45.

[52] Coutinho, 2010. See discussion in section 2.3 above.

[53] See the announcement of the APRM program in The World Bank Group, 2011. The announcement made explicit reference to the launching of a "debut facility" in partnership between the International Finance Corporation (IFC), which belongs to the World Bank Group, and the J. P. Morgan banking corporation. For a discussion of cooperation initiatives that promote the adoption of hedging techniques using derivative markets and private actors in the derivatives industry, see Bush, 2012.

[54] See Castro, 2007 and Castro, 2011.

[55] The designation "general" applied to the "U clause" or to the "M clause" covers both private and public interest contents of such clauses.

[56] See Castro, 2010.

[57] See Castro, 2011: 43-44.

[58] The original 1988 Basel Accord on banks' capital requirements have been revised twice. The latest version (Basel III) was published in 2010. See Basel Committee on Banking Supervision, 2010.

[59] For an argument that the rules of Basel II were "procyclical" (by which is meant that they tended to reinforce the movements of the business cycle), see Drumond, 2009. In legal terms, procyclicality of course adversely affects the enjoyment of rights both by holders of consumption rights and holders of production rights. The downward swing of the business cycle may throw individuals and groups into unwanted "frozen" positions. With the help of the LAEP approach, what to do about perceived procyclicality of some policies becomes not only an economic but also a *legal* issue.

[60] This paragraph draws on Castro, 2010.

[61] See Sullivan/ Harrison, 2003. In this sense, these authors stress that "Jeffersonianism found expression in the congressional debates culminating in the passage of the Sherman Act". See idem, p. 3.

[62] See Trebilcock/House, 1995: 26-30.

[63] This point is articulated in Castro, 2009: 52-60.

[64] Idem, ibidem.

[65] As put by Paul Davidson: "[E]conomic decisions are rarely made on anything like a clean slate. As different individuals or groups approach the same economic circumstances with different 'slates,' so their expectations and hence their decisions may also differ. Post Keynesians, therefore, emphasize the role played by this heterogeneity of expectations, as well as the importance of the fact that future events cannot be fully anticipated." See Davidson, 1980:158.

[66] Figures are for short-term interest rates percent per annum. Source: Principal Global Indicators (PGI) published by the International Monetary Fund (IMF), available at http://www.principalglobalindicators.org/. Visited on May 5, 2012.

[67] See Castro, 2010: 36.

>> REFERENCES
BOOKS AND ARTICLES

Aranha, Márcio Iorio (2010). "Virtude Política e Abertura Estrutural das Agências Reguladoras: O Caso das Telecomunicações". *In*: Cláudia Fernanda de Oliveira Pereira (ed.). *O Novo Direito Administrativo Brasileiro*. Belo Horizonte: Editora Fórum, 167-191.

Bakker, Saskia *et al*. (2009). "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)". *Journal of Human Rights Practice*, vol. 1, no. 3, 436-458 doi:10.1093/jhuman/hup017.

Bonnet, Céline *et al*. (2012). "Empirical Evidence on Satisfaction with Privatization in Latin America". *World Bank Economic Review* 26/1, 1-33 doi:10.1093/wber/lhr037.

Bucci, Maria Paula Dallari

(2006). "O Conceito de Política Pública em Direito". *In*: Maria Paula Dallari Bucci (ed.). *Políticas Públicas: Reflexões sobre o Conceito Jurídico*. São Paulo: Editora Saraiva, 1-49.

(2002). *Direito Administrativo e Políticas Públicas*. São Paulo: Editora Saraiva.

Bush, Sasha Breger (2012). *Derivatives and Development: A Political Economy of Global Finance, Farming, and Poverty*. New York: Palgrave Macmillan.

Carvalho, Vinícius Marques de (2010). "Regulação Econômica e Serviços Públicos". *In*: Mario Gomes Schapiro (ed.) *Direito Econômico Regulatório*. São Paulo: Editora Saraiva, 21-77.

Castro, Marcus Faro de

(forthcoming, 2013). "Economic Development and the Legal Foundations of Regulation in Brazil". *Law and Development Review*.

(2012). *Formas Jurídicas e Mudança Social: Interações entre o Direito, a Filosofia, a Política e a Economia*. São Paulo: Editora Saraiva.

(2011). "Direito, Tributação e Economia no Brasil: Aportes da Análise Jurídica da Política Econômica". *Revista da PGFN*, vol. 1, no. 2, jul./dez., 23-51.

(2010). "Liberalism, Competition and Rights: Towards a New Vision of Market-Oriented Legal Reforms". *In*: Miodrag Micovic (ed.). *Liberalism and the Protection of Competition* [original book title in Serbian]. Kragujevac: Graduate Program of the Faculty of Law of Kragujevac, 33-47.

(2009). "Análise Jurídica da Política Econômica". *Revista da Procuradoria-Geral do Banco Central do Brasil*, vol. 3, no. 1, junho, 17-70.

(2007). "A Função Social como Objeto da Análise Jurídica da Política Econômica". *Notícia do Direito Brasileiro* 14, 107-128.

Castro, M. F. / Carvalho, M. I. V. de (2003). "Globalization and Recent Political Transitions in Brazil". *International Political Science Review* 24, 465-490.

Chang, Ha-Joon (2007). "Understanding the Relationship Between Institutions and Economic Development – Some Key Theoretical Issues". *In*: Ha-Joon Chang (ed.). *Institutional Change and Economic Development*. Tokyo/London: United Nations University Press/Anthem Press, 17-33.

Coutinho, Diogo R.

(2010). "Linking Promises to Policies: Law and Development in an Unequal Brazil". *The Law and Development Review*, vol. 3, no. 2, May, 3-40 doi: 10.2202/1943-3867.1055.

(2002). "A Universalização do Direito Público para o Desenvolvimento como uma Tarefa da Regulação". *In*: Calixto Salomão Filho (ed.). *Regulação e Desenvolvimento*. São Paulo: Malheiros Editores, 65-123.

Davidson, Paul (1980). "Post Keynesian Economics". *The Public Interest*, special edition, 151-173.

Drumond, Ines (2009). "Bank Capital Requirements, Business Cycle Fluctuations and the Basel Accords: A Synthesis". *Journal of Economic Surveys*, vol. 23, no. 5, 798–830 doi: 10.1111/j.1467-6419.2009.00605.x.

Fabiani, Emerson (2011). *Direito e Crédito Bancário no Brasil*. São Paulo: Editora Saraiva.

Faria, José Eduardo

(2008). *Direito e Conjuntura Econômica*. São Paulo: Editora Saraiva.

(1993). *Direito e Economia na Democratização Brasileira*. São Paulo: Malheiros Editores.

Gerschenkron, Alexander (1962). *Economic Backwardness in Historical Perspective*. Cambridge: Belknap Press of Harvard University Press.

Grau, Eros Roberto (2002). "As Agências, Essas Repartições Públicas". *In*: Calixto Salomão Filho (ed.). *Regulação e Desenvolvimento*. São Paulo: Malheiros Editores, 25-28.

Hall, Peter/Soskice, David (2001). *Varieties of Capitalism*. Oxford: Oxford University Press.

Hansmann, H./Kraakman, R. (2004). "The End of History for Corporate Law". *In*: J. N. Gordon, M. J. Roe (eds.). *Convergence and Persistence in Corporate Governance*. Cambridge: Cambridge University Press.

Landman, Todd/ Carvalho, Edzia (eds.) (2009). *Measuring Human Rights*. Abingdon: Routledge.

LaPorta, R./Lopes-de-Silanes, F./Schleifer, A. (2008). "The Economic Consequences of Legal Origins". *Journal of Economic Literature*, vol. 46, no. 2, 285–332.

Milhaupt, Curtis/Pistor, Katharina (2008). *Law & Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World*. Chicago: University of Chicago Press.

Morais, L./Saad-Filho, A. (2011). "Da Economia Política à Política Econômica: O Novo-Desenvolvimentismo e o Governo Lula". *Revista de Economia Política*, vol. 31, no. 4 (124), October-December, São Paulo, 507-527.

Nunes, Edson de Oliveira *et al.* (2007). *Agências Reguladoras e Reforma do Estado no Brasil: Inovação e Continuidade no Sistema Político-Institucional*. Rio de Janeiro: Garamond.

Nusdeo, Fábio (2002). "Desenvolvimento Econômico: Um Retrospecto e Algumas Perspectivas". *In*: Calixto Salomão Filho (ed.) *Regulação e Desenvolvimento*. São Paulo: Malheiros Editores, 11-63.

Pitofsky, Robert (1990). "New Definitions of Relevant Market and the Assault on Antitrust". *Columbia Law Review*, vol. 90, no. 7, November, 1805-1864.

Prado, Mariana Mota (2010). "What is Law and Development?". *Revista Argentina de Teoria Jurídica*, vol. 1, October, 1-20. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907298>. Accessed: November 20, 2011.

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

Roe, Mark J. (2006). "Legal Origins, Politics and Modern Stock Markets". *Harvard Law Review*, vol. 120, 460-627.

Rosga, Ann J./Satterthwaite, Margaret L. (2009). "The Trust in Indicators: Measuring Human Rights". *Berkeley Journal of International Law*, vol. 27, no. 2, 253-315.

Sabel, Charles/Zeitlin, Jonathan (2012). "Experimentalist Governance". *In*: David Levi-Faur (ed.). *The Oxford Handbook of Governance*. Oxford: Oxford University Press, 169-183.

Salomão Filho, Calixto (2002). "Regulação e Desenvolvimento". *In*: Calixto Salomão Filho (ed.) *Regulação e Desenvolvimento*. São Paulo: Malheiros Editores, 29-63.

Schapiro, Mario G. (ed.)

(2010). *Direito Econômico Regulatório*. São Paulo: Editora Saraiva.

(2010a). *Novos Parâmetros para a Intervenção do Estado na Economia*. São Paulo: Editora Saraiva.

(2010b). "Repensando as Relações entre Estado, Direito e Desenvolvimento: Os Limites do Paradigma *Rule of Law* e a Relevância das Alternativas Institucionais". *Revista Direito GV*, vol. 6, no. 1, Jan-Jun., 213-252.

Schapiro, M. G./Trubek, D. M. (eds.) (2012). *Direito e Desenvolvimento: Um Diálogo entre os BRICs*. São Paulo: Editora Saraiva.

Sullivan, Thomas E./Harrison, Jeffrey L. (2003). *Understanding Antitrust and Its Economic Implications*. Newark: LexisNexis / Mathew Bender.

Tácito, Caio (1997). "O Desafio do Ensino do Direito". *In*: C Tácito. *Temas de Direito Público (Estudos e Pareceres)*. Rio de Janeiro: Editora Renovar, 1st volume, 27-37.

Tamanaha, Brian (1995). "An Analytical Map of Social Scientific Approaches to the Concept of Law". *Oxford Journal of Legal Studies*, vol. 15, no. 4, 501-535.

Trebilcock, M./Howse, R. (1995). *The Regulation of International Trade*. London: Routledge.

Trubek, D. M./ Coutinho, D. R./ Schapiro, M. G. (2013). "Towards a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions". *In*: Hassane Cissé, Sam Muller, Chantal Thomas and Chenguang Wang (eds.). *World Bank Legal Review*, vol. 4, pp. 281–251.

Trubek, D. M. / Santos, A. (eds.) (2006). *The New Law and Economic Development*. Cambridge: Cambridge University Press.

CASES

Lindiwe Mazibuko and Others v City of Johannesburg and Others, Case CCT 39/09 (2009) ZACC 28. Date of Judgment: 8 October 2009. Available at <http://www.constitutionalcourt.org.za/Archimages/13884.DOC>. Accessed: Jan. 30, 2012.

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169. Date of Judgment: 4 October 2000. Available at: <http://www.saflii.org/za/cases/ZACC/2000/19.html>. Accessed: Jan. 20, 2013.

NEWS ORGANIZATIONS

Bom Dia Brasil (2011). Aumento da mensalidade escolar ultrapassa índice da inflação. Available at: <http://g1.globo.com/bom-dia-brasil/noticia/2011/11/aumento-da-mensalidade-escolar-ultrapassa-indice-da-inflacao.html>. Accessed: Jan. 30, 2012.

Clark, Neil (2012). Help fight fare rises and push for railway renationalization. *In*: *The Guardian*. Available at: <http://www.guardian.co.uk/commentisfree/2012/jan/02/fare-rises-railway-nationalisation?intcmp=239>. Accessed: Jan. 30, 2012.

Guardian, The (2012) Jan 2, Rail fare rises take effect. Available at: <http://www.guardian.co.uk/uk/2012/jan/02/rail-fare-rises?cat=uk&type=article> Accessed: Jan. 30, 2012.

OTHER SOURCES

Basel Committee on Banking Supervision (2010). Basel III: A global regulatory framework for more resilient banks and banking systems. Available at: <http://www.bis.org/publ/bcbs189_dec2010.htm>. Accessed: May 2, 2012.

International Monetary Fund (IMF). Principal Global Indicators (PGI). Available at: <http://www.principalglobalindicators.org/>. Accessed: May 5, 2012.

Organisation for Economic Co-Operation and Development (OECD) (2008). *Brazil: Strengthening Governance for Growth.* OECD Reviews of Regulatory Reform. Available at: <http://www.regulacao.gov.br/publicacoes/livros/oecd-reviews-of-regulatory-reform-brazil>. Accessed: Feb. 5, 2012.

The World Bank Group (2011). "World Bank Group Announces New Instrument to Help Food Producers and Consumers in Developing Nations Deal with Volatile Prices". Press Release No:2011/559/EXT. Available at : <http://go.worldbank.org/T7EA0VLHG0>. Accessed: Dec. 10, 2012.