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**Inequality and the Subversion of the Rule of Law in Brazil**

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## Inequality and the Subversion of the Rule of Law in Brazil

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### Abstract

The main objective of this essay is to try to understand the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the rule of law: that people should be treated impartially by the law and by those responsible for its implementation. The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, obliterates legal impartiality, causing the *invisibility* of the extremely poor, the *demonization* of those who challenge the system, and the *immunity* of the privileged, in the eyes of individuals and institutions. In synthesis, extreme and persistent social and economic inequality erodes reciprocity, both in the moral and the mutual advantage sense, thus impairing the integrity of the rule of law.

### Resumo

O principal objetivo desse artigo é procurar entender os efeitos, no sistema jurídico, da polarização entre pobreza e riqueza, especialmente com relação a uma das idéias centrais do Estado de Direito: a noção de que as pessoas devem ser tratadas de maneira imparcial pela lei e por aqueles encarregados de sua implementação. O argumento principal proposto aqui é que a exclusão social e econômica, decorrente de níveis extremos e duradouros de desigualdade, destrói a imparcialidade da lei, causando a *invisibilidade* dos extremamente pobres, a *demonização* daqueles que desafiam o sistema e a *imunidade* dos privilegiados, aos olhos dos indivíduos e das instituições. Em suma, a desigualdade sócio-econômica extrema e persistente

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corrói a reciprocidade, tanto em seu sentido moral quanto como interesse mútuo, o que enfraquece a integridade do Estado de Direito.

## 1. Introduction

How does profound and persistent social and economic inequality impact the integrity of the rule of law? The main objective of this essay is to try to understand the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the rule of law: that people should be treated impartially by the law and by those responsible for its implementation. The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, obliterates legal impartiality, causing the *invisibility* of the extremely poor, the *demonization* of those who challenge the system, and the *immunity* of the privileged, in the eyes of individuals and institutions. In synthesis, extreme and persistent social and economic inequality erodes reciprocity, both in the moral and the mutual advantage sense, thus impairing the integrity of the rule of law.

This paper is divided into four sections, followed by some conclusions. In the first part I summarize a substantive and a formalist conception of the rule of law, and try to understand why this ideal has become almost unanimously embraced in our times. The challenge in the second section is to provide at least some explanation of why states and people would comply with the rule of law standards discussed in the first section. The third part will consider the impact of extreme and persistent inequality on the rule of law. In this section I will draw on my familiarity with the Brazilian experience - and this is not an entirely arbitrary choice. Although it may claim a reasonably modern legal system and an independent judiciary, in accordance with most of the so called virtues of the rule of law, Brazil holds a mixed record in terms of compliance with the rule of law, especially on how the law is implemented. One explanation for this is inequality. I hope the reference to Brazil will not jeopardize my intention to draw some more general conclusions about the relationship of the rule of law and inequality. My final section will not be pessimistic, however. The focus will be on how even an incomplete rule of law system can be employed or challenged to empower the *invisible*, humanize the *demonized*, and bring the *immune* back to the realm of law.

## 2. The concept of the Rule of Law

The idea of the rule of law has become almost unanimously embraced in our time. It has served as an extremely powerful ideal for those fighting authoritarianism and totalitarianism in the last two decades, and is considered by many to be one of the main pillars of a democratic regime (O'Donnell 2004). For human rights advocates, the rule of law is perceived as an indispensable tool to avoid discrimination and arbitrary use of force (Vieira 1996). At the same time, the idea of the rule of law — revived by libertarians like Hayek in the middle of the twentieth century — was fervently espoused by international financial agencies and legal development aid institutions as a fundamental prerequisite for the establishment of efficient market economies (Carothers 2006: 3-13). On the other side of the political spectrum, even Marxists, who in the past viewed the rule of law as merely a formal super-structural mechanism to preserve the power of elites, began to recognize it as an unconditional human good (Thompson 1987:357). It would be hard to find any other political ideal praised by such a diverse audience. But the question is: are we all praising the very same idea? It is clear that people are either talking about different concepts of rule of law or are emphasizing distinct characteristics of a more abstract notion of the rule of law.

The classical concept of rule of law was subjected to severe reevaluation in the first two decades of the last century. Thinkers like Max Weber warned us of the process of deformalization of law, as a consequence of transformations in the public sphere, in *Economy and Society* (1984: 603-20). The years that followed Weber's work were marked by tense intellectual and political struggle over the capacity of the *Rechtsstaat* to comply with the new challenges posed by the social-democratic Weimar Constitution. This struggle is exemplified in the debate between conservatives such as Carl Schmitt and social democrats such as Franz Neumann (Unger 1979: 225-228). Hayek responded to these sceptical perspectives about the rule of law in his influential *The Road to Serfdom* (1944).

For Hayek, state intervention in the economy and the growing discretionary power of bureaucrats to establish and pursue social goals threatens economic efficiency; as a consequence of transformations in the functions of the state, law declined as a substantial instrument in the protection of liberty. The notion that the state had not only the obligation to treat its citizens equally before the law, but also to ensure substantive justice, was accompanied

by the argument by new legal theorists that the traditional concept of rule of law had become incompatible with the new reality. Different theories of law such as positivism, legal realism or jurisprudence of interest, constructed a desubstantialized notion of law, liberating the state from the inherent limitations imposed by a substantive concept of law.

To overcome this situation of “oppression”, where the state can coerce its citizens - through normative acts - without the necessity of justifying its action in a general and abstract law, it would be necessary to return to the origins of the rule of law. For this purpose Hayek revisited history and established a list of essential normative elements of the rule of law as the instrument *par excellence* for securing liberty. On his version, rule of law cannot be compared to the principle of legality developed by administrative law, because it is a material conception, concerning what the law ought to be. It is therefore a meta-legal doctrine and a political ideal that would serve the cause of freedom, and not a mere conception of a government acting in accordance with norms. The rule of law should be structured, according to Hayek, by the following elements: a) law should be general, abstract, and prospective, so the legislator cannot arbitrarily choose one person to be the target of legal coercion or privilege; b) law should be known and certain, so citizens can plan ahead - for Hayek this is one of the main factors contributing to the West’s prosperity; c) law should be equally applied to all citizens and government officials, so the incentive to enactment of unjust laws decreases; d) there should be a separation between the law-givers and those with the power to apply the law, judges or administrators, so that rules will not be made with particular cases in mind; e) judicial review of the administrative discretionary decisions should be possible to correct any misapplications of the law; f) legislation and policy should be also separated, and state coercion be legitimised only by legislation, to prevent the coercion of citizens for individual purposes; and g) there should be a non-exhaustive bill of rights to protect the private sphere (Hayek 1990: 87-97).

Thus, Hayek’s conception of the rule of law embodies a substantive conception of law, a strict notion of separation of powers, and the existence of liberal rights to guarantee the private sphere. Rule of law is therefore modelled to serve as an instrument to protect private property and a market economy. The major problem with this conception is that the rule of law becomes captive of this particular political ideal.

In reaction to this and other kinds of substantive formulations of the rule of law, such as the more socially oriented one that resulted from the Delhi Congress of the International Commission of Jurists in 1959, Joseph Raz proposed a more formalist conception, which would avoid the confusion between several social or ideological goals and the intrinsic virtues of the rule of law. For him, “if the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function“ (Raz 1979: 211).

For Raz the rule of law in a broader sense “means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it” (Raz 1979:212). Raz’s construction requires that laws should be understood as general rules, so they can effectively guide actions. In this sense law is not just a fact of power, but it needs to have a particular form. Raz, however, does not shift to the position espoused by Hayek that only abstract and general rules can constitute a rule of law system. For Raz, it would be impossible to govern with general rules only; any concrete system must be composed of general and particular rules, which in turn should be consistent with the general ones. To comply with the objective of a legal system that can guide individual action, Raz creates his own list of rule of law principles, according to which laws should be prospective, open, clear, and relatively stable; and the making of particular laws should be guided by open, stable, clear and general rules.

But these rules will only make sense if there are institutions responsible for their consistent implementation, so that law can become an effective rule to guide individual action. Raz’s construction, therefore, requires the existence of an impartial and congruent, because if rules are reasons for action, and the judiciary is responsible for applying these rules, then it would be futile to guide one’s action by the law if the courts could take other reasons that are not the law into consideration when adjudicating cases. For the same reason principles of due process, such as fair hearings and impartiality, should be contemplated. Rule of law also requires that courts should have the power to review acts of the other branches of the government, to ensure conformity with the rule of law. Courts must be easily accessible so as not to frustrate the rule of law. Lastly, the discretionary powers of crime prevention agencies should not be allowed to pervert the law, in the sense that neither the prosecutor nor the police

should have the discretion to allocate its resources to combat crime on other bases than those established by the law (Raz 1979: 216-17).

From this perspective, the idea of the rule of law is a formal concept according to which legal systems can be measured not from a substantive point of view, such as justice or freedom, but by their functionality. The main function of a legal system is to serve as a secure guide for human action. And that is the first reason why a formalist concept of rule of law, such as the one formulated by Raz, receives broad support from different political perspectives. It is extremely valuable for governments in general to have an efficient tool for guiding human behaviour. However, the adaptability of a formalist conception of the rule of law to different political perspectives does not mean that it is compatible with all kinds of political regimes. By favouring predictability, transparency, generality, impartiality and granting integrity to the implementation of law, the idea of the rule of law becomes the antithesis to arbitrary power (Raz 1979: 220). So the distinct political perspectives that embrace the rule of law have in common an aversion to arbitrary use of power. This is another explanation why the rule of law is embraced by democrats, liberal egalitarians, neo-liberals and human rights activists alike. Regardless of their differences they are all in favour of curbing arbitrary rule. In an open and pluralist society, which offers space for competing ideals of the public good, the notion of the rule of law becomes a common protection against arbitrary power.

There is, however, a less noble explanation for this broad support for the rule of law which we should be aware of. Since the rule of law is a multifaceted concept, if we take each of its constitutive elements separately they will be extremely valuable to the advance of different and some times competing values or interests, like market efficiency, equality, human dignity or freedom. For those pushing for market reforms the idea of a legal system that provides predictability and stability is of the utmost importance. For democrats, generality, impartiality and transparency are essential, and for human rights advocates equality of treatment and the integrity of law enforcement agencies are indispensable. So, what also helps explain the attraction of so many to the rule of law is the partial reading of a multifaceted concept made by distinct political conceptions. Therefore when we find someone praising the rule of law we must be cautious and check whether they not favouring only those characteristics of the rule of law that support the social goals they want to advance.

### 3. Compliance with the Rule of Law

A significant problem with the kind of conceptualisations of the rule of law outlined above (both substantive and formalistic) is that they do not help us understand which are the external (social, economic or political) conditions that favour the adherence of a legal system to the rule of law and thus compliance by both state officials and individuals with the law. That is why Maravall and Przeworski are so disappointed with the kind of juridical laundry lists discussed above, which they regard as “implausible as a description” and “incomplete as an explanation” (2003: 11). So the first challenge facing us is to try to understand which conditions or mechanisms trigger adherence to the rule of law. Why would any government with indisputable control over the means of coercion submit itself to the rule of law? And why would any of us comply with the law? Let us start with the first question.

#### 3.2. Why would a ruler adhere to the rule of law?

According to Holmes, Machiavelli’s main thesis on this issue is “that governments are driven to make their own behaviour predictable for the sake of cooperation. Governments tend to behave as if they were ‘bound’ by law, rather than using law unpredictably as a stick to discipline subject populations... because they have specific goals that require a high degree of voluntary cooperation...” (Holmes 2003:20). So law will be used parsimoniously by the ruler to gain cooperation from specific groups within society, which the ruler would not have without showing some respect for their interests. As the ruler needs more support, more groups will be included under the umbrella of the law, and in exchange for their support they will benefit from predictable treatment by the ruler.

Liberalism and democracy demand the expansion of the rule of law to newly legally entitled individuals. Indeed, this is how the rule of law evolved from the Middle Ages, by slowly extending legal standing to different groups. The Magna Carta is perhaps the first symbol of this process of expansion of legal entitlements that has culminated in the International Bill of Rights in the twentieth century and in the rights charters of contemporary constitutional democracies.



The distribution of rights, which empowers people, is therefore a key device to obtain cooperation. T.H. Marshal, in his classic work *Class, Citizenship and Social Development* (1969), gives a clear description of the evolution of citizenship through the inclusion of people under the wings of law in western countries. New groups struggled to achieve legal status through the extension of civil, political, social and economic rights, acquiring different levels of inclusion under the rule of law, in return for their cooperation. So even if we cannot conflate rule of law with citizen rights, it is very difficult to historically dissociate the expansion of citizenship from the extension of the rule of law. Generality of the law and impartial implementation of the law, as internal virtues of a rule of law system, are directly associated with the notion of equality before the law that is obtained by expansion of citizenship (Bendix 1964: 92).

In contemporary democratic regimes, where legitimacy and cooperation are dependent on high levels of inclusion, rights tend to be distributed more generously. However even a democratic regime does not need cooperation from every group on equal terms, so it has no incentive to treat everyone equally under the law all the time. More than that, since groups hold disproportional social, economic and political power in society, the cost of their cooperation will also be disproportionate, which means that law and its implementation may be shaped in terms of different clusters of privileges, rather than on the principles of the rule of law.

This means that any approximation of the idea of rule of law depends not just on the expansion of rights on paper, but also, and perhaps more critically, on how consistently these rights are implemented by the state. This is the paradox faced by several democratic regimes with high levels of social inequality, such as Brazil. Although equal rights are recognized on the books, governments do not feel constrained to comply with the obligations correlated to these rights on equal terms for all society members. And since the costs of claiming the implementation of rights through the rule of law system are disproportionately larger for some members of society than for others, the rule of law becomes a partial good, favouring mostly those who have the power and resources to demand it from the state and to take advantage of it. In other words, the formal equality provided by the language of rights does not necessarily convert into equal access to the rule of law or impartial implementation of laws and rights.<sup>1</sup> So it is possible to have rights, but not sufficient resources to claim their implementation. Therefore it is more appropriate to think of the rule of law not in terms of existence or non-existence, but in

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<sup>1</sup> I thank Persio Arida for this observation.

terms of degrees of inclusiveness. Democratic processes can expand the rule of law. But even in democratic regimes, in societies with extreme levels of inequality, where people and groups possess disproportionate resources and power, the rule of law tends to be less able to protect the poor and to make the powerful accountable to the law.

However, the control of state power and its submission to the rule of law is not only a consequence of how power is socially distributed. In modern societies, institutions are created to shape behaviour through numerous forms of incentives. Institutions can also be designed to check each other. As perceived by Madison, when ambition is disposed to restrain ambition, the possibility of keeping the government under control is increased (Hamilton, Madison and Jay 1984, ch. 51). Foundational moments then become very important. When competing social powers are not sufficiently strong to overcome each other, they tend to compromise on the creation of political structures with fragmented powers. The least empowered groups can benefit from these struggles. This is the basic logic that informs modern constitutionalism.

However, the rule of law aims for more than having government under legal or constitutional control. It also intends to guide individual behaviour and social interaction. Therefore it is also necessary to explore why people would comply with the law. What are the reasons that we all take in to account before complying with the law?

### 3.2. Why would people comply with the law?

*Cognitive reasons.* The first set of reasons for individual compliance with the law is cognitive, and concerns our ability to understand the basic concepts of law, such as the notions of rules and rights. Without such basic cultural assumptions we cannot think about the possibility of respecting the law. This is not a trivial matter. In many societies the concepts that people are endowed with equal rights, and that the law should be impartially enforced, are often contrary to day-to-day experience. Class privileges and hierarchical entitlements are entrenched in different cultural systems, making the experience of the generality of law unobservable. Besides understanding the structural function of basic legal concepts, it is important that people have an understanding of the basic rules that govern their own societies, and of their own

obligations and rights. In societies with large concentrations of poverty and illiteracy, this condition is very difficult to achieve.<sup>2</sup>

*Instrumental reasons.* The second set of reasons for complying with the rule of law is linked to our ability to think instrumentally, to calculate the risks and potential benefits of the actions we intend to perform. People respect the law and the rights of others in order to obtain rewards or escape punishment. Taking a narrow instrumental view, respect for the law is reinforced if disrespecting it is clearly damaging to one's pocket, freedom, image, physical well being or integrity, and if respecting it is likewise beneficial for the same reasons. To have instrumental value, the rule of law must make one better off. Through this instrumental reasoning, individuals seek to maximize social and economic utility. Two instrumental reasons bear discussion in this context – fear of state coercion and mutual advantage reciprocity.

To the extent that people fear and expect punishment or reward from the state they tend to respect the rule of law. This could be called the Hobbesian argument. State coercion can be an effective instrument for the rule of law in some circumstances and is also a necessary condition because some degree of antisocial behaviour will always exist that cannot be otherwise controlled. Impunity that is caused by state inefficiency, corruption or selectivity jeopardizes the threat of coercion as a means of obtaining compliance. It should also be taken into account that the state, in many circumstances, has to be provoked by individuals before it exercises coercion. People must often file complaints, bring lawsuits, or inform the police about certain unlawful facts in order for the state to take action. So lack of resources or distrust of authorities can have a strong impact on the mobilization of state power, allowing those who do not comply with the law to act with impunity.

It would be untenable for any society to bear the cost of the level of state coercion needed to ensure compliance with all legal standards. Imagine, for instance, if the threat of a fine or prison were the only reason people did not run red lights or commit other crimes. The experience of totalitarian states shows that to achieve obedience by surveillance is both immensely expensive and, even if the costs could be borne, absolutely undesirable.

Instrumental reasons for compliance with the law should therefore extend beyond the state coercion framework. People are part of social spheres, groups and communities that shape and determine their actions (Galligan 2007: 310-26). Hence a second instrumental reason for respecting the law is an expectation of reprisal or benefit from a community or a

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<sup>2</sup> In this respect it is important to notice that the level of knowledge about the political constitution in South America is very low; just 30% of Latin Americans know something/much about their fundamental law, and only 34% have knowledge about their duties and obligations, Latinobarometro, 2005, p. 14.

social sphere to which one belongs or circulates in. Deceit in the market or in marriage can have serious consequences. Credibility is a major asset in any group. Losing it by breaking the law could damage one's position, curtailing one's capacity to engage in new relationships with other members of that social sphere. That is why people usually act in accordance with the law even in the absence of state authority (Ellickson 1991:281-83).

In a mutually advantageous relationship, the golden rule is that I do not do to others what I would not like them to do to me. Not being a substantive moral principle, this neither affirms nor denies the existence of a deeper moral framework. Mutually advantageous relationships, however, can help to obtain compliance with the law, but even if only on fragile terms. Even within a structure that is supposed to be designed for mutual advantage, in circumstances of disparity of power, individuals may have an incentive to cheat: what is in my interest is that everybody else cooperates and I defect (Barry 1999: 51). Peer pressure can also be problematic, because the social environment can be infused with a culture of non-compliance or, worse, the internal culture of obedience challenges the rule of law, as in the case of the mafia and other forms of organized crime enterprises. Consequently, instrumental reasons represented by coercion or mutual advantage, both of which are essentially self-interested, cannot fully explain why people would comply with the law. However necessary, instrumental reasons are insufficient as a condition for the rule of law.

*Moral reasons.* Morality has been neglected by most recent analyses of the efficacy of the law, especially those advanced by formalist legal thinkers or rational choice researchers (Becker 1968: 169-217). In this sense, Lon Fuller's claim that moral reciprocity is a fundamental element for the existence of a legal system becomes particularly interesting (Fuller 1969: 21-25). The establishment of the rule of law would be considerably easier in those societies in which individuals value others and their rights to the same extent that they value themselves. These rights, equally distributed, are not a gift from heaven, but a social construction; a decision made by the community to value individuals on equal terms, and to ground the exercise of power on these basic rights (Habermas 1996: 119). This means that collective decisions are only valid if they derive from the will of autonomous individuals, and if they respect the sphere of human dignity delineated by these same rights (Habermas 1996: 82).

In a system in which there is a moral commitment to the rule of law each citizen has the status of a rights holder, and is recognized as such by other citizens and the state. In this sense, respect for the rights of others is the fundamental basis for the generalization of expectations

that leads to the establishment of the rule of law. As these expectations of respect for everyone's rights become generalized, the establishment of an authentic rule of law also becomes possible.

One can argue, however, that reciprocity always has a utilitarian origin, that is, my respect for others does not arise from the fact that I ascribe them some value (Kantian reciprocity), but from the fact that we have entered into a non-aggression pact that serves our interests (Hobbesian reciprocity). As I have argued above, there is a difference between moral reciprocity based on the notion of human dignity and mutual advantage reciprocity, based on strategic calculation. Going back to the traffic light example, according to the moral notion of reciprocity, I would stop my car because I firmly believe that other drivers or pedestrians have the same right that I have to cross the junction in safety, therefore I have a concomitant obligation to stop. In a community bound by moral reciprocity, based on rights, law would be easier to implement. It is therefore far more difficult to build moral reciprocity in a society characterized by profound social and economical disparities among its members, because these deep inequalities make the sense of reciprocity necessary for the rule of law difficult to achieve.

The idea of morality, however, could be more formal, as found in contractual authors like Rousseau. In this case, the moral justification for compliance with the law does not derive from the fact that a given legal system is in harmony with a pre-established set of values entrenched by rights. Compliance is due to the fact that citizens themselves, under a fair procedure, *produce* the laws that regulate social organization. The fairness of the procedure guarantees that self-interest is neutralised, so that people can make decisions in terms of the public good, which then creates a moral obligation on all citizens to accept the results of the procedure (Rousseau 1955: 339-40). If we follow Rousseau's rule of law theory here, the outcome of such a procedure would be general laws that are inherently fair, due to the fairness of the procedure through which they were legislated. It is also important to stress that procedural justice is not limited to a process that leads to the enactment of general laws, which would be accepted by all participants in the political process, but also on how these laws are implemented by the state. Again following Rousseau, one of the major causes of the decline of democracy is the distortion of the enforcement of general laws by magistrates that tend to advance their own private interests to the detriment of the general will expressed by the law (Rousseau 1955: 418). So the

fairness of the implementation of laws is as important as the fairness of the creation of laws. If the law is not enforced without impartiality, in accordance with the due process standards set forth by the law itself, the rule of law will lose its authority, and consequently people will not take it as an acceptable guide to their action (Tyler 1990).

To summarize the argument advanced in this section, individual compliance with the law is supported by three major sets of reasons: cognitive, instrumental and moral. As I have tried to argue, all these reasons are important in explaining why individuals, both citizens and officials, act in accordance with the rule of law, even though the weight of each reason will vary in conformity to the nature of the action, the actors involved, the circumstances, or the social spheres where the actions are taking place. For the purpose of this essay, the major question to be addressed is how social and economic inequality negatively affects all of these mechanisms.

In the following section, I will argue that inequality obliterates the comprehension and knowledge of basic legal concepts, subverts the enforcement of laws and use of coercion, and acts against the constructions of reciprocity, both on moral and mutual advantage terms. Bearing in mind the three bases for rule of law discussed above, I will try to demonstrate that the Brazilian legal system, although for the most part in conformity with the formal elements of the rule of law, does not achieve impartiality or even congruency. Through an examination of the Brazilian case I will try to demonstrate that a minimum level of social and economic equality among individuals is crucial to the establishment of relationships of reciprocity and the existence of a rule of law system.

#### 4. Inequality and the Rule of Law

In 1988 Brazil adopted a new constitution, after more than two decades under an authoritarian regime. In reaction to the experience of arbitrary rule and a past of social injustice and inequality, the new constitution was forged under the principles of the rule of law, democracy and human rights. Its bill of rights guarantees civil, political, social and economic rights, including the rights of vulnerable groups such as Indians, the elderly and children. These rights receive special protection, and cannot be abolished even by constitutional amendments. Brazil today is part of the main international human rights conventions, which have a direct

effect on the Brazilian legal system. Therefore all the substantive and procedural guarantees of the International Bill of Rights have been incorporated into the Brazilian legal system.

According to the Brazilian Constitution, only the law, enacted by Congress in accordance with the Constitution, can impose legal obligations on individuals. Decrees and regulations issued by the executive are only valid if they are in strict conformity with the law. Every person is “equal before the law”, without any distinction on the basis of class, race, religion, or gender, etc. Laws are prospective, entering into force only after their publication. Retroactive laws are only admitted if they benefit individuals — therefore it is impossible to create a post facto law establishing a crime or a tax, but it is possible to overturn a criminal law, and this abolition will benefit anyone punished by the defunct law in the past. There are no secret laws. In case of emergency the president can enact provisional measures that have to be approved by Congress within a period of sixty days to become law, otherwise they lose their efficacy retroactively to their enactment. In sum, although many Brazilian laws would not pass Hayek’s test of generality, since many of them have a specific and individualized purpose (as do many laws enacted in any post-liberal society), they certainly would be acceptable according to Raz’s formulation of the concept of law, where particular rules are admissible if they are consistent with general rules. Brazilian laws can in general be considered understandable, not contradictory and reasonably stable.

In relation to the institutions responsible for the implementation of law, the Brazilian legal system could also formally be considered to be in accordance with Raz’s requirements for the rule of law. The constitution embodies a system of separation of powers, differentiating between those with the responsibility to create and to apply the law. As in many contemporary systems, a balance of the branches of government is achieved through the separation and partial overlap of powers; the executive has powers to regulate, and to make administrative adjudication in particular areas. The judiciary holds extensive power to review legislation and administrative acts that conflict with the constitution. The legislature has more power than to simply enact general and abstract laws; it can control the executive and investigate malpractice. This flexible notion of separation of powers is similar to what is found in many other democracies.

Although on paper this institutional setting seems to conform to Raz's rule of law model, the Brazilian legal system suffers from a severe lack of congruency between the laws and the actual behaviour of individuals or state officials.

There is today a growing awareness in Brazil that law and rights still play a very minor role in determining individual or official behaviour. According to the 2005 Latinobarometro Report, there is a high degree of distrust in the capacity of the state to impartially implement legislation and, more problematically, only 21% of Brazilians respect the laws themselves<sup>3</sup>. According to Guillermo O'Donnell, most countries in Latin America were not able to consolidate a rule of law system after the transition to democracy. He argues that extreme inequality throughout the region is one of the major obstacles to an impartial implementation of the rule of law. Brazil, as one of the most unequal countries in the continent, could be characterized as an *unrule* of law system (O'Donnell 1998: 37-57).

Democratisation and liberalization were not sufficient to overcome entrenched obstacles to the implementation of the rule of law in Brazil. The failure to significantly improve the distribution of resources and break the very hierarchical Brazilian social fabric have kept law from performing its role as a reason for actions for several sectors of Brazilian society. Brazil stands as the 10<sup>th</sup> largest economy in the world. However it holds one of the worst records in terms of unequal wealth distribution (58.0 Gini index). According to IPEA, a research institute linked to the Ministry of Planning, 49 million people are poor in Brazil, and 18.7 million are in a condition of extreme poverty, out of a population of 186 million people. In the last decade the richest 1% of the population shared almost the same wealth as the poorest 50%. These, among many other indicators of the gross inequalities within Brazilian society, have a strong effect on the impartiality required from institutions responsible for implementing the law in the country. As in many of the countries faced with this degree of inequality, the Brazilian state is usually generous to the powerful, insensitive to the excluded, and harsh to those who challenge the hierarchical stability of society.

#### 4.1. Invisibility, Demonization and Immunity

The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, causes the *invisibility* of the extremely poor, the

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<sup>3</sup> Latinobarometro, 2005. p.17.



*demonization* of those who challenge the system, and the *immunity* of the privileged, obliterating the legal impartiality that is required by the rule of law. In synthesis, extreme and persistent social and economic inequality provokes the erosion of the rule of law's integrity. Law and rights under such circumstances can often appear as a farce, an issue of power for those who are among the lucky few negotiating the terms for those excluded.

*Invisibility* means here that the human suffering of certain segments of society does not cause a remedial moral or political reaction from the most advantaged and does not trigger an adequate legal response from state officials. The loss of human lives and the offence to the human dignity of poor people, although reported and extensively acknowledged, is invisible in the sense that it does not result in a political and legal reaction or encourage social change.

Besides misery itself, and all of its deplorable consequences in terms of rights violations, one of the most dramatic expressions of invisibility in Brazil is the extremely high rates of homicide that victimize predominantly poor populations. As the World Health Organization presented in its last report on violence, Latin America holds the worst record in terms of homicide rates on the planet. Brazil, one of the most violent countries in the region, accumulated more than 800,000 deaths by intentional homicide in the last two decades (IBGE 2005). By comparison, more people become victims of homicide every year in Brazil than in the Iraq war<sup>4</sup>. It is important to note that the vast majority of those killed are poor, uneducated, young black men who live in the Brazilian social periphery (Cardia, Adorno and Poletto 2003: 60). As cautiously demonstrated by Fajnzylber, Lederman and Loayza (2002), there is a robust causal relation between inequality and violent crime rates across countries, including Brazil.

When added to other crime rates, and the fact that many poor neighbourhoods in large cities are controlled by organized crime with the complicity of state officials, these figures send the message that law is not able to serve as a reason for action in some environments, and most of all, that legal constraints, such as the criminal legal system, are insufficient to protect vulnerable groups within society. Obscene levels of impunity for some members of society, besides allowing human losses **among** the poor not to receive an appropriate response from the legal system, reinforce the perverse notion that these lives are not valuable. This vicious circle of elevated levels of violent criminality and impunity brutalizes interpersonal relationships and reduces our capacity for compassion and solidarity.

Invisibility becomes a particularly troublesome trend in a democratized regime and consumer-oriented context. For some of those who have not experienced being treated with

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<sup>4</sup> United Nations estimates that 34,000 Iraqis lost their lives in 2006 against 46,000 in Brazil.

equal concern and respect by those responsible for implementing the law and by society in general, there is no reason to act in accordance with the law. In other words, for those raised among the invisible classes in non-traditional societies, there are less moral or instrumental reasons to comply with the law. In challenging invisibility through violent means these individuals start to be perceived as a dangerous class, to which no protection of the law should be granted.

*Demonization*, the process by which society deconstructs the human image of its enemies who from now on will not deserve to be included under the reach of law, is therefore the result. As in the famous phrase of Graham Greene, they became part of the “torturable classes”. Any attempt to eliminate or inflict harm to the demonized is socially legitimized and legally immune.

To understand the meaning of *demonization* in Brazil we turn our attention to gross human rights violations. The persistence of the arbitrary use of force by state officials, or other armed groups with official complicity, against *demonized* people such as suspects, ordinary criminals, inmates, and even members of social movements is well recorded every year by domestic and international human rights organizations. The press database of the Centre for the Study of Violence of the University of São Paulo, registered more than six thousand cases of the arbitrary use of lethal force by the Brazilian police from 1980 to 2000. Each of these cases resulted in at least one death (Cardia, Adorno and Poletto 2003: 49).

According to the Human Rights Watch 2006 Report, “police violence – including excessive use of force, extra judicial executions, torture and other forms of ill-treatment – persists as one of Brazil’s most intractable human rights problems”<sup>5</sup>. In 2006, the police in the state of Rio de Janeiro alone killed more than one thousand people.

Torture remains a common practice both in police investigations and as a disciplinary method used in the prison system and in juvenile detention facilities. As reported by the former United Nations Special Reporter on Torture, Sir Nigel Rodley:

Torture and similar ill-treatment are meted out on a widespread and systematic basis in most of the parts of the country visited by the Special Rapporteur... It does not happen to all or everywhere; mainly it happens to poor, black common criminals involved in petty crimes or small-scale drug distribution. [...] Conditions of detention in many places are, as candidly advertised by the authorities themselves, subhuman [...] The Special Rapporteur feels constrained to note the

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<sup>5</sup> Human Rights Watch, Word Report, 2007, 185.

intolerable assault on the senses he encountered in many of the places of detention, especially police lock-ups he visited. The problem was not mitigated by the fact that the authorities were often aware and warned him of the conditions he would discover. He could only sympathize with the common statement he heard from those herded inside, to the effect that 'they treat us like animals and they expect us to behave like human beings when we get out'<sup>6</sup>.

Rodley captured in this sentence the essence of *demonization*. Human beings who are treated like animals have no reason to behave lawfully. *Demonization*, besides being a violation of the law in itself, creates a downwards spiral of violence and barbarous behaviour on the part of individuals against each other, which helps to explain not just outrageous homicide rates, but also the extreme cruelty of some manifestations of criminality.

*Immunity* before the law, for those who occupy an extremely privileged position in society, is the third consequence of extreme inequality to be mentioned here. In a very hierarchical and unequal society the rich and powerful, or those acting on their behalf, view themselves as being above the law and *immune* to obligations derived from other people's rights. The idea of immunity can be understood by focusing on the impunity with which human rights violators or of those involved in corruption, who are predominantly among the powerful or the rich, are able to act.

Impunity for human rights violators is endemic in Brazil, as reported by major human rights organizations, and also recognized by federal authorities. Cases like Vigário Geral (1993), Candelária (1993), Corumbiara (1995), Eldorado de Carajas (1996), Castelinho (2002), or the police reaction to PCC attacks in 2006, resulted in hundreds of victims of extra-judicial killings, without any major attempt to bring state officials to account. But perhaps the most notorious case of impunity for a gross human rights violation was the acquittal of Colonel Ubiratan Guimarães by the São Paulo State Supreme Court in 2005. Ubiratan Guimarães was in charge of the police operation that resulted in the death of one hundred and eleven inmates during a prison riot in 1992. After fourteen years no one has been convicted for the "Carandiru Massacre". The State Governor and the Secretary of Security at that time were not even investigated for their involvement in this incident, sending a clear sign that demonized people are not included under the protection of the law.

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<sup>6</sup> [www.unhcr.ch/Huridocda/Huridoca.nsf/0/b573b69cf6c3da28c1256a2b00498ded/\\$FILE/g0112323.doc](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/b573b69cf6c3da28c1256a2b00498ded/$FILE/g0112323.doc)

Immunity is also a pattern for those involved in corruption. Even though Brazil received an overall moderate rating in the Global Integrity Index, published every year by Transparency International - it was ranked as number sixty-two among the 65 nations analysed - the unmet challenge of impartial implementation of the laws cannot be ignored. In the last two decades there have been hundreds of scandals involving politicians, businesses, and members of the judiciary. The enormous majority end in impunity for those involved. In the last ten years, of the twenty-six cases of corruption involving members of the House of Representatives that arrived at the Supreme Court, not a single federal legislator was found guilty. At this exact moment the majority of Supreme Court justices declared unconstitutional the anti-corruption law that allowed politicians and other public officials to be sentenced by trial judges<sup>7</sup>. If this decision is sustained by the Court plenary it is estimated that more than fourteen thousand legal charges against officials around the country will be summarily closed, amplifying the perception that the law does not apply to the powerful in the same way that it is enforced against the disenfranchised.<sup>8</sup>

Disproportional distribution of resources among individuals and groups within society subverts institutions, including those agencies with the responsibility to implement the law. An analysis of the Brazilian penitentiary census shows that the poor and uneducated are selected almost exclusively by the Brazilian criminal system for incarceration. That is the conclusion of Glaeser, Scheinkman and Shleifer, after an econometric analysis of the impact of inequality on institutions of justice: "inequality... enables the rich to subvert political, regulatory, and legal institutions of society for their own benefit. If a person is sufficiently richer than another, and the courts are corruptible, then the legal system will favour the rich, not the just. Likewise, if political and regulatory institutions can be moved by wealth and influence, they will favour the established, not the efficient" (2002: 3). As stated by the Brazilian Deputy General Federal Attorney, "corruption is a direct consequence of the perverse concentration of income in Brazil"<sup>9</sup>. The conclusion is that de facto immunity from the law, although a general phenomena in Brazil, is more prominent among the privileged.

#### 4.2. The Erosion of the Authority of the Law

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<sup>7</sup> Case brought by the former President Fernando Henrique Cardoso, through Reclamação 2138.

<sup>8</sup> Even though the majority of the Supreme Courts Justices already decided that the law is unconstitutional, until the end of the trial they are allowed to change their votes.

<sup>9</sup> Carvalho, cited by Carlos Tautz, Reporter's Notebook: Brazil, Transparency International, 2006.

As the Brazilian experience shows, extreme levels of social and economic inequality that polarize the poor on one side and the affluent on the other create a severe obstacle to the integrity of the rule of law. By fomenting gross power disparities within societies, inequality places the poor in a disadvantaged position, in which they are socially marginalized in the eyes of the better off as well as in the eyes of state officials, who are captive to the interests of those who have more power in society. This creates a hierarchy within society, where second-rate individuals cannot achieve a real status of full citizenship and are not fully recognized as rights holders (even though they may formally be so). Discrimination, in this sense, tends to loosen the bonds of reciprocity within the community, softening the sense of moral obligation by the powerful towards those who are excluded. Once the disadvantaged members of society cease to be regarded as worthy of equal regard, they are quickly deprived of the rights that protect other citizens. Therefore, one cannot achieve reciprocity in a society where great inequality among individuals exists. Consequently, the law will hardly be effective as an instrument of social organization and pacification.

The same rationale may be applied to the effect of self-interested reciprocity in the construction of a peaceful social order. If the reciprocal interests of all agents in a community are not satisfied, the underprivileged agents will hardly have reasons to behave according to the rules of a game that systematically harms their interests. From the other side, the privileged feel that there is no social constraint on the maximization of their interests. This situation eliminates incentives on both sides for compliance with the rules and respect for rights in the sphere of interpersonal relations.

Deprived of social and economic status, the invisible individual is socialized to place themselves in a position of inferiority vis-à-vis the immune individuals and to accept the arbitrariness of public authorities. They cease to expect that their rights will be respected by others or by the institutions with the responsibility to implement the law. Those who react to this degrading position are regarded as a threat to the social order and are treated as enemies. At the same time, immune individuals do not consider themselves bound to respect those they consider inferior or enemies. The same applies to the co-opted authorities. In this situation, a large number of people are below the law while a group of privileged individuals is beyond the control of the state. In this manner, the state, which is supposedly responsible for the fair application of formal mechanisms of social control in accordance with the law, begins to

reproduce socially generalized standards. The result is that the state is negligent towards the invisible, violent and arbitrary towards the outcasts, and docile and friendly towards the privileged that place themselves beyond the law. So even though there may be a legal system that formally complies with the several virtues of the rule of law, the lack of a minimum of social and economic equality will inhibit reciprocity, thereby subverting the rule of law.

## Conclusion

The conclusion that long and persistent inequality tears social bonds, causing invisibility, demonization and immunity, and impairs compliance with the rule of law, should not mean that the idea of the rule of law is futile in these circumstances. In new democratic regimes, such as Brazil and many other developing countries, constitutions tend to be a reaction to a past of authoritarianism and major social injustices, and are designed to foster social cooperation and legitimacy. New constitutions normally bring a generous bill of rights that recognize civil and political rights, and also a large range of social rights. They also recognize the major institutional elements of the rule of law and representative democracy. More than that, these post-authoritarian constitutions create new institutions, like ombudsmen, public defenders, human rights commissions and public ministries to monitor compliance with the rule of law and to protect the constitutional rights of individuals and vulnerable groups.

This reconfiguration of legal systems around the developing world has also been a consequence of pressure from civil society. Forged during the struggle against arbitrary rule and strengthened throughout democratisation, civil society organizations are key players in denouncing abuses, making governments more accountable, and providing alternative polices to alleviate major social problems. For example, the number of non-profit organizations in Brazil has more than doubled in recent decades. From the two hundred and seventy thousand civil society organizations legally established in the country, almost one fifth are dedicated to the “development and protection of rights” (IPEA 2005: 35). The question, therefore, is how these new players are using their institutional and social power to challenge the formal legal systems to become more impartial and to overcome their inability to apply the law equally to all citizens.

It would be naive to attribute to legal systems the capacity to produce their own efficacy, but it would also be equivocal to disregard the potentialities of new actors to promote social change through the employment of legal strategies. Even a fragile legal system can provide mechanisms that, duly used, will enhance impartiality and equal recognition of legal subjects. Public interest law, human rights advocacy, strategic litigation, pro bono and public defence offices can mobilize legal resources in favour of less empowered interests or against over represented interests. This move from within the legal system to empower the weak, protect the demonised, and destabilize entrenched privileges, should not be viewed, however, as a new panacea, but only as part of a larger effort to construct more reciprocal societies, where the rule of law can take hold. This effort is based on the presumption that the legal system occupies a special intermediating position between politics and society. As a product of social relations and political decisions, legal systems are also a vector for these relations and decisions. Law should not only mirror the distribution of power within society. It is far more important that modern legal systems are characterized by fair rules and procedures aimed at obtaining legitimacy and cooperation.

Therefore the question for those social and institutional agents concerned with inequality from a rule of law perspective is how to mobilize the “inner morality of law”, as termed by Fuller, to reduce invisibility, demonization and immunity. How can the legal system enhance the position of those who are below the law, breach the comfort of those above the law, and recover the loyalty of those who are against the law?

Lawyers and judges cannot do much to change society; in fact they are normally interested in reinforcing the status quo. But they can have some impact when challenged by other social actors. As the recent experience of many extremely unequal countries like India, South Africa, Brazil or Colombia shows, the legal community in general and courts in particular can, in some circumstances, be responsive to the demands of the poor when they seek redress through the legal system (Gargarella, Domingo, Roux 2006). Therefore any attempt to make use of law to improve the rule of law itself presupposes that there is political and social mobilization backing it. Due to the egalitarian characteristics of the rule of law, as discussed above, interests that would be squashed in a purely political arena can gain some status through a legal system characterized by the rule of law. Although legal institutions are also vulnerable to subversion by the powerful, they can eventually balance out inequalities in the political system. In translating a

social demand into a legal demand we move from a pure power competition to a process in which decisions are justified in legal terms. The need for legal justification reduces the space for pure discretion, which tends to be to the disadvantage of the weaker members of society. In these circumstances the legal system can give public visibility, in terms of rights recognition, to those who are disregarded by the political system and by society itself. In the same direction, the generality of law, and the transparency and congruency claimed by the idea of the rule of law, can trap the privileged, bringing them back to compliance with the law.

It is important to re-emphasise, however, that this kind of legal social activism should be viewed only as a piece of a much larger scheme of initiatives to promote a society in which everyone is treated with equal concern and respect.

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