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SUR - HUMAN RIGHTS UNIVERSITY NETWORK is a network of academics working together with the mission to strengthen the voice of universities in the South on human rights and social justice, and to create stronger cooperation between them, civil society organizations and the United Nations. Conectas Human Rights, a not-for-profit organization founded in Brazil, is home to Sur. (See website <[www.conectas.org](http://www.conectas.org)> and portal <[www.conectasur.org](http://www.conectasur.org)>. To access the online version of the journal, please go to: <[www.surjournal.org](http://www.surjournal.org)>.)

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## PRESENTATION



This sixth issue of *Sur – International Journal on Human Rights* has a special meaning for us because it reflects the initial results of an ongoing collaborative research project of our network. In June 2006, *Sur* started a research on “The Justiciability of Human Rights: India, Brazil and South Africa” aiming at comparing the implementation of human and constitutional rights by the Supreme Courts of these three countries.

India, Brazil and South Africa share a number of common features. All three enjoy relatively stable democratic systems and occupy key positions in their respective regions, both in the political and economic spheres. They also share common problems, namely the challenge of overcoming poverty, discrimination and inequality, and of promoting equal access to justice, good quality education, health and housing programs. In this sense, they share the common challenge of consolidating the rule of law and democratic institutions, as instruments to the realization of human rights for all as required by their own Constitutions and by the international human rights treaties they have ratified.

The objective of the research is to understand the role of the Constitutional Courts in India, Brazil and South Africa in the promotion and protection of human rights. The study also takes into account the role of civil society and public interest law organizations in their court-related interventions.

In this issue of the *Journal*, we have included two articles that reflect the initial dialogue among the researchers on the topic, one by Prof. Upendra Baxi, responsible for the research in India, and another by Prof. Oscar Vilhena Vieira, coordinator of the

project and responsible for the research in Brazil. The article by Rodrigo Uprimny, who has also been cooperating with the project, discusses some aspects of the judicialization of politics in Colombia.

We are convinced that knowledge-sharing and research partnerships are the most efficient and consistent instruments to create a stronger intellectual community in the South. The initial steps of this research have confirmed our perception. Through collaborative research, strong links are established by professors and new ideas and opportunities for partnership are discovered.

This issue of the Sur Journal also examines women's rights in Latin America and rights of children in South Africa. Laura Pautassi's article reflects on the various steps taken in Latin America towards assuring equality between men and women, with special focus on the responsibility of the State regarding to labor regulations. Gert Jonker and Rika Swanzen's article presents the experience of the intermediary services provided for child witnesses in some areas in the western suburbs of Johannesburg.

Sergio Branco's article derives from his lecture at the VI International Human Rights Colloquium (Nov. 2006) on the impact of copyright regulation on human rights in the Brazilian context. He analyzes how the current copyright structure and the improper use of technology pose a serious threat to the implementation of the human rights to education.

Thomas Pogge focuses on the discussion of North-South inequality. He claims that the current appropriation of wealth from our planet is highly uneven, invoking three different grounds of injustice: the effects of shared social institutions, the uncompensated exclusion from the use of natural resources, and the effects of a common and violent history. Pogge shows that it may be possible to gather adherents of the dominant strands of Western normative political thought into a coalition dedicated to the eradication of world poverty through the creation of a Global Resources Dividend or GRD.

We would like to thank the following professors and partners for their contribution in the selection of articles for this issue: Ann Skelton, Alejandro Garro, Fateh Azzam, Flavia Piovesan, Florian Hoffmann, Glenda Mezarobba, J. Paul Martin, Jeremy Sarkin, Juan Amaya Castro, Lorena Frías, Maria Herminia Tavares de Almeida, Roberto Garretón, Thami Ngwenya and Vinodh Jaichand.

Finally, we would like to announce that the next edition of the Sur Journal will be a special issue on transitional justice, published in collaboration with the International Center for Transitional Justice (ICTJ).

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UPENDRA BAXI

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## ABSTRACT

The author underscores that the patrimonial liberal Rule of Law (ROL) discourse usually disregards alternative traditions. First, it does not permit any reflection on the normative socialist ROL conceptions. Second, it disregards the very existence of other ROL traditions: for example, the pre-colonial, those shaped by the revolt against the Old Empire, or the non-mimetic contributions by the proud judiciaries in some “developing societies”.

In this context, the author analyses the distinctiveness of the Indian ROL and argues that it offers revisions of the liberal conceptions of rights. The author adds that the Indian ROL stands normatively not just as a *sword* against State domination, but also as a *shield*, empowering a “progressive” state intervention in civil society. Finally, the author introduces some current trends in the constitutional jurisprudence and highlights the leadership of the Supreme Court in the development of an extraordinary form of jurisdiction under the rubric of social action litigation.

Original in English.

## KEYWORDS

Rule of Law – Federalism – Thin notion of Rule of Law – Thick notion of Rule of Law – Judicial review



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# THE RULE OF LAW IN INDIA

Upendra Baxi

## A new discourse?

The Rule of Law (as a set of principles and doctrines — hereafter ROL) has a long normative history that privileges it as an inaugural contribution of the Euro American liberal political theory. ROL emerges variously, as a “thin” notion entailing procedural restraints on forms of sovereign power and governmental conduct, which may also authorize Holocaustian practices of politics<sup>1</sup> and as a “thick” conception involving the theories about the “good”, “right”, and “just”.<sup>2</sup>

The patrimonial liberal ROL discourse organizes amnesia of alternative traditions. It allows not even a meagre reflection on the normative socialist ROL conceptions. It disregards the possibility that other ROL traditions of thought ever existed: for example, the pre-colonial, those shaped by the revolt against the Old Empire, or the non-mimetic contributions by the proud judiciaries in some “developing societies”.<sup>3</sup>

Likewise, a community of critical historians has demonstrated that in the countries of origin, both the “thin” and “thick” versions for long stretches of history remained consistent with violent social exclusion; the institutional histories of ROL in the metropolis for a long while remained signatures of domination by men over women, by the owners of means of production over the possessors of labour-power, and by persecution of religious, cultural and civilizational minorities. Students of colonialism/imperialism have stressed that the ROL values remained wholly a “whites-only” affair.<sup>4</sup> The triumphalist celebration of ROL as an “unqualified human good” even goes so far as to

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*Notes to this text start on page 22.*

reduce struggles against colonialism/imperialism as an ultimate unfolding in human history of the liberal values coded by the ROL.<sup>5</sup> Even the insurgent histories that generate a universal recognition of human right to self determination and further the itineraries of contemporary human rights stand misrecognized as the miming of the Euroamerican ROL world-historic imagination! The historic fact that non-Western communities of *résistance* and peoples in struggles have enriched ‘thick’ ROL conceptions is simply glossed over by the persistent myths of the “western” origins;<sup>6</sup> the promotion of ROL as prize cultural export continues old contamination in even more aggressive forms in this era of contemporary globalization.

### The “new-ness” of contemporary ROL talk

In contemporary talk, however, ROL goes transnational or global. It is no longer a bounded conception but is now presented as a universalizing/globalizing notion. In part, the new “global rule of law” relates to the emerging notions of global social policy and regulation.<sup>7</sup>

More specifically, the networks of international trade and investment regimes promote a view that national constitutions are obstacles that need “elimination” via the newly-fangled discourses of global economic constitutionalism.<sup>8</sup> The war *on* “terror” now altogether redefines even the “thin” ROL notions.<sup>9</sup> The paradigm of Universal Declaration of Human Rights stands now confronted by a new paradigm of trade-related, market-friendly human rights.<sup>10</sup> The inherently undemocratic international financial institutions (IFIs), notably the World Bank, not the elected officials in “developing” societies, now present themselves as a new global sovereign who decides how the “poor” may be defined, poverty measured, the “voices of the poor” may be globally archived, and how poverty alleviation and sustainable development conditionalities may expediently redefine “good governance”. The precious and manifold diverse civil society and new social movement actors do not quite escape the Master/Slave dialectic; even when they otherwise contest wholesale, they accept in retail the new globalizing ROL notions and platforms.

Space constraints forbid a fully detailed analysis of the newness of ROL; however, it remains appropriate to point at least to some crucial factors. First, the current extension of ROL to the realms of international development, economic, strategic and even military international orders is discontinuous with the Cold War, which marked at least two violently competing paradigms of ROL: the bourgeois and the socialist. Today, the socialist ROL, a form in which private ownership of means of production was not considered the foundation of a “good” society and human freedom, has almost disappeared

from view.<sup>11</sup> Second, increasingly now it becomes difficult to keep apart the ROL from the new human rights and global social policy languages; I may rather refer here for example, to voluminous ongoing work of the United Nations human rights treaty bodies, the effort to develop the right to development, the Millennial Development Goals and Targets, which develop rather different kinds of globalizing ROL-oriented normativity. Third, the merger between these human rights and global social policy carries some costs. The so-called universal human rights become eminently negotiable instruments in the pursuit of diverse global policies. Fourth, even as the so-called “judicial globalization” promotes an unprecedented salience of judicial actors, their modes of activist justicing, at national, regional and supranational levels introduces new ways of articulation of ROL values and standards, it also, at the same moment, promotes, the structural adjustment of judicial activism.

Fifth, human rights and social activism practices contribute more than ever before to a multitudinous re-articulation of the rolled-up ROL notions. Human and social rights activism needs to contest the hyper-globalizing ROL talk, promoting the reach of the communities of direct foreign investors, often personified by the new sovereign estates of multinational corporations (MNCs), and more generally by their normative cohorts, principally international financial institutions, and development assistance regimes. At the same time historically situated activist agencies also remain confronted with the need to reinvigorate some proceduralist and some “thick” ROL conceptions.

Sixth, the new ROL discursivity/idolatry presenting it as a new form of global public good remains unmarked and untroubled by the bounded ROL conceptions, which had as its cornerstone the doctrine of separation of powers, or differentiation of governance functions, that fosters the belief in limited governance, an antidote to tyranny, signified by concentration of powers. True, as Louis Althusser<sup>12</sup> reminded us, the doctrine also masks the “centralized unity of state power”. The bounded ROL talk at least provided platforms of critique; the globalizing ROL knowing no such conception that may limit “global good governance” further undermines the “rationality” of the bounded ROL conceptions.<sup>13</sup>

At stake then remains in the new ROL discourse a deep contradiction between ROL as a globalizing discourse that celebrates various forms of “free” market fundamentalisms and some new forms that seek “radically” to universalize human rights fundamentalisms. This incommensurability defines both the space for interpretive diversity and also a growing progress in measurement that standardize, via human rights and development indicators/benchmarks, new core meanings of the ROL.

## Government of laws and men

ROL notions have suffered much by two popularizing aphorisms: ROL signifies “government of laws, not of men”; “Rule of Law is both, and at once, government of law and of men”. If “men” is used inclusively as signifying all human beings, the slogans may signify secularity: not Divine authority but human power makes both government and law. This however poses the question whether constitutions and laws based on religion disqualify at the threshold from being ROL societies. On a different plane, in the feminist practices of thought that inclusiveness remains always suspect. It identifies literally both these slogans as representing the government of, by, and for men. This raises the question concerning feminization of state and law in a post-patriarchal society. Likewise, the emerging critique on the platform of rights of peoples living with disability translates both “government” and “men” as affairs of dominance by all those temporarily able-ed. This raises the question of indifference to difference. I may not here pursue these, and related, questions for reasons of space save to say that all ROL notions that ignore them remain ethically fractured.

The ROL message that those in power should somehow construct and respect constraints on their own power is surely an important one. But the importance of this sensible requirement is not clear enough. To be sure, rulers as well as ruled ought to remain bound by the law (conceived here as a going legal order, an order of legality) regardless of the privilege of power. But it is never clear enough whether they ought to do so instrumentally (that is in Max Weber’s terms “purpose rational”, even expedient rule following conduct) or intrinsically (legality as an ethical value and virtue.) Instrumentalist compliance negotiates ROL languages in ways that perfect pathways of many a hegemonic and rank tyrannical credential. To follow ROL values because they define the “good”, the right, and the “just” law and state conduct is to develop a governance ethic. It is at this stage that massive difficulties begin even when we may want to consider the ROL tasks as those defining the “rule of *good law*”.

Elucidating “good” law entails “a complete social philosophy” which deprives the notion of “any useful function”. As Joseph Raz<sup>14</sup> acutely reminds us: “We have no need to be converted to rule of law in order to discover that to believe in it is also to believe that good should triumph”. But the “good” that triumphs, as a “complete social philosophy”, may be, and indeed has often been, defined in ways that perpetuate states of Radical Evil— complete social philosophies have justified, and remain capable of justifying, varieties of violent social exclusion. Is this the reason why contemporary postmetaphysical approaches invite us to tasks of envisioning justice—qualities of the basic structure of society, economy, and polity, in ways that render otiose the Rule of Law languages?<sup>15</sup>

## What ROL addresses and doesn't?

In any response to this question, it may be useful to make a distinction between ROL as providing constraint-languages and facilitative languages. As constraint-languages, fully informed by the logics and languages of contemporary human rights, ROL speaks to what sovereign power and state conduct may not, after all, *do*. It is now normatively well accepted that state actors may not as ways of governance practice genocide, ethnic cleansing, institutionalized apartheid, slavery/slave-like practices, and rape and other forms of abuse of women. Outside this, the ROL constraint languages stipulate/legislate the following general notions.

1. State powers ought to be differentiated; no single public authority ought to combine the roles of the judge, jury, and executioner
2. Laws/decrees ought to remain in the public domain; that is, laws ought to be general, public, and ought to remain contestable political decisions
3. Governance via undeclared emergencies remains violative of ROL values and illegitimate
4. Constitutionally declared states of emergency may not constitute indefinite practices of governance and adjudicative power ought not to authorize gross, flagrant, ongoing, and massive violation of human rights and fundamental freedoms during the states of emergency
5. The delegation of legislative powers to the executive ought always to respect some limits to arbitrary sovereign discretion
6. Governance at all moments ought to remain limited by regard for human rights and fundamental freedoms
7. Governance powers may be exercised only within the ambit of legislatively defined intent and purpose
8. Towards these ends, the State and law ought not to resist, or to repeal powers of judicial review or engage in practices that adversely affect the independence of the legal profession.

These “oughts”, far from constituting any fantastic wish-list, define the terrain of ongoing contests directed to inhibit unbridled state power and governance conduct. The question is not whether these “oughts” are necessary but whether they are *sufficient*. It is here that we enter the realms of the ROL facilitative languages which leave open a vast array of choices for the design and detail of governance structures and processes. These choices concern the processes of composing legitimate political authority, forms of political rule, obligations of those governed and of those who govern.

### *Constitution of legitimate authority*

The ROL does not quite address this dimension. Assuming, however, that universal adult franchise constitutes a core ROL value, the ROL seems equally well served by both the “first past the post” or “proportional” and “preferential” voting systems and related variants. Neither the thin nor the thick ROL versions offer any precise norms and standards for the delimitation of constituencies in ways that avoid gerrymandering representation.<sup>16</sup> Further, ROL remains rather indifferent to the question of state funding of elections; nor does it engage corporate campaign funding. Elections cost big money for political leaders and parties at fray; what “regulation” may violate the liberal ROL freedom of speech and association values remains an open question. So do appeals to forms of “hate speech” in the competitive campaign politics. The dominant ROL discourse moreover remains indifferent to the question of affirmative programs of legislative representation, which modify the right to contest elections for cultural and civilizational minority groups and coequal gender representation. The ROL languages, for weal or woe, insufficiently address the notion of participation, do not extend so far as to prescribe means of constitutional change such as referenda, or the right to recall of errant or corrupt legislators.

### *Forms of political rule*

As concerns structures of governance, ROL remains rather indifferent to choices amongst *federalism* over *unitary*, *republican* over *monarchical*, *secular* over *theocratic*, *flexible* over *rigid*, constitutional formats. Nor do these foreclose choices concerning the scope and method for amending constitutions. The composition, of judicial power and of the administration of justice (methods of judicial appointment, tenure, and removal of judges, constructions of judicial hierarchies, etc.) remain infinitely open within the ROL languages.

### *Obligations of governed and of governors*

The celebrated constraints upon lawmaking (legislative) power do *not* entail any ethical *obligation* to make laws for instance, a public ‘right’ to have a law made for disadvantaged, dispossessed, and deprived peoples; these remorseless non-decisions impact upon many a human, and human rights, future. Niklas Luhman reminded us poignantly that political decision concerning the making/unmaking/remaking of laws remains nothing but the *positivization of arbitrariness*. However, this arbitrariness is overridden by the disciplinary globalization where the South States have mandatory obligations to make law favouring the communities of direct foreign investors over those of their own citizens; these obligations stand fostered by

transnational corporations and international financial institutions which themselves owe very little democratic accountability and human rights responsibilities.

Finally, without being exhaustive, how may ROL address its Other? A multitude of mass illegalities often historically generate forms of citizen understandings that eventually redefine interpretations of the ROL. Inflected by indeterminate notions of popular “sovereignty”, these divergent insurgencies signify terrains of struggle of the Multitudes against the Rule of the Minuscule.<sup>17</sup> What space may we, and how, may “we”, (the ROL “symbol traders”) provide for these militant particularisms in our narratives?

This summary checklist of anxieties is *not* intended to suggest that we dispense altogether with the ROL languages and logics. Rather, it invites sustained labours that subject the normative and ideological histories and frontiers of ROL with very great care and strict scrutiny.

Towards this end, I reiterate my one sentence summation: ROL is always and everywhere a terrain of peoples’ struggle incrementally to make power *accountable*, governance *just*, and state *ethical*. Undoubtedly, each romantic/radical term used here (accountability, justice and ethics) needs deciphering and in what follows I seek to do so by reflecting on the Indian ROL theory and practice.

## Originality and mimesis-postcolonial Indian ROL

Of necessity, many a colonially induced historic continuity<sup>18</sup> marks the Indian Constitution. But the colonial inheritance relates more to the apparatuses and institutions of governance than to conceptions of justice, rights, and development. These in turn affect continuities with the colonial past. The distinctiveness of the Indian ROL lies in providing space for a continuing conversation among four core notions: “rights”, “development”, “governance” and “justice”.<sup>19</sup> Thus it also offers revisions of the liberal conceptions of rights, which affect distinctive forms of constitutional life of the South.<sup>20</sup>

The hegemonic ROL talk underestimates the world historic pertinence of the Indian constitutionalism ROL conceptions. In the scramble for a New Empire, the constituent imagination of the so-called “transitional societies” remains tethered primarily to what these former socialist societies may learn from the American constitutional experience. Thus stand monumentally sequestered some considerable opportunities for comparable learning from the Indian ROL experience and imagination. Postsocialist constitution-making has much to learn from the originality of the postcolonial form; however, and despite renewed interest in comparative constitutional studies, it seems that the “New” Europe has very little to learn from the old Global South.

For the moment, I briefly consider below the relatedness of these four key notions: governance, rights, justice, and development.

## Governance

The Holocaust of the Partition of India furnishes the histrionic moment in which the Indian constitution stands composed. The establishment of frameworks for collective human security and order was considered as a crucial ROL resource in the same way that today the making of a new global ROL remains affected by the two “terror” wars. The notion that the radical reach of self-determination ought to be confined merely to the end of the colonial occupation furnishes a new leitmotif for Indian governance; integrity and unity of the new nation redefines Indian ROL to authorize vast and ever proliferating powers of preventive detention and eternal continuation of many colonial security legislations as laws in force.<sup>21</sup> Since its birthing moment, the Indian ROL itineraries are shaped by both the doctrine of the reason of the state and the accentuated practices of militarized governance. No ROL value consideration in general, overall, is allowed to intrude upon state combat against armed rebellion aimed at secession from the Indian Union. In this the Indian experience is scarcely unique.

What is distinctive, however, is the governance/management of the politics of autonomy.<sup>22</sup> In theory, Parliament has the power of redrawing the federal map, creating new states, diminishing or enlarging their boundaries, and even the names of states without any democratic deliberation. Yet the almost constant creation of new states within the Indian federation, along linguistic/cultural/identity axes, entails multitudinous people’s movements, considerable insurgent and state violence. The politics of autonomy requires Indian understanding of the federal *principle* and *detail*.

If the federal principle privileges the *local* within the *national*, respecting the geography of difference in ways that authorize local knowledges, cultures, powers, and voices to inform and shape governance, the federal detail —mainly the distribution of legislative, executive, and administrative powers— seeks to negate this. True, this distribution of powers can only be changed by constitutional amendments and these remain difficult of negotiation and achievement in the current era of coalitional politics. However, the Indian Parliament retains a generous residuary authority that empowers it to legislate on matters not specified in the state and concurrent list; further, the laws it may make often have an overriding national authority. Additionally, Article 35 specifically gives Parliament overriding powers to make laws that outlaw millennially imposed disabilities and discriminations on India’s untouchables (Article 17) and slavery and slave-like practices (Articles 23-24.) And, drawing heavily from the “experience” of comparative Commonwealth federalism, especially Canada and Australia, the Indian Supreme Court innovates constantly in its interpretive provenance to further hegemonic national role for the Union government.

India's distinctive cooperative federalism remains defined and developed by many institutional networks. The constitutionally ordained National Finance Commission constructs human rights normativity in allocation of federal resources to states. The constitution and the law create India-wide national agencies<sup>23</sup> entrusted with the tasks of protection and promotion of the human rights of "discrete and insular" minorities. The Comptroller and Auditor General of India, assisted by the Central Vigilance Commission, at least help fashion the discourse concerning corruption in high places. And, overall, the Indian Election Commission has incrementally pursued the heroic tasks of attainment of a modicum of integrity in the electoral process. The ways in which these and related agencies actually perform their tasks is a subject of lively political discourse, within the practices of investigative journalism, and social movement and human rights activism made constitutionally secure by the exertions of State High Courts and the Supreme Court of India.

All this enables continual re-articulation of people's power confronted by a heavily militarized polity and state formation, which put together and often inflict heavy democratic deficit on the processes, institutions, and networks of governmentability. Thus, increasingly civil society interventions activating high judicial power have led to some softening of the anti-democratic aspects of the Indian Constitution at work.<sup>24</sup>

Overall, it seems to be the case that the federal principle holds within normative restraints of the federal detail. Put another way, Indian federalism contributes to the ROL discourse not just as facilitating governance but also as empowering participatory forms of citizen resilience and self-reliance. This experience needs to be accorded a measure of dignity of discourse in our "comparative" constitutionalism conversations.

## Rights

The Indian ROL notions remain deeply bound to the ways in which fundamental rights stand conceived. Far from reiterating either the liberal or libertarian theologies of rights as corpus of limitation on state sovereignty and governmental conduct, the Indian ROL conceptions also empower progressive state action. Thus, for example, the following constitutional rights enunciations authorize legislative and policy action manifestly violative of some liberal conceptions of rights:

- Article 17 outlaws social practices of discrimination on the ground of "untouchability"
- Articles 23-24, enshrining "rights against exploitation", outlaws the practices of agrestic serfdom (bonded and other forms of un-free labour)

and related historic practices of violent social exclusion

- Articles 14-15 authorize, under the banner of fundamental rights, state combat against vicious forms of patriarchy
- Articles 25-26 so configure Indian constitutional secularism as to empower state to fully combat human rights offensive practices of the dominant “Hindu” religious tradition
- Articles 27-30 provide a panoply of fecund protection of the rights of religious, cultural, and linguistic minorities.

The Indian ROL stands here normatively conceived not just as a *sword* against State domination and violation and historic civil society norms and practices but also as a *shield* empowering an encyclopaedic regime of “progressive” state intervention in the life of civil society. In so doing, it engages in simultaneous disempowerment and re-empowerment of the Indian State in ways that makes more complicated governance, politics, and constitutional development. In terms of social psychology of the yesteryear, the Constitution thus inaugurates “cognitive dissonance” in ways that necessarily marks its rather schizoid course of development.

The rights texts, enunciated in a coequal world-historic time of the Universal Declaration of Human Rights, further impact on the development of international human rights norms, standards, and even values. I have here in view Part IV of the Constitution which enacts the distinction between regimes of civil and political rights and social and economic rights, which subsequently dominate the global human rights forms of talk.

The Directive Principles of State Policy declared as paramount as fashioning the ways of governance – acts of making law and policy – thus incarnate the previously unheard code of state constitutional obligations. Many actually installed at the time of origin, and subsequent governance mechanisms and arrangements, articulate institutional ways of moving ahead with this mission. I do not burden this text with any detailed enumeration.<sup>25</sup>

The Indian ROL conceptions further fashion an extraordinary scope for judicial review powers – a new jewel in the postcolonial Indian crown, as it were. The extraordinary powers to redress violation of fundamental rights have achieved, here summarily put, the following results. First, a stunning achievement which refers to administrative law jurisprudence directed to combat and control uses of discretionary powers; second, wide adjudicatory surveillance over legislations accused of violating fundamental rights or the principle and detail of Indian federalism; third, the enormous achievement fashioned by the Supreme Court of India giving its inaugural, and awesome powers of invigilation over the exercise of plenary amendatory powers via the doctrine of the basic structure and the essential features of the Constitution. These powers now stand

further routinized to bring home micro-accountability for the exercise of everyday legislative, executive, and administrative exercises of power under adjudicatory surveillance.<sup>26</sup>

The exercise of judicial midwifery to deliver human rights and limited governance is not uniquely Indian; what is distinctive of the Indian story is that justices increasingly believe, and act on the belief, that basic human rights are safer in their interpretative custody than with representative institutions. This belief and practice combine to produce a distinctive type of “constitutional faith” (to borrow a fecund expression of Sanford Levinson, 1988) which further enduringly renders legitimate expansive judicial review.

### Justice/Development

An extraordinary feature of the constitutionalism that informs Indian ROL is posed by the question of *justice of rights*. I have recently elaborated this in some anxious detail<sup>27</sup> suggesting further that the problematic of justice of rights may not be grasped by conceptions of Indian development, or the constitutionally imagined/desired social order. In the moment of making the constitution at least three salient justice- of- rights type questions stood posed. First, if promotion and protection of human rights and fundamental freedoms entailed maximal deference to full ownership over the means of production as the very foundation of freedom, how may “just” social redistribution *ever* occur? Second, how may fullest deference to communitarian rights be reconciled with the individual rights of persons who wish to belong to a community and yet also protest against individual rights violation within privileged acts of group membership? Third, how far should go group-differentiated rights that privilege programmes of affirmative action, not just extending to educational and employment quotas, but also to legislative reservations for the scheduled castes and tribes, as ways of righting past and millennial wrongs?

These three interlocutions also define the constitutional conceptions of “development”. If one were to take the Preamble and the Directive Principles of State Policy at all seriously, development signifies the *disproportionate* flow of state and societal resources that enhance real-life benefits for the Indian impoverished masses that Babasaheb Ambedkar luminously and poignantly described as India’s *atisudras*, the social and economic proletariat. Much before the right to development-based notions of governance and development arrived on the scene of global ROL, the Indian constitution had already codified this understanding. In any event, the “justice of rights” problem has been variously recurrent in the Indian experience and I offer to view below some vignettes.

## ROL as unfolded by the Indian Judiciary

The Indian Supreme Court is a forum with unparalleled vast general jurisdiction. It is not a constitutional court, though much of its business relates to issues concerning the enforcement of fundamental rights. The law laid down by the Court is declared to be binding on all courts throughout the territory of India and by necessary implication upon citizens and state actors. Further, not merely all authorities of the state are obligated to aid the enforcement of the apex judicial decisions but also the Court is empowered to do “complete justice”, an incredible reservoir of plenary judicial power, which it has used amply in the past two decades. Legislative overruling of apex judicial decisions occurs but infrequently; however, an extraordinary device called the 9<sup>th</sup> Schedule has been invoked since the adoption of the Constitution to immunize statutes placed in it from the virus of judicial review, even when *ex facie* the legislations inscribed therein remain fundamental rights violative. In a recent decision, the Supreme Court has assumed powers of constitutional superintendence over the validity of laws thus immunized.

In the early years, the Court took the view that although the Directives cast a “paramount” duty of observance in the making of law and policy, their explicit non-justiciability meant that the rights provisions overrode the Directives. This generated high-intensity conflict between Parliament and the Court, resulting in a spate of constitutional amendments. In the process, much constitutional heat and dust has also been generated, in the main over a “conservative” judiciary that seemed to frustrate a “progressive” Parliament committed to agrarian reforms and redistribution leading to Court “packing” Indian – style.<sup>28</sup>

Over time, two kinds of adjudicative responses developed. First, the Supreme Courts began to deploy the Directives as a technology of constitutional interpretation, favouring an interpretative style that *fostered*, rather than *frustrated*, the Directives. This “indirect” justiciability has contributed a good deal towards fructification of the substantive/ “thick” versions of the Indian ROL. Second, in its more activist incarnation since the eighties, the Court has begun to *translate* some Directives into rights. Perhaps, a most crucial example of this is the judicial insistence that the Directive prescribing free and compulsory education for young persons in the age group 6-14 is a fundamental right.<sup>29</sup> The Court here generated a constitutional amendment enshrining this right as an integral aspect of Article 21 rights, to life and liberty.

Simultaneously with the adoption of the Constitution, Indian Justices strove to erect fences and boundaries to the power of delegated legislation (processes by which the executive power actually legislates.) They conceded this power but with a significant accompanying caveat: the rule-making power

of the administration ought not to usurp the legislative function of enunciation of policy, accompanied by prescriptive sanctions. Thus came into being the “administrative law explosion”, where Justices did not so much invalidate delegated legislation but vigorously policed its performance. The executive may make rules that bind; but courts made it their business to interrogate, and even invalidate, specific exercises of administrative rule-making. A stunning array of judicial techniques over the review of administrative action has been evolved.

Justices asserted judicial review power over the constitutionality of legislative performances. Laws that transgressed fundamental rights or the federal principle and detail activated the “essence” of judicial review power. Whenever possible the Supreme Court sought to avoid invalidation of laws; it adopted the (standard repertoire of “reading down the statutory scope and intendments so as to avoid conflict and by recourse to the peculiar judicial doctrine of ‘harmonious construction’”). But when necessary, enacted laws were declared constitutionally null and void. And even when resuscitated by legislative reaffirmation, they were re-subjected to the judicial gauntlet of strict scrutiny. The instances of judicial invalidation of statutes far exceed in number and range the experience of judicial review in the Global North.

Going beyond this, Indian Justices have assumed awesome power to submit constitutional amendments to strict judicial scrutiny and review. They performed this audacious innovation through the judicially crafted doctrine of the Basic Structure of the Constitution, which stood, in judicial, and juridical discourse, as definitive of the “personality” defined, from time to time, as the “essential features” of the Constitution. They proclaimed the “Rule of Law”, “Equality”, “Fundamental Rights”, “Secularism”, “Federalism”, “Democracy” and “Judicial Review” as essential features of the Basic Structure, which amendatory power may not ever lawfully transgress.

Initially articulated as a judicial doctrine crafting the limits of amendatory power, the regime of the Basic Structure limitation has spread to other forms of exercise of constitutional, and even legislative, powers. The ineffable adjudicatory modes also mark a new and a bold conception: “constituent power” (the power to remake and unmake the Constitution) stands conjointly shared with the Indian Supreme Court to a point of its declaring certain amendments as constitutionally *invalid*.

This judicial, and juridical, production then momentously (because Justices undertook the task of protecting the constitution against itself!) traversed constitutional jurisprudence of Pakistan, Bangla Desh, and Nepal. The “comparative” ROL discourse so far wholly passes by this diffusion.

To conclude this narrative, the appellate courts under the leadership of the Supreme Court had devised an extraordinary form of jurisdiction under the rubric of social action litigation [SAL] still miscalled “public interest

litigation”. Here summarily put, the SAL has accomplished the following astonishing results:

- a radical democratization of the doctrine of *locus standi*; every citizen may now approach courts for vindicating the violation of human rights of co-citizens
- the “de-lawyering” of constitutional litigation in the sense that petitioners-in-person with all their chaotic forensic styles of argumentation are being admitted
- the establishment of new styles of fact-finding via socio-legal commissions of enquiry to assist adjudicatory resolution
- the generation of a new adjudicatory culture; the SAL jurisdiction is conceived not as adversarial but as a collaborative venture between citizens, courts, and a recalcitrant executive
- the invention of continuing jurisdiction through which courts continue to bring about some minimal restoration of human rights in governance practices
- the fashioning of new ways of judicial enunciation of human rights, a complex affair in which the Supreme Court especially brings back to life rights deliberately excluded by the constitution makers (such as the right to speedy trial), creates some component rights to those enunciated by the constitutional text (such as the right to livelihood, privacy, education and literacy, health and environment), re-writing the constitution by way of invention of new rights (such as right to information, immunity from practices of corrupt governance, rights to constitutional secularism, the right to compensation, rehabilitation, and resettlement for violated populations).

This new judicial disposition, or *Dispositif*, had its share of acclaim as well as criticism. The acclaim registers the emergence of the Supreme Court itself as an integral part of the new social movement aspiring to re-democratize the Indian state and governance. The criticism takes in the main two principal forms. First, the agents and managers of governance cry “judicial usurpation”. This outcry has a hollow ring indeed because in reality SAL assumes many labours and functions that increasingly coalitional regime political actors simply can no longer manage; put another way, the Supreme Court assumes the tasks of national governance, otherwise appropriately assigned to democratic governance. Second, the frequently disappointed SAL litigants cry foul when the SAL fails to deliver its promises. The expectational overload here remains diverse and staggering, respecting no limits of the capacity, opportunity, and potential of judicial power as an arm of national governance. Thus, the apex

Court often falters and fails in addressing, let alone redressing, contentious politics concerning ways in which the Judiciary may:

- fully declare mega-irrigation projects constitutionally human rights offensive
- deprive constitutional legitimating of the current policies of privatisation/deregulation as being anti-developmental and human rights violative/offensive
- translate, with full constitutional sincerity, the current motto: women's rights are human rights, with due deference to religious and social pluralisms
- the adjudicatory voice promote “the composite culture” of India (Article 51-A) in fashioning ROL conceptions, of rights, justice, development, and governance
- foster and further participation in governance as the leitmotiv of the constitutional conception of the Indian ROL. How may they “best” meet the argument against concretising equality of opportunity and access for the millennially deprived peoples via educational/employment quotas in State administered/aided educational institutions and state and federal employment.<sup>30</sup>

### Some conclusionary remarks

It is beyond the bounds of this essay to provide even a meagre sense of violence and violation embedded in the histories of rule of law in India. Not merely have the impoverished been forced to cheat their ways into meagre survival, “jurispathic” (to evoke Robert Cover’s phrase) dimensions of the extant Indian ROL have continually worked new ways of their disenfranchisement. These stories of violent social exclusion may be told variously. I have recently narrated the institutionalisation of the “rape culture” in the context of Gujarat 2002 violence and violation.<sup>31</sup>

But it is to literature rather than to law that we must turn to realize the full horror of the betrayal of the Indian “Rule of Law”. Mahasweta Devi’s *Bashai Tudu* speaks to us about the constitutive ambiguities of the practices of militarized ‘rule of law’ governance and resistance in contemporary India. Rohinton Mistry’s *A Fine Balance* educates us in the constitutional misery of untouchables caught in the ever-escalating web of “constitutional” governance. These two paradigmatic literary classics abundantly invite us to pursue a distinctively Indian law and literature genre of study, outside which it remains almost impossible to grasp the lived atrocities of Indian ROL in practice.

These also make the vital point (with the remarkable Indian *Subaltern*

*Studies* series) that the pathologies of governance are indeed normalizing modes of governance as a means of controlling (to evoke Hannah Arendt's favourite phrase) "rightless" peoples. The jurispactic attributes of the Indian Rule of Law at work can be described best in terms of social reproduction of rightlessness. Indian judicial activism begins to make and mark a modest reversal.

The Indian story at least situates the significance of the forms of creationist South narratives for contemporary Rule of Law theory and practice. Time is surely at hand for constructions of multicultural (despite justified reservation that this term evokes) narratives of the Rule of Law precisely because it is being loudly said that "history" has now ended, and there remain on horizons *no* meaningful "alternatives" to global capitalism.

The authentic quest for renaissance of the Rule of Law has just begun its world historic career. ROL epistemic communities have choices to make. Our ways of ROL talk may either wholly abort or aid to a full birth some new ROL conceptions now struggling to find a voice through multitudinous spaces of people's struggles against global capitalism that presage alternatives to it.

We need after all, I believe, to place ourselves all over again under the tutelage of Michael Oakeshott.<sup>32</sup> He reminds us, preciously, that far from being a "finished product" of humankind history, the Rule of Law discourse "remains an individual composition, a unity of particularity and generality, in which each component is what it is in virtue of what it contributes to the delineation of the whole". That virtue of the "whole" may not any longer legitimate Euro American narratology. Rather the task remains re-privileging other ways of telling ROL stories as a form of participative enterprise of myriad "subaltern" voices.

## NOTES

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1. G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1995. See also G. Adorni, "Legal Intimations: Michael Oakeshott and the Rule of Law", *Wisconsin Law Review*, 1993, p. 838; U. Baxi, "The Gujarat Catastrophe: Notes on Reading Politics as Democidal Rape Culture" in Kalpana Kababiran (ed.), *The Violence of Normal Times: Essays on Women's Lived Realities*, New Delhi, Women Unlimited in association with Kali for Women, 2005, pp. 332-384; U. Baxi "Postcolonial Legality" in Henry Schwartz & Sangeeta Roy (eds.), *A Companion to Postcolonial Studies*, Oxford, Blackwell, 2001, pp. 540-555; B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques*, London, Pluto Press, 1984; M. Galanter, *Competing Equalities*, Delhi, Oxford, 1984; M. Hidayatullah, *The Fifth and Sixth Schedules of the Constitution of India*, Gauhati, Ashok Publishing House, 1979; C. Schmitt, *Political Theology*:

*Four Chapters on the Concept of Sovereignty*, Cambridge, The MIT Press, George Schwab trs, 1985; A. Sen, *Development as Freedom*, Oxford, Oxford University Press, 1999 and J. Stone, *The Social Dimensions of Law and Justice*, Sydney, Maitland, 1966, pp. 797-99.

2. See, for this distinction variously elaborated, L. Fuller, *Morality of Law*, New Haven, Yale University Press, 1964; N. McCormick, "Natural Law and the Separation of Law and Morals" in Robert P. George (ed.) Oxford, *Natural Law Theory: Contemporary Essays*, Clarendon Press, 1992, pp. 105- 133; J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford Clarendon Press, 1980 and G. Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, 1988.

3. A valuable comparative beginning is made by a group of scholars: see, R. Peernbohm, *Asian Discourses on the Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and U.S.*, London, London and Routledge, 2004. The present essay substantially extends and revises my contribution to the volume.

4. See R. Young, *Postcolonialism: An Introduction*, Oxford, Blackwell, 2001 and U. Baxi, "The Colonialist Heritage" in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, pp. 6-58. See also the materials therein cited.

5. E. P. Thompson, *Whigs and Hunters: The Origins of Black Act*, London, Allen Lane, 1975.

6. U. Baxi, *The Future of Human Rights*, Delhi, Oxford University Press, 2<sup>nd</sup> ed., 2006.

7. Differently presented, for example in Braithwaite and Dathos (2000), Chibundo (1999) and B. S. Chimni, "Cooption and Resistance: Two Faces of Global Administrative Law", *New York Journal of International Law and Politics*, vol.37, Number 4/Summer 5, 2005, pp.799-827.

8. See Gill (2000) and Schneiderman (2000).

9. See U. Baxi, "The War on Terror and the 'War of Terror', Nomadic Multitudes, Aggressive Incumbents & the 'New International Law'", *Osgoode Hall Law Journal*, v. 43, number 1 & 2, 2005, pp.1-36. See also M. L. Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law", *New York University Public Law and Legal Theory Working Papers*, Paper 43, 2006; Idem, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Rendition'", New York, ABCBY and NYU School of Law, 2004.

10. U. Baxi, *The Future of Human Rights*, Delhi, Oxford University Press, 2<sup>nd</sup> ed., 2006.

11. But see R. Peernbohm, "Let One Hundred Flowers Bloom, One Hundred School Contend: Debating Rule of Law in China", *Michigan Journal of International Law*, v. 23, 2002, p. 471.

12. L. Althusser, *Montesquieu, Rousseau, Marx: Politics and History*, London, Verso, Ben Brewster trs, 1982.

13. Indeed, the separation of powers invests the executive with sovereign discretion in the realms of macro and micro development planning, arms production (inclusive of weapons of mass destruction), decisions to wage many types of (covert as well as overt) war, or management of insurgent violence. Our ROL talk unsurprisingly, but still unhappily, more or less, ends where the militarized state (the "secret" State, to evoke E. P. Thompson, *Writing by the Candlelight*, London, The Merlin Press, 1989 begins.

14. J. Raz, "The Rule of Law and its Virtue", *Law Quarterly Review*, v. 93, 1977, p. 208.
15. J. Rawls, *The Law of Peoples*, Cambridge, Harvard University Press, 1999; Idem, *Political Liberalism*, New York, Columbia University Press, 1993. See also J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, The MIT Press, William Rehg trs, 1996.
16. See J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, Chapel Hill, University of North Carolina Press, 1999.
17. I invite your attention to such diverse phenomena as May 1968, the campus protest in the United States against the Vietnam War, massive peoples demonstrations against the Uruguay round and the WTO, the Tiananmen Square, the struggles against apartheid regimes in the United States and South Africa, against perversions of the East and Central European socialist legality and more recently the protests against the invasion of Iraq and the various 'velvet' and 'orange' revolutions. For befittingly amorphous notions of 'multitudes' see, A. Negri, *Insurgencies: Constituent Power and the Modern State*, Minnesota, University of Minnesota Press, Muarizia Boscagli trs, 1999; A. Negri & M. Hardt, *Empire*, Cambridge, Harvard University Press, 2000; and in a rather dissimilar genre see P. Virno, *A Grammar of Multitude For An Analysis of Contemporary Forms of Life*, Los Angeles and New York, SEMIOTEXT{E}, Isabella Bertolotti, James Cascaito, Andréa Casson trs., 2004.
18. G. Austin, *The Indian Constitution: The Cornerstone of Nation*, Delhi, Oxford University Press, 1964; Idem, *Working a Democratic Constitution — The Indian Experience*, Delhi, Oxford University Press, 1999, pp. 540-555. U. Baxi, "The Colonialist Heritage" in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, pp. 6-58.
19. Jawaharlal Nehru captured this relationship by insisting that the "rule of law" must not be divorced from the "rule of life".
20. The Indian constitutionalism makes normative impact on postcolonial constitutionalism, illustrated most remarkably and recently by the post-apartheid South African Constitution. So inveterate, however, are Euroamerican habits of heart that the dominant, even comparative, discourse represents the Indian and related Southern forms of constitutionalism as merely mimetic.
21. The Indian Supreme Court has thus constructed a magnificent edifice of preventive detention jurisprudence subjecting acts of detention to strict scrutiny, while sustaining legislative constitutionality of such measures. But see, U. K. Singh, *The State, Democracy, and Anti-terror Laws In India*, New Delhi, Sage, 2007.
22. See, for more recent perspectives, R. Samaddar, *The Politics of Autonomy*, New Delhi, Sage, 2005.
23. Such as, for example, the Inter-State Development Council, the Planning Commission, Human Rights Commission, the Minorities and Women Commissions, the Scheduled Castes and Tribes Commission, the Central Vigilance Commission, The Indian Law Commission.
24. For example, the extraordinary power to impose the President's Rule, suspending or dismissing state governments/legislatures once liberally exercised has now been attenuated to a vanishing

point by various decisions of the Supreme Court. The power to declare and administer the states of constitutional Emergency, in situations of armed rebellion and of external aggression that result in wide-ranging suspension of human rights under Part 111 of the Constitution, have been steadily brought under judicial scrutiny and human rights-friendly constitutional amendments.

**25.** The reference here is to a variety of Directives reinforcing structures of governance – structures such as the Commission for the Scheduled Castes and Tribes, the Planning Commission, the Finance Commission, the Election Commission, and some recent national human rights institutions such as the National Human Rights Commission and the National Commission for Women, some also replicated in state governance. Although explicitly declared non-justiciable, the Directives cast a “paramount” duty of observance in the making of law and policy. Because of this, Indian courts have deployed the Directives as a technology of constitutional interpretation: they have favoured interpretation that *fosters*, rather than *frustrates*, the Directives. This “indirect” justiciability has contributed a good deal towards fructification of the substantive/ “thick” versions of the Indian ROL.

**26.** I do not burden this article with references and sources that testify to this achievement. Interested readers may find it useful to consult treatises on Indian constitutional and administrative law, notably by Durga Das Basu, H. M. Seervai, M.P. Jain, S.N. Jain, S.P. Sathe, I.P. Massey, Rajiv Dhavan, among eminent others.

**27.** U. Baxi, “Justice of Human Rights in Indian Constitutionalism: Preliminary Notes” in Thomas Pantham and V. R. Mehta (ed.), *Modern Indian Political Thought*, Delhi, Sage Publications, 2006, pp. 263-284.

**28.** See S. P. Sathe, *Judicial Activism in India*, Delhi, Oxford University Press, 2002. U. Baxi, *The Indian Supreme Court and Politics* Lucknow, Delhi, Eastern Book Company, 1980 and Idem, *Courage, Craft, and Contention: The Indian Supreme Court in mid-Eighties*, Bombay, N. M. Tripathi, 1985.

**29.** C. Raj Kumar, “International Human Right Perspective on the Right to Education: Integration of Human Rights and Human Development in the Indian Constitution” in *12 Tulane International and Comparative Law* 237, 2004.

**30.** The various constitutional amendment bills providing reservation for women in national and state legislatures have yet to materialize. Their chequered contemporary legislative histories remain mired, in socially significant ways, over the issue of “reservations within reservations”. That is the issue whether this device should be stratified so as to enable/ empower women doubly/ multiply oppressed by state and civil society, through provisions for a representational quota for women belonging to “underclasses”.

**31.** U. Baxi, “The War on Terror and the ‘War of Terror’”, *Nomadic Multitudes, Aggressive Incumbents & the ‘New International Law’*, *Osgoode Hall Law Journal*, v. 43, number 1& 2, 2005, pp. 1-36.

**32.** M. Oakeshott, *On Human Conduct*, Oxford, Oxford University Press, 1975, pp. 1-31.



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#### ABSTRACT

The idea of Rule of Law has become almost unanimously embraced in our days. For human rights advocates, Rule of Law is perceived as an indispensable tool to avoid discrimination, and arbitrary use of force. But, 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.

By revising a substantive and a formalist conception of the Rule of Law, I will try to provide some explanation about why states and people would comply with the Rule of Law standards. The article will also consider the impact of extreme and persistent inequality over the Rule of Law, using my familiarity with the Brazilian experience as an example. In the final section, 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.

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Original in English.

#### KEYWORDS

Rule of Law – Democratic regimes – Legal system – Social and economic inequality – Brazilian experience.

# INEQUALITY AND THE SUBVERSION OF THE RULE OF LAW\*

Oscar Vilhena Vieira

## 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 extreme 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.

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*Notes to this text start on page 46.*

This paper is divided into four sections, followed by some conclusions. In the first part I will revise 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 about 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 over the Rule of Law. In this section I will lean upon my familiarity with the Brazilian experience - and this is not an entirely arbitrary choice. Although it may claim to have 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.

### The concept of the Rule of Law

The idea of Rule of Law has become almost unanimously embraced in our days. It has served as an extremely powerful ideal for those fighting authoritarianism and totalitarianism in the last two decades, and it is considered by many to be one of the main pillars of a democratic regime.<sup>1</sup> For human rights advocates, the Rule of Law is perceived as an indispensable tool to avoid discrimination, and arbitrary use of force.<sup>2</sup> At the same time the idea of the Rule of Law revived by libertarians, like Hayek in the middle of the twentieth century, was espoused with fervour by international financial agencies and legal development aid institutions as a fundamental prerequisite for the establishment of efficient market economies.<sup>3</sup> 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, have started to recognize it as an unconditional human good.<sup>4</sup> 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? Obviously people are either talking about different concepts of Rule of Law or emphasizing distinct virtues or characteristics of a more abstract notion of the Rule of Law.

The classical concept of Rule of Law has been subjected to severe revaluation 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*.<sup>5</sup> 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, and that can be found in the debate between conservatives such as Carl Schmitt and social democrats represented by Franz Neumann.<sup>6</sup> Hayek responds to these sceptical perspectives about the Rule of Law in his influential *The Road to Serfdom*, from 1944.<sup>7</sup>

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, there was a process of decline of law 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 of 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 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. According to 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, 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 that the legislator cannot arbitrarily choose one person to be the target of its coercion or privilege; (b) law should be known and be certain, so that citizens can plan - 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 enact 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) there should be a possibility of judicial review of the administrative discretionary decisions to correct eventual misapplication of the law; (f) legislation and policy should also be 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.<sup>8</sup>

Thus, Hayek's conception of the Rule of Law embodies a substantive conception of law, a strict notion of separation of powers, and an existence of liberal rights to guarantee the private sphere; being modelled therefore 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 a particular political ideal.

In reaction to this and other kinds of substantive formulations of 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".<sup>9</sup>

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 subject to it".<sup>10</sup> 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 independent judiciary, because if rules are reasons for actions, and the judiciary is responsible for applying these rules, it would be futile to guide one's action by the law if the courts would take other reasons into consideration when adjudicating cases. For the same reason principles of due process, as fair hearings or 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.<sup>11</sup>

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 a broad support from different political perspectives. It is extremely valuable for governments in general to count on an efficient tool to guide human behaviour. However, being instrumental to distinct political perspectives does not mean that even a formalist concept of Rule of Law 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 Rule of Law becomes the antithesis to arbitrary power.<sup>12</sup> So the distinct political perspectives that embrace the Rule of Law have in common an aversion to the arbitrary use of power; and this is another explanation why the Rule of Law is embraced by democrats, liberal equalitarians, neo-liberals or human rights activists. 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 public good, the notion of 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 that 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 advance different and some times competing values or interests, such as 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 to explain the attraction of such a large audience 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 have to be cautious and check if they are not just being laudatory to one of its virtues. A virtue that supports the social goals they want to advance.

## **Compliance with the Rule of Law**

A significant problem with the kinds of conceptualisations of Rule of Law outlined above (both substantive or formalistic) is that they do not help us to understand which are the external (social, economic or political) conditions that would favour

the adherence of a legal system to the idea of Rule of Law, so that both state officials and individuals would comply with the law. That is why Maravall and Przeworski are so disappointed with the kind of jurists' lists discussed above, which they regard as "implausible as a description" and "incomplete as an explanation".<sup>13</sup> So the first challenge facing us is to try to understand which conditions or mechanisms trigger compliance with 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's start by the first question.

### *Why would a ruler comply with the 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 [...]".<sup>14</sup> 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 wings of law, and in exchange for their support they will benefit from predictable treatment by the ruler.

Liberalism and democracy demand the expansion of Rule of Law to new legally entitled individuals. Indeed, this is how the Rule of Law evolved from the Middle Ages, by slowly extending privileges 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.

Distribution of rights, which empowers people, is therefore a key device to obtain cooperation. T.H. Marshal, in his classic *Class, Citizenship and Social Development* (1969),<sup>15</sup> gives a clear description of the evolution of citizenship, through the inclusion of people under the wings of law, in western countries. It has been through political struggle that new groups achieve legal status through civil, political, social and economic rights, acquiring different levels of inclusion on the Rule of Law, in return for their cooperation. So even if we cannot confound Rule of Law with citizen rights, it is very difficult historically to dissociate the expansions of citizenship from the extension of the Rule of Law. Generality of 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 obtained by expansion of citizenship.<sup>16</sup>

In contemporary democratic regimes, where legitimacy/cooperation is 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 resources in society, the cost of their cooperation will also be disproportional, which means that law and its implementation will be shaped in terms of different clusters of privileges.

This means that any approximation to 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. And here is the paradox faced by several democratic regimes with high levels of social inequality. Although equal rights are recognized in the books, as a symbolic measure to obtain cooperation, 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, Rule of Law becomes a partial good, favouring mostly those who have power and resources to take advantage of it. In other words, the formal equality provided by the language of rights does not convert into equal access to the Rule of Law or impartial implementation of laws and rights.<sup>17</sup> So it is possible to have rights, but not sufficient resources to claim their implementation. Therefore it is more appropriate to think of a Rule of Law not in terms of existence or non-existence, but in terms of levels of inclusiveness. Democratic process can expand Rule of Law. But even in democratic regimes, in societies with extreme levels of inequality, where people and groups possess disproportional 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 law is not just 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 disposed to check each other. As perceived by Madison: when ambition is disposed to restrain ambition, the possibility of having government under control increases.<sup>18</sup> Foundational moments then become very important. When competing social powers are not sufficiently strong to overcome each other, they tend to compromise in the creation of political structures with fragmented powers. The least empowered groups can benefit from the result of these elite struggles. This is the basic logic that informs modern constitutionalism.

However, the Rule of Law aims at 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 into account when complying with the law?

*Why would people comply with the law?*

*Cognitive reasons.* The first set of reasons for individual compliance with the law is certainly cognitive, and concerns our ability to understand the basic concepts of law, like 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 concept that people are endowed with equal rights, and that the law should be impartially enforced, is often contrary to day-to-day experience. Existing privileges, class and hierarchical entitlements are entrenched in different cultural systems, making the experience of 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 concentration of poverty, and illiteracy, this condition is hardly ever achieved.<sup>19</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 risks and potential benefits in the actions we intend to perform. People respect the law and rights of others 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 an instrumental value, respecting 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 behavior will always exist that cannot be otherwise controlled. So impunity caused by state inefficiency, corruption or selectivity jeopardizes the ability of the threat of coercion as a means of obtaining compliance. It should be also 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 just 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 a crime. 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.<sup>20</sup> Hence a second instrumental reason for respecting the law is an expectation of reprisal or benefit from a community or a 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 voluntary 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.<sup>21</sup>

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 it neither affirms nor denies the existence of a deeper moral framework. Mutually advantageous relationships, however, can help to obtain compliance with the law, but also in fragile terms. Starting from a structure of mutual advantage, in circumstances of disparity of power, individuals have an incentive to cheat: what is in my interest is that everybody else cooperates and I defect.<sup>22</sup> Peer pressure can also be problematic, because the social environment can be infused by 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 (self-interested) arrangements cannot fully explain why people would comply with the law. However important, they are insufficient as a complete explanation.

*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.<sup>23</sup> In this sense, Lon Fuller's claim that moral reciprocity is a fundamental element for the existence of a legal system becomes particularly interesting.<sup>24</sup> 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 present 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.<sup>25</sup> 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.<sup>26</sup>

This is a system governed by rules, in which each citizen is given the status

of a right holder, granted a sphere of protection as a person in contact with other citizens and the state, the latter being also subject to the reciprocity principle. In this sense, the self-restraint that implies 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).<sup>27</sup> 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, therefore I have a correlated obligation to stop. In a community bound by moral reciprocity, based on rights, law would be easier to implement. It goes without saying how difficult it is to obtain or build moral reciprocity in a modern and consumer oriented society characterized by profound social and economical disparities among its members.

The idea of morality, however, could be more formal, as 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 special fair procedure, produced the laws regulating social relationships and the public sphere. The fairness of the procedure would guarantee that maximization of self-interest will be neutralised, so people could deliberate in terms of public good, which creates a moral obligation on all citizens to accept those results.<sup>28</sup> If we follow Rousseau's Rule of Law theory here, not only must procedures be fair, but also the outcome should be delivered through a specific means to secure impartiality. That is: general laws. It is likewise important to stress that procedural justice is not limited to processes that lead 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.<sup>29</sup> So the fairness of implementation of laws is as important as the fairness of the production of laws. If the enforcement is not carried out with 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.<sup>30</sup>

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 (citizens and officials) act in accordance with the Rule of Law, even though the weight of each reason will vary in conformity with 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; it subverts enforcement of laws and use of coercion; and finally it acts against the construction of reciprocity, both on moral or 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 elements that make a legal system a Rule of Law, does not achieve impartiality or even congruency. Via 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.

## **Inequality and the Rule of Law**

In 1988 Brazil adopted a new constitution, after more than two decades of 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 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 are part of the Brazilian legal system.

According to the Brazilian Constitution, the law is the only instrument that can impose legal obligations on individuals, laws being considered those normative acts enacted by Congress procedurally and substantively in accordance with the constitution. Every person is “equal before the law”, without any

distinction. Laws should be prospective, entering into force only after their publication; retroactive laws are just admitted if they benefit individuals. There are no secret laws. In case of emergency the president can enact provisional measures that have to be approved by Congress to become law, within a period of sixty days; otherwise they lose their efficacy since 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 about the concept of law, where particular rules are admissible if they are consistent with general rules. I also believe that 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. 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 the separation of powers is not as sharp as in the Montesquieu model; 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. But certainly this flexible notion of separation of powers is no looser than the one admitted by 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 enacted and the behaviour of individuals or state officials.

There is today a growing awareness 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 large amount of distrust in the capacity of the state to impartially implement its legislation and, more problematically, only 21% of Brazilians respect the laws themselves.<sup>31</sup> According to Guillermo O'Donnell most countries in Latin America were not able to consolidate a Rule of Law system after 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 instead of a law empire.<sup>32</sup>

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 reason for actions for several sectors of Brazilian society. Brazil stands as the 8<sup>th</sup> largest economy in the world, according to recent revaluation of Brazilian Gross Domestic Product. However it holds one of the worst records in terms of wealth distribution (0,584 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. 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 countries with this configuration, the Brazilian state is usually sweet to the powerful, insensible to the excluded, and harsh to those who challenge the hierarchical stability of society.

### *Invisibility, demonization and immunity*

The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, causes *invisibility* of the extreme poor, *demonization* of those who challenge the system, and *immunity* of the privileged, obliterating legal impartiality. In synthesis, extreme and persistent social and economic inequality provokes the erosion of 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 moral or political reaction from the most advantaged and does not trigger an adequate legal response from state officials. The loss of human lives or offence to 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 its deplorable consequences in terms of rights violations, one of the most dramatic expressions of invisibility in Brazil is the extremely high rates of homicides 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.<sup>33</sup> More people become victims of homicide every year in Brazil than in the Iraq war.<sup>34</sup> It is important to say that the vast majority of those killed are poor, uneducated, young black men who used to live in the Brazilian social periphery.<sup>35</sup>

As cautiously demonstrated by Fajnzylber, Lederman and Loayza,<sup>36</sup> there is a robust causal relation between inequality and violent crime rates across countries.

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, 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 of compassion and solidarity.

But if invisibility can be accepted in traditional societies it becomes a troublesome trend in a democratized regime and consumer-oriented context. For some of those who have not experienced being treated with equal concern and respect by those responsible to implement the law and by society in general, there is no reason to act in accordance with the law. In other words, for those raised under invisibility 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* therefore is a process by which society deconstructs the human image of its enemies, which from now on will not deserve to be included under the realm of law. 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 *demonization* 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 like suspects, ordinary criminals, inmates, and even members of social movements is well recorded every year by local and international human rights organizations. The press database of the Centre for the Studies of Violence of the University of São Paulo, registered more than six thousand cases of arbitrary use of lethal force by the Brazilian police from 1980 to 2000. Each of these cases resulted in at least one death.<sup>37</sup>

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>38</sup> In 2006, the police, just in the state of Rio de Janeiro, 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 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>39</sup>*

Rodley captured in this sentence the essence of *demonization*. Human beings treated like animals have no reason to behave lawfully. *Demonization*, besides being a violation of the law in itself, creates an autonomous spiral of violence and barbarous behaviour on the part of individuals against each other, and that 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 of human rights violators or of those involved in corruption, being the powerful or the rich.

Impunity of human rights violators is endemic in Brazil, as reported by major human rights organizations, and also recognized by federal authorities. Cases like Vigário Geral in 1993, Candelária, 1993, Corumbiara, 1995, Eldorado de Carajas, 1996, Catelinho, 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 face their responsibilities. But perhaps the most notorious case of impunity of 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, as a consequence of a prison riot, in

1992. After thirteen years no one was found guilty 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 law.

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 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, from the twenty-six cases of corruption involving members of the House of Representatives that arrived at the Supreme Court, no one 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 tried by first instance judges.<sup>40</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>41</sup>

Disproportional distribution of resources among individuals and groups within society subverts institutions, including the work of those agencies with the responsibility to implement the law. An analysis of the Brazilian penitentiary census shows that only the poor and uneducated are selected by the Brazilian criminal system to be incarcerated. 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”.<sup>42</sup> As stated by experience of the Brazilian Deputy General Federal Attorney, “corruption is a direct consequence of the perverse concentration of income in Brazil”.<sup>43</sup> The conclusion is that impunity, although a general phenomena in Brazil, is more prominent for the privileged ones.

### *The erosion of law's authority*

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 those in a better situation 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 hierarchical society, where second-rate individuals cannot achieve a real status of full citizenship and are not fully recognized as right holders (even though they may formally be so). Discrimination, in this sense, tends to loosen the reciprocity bonds within the community, softening the feeling of moral obligation by the powerful towards those who are excluded. Once they cease to be perceived as valuable subjects, it doesn't take much to deprive them of the set of rights that protects other citizens. Therefore, one can hardly achieve reciprocity in a society where major hierarchies and inequalities among individuals exist. 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 agents in the exchange relations that make possible the production and circulation of wealth within 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 poles for compliance with the rules and respect for rights in the sphere of the interpersonal relations.

Deprived of social and economic status, the invisible individuals start to be socialized in a way that leads them 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 become a threat 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 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 was supposedly responsible for the application of formal mechanisms of social control, pursuant to the law and by its means of coercion, begins to reproduce socially generalized standards. The result is that the state is negligent with the invisible, violent and arbitrary towards the moral outcasts, and docile and friendly towards the privileged that place themselves above the law. So even though you may have a legal system that complies with the several "excellences" related to the formality 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 Rule of Law standards, should not mean that the idea of Rule of Law is futile in these environments. In new democratic regimes, such as Brazil and many other developing countries, constitutions tend to be reactive to a past of authoritarianism and major social injustices, and in search of legitimisation (to gain cooperation). New constitutions normally bring a generous bill of rights that recognize civil, political, and also a large range of social rights. They also recognize the major institutional elements of Rule of Law and representative democracy. More than that, these post-authoritarian constitutions create new institutions, like ombudsmen, public defenders, human rights commissions and prosecutors office 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 civil society pressures. Forged during the struggle against arbitrary rule and strengthened throughout democratisation, civil society organizations are a key player in denouncing abuses, making governments more accountable, and providing alternative polices to alleviate major social problems. Just as an 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”.<sup>44</sup> The question, therefore, is how these new players are using their institutional or social power to challenge formal Rule of Law systems to become more impartial, overcoming their inability to apply the law in equal terms to all its citizens.

It would be naive to attribute to legal systems the capacity to produce their own efficacy, but it would be also 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 would have better

conditions to flourish. This alternative is based on the presumption that the legal system occupies a special intermediary position between politics and society. Being a product of social relations and political decisions, legal systems are also a vector for these relations and decisions. Law does not only mirror the distribution of power within society. Modern legal systems are constituted by entrenched privileges of the powerful, but also 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.<sup>45</sup> Therefore any attempt to make use of the law to improve the Rule of Law itself presupposes that there is political and social mobilization backing it. Owing to some formal egalitarian characteristics of the Rule of Law, as discussed above, interests that would be squashed in a pure political arena can gain some status in a more legally infused environment. Although legal institutions are also extremely vulnerable to subversion by the powerful, they can eventually produce short circuits in the political system. In translating a social demand into a legal demand we move from a pure power competition to a process where decisions must be justified in legal terms. And the need for legal justification reduces the space for pure discretion. 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, generality of law, transparency or congruency claimed by the idea of Rule of Law can trap the privileged, bringing them back to the realm of 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 where everyone is treated with equal concern and respect.

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## ABSTRACT

In Colombia, the judicialization of politics has assumed greater proportions than in many other Third World countries where judicial prominence has become mainstream. What can have prompted the development of this phenomenon? What is its impact on the democratization of Colombian society? What are the democratic merits and the risks of judicialization? Besides attempting to provide answers to these questions, I also propose to analyze the Colombian case, through illustrative examples and a theoretical discussion on the evolution of the phenomenon.

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## KEYWORDS

Judicialization of politics – Democracy – Rule of law – Judicial prominence – Constitutional justice – Independent Judiciary



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# JUDICIALIZATION OF POLITICS IN COLOMBIA: CASES, MERITS AND RISKS

Rodrigo Uprimny Yepes

Over the past two decades, the Colombian judicial system has not only undergone profound changes, it has also secured a firm foothold in the political arena. The decisions of the courts have, in many cases, had sizable repercussions on the overall evolution of the country. Colombia therefore has witnessed a significant judicialization of certain aspects of politics over this period.

Obviously, a central justice system and a certain amount of judicialization of politics are not exclusive to Colombia, since, for a host of different reasons, judicial prominence has become mainstream in numerous countries, developed and developing alike.<sup>1</sup> Nevertheless, judicialization of politics in Colombia appears to have assumed greater proportions than in other countries and, therefore, it could prove interesting to study the dynamics of this phenomenon and, more specifically, its democratic merits, but also the risks it poses.

I propose, then, in this paper, to analyze the judicialization of politics in Colombia. I shall begin by presenting some illustrative examples and then take a theoretical look at its evolution, in an attempt to identify its driving forces, as well as its merits and risks for the consolidation of our democracies.

## **The cases: some significant examples of the judicialization of Colombian politics**

I understand very explicitly the term “judicialization of politics” to mean the fact that certain matters that were traditionally decided through political channels, and that were considered belonging to political democracy, begin to

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*Notes to this text start on page 64.*

be decided increasingly more so by judges, or at least become far more dependent on judicial decisions, meaning that, in turn, many social actors begin to formulate their demands in legal and judicial terms. Obviously, this definition is purely descriptive and merely represents a shift in the traditional boundaries between the judicial and political systems in democratic societies, insofar as the procedural steps and the decision-making for certain matters have been transferred from the political to the judicial arena, with the legal dimensions of social action and public policy acquiring more clout.<sup>2</sup> Another question is whether or not the judicialization of politics is desirable democratically, a subject of ongoing debate in recent years, and one that I shall attempt to provide some answers for in this paper.

This being the case, Colombia has, over the past two decades, witnessed some important forms of judicialization of politics in numerous fields, but perhaps the most significant have been the following: (a) the struggle against political corruption and for the overhaul of political practices; (b) curtailing the abuse of government authority, in particular the “state of emergency”, or what in Colombia is called a “state of exception”; (c) protecting minority groups and individual autonomy; (d) protecting stigmatized populations or those in situations of manifest weakness and, last but by no means least, (e) the management of economic policy, in virtue of the judicial protection of social rights. I shall now briefly describe each of these elements of judicialization of Colombian politics.

### *Judges and the struggle against political corruption and for the overhaul of political practices*

Over the past decade, the Colombian judicial system has played an important role in the drive to reform political customs, in an attempt to curb political clientelism and corruption. Two examples are particularly illustrative: first, the role of the judges during the crisis of President Ernesto Samper (1994-98), who was the subject of a Congressional inquiry into charges that he had knowingly accepted money from a drug cartel for his election campaign. In this crisis, representatives from the judiciary, through their declarations and decisions, played a central role in the political landscape. It was a political crisis, but also one that was highly judicialized.<sup>3</sup>

The second example concerns the process of “loss of investiture”, or removal from public office, decreed by the Council of State. To understand this process, we need to bear in mind that the Constitution of 1991 assigned significant powers to the judiciary to correct political misconduct and corruption, enshrining this “loss of investiture” into law. The sanction amounts to a “political death”, since whoever receives it can never again occupy the position of an

elected official. The process is judicial in nature and decided by the high tribunal for administrative and disciplinary issues (the Council of State) against members of Congress who commit certain offenses, namely peddling influence, conflicts of interest or even being absent in more than six plenary sessions in which legislative bills are voted. Between 1991 and 2003, the Council of State issued some 350 indictments for loss of investiture, and in 42 cases congressmen actually lost their seats.<sup>4</sup>

These examples illustrate the sizable influence that judicial decisions have had on the attempts to reform political customs in Colombia.

### *Judicial review of legal and political emergency powers*

For many decades, Colombia possessed a very distinctive democracy, since while it did not succumb to military dictatorship like many other countries in the region, it never managed to consolidate a true democracy. One of the reasons for this restricted, or “exceptional” democracy, as some analysts have labeled it, was the consistent use of the “state of siege” and the “state of exception” (or “state of emergency”), which give the president extraordinary powers, by consecutive governments. As a result, from the temporary closure of Congress during the administration of Ospina Pérez (1946-1950), in November 1949, until the promulgation of the Constitution of 1991, Colombia was in an almost permanent state of emergency, since for these 42 years, 35 were spent under a state of siege.

After the adoption of the Constitution of 1991, the Constitutional Court decided to exercise a far stricter judicial review of these powers by the government. In particular, it began to exercise a “material” control of presidential declarations of emergency, meaning that the Court analyzed whether or not a crisis was severe enough to justify the president assuming emergency powers. Previously, the evaluation was considered a political question, and as such it was the job of the president alone to determine whether or not economic turmoil or public order disturbances justified declaring a state of emergency. For its part, the Supreme Court, which was responsible for determining constitutionality prior to the Constitution of 1991, considered that this decision was not subject to judicial review and, as such, should only be submitted to the political review of Congress.<sup>5</sup> However, the Constitutional Court determined, from its very first decisions in 1992 until its latest rulings in 2003, that although the government should enjoy a degree of discretion to identify whether or not a crisis exists and whether or not to declare a state of emergency, its decisions are subject not only to the political control of Congress, but also to judicial review. This doctrine, therefore, has implied a judicialization of the control for declaring states of emergency; consequently, of the twelve such declarations, of

either internal disturbance or state of emergency, made between 1992 and 2002, the Constitutional Court fully ratified five, fully annulled three and partially ratified four.<sup>6</sup> The practical and political impact of this intervention by the Constitutional Court appears to be fairly significant, at least according to the following indicator: the amount of time spent by Colombians in states of emergency fell from 80% in the 1980s to less than 20% after the introduction of this judicial review in the 1990s.

*Protection of personal autonomy and of ethnic and cultural minorities*

Despite the existence of a constitutional review in Colombia since 1910, the definition and scope of the rights of the person and of minority groups was usually considered a political matter to be addressed and established by lawmakers. There are two factors that appear to have influenced this sentiment: on the one hand, the previous Constitution, in effect since 1886 but with important amendments in 1910 and 1936, had a relatively limited bill of rights; and, on the other hand, the Supreme Court, which was responsible for determining constitutionality between 1910 and 1991, saw its role as “organicistic” and “jurisdictional”. That is, the court understood that its responsibility was not so much to define the scope of these rights, but essentially to assure that the “allocation of jurisdictions” between the different “organs of the State” established in the Constitution was respected. The result was that the jurisprudence of the Supreme Court during this period on matters of constitutional rights was both insufficient and extremely timid.

In contrast, after the promulgation of the Constitution of 1991, which boasts a broad bill of rights, and after the Constitutional Court began operating in 1992, the situation changed dramatically, both quantitatively and qualitatively. First of all, the number of rulings focusing on the definition of the scope of fundamental rights increased significantly. And this led the Constitutional Court to intervene, with some extremely controversial rulings, in the definition of the scope of constitutional rights and of minority groups, such as the decriminalization of drug use for addicts (sentence C-221/94) and voluntary euthanasia for terminally ill people (sentence C-239/97).<sup>7</sup> Similarly, the Court has protected traditionally discriminated minorities, such as people with HIV/AIDS and homosexuals. As such, homosexuality constituted a crime until 1980, and although this type of offence was abolished, several labor regimes remained in place, namely for teachers and public security forces, that enabled a person to be disciplined for homosexual behavior. The Court tackled discrimination against homosexuals at all these levels. For instance, the sentence T-097/94 protected the intimacy of homosexuals in the public security forces

and C-507/99 asserted that members of the military could not be penalized for homosexuality. Similarly, on other occasions, the Court made it impossible to expel a student for homosexual behavior (T-100/98), or penalize a teacher for the same reason (C-481/98). On a much broader level, the Court ruled that any differential treatment of a person based on their sexual preference was considered discriminatory and, therefore, unconstitutional (C-481/98).

The Court also determined, to a large degree, the scope of pluralism, not only championing equality between religions, through the annulment of the Concordat and the privileges of Catholicism, but also recognizing very broad spheres for the administration of justice by indigenous authorities.<sup>8</sup>

By presenting these examples, I do not mean to imply that Colombian constitutional jurisprudence was always progressive. For instance, the Court's defense of the fundamental rights of homosexuals had its limits, since it protected them against discrimination as individuals, but not as couples, determining that the law need not recognize the legal status of same-sex unions (C-098/98), that it was legitimate for the law to ban homosexual couples from adopting children (C-814/01) and that the healthcare system was not required to accept the partner of a homosexual as a beneficiary (SU-623/01). However, it is not my intent here to comment on the progressiveness of the Colombian Constitutional Court's jurisprudence, but instead only to point out that, over the past decade, the scope of constitutional rights has been defined largely by judicial decisions, which means that it is a highly judicialized issue.

*The policies for stigmatized populations:  
prisoners and the internally displaced*

Certain policies concerning the treatment of stigmatized populations and those in situations of manifest weakness have also been significantly judicialized in recent years. This has occurred primarily with prisoners and displaced persons. The former have filed numerous *tutela* suits,<sup>9</sup> enabling citizens to seek immediate redress for violations of their basic constitutional rights, given the overcrowding and poor conditions in Colombian prisons. After ruling on several individual *amparos*,<sup>10</sup> the Constitutional Court decided that it was dealing with a blanket problem, declared an "unconstitutional state of affairs" in the country's prisons and instructed the government to solve the prison overcrowding problem within a given number of months.

A similar situation arose, on a much wider scale, with the country's internally displaced persons. Due largely to the escalation of its armed conflict, Colombia has an enormous displaced population that constitutes a veritable humanitarian tragedy. Just like with the prison case, several displaced persons filed *tutelas* calling for the national and local authorities to protect their

fundamental rights. The Constitutional Court, as it did with the prisoner situation, after ruling on numerous individual *amparos*, declared an “unconstitutional state of affairs” (T-025/04) due to the inconsistency and precarious nature of state policy concerning forced displacement. In this decision, the Court ordered the national authorities to reformulate and clarify its strategies for addressing forced displacement in order to satisfy the basic needs of these persons.

These decisions illustrate the significant judicialization of certain public policies, since the decisions of the Court not only implied considerable public spending,<sup>11</sup> they also established priorities and orientations for government strategies in these sectors.

### *The judicialization of economic policy and the protection of social rights*

The final, and perhaps the most significant, example of judicialization of politics has been the extremely important influence wielded by the Constitutional Court on economic policy as a result of this tribunal’s mission to protect social rights. There are countless examples, so any attempt at codification runs the risk of being inadequate; but perhaps the best approach would be to present two types of intervention: individual or group protection by means of *tutela* and an abstract or general review of the constitutionality of laws with economic content.

On the one hand, the Constitutional Court has defended that social rights may be upheld by judges via the protection of constitutional rights, given that social and constitutional rights are intrinsically linked. For a social right to be protected, the lack of protection that is invoked before the judge must imply that another right, considered fundamental and immediately applicable, is affected, as is the case with the right to life. And in these cases, the protection is usually afforded through individual *tutelas*, which, as we have seen, are Colombia’s equivalent to the *amparo* in other countries. Prior to 1998, judicial protection of social rights, despite the progressive character of the jurisprudence, did not provoke any serious conflicts between judges and officials from the other branches of the government. The number of *tutela* rulings for the protection of social rights was not significant and, as such, the judicial activism of the Court was only unacceptable to the very harshest critics of social constitutionalism. Furthermore, the majority of these rulings referred to cases of people contractually linked to a state healthcare, education or welfare system. After 1998, however, the situation changed dramatically, given the soaring demand for *tutela* protection of the right to health against welfare entities. The costs increased threefold: while in 1998 the demand for healthcare via *tutela* cost 4.793 billion pesos, by 1999 this figure had risen to 15.878 billion.<sup>12</sup>

Moreover, *tutelas* that formally invoke the right to health or the right to life, through which petitioners generally request treatment they deem necessary to preserve a life of dignity, numbered approximately 3,000 in 1995 and represented roughly 10% of all the *tutelas* filed to the Court that year. By the first half of 1999, this ratio had risen to 30% and the number of cases had increased to nearly 20,000, that is, nearly 40,000 per year.<sup>13</sup>

On the other hand, the Court has strongly affected economic policy in virtue of an abstract review of constitutionality that has led it to declare unconstitutional, either entirely or partially, certain laws that violate certain constitutional principles and rights. For instance, the Court has annulled laws extending value added tax to basic need products (C-776/03), ordered the partial indexation of salaries for civil servants (C-1433/00, C-1064/01 and C-1017/03), extended some pension benefits to certain population groups, after considering that the restriction disregarded the principle of equality (C-409/94) and banned alterations to certain pension regulations, after considering that they affect the vested rights of workers (C-754/04). All these rulings have had significant economic and budgetary implications.<sup>14</sup>

One of the most striking examples of the judicialization of economic policy was the intervention in the mortgage owners debt crisis in 1998 and 1999. Given the importance of this case, it is worth describing it in some detail.

In 1997, Colombia plunged into a bitter recession that, coupled with certain economic policy decisions, made life extremely difficult for thousands of middle class citizens who had contracted mortgages to pay for their homes. In a matter of months, it was said that some 90,000 people were on the verge of losing their homes and this figure rose, two years later, to 200,000 families.<sup>15</sup>

These debtors were largely from the middle class, people who do not usually engage in social protest. Nevertheless, the situation grew so serious that the debtors began to band together to defend themselves against the financial institutions. In 1998, they staged peaceful demonstrations and drafted petitions calling for the government and Congress to make changes to the credit system (known as UPAC) and to provide them with some relief.

Very quickly, and in response to the lack of receptiveness from the government and Congress, the debtors and their associations resorted to a judicial strategy and, in particular, submitted their claims about the rules governing the UPAC system to the Constitutional Court.

Between 1998 and 1999, the Court delivered several rulings on the UPAC system that, in general, tended to protect the debtors. Furthermore, the Court ordered a new law regulating the housing credit market to be passed within a period of seven months. This sentence placed the Court in the eye of the storm, since although the debtors and some social movements supported its rulings, business groups, some sectors of government and countless analysts fiercely

attacked the Constitutional Court, criticizing it for overstepping its boundaries and for being ignorant of the workings of a market economy, and they proposed that the Court should not rule on the constitutionality of economic legislation.

In this context, Congress deliberated and passed, at the end of 1999, a new housing credit law that incorporated, among other things, two trillion pesos (nearly 1.2 million dollars) in relief for the mortgage owners and once again pegged mortgage debts to inflation. The influence of the Court's decisions in the parliamentary debates was unmistakable.

These cases illustrate that Colombian economic policy in recent years has been strongly affected by constitutional rulings, which have not only had considerable financial implications but have also defined certain guidelines for this policy.

### *An initial conclusion*

All these examples enable us to reach an initial conclusion: there has been a strong judicialization of Colombian politics over the past few decades, which gives rise to some obvious questions: what could have prompted the development of this phenomenon? What has its impact been on the democratization of Colombian society? In the remainder of this paper, I shall endeavor to provide some answers to these questions.

### **An attempt at interpretation: the driving forces of Colombian politics**

An explanation of what has triggered the judicialization of politics is not easy, since the interpretations are not entirely consistent. Nevertheless, it is possible to identify some factors shared by different countries and others specific to Colombia that enable us to understand, at least partially, the logic behind this phenomenon.

#### *Driving forces of judicialization shared by other countries<sup>16</sup>*

One initial factor leading to judicialization both in Colombia and in other countries is the disillusionment with politics, which caused some circles to turn to the judiciary for answers to problems that, in principle, should be debated and resolved, owing to the mobilization of the citizenry, on a political level. This phenomenon is obviously not exclusive to Colombia, since the political and representation crisis is in general a factor that has profoundly influenced the current prominence of the judiciary. As such, the proliferation – or perhaps the greater transparency – of corruption has placed judges in the heart of the

political landscape, given either their permeability to corruption, or their actions to combat it, which not only pits them against the political powers, it has also converted certain officials or judges into figures of great public prominence who enjoy the backing of the citizenry. Moreover, in the social field, some sectors of the judiciary have embraced the cause of defending citizenship rights, which has led to the judicial structure, whose officials are not popularly elected, sometimes being perceived as more democratic than the government bodies whose officials are elected by popular vote, giving rise to a rather paradoxical shift in democratic legitimacy from the political system to the judicial system. Finally, many citizens consider the judiciary to be more accessible and democratic than the legislative or the executive branches, as certain conflicts can be settled more easily by the judicial structure, where there is no need for political intermediaries.

Second, this interest on the part of the citizenry to judicialize certain conflicts has sometimes been accompanied by an interest by certain political actors (parties and governments alike) to depoliticize some sensitive issues, to avoid being weighed down by the consequences of their decisions, or because they are faced with an institutional obstacle that prompts them to accept or even welcome the delegation of these matters to the judges.

A third force propelling judicialization has been the effort to strengthen the power of the judiciary and to assure its independence, which is essential for the rule of law. This process has been driven by many diverse factors in Latin America. For instance, human rights groups and social movements that opposed the authoritarian regimes advocated that a strong judiciary was essential to consolidate democracy and to guarantee people their rights. Meanwhile, international financing institutions and the Washington Consensus also backed these reforms, to provide for foreign investment, since without an independent judiciary, there can be no legal protection, nor security for property or contract rights. These forces have implied a certain strengthening of the judicial structure, and indeed a judicial branch with more personal and political independence, and equipped with more resources, has a greater chance of intervening in political processes.

Fourth, many countries have, in recent years, experienced a shift towards what some authors call neoconstitutionalism, which is characterized by the promulgation of constitutions with a long list of fundamental rights and, moreover, that are normative in nature, establishing constitutional justice systems to assure respect for these rights, even by legislative majorities. This form of constitutional justice has also helped fuel the judicialization of politics, not only given the ability of these courts to annul legislative and government decisions by invoking constitutional clauses that are essentially open to interpretation, but because it enables individual citizens or social groups to articulate their demands in the language of rights.

This internal constitutionalization of the law coincides with the relative strengthening, in recent years, of international human rights mechanisms, which have also encouraged complaints to be formulated in terms of rights and reinforced the judicial dimension of political criticism.

### *Possible forces specific to Colombia*

The situation in Colombia, to a certain degree, simply accentuates certain trends existing in other countries, but there are some elements that seem to be specific to the country.

On the one hand, there is a weakness in the mechanisms of political representation, although this appears to run deeper in Colombia than in other countries in the region, hence the greater inclination to substitute political for judicial action. Now is not the time or the place to make a systematic presentation of this phenomenon, which has been analyzed in detail by other authors. All I shall do is point out that this has bred a deep disrespect for Congress and the so-called political class, which has enabled judges and, in particular, the Constitutional Court to play a more prominent role. As a result, what very often occurs is not that this tribunal confronts the other branches, but rather that it steps in to occupy the vacuum they have left; and this intervention is accepted as legitimate by broad sectors of society, which consider that at least one branch of government operates progressively and efficiently.

On the other hand, Colombia has an historic tradition of weak social movements compared to other peripheral or Latin American countries. And not only are these social movements infirm, but in recent years violence has significantly raised the costs and risks of keeping them running, since many leaders and activists have been murdered. These two factors – historic weakness and growing risks – tend to strengthen judicial prominence and, more specifically, that of constitutional justice. In effect, since access to constitutional justice is relatively easy, as we shall see further ahead, it is natural that many social groups will be inclined to employ legal arguments instead of relying on social and political mobilization, which comes with enormous risks and costs in Colombia.

The fact is that Colombian legal procedure makes access to constitutional justice relatively easy and inexpensive. The *acción pública* appeal has existed since 1910, enabling any citizen to challenge the constitutionality of any law, without needing to be a lawyer or observe any special formalities. But this is not all. The Constitution of 1991 created an additional device, the *tutela*, by virtue of which any person may, without any special requisites, request from any judge protection of their fundamental rights. The judge is required to decide quickly (10 days) and all sentences are forwarded to the Constitutional Court,

which decides which it will review at its discretion. This simplified access to constitutional justice has prompted the Court to play a more prominent role, since it is relatively easy for citizens to transform a complaint into a legal issue that needs to be decided constitutionally, and in a reasonable short period of time, by the constitutional justice system. And, as comparative legal studies have shown, the more access there is to the courts, the more political influence these courts wield.<sup>17</sup>

In Colombia, the simultaneous movement of neoconstitutionality and promotion of human rights, which also occurred in other countries, is materialized in the Constitution of 1991, which is not the product of a triumphant revolution, but instead an attempt, within an extremely complex historical context, at an agreement to broaden democracy to confront violence and political corruption. Under these circumstances, playing a very important role in the Constituent Assembly were political and social forces traditionally excluded from Colombian electoral politics, such as representatives from some disbanded guerrilla groups and indigenous and religious minorities. The composition of the Assembly, therefore, was pluralist by Colombian electoral standards. Considering this situation, many of the delegates appeared to make the following diagnosis: exclusion, lack of participation and weakness of human rights protection were the basic underlying causes of the crisis in Colombia. This explains some of the ideological orientations of the Constitution of 1991: the expansion of participation mechanisms, the establishment of State responsibility for social justice and equality, and the incorporation of a rich bill of rights and new judicial mechanisms for their protection.

All this explains the generosity afforded human rights by this Constitution, which confers a special legal force to human rights, since not only does it determine that the majority of the constitutional rules that contain these guarantees are directly applicable, but it also establishes that international human rights treaties shall prevail in the internal order and shall constitute criteria for interpreting constitutional rights. The Constitution of 1991, therefore, has a vocation for judicial application, which is conducive to a certain judicial activism in favor of human rights. Although it was not impossible in the previous constitutional order, it had less legal grounding.

On the other hand, there is also a strong tension between the social content of many of the Constitution's clauses and the development strategies that Colombian governments have implemented since 1990. As a result, while the Constitution permits privatization and certain neoliberal policies, many of its rules favor an active intervention by the State to pursue social justice, given that representatives of groups traditionally excluded from Colombian politics had a considerable influence drafting it. However, the Gaviria administration (1990-1994), which had vigorously promoted the constitutional process,

unleashed, perhaps with even greater force, an economic liberalization strategy that was clearly neoliberal. Therefore, while the Constitution to some degree demanded more State presence and an intervention in resource redistribution by the authorities, governments actually implemented development plans that tended to cut back on the social presence of the State and to allow market forces to dictate the allocation of resources.<sup>18</sup>

Very quickly, and for a number of different reasons, the political forces that wrote the Constitution weakened politically, meaning that one of the few institutions capable of applying the Constitution's progressive content was the Constitutional Court. And this tribunal, from its earliest rulings, decided to take on this function with vigor, taking seriously the role of judges in the development of fundamental rights. As such, the Court soon became practically the only executor of the constitutional principles.

Over the years, therefore, the Court gradually came to present itself as the executor of the values of freedom and social justice enshrined in the Constitution, allowing it to acquire a significant legitimacy in certain social sectors. But it always walked the knife's edge, since its progressiveness also triggered fierce criticism from other sectors, in particular from business circles and the government, which attacked the jurisprudence of the Court, accusing it of being populist and naïve. These players have not limited themselves to making criticisms; they have also attempted, so far without success, to pass numerous reforms to shut down the Court, or at least to seriously limit its authority.

In addition to this, certain traits exist in Colombia that are conducive to judicial activism and prominence, namely the traditional respect, at least formally, for constitutional principles and the importance of an independent judiciary.

The Constitutional Court was created by the new Constitution that the Constituent Assembly approved in 1991. However, Colombia already had a long tradition of judicial review of constitutionality, dating back to at least 1910, when the Supreme Court of Justice was recognized as the authority to rule on the constitutionality of laws. And the Supreme Court performed this function, with varying levels of fortune, for nearly eight decades, often making decisions that were very controversial, but always accepted by the political forces. As a consequence, when the Constitutional Court began operating in 1992, the Colombian legal and political culture was already very familiar with the judicial review, to the extent that few people in Colombian legal circles considered it strange that this tribunal could annul laws approved by Congress. The Colombian Constitutional Court, in spite of being a new institution, did not have to struggle for the political forces to recognize the legitimacy of the judicial review, since this was already widely accepted in Colombian legal and political circles.

*Merits and risks of the judicialization of politics for the consolidation of democracy*

A partial judicialization of political life doubtless has certain virtues. For instance, it can prevent the abuse of power by political bodies and by majorities against stigmatized minorities or individuals. Therefore, the language of rights occupies an important place in contemporary democracies, and the recognition and judicial protection of these rights – albeit performed by non-majority parties, which judges and constitutional courts are – should be seen not as limitations to democracy, but instead as guarantees of the prerequisites of democracy. Therefore, while they cannot boast a democratic origin, constitutional judges perform a crucial democratic role, since they are the guardians of the continuation of the democratic process.

The earlier justification for a certain amount of judicialization of politics is also linked to the importance of fundamental rights in a democratic society. The idea is that many of these rights are, first and foremost, procedural presumptions for a functioning democracy, since a true democratic debate could hardly take place if the freedoms of expression and mobilization, the right of association and political rights, etc. were not guaranteed. The existence of these rights, then, is essential for a democracy to be truly considered a regime in which citizens are free and who deliberate to govern themselves. However, for these people to be genuinely free, it is also necessary to assure them the minimum conditions of dignity, which enables them to develop as autonomous individuals. And these conditions are our fundamental rights, considered indispensable for all people to enjoy the dignity necessary to be truly free, equal and autonomous citizens. As such, these rights are also a type of material presumption for a democratic regime, since without free and equal citizens, a government could hardly be considered democratic. Therefore, if fundamental rights are both procedural and material presumptions of democracy, it goes without saying that these rights need to be guaranteed, regardless of the opinion of the majorities. Within this context, if fundamental rights are – and please forgive the redundancy – fundamental for democracy, then it is obvious that by assuring they are upheld, the judges are performing an essential democratic function.

As a consequence, and borrowing the terminology suggested by Luigi Ferrajoli,<sup>19</sup> although judges and constitutional courts lack formal democratic legitimacy, as they are not elected by popular vote, they do enjoy a substantial democratic legitimacy, inasmuch as they assure fundamental rights and protect the continuity and impartiality of the democratic process.

On the other hand, a certain amount of judicialization also seems inevitable when obstacles are encountered in the political system that can,

for example, cause it to lose its capacity to respond to particular types of corruption practices, when these practices grow so widespread that they become part of the system's ordinary rules of play. In such contexts, the intervention of the judiciary – an actor that is partially removed from the political system as such – can unleash a process of political reform that may otherwise have been impossible. In this vein, judicialization is not in itself harmful, since it can act as a catalyst sparking a democratic overhaul of politics.

Third, a certain amount of judicialization of politics, particularly the type associated with the protection of rights, may also serve, however paradoxical it might seem, as a mechanism of social and political mobilization, inasmuch as it empowers certain social groups and expedites their social and political action, as was the case with the mortgage owners thanks to the judicial decisions they were awarded.

Nevertheless, there are also some clear risks of an excessive judicialization of political life, since this can hamper the consolidation of our fragile democracies.

On the one hand, it can overburden the judicial system, which can start to find it difficult to assume tasks that are not entirely within its jurisdiction. Therefore, the transfer of an excessive number of problems to be resolved by judges could end up affecting the very legitimacy of the administration of justice, which does not in the long-term have the capacity to respond to such a challenge. And this occurs not only as a result of the quantity of problems that the judicial system ends up having to resolve, but also as a result of the issues involved, since the judiciary may not be the most appropriate place for some conflicts. The risks of judicial error are great.

On the other hand, judicialization may give rise to a contrast between a visible and prominent judiciary, which decides few cases, but in a spectacular fashion, while the vast majority of topics are decided by an invisible judiciary that tends to operate more routinely and whose procedure is inefficient and partial.<sup>20</sup> In Colombia, there is clear evidence of these routine inefficiencies, as is the case, to give just one indicator, with criminal impunity. Despite the discrepancies that exist in the country about the concept and scale of this impunity, all political analysts generally acknowledge it to be both significant and persistent. We could, therefore, reach an unwanted combination of an enormously deficient and also prominent judiciary. In this situation, the former would offset the latter, that is, the functional deficiencies of the judicial system would, to a certain degree, be compensated by an exceptional intervention by judges in major political debates. Political prominence on the one hand and functional deficiencies on the other are, therefore, closely connected: while the judiciary does not resolve its functional problems and garner strength and capability through the observance of its natural social

duties, its intervention in major political debates may be the pretext for a shift in objectives and towards an even greater weakening of its obligations.

Third, the judicialization of political conflicts almost inevitably tends to politicize, in the worst sense of the word, judicial conflicts, since the courts and processes are transformed into situations and tools to be exploited by political actors, which profoundly destabilizes the role of the judicial system as the guarantor of human rights and the rules of the democratic game. The law is no longer the general rule that society recognizes, since it is considered that the meaning of the rules can be manipulated depending on the interests at play. Public opinion, therefore, begins to distrust all judicial decisions, undermining the very legitimacy of the administration of justice. And this is even more serious in fragile democracies, since in these cases the independence of the judiciary is far from consolidated.<sup>21</sup>

Fourth, this excessive judicialization often leads to delays in political solutions that are necessary to confront specific problems, a situation that was illustrated by the “Process 8000” campaign against political corruption. In this case, the lack of clear rules on political parties and elections smoothed the way for the infiltration of drug money into the 1994 presidential campaign. As a consequence, the debate at the time on political reform was put off, taking a back seat to the outcomes of the Process 8000 campaign and the inquiry into the president, and was only seriously taken up again several years later.

Finally, while judicialization in countries like Colombia can be explained in part by the weakness of social movements and it is said to be able to refresh democratic politics, then undoubtedly it can also accentuate the apathy of citizens. The use of legal arguments to resolve complex social problems may give the impression that the solution to many political problems does not require democratic engagement, but instead judges and providential officials. This is serious, as not only does it imply an increase in the demobilization of citizens, but it also casts doubts on the very democratic principles, since it is the duty of officers of the judiciary – who are not elected – to defend the eventual virtues of democracy. The risks of authoritarian and anti-democratic solutions are there considerable, since society would increasingly place their trust in providential men to restore virtue and to solve problems.

This analysis leads to a conclusion, therefore, that while apparently obvious is nonetheless important: judicialization has its merits, but it also comes with risks. The challenge then is to empower its democratic potential and minimize its unwanted effects, which, from an academic point of view, should prompt us to investigate more specifically which forms of judicialization promote democratization and which, in contrast, are democratically risky.

## NOTES

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1. See, for example, Boaventura Santos, "Los paisajes de las justicias en las sociedades contemporáneas", in Boaventura Santos & Mauricio García-Villegas (eds.), *El caleidoscopio de las justicias en Colombia*, Bogotá, Uniandes-Siglo del Hombre-Colciencias-CES, 2001.
2. For similar concepts, see the work of Pilar Domingo, in particular her article in this issue and her paper entitled: Pilar Domingo, "Judicialisation of Politics: The Changing Political Role of the Judiciary in Mexico", in Rachel Sieder, Line Schjolden & Alan Angell (eds.), *The Judicialisation of Politics in Latin America*, New York, Palgrave Macmillan, (in press 2005).
3. See, on this topic: Rodrigo Uprimny, "Jueces, narcos y políticos: La judicialización de la crisis política", in Francisco Leal Buitrago (ed.), *Tras las huellas de la crisis política*, Bogotá, Tercer Mundo Editores, Fescol, IEPRI, 1996.
4. On this topic, see: Fernando Cepeda Ulloa, "La pérdida de investidura de los congresistas: una herramienta eficaz contra la corrupción", in Fernando Cepeda Ulloa (Ed), *Las fortalezas de Colombia*, Bogotá, Ariel, IADB, 2004, pp. 489 ff.
5. For an introduction to the evolution of the judicial review for the use of these extraordinary powers, see Rodrigo Uprimny, "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia", in Siri Glippen, Roberto Gargarella & Elin Skaar (Eds), *Democratization and the Judiciary*, London, Frank Cass, 2003.
6. According to the Colombian Constitution of 1991, there are three types of "states of exception": on the one hand, the "state of foreign war", for cases of international armed conflict, which has never been used; on the other hand, the "state of internal disturbance", for cases of severe disruption of public order; and, finally, the "state of emergency", for cases of serious economic crisis or natural disaster.
7. The Colombian Constitutional Court basically delivers two types of sentences: rulings on constitutionality, or an abstract review of laws, whose numbers begin with the letter "C", and decisions on what in Colombia is known as *tutela*, or protection of constitutional rights, which are those beginning with the letter "T". Rulings on constitutionality are handed down by the Plenary Chamber of the court, comprised of nine judges, while the *tutela* rulings are generally made by the various Chambers of Review, each one comprised of three judges, with the exception of unifying sentences, which combine constitutionality and *tutela* cases and are decided by the Plenary Chamber. The sentences of the Constitutional Court, then, can be identified by three elements: the caption, ("C", "T" or "SU") which indicates the type of procedure and decision; the first number, which corresponds to the sequential order of rulings in a given year; and the second number, which specifies the year. Therefore, the ruling T-002/92 is the second sentence delivered by the Court in 1992, and corresponds to a *tutela* case judged by three judges in a Chamber of Review.
8. On the efforts of the Court to protect ethnic diversity, see the work of Vítor Manuel Uribe.
9. *Tutela* suits in Colombia are the equivalent to the *amparo* in other Latin American countries. *Amparo* is a judicial suit aimed at protecting fundamental constitutional rights. It may be presented to any judge and it is decided in a few days.

10. For a definition of *amparo*, please see n. 9.
11. According to a report from the Budget Directorate of the Ministry of Finance, presented in October 2004 at a seminar on the topic, the ruling on displaced persons could cost approximately one trillion pesos, that is, nearly 400 million dollars at a revalued rate of 2500 pesos per dollar. And the decision on prisons cost around 300 billion pesos in operating expenses and some 260 billion in investments, that is, a total 560 billion pesos, which is equivalent to approximately 230 million dollars.
12. See Luis Carlos Sotelo, "Los derechos constitucionales de prestación y sus implicaciones económico-políticas", in Departamento Nacional de Planeación de Colombia, *Archivos de macroeconomía*, Documento 133, 2000.
13. See Corte Constitucional y Consejo Superior de la Judicatura, *Estadísticas sobre la tutela*, Bogotá, 1999. This trend continued in subsequent years.
14. According to the aforementioned Ministry of Finance report, the cost of these sentences is high. Two examples: sentence C-409/04 has cost, since 1995, many hundreds of millions of pesos and continues to cost the equivalent of nearly 800 billion pesos per year, that is, around 320 million dollars per year. Sentence C-776/03, on VAT, cut tax revenues by approximately 750 million pesos, or nearly 300 million dollars.
15. See the Colombian magazine *El Espectador* from 29 April 1997 and 1 June 1999.
16. On this point, see the concise presentation by Pilar Domingo: *op.cit.* Also see Javier Couso, "Consolidación democrática y poder judicial: los riesgos de la judicialización de la política", *Revista de Ciencia Política*, Vol XXIV, No 2, 2004, pp. 37 ff.
17. Herbert Jacob et al., *Courts, Law and Politics in Comparative Perspective*, New Haven, Yale University Press, 1996, pp. 396 ff.
18. On the tensions between the social content of the Constitution and the neoliberal strategies of governments in the 1990s and, in particular, the Gaviria administration, see José Antonio Ocampo, "Reforma del Estado y desarrollo económico y social en Colombia", *Análisis Político*, No 17, September/December 1992. See also Andrés López Restrepo, "El cambio de modelo de desarrollo de la economía colombiana", *Análisis Político*, N. 21, January/April 1994.
19. See Luigi Ferrajoli, *Razón y derecho*, Madrid, Trotta, 1985, pp. 855 ff.
20. On this contrast, see César Rodríguez, Mauricio Garcia and Rodrigo Uprimny, "Justice and society in Colombia: a sociological analysis of Colombian courts", in Lawrence Friedman & Rogelio Pérez-Perdomo (Eds), *Legal Culture in the Age of Globalization*, Stanford, Stanford University Press, 2003.
21. In a similar sense, see Couso: *op. cit.*, pp. 43 ff.



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## ABSTRACT

This paper reflects on the various steps that have been taken in Latin America towards assuring equality between men and women, through the different strategies and affirmative actions that have been applied in various fields (labor relations, family-work reconciliation, social security). The analysis concentrates on the responsibility of the State when it comes to labor regulations, primarily the legal principle of equal treatment and the right to social security. The paper distinguishes between the concepts of discrimination and inequality, and analyzes the principles of gender equality and differences that can be found in labor and social security laws. From there, some public policy proposals shall be presented that promote new institutional frameworks, in particular for the pension system, but also for conciliatory policies and employment in general.

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## KEYWORDS

Equality – Discrimination – Social rights – Focus of rights – Gender policies –Affirmative action – Labor market – Social security



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# IS THERE EQUALITY IN INEQUALITY? SCOPE AND LIMITS OF AFFIRMATIVE ACTIONS

Laura C. Pautassi

## Introduction

Over the past two decades, the principles of political, economic and social organization in Latin America have undergone a process of transformation. First, through the sustained implementation of structural and State reform policies in the region that, while taking on different characteristics in each country, gave rise to a series of policies and measures with a clear objective. The goal was to restructure the State by changing the ways it traditionally used to function, through a growing subrogation of its functions accompanied by in-depth internal economic transformations, with new social and economic agents, and with the implementation of new forms of protection and social security.

One phenomenon that has altered the profile of the region's social agenda was the entrance of women into public life, both through their incorporation into the labor market, through the visible advances in education and through an incipient – yet still insufficient – engagement in terms of political participation. Nevertheless, this has not produced in men the same acceptance of responsibility for reproductive tasks, that have been historically female.

As such, men and women have been affected by the application of reform policies in numerous ways, primarily concerning their status in the labor market, particularly given the changes in hiring methods, with part-time contracts, labor mobility and outsourcing, the loss of social benefits that were previously standard in stable employment, severe restrictions in the system

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*Notes to this text start on page 87.*

of social policies, rising unemployment and underemployment, not to mention lower salaries, if they even exist.

Running in parallel to these situations of vulnerability, and paradoxically during the reform processes in the region, women have managed to secure legal recognition and formal equality in all countries across the region. The majority of the States have ratified key human rights treaties and in due course they adapted their national legal frameworks to accommodate these international instruments. They also introduced affirmative action measures, recognized reproductive rights and indeed all countries created jurisdictional mechanisms to further equality policies. Women's organizations, with their age-old struggles, also pressured their governments for a gender agenda, seeking to consolidate strategies and key policies to promote equality and introduce a debate on citizenship for men and women.

On the other hand, as Castel points out, the discourse on the incorporation of women into the labor market occurs precisely at the time when work, as a privileged element in the social relation, is devalued, while the market is affected by the ever more notable and demanding presence of women who exert pressure on it and demand efficiency and results from politicians.<sup>1</sup>

This is the context in which the asymmetries of Latin American institutional development become explicit. First, the sum of the actions taken by different social and political agents has produced a framework of rights and consensuses to promote gender equality. Nevertheless, the results are far from satisfactory: poverty, discrimination and inequality persist and embody in social exclusion the great "phenomenon" of countries in the region. This means that there has been an increase in the asymmetry when it comes to human rights, considering that the current stage of development and inclusion in productive work has generated an unparalleled contrast between a greater realization of civil and political rights and a dramatic setback in the realization of social and economic rights. Meanwhile, socio-economic insecurity and social vulnerability have deteriorated, with an impact on gender.

This situation reflects a weak – but no less important – link between the spheres of citizenship and the true scope of the principle of equal opportunities and treatment. It is necessary here to make a clarification: the law in general – and labor law in particular – reveals the ongoing tension between the regulation of the public sphere and the liberal view of a State that does not meddle in private affairs, which should be free from State intervention.<sup>2</sup>

In fact, and as I shall argue throughout this article, labor laws have transposed the traditional boundary between public and private,<sup>3</sup> standing between the two and upsetting the equality between the contractual parties. They establish that, given the relationship of subordination characterizing

the employment contract, the working party requires special attention. In addition, this branch of law presents a dichotomy in which two distinct values compete: on the one hand we accept the validity of the principle of equality among workers; on the other, we complain about the different rules for certain principles. This dichotomy, which may also be considered a tension, is particularly important when it comes to female work, which involves reproductive cycles and the subsequent social relations that imply the need to assume both family as well as productive working responsibilities. This relationship becomes so complicated that difference is used to claim equality.

However, this legal recognition of difference to assure rights to provide effective equal opportunities for women does not take into account the gender division of work in the home, where the male worker rarely assumes any active co-responsibility for reproductive tasks. This deepens the divide between the public and the private, without enough consideration for the existing conflicts in these two spheres and relegating to the private sphere the particularities and differences of gender. In other words, what is protected and regulated for women is related to their responsibility in the private world, and not the productive-reproductive *continuum* as a point of analysis of relationships involving men and women, or the elimination of discrimination in the public world.<sup>5</sup>

In my argument, I emphasize that this recognition of rights in the field of labor and social security law does not always represent a recognition of the rights of women. This means that although rules and principles have been incorporated that recognize equality in the workplace, the legal substratum does not consider women as individuals with inherent rights of their own, but instead that their rights derive from their inclusion in the formal labor market or from their bond to another rights holder (her husband or father), who are also not considered as such: their rights derive from their status as a paid worker.

This treatment of women in the social security system as holders of rights that are derived, i.e. not their own, characterizes the organization and development of social policy systems in Latin America. Concerning their inclusion in the labor market, the idea of a “derived” rights holder influences the majority of labor regulations and has, doubtless, become embedded in the workings of the labor market, among other reasons because the inclusion of women in this market was never even contemplated.

However, this organizational form of the system can be remedied with a series of interventions such as the ones I shall propose later in this paper, which will contribute to creating fairer systems, to which access will be based not on rights derived from employment or from a legal bond with a worker, but in virtue of one’s status as a citizen, male and female alike.<sup>6</sup>

Given this situation, I intend in this article to analyze the scope of the treatment of women as individuals with derived rights in the sphere of social security, and the role of the reforms in the consolidation of this category. As a result, I shall pay special attention to the pension reforms and their effects on men and women.

To put the debate into context, I shall first examine the responsibility of the State concerning labor regulations, drawing heavily on the legal principle of equal treatment, the right to social security, distinguishing between the concepts of discrimination and inequality, and analyzing the principles of gender equality and differences found in labor and social security regulations. From there, I shall present some public policy proposals that, while not intended to be definitive, aim to explore new areas and approaches for incorporating into the political arena, and also into the State agenda, the needs for new institutional frameworks to remedy the inequalities that currently prevail.

### **Labor law: the first affirmative action?**

Labor law is a branch of autonomous law that warrants State intervention in legal relationships between independent parties. This intervention is justified on the grounds that there is a pre-existing inequality between the two parties in the relationship, based on their different economic status and hierarchical position: one of the parties, the employer, holds sway over the other party, the employee, who obeys him and performs the agreed upon services in exchange for a salary. This has given rise to a distinctive legal structure, one that serves the industrial capitalist system that regulates both individual relations between employer and employee, and collective relations between bosses and unions. This incorporation of collective subjects that are authorized to act is unprecedented and empowers group subjects to set hiring rules for certain spheres of productive activity.

Unlike other branches of the law, such as civil law or commercial law, which protect the parties' autonomous will and endorses the freedom of contract, labor law acknowledges the need to lend social protection to those in a subordinate employment relationship or whose economic or legal situation is recognizably disadvantageous compared to the other party. In this context, labor law is not based on the premise of equality between the contracting parties. In contrast, its goal or aspiration is substantive equality and, to achieve this, it lends special protection to the weaker party in labor relationships.<sup>7</sup>

Concerning the specific regulation for women workers, it is worth noting that the first labor rules emerged specifically to protect women and children

who were exploited during the industrial revolution. For this reason, the rules originated from the intention to protect women from the demanding labor conditions that existed at the time, either from working the night shift or in unsanitary or hazardous environments, while considering women only in their role as mothers – provisions that were introduced principally by ILO protection conventions.<sup>8</sup>

In the mid 1940s, when Latin American countries were building the foundations of the Welfare State, women continued to be treated as mothers, a situation that is in line with the formation of a special type of institutional arrangements like those that have developed in the region, particularly in the Southern Cone countries. As such, the figure of the paid worker was masculine. The “typical” labor relationship, therefore, was full time, regular employment during a working life with very few career changes. Obviously, women were at a disadvantage, obtaining some protection rules, but not achieving the principle of equality. What could legally have been correct, providing an opportunity for effective social solidarity, produced a fragmented, unfairly privileged system, based fundamentally on the differences identified in the labor market.

In due course, the overall improvement in working conditions, without any distinction for gender, eventually put an end to this special protection initially provided exclusively for women and children, and they gradually became the rights of workers of both sexes. By the 1950s, a slow and progressive process was embarked upon to eliminate from domestic legal frameworks the rules that breached this principle of equality, a process that unfolded heterogeneously and with different features in each country, and that occurred with the sanction of the ILO agreements on equality, proclaiming the principle of equality between the sexes.<sup>9</sup>

It is interesting to note that, since the mid 1980s, Latin American countries have, in conjunction with the reestablishment of democratic governments, reformed their Constitutions and assumed a significant number of commitments to their citizens to assure equality and equal opportunities in various social spheres. Moreover, they undertook, by ratifying international covenants and treaties, to assure equality and non-discrimination, not to mention the right to work.

In fact, the international declarations and treaties recognize the right to work, but with exceptions concerning the conditions in which they can be realized, making them subordinate to the resources and peculiarities of each State or to the obligation of the State to establish policies to guarantee this right. This is the case with the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes that States Parties recognize the right to work, which includes the right of everyone to the opportunity to

gain their living by work which they freely choose or accept. Each State Party agreed to take the appropriate steps to safeguard this right. The obligations of the States Parties are not limited to satisfying the minimum requirements of economic, social and cultural rights; they include the adoption of measures to fully and progressively satisfy these rights, using the maximum of their available resources.

The first international instrument to address discrimination against women specifically is the Convention on the Elimination of All forms of Discrimination against Women – CEDAW, which defines as discrimination

*distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*<sup>10</sup>

The whole document promotes the creation of affirmative action policies to improve opportunities for the economic, social, cultural, civil and political participation of women. Concerning female employment, the CEDAW addresses not only the demand for employment, related to the criteria for selection, equal remuneration, social security, protection of health and maternity, but also the provision and expansion of the autonomy of female workers, related to the choice of work or profession and to professional training.<sup>11</sup> It also provides for the right of women to family benefits, regardless of their marital status<sup>12</sup> and plainly states that the rights of female workers should be protected from potential discrimination on the grounds of marriage and/or maternity. It clearly establishes that States should take all necessary measures, including sanctions where appropriate, to prohibit this form of discrimination and protect maternity through paid leave and prevent women from any involvement in work that could prove harmful during pregnancy. Other benefits include the provision of childcare and other services that enable parents to combine work and family responsibilities.<sup>13</sup>

This process of incorporating equality principles through constitutional channels or through international treaties and conventions was accompanied in many cases by the implementation of an equal opportunities policy at the behest of organizations for the protection of women in each of the countries in the region, organizations that very often have state or local chapters.

Nevertheless, in spite of the progress asserting the principle of equality, in the majority of the countries in the region the 1990s brought with them neoliberal structural adjustment policies that, among other things, triggered profound economic changes together with tax reforms and labor market

flexibility measures, accompanied by harsh restrictions against job security and social institutions.<sup>14</sup>

As a result, there currently exists in the region a distinct asymmetry between the constitutional frameworks with their broad consideration for equal opportunities, an important breakthrough in domestic equality policies, and the lack of effective enforcement mechanisms, in the context of consolidating the participation of women in urban labor markets.<sup>15</sup>

In this new context, the problem is not that women are considered and protected as “mothers”, but instead, in light of these deficient employment policies, the problem is precisely being or wanting to be a mother. In other words, maternity, in the context of labor flexibility, has become a source of disadvantage for women. Hiring women is discouraged as a result of allegedly higher labor costs,<sup>16</sup> no reproductive services are provided and, in cases of absolute deficiency, female employees are actually penalized if they “infringe” the rules and become pregnant. Therefore, maternity is transformed from a social function protected by the State into an individual issue that, compounded by the denial of social services from the State, further complicates the situation of female workers in the majority of Latin American countries. In the case of informal workers, who enjoy no protection whatsoever, the problem is more serious still: they depend, in the best of cases, on the “goodwill” of their employers.

In other words, the current situation in Latin America is also characterized by the persistence of the culture in which the responsibility for taking care of children and the home falls primarily on women, and not on couples. Indeed, regulations in the majority of the region’s countries reflect this phenomenon, by focusing on childcare leave, subsidies for maternity and the provision of day care services. While this is very obviously a cultural problem, it speaks volumes that the State reinforces it with legislation and policies and, in the very act of regulating employer-employee relations, assigns women a dual function.

It is precisely in the field of policies for greater conciliation between productive work and raising children (reproductive work) that affirmative action in labor regulations ought to be concentrated, to promote a genuine breakthrough in the principle of equality. I shall return to this point later, in the policies I propose.

### **Is social security blind to gender?**

Security, as an objective of government policy, seeks to protect individuals from material risks and individual material insecurities typically related to illness, incapacity to work or difficulty finding employment due to loss of

skills, lack of income for maternity or raising children, the need to guarantee income for retirement or in the event of losing the family provider. These situations, known as contingencies, should not be settled by public charity or forms of mutualism or cooperation, but instead through collective arrangements. In other words, social security translates into actions of the State grounded in formal legislation and guaranteed by social rights and by the technical and administrative intervention of the state apparatus.<sup>17</sup>

Originally, social security law was differentiated from labor law in that it did not seek to protect the paid worker as such, but instead it attempted to protect the integrity of the individual. As the system developed, and mechanisms were designed to ensure that benefits were effectively received, beneficiaries included dependent workers and, in some cases, their family group, although in general the recipient of the benefits has been the dependent worker and not the titleholder. For unpaid workers, coverage was limited to a number of well-defined contingencies, although in most cases the protection was a consequence of voluntary adherence. In other words, the principle of universality has not been sufficiently developed, as it is still necessary to meet certain conditions to be eligible for benefits, one of which is being a paid worker.

In short, protected individuals are all those included in the formal coverage of the system who become potential claimants of the established benefits that are made available in the event of a contingency, provided they meet the necessary conditions (age, illness). These requirements may refer to the objectivization of the contingency (degree of disability, for instance), certain legal conditions (such as being married) or the affiliation with the social security system (length of membership or minimum contribution). Clearly, the system is not unconditionally accessible to all citizens.

The State plays a dual role in this system: on the one hand it recognizes the right to social security for all inhabitants, legislating and regulating accordingly. On the other hand, it assumes the responsibility of providing benefits either directly or via an intermediary to the beneficiaries. This consideration is the origin and foundation of Latin America's principal Welfare States. However, these States boast differing degrees of structuring, which has resulted in fragmented systems with inadequate coverage and administration and financing problems.

In fact, coverage is paid for in general through a social insurance system financed by taxes on income; it is not based on a broader welfare system like in Scandinavian countries. For the benefits to be paid, it is necessary for each worker and their employer to support the system, since otherwise it would not work. That is to say, only contributors have rights, which is the basis of the contributive system.

This not only exposes a legal and normative precision, it also determines how opportunities are distributed to the various members of society. That is, individuals with a formal job receive all the benefits and rights, not only as a result of their status as workers, but they also enjoy full citizenship, unlike people who do not have jobs. In the distribution of opportunities, women historically lose out, among other reasons because of the lack of recognition for reproductive work and given their low rate of inclusion in the public sphere.<sup>18</sup>

Given the way things have developed, paid employment is the source of other rights and one of the elements constituting citizenship in Latin America, then employment ought to be a right that, in accordance with the principle of equality, is accessible to all citizens. For the same reason, ought not the right to social security be guaranteed to all citizens, regardless of their status as workers and contributors?

These questions raise a number of dilemmas concerning the responsibility of the State as a guarantor of social security, both in the coverage of risks and contingencies, and in setting the basic conditions for the development of an autonomous existence, a fundamental principle of equity and equality.

As a consequence, since a paying job is the chief means for people to earn an income and also a means of social and personal inclusion, in the broadest sense, then observing a person's status in the labor market is a reasonable starting point for addressing the different expressions of social problems and discrimination that currently prevail. It is the role of the State to guarantee this inclusion.

To illustrate this point, female work presents the following characteristics: on the one hand, a paying job for women is central for their personal fulfillment and for exercising their autonomy, while it also has a certain character of emancipation of traditional family and cultural standards, and constitutes a source of income that provides the security for them to negotiate new family arrangements, not to mention helping prevent domestic violence. On the other hand, a large number of women do not have "productive" jobs, primarily because the market cannot absorb them, nor will it be able to. This is because involuntary unemployment is steadily rising and labor "disqualification" occurs when people accept jobs they are overqualified for, or in virtue of gender discrimination. Finally, "reproductive", or unpaid domestic work, done basically by women, is considered to be "socially useful", but still unpaid.

Gender discrimination, either in the wage-earning job market or in relation to domestic tasks is, in fact, one of the many forms of a far more complex problem: the methods of social inclusion and the ways in which cohesion is maintained in profoundly unequal societies. We should not fail

to recognize that the availability of a job, either formal or informal, or entry into contemporary societies where market regulation prevails, are essential elements for people's performance and choices and, obviously, the satisfaction of their needs. Poverty clearly restricts freedom and curbs the performance or the "skills" of individuals, just as lower wages paid women for doing the same task as men, as a result of discrimination, reduces the possibility of fulfillment for women, and also undervalues their work.

The lack of a public policy approach from a gender perspective explains, in part, the state of the female labor market. The first indicator of this is that female inclusion has been largely precarious and involving low-qualified tasks in the informal market and, as such, having no social security coverage. Another feature that is perhaps less visible, or at least more difficult to quantify, but nonetheless of significant importance, has been the reduction in the quality of existing jobs. In response to the imbalances apparent on the wage-earning job market, a discourse emerged in official circles, backed by experts from multilateral credit organizations, revealing that the difficulties of entering the labor market are centered on the way people offer their labor power on the market, placing the responsibility, therefore, squarely on the individuals for their status and track record in the labor market.<sup>19</sup>

Therefore, as women started to become regular participants in the labor market, it became clear that there was a lack of social security for them. Their arrival occurred in a context of greater restrictions, more informal and precarious labor markets, and notorious coverage flaws in the social security systems.

As such, public policies introduced over the past 20 years in most countries in the region have been founded on the principle that women are holders of rights that are derived from other rights, never actually holders of the rights themselves.<sup>20</sup> Consequently, the political strategies adopted have been concerned with streamlining the methods of detecting and classifying the needs of women, the access to professional training, the allegedly higher labor costs and rates of absenteeism associated with maternity, among other things. They have not been based on the assumption of the existence of a differentiated power structure that generates asymmetric relations. Therefore, the impact of economic and social policies on women has not been taken into account. Instead, a "veil of ignorance" has been legitimized in terms of the non-neutrality of macroeconomics concerning gender.

So, what is the responsibility of the State when it comes to guaranteeing employment and social security? One element, which is fundamentally related to distributive justice, refers to the gender division between paid "productive" work and unpaid "reproductive" domestic work performed primarily by women, and is reflected in labor regulations. Meanwhile, there

is also a division in paid employment, discriminating between better paid, higher skilled jobs usually in industry that are male dominated, and poorly paid, less skilled jobs with lower productivity in the services sector that are considered “typically” feminine occupations. This situation occurs when the State neglects its social functions, requiring households and, in particular, women to take on greater responsibilities to satisfy basic needs and for social reproduction tasks.

Returning to the crux of the question, does this situation imply that the social security system should intervene by protecting, ahead of definitive unemployment, coverage for the entire working cycle of individuals and also assume responsibility for their training, to provide the conditions for them to improve their mobility in the job market? What should the State assure: employment or the job position?

Here we come up against another ongoing argument concerning the limits of social security, not due to the capacity of the State to provide this service, but given the difficulties of funding the system. As I pointed out earlier, the legal frameworks and numerous international conventions guarantee the right to social security, but in reality restrictions are imposed due to public finance. At this point a digression is necessary: sectoral reforms across Latin America have been extremely expensive, and countries have spent huge amounts of resources, in most cases in foreign debt money, concomitantly granting fewer benefits, of lower quality and at greater expense. In other words, the resources are available for reforms, but not to pay benefits.

So now another question crops up: is it possible to implement in countries in the region a dynamic domestic policy whereby decisions on social public spending are made through direct democratic processes in which the final assessment of the role of the State is based directly on the needs and preferences of its citizens?

We can see, then, that the objectives of social security are contingent upon funding, this being the key argument used to block amendments to the reforms already in place. That is to say, “ceilings” and limits to social security funding are constantly established, or direct reductions in the resources earmarked to social public spending for benefits, although we hear very little, for instance, about the fiscal cost of the transition from one pension system to another.<sup>21</sup>

This means that we cannot establish simple causalities that reduce the problems of social vulnerability to economic stagnation, nor can we dispense with economic growth if the objective is to reduce vulnerability. Until now, we have considered it the responsibility of the State to guarantee social security. As Ewald points out: “Social responsibility is the modern form of politics”.<sup>22</sup> In Latin America, however, we can observe how it was transformed into non-

politics, or the lack of responsibility of the State to its commitments, allowing the new hegemony of the market to prevail.

It is interesting to take a look at the argument formulated by Folbre, who claims that one way of facing this challenge is not to think of markets as intrinsically bad to recognize “who owns what”, nor to encourage the overvaluation that economists make of this abstraction called “the market”, but instead emphasize that women have a legacy of responsibilities in care provision that should make them suspicious of the principle of “every man for himself”.<sup>23</sup> In other words, it is important to take a fresh look at the classic trilogy: State, market and family, to see what roles and responsibilities rest with each of them in this new scenario.

### **Courses of action: a new vector of social integration**

Social security and full employment are unresolved issues for women in Latin America. Although the growth in labor market informality across the region frequently affects men, there is still a certain institutional inertia they benefit from, and they not only enjoy more possibilities for access, but they also have a certain culture of social security that enables them to incorporate or avail themselves of its protection content. For women, however, particularly those with fewer resources, coverage for contingencies is an inaccessible ideal, while the urgency is constantly present.

Consequently, it is important to emphasize the need to shift the focus of intervention, continuing with the premise that it is necessary to achieve a greater incorporation and participation of citizens, male and female alike, in the labor market, while also considering the limits. That is, devise and propose policies that are not based on the illusion of creating new jobs in depressed labor markets like those in Latin America, but that instead consider social security as a new vector of social integration.

Once again, it consists of proposing ways to consolidate social security networks and not social protection systems. It is necessary to determine precisely the limits of the term “social protection”, which has begun to replace “social security”, representing a clear setback. The term social security used to refer to a broad welfare package, with the State playing a strong role not only in provision, but also in regulation and funding. In contrast, the term social protection suggests a much more limited model, marking a shift from broad State action to a scheme in which individuals, households and communities play a much more active role.

Similarly, the first institutions that sought to reform the social security system were precisely those that had the most chances of being “offered” to private administration, as is the case with the pension system. The central

characteristics of the reforms, with differential impacts, can be summarized in the following way:<sup>24</sup>

- privatization of the administration of social insurance (pensions, health insurance) reinforces the relationship between access to the institution and the situation on the labor market
- dismantling social institutions eliminates the “unconditional” networks of protection and reduces the effective level of coverage, both vertical and horizontal
- as a result, much of the responsibility for the coverage of social contingencies is transferred to citizens themselves, leaving them dependent to a large extent on their capacity to generate their own income
- there has been a greater selection and fragmentation of programs, since they are designed around the specific characteristics of different groups identified as the target population
- women, young people and the elderly are the hardest hit in this situation, as the only “solution” offered to them is to be the “beneficiary” of a targeted assistance program
- this fragmentation helps widen the social divide, as institutions representing “general interests” lose ground to those representing “private interests”
- the new scenario modifies the nature of conflicts and thus the role of the political actors. Previously, pressure was applied to obtain the expanding benefits, whereas now there is a struggle over the meaning of selectivity
- from a regulatory viewpoint, structures requiring public protection and collective actors have been abandoned, with full responsibility transferred to individuals, who are made directly responsible for their situation;
- in parallel, there are fewer institutions inspecting and reviewing the operation of the new systems, which has considerably increased the lack of protection for citizens.

The outcome of the pension reforms that endorsed individual commitment, based on the idea of “individual capitalization”, as a solution to contingencies and also to the inefficiency of the State, has revealed a lack of structural development of the social system, aggravating the problems that existed in the former systems, while also promoting the inequality of the various systems and of society at large. Similar situations have occurred in relation to healthcare coverage, where the system of family coverage has been modified in most countries, and restrictively so.

The situation grows more complex still when we add the problem of derived rights instead of inherent rights. The instability and vulnerability stop being circumstantial and become central. Just as informal employment in the labor market has quickly become the rule, not the exception, for new hirings, causing major instability in the foundations for building professional careers, coverage of social contingencies has suffered the same fate. This reality is now so deeply ingrained that the very institutions are acquiring contingent features, with a logic that is complex and inaccessible to citizens.

In this aspect, women lose out once again, since culturally and institutionally speaking their relation with social security has always been unequal. There is also an important variable referring to new contingencies: there is no coverage and the topic is not open for discussion. There are gender-specific contingencies that have not been incorporated by the reforms.

Pension legislation exposes the lack of promotion of opportunities to access the system, to expand coverage, to raise contributions, to reduce risks and to even out the actuarial calculation. This lack of promotion differs considerably between men and women and ultimately results in inequitable conditions for women. Once again, the main forms of discrimination are gender inequality in the labor market and disregard for reproductive work.

The numerous studies conducted on the pension reforms<sup>25</sup> have shown that the conditions for acquiring a pension right in the reformed legislations follow a pattern that, in general terms, is common to them all. Moreover, in each of them we can observe specific regulations that exhibit neutrality in terms of gender. Thus women are directly discriminated against, since they are not considered citizens and rights-holders. In the best case scenario, they are considered workers. A significant number of women are treated as dependent spouses, housewives and mothers, while an almost negative valuation is attributed to domestic work, as women who exclusively do to this kind of work are considered “dependents” and “beneficiaries” of their husband’s pension. This benefit is not available to economically active women, even when they also dedicate their time to domestic work. Their paid work and savings appear not to have any value. In Chile, for example, widowers do not receive pensions. Additional unfair treatment concerns retirement age, which for women is five years earlier than for men. In view of this, and because of their higher life expectancy, women in an individual capitalization system receive lower pensions.<sup>26</sup>

The new pension systems reproduce the occupational and wage discrimination that affects women. This is a very important point, since it is usually argued that problems intrinsic to the labor market cannot be attributed to the pension system. Although this is true, numerous studies have illustrated

the presence of discrimination and problems inherent in the pension system that reproduce inequities in the labor market. The reform did not take into account, for example, that stable employment is no longer the rule; instead, flexible labor, wages and working hours predominate. Neither did it take into consideration the changes in the production systems.<sup>27</sup>

### **Once again, the centralism of the State**

No change will be possible without a political commitment to apply an ethical and political principle of gender equality. An equality that does not merely imply an improvement in conditions for employment and coverage of social contingencies for women, but one that involves a commitment to challenge the current systems of distributing opportunities and – let's face it – the capacities of women and men.

In other words, what is required are not simply technical changes to the reforms that have already been made, but instead a new political consensus embracing the principles that are at play when it comes to social inclusion. In turn, inclusion will only be achieved when social security is viewed in its broadest sense, and not just restricted to the pension system. Therefore, the centrality of the economic model in which the social security systems are a part is indisputable and key to any political decision that is taken.

This makes it necessary to introduce into the political sphere of Latin American countries the debate on who should guarantee social security, the exact responsibility of the State and the principles upon which it should be guaranteed, and also whether it should be based more on programs focusing on people who are not included in the labor market or with informal jobs. In other words, whether it is provided as a type of aid program, or whether social security should be guaranteed as a right of all citizens, that is, an inherent right that can be immediately accessed.

Also to be incorporated definitively into the agenda of governments are thorough assessments of the reforms that have been implemented, to understand why these policy options have produced the aforementioned results. It is worth noting that the exclusionary dynamics in place in the majority of the countries across the region do not only observe the application of technical equations, but they are based on cultural and social contents that delegitimize the social security institutions and the memory of the Welfare States in the region, and that are absolutely blind to gender issues.

Another issue key to the political discussion is the sparse realization of social rights as a constitutive part of the development of countries in the region.<sup>28</sup> It is worth pointing out once again that these affirmations are not only propositional, but operative. There is no way to effectively fight

discrimination if universal social security networks are not created with greater impacts on less autonomous social groups. For example, by including women in institutional agreements that solve the problems of social insecurity and precarious labor conditions that affect the majority of the population. The solution does not lie in isolated actions aimed at offering temporary relief for irreparable damages, but instead in stable policies that provide the conditions necessary to prevent people from falling into marginality and exclusion. These networks should function permanently to provide guarantees to all citizens from the moment they are born.

This topic is related to the principle of equality. It requires, firstly, an identical legal status and, secondly, the effective realization of life opportunities. Although the first principle is guaranteed *de jure* both in domestic constitutions and international covenants and treaties, the same cannot be said for standard of living, which is not the same for everyone, nor are there any guaranteed minimum standards for each individual.

The idea of social security has been erased in the context of situations that represent greater insecurity and vulnerability. Even though this may be a consequence of the reforms, it does not mean that it should be abandoned as a system ideal. Although social security has become insecure, it does not mean that it should be transformed into a rule for future models. On the contrary, it should contain instruments to minimize these consequences.<sup>29</sup>

It becomes necessary, once again, to consider the idea of proposing comprehensive actions in the context of patterns of income distribution and patterns of residual capacities that occur in Latin America. We have to consider the reasons why Latin American societies have such a low redistribution capacity to be able to place within these limited patterns the effects of new reforms. What follows is a set of proposals to formulate comprehensive policies that aim to combine productive work, reproductive work and a comprehensive social security system. That is, a broader spectrum than just sectoral policies and affirmative actions, one that also embraces and energizes them.

## Policies and affirmative actions

These proposals may be placed into two forms:

- treatment of people as individuals with inherent rights of their own, as male or female citizens, without any preconditions
- strategies to implement and guarantee these inherent rights, which in this paper we shall call related rights.

How do we make this shift from the category of contributing worker to a system that, albeit partially contributive, prioritizes the category of citizen? Is this possible? Can this shift be legitimized?

To be sure, we consider that it is not only possible, but necessary. There is also a legitimacy to this proposal, since it is nothing more and nothing less than considering what has already been established: women and men are entitled to citizen rights, which consist of civil, political and social rights. Instead of considering capacity associated with a category (worker, contributor), the only thing to be considered should be the status as a citizen.

The first step towards achieving the legitimacy of this proposal is to consider social security in its full scope, and not only limited to the pension system or other social insurances. The system needs to be reorganized, with a view to strengthening new forms of coverage for social contingencies (biological, socio-economic and pathological), while considering the specifics of gender in each case and incorporating actions, today isolated in social policies, into a systemic whole.

This gives rise to a new question: how to consolidate reforms that embrace equality without being yet another burden on the salary of workers? This has not been the topic of much discussion, since in most countries the solutions to the lack of funding of reformed systems come in the form of new contributions borne primarily by workers and, secondly, by employers.

The actions that need to be implemented, and that are considered socially useful for all society, cannot and should not be funded by social contributions, including, among other things, employment policies; unemployment benefit; measures for the conciliation between family care and work; maternity; and consideration for other unforeseen periods, such as raising children, training and studying.

On the other hand, most countries in the region have signed international human rights covenants and treaties, which they are obligated to observe. They represent minimum obligations. These requirements are based on the exercise of a full citizenship and belong to the field of fundamental human rights. So, what do related rights consist of?

In the context of policy proposals, related rights are actions and guarantees that, respecting a minimum content, need to exist to effectively guarantee the exercise of a right to social security.

Returning to the idea expressed at the start of this paper, the new vector of social integration should not be formal paid employment, but instead a redefined system of social security. That is, no longer linking benefits to the status of a paid worker, but considering the rights of each citizen, male and female alike.

In this way, one of the first related right that can be guaranteed is the incorporation into the marriage contract of the possibility of shared

contributions to the pension scheme, which in principle is not established in civil regulations – with some exceptions – in Latin America. As such, in the case of divorce, the contributions made during marriage by both spouses can be considered marital assets. The law calls for a 50-50 division between spouses of the contributions made by them both during the marriage. This should be considered an inalienable right.<sup>30</sup>

The situation is decidedly simple and it does not in any way affect the pension system. All that is required is a different approach, treating the pension contributions made during marriage or common-law relationship as an inherent right and considered as a marital asset. As a result, the inherent rights of women are highly likely to be strengthened.

For the purpose of effectively incorporating and promoting the development of a system that considers the rights of women as inherent rights, the proposal is to consider the periods of contribution for women – which continue to be shorter than those for men, both in duration and in terms of the value of the contribution, in spite of the plans for equal treatment and family conciliation – to be lower than those required for men or to compensate age for years of contribution or vice-versa. This proposal is based on the understanding that an increase in the remunerated activities of women is not enough to secure a retirement pension without resorting to derived rights.

One of the reasons why women never achieve the same size pension or welfare benefit as men is because they put their working life on hold to raise children, because they do part-time work or due to discriminatory practices (salary, occupational, among others). These situations are reflected in the value of the pension or welfare benefit. The reform of the pension system conducted in Germany in 2001 is particularly illustrative, since it incorporated an additional accessory to the pension depending on the number of children in the household. This accessory, the exercise of an inherent right of women, also applies for widow's pensions.<sup>31</sup>

Therefore, we could consider incorporating provisions like those established in Germany, whereby women who have contributed to the social security system for 25 years have a basic contribution covered for a period of 10 years immediately following the birth of a child, considered as if it were done by the average covered contributions of all those insured in the year in question. In this way, part-time work is not penalized, because if it were calculated as contribution time, the calculation base would be very low, which means that any resulting pension would also be low. When work is put on hold to care for a child that cannot work and is aged under 18 and, as a result of the dependence of the child, one of the parents has to dedicate at least 28 hours per week to their care, the covered contributions are considered as if it were the average of all those insured.

This reasoning needs to be complemented with another situation: while we refuse to accept that child-raising tasks should be considered in the public sphere, and not in the private sphere, no progress will be made in the situation for women. Issues such as the division of domestic work and the treatment of women as “dependents” will remain in force and there will be no changes in the pension coverage for unpaid women. Neither will there be any recognition that child-raising tasks are crucial for the generation of social capacities, which are indispensable for the development of a person and their opportunities.

### **Stretching the limits...**

This analysis has resulted in a favorable context that supports the experience of achieved goals, such as those described throughout this paper. Nevertheless, it would be recommendable to select a set of affirmative actions on work and social security that promotes a shift in the quality of the actions already developed. In this paper, we have presented some that will no doubt spark debate, but by no means do we consider them conclusive and exhaustive.

In fact, we need to evaluate the limitations presented by this combination of restrictive regulatory frameworks, within the context of structural adjustment processes, and affirmative actions promoting equality, and whether the latter have remedied the existing discrimination. A quick look at the legal texts and equality policies in place would make it look like they have. However, statistics on occupational and wage discrimination and on the various forms of segregation, combined with the precariousness and low or inexistent coverage of social security and contingencies in general offset the successes that have supposedly been achieved.

Here I shall raise a specific recommendation. It is not about including and incorporating more rights, but instead about reviewing the rights already established and recognized by international instruments and domestic legislation, and verifying whether they satisfy the minimum social rights standards.<sup>32</sup>

For this reason, it would be important to submit to review many of the sanctioned rules or associated rights and determine whether they observe the established requirements. This type of control of legitimacy is important to keep track on numerous policies, programs and actions that grant rights, and that are not always legitimate. Conversely, the obligation to guarantee essential levels of rights obligates the State not to interfere with this minimum content by restricting them, considering that all restrictions on economic, social and cultural rights should be submitted to a review to ascertain whether or not the essential content of the regulated right has been interfered with.<sup>33</sup>

Finally, but by no means any less important, it is essential to address

mechanisms for the inclusion – and not just regulation – of the huge numbers of informal workers that exist in Latin America. Until we provide them with the same rights and duties as formal workers, equal treatment and opportunities for men and women will never be an operating principle.

Consequently, it is the State at all its levels that needs to spearhead the process of change, as a result of the obligations it assumed upon ratifying international instruments, both those dealing with human rights and the more specific ones on social rights, reaffirming the pursuit for equality.

Only when we develop integrated systems, whether centered on employment, considering the differences and discriminatory situations that we need to remedy through affirmative actions, or on social security as a vector of integration, will we be on the right path towards implementing the principle of equal opportunities.

In other words, it is about more than just guaranteeing employment and social security, but about making it accessible to all members of society, under equal conditions, and by doing so achieving a form of social inclusion that not only comprises the spheres of formal employment, but that spreads into all spheres of public life. It is about combining citizenship with the effectiveness of rights.

## NOTES

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1. R. Castel, *La Metamorfosis de la Cuestión Social. Una Crónica del Salariado*, Buenos Aires, Paidós, 1997.
2. R. Dworkin, *Taking Rights Seriously*, London, Duckworth & Co, 1977. Dworkin makes a distinction between "equal treatment" and "treatment as an equal". The principle, he argues, is that people ought to be treated "as equals" (that is, people who have the same moral right to pursue a freely chosen life plan and to be treated with the same respect as anyone else), giving them adequate use of the resources at their disposal, which enables them to take advantage of the opportunities that present themselves. The right to the "same treatment" may only be derived from the other principle.
3. Public law refers to the relations between branches of the State or between these branches and individuals, while private law governs the relationships between individuals. In this division, the acceptations public and private carry different meanings than those attributed them when the focus is gender. Hereinafter in this paper, this is the meaning I shall employ; with "private" designating the space and the relations inside the home and "public" representing the space, processes and relations outside the home. L. Pautassi, E. Faur & N. Gherardi, "Legislación Laboral en Seis Países Latinoamericanos. Límites y Omisiones para una Mayor Equidad", Serie *Mujer y Desarrollo*, n° 56, Santiago de Chile, ECLAC, 2004.
4. In the majority of labor codes and specific regulations in Latin America, this dichotomy has been resolved by prioritizing the protection of maternity, not equality. Once again, this option is in line with the commitments assumed by the States in international conferences (in particular CEDAW), International Labor Organization (ILO) conventions and domestic equal opportunity policies, while it also reflects the limitations imposed by the nature of the legal discourse. It also incorporates the principle that not all inequality implies discrimination, meaning the assurance of equality should not imply equal treatment for those who find themselves in different circumstances.
5. See, on this subject, L. Pautassi, E. Faur & N. Gherardi, *op. cit.*
6. Some of the points analyzed here have already been presented in Laura Pautassi, "¿Bailarinas en la Oscuridad? Seguridad Social en América Latina el Marco de la Equidad de Género", a paper presented at the *Thirty-Eighth Meeting of the Presiding Officers of the Regional Conference on Women in Latin America and the Caribbean*, Mar del Plata, 7-8 September 2005.
7. These principles are found in the domestic legislation of every Latin American country, in the legal framework that contains the political constitutions, labor codes (when these exist) and other complementary laws and regulatory provisions. International human rights treaties and International Labour Organization (ILO) conventions also have a significant influence on this framework, since besides being of mandatory application for domestic courts, they have also orientated some guidelines of domestic legislation. See Pautassi, Faur & Gherardi, *op.cit.*
8. Conventions 3, 13, 41, 89, 103 and 127.
9. Conventions 100, 111, 156 and 171. Nevertheless, this evolution was not entirely linear and for many years, from 1919 to 1981, various approaches to female work, including various legally

protected interests, overlapped: women as weak individuals requiring special protection, women as mothers, maternity, equality and, finally, protection of maternity/paternity. Flavia Marco, "Consecuencias Económicas de la Discriminación Laboral por Género", *Masters thesis in Economic Law*, Santiago do Chile, University of Chile, Law Faculty, Graduate School, 1999.

10. United Nations General Assembly, *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW), 1979, article 1.

11. *Ibid.*, article 11.

12. *Ibid.*, article 13.

13. *Ibid.*, articles 11 and 12.

14. Pautassi, Faur & Gheradi, *op. cit.*

15. It is worth pointing out that the amount of women active in the urban job market between 1990 and 2004 rose from 37.9% to 51%. This is a sizable increase, although still far behind the figure for men, which in 2004 was 78%. Latin America presents the widest unemployment gap between men and women: 3.4% in 2003. Economic Commission for Latin America and the Caribbean (ECLAC), *Gender Statistics*, Women and Development Unit, 2006, available on the internet, at the link <[www.cepal.org/mulher/proyectos/perfiles/default.htm](http://www.cepal.org/mulher/proyectos/perfiles/default.htm)> or <[http://www.eclac.cl/mujer/proyectos/perfiles\\_en/default.htm](http://www.eclac.cl/mujer/proyectos/perfiles_en/default.htm)>, accessed on January 16, 2007.

16. An analysis of the structure of labor costs by gender conducted in five countries (Argentina, Chile, Brazil, Mexico and Uruguay) reliably confirms that it is indeed a myth that hiring women implies greater labor costs. L. Abramo & R. Todazo, *Cuestionando un Mito: Costos Laborales de Hombres y Mujeres en América Latina*, International Labour Organization, Lima, 2002.

17. Claus Offe notes that none of these questions have been established in a straightforward and unquestionable manner, hence the *ambiguous* and *obscure* nature of social security. Claus Offe, "Un Diseño no Productivista para Políticas Sociales", in Rubén Lo Vuolo (comp.), *Contra la Exclusión. La Propuesta del Ingreso Ciudadano*, Buenos Aires, CIEPP/Miño y Dávila, 1995.

18. The "full" inclusion of women will only occur when they enjoy all formal rights, particularly educational rights. People who are not included in the formal labor market and, as such, do not contribute to the social security system, do not enjoy these rights. In this vein, there is a sizable contingent of women labeled "inactive", who are placed in this category for the simple fact that they do not have access to the labor market, basically because of their domestic responsibilities.

19. This discourse has been emphasized in recent years to illustrate the need to resolve the problem of economic recession as a preliminary measure for improving the situation on the labor market. While it is obvious that the chances of improving opportunities on the labor market without economic growth are next to nothing, the opposite is not necessarily true.

20. A paradigmatic example of this are the numerous and varied social programs designed and geared towards "vulnerable groups". In these, women appear as the principle group subject to vulnerability and they are treated as "beneficiaries" or "recipients" of specific programs, not as

holders of rights. As such, they are beneficiaries of a “program for” (maternal and childcare programs) and not holders of “a right to” (healthcare).

21. See on this subject Carmelo Mesa Lago, “Desarrollo Social, Reforma del Estado y de la Seguridad Social en el Umbral del Siglo XXI”, *Serie Políticas Sociales*, n° 36, Santiago de Chile, ECLAC, January 2000.

22. F. Ewald, *L’Etat Providence*, Paris, Bernard Grasset, 1986, p. 540.

23. Nancy Folbre, *The Invisible Heart. Economics and Family Values*, New York, The New Press, 2001.

24. Here, we once again take up the topic developed in Laura Pautassi, “Legislación Previsional y Equidad de Género en América Latina”, *Serie Mujer y Desarrollo*, n° 42, Santiago de Chile, ECLAC, 2002.

25. See, on this subject, Flavia Marco, *Los Sistemas de Pensiones en América Latina, Un Análisis de Género*, Santiago de Chile, ECLAC, 2004.

26. Flavia Marco, op. cit.

27. Flavia Marco, op. cit., p. 33. Based on empirical evidence from the pension reforms in various Latin American countries, the author asserts that both individual capitalization schemes and public pension systems distribute benefits inequitably. However, she adds that “social security can and should observe a function to correct social inequalities. This reasoning answers the question as to whether or not pension deficiencies are attributable to the labor market and whether this market is one of the various spheres of application of social policies”.

28. For an analysis of the gap between rights and the development perspective, see Victor Abramovich, “Una Aproximación al Enfoque de Derechos en las Estrategias y Políticas de Desarrollo”, *ECLAC review*, n° 88, Santiago de Chile, ECLAC, April 2006.

29. Mario Paganini, *Financiamiento de lo Inestable*, Santa Fe, mimeo, 2002

30. It is worth pointing out that countries such as Germany incorporated shared pension contributions as an inalienable right since 1977.

31. Fidel Ferreras Alonso, *Adaptar la Seguridad Social a las Nuevas Situaciones Sociales: El Ejemplo de Alemania*, Madrid, mimeo, June 2001.

32. Among the most common standards, those recognized as minimum content of rights are those of progressiveness and non-regressiveness; of non-discrimination; of information production and policy formulation; of participation of sectors involved in the designing of public policies and of access to technology. Centro de Estudios Legales y Sociales (CELS-Argentina), *Plan Jefes y Jefas. ¿Derecho Social o Beneficio sin Derechos?*, Colección Investigación y Análisis 1, Buenos Aires, CELS, 2004.

33. Abramovich, op. cit.



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#### ABSTRACT

Efforts to reduce the trauma in an adversarial court system are complicated by the arguments that the prosecution of sexual abuse cannot take place in disregard of the rights of the alleged perpetrator. The questioning of a child witness is a very specialised task, and the prosecutors and defence counsel are not trained in these methods. Therefore, intermediary services to the child witness in court are important to reduce the trauma experienced by the child. This article aims to highlight that crimes against children and the subsequent criminal proceedings where the child is required to testify as a witness occurs frequently enough to warrant intermediary services to all child witnesses. Practical implications will be highlighted in order to improve the current intermediary process, regionally, provincially and nationally. Firstly, it will reflect on the intermediary services provided for child witnesses in some areas in the western suburbs of Johannesburg; secondly, it will discuss practical experiences and supportive literature, as well as the Bethany House's experience with the project Child in Crisis Foundation (SA).

Original in English.

#### KEYWORDS

Child witness - Rights of children - Judgements - Intermediary system - Sexual violence - Victims - Court process - Prevention - Family violence - Assistance to victims



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# INTERMEDIARY SERVICES FOR CHILD WITNESSES TESTIFYING IN SOUTH AFRICAN CRIMINAL COURTS

Gert Jonker and Rika Swanzen

## Introduction

According to Coughlan and Jarman<sup>1</sup> the purpose of intermediary services to the child witness is to reduce the trauma experienced by the child. However, efforts to reduce the trauma in an adversarial court system are complicated by the arguments that the prosecution of sexual abuse cannot take place in disregard of the rights of the alleged perpetrator. South Africa made international legal (and human rights) history with the promulgation of Section 170A of Criminal Procedures Act 51 of 1977 which was introduced through the Criminal Law Amendment Act 135 of 1991. This provides for the appointment of an intermediary for children in cases of sexual abuse for reasons of youthfulness or emotional vulnerability.<sup>2</sup>

Müller<sup>3</sup> says that in evaluating the competency of the child to act as a witness, there are two components to consider. The first requirement is eyewitness ability, i.e. the ability to report the details of an observed event accurately and completely. This relates to the child's cognitive development with consideration of factors that influence the acquisition, retention, retrieval and verbal communication of information. The second requirement is the witness's willingness to tell the truth, i.e. the motivational aspect. Although it is understood that grasping the difference between truth and lies is crucial in testifying, the competency of child witnesses in this regard was investigated by the South African Law Commission in 2001. After evaluating the South

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*Notes to this text start on page 112.*

African position, the commission recommended that a witness should not be disqualified from testifying due to the fact that he or she is unable to define the difference between telling the truth and lies. It was submitted that all witnesses be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand. The proposed test focuses on the cognitive ability of the child. There is little clarity, however as to who will perform these evaluations or how they will be done.<sup>4</sup>

A practical description then of the intermediary process and its necessity is:

*In South Africa, an intermediary system is attempting to reduce the trauma and secondary abuse often experienced by child witnesses in court cases involving [sexual] abuse. By separating the child from the formal courtroom and allowing an intermediary to relay questions and answers to the child via closed circuit television, it was hoped that the stress of the experience for these children would be reduced while retaining the rights of the accused to cross-examine witnesses and to a fair trial[...] Protecting the rights of children is an universally accepted principle that influences the development of policy and practice. Where these rights have been violated - such as in sexual abuse, it is imperative that the response from societal institutions (such as justice and welfare) not only seek to protect children from further abuse of their rights but also seek to actively redress some of the violations that have taken place. It is thus essential that when possible, children giving evidence in criminal cases of sexual abuse be protected from further harm. The intermediary system for child witnesses is one such effort.<sup>5</sup>*

Coughlan and Jarman<sup>6</sup> also confirm that a significant body of literature has shown that the experience of giving evidence is emotionally traumatic and sometimes developmentally and cognitively impossible for children as they struggle to remember details over extended periods of time, to cope with the abstract language, and to be exposed to processes and standards that are often meaningless to them. Müller<sup>7</sup> states that cross-examination is not only traumatic for children, but also results in inaccurate evidence. The child is questioned in a hostile environment, often about very intimate and emotionally-laden events. The defence is obliged to attack the child's credibility in an attempt to highlight inconsistencies and discredit the child's evidence. In light of this, the questioning of a child witness is a very specialised task, and the prosecutors and defence counsel are not trained in these methods.<sup>8</sup>

This article has two parts. Firstly it will reflect on the intermediary services provided for child witnesses in three magisterial areas in the western suburbs of Johannesburg in the Gauteng Province, South Africa. Secondly, a discussion from practical experiences and supportive literature will be given. Through

this article we want to highlight that crimes against children and the subsequent criminal proceedings where the child is required to testify as a witness, occurs frequently enough to warrant intermediary services to all child witnesses. Implications for practice will be highlighted later on in this article, in order to improve the current intermediary process, regionally, provincially and nationally.

## A description of the intermediary

The introduction of South Africa's Criminal Law Amendment Act 135 of 1991, which came into effect on 1 August 1993 brought the following about in criminal cases with child witnesses, as summarised in the following table by Viviers:<sup>9</sup>

**Table 1. Intermediary responsibilities**

<b>Relevant section in the Criminal Procedure Act</b>	<b>Practical Implication</b>
<b>Section 161 (2)</b> – 'viva voce' shall in case of a deaf and mute witness, be deemed to include gesture-language and in case of a witness under 18, be deemed to include demonstration, gestures or any other form of non-verbal expression.	Allows child to give testimony in a way appropriate to his/her age by using gestures, demonstrations and other forms of non-verbal communications. It is the task and responsibility of the intermediary to understand gestures, demonstrations and non-verbal communication and to verbalise it to the court.
<b>Section 165</b> – Where the person concerned is to give evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section 162, 163 or 165 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.	The judge or judicial officer may call upon the intermediary for assistance in administration of the oath, affirmation, or admonition. The intermediary may have to present it in such a way that the child understands it, and that the court is satisfied that the child will be able to give testimony on the truth and knows the difference between true and false evidence.
<b>Section 170A(1)</b> – Whenever criminal proceedings are pending before any court and it appears to such a court that it would expose any witness under the age of 18 to undue mental stress or suffering if he testifies at such proceedings, the court may subject to subsection (4), appoint a competent person as an intermediary in order to enable such a witness to give evidence through that intermediary.	The discretion to use an intermediary rests with the court and must be requested by the prosecutor with the judge ruling on its necessity. This calls strongly for social workers to advocate (not instruct) for the use of intermediaries in all cases where child witnesses have to give testimony. It should be noted that age is only one factor to be considered in deciding whether to appoint an intermediary. The mere fact that the witness is a child does not compel the court. Before making a decision it's necessary to afford the parties an opportunity to address it.
<b>Section 170A(2)(a)</b> – No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed and intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.	All questions by the prosecutor, the defence, or any other person in the court must be addressed to the child through the intermediary. Only the Court i.e. the magistrate has the prerogative to ask questions directly to the child witness. In such cases the magistrate has to request the intermediary to convey the question, as asked, to the child, or may address the child directly.

<p style="text-align: center;"><b>Relevant section in the Criminal Procedure Act</b></p>	<p style="text-align: center;"><b>Practical Implication</b></p>
<p><b>Section 170A(2)(b)</b> – The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.</p>	<p>The intermediary is allowed to simplify the questions to the child in such a way that the child understands it, without changing the meaning. The magistrate is the only party who may request the intermediary to convey the question asked in the exact wording to the child. Then the intermediary may not simplify those specific questions. Intermediaries should take care not to interpret the question when it is conveyed to the child, or to analyse / alter the child’s response.</p>
<p><b>Section 170A(3)</b> – The court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place – (a) which is informally arranged to set that witness at ease; (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through a medium of any electronic or other devices, that intermediary as well as witness during the testimony</p>	<p>The child gives her testimony via the intermediary usually in a separate room which is linked to the court usually by close circuit television or by way of a one-way mirror. The child does not see or hear the proceedings but the court sees and hears the child and intermediary.</p>
<p><b>Section 170A(4)(a)</b> – The Minister may by notice in the Gazette determine the person or the category or class of persons who are competent to be appointed as intermediaries.</p>	<p>In accordance with Government Notice No R.1374, 30 July 1993 issued by the Minister of Justice (Proclamation in Government Gazette no 15024, as amended by Government no 17822 of 28 February 1997, and amended by Government Gazette no 22435 of 2 July 2001), the following persons are competent to be appointed as intermediaries: <b>Social Workers</b> registered in accordance with s17 of the Social Work Act 110, 1978 and who have a minimum of 2 years experience in social work. Persons who hold a masters degree in social work with 2 years experience in social work. <b>Medical practitioners</b> who are registered with The SA Medical and Dental Council under Act 56 of 1974 and who are also registered as paediatricians or psychiatrists. <b>Family Counsellors</b> appointed under s3 of Act 24 the Mediation in terms of Certain Divorce Matter Act of 1987 and who are registered as social workers, or who are classified as teachers in the classification category C to G as issued by the Dept of Education, or who are registered as clinical, educational or guidance psychologists. <b>Child Care Workers</b> who have completed the 2 year training of the National Association for Child Care Workers and with a minimum of 4 years experience. <b>Teachers</b> who have a minimum of four years experience and who have never been suspended or temporarily suspended from teaching. <b>Psychologists</b> who are registered as clinical, educational or guidance under Act 56 of 1974.</p>
<p><b>Section 170A (4)(b)</b> – An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance, may determine.</p>	<p>The use of the word ‘shall’ indicates that the Minister of Justice and the Department of Justice are obliged to pay the claims submitted by the intermediary in respect to services rendered.</p>

Combrink and Durr-Fitchen<sup>10</sup> highlighted that persons who are competent to be appointed as intermediaries in terms of categories determined by law will not necessarily be suitable intermediaries. Based on discussion sessions between members of the legal, social work and psychology professions held at the Wynberg Sexual Offences Court, and an analysis of intermediary functioning, it became clear that certain personal requirements have to be complied with. The most basic prerequisites for a suitable intermediary would *inter alia* include the following:<sup>11</sup>

- a proven ability to relate to children and an ability to develop rapport in a short time
- an awareness of transference with regard to the gender of the intermediary.
- communication skills – be fluent in the child’s language and reflecting clear messages
- interviewing techniques with good observation skills and the ability to convey warmth, empathy and support to the child, while still remaining impartial and objective
- a working knowledge of legal aspects, the dynamics of sexual abuse and developmental stages with related intellectual and verbal abilities
- a comfortable awareness of one’s own sexuality
- the intermediary and therapist should be two different people to decrease the charge that bias increases the risk on appeal.

### Description of the intermediary process

Coughlan and Jarman<sup>12</sup> explain that in most instances the intermediary is a social worker who prepares the child for the court appearance and sits with the child in the camera room. Her role is to translate questions posed by the magistrate, attorney, prosecutor, or alleged perpetrator, into language the child will understand, without changing the general purport of the question. The intermediary has the duty of buffering aggression and intimidation and of informing the court when the witness tires or loses concentration in order for the presiding officer to adjourn the court. A closed-circuit television, a microphone, and the intermediary form the basis of the system. A television is in the main courtroom and a camera room that is adjacent to the main courtroom accommodates the child witness and the intermediary. The intermediary is fitted with earphones. Only the intermediary hears the questions, but the persons present in the courtroom hear the answers and anything else that happens in the witness room. This system differs from the English situation in which closed circuit television is used but no intermediary is involved.<sup>13</sup>

The Bethany House Trust was established in 1998 as a project of the Child in Crisis Foundation (SA). It is registered as a Children’s Charity Trust by the High

Court and is also registered as a Non Profit and Public Benefit Organisation. The Trust offers Child and Youth Development, Professional Parenting, and Child Witness Services. In April 2003 Bethany House entered into a public/private partnership with the South African Departments of Justice and Social Development to conduct a pilot project with regard to intermediary services. Although intermediary services were available at that stage, the service was not co-ordinated, intermediaries were not properly capacitated and court officials generally did not use the service. Bethany House trained a core team of intermediaries, launched an awareness and educational campaign in order that all court officials became aware of and started to utilise the service. A 100% child focused service was developed to accommodate all child witnesses, regardless of gender and mother tongue. Challenges included the fact that in the geographic area where the pilot project was launched, 11 different languages are spoken by child witnesses, which necessitated that intermediaries should be conversant in all those languages.

The primary objective of the pilot project was to provide sustained, professional intermediary services to child witnesses. In order to accomplish this, Bethany House developed a unique case management database for the scheduling and tracking of cases. Data derived from this application can be used to inform policy and budget planning in services to children by welfare, police and justice departments. The data used in this article were obtained from this database. Information to populate the database is obtained from the magistrates courts where these cases are heard. A secondary aim was to compile a tentative victim and perpetrator profile for a specific geographic area. However, the data presented in this article have not been compared to population trends. The frustration with regard to developing a database such as the one mentioned above is confirmed by the experience of Coughlan and Jarman<sup>14</sup> who state that to date there is very little, if any, research on the intermediary system's use in South Africa. It is difficult to ascertain if the system has had any impact on conviction rates because the national moratorium on the release of crime statistics and information by the police has made this kind of data gathering impossible. It can therefore be argued that Bethany House's attempt at providing information through the use of a database is ground-breaking in determining the success and status of intermediary services.

### *Magisterial Districts served*

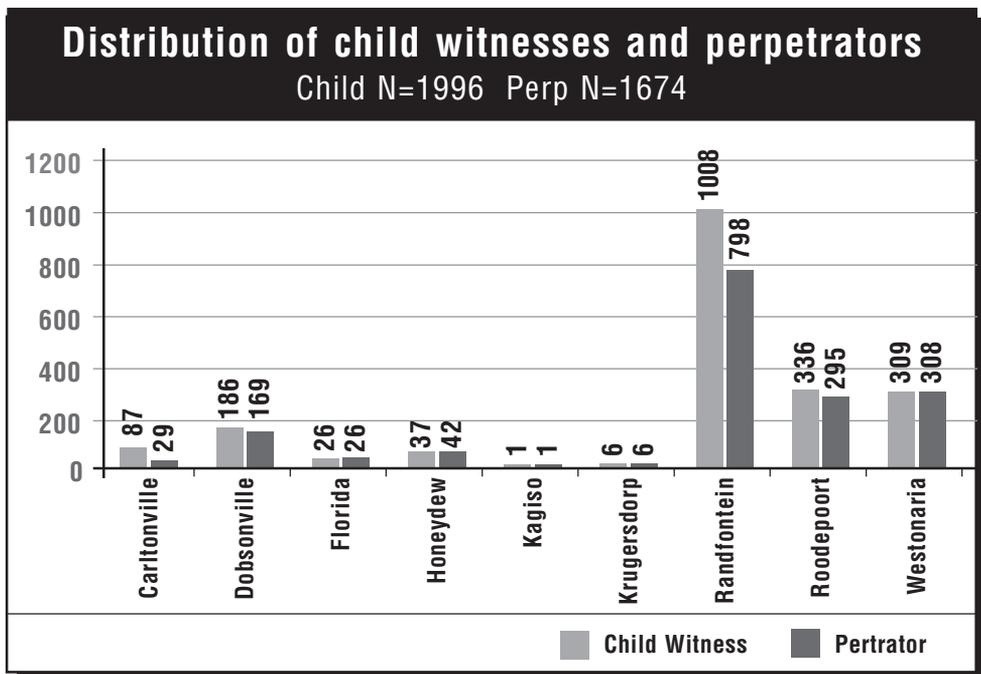
Table 2 gives an overview of the geographic areas where intermediary services have been rendered to child witnesses from April 2003 to September 2006. The magisterial districts (courts) currently served by Bethany House are Randfontein, Roodepoort and Westonaria. In a few cases Bethany House assisted other courts. The table also shows the different police areas within the magisterial districts and the number of reported cases in each.

**Table 2. Cases per Magisterial Districts and police areas**

Magisterial District	No of cases	Police area	No of cases
Oberholzer Court	7	Carltonville Police Station	29
Krugersdorp Court	7	Krugersdorp Police Station	6
		Kagiso Police Station	1
Protea Glen Court	1	Soweto Police Station	1
Randfontein Court	716	Randfontein/Toekomrus/Mohlakeng	692
Roodepoort Court	506	Roodepoort Police Station	285
		Dobsonville Police Station	160
		Florida Police Station	26
		Honeydew Police Station	35
Westonaria Court	259	Westonaria	262
<b>Total</b>	<b>1496</b>	<b>Total</b>	<b>1496</b>

In the magisterial districts which Bethany House serves, 1496 cases were handled in 3 ½ years. This clearly illustrates the frequency of court cases and serves as an indication that the service is necessary.

Figure 1 presents a graphic of the number of child witnesses and perpetrators in each magisterial district. The higher number of incidents in Randfontein is noticeable, although these data should be balanced with influencing factors such as varying population density and the fact that prosecutors in some districts do not always request the service.

**Figure 1. Child witness and perpetrator rates per Magisterial District**

### *Descriptors of child witnesses*

Table 3 sets out the gender, ages and mother tongues of the child witnesses who were the victims of crimes explained afterwards in Figure 2. Note that the child witness population is larger than the number of cases discussed in the previous section, since in some cases more than one child gave testimony (multiple victims) in the same case.

**Table 3. Demographic details of child witnesses**

GENDER		Boys = 297 (15%)					Girls = 1699 (85%)				N=1996
AGE	0-4yrs	5-8yrs	9-12yrs	13-16yrs	17-21yrs	Above 30	N				
	117 (5.86%)	483 (24.19%)	702 (35.17%)	551 (27.6%)	56 (2.8%)	9 (0.45%)	1996				
MOTHER TONGUE	Afrikaans	English	Sepedi	Sesotho	Shangaan	Swazi	Tsonga	Tswana	Venda	Xhosa	Zulu
	469	67	16	155	7	11	18	680	6	233	334

Table 3 gives the following demographic detail regarding child witnesses that can be used to offer a profile of the typical child client in the Bethany House service area:

- Eighty-five percent of the witnesses are girls.
- The biggest age cluster is children between the ages of 9 and 12 years. It is significant to note that the highest number of children per age was 13 year olds – 259 (13%) of the total children served.
- Significantly more Tswana (34%) and Afrikaans (23.5%) children received intermediary services. This corresponds with the cultural representation in the area.
- Children from a number of cultures (11) are in need of intermediary services. This implies that intermediaries also need to be representative of these cultures to truly assist the child through language and understanding of cultural context.

In the Gauteng Province there are 345 600 girls in the age group 10 to 14 years.<sup>15</sup> If the profile information presented above is considered, the focus for preventive and treatment services should be geared towards the activities of this age group.

### *Types of crimes against the victims*

The Family Violence, Child Protection and Sexual Offences (FCS) units of the South African Police Services (SAPS) are responsible for investigating crimes

against children such as assault with the intent to do grievous bodily harm, attempted murder, rape, incest, indecent assault, common assault, kidnapping, abduction, the sexual exploitation of children and adults in terms of the Sexual Offences Act 23 of 1957, relevant crimes in terms of the Prevention of Family Violence Act 133 of 1993, the Domestic Violence Act 116 of 1998 and the Films and Publication Act 65 of 1996.<sup>16</sup> What is significant of this type of crime and case outcome (discussed later) is the number of reported cases vs. the conviction rates. This section gives an overview of the type of crimes the intermediaries in the Bethany House pilot project were involved in.

Figure 2 shows the charge type with regard to the cases the child witnesses were involved in. One can see that there was a significantly larger number of rape and indecent assault cases. With regard to profile identification, the data on the charge type shows that:

- children who were victims of rape (64.52% of total cases) and indecent assault (27.57%) were the biggest witness cluster
- no intermediary services were given in child abandonment and neglect cases

The experience of sexual abuse impacts negatively on the child's development, behaviour and perception of his environment, and is referred to as trauma. The

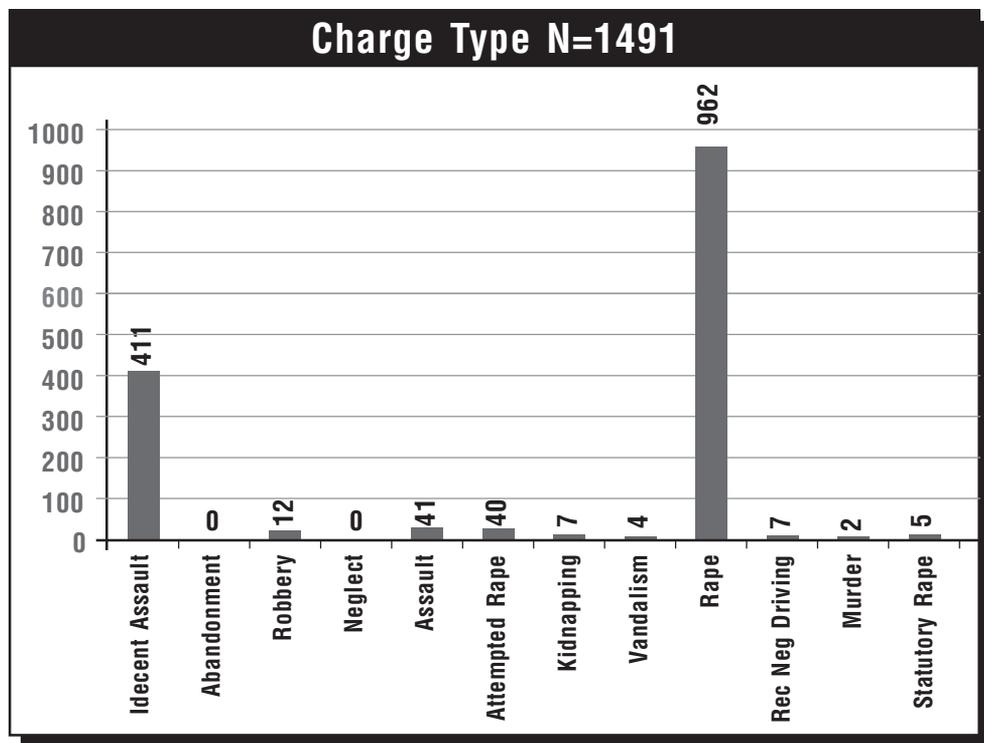


Figure 2. Types of charges in child witnessing cases

traumatic effects of sexual abuse are argued to be the most complex and most pervasive in terms of the impact on the child's life. When the trauma is inflicted by a person known to the child, the suffering may be more intense and persistent. The sudden, horrifying and unexpected nature of an event also defines trauma.<sup>17</sup>

The effect on the child may vary in seriousness and be lasting in nature. It includes a loss of childhood, loss of family if the child is removed, and loss of trust which will influence future relationships. The child may also experience complex post-traumatic symptoms such as low self-esteem, fear, misplaced anger and hostility, inappropriate sexual behaviour and attitude, depression, guilt or shame, self-destructive behaviour, powerlessness, blurred role-boundaries and role confusion, pseudo-maturity or developmental regression and dissociation. A court does not have the expertise to conclude on the consequences of indecent assault and rape on child victims. Factual allegations relating to trauma can be proved by the State, or the court can inform itself by calling witnesses in terms of section 274 (1) of the Criminal Procedure Act. A possibility would be to call the mother or teacher to testify about symptoms of trauma such as sleeping, eating and socialising patterns, standard of homework, ability to concentrate, attitude towards discipline and a nervous or fearful state of mind. If this evidence is not challenged, it may be accepted without psychiatric evidence on the effects of rape.<sup>18</sup>

### *Perpetrator relation to child*

An interesting reason why most cases do not go to court is 'undetected' cases, which refers to cases where the police have not identified the suspect. Some cases are unsolved because the police have inadequate or no leads to follow up on through no fault of their own. In other cases incomplete or poor police investigation.<sup>19</sup>

Figure 3 illustrates the relationship between the perpetrator and the child. In the majority of cases (1755 or 95%) males were the perpetrators. In 62% (1145) of the cases the male was known to the child and in only 33% (610) of the cases was the male a stranger to the child.

The graphic offers the following information about the relationship to the child for purposes of compiling a victim profile:

- In the majority of the cases the perpetrator is a male known to the child: a neighbour (402 or 22%); a biological family member (401 or 22%); step family member (103 or 5.6%); and a male that the child stood in relationship with outside of the family (220 or 12%).
- In descending order the child in need of intermediary services is most at risk in their immediate home and family environment as well as in their social relationships and school.

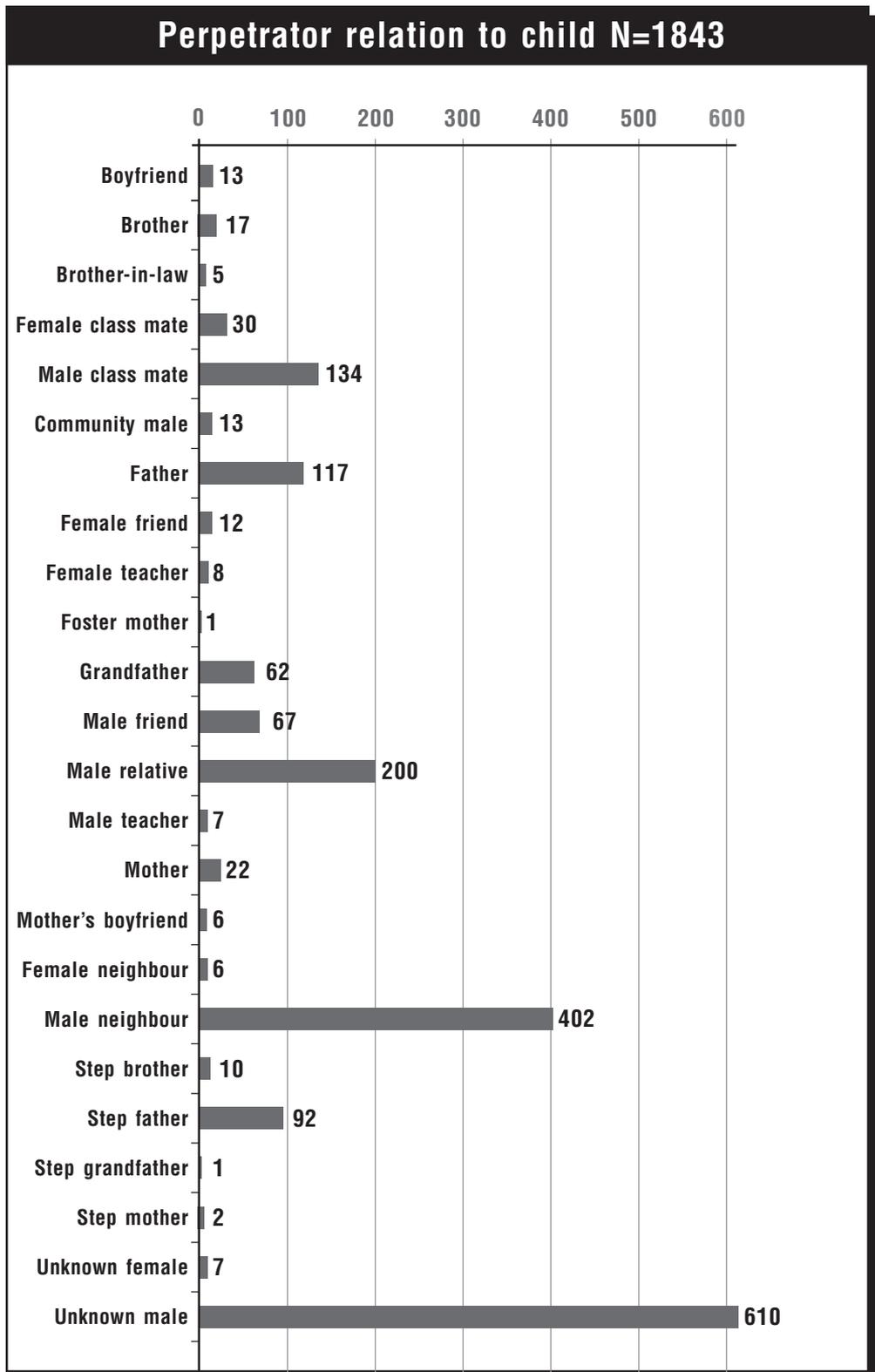


Figure 3. The perpetrator's relation to the child

With cognisance of the fact that the majority of children experienced rape and indecent assault and that a large number of perpetrators were known to the child, it can be assumed that the child witnesses have experienced high levels of trauma. It is the responsibility of the Departments of Welfare and Justice to be sensitive towards this fact and to explore which symptoms of the child will need post-trial treatment.

Describing the perpetrators involved with the crimes against the children will also contribute to the understanding of the intermediary process in the West Rand.

*Descriptors of the perpetrator*

Table 4 gives information on the gender, age and culture of the perpetrators involved in the cases in the magisterial districts mentioned in Table 1. Cause for concern exists as there is a large percentage of perpetrators who are younger than 19 years.

Useful information from the table below includes:

- The overwhelming majority of perpetrators are male (95%) and most are between 19 and 40 years old.
- Again a larger number of perpetrators come from the Afrikaans and Tswana cultures. A comparative analysis of the population representation in the West Rand area may shed more light on why perpetrators from the Afrikaans and Tswana community constitute the biggest cluster of perpetrators (Note that Afrikaans is the mother tongue of white and coloured persons in the represented communities).

**Table 4. Demographics of perpetrators**

GENDER	Male=1589 (95%)					Female=85 (5%)					N=1674	
	Under 19	19 -29yrs	30-39yrs	40-49yrs	50-59yrs	Over 59						
	394 (23.54%)	478 (28.55%)	433 (25.87%)	241 (14.4%)	75 (4.48%)	53 (3.17%)					1674	
MOTHER TONGUE	Afrikaans	English	Ndebele	Sepedi	Sesotho	Shangaan	Swazi	Tsonga	Tswana	Venda	Xhosa	Zulu
	413	30	11	19	134	45	8	32	493	14	199	274

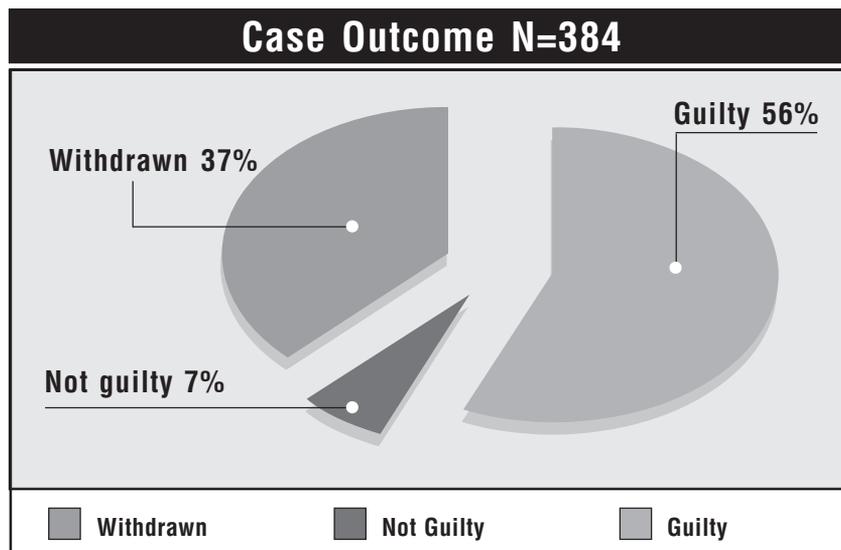
*Case outcome*

Case outcome is a significant part of the process for the child witness. The very reason for testifying against the perpetrator is to prove his or her guilt. Sentencing implies punishment for wrongdoing and the punishment should fit the crime. Since the interest of intermediary services lies in protecting the

child during a criminal process where it is hoped that a fair trial is conducted, it is of interest to reflect on the outcomes of the cases captured on Bethany House's database.

Figure 4 shows the outcome of 384 criminal cases. This is only a small number of the 1 496 cases described in Table 2. In the next section the effectiveness of the process will be discussed and some light will be shed on why so little of the case outcome is known.

What is encouraging about the information gained from the data on the case outcome is that there were no mistrials. The high number of cases withdrawn in the court (143) is of concern. Interrogation of the legal process which leads to cases being withdrawn after a perpetrator was charged and brought before court is necessary. When withdrawn, no decision regarding the guilt or innocence of the perpetrator is made. In the cases handled by Bethany House, no further contact with the child exists after the verdict. It should be asked, however, what the effect of this is on the child witness.



**Figure 4. The case outcome of intermediary cases**

For the purpose of profile building the information on verdicts gives the following insight:

- The majority of the cases (56%) brought before court have led to a guilty verdict.

In comparing the statistical trends of the Bethany House pilot project with national police statistics before 2000 one can see that 58% of the reported rape cases

involving victims under 18 years, did not go to court. Furthermore, 18% were withdrawn in court and only 9% were found guilty. If you consider the under reporting rate in cases of child abuse – especially those involving family members - the conviction rate compared to actual crimes is poor. Acquittals constitute 9% of the cases before court. It is important to note that the prosecution authority tends to try only those cases with a reasonable prospect of obtaining a conviction. Prosecution resources focus on the most promising cases. Rape is often more difficult to prove than other crimes. Still, child rape cases that went to trial were twice as likely as adult rape charges to result in conviction.<sup>20</sup>

Clause 47 of the draft Sentencing Framework Bill 2000 proposes the presentation of victim impact statements to courts about harm suffered by the victim in order to learn what impact the crime had in practice. Unlike the trial itself, with sentencing impressions become more important than facts, and considerations which were irrelevant on the merits now acquire importance, placing the expectation on the court to make a complex value judgement. The issues at stake in exercising the sentencing discretion are the interest of justice. A bad choice of punishment is against the interests of justice and the discretion to impose an appropriate sentence can only be exercised on the basis of all the facts relevant to the matter. Aggravating circumstances also influence the sentence. These are the process of grooming that shows premeditated planning, abuse of an authority position, knowledge of HIV-positive status, and the defencelessness of the victim. Mitigating factors in sentencing can be the youthfulness of the accused, no previous convictions, no weapon, and perception of willingness of victim older than 16.<sup>21</sup>

The Criminal Law Amendment Act 105 of 1997 came into operation in May 1998 and section 51 makes provision for a system of minimum sentencing where more serious crimes are concerned. The purpose of introducing minimum sentences was the need to deal a decisive blow to serious crime through the use of dramatically increased sentences. The minimum sentences in the relation to serious crimes against children are the following:<sup>22</sup>

1. life imprisonment shall be imposed in a case of rape where:
  - the victim was raped more than once or by more than one person under common purpose
  - the accused has been convicted of two or more offences of rape without being sentenced yet
  - the accused knew that he was HIV infected
  - the victim is a girl under the age of 16 years
2. imprisonment for a period of 10, 15 and 20 years respectively for first,

second and third offenders shall be imposed in the following instances:

- rape other than in the abovementioned situations (e.g. where the accused had a firearm intended for use or where the victim is over 16 years of age)
- indecent assault on a child younger than 16 involving the infliction of bodily harm (i.e. every kind of physical injury however trivial it might appear)
- assault to do grievous bodily harm on a child younger than 16 years.

With cognisance of the proposed framework for sentencing, of the 2 599 family violence and sexual offence cases against children brought before court in 2005/2006, 14 116 years of imprisonment, 146 life sentences, and fines to the value of R474 560 were handed down in judgements.<sup>23</sup>

## Discussion

The information gained from the statistical data on the Bethany House database from April 2003 to September 2006 provides information that can be used for welfare, judicial and police planning in the West Rand service area. The experiences gained from the pilot project are also significant to inform practice. These are discussed next. Together with the discussion of Bethany House's experience with intermediary service delivery an article of the experiences of other social workers in South Africa, where they pose the question whether the intermediary system is worth saving, is discussed. Cognisance will also be taken of the work done by Karen Müller on conceptualising the relationship between the judicial officer and the child witness.

According to Coughlan<sup>24</sup> the intermediary system is only in use in main city centers of South Africa, such as East London, Cape Town, Port Elizabeth, Johannesburg, Pretoria, Durban and Pietermaritzburg. There are no such facilities in rural courts. In addition, in cities like East London, for all intents and purposes, the service was not provided as social workers at the time refused to continue to offer the service. Experiences of a small number of these intermediaries shed light on the fact that they were inadequately trained and had to deal with anxieties and emotions regarding the court process and the child's trauma. For these experiences they received no debriefing.

First we will summarise the experiences of intermediaries as reflected by Coughlan in 2002<sup>25</sup> and then we will focus on our own experiences with the intermediary system in our direct service delivery area. In the light of these we will discuss implications for practice suggested by other authors interested in the child witness situation in South Africa, to add to our own.

### *Difficulties experienced by intermediaries*

Many of the difficulties experienced by Coughlan and Jarman<sup>26</sup> related to the environment and process of the court itself. These include the impact of long delays and the stress of a looming trial; the unpredictability of the presence of an intermediary; preserving the rights of the accused versus avoiding further abuse of the child; questioning the child's ability to adhere to adult-defined concepts of truth; lack of consideration of cultural approaches to talking about sexual matters; the potential for errors in translations; requiring the child to repeat the details of the abuse; weighing up whether successful prosecution is worth the trauma experienced by the child; conflict between social worker and intermediary roles; and delays for up to 2 years for cases to be heard because of judicial backlogs.

Müller<sup>27</sup> adds that the intermediary was introduced to assist the child witness by removing all hostility and aggression from a question and by changing a question, where necessary, so that it would be more understandable to the child. However, in practice, the use of an intermediary has given rise to a number of problems. The power of the intermediary is very limited, since the intermediary is perceived to be nothing more than an interpreter (and not an expert witness) and the court can at any time insist that the intermediary repeat the question exactly as it was phrased. A further disadvantage of the present system is that the intermediary does not have the authority to comment on a question and give an opinion as to whether a child understands a question or not. The intermediary is powerless to intervene and argue that questions should not be asked in a particular sequence or not phrased in a certain manner.

These authors highlight that the context within which the child offers her witness may be causing more harm than it is worth. There has been disillusionment under those who hoped to act as intermediary in order to make the process easier for the child, only to be faced with age inappropriate expectations of the child and a stern focus on the rights of the accused. The next section shows how Bethany House's own experiences confirm the ineffectiveness of the current process. There is however some hope on the horizon. This glimmer of light will be discussed as changes that may see the light in the next year or so.

### *Effectiveness of the current process*

The effectiveness of the current process can only be described as "user-unfriendly". This specifically refers to the use of language and the integration of the legal process into the child's already traumatized world. The time lapse between the time the case is reported to police, the time the case is brought before court for the first time and the time the child gives testimony, can be as long as 2 years.

Not only is the judicial process compromised by this, but the child witness remains in limbo as far as the “healing process” is concerned.

The number of times a case is postponed is illustrated in the next table. Apart from increased costs to represent the child victim, the child witness has to attend every hearing. In practice this means that the child is prepared for court (once), then has to be prepped for testimony, attend the hearing and be ready to testify on every occasion. The child victim is thus subjected to undue mental stress even before testifying.

Post testimony services such as therapy can only commence after the child has testified in court, in order to ensure that the child’s testimony is not contaminated. In reality there is little intervention afterwards. Therapeutic services are not readily available to child witnesses and more than often parents or caregivers cannot access the limited services available due to economic inhibitors. In the majority of instances, the practical preparation for the court case is the only help available to the child.

If the child was infected by the perpetrator with the HIV/AIDS virus when the crime was committed, the child may also be too ill to testify or may have died before testimony could be given against the perpetrator. Although the South African government has ARV (anti retroviral) programs which can be accessed by child witnesses infected by HIV/AIDS, the child can often not get to the hospitals where the service is available due to huge distances and economic factors such as the cost of transport.

	<b>no of cases</b>	<b>no of postponements</b>	<b>% of total</b>
	147	0	29.76
	122	1	24.70
	69	2	13.97
	55	3	11.13
	36	4	7.29
	23	5	4.66
	16	6	3.24
	7	7	1.42
	9	8	1.82
	3	9	0.60
	1	10	0.20
	1	11	0.20
	1	12	0.20
	3	13	0.61
	1	16	0.20
<b>Total</b>	<b>494</b>	<b>107</b>	<b>100.00</b>

Furthermore, significant under reporting of crimes occur, especially crimes committed within a family unit. The recent de-centralisation of the specialised policing unit responsible for investigating crimes against children, may compound under reporting as the community in general has also lost faith in the state's ability to protect their children.

Of the reported cases a small percentage are eventually brought before court, and even then an unacceptable high percentage of those cases are withdrawn in court. This happens when crucial evidence is lost (e.g. DNA) or when the witness cannot be traced. Because of the long delays, the child witness sometimes moves away without leaving forwarding addresses, compelling the state to withdraw the case in court.

A small percentage of these cases that makes it to and through the criminal court process result in convictions. It can thus be argued that the court process holds little gain for the child. The primary reason/s for criminal prosecution is not necessarily in the best interest of the child. There seems to be little or no correlation between the child's best interest and the expectations of the prosecuting authority.

The effectiveness of an already questionable legal process is further hampered by missing or defective (e.g. ear phones) equipment used to conduct intermediary services, resulting in long delays or postponements. In some instances the court proceedings are moved to another court district where a court with functional equipment can be accessed.

The existence of common findings among intermediaries from towns geographically far removed such as East London in the Eastern Cape Province and the West Rand, a region of the Gauteng Province, warrant further exploration into the intermediary process, taking cognisance of the need to make use of data to plan effective interventions for child witnesses.

### *Foreseen changes*

Project 107 of the South African law commission on Sexual Offences: process and procedure (2002) suggests a strategy of adopting guiding principles (Protocols and Memoranda or Codes of Good Practice) for bringing about changes in the management of sexual offences. The development of this 'national multi-disciplinary' framework should lead to an inter-sectoral binding agreement, forming the basis for provincial or regional multi-disciplinary codes of practice and embodied in legislation to ensure compliance. Brief mention is made here of some of the recommendations that should positively impact on the current legal process. These recommendations are reflected in the discussion document to be found on <[http://www.doj.gov.za/salrc/dpapers/dp102\\_prj107/dp102execsum.pdf](http://www.doj.gov.za/salrc/dpapers/dp102_prj107/dp102execsum.pdf)>. <sup>28</sup>

- Mandated bodies such as organs of government must deliver prompt, sensitive, effective, dependable, fully coordinated and integrated services.
- Budgetary provision must be made for the effective implementation and operation of the national framework.
- A multi-disciplinary coordinating committee should monitor, supervise and evaluate the implementation of such a framework.
- Flexible case-flow management techniques are recommended. The case-flow management strategy must be developed inter-sectorally to reduce delays in the criminal procedure process.
- Appropriate accredited training and debriefing of service providers are also stressed.
- There is ample precedent in South Africa for the creation of joint or inter-agency teams for the investigation and prosecution of high priority crimes.
- Only specially trained medical personnel, police officers, prosecutors, magistrates and counsellors should deal with serious sexual offences.
- Preferably all serious sexual offences cases must be prosecuted in special Sexual Offences courts.
- All child victims in sexual offence cases in need of care and protection should be able to rely on a responsive welfare system.
- South Africa is a country of limited resources, and the provision of PEP to rape victims has accordingly become a contentious issue. It is acknowledged that the cost implications of providing all victims of sexual violence with PEP treatment would be extremely high. However, the cost of not providing PEP will assuredly be much higher and will affect the public health care system and have a ripple effect on the economy. It is the responsibility of the state to provide the financial means to cover the cost of PEP for victims of sexual violence as these complainants have been exposed to a life threatening disease through no choice of their own.
- Protocols for medical practitioners and health care professionals should be developed.
- Police should review procedures for recording and following up “unfounded” cases and cases where the victim wishes to withdraw the matter.
- The Sexual Offences Act should place a positive obligation on the police to accept and register all complaints of sexual offences, and that the police should not have discretion as to whether or not to proceed with an investigation even when requested not to proceed by the victim. The sole discretion not to proceed with an investigation should be that of the prosecuting authority.

Although a lot of work has been done by the SA Law Commission to improve the status quo, the authors reiterate the question of what is needed for this issue to become a legislative and budgetary priority.

### *Implications for practice and recommendations*

We agree with Coughlan and Jarman<sup>29</sup> when they state that the profession and government's welfare officers need to put ongoing training and adequate supervision and opportunities for debriefing in place for intermediaries. For this to take place, the intermediary role has to achieve a higher level of visibility and acceptance than is currently the case. Intermediary work is not recognized as a key function and is thus not provided for in the normal professional and collegial mechanisms set up to support and account for professional practice.

This must be challenged - not only in the interests of the social workers, but also for the children. Given the ad hoc nature of intermediary work, there is no system for support, for accountability, and for a developmental perspective on the pursuit of expertise. Given the extensive restructuring of government social services taking place nationally in South Africa, this is possible only if sufficient senior people make it a priority.

While social workers can ensure that the matter remains on the agenda, they need the legal fraternity and those responsible for setting priorities and procedures in the courts. Child abuse cases should not have to wait more than a couple of months to go to trial. Postponements should be vigorously avoided. Adequate notice should be given so that children can be prepared and so that the social workers are certain to be available.

Recognition of the intermediary service should be given by those in authority for without the cooperation of social workers, the whole system will fail nationally, exposing those involved to charges that the constitutionally protected rights of children are being violated.

Van der Merwe and Müller<sup>30</sup> also offered some practical and useful guidelines with regard to judicial management in order to protect the child during the court process. This includes ground rules for attorneys with specific reference to the asking of developmentally appropriate questions.

The judicial officer should also explain the process of questioning to the child and what will happen next, reinforce the need for him/her to tell the truth, give the child witness an idea of what is expected of him/her and interventions from the bench may be necessary in instances where the child cannot understand the weight attached to a police statement.

A recess should be called when the child shows signs of fatigue, loss of attention, shut down responses (such as "I don't know" or "I don't" remember) or unmanageable stress. The presence of a support person has proved to help the child respond better to questioning.

The child has the right to have procedures dealt with expeditiously in time frames appropriate to the victim and the offence. As such non-

compliance with the proposed case-flow management strategy should be met with sanction.

It is also suggested that cross-examination of the witness be completed before the child is given the opportunity to go into the court room and identify the accused. Any further questions relating to the identification may then be dealt with.

The authors add to the above the following suggestions.

The use of a database to track the services delivered to children and to offer information that can help with planning is crucial. All the role players need to use / contribute to this database which should be applied provincially and nationally.

The definition and responsibilities of the intermediary should be formalised. It should be governed as a speciality area in social work.

To address the concern of the credibility of evidence presented by child witnesses, De Young's<sup>31</sup> conceptual model for judging truthfulness and 'Statement Validity Analysis' (SVA), must be adopted as a crucial assessment tool of the validity of statements throughout the witnessing process. Naturally this must then form part of the training of an intermediary to contribute to the process by verifying the credibility of statements to the court.

To truly empathise with the difficulties inherent to the court procedures and disclosure of personal and emotionally-laden information, knowledge of "Child Abuse Accommodation Syndrome"<sup>32</sup> must form part of the preparation of the social worker to act as an intermediary.

Proper understanding of the cautionary rule of practice where the factual adjudicator must warn himself to be cautious in evaluating evidence which practice has shown to require circumspection. Cautionary rules that apply in evaluating evidence are single witnesses; collaboration; traps; young children; identity; sexual deviancy; private detectives; prostitutes; and detained witnesses.<sup>33</sup>

Information gained from the cases managed by Bethany House (marked with roman numerals throughout this document) should be considered, together with further research, for profile identification that can assist with planning of prevention and treatment of child abuse. The use of "impact statements" of teachers, family and other adults that can testify to the consequences of the abuse on the child, will increase appropriate sentencing of the perpetrator.

The establishing a socio-legal clinic where the legal and social work professions can combine their services to most effectively serve the child-client is crucial. We also urge that recommendations of the SA Law Commission be given priority and that the implementation of those recommendations be accelerated.

## Conclusion

This article presents a number of interesting realities with regard to the intermediary system. The question is asked whether a more focused and standardised approach to the system (with the release of more information for planning purposes) would strengthen the cases of children, hopefully leading to more convictions and in the end contribute to safer environments for children. Prominence needs to be given to problems highlighted by a number of authors. It has been more than 10 years since the Criminal Procedure Act was amended to allow for the use of intermediaries. Now is the time to follow through on the steps taken by South Africa to act in the best interest of their children.

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## ABSTRACT

Throughout the 20th century, the development of new technologies gradually narrowed the distance between man, cultural work and intellectual property; this peaked with the advent of the internet in the mid-90s. Access to works from all over the world has enormously increased the possibilities of disseminating knowledge and the materials for education and, at the very least, has also helped form a global community. Nevertheless, the owners of intellectual property – copyrights, brands, patents – may not use them indiscriminately. Therefore, in general terms, what I propose to analyze in this article is how the current copyright structure and the improper use of technology poses a serious threat to the implementation of the human right to education. I shall draw primarily on Brazilian law, although some comments will be useful to understand the system in other countries, as well as to draft the copyright goals that need to be pursued.

Original in Portuguese. Translated by Barney Whiteoak.

## KEYWORDS

Copyright – Right to education – Human dignity - Technology – Intellectual property – Social function of property – Brazilian copyright law – Brazilian and American Systems



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# BRAZILIAN COPYRIGHT LAW AND HOW IT RESTRICTS THE EFFICIENCY OF THE HUMAN RIGHT TO EDUCATION

Sergio Branco

*Everything has been said before,  
but since nobody listens we have to  
keep going back and beginning all over again.*

*André Gide  
The Treatise of the Narcissus*

## Introduction

Throughout the 20th century, the development of new technologies gradually narrowed the distance between man and cultural work. It became increasingly easier to access artistic, scientific and literary works for study or pleasure. Moreover, other forms of expression also emerged, not to mention other formats, that enabled works to be accessed increasingly more quickly and efficiently. This peaked with the advent of the internet in the mid-90s.

Towards the end of the last century and, it must be said, largely as a result of the internet, it became clear that access to knowledge – including texts, music, films, photographs, recordings, among others – extended beyond the boundaries of the physical. With the breakdown of territorial borders in the virtual world and the fast pace of globalization, the encyclopedic dream of gathering all human knowledge in one place was realized in the most unexpected and democratic manner possible: anyone hooked up to the world wide web would have access to practically all human knowledge. Or at least they ought to.

In spite of some collateral negative effects of globalization, there is no denying the benefit of being able to access Scandinavian literature, Honduran

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*Notes to this text start on page 133.*

music, Indian art or Nigerian cinema. Everything at arms reach – that is to say, just a few keystrokes away. Access to works from all over the world has enormously increased the possibilities of disseminating knowledge and the materials for education. It has also, at least indirectly, helped form a global community that promotes the development of friendly relations between nations – as the preamble of the Universal Declaration of Human Rights intends.<sup>1</sup>

Nevertheless, in our globalized and capitalist world, access to culture is not always free. Everything appears to be owned, and everything appears to have a price. Oscar Wilde, in the 19th century, said wisely that people know the price of everything and the value of nothing. We have not come very far since then. Nowadays it seems that the value of things is intrinsically linked to the price that can be charged. And price is not the only “guardian” against access to cultural property, functioning like a toll booth. Technology and the law can also be major hindrances to accessing knowledge.

Following the industrial revolution – which dictated legal relations at least until the first half of the 20th century – we are now experiencing a technology revolution that has to cope with certain realities and accommodate them into a difficult equation: as wealth has dematerialized, that is to say, as non-material, intangible goods have become more valuable than actual physical goods, the law requires what it calls the “functionality of institutions”, which means that the ownership of these goods may not be exercised arbitrarily, rather it must observe its social function.

In practice, this means that the owners of intellectual property – copyrights, brands, patents – may not use them indiscriminately. They must ensure that this property fulfills the useful function reserved for it in society.

Emílio García Méndez illustrates the sheer importance of this issue when he says:<sup>2</sup>

*In the current stage of technological development, in which access to knowledge constitutes the decisive and fundamental factor allowing for an existence worthy of human dignity, which is the ultimate purpose of human rights, the right to education cannot be submitted to any form of negotiation, and must be considered to be as much an absolute priority as the abolition of slavery or of torture.*

Drawing once more on the text of the Universal Declaration of Human Rights, note that article 26 establishes that “everyone has the right to education”. Evidently, to have education, it is necessary to have access to the mechanisms through which education is provided: texts, music, films. In our modern multimedia world, it would be reactionary to argue that the only materials required to provide an education are books and class notes, which would have been true decades ago.

Nevertheless, what can be observed nowadays is that although (i) education is on the human rights roster; (ii) on the same roster and intrinsically linked to the right to education are the rights to freedom of opinion and of expression, to receive and transmit information and ideas through any media and irrespective of borders, and to participate freely in the cultural life of the community; and (iii) the exercise of all these rights is indispensable to human dignity and to the free development of personality, the truth of the matter is that we cannot always fully exercise these rights that are enshrined in the Universal Declaration of Human Rights, either in virtue of the law or in virtue of technology.

What I propose in this paper is to illustrate, in general terms, how the current copyright structure and the improper use of technology poses a serious threat to the implementation of the human right to education (which, in its broadest sense, also embraces other human rights). We shall draw primarily on the Brazilian copyright law, although various other comments will be useful for us to understand the system in other countries.

The Brazilian Copyright Law (LDA), of 1998, was drafted based on the principles established in the Berne Convention of 1886. Specialists consider the LDA to be one of the most restrictive copyright laws anywhere in the world, since, among other things, it does not grant users of copyrighted works the right to a private copy. In other words, under no circumstances is anyone permitted to make a full copy of another person's work, unless they have prior and express permission from the holder of the copyright. As we shall see, such an impediment is extremely damaging, particularly in a developing country like Brazil.

To achieve our objectives, we shall divide the text into three distinct parts: first, we shall address the structure of copyright and the grounds for its existence, including the pursuit of its social function. We shall then address some specific aspects of Brazilian law, most notably the problems arising from the restriction on making a full copy of another person's work and how this impediment poses a threat to the implementation of the right to education. Further along, we shall make some brief comments on the Anglo-American copyright system and how this system too, in its own way, is restrictive. Whilst on this point, we shall address the obstacles imposed by technology. Finally, we shall conclude by presenting the copyright goals that need to be pursued.

### **Copyright: an overprotected right**

Intellectual property is so deeply ingrained in our lives that we barely even stop to consider how it affects us on a daily basis. But one thing is for sure:

there is no longer any chance of us living in a world without property created intellectually.

The examples are numerous. Each day, we encounter a vast range of brand names on the products we use and consume, in the stores where we do our shopping and even in our workplaces; we use technology products that are often protected by patents; we use software uninterruptedly in our offices and, finally, in our leisure time, we read books, watch films and soap operas, listen to music. But one thing is hard to forget: in our 21st century culture, nearly everything has its owner.

This being the case, the use of intellectual property goods represents an ever growing share of the globalized economy. According to the Brazilian business newspaper *Valor Econômico*, “with a global GDP exceeding US\$380 billion, trade in cultural property goods has multiplied fourfold in the past two decades – in 1980, it was US\$95 billion”.<sup>3</sup>

When we talk about cultural property, we are inevitably dealing with copyright, which is a branch of intellectual property. The specialized doctrine tells us that there are two distinct, albeit intrinsically connected, forms of copyright – one with a moral element and the other with a proprietary, pecuniary, or, we might say, economic element.

Concerning the moral rights, the doctrine states that we are dealing with a personality right.<sup>4</sup> And, as we well know, personality rights are by nature, among other things, not subject to pecuniary evaluation. Therefore, when we refer to elements of copyright in relation to their economic evaluation, we can only be referring to rights that are proprietary in nature.

The Brazilian Constitution, in article 5, clause 22 and 23, provides that the right of property is guaranteed, but that it shall observe its social function. Further on, in article 170, the first in the chapter entitled “General Principles of the Economic Activity”, the Constitution establishes that the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for certain principles, among which figures the social function of property.

However, since copyright is a specific branch of intellectual property, it needs to be determined to what degree the social function of property applies to copyright.

To begin with, it is important to emphasize the difference between *corpus mechanicum* and *corpus mysticum*, since the confusion over the rights conferred each of them has given rise to numerous imprecisions and problems. The former refers to the material format, or the medium on which the work is displayed. The work itself, the actual copyrighted article, is the *corpus mysticum*, which exists in its own right irrespective of the material format.

The purchase of a book whose work is protected by copyright does not confer the buyer any entitlement over the work, which is not the book itself, but rather, we might say, the text contained in the book. Therefore, the buyer may exercise all prerogatives of ownership over the actual physical book, as if it were any other product, such as a clock or a car. He may destroy it, dispose of it, lend it, rent it or sell it, if he so wishes.

Nevertheless, use of the work itself, or the text of the book, is only permissible within the strict confines of the law. Therefore, whilst on first impression it might seem a perfectly reasonable thing to do, a full copy of the book may not be made by the owner, regardless of the purpose he has for the copy. This is because the usage in this case does not refer to the material product (the book), but instead to the intellectual product (the text) that the book contains.

Even in the case of a painting, in which the work is inextricably affixed to its physical medium, the sale of the material product does not grant the buyer any right over the work itself, meaning that the owner of the painting is not permitted, unless the law or a contractual agreement with the author of the work makes such provisions, reproduce the work by making copies.

But it is not only from the point of view of the functionality of property that copyright needs to be analyzed. There are also important economic and marketing issues. On this point, it is important to touch upon the theory of market failure, on which the doctrine, particularly American doctrine, has focused in recent years.

One might assume that the market would ideally be capable of managing the economic forces that govern supply and demand, in such a way that the market itself would undertake to oversee the natural distribution of existing resources and the benefits to be derived. However, this rule does not hold true in cases involving intellectual property, for the reasons adduced by Denis Borges Barbosa:<sup>5</sup>

*A problem exists: the nature of immaterial goods in the vast majority of hypotheses causes an immaterial product, once introduced on the market, to be susceptible to immediate dispersion. Publishing knowledge itself in a scientific journal, if there were no legal restrictions, places it in the common domain, that is to say, it becomes absorbable, assimilable and usable by any person. As this knowledge has economic potential, it serves to level the playing field for competition. Or, if this does not occur, it will benefit those owners of companies that are most adept at competing to exploit this accumulated margin of knowledge. But the disadvantage of this dispersion of knowledge is that there is no reward for the economic activity of research. Consequently, it is necessary to resolve what economists call market failure, which is the tendency for the dispersion of immaterial goods, primarily*

*those involving knowledge, with a legal mechanism that creates a second market failure, which is the restriction of rights. The right becomes inalienable, reserved, restricted.*

In short, once any type of movable property has changed hands, the new owner may exercise all prerogatives of ownership over the purchased product, while the former owner fully relinquishes all title to the product.

On the other hand, the buyer who purchases a material product that contains copyright protected work (a work of art, for example) may exercise the right of ownership over the material product, but not over the intellectual work, except when the law or a contractual agreement permits. Furthermore, the bond between the author and the work will never be severed, since although the original version of the work may be sold and although it may even be destroyed, the author's moral rights will be reserved. These rights include, among other things, the right to have his name displayed or announced as the author of the work.

Finally, as the market is incapable of efficiently regulating the supply and demand for intellectual work, State intervention is indispensable to assure continued investment. After all, if a market agent invests in the development of a given technology that, given its characteristics, requires a heavy investment but is easy to copy, the market alone will be insufficient to guarantee that investment flows continue.<sup>6</sup>

These issues become even more complex when addressed within the realm of the internet.

When, in the physical world, A owns a car, this prevents B from being the owner at the same time as A, except in a situation of joint ownership. But even in this case, when A is using the car he owns, this prevents B from separately using the same car at the same time. This means that, in the physical, tangible world, there is a scarcity of products, which is as good as saying that the use of a product by one person normally prevents it being used simultaneously by someone else.

Therefore, if A steals B's car, B will discover the theft quickly because the theft prevents him using his car. B will probably report the theft promptly and take the necessary steps to get his car back. But the same does not apply for intellectual property. If A reproduces B's intellectual work, B may not discover this unauthorized reproduction for a long time (perhaps never) because reproduction by A does not deprive B of the use his work.<sup>7</sup> Moreover, this reproduction may take place in another state or country.<sup>8</sup>

This has long been the foremost dilemma facing intellectual property.<sup>9</sup> It gave rise to concerns about securing international protection, prompting the emergence of the first international treaties that examine this topic.

One might say that the Industrial Revolution unleashed the first, much-needed, regulation on intellectual property rights. Nevertheless, we now face even more serious conflicts. In the digital world, not only can a piece of intellectual property be copied without the owner becoming aware of it (making the market failure we saw earlier more evident), but very often it is impossible to distinguish between the original and the copy. And there is an additional problem: copies may feasibly be made by the hundreds, in very little time and at minimal cost.

It is clear, therefore, that we are facing new paradigms, new concepts and new challenges, doctrinary and legislative alike. Therefore:

*since intellectual property forged in the 19th century presents serious problems of efficiency when faced with technological evolution, jurists need to do more than just fall back ever more resolutely on their established principles as a means of resolving the problem, something that traditional legal analysis appears to want to do.<sup>10</sup>*

Quite to the contrary, it is imperative to come up with solutions that are in line with contemporary needs.

Now would be a good time to say a few words about the current economic aspects of intellectual property.

The cost of producing a book<sup>11</sup> can be considered as the sum of two components. The first is the cost of creating the work. Obviously, this value has nothing to do with the number of copies either printed or sold, since it is related to the time the author spends writing the book plus the editor's expenses preparing the edition. Landes and Posner call this the "cost of expression". The second component, the cost of producing the copies of the book, increases with the number of units to be printed, and includes printing, binding and distribution costs.<sup>12</sup>

However, in a globalized society where the internet has made it possible to access any digital work that, regardless of its aggregate cost of production, can be reproduced in high quality and at minimal cost, it truly is necessary to review the issue of copyright. A new form of ownership has clearly emerged that is far more volatile than we have grown accustomed to and, in virtue of its peculiarities and the new questions it raises, new responses need to be engineered.

Given the persuasiveness of the figures already presented (footnote 3) on the entertainment industry, we need not hesitate when we say: copyright now primarily serves the interests of the entertainment industry, large communication conglomerates and multinational mass media corporations. The unknown authors, budding musicians and artists from remote pockets

of the country are incidental beneficiaries, but this is nothing more than a happy coincidence.

Some examples speak volumes.

In 1998, the United States Congress approved a law extending copyright terms by 20 (twenty) years. This extension, to an already lengthy period of 75 (seventy five) years, was granted largely due to lobbying from media groups such as Disney, which was poised to lose Mickey Mouse to the public domain. Accordingly, “Mickey Mouse, which would pass into the public domain in 2003, received another 20 years of servitude. And he took with him the work of George Gershwin and all the other cultural property that would have passed into the public domain with him had it not been for the change in the law”.<sup>13</sup>

This excessive protection for copyright owners is food for thought. If the law is supposed to protect the author (and in Roman-Germanic legal systems, such as Brazil’s, the name given the law is not copyright but “author rights”), then why extend the copyright term so long after their death? It is clear that the purpose of the law is not to protect the author, but instead the copyright owner, and for as long as possible. Nevertheless, the greater the protection, the less access that other people will have to the work, since they will always require authorization from the owner of the copyright protecting the work.

From the outset, we can observe how this poses a serious risk to the right to broad-based access and to freedom of expression. After all, man has always been in the habit of drawing on other people’s work to create his own. The international cultural repository ought, therefore, to be made widely available to individuals, both to promote cultural development and to make (re)creation possible.

Interesting observations have been made by Landes and Posner<sup>14</sup> on the use, by famous authors, of preexisting works. The two authors note that creating new work involves borrowing or creating from previously existing works, and adding original expression to them. A new work of fiction, for example, will contain the contribution of the author, but also characters, plots, details, etc. that were invented by preceding authors. Therefore, an analysis of copyright, when applying the test of “substantial similarity” that many courts use (in the United States), would have to conclude that “West Side Story” infringes on the rights of “Romeo and Juliet”, were this play still protected by copyright.

Furthermore, it is clear that overzealous copyright protection can backfire against the industry, creating the need for a veritable myriad of licenses and authorizations to shoot a movie, for example. On this matter, Lawrence Lessig, in the face of so many impositions from the United States cinema industry when it comes to clearing<sup>15</sup> copyrights to produce a movie, jests that a young

filmmaker is totally free to make a movie in an empty room with two of his friends.<sup>16</sup>

Under no circumstances should copyright exist only to grease the wheels of the entertainment industry. Access to culture must not be restricted for the benefit of a select group. This is why, even though the cultural industry reigns supreme, the copyright protection system should cover all creative works embraced by it, regardless of its quality or impact.

Taking it one step further: given the contemporary concept of what Brazilian law calls the “functionality of institutions”, copyright needs, first and foremost, to observe its social function, which implicitly includes guaranteeing access to knowledge and education.

There is no justification to the claim that without the strict protection that we enjoy today there would be no cultural production. Even before there were laws protecting copyright, there was widescale production of intellectual work, and the authors had far more recourse to other people’s work to create their own, since practically everything was found in the public domain.

We believe that a compromise needs to be found. In principle, and in general terms, copyright has the worthy function of remunerating authors for their intellectual production. Otherwise, the majority of authors would have to live on State subsidies, which would make cultural production infinitely more difficult and unjust. Nevertheless, copyright cannot hold back cultural and social development. Balancing the two sides of the coin in a capitalist, globalized and, if that were not enough, digital economy is, therefore, the arduous task to which we must dedicate ourselves.

It is somewhere in the intersection between these two premises, which also have to safeguard the interests of large capitalist groups, ordinary grassroots artists and consumers of art, whatever its origin, that we have to accommodate the economic particularities of copyright and determine its social function.

### **Legal limitations on access to knowledge in the Brazilian system**

In the world of ideas, Lavoisier’s famous theory seems to apply particularly well. Culture feeds off itself, in such a way that each artistic composition is only possible inasmuch as it absorbs a series of influences (often unconsciously by the author) from the natural repository that is at everyone’s disposal, as we have already seen.

A well-known quotation by Northrop Frye states that “poetry can only be made out of other poems; novels out of other novels”.<sup>17</sup> There are countless examples of authors who have drawn on existing works to create their own.

In fact, rare are the examples of authors who are completely original. And considering originality in its strictest sense, there may actually be no examples at all.

This occurs because it is inevitable that all authors are, albeit unconsciously, influenced by other authors. It is unthinkable, therefore, in this day and age, for a book to tell a story that has never, even in part, been told before. Some might say, and justifiably so, that the major themes are limited and have already been exhausted.

Nevertheless, gone are days in which any author can draw freely on other available works at their disposal. As a result primarily of the economic importance of copyright, the law awards the author a lifelong monopoly and, in Brazil's case, an additional 70 years counting from the year after their death, during which time nobody may use the work without authorization. As we can see, creation is costly. Were unrestricted reproduction to be tolerated, this would allegedly undermine the economic interests of the work.

However, just as permitting the free and unrestricted use of other people's works is unfeasible, a complete ban on the use of third party works is equally unfeasible, since such an extreme step, to a far greater and more damaging degree, would hinder social development.<sup>18</sup> It is clear, then, that "there are two legitimate interests that lawmakers need to take into account, those of the author of the work, who needs to be protected and remunerated for his creation and, on the other hand, those of society, to observe the work's social function".<sup>19</sup>

For this reason, and geared precisely towards finding a balance between the interests that need to be safeguarded, the LDA provides for situations in which intellectual property, while protected by copyright, may be used without the authorization of the author.

It can be said that the cornerstone of all copyright limitations is found in article 5, item XXIII, of the Brazilian Federal Constitution, which provides for the "social function" of property. After all, it will be to observe this social function that lawmakers will place limits on the use of copyright by its owners. It can also be said that the restrictions on copyright represent a legal authorization to use the copyright protected works of third parties without requiring authorization from the owners this copyright.

However, as we shall see, in the digital world, the restrictions that the LDA incorporates are insufficient considering how, in the virtual environment that is the internet, the majority of users access third-party works. Indeed: it does not consider how numerous users need to make use of works to guarantee them their right to education.

While it would be worthwhile to take a closer look at these copyright restrictions and the extent of their application, we shall confine ourselves

exclusively to the ban on making a full copy of a third-party work, since this is what poses the greatest risk to the enforcement of such human rights as education and access to knowledge.

The common denominator of the restrictions incorporated into article 46 of the LDA is clearly the non-commercial use of the work. Furthermore, the law sets a value on the informative, educational and social nature of this use. At any rate, the most controversial subitem of Article 46, and of most interest for this paper, is the one that states that reproduction does not constitute a copyright violation when made as a single copy of small extracts, for the private use of the copier, provided that it is made by him and when there is no gainful intent.<sup>20</sup> Law 9.610/98, therefore, introduces an important change to copyright in Brazil. *De lege lata*, under the terms of Article. 46, II, of the LDA, it is no longer possible to reproduce the work in full, only small extracts.

Eliane Y. Abrão sheds some light on this subitem:<sup>21</sup>

*Unlike the previous legislation, which permitted a (single) full copy of any protected work provided that it was for the private and personal use of the person who made it, legislators in 1998 restricted the use of the private (full) copy: authorizing only the reproduction of small extracts.*

*In other words, given the current limitation, considered to be infringing the law is anyone who duplicates a book in full, or copies a complete magnetic tape or reproduces all the tracks of a CD, even though it may be for personal use and without gainful intent. It is the banning of the so-called "private copy.*

[...]

*The arguments in favor of the ban on making a full copy of copyrighted work are consistent. Take, for example, the possibility of two or three hundred students from across the country simultaneously making full copies of a recently published edition. The loss to the editor and to the author would be considerable, since the aforesaid book could be considered a good investment if it sold only a thousand copies.*

While we recognize the premise of the arguments presented above, it is crucial to consider the author's final words. She claims that it would be detrimental to the editor of a given book if 200 or 300 students made a full copy of the recently published work. But we enquire: which students are these? If we consider that Brazil is a country with a shamefully high percentage of people living in poverty and below the poverty line, should we expect students from poorer families to pay for the books that will guarantee them their education, just like any other student?

It needs to be considered that in the majority of cases, poor students are excluded from the market because they simply do not have the money to

purchase the immaterial goods they need for their education. There is, therefore, no loss to be incurred by the editor, since if it were not for the possibility of making a copy, the students would not have any other means of accessing these works.

Furthermore, the lawmakers' decision causes some ostensibly inescapable problems. Starting with a glaring practical problem pointed out by the author herself: the observance of this provision of the law is all but impossible to enforce. Largely because of this, thousands of people flout this legal dictate on a daily basis.

Moreover, and perhaps more seriously, the law does not distinguish between recently published works and those that are out of commercial circulation but still within their copyright protection term. Therefore, if someone needs to use a rare work that is out of circulation and only available in the library of some far-off city, if the book is still protected by copyright under the terms of the LDA, it may not be copied in full even if this restriction prevents an individual's access to knowledge and education, and even though banning the copy is far more damaging than the copy itself. In this case, the law is extremely unjust, since it does not permit the dissemination of knowledge by making a full copy of rare works whose reproduction does not imply any economic loss for its author.

In fact, the LDA makes no distinction over the use to which the copy will be put. It is equally unlawful to make a copy for didactic purpose, for archiving, for use by non-profit organizations, for home use or even for works that are out of circulation, which represents entirely inadequate treatment for these specific cases.

It is clear that by indiscriminately banning full reproductions of all works, the law consequently bans the copying of texts, music, films and photos, among other works, even if they are used for didactic and educational purposes.

From these examples, it is not difficult to see how complicated it can be to determine the limits of what the law itself prescribes.

### **Legal limitations on access to knowledge in the Anglo-American system**

While on the subject of limitations to copyright, it is important to mention that American law<sup>22</sup> provides for the doctrine of fair use. It could be said that fair use is an exception that users can avail themselves of when accused of copyright violation. It constitutes a general clause to be interpreted by the courts, becoming statutory in 1976 when it was incorporated into title 17 of the United States Code.<sup>23</sup>

According to the criteria enshrined in section 107, title 17 of the U.S. Code, the following four factors are considered when determining whether reproduction constitutes fair use:<sup>24</sup>

- *the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes: but note that this factor is not precise, since other considerations come into play and no single criteria has the effect of being automatically applicable. In any case, the commercial nature of the use is a negative indicator, since the right of the author figures economically in an exclusive [right] to exploit the work;*
- *the nature of the copyrighted work: we are to suppose that for more fictional works the scope of fair use is greater than for more imaginary works;*
- *the amount and substantiality of the portion used in relation to the copyrighted work as a whole: for example, even quotations may be conflictive, if they are long and repeated and end up representing practically an appropriation of the work as a whole;*
- *the effect of the use upon the potential market for or value of the copyrighted work: this is said by some to be the most important of all the criteria. (author's emphasis)*

Note that the American system for determining fair use differs greatly from the Continental European system. The former establishes criteria according to which, depending on the actual use of the third-party work, it can be determined whether or not a particular use constitutes a copyright violation. Meanwhile, in the Continental European system (which is observed in Brazil), the limitations are catalogued in a list of circumstances under which the doctrine permits exemptions. In other words, if the circumstances do not match the authorizations expressly provided by law, the use of the third-party work will not be permitted.

José de Oliveira Ascensão<sup>25</sup> outlines the main distinctions between the American and European systems, when he says:

*the American system is malleable, while the European system is precise. However, taking a negative view, the American system is imprecise, while the European system is unbending. The American system does not provide any prior certainty about what can be considered fair use. The European system, on the other hand, displays a lack of capacity to adapt.*

Ascensão goes on to say that after weighing up the merits and demerits, it can be concluded that the American system is superior. Besides not being contradictory like the European system, the author contends that it maintains

the capacity to adapt to new circumstances, while the European systems have become defunct institutions.

The issue is indeed interesting. Since American law, unlike ours, does not specify the circumstances under which third-party copyrighted works can be used without it constituting a copyright violation, it is from criteria built through doctrine and through case law that a clearer understanding of the meaning of fair use will be consolidated.

Siva Vaidhyanathan<sup>26</sup> sheds some light on the matter:<sup>27</sup>

*If a court is charged with deciding whether a use of a copyrighted work is “fair” or not, the court must consider the following issues: the purpose or character of the use, such as whether it was meant for commercial or educational use; the nature of the original, copyrighted work; the amount of the copyrighted work that was taken or used in the subsequent work; and the effect of the use on the market value of the original work.<sup>28</sup> So, for example, if a teacher copies three pages from a 200-page book and passes them out to students, the teacher is covered by fair use. But if that teacher photocopies the entire book and sells it to students at a lower cost than the original book, that teacher has probably infringed on the original copyright. More often than not, however, fair use is a gray and sloppy concept. [...] In addition to fair use, Congress and the federal courts have been unwilling to enforce copyrights in regard to private, noncommercial uses. Basically, courts have ruled that consumers are allowed to make copies of compact discs for use in their own tape players, and may record television broadcasts for later home viewing, as long as they do not sell the copies or display them in a public setting that might dilute the value of the original broadcast. So despite the warnings that accompany all broadcasted sporting events, most private, noncommercial, or educational copying of copyrighted falls under the fair use or private use exemptions to the law.*

It transpires, then, that the system of fair use does not resolve all the problems either. In fact, quite the opposite is true. Their imprecision poses other problems, namely concerning the use of other people’s works, which can unnecessarily restrict freedom of expression and the exchange of ideas – human rights enshrined in the Universal Declaration of Human Rights, as we have already seen.

Lawrence Lessig<sup>29</sup> describes an interesting case in the United States that demonstrates fairly clearly the problems that can arise when trying to determine *fair use*.

In 1990, the documentary filmmaker Jon Else was in San Francisco making a documentary on the operas of Wagner. During one of the performances, Else had been filming the theater’s stagehands. In a corner

backstage a television was showing an episode of *The Simpsons*. As Else saw it, the inclusion of this cartoon lent some special flavor to the scene.

Once the documentary was complete, in virtue of the four and a half seconds in which the cartoon appeared in his film, the director decided to contact the copyright owners, since *The Simpsons* is copyrighted and is owned by someone.

To begin with, Else got in touch with Matt Groening, the creator of *The Simpsons*, who immediately approved the use of the cartoon in the documentary, since it was only a four-and-a-half-second clip and could not possibly damage the commercial exploitation of his work. However, Groening told Else to contact Gracie Films, the company that produces the program.

When contacted, the licensing people at Gracie Films were happy for *The Simpsons* to be used in the film, but, like Groening, they wanted to be careful and said Else should also consult Fox, Gracie's parent company.

And so it was done. Else contacted Fox and was surprised to discover two things: first, that Matt Groening was not the owner of his own creation (or at least that is what Fox believed) and, second, that Fox wanted ten thousand dollars as a licensing fee to use the four-and-a-half-second clip of *The Simpsons* playing on a television set in the corner of a shot backstage in a theater.

Since Else did not have the money to pay the licensing fee, before the documentary was released, the director decided to digitally replace the shot of *The Simpsons* with a clip from another film that he had directed 10 years earlier.

This case is a clear example of fair use, an opinion that Lawrence Lessig endorses. Nevertheless, the author presents the reasons why Else decided not to rely on fair use to include the unauthorized clip of *The Simpsons*, and we briefly include three of them here:

- Before the film (in this case, the documentary) can be broadcast, the network requires a list of all the copyrighted works included in the film and it makes an extremely conservative analysis of what can be considered fair use.
- Fox has a history of blocking unauthorized usage of *The Simpsons*.
- Regardless of the merits of the proposed use of the cartoon, there was a distinct possibility that Fox would sue for unauthorized use of the work.

Lessig concludes by explaining that in theory, fair use means that no permission is needed by the owner. The theory, therefore, supports freedom of expression and insulates against a permission culture. But in practice, fair use functions very differently. The blurred lines of the law means the chances of claiming

fair use are slight. As such, the law has the right aim, but practice has defeated the aim.<sup>30</sup>

This example illustrates that although the doctrine of fair use is capable of adapting to technological innovations with more ease and success than the Continental European system, it is not capable of resolving in practice some basic issues, given the fuzziness of its defining lines.

And if legal problems were not enough, technology can also serve to limit the achievement of the human rights of access to knowledge, to education and to scholarship. If, on the one hand, the law can be interpreted, technology functions with inflexible rules. The existence of DRM (digital rights management) and TPM (technical protection measures), technologies used to control the duplication of intellectual works, poses a risk to various other rights, such as the right to privacy and consumer rights.

On this topic, Guilherme Carboni has written some wise words:<sup>31</sup>

*DRM systems prevent all forms of copying, even those permitted by copyright legislation in various countries, which means that they may constitute a serious violation of the limitations to these rights. Some DRM apologists have embraced the viewpoint that the technology achieves the desired effects without causing any damage to the users or their computers. Others believe the copyright owners ought to have the right to decide how their works are distributed, and have control over them. In this case, DRM is a means of making the enforcement of this right possible. In our opinion, the DRM system presents no benefits for society. Cory Doctorow, in his fascinating speech 'DRM Talk' mentions that whenever a new technology has disrupted copyright, it is the copyright that is changed, not the other way around. He argues that copyright is not an ethical proposition, but a utilitarian one. New technology disrupting copyright normally simplifies and cheapens creation, reproduction and distribution of intellectual property. Doctorow explains that new technology always gives us more art with a wider reach, which is what technology is for. Indulging in metaphor, he says that new technology 'gives us bigger pies that more artists can get a bite out of'.*

Further on, Carboni addresses the topic from an angle that is of particular interest for us:<sup>32</sup>

*The final report of the Commission on Intellectual Property Rights – Integrating Intellectual Property Rights and Development Policy, of the World Trade Organization (WTO), reads: 'the arrival of the digital era provides great opportunities for developing countries in accessing information and knowledge. The development of digital libraries and archives, Internet-based distance learning programmes, and the ability of scientists and researchers to access sophisticated on-*

*line computer databases of technical information in real time are just some examples. But the arrival of the digital era also poses some new and serious threats for access and dissemination of knowledge. In particular, there is a real risk that the potential of the Internet in the developing world will be lost as rights owners use technology to prevent public access through pay-to-view systems’.*

Our abuse of technological regulation has prompted some ridiculous, unjust and often tragically comic situations. Adobe, for example, through its system of e-books, found itself embroiled some time ago in a curious case.

Among its catalogue of books available for download was the classic *Alice in Wonderland*, from the public domain (that is, the term of the copyright protection has expired). Even though the book has passed into the public domain, when clicking on the program to access the text, the user encountered the following list of restrictions:<sup>33</sup>

- Copy: no text selections can be copied from the book to the clipboard.
- Print: no printing is permitted of this book.
- Lend: this book cannot be lent or given to someone else.
- Give: this book cannot be given to someone else.
- Read aloud: this book cannot be read aloud.

Since this book is in the public domain, the absurdity of these restrictions speaks for itself. Apparently, this was a case of a public domain children’s book that parents could not be read aloud to their children.

When questioned about the restrictions, Adobe was quick to defend itself, explaining that the final restriction was referring to the use of the program’s “Read Aloud” button, not to somebody actually reading the book out loud. But Lawrence Lessig enquires: if someone managed to disable the technological protection preventing the book from being read aloud so it could be read by the program to a blind person, would Adobe consider such a use to be fair?<sup>34</sup>

As is so obviously apparent, even in the system of fair use it is necessary to find new avenues of interpretation to satisfactorily safeguard the human right of access to knowledge and, consequently, to education.

## Conclusion

Concerning the interaction between copyright and human rights, Guilherme Carboni states that:<sup>35</sup>

*according to article 27 of the Universal Declaration of Human Rights, ‘everyone has the right freely to participate in the cultural life of the community, to enjoy the*

*arts and to share in scientific advancement and its benefits'. The second paragraph of this article provides that 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. Note, then, that the Universal Declaration of Human Rights enshrines as human rights both the right to culture and the right of the author, which means that there ought to be a balance between the two.*

This desired balance is pursued by the law. Nevertheless, the legal order in Brazil has proven to be more than inadequate to uphold the human right to culture – and, consequently, the human right to education, to freedom of expression and the others referred to earlier.

Similarly, the Anglo-American system of fair use, while more flexible, implies the emergence of situations that create an imbalance between the right to culture and the protection of copyright.

Furthermore, it is now vital to analyze the pragmatic use of technology as a way of disseminating knowledge, not of unduly restricting it.

We agree with Emilio García Méndez when he says that “if the Universal Declaration of Human Rights states that ‘all human beings are born free and equal in dignity and rights’, this is precisely because men are not equal by nature, since, if it were so, the declaration’s content would be, at the very least, superfluous”.<sup>36</sup> This could not be closer to the truth. So nothing, therefore, is more important or more pressing than to treat the unequal differently so as to diminish the inequalities that undermine them.

In a country like Brazil where 6 million children live in absolute poverty<sup>37</sup> we cannot ignore the benefits of technology, nor regard copyright as an absolute rule to be followed to the letter. Copyright is part of a far wider context, involving constitutional and international rules that need to be respected. As the Brazilian Constitution requires the observance of the social function of all forms of property – including immaterial property – it is of vital importance that the LDA is read in the light of the Constitution and not the other way around.

Under no circumstances can the millions of people living in poverty and below the poverty line<sup>38</sup> be stripped of their right to scholarship to raise their level of social well-being. It should never even cross people’s minds that the unrestricted and unremunerated access to intellectual property by this group of people could result in any financial losses to the owners of these works, since people living in poverty and below the poverty line are excluded from the consumer market due to an absolute lack of economic resources. This being the case, there is no financial loss because unless the intellectual property is accessible either for free or at a substantially reduced rate, it would otherwise never be consumed.

If social, economic and cultural rights really are demandable rights – as the best doctrine preaches – <sup>39</sup> then copyright needs to mirror the promotion of these human rights – not be an obstacle. In a crisis such as the one we are now experiencing – in which the old laws can no longer adjust and there are still no adequate new laws – we need to think long and hard about what path we propose to follow.

## NOTES

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1. All references to the Universal Declaration of Human Rights are based on the text available at <<http://www.un.org/Overview/rights.html>>, accessed on December 16, 2006.
2. E. G. Méndez, "Origin, Concept and Future of Human Rights: Reflections for a New Agenda", *SUR – International Journal on Human Rights*, Vol. 1. Human Rights University Network, 2004, p. 12.
3. R. Borges, *Eu & Fim de Semana* section, *Valor Econômico* newspaper, Rio de Janeiro, 16 July 2004, p. 10. Moreover, according to Lesley Ellen Harris, a Canadian lawyer, "IP accounts for more than 20 percent of world trade, which equals approximately US\$ 740 billion (the author is most likely referring to annual amounts). L.E. Harris, *Digital Property – The Currency of the 21st. Century*, Toronto, McGraw Hill, 1998, p. 17.
4. On this subject, see A. de Cupis, *Os Direitos da Personalidade*, Campinas, Romana, 2004, p. 24, among others.
5. D. B. Barbosa, *Uma Introdução à Propriedade Intelectual*, 2<sup>nd</sup> ed, Rio de Janeiro, Lumen Juris, 2003, pp. 71-72.
6. *Ibid.*
7. This is why intellectual property goods are called "non rivals", since use by one person does not prevent the use of the same article, at the same time, by someone else.
8. W. M. Landes & R. A. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge, Harvard University Press, 2003, pp. 18-19.
9. Thomas Jefferson said about ownership of ideas, unlike material goods: "Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it", cited by Ronald Bettig, in R. V. Bettig, *Copyrighting Culture – The Political Economy of Intellectual Property*, Boulder, Westview Press, 1996, p. 79.
10. R. Lemos, *Direito, Tecnologia e Cultura*, Rio de Janeiro, Ed. FGV, 2005, p. 13.
11. Obviously, we are talking about a book to exemplify a principle that can be applied to any piece of intellectual property.
12. W. M. Landes & R. A. Posner, *op. cit.*, p. 37.

13. R. Lemos, "A Revolução das Formas Colaborativas", *Mais* section, *Folha de São Paulo* newspaper, São Paulo, April 18, 2004, p. 10.
14. W. M. Landes & R. A. Posner, op. cit. pp. 66-67.
15. Clearing is the act of obtaining all the necessary licenses for the use of third party works that appear in movies, albeit incidentally, to avoid potential complications upon the release of the work. "Twelve Monkeys", a 1995 film directed by Terry Gilliam, had its release legally suspended because an artist claimed that the film showed a chair of his own design. L. Lessig, *The Future of Ideas – The Fate of the Commons in a Connected World*, New York, Random House, 2001, p. 4.
16. L. Lessig, op. cit., p. 5.
17. M. Rose, *Authors and Owners – The Invention of Copyright*, Cambridge, Harvard University Press, 1993, p. 2 and W. M. Landes & R. A. Posner, op. cit., p. 60.
18. After all, it is possible to conceive of intellectual creation in a free world in which we are all able to copy other people's work, since there will always be people who are prepared to create without caring that their work may be copied. However, cultural development would definitely be impeded if it were illegal, even minimally, to draw on third party works, since this would even prevent the use of quotations, making works such as this article illegal. Obviously, these are two extremes and we are only entertaining them for argument's sake.
19. M.E.R. JUNDI, "Das Limitações aos Direitos Autorais", *Direito Autoral* magazine, Year 1, Number 1, Rio de Janeiro, Lumen Juris, August 2004, p. 175.
20. Brazilian Copyright Law (LDA), 1998, Article 46, II.
21. E. Y. Abrão, *Direitos de Autor e Direitos Conexos*, São Paulo, Ed. do Brasil, 2002, p. 148.
22. In the United Kingdom, it is called fair dealing, although it has different characteristics. Since 1911, fair dealing has evolved to include the general clause characteristic of fair use, as well as the legislative specifications that bring it in line with the continental European system and, consequently, the Brazilian system for determining the conducts that do not violate copyright. J. O. Ascensão, "O Fair Use no Direito Autoral", *Direito da Sociedade e da Informação*, Vol IV, Coimbra, Coimbra Editores, 2003, p. 95.
23. United States Copyright Act of 1976, which was followed by additional enactments, such as the Digital Millennium Copyright Act.
24. According the commentaries of José de Oliveira Ascensão. J. O. Ascensão, op. cit., pp.95-96.
25. J. O. Ascensão, op. cit., p. 98.
26. Assistant professor of culture and communication at New York University.
27. S. Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, New York, New York University Press, 2001, p. 27.
28. As we have seen, these are items contained in section 107 of the United States Copyright Act, referred to previously.
29. L. Lessig, *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York, The Penguin Press, 2004, pp. 95-99.

30. Ibid., p. 99.
31. G. C. Carboni, *A Função Social do Direito de Autor e sua Regulamentação no Brasil*, São Paulo, Ed. Juruá, 2006.
32. Ibid.
33. L. Lessig, *Free Culture*, op. cit.
34. Ibid.
35. G. C. Carboni, op. cit.,
36. E. G. Méndez, "Origin, Concept and Future of Human Rights: Reflections for a New Agenda", *SUR – International Journal on Human Rights*, Vol. 1, Sur Human Rights University Network, 2004, p. 9.
37. *The United Nations Children's Fund* (UNICEF), available at <[http://www.bris.ac.uk/poverty/Child%20poverty\\_files/UNICEF%20report%20stuff/BBC%20Brasil.htm](http://www.bris.ac.uk/poverty/Child%20poverty_files/UNICEF%20report%20stuff/BBC%20Brasil.htm)>, accessed on December 17, 2006.
38. World Bank: "The World Bank defines extreme poverty as living on less than US\$ (PPP) 1 per day, and moderate poverty as less than \$2 a day. It has been estimated that in 2001, 1.1 billion people had consumption levels below \$1 a day and 2.7 billion lived on less than \$2 a day". Available at <<http://en.wikipedia.org/wiki/Poverty>>, accessed on 17 December, 2006.
39. On this topic, see F. Piovesan, "Social, Economic and Cultural Rights and Civil and Political Rights", *SUR – International Journal on Human Rights*, Vol. 1. Human Rights University Network, 2004.



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#### ABSTRACT

The current appropriation of wealth from our planet is highly uneven. Affluent people use vastly more of the world's resources, and they do so unilaterally, without giving any compensation to the global poor for their disproportionate consumption. Invoking three different grounds of injustice – the effects of shared social institutions, the uncompensated exclusion from the use of natural resources, and the effects of a common and violent history – the author's goal is to show that it may be possible to gather adherents of the dominant strands of Western normative political thought into a coalition focused on eradicating world poverty through the introduction of a Global Resources Dividend or GRD.

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#### KEYWORDS

Systemic world poverty - Natural resources - Economic inequality - Global institutional order

## ERADICATING SYSTEMIC POVERTY: BRIEF FOR A GLOBAL RESOURCES DIVIDEND

Thomas W. Pogge

*Article 25: Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care.*

*Article 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.*

*Universal Declaration of Human Rights*

In two earlier essays,<sup>1</sup> I have sketched and defended the proposal of a global resources dividend or GRD. This proposal envisions that states and their citizens and governments shall not have full libertarian property rights with respect to the natural resources in their territory, but can be required to share a small part of the value of any resources they decide to use or sell. This payment they must make is called a dividend because it is based on the idea that the global poor own an inalienable stake in all limited natural resources. As in the case of preferred stock, this stake confers no right to participate in decisions about whether or how natural resources are to be used and so does not interfere with national control over resources, or eminent domain. But it does entitle its holders to a share of the economic value of the resource in question, if indeed the decision is to use it. This idea could be extended to limited resources that are not destroyed through use but merely eroded, worn down, or occupied, such as air and water used for discharging pollutants or land used for farming, ranching, or buildings.

Proceeds from the GRD are to be used toward ensuring that all human beings can meet their own basic needs with dignity. The goal is not merely to

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*Notes to this text start on page 155.*

improve the nutrition, medical care and sanitary conditions of the poor, but also to make it possible that they can themselves effectively defend and realise their basic interests. This capacity presupposes that they are freed from bondage and other relations of personal dependence, that they are able to read and write and to learn a profession, that they can participate as equals in politics and in the labour market, and that their status is protected by appropriate legal rights which they can understand and effectively enforce through an open and fair legal system.

The GRD proposal is meant to show that there are feasible alternative ways of organising our global economic order that the choice among these alternatives makes a substantial difference to how much severe poverty there is world-wide and that there are weighty moral reasons to make this choice so as to minimise such poverty. My proposal has evoked some critical responses<sup>2</sup> and spirited defences<sup>3</sup> in the academy. But if it is to help reduce severe poverty, the proposal must be convincing not only to academics, but also to the people in governments and international organisations who are practically involved in poverty eradication efforts. I am most grateful therefore for the opportunity to present a concise and improved version of the argument in this volume.

### **Introduction: radical inequality and our responsibility**

One great challenge to any morally sensitive person today is the extent and severity of global poverty. Among about 6373 million human beings (in 2004), 850 million lack adequate nutrition, 1037 million lack access to safe water, and 2600 million lack basic sanitation,<sup>4</sup> more than 2000 million lack access to essential drugs<sup>5</sup> 1000 million are without adequate shelter and 2000 million without electricity.<sup>6</sup> “Two out of five children in the developing world are stunted, one in three is underweight and one in ten is wasted”.<sup>7</sup> 179 million children under 18 are involved in the “worst forms of child labour” including hazardous work in agriculture, construction, textile or carpet production as well as “slavery, trafficking, debt bondage and other forms of forced labour, forced recruitment of children for use in armed conflict, prostitution and pornography, and illicit activities”.<sup>8</sup> Some 799 million adults are illiterate.<sup>9</sup> Roughly one third of all human deaths, some 50,000 daily, are due to poverty-related causes and thus avoidable insofar as poverty is avoidable.<sup>10</sup> If the US had its proportional share of these deaths, poverty would kill over 70,000 of its citizens each month — more than were killed during the entire Vietnam War. For the UK, the monthly death toll from poverty-related causes would be 15,000.

There are two ways of conceiving global poverty as a moral challenge to us: we may be failing to fulfil our positive duty to help persons in acute distress. And we may be failing to fulfil our more stringent negative duty not to uphold injustice, not to contribute to or profit from the unjust impoverishment of others.

These two views differ in important ways. The positive formulation is easier to substantiate. It need be shown only that the poor are very badly off, that we are very much better off and that we could relieve some of their suffering without becoming badly-off ourselves. But this ease comes at a price: some who accept the positive formulation think of the moral reasons it provides as weak and discretionary and thus do not feel obligated to promote worthy causes, especially costly ones. Many feel entitled, at least, to support good causes of their choice — their church or alma mater, cancer research or the environment — rather than putting themselves out for total strangers half a world away, with whom they share no bond of community or culture. It is of some importance, therefore, to investigate whether existing global poverty involves our violating a negative duty. This is important for us, if we want to lead a moral life and important also for the poor, because it will make a great difference to them whether we affluent do or do not see global poverty as an injustice we help maintain.

Some believe that the mere fact of radical inequality shows a violation of negative duty. Radical inequality may be defined as involving five elements (extending Nagel):<sup>11</sup>

- 1 The worse-off are very badly off in absolute terms.
- 2 They are also very badly off in relative terms — very much worse off than many others.
- 3 The inequality is impervious: it is difficult or impossible for the worse-off substantially to improve their lot; and most of the better-off never experience life at the bottom for even a few months and have no vivid idea of what it is like to live in that way.
- 4 The inequality is pervasive: it concerns not merely some aspects of life, such as the climate or access to natural beauty or high culture, but most aspects or all.
- 5 The inequality is avoidable: the better-off can improve the circumstances of the worse-off without becoming badly off themselves.

World poverty clearly exemplifies radical inequality as defined. But I doubt that these five conditions suffice to invoke more than a merely positive duty. And I suspect most citizens of the developed West would also find them insufficient. They might appeal to the following parallel: suppose we discovered people on Venus who are very badly off, and suppose we could help them at little cost to ourselves. If we did nothing, we would surely violate a positive duty of beneficence. But we would not be violating a negative duty of justice, because we would not be contributing to the perpetuation of their misery.

This point could be further disputed. But let me here accept the Venus argument and examine what further conditions must be satisfied for radical

inequality to manifest an injustice that involves violation of a negative duty by the better-off. I see three plausible approaches to this question, invoking three different grounds of injustice: the effects of shared social institutions, the uncompensated exclusion from the use of natural resources and the effects of a common and violent history. These approaches exemplify distinct and competing political philosophies. We need nonetheless not decide among them here if, as I argue, the following two theses are true. First, all three approaches classify the existing radical inequality as unjust and its coercive maintenance as a violation of negative duty. Second, all three approaches can agree on the same feasible reform of the status quo as a major step toward justice. If these two theses can be supported, then it may be possible to gather adherents of the dominant strands of Western normative political thought into a coalition focused on eradicating world poverty through the introduction of a Global Resources Dividend or GRD.

### Three grounds of injustice

#### *The effects of shared social institutions*

The first approach<sup>12</sup> puts forward three additional conditions:

- 6 There is a shared institutional order that is shaped by the better-off and imposed on the worse-off.
- 7 This institutional order is implicated in the reproduction of radical inequality in that there is a feasible institutional alternative under which so severe and extensive poverty would not persist.
- 8 The radical inequality cannot be traced to extra-social factors (such as genetic handicaps or natural disasters) which, as such, affect different human beings differentially.

Present radical global inequality meets Condition 6 in that the global poor live within a world-wide states system based on internationally recognised territorial domains, interconnected through a global network of market trade and diplomacy. The presence and relevance of shared social institutions is shown by how dramatically we affect the circumstances of the global poor through investments, loans, trade, bribes, military aid, sex tourism, culture exports and much else. Their very survival often crucially depends on our consumption choices, which may determine the price of their foodstuffs and their opportunities to find work. In sharp contrast to the Venus case, we are causally deeply involved in their misery. This does not mean that we should hold ourselves responsible for the remoter effects of our economic decisions. These

effects reverberate around the world and interact with the effects of countless other such decisions and thus cannot be traced, let alone predicted. Nor need we draw the dubious and utopian conclusion that global interdependence must be undone by isolating states or groups of states from one another. But we must be concerned with how the rules structuring international interactions foreseeably affect the incidence of extreme poverty. The developed countries, thanks to their vastly superior military and economic strength, control these rules and therefore share responsibility for their foreseeable effects.

Condition 7 involves tracing the incidence of poverty in an explanatory way to the structure of social institutions. This exercise is familiar in regard to national institutions, whose explanatory importance has been powerfully illustrated by domestic regime changes in China, Eastern Europe and elsewhere. In regard to the global economic order, the exercise is unfamiliar and shunned even by economists. This is due in part, no doubt, to powerful resistance against seeing oneself as connected to the unimaginable deprivations suffered by the global poor. This resistance biases us against data, arguments and researchers liable to upset our preferred world view and thus biases the competition for professional success against anyone exploring the wider causal context of global poverty. This bias is reinforced by our cognitive tendency to overlook the causal significance of stable background factors (e.g., the role of atmospheric oxygen in the outbreak of a fire), as our attention is naturally drawn to geographically or temporally variable factors. Looking at the incidence of poverty world-wide, we are struck by dramatic local changes and international variations, which point to local explanatory factors. The heavy focus on such local factors then encourages the illusion, succumbed to by Rawls<sup>13</sup> for example, that they completely explain global poverty.

This illusion conceals how profoundly local factors and their effects are influenced by the existing global order. Yes, a culture of corruption pervades the political system and the economy of many developing countries. But is this culture unrelated to the fact that most affluent countries have, until quite recently, allowed their firms to bribe foreign officials and even made such bribes tax-deductible?<sup>14</sup> — Yes, developing countries have shown themselves prone to oppressive government and to horrific wars and civil wars. But is the frequency of such brutality unrelated to the international arms trade, and unrelated to international rules that entitle anyone holding effective power in such a country to borrow in its name and to sell ownership rights in its natural resources?<sup>15</sup> — Yes, the world is diverse, and poverty is declining in some countries and worsening in others. But the larger pattern of increasing global inequality is quite stable, reaching far back into the colonial era: “The income gap between the fifth of the world’s people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960. [Earlier] the income gap between the top and bottom countries increased from

3 to 1 in 1820 to 7 to 1 in 1870 to 11 to 1 in 1913".<sup>16</sup> The World Bank reports that in the high-income countries GNI per capita, PPP (current international \$), rose 52.7% in real terms over the 1990-2001 globalization period.<sup>17</sup> World Bank interactive software<sup>18</sup> can be used to calculate how the poorer half of humankind fared, in terms of their real (inflation/PPP adjusted) consumption expenditure, during the same period. Here the gains for various percentiles, labeled from the bottom up: +20.4% for the 50th percentile (median), +20.0% for the 35th percentile, +15.9% for the 20th percentile, +12.9% for the 10th percentile, +6.6% for the 3rd percentile, -7.3% for the 1st (bottom) percentile. The affluent countries have been using their power to shape the rules of the world economy according to their own interests and thereby have deprived the poorest populations of a fair share of global economic growth<sup>19</sup> quite avoidably so, as the GRD proposal shows.

Global poverty meets Condition 8 insofar as the global poor, if only they had been born into different social circumstances, would be just as able and likely to lead healthy, happy and productive lives as the rest of us. The root cause of their suffering is their abysmal social starting position which does not give them much of a chance to become anything but poor, vulnerable and dependent — unable to give their children a better start than they had had themselves.

It is because the three additional conditions are met that existing global poverty has, according to the first approach, the special moral urgency we associate with negative duties, so that we should take it much more seriously than otherwise similar suffering on Venus. The reason is that the citizens and governments of the affluent countries — whether intentionally or not — are imposing a global institutional order that foreseeably and avoidably reproduces severe and widespread poverty. The worse-off are not merely poor and often starving, but are being impoverished and starved under our shared institutional arrangements, which inescapably shape their lives.

The first approach can be presented in a consequentialist guise, as in Bentham, or in a contractualist guise, as in Rawls or Habermas. In both cases, the central thought is that social institutions are to be assessed in a forward looking way, by reference to their effects. In the present international order, billions are born into social starting positions that give them extremely low prospects for a fulfilling life. Their misery could be justified only if there were no institutional alternative under which such massive misery would be avoided. If, as the GRD proposal shows, there is such an alternative, then we must ascribe this misery to the existing global order and therefore ultimately to ourselves. As, perhaps surprisingly, Charles Darwin wrote in reference to his native Britain: "If the misery of our poor be caused not by laws of nature, but by our own institutions, great is our sin".<sup>20</sup>

### *Uncompensated exclusion from the use of natural resources*

The second approach adds (in place of Conditions 6-8) only one condition to the five of radical inequality:

- 9 The better-off enjoy significant advantages in the use of a single natural resource base from whose benefits the worse-off are largely, and without compensation, excluded.

Currently, appropriation of wealth from our planet is highly uneven. Affluent people use vastly more of the world's resources, and they do so unilaterally, without giving any compensation to the global poor for their disproportionate consumption. Yes, the affluent often pay for the resources they use, such as imported crude oil. But these payments go to other affluent people, such as the Saudi family or the Nigerian kleptocracy, with very little, if anything, trickling down to the global poor. So the question remains: what entitles a global elite to use up the world's natural resources on mutually agreeable terms while leaving the global poor empty-handed?

Defenders of capitalist institutions have developed conceptions of justice that support rights to unilateral appropriation of disproportionate shares of resources while accepting that all inhabitants of the earth ultimately have equal claims to its resources. These conceptions are based on the thought that such rights are justified if all are better off with them than anyone would be if appropriation were limited to proportional shares.

This pattern of justification is exemplified with particular clarity in John Locke.<sup>21</sup> Locke is assuming that, in a state of nature without money, persons are subject to the moral constraint that their unilateral appropriations must always leave "enough, and as good" for others, that is, must be confined to a proportional share.<sup>22</sup> This so called Lockean Proviso may however be lifted with universal consent.<sup>23</sup> Locke subjects such a lifting to a second order proviso, which requires that the rules of human coexistence may be changed only if all can rationally consent to the alteration, that is, only if everyone will be better off under the new rules than anyone would be under the old. And he claims that the lifting of the enough and as good constraint through the general acceptance of money does satisfy this second order proviso: a day labourer in England feeds, lodges and is clad better than a king of a large fruitful territory in the Americas.<sup>24</sup>

It is hard to believe that Locke's claim was true in his time. In any case, it is surely false on the global plane today. Millions are born into poverty each month, in a world where all accessible resources are already owned by others. It is true that they will be able to rent out their labour and then buy natural resources on the same terms as the affluent can. But their educational and employment

opportunities are almost always so restricted that, no matter how hard they work, they can barely earn enough for their survival and certainly cannot secure anything like a proportionate share of the world's natural resources. The global poor get to share the burdens resulting from the degradation of our natural environment while having to watch helplessly as the affluent distribute the planet's abundant natural wealth amongst themselves. With average annual *per capita* income of about \$100, corresponding to the purchasing power of \$400 in the US, the poorest fifth of humankind are today just about as badly off, economically, as human beings could be while still alive.<sup>25</sup> It is then not true, what according to Locke and Nozick would need to be true, that all are better off under the existing appropriation and pollution rules than anyone would be with the Lockean Proviso. According to the second approach, the citizens and governments of the affluent states are therefore violating a negative duty of justice when they, in collaboration with the ruling elites of the poor countries, coercively exclude the poor from a proportional resource share.

### *The effects of a common and violent history*

The third approach adds one condition to the five of radical inequality:

- 10 The social starting positions of the worse-off and the better-off have emerged from a single historical process that was pervaded by massive grievous wrongs.

The present circumstances of the global poor are significantly shaped by a dramatic period of conquest and colonisation, with severe oppression, enslavement, even genocide, through which the native institutions and cultures of four continents were destroyed or severely traumatised. This is not to say (or to deny) that affluent descendants of those who took part in these crimes bear some special restitutive responsibility toward impoverished descendants of those who were victims of these crimes. The thought is rather that we must not uphold extreme inequality in social starting positions when the allocation of these positions depends upon historical processes in which moral principles and legal rules were massively violated. A morally deeply tarnished history should not be allowed to result in radical inequality.

This third approach is independent of the others. For suppose we reject the other two approaches and affirm that radical inequality is morally acceptable when it comes about pursuant to rules of the game that are morally at least somewhat plausible and observed at least for the most part. The existing radical inequality is then still condemned by the third approach on the ground that the rules were in fact massively violated through countless horrible crimes whose

momentous effects cannot be surgically neutralised decades and centuries later.<sup>26</sup>

Some friends of the present distribution claim that standards of living, in Africa and Europe for instance, would be approximately the same if Africa had never been colonised. Even if this claim were both clear and true, it would still be ineffective because my argument applies to persons, not to societies or continents. If world history had transpired without colonisation and enslavement, then there would perhaps now be affluent people in Europe and poor ones in Africa, much like in the Venus scenario. But these would be persons and populations quite different from those now actually living there. So we cannot tell starving Africans that they would be starving and we would be affluent even if the crimes of colonialism had never occurred. Without these crimes there would not be the actually existing radical inequality which consists in these persons being affluent and those being extremely poor.

So the third approach, too, leads to the conclusion that the existing radical inequality is unjust, that coercively upholding it violates a negative duty, and that we have urgent moral reason to eradicate global poverty.

### A moderate proposal

The reform proposal now to be sketched is meant to support my second thesis: that the *status quo* can be reformed in a way that all three approaches would recognise as a major step toward justice. But it is also needed to close gaps in my argument for the first thesis: the proposal should show that the existing radical inequality can be traced to the structure of our global economic order (Condition 7). And it should also show that Condition 5 is met; for, according to all three approaches, the *status quo* is unjust only if we can improve the circumstances of the global poor without thereby becoming badly-off ourselves.

I am formulating my reform proposal in line with the second approach, because the other two would support almost any reform that would improve the circumstances of the global poor. The second approach narrows the field by suggesting a more specific idea: those who make more extensive use of our planet's resources should compensate those who, involuntarily, use very little. This idea does not require that we conceive of global resources as the common property of humankind, to be shared equally. My proposal is far more modest by leaving each government in control of the natural resources in its territory. Modesty is important if the proposed institutional alternative is to gain the support necessary to implement it and to sustain itself in the world as we know it. I hope that the GRD satisfies these two *desiderata* by staying close to the global order now in place and by being evidently responsive to each of the three approaches.

In light of the vast extent of global poverty today, one may think that a massive GRD would be necessary to solve the problem. But I doubt this is so.

Present radical inequality is the cumulative result of decades and centuries in which the more affluent societies and groups have used their advantages in capital and knowledge to expand these advantages ever further. This vast gulf between rich and poor does not demonstrate that economic systems have irresistible centrifugal tendencies. Rather, it shows the power of long term compounding when such tendencies are not continuously resisted (as they are, to some extent within most modern states). It is quite possible that, if radical inequality has once been eradicated, quite a small GRD may, in the context of a fair and open global market system, be sufficient continuously to balance those ordinary centrifugal tendencies of markets enough to forestall its re-emergence. The great magnitude of the problem does suggest, however, that initially more may be needed so that it does not take all too long until severe poverty is erased and an acceptable distributional profile is reached.<sup>27</sup> To get a concrete sense of the magnitudes involved, let us consider an initial, maximal figure of one percent of aggregate global income. While affluent countries in 2005 actually provided \$106.5 billion annually in official development assistance,<sup>28</sup> a one percent GRD would have raised over \$450 billion that year.<sup>29</sup> Such an amount, if well targeted and effectively spent, would make a phenomenal difference to the poor even within a few years. On the other hand, the amount is rather small for the rest of us: well below the annual defence budget of just the US alone, significantly less than the annual 'peace dividend' enjoyed by the developed countries, and less than half the market value of the current annual crude oil production.<sup>30</sup>

Let us stay with the case of crude oil for a moment and examine the likely effects of a \$2 per barrel GRD on crude oil extraction. This dividend would be owed by the countries in which oil is extracted, though most of this cost would be passed along, through higher world market prices, to the end users of petroleum products. At \$2 per barrel, over 17 percent of the high initial revenue target could be raised from crude oil alone — and comfortably so: at the expense of raising the price of petroleum products by about a nickel per gallon (0.63 pence per litre). It is thus clearly possible — without major changes to our global economic order — to eradicate world hunger within a few years by raising a sufficient revenue stream from a limited number of resources and pollutants. These should be selected carefully, with an eye to all collateral effects. This suggests the following *desiderata*: the GRD should be easy to understand and to apply. It should, for instance, be based on resources and pollutants whose extraction or discharge is easy to monitor or estimate, in order to ensure that every society is paying its fair share and to assure everyone that this is so. Such transparency also helps fulfil a second *desideratum* of keeping overall collection costs low. The GRD should, thirdly, have only a small impact on the price of goods consumed to satisfy basic needs. And it should, fourthly, be

focused on resource uses whose discouragement is especially important for conservation and environmental protection. In this last respect, the GRD reform can produce great ecological benefits that are hard to secure in a less concerted way because of familiar collective-action problems: each society has little incentive to restrain its consumption and pollution, because the opportunity cost of such restraint falls on it alone while the costs of depletion and pollution are spread world-wide and into the future.

The scheme for disbursing GRD funds is to be designed so as to make these funds maximally effective toward ensuring that all human beings can meet their own basic needs with dignity. Such design must draw upon the expertise of economists and international lawyers. Let me nonetheless make some provisional suggestions to give more concreteness to the proposed reform. Disbursement should be made pursuant to clear and straightforward general rules whose administration is cheap and transparent. Transparency is important to exclude political favouritism and the appearance thereof. It is important also for giving the government of any developing country clear and strong incentives toward eradicating domestic poverty. To optimise such incentive effects, the disbursement rules should reward progress: by allocating more funds to this country and/or by assigning more of its allocation directly to its government.

This incentive may not always prevail. In some poor countries, the rulers care more about keeping their subjects destitute, uneducated, docile, dependent and hence exploitable. In such cases, it may still be possible to find other ways of improving the circumstances and opportunities of the domestic poor: by making cash payments directly to them or to their organisations or by funding development programs administered through UN agencies or effective non-governmental organisations. When, in extreme cases, GRD funds cannot be used effectively in a particular country, then there is no reason to spend them there rather than in those many other places where these funds can make a real difference in reducing poverty and disadvantage.

Even if the incentives provided by the GRD disbursement rules do not always prevail, they shift the political balance of forces in the right direction: a good government brings enhanced prosperity through GRD support and thereby generates more popular support which in turn tends to secure its position. A bad government finds the poor harder to oppress when they receive GRD funds through other channels and when all strata of the population have an interest in realising GRD-accelerated economic improvement under a different government more committed to poverty eradication. With the GRD in place, reforms will be pursued more vigorously and in more countries, and will succeed more often and sooner, than would otherwise be the case. Combined with suitable disbursement rules, the GRD can stimulate a peaceful international competition in effective poverty eradication.

This rough and revisable sketch has shown, I hope, that the GRD proposal deserves serious examination as an alternative to conventional development assistance. While the latter has an aura of hand outs and dependence, the GRD avoids any appearance of arrogant generosity: it merely incorporates into our global institutional order the moral claim of the poor to partake in the benefits from the use of planetary resources. It implements a moral right — and one that can be justified in multiple ways: namely also forward- lookingly, by reference to its effects, and backward lookingly, by reference to the evolution of the present economic distribution. Moreover, the GRD would also be vastly more efficient. The disbursement of conventional development aid is heavily influenced by political considerations as is shown by the fact that so little goes toward poverty eradication. The GRD, by contrast, would initially raise 30 times as much exclusively toward meeting the basic needs of the global poor.

Since the GRD would cost more and return less in direct political benefits, many of the wealthier and more powerful states might be tempted to refuse compliance. Wouldn't the GRD scheme then require a global enforcement agency, something like a world government? In response, I agree that the GRD would have to be backed by sanctions. But sanctions could be decentralised: once the agency facilitating the flow of GRD payments reports that a country has not met its obligations under the scheme, all other countries are required to impose duties on imports from, and perhaps also similar levies on exports to, this country to raise funds equivalent to its GRD obligations plus the cost of these enforcement measures. Such decentralised sanctions stand a very good chance of discouraging small scale defections. Our world is now, and is likely to remain, highly interdependent economically. Most countries export and import between ten and fifty percent of their gross domestic product. No country would profit from shutting down foreign trade for the sake of avoiding its GRD obligation. And each would have reasons to fulfil its GRD obligation voluntarily: to retain control over how the funds are raised, to avoid paying extra for enforcement measures and to avoid the adverse publicity associated with non-compliance.

To be sure, such a scheme of decentralised sanctions could work only so long as both the US and the European Union (EU) continue to comply and continue to participate in the sanction mechanism. I assume that both will do this, provided they can be brought to commit themselves to the GRD scheme in the first place. This prerequisite, which is decisive for the success of the proposal, is addressed in Section 5. It should be clear however that a refusal by the US or the EU to participate in the eradication of global poverty would not affect the implications of the present section. The feasibility of the GRD suffices to show that extensive and severe poverty is avoidable at moderate cost (Condition 5), that the existing global order plays an important role in its persistence (Condition 7) and that we can take what all three approaches would recognise as a major step toward justice (second thesis).

## The moral argument for the proposed reform

By showing that Conditions 1–10 are met, I hope to have demonstrated that present global poverty manifests a grievous injustice that can and should be abolished through institutional reform — involving the GRD scheme, perhaps, or some superior alternative. To make this train of thought as transparent and criticisable as possible, I restate it now as an argument in six steps. The first two steps involve new formulations, so I comment on them briefly at the end.

- 1 If a society or comparable social system, connected and regulated by a shared institutional order (Condition 6), displays radical inequality (Conditions 1–5), then this institutional order is *prima facie* unjust and requires justification. Here the burden of proof is on those who wish to defend this order and its coercive imposition as compatible with justice.
- 2 Such a justification of an institutional order under which radical inequality persists would need to show either
  - 2a that Condition 10 is not met, perhaps because the existing radical inequality came about fairly: through an historical process that transpired in accordance with morally plausible rules that were generally observed; or
  - 2b that Condition 9 is not met, because the worse off can adequately benefit from the use of the common natural resource base through access to a proportional share or through some at least equivalent substitute; or
  - 2c that Condition 8 is not met, because the existing radical inequality can be traced to extra social factors (such as genetic handicaps or natural disasters) which, as such, affect different persons differentially; or
  - 2d that Condition 7 is not met, because any proposed alternative to the existing institutional order either
    - is impracticable, that is, cannot be stably maintained in the long run; or
    - cannot be instituted in a morally acceptable way even with good will by all concerned; or
    - would not substantially improve the circumstances of the worse-off; or
    - would have other morally serious disadvantages that offset any improvement in the circumstances of the worse-off.
- 3 Humankind is connected and regulated by a shared global institutional order under which radical inequality persists.
- 4 This global institutional order therefore requires justification from 1 and 3.
- 5 This global institutional order can be given no justification of forms 2a, 2b, or 2c. A justification of form 2d fails as well, because a reform involving introduction of a GRD provides an alternative that is practicable, can (with some good will by all concerned) be instituted in a morally acceptable

way, would substantially improve the circumstances of the worse off and would not have disadvantages of comparable moral significance.

6 The existing global order cannot be justified from 4, 2 and 5 and hence is unjust from 1.

In presenting this argument, I have not attempted to satisfy the strictest demands of logical form, which would have required various qualifications and repetitions. I have merely tried to clarify the structure of the argument so as to make clear how it can be attacked.

One might attack the first step. But this moral premise is quite weak, applying only if the existing inequality occurs within a shared institutional order (Condition 6) and is radical, that is, involves truly extreme poverty and extreme differentials in standards of living (Conditions 1-5). Moreover, the first premise does not flatly exclude any institutional order under which radical inequality persists, but merely demands that it be justified. Since social institutions are created and upheld, perpetuated or reformed by human beings, this demand cannot plausibly be refused.

One might attack the second step. But this moral premise, too, is weak, in that it demands of the defender of the *status quo* only one of the four possible showings (2a-2d), leaving him free to try each of the conceptions of economic justice outlined in Section 2 even though he can hardly endorse all of them at once. Still, it remains open to argue that an institutional order reproducing radical inequality can be justified in a way that differs from the four (2a-2d) I have described.

One might try to show that the existing global order does not meet one of the ten conditions. Depending on which condition is targeted, one would thereby deny the third premise or give a justification of forms 2a or 2b or 2c, or show that my reform proposal runs into one of the four problems listed under 2d.

The conclusion of the argument is reached only if all ten conditions are met. Existing global poverty then manifests a core injustice: a phenomenon that the dominant strands of Western normative political thought jointly — albeit for diverse reasons — classify as unjust and can jointly seek to eradicate. Insofar as advantaged and influential participants in the present international order grant the argument, we acknowledge our shared responsibility for its injustice: we are violating a negative duty of justice insofar as we contribute to (and fail to mitigate) the harms it reproduces and insofar as we resist suitable reforms.

### **Is the reform proposal realistic?**

Even if the GRD proposal is practicable, and even if it could be implemented with the good will of all concerned, there remains the problem of generating this good will, especially on the part of the rich and mighty. Without the support

of the US and the EU, massive global poverty and starvation will certainly not be eradicated in our lifetimes. How realistic is the hope of mobilising such support? I have two answers to this question.

First. Even if this hope is not realistic, it is still important to insist that present global poverty manifests a grievous injustice according to Western normative political thought. We are not merely distant witnesses of a problem unrelated to ourselves, with a weak, positive duty to help. Rather we are, both causally and morally, materially involved in the fate of the poor by imposing upon them a global institutional order that regularly produces severe poverty and/or by effectively excluding them from a fair share of the value of exploited natural resources and/or by upholding a radical inequality that evolved through an historical process pervaded by horrendous crimes. We can realistically end our involvement in their severe poverty not by extricating ourselves from this involvement, but only by ending such poverty through economic reform. If feasible reforms are blocked by others, then we may in the end be unable to do more than mitigate some of the harms we also help produce. But even then a difference would remain, because our effort would fulfil not a duty to help the needy, but a duty to protect victims of any injustice to which we contribute. The latter duty is, other things equal, much more stringent than the former, especially when we can fulfil it out of the benefits we continually derive from this injustice.

My second answer is that the hope may not be so unrealistic after all. My provisional optimism is based on two considerations. The first is that moral convictions can have real effects even in international politics — as even some political realists admit, albeit with regret. Sometimes these are the moral convictions of politicians. But more commonly politics is influenced by the moral convictions of citizens. One dramatic example of this is the abolitionist movement which, in the nineteenth century, pressured the British government into suppressing the slave trade.<sup>31</sup> A similar moral mobilisation may be possible also for the sake of eradicating global poverty — provided the citizens of the more powerful states can be convinced of a moral conclusion that really can be soundly supported and provided a path can be shown that makes only modest demands on each of us.

The GRD proposal is morally compelling. It can be broadly anchored in the dominant strands of Western normative political thought outlined in Section 2. And it also has the morally significant advantage of shifting consumption in ways that restrain global pollution and resource depletion for the benefit of all and of future generations in particular. Because it can be backed by these four important and mutually independent moral rationales, the GRD proposal is well positioned to benefit from the fact that moral reasons can have effects in the world. If some help can be secured from economists, political scientists

and lawyers, then moral acceptance of the GRD may gradually emerge and become widespread in the developed West.

Eradicating global poverty through a scheme like the GRD also involves more realistic demands than a solution through private initiatives and conventional development aid. Even when one is certain that, by donating \$900 per year, one can raise the standard of living of two very poor families by \$400 annually, the commitment to do so is hard to sustain. Continual unilateral mitigation of poverty leads to fatigue, aversion, even contempt. It requires the more affluent citizens and governments to rally to the cause again and again while knowing full well that most others similarly situated contribute nothing or very little, that their own contributions are legally optional and that, no matter how much they give, they could for just a little more always save yet further children from sickness or starvation.

Helping to implement the GRD, by contrast, one would also lower one's family's standard of living by \$900 annually, but one would do so for the sake of raising by \$400 annually the standard of living of hundreds of millions of poor families. One would do so for the sake of eradicating severe poverty from this planet while knowing that all affluent people and countries are contributing their fair share to this effort.

Analogous considerations apply to governments. The inefficiency of conventional development aid is sustained by their competitive situation, as they feel morally entitled to decline to do more by pointing to their even stingier competitors. This explanation supports the optimistic assumption that the affluent societies would be prepared, in joint reciprocity, to commit themselves to more than what they tend to do each on its own.

Similar considerations apply to environmental protection and conservation, with respect to which the GRD also contributes to a collective solution: levels of pollution and wastefulness will continue to be much higher than would be best for all so long as anyone causing them can dump most of their cost on the rest of the world without any compensation ('tragedy of the commons'). Exacting such compensation, the GRD redresses this imbalance of incentives.

An additional point is that national development aid and environmental protection measures must be politically fought for or defended year after year, while acceptance of the GRD scheme would require only one — albeit rather more far reaching — political decision.

The other optimistic consideration has to do with prudence. The times when we could afford to ignore what goes on in the developing countries are over for good. Their economic growth will have a great impact on our environment and their military and technological gains are accompanied by serious dangers, among which those associated with nuclear, biological and chemical weapons and technologies are only the most obvious. The transnational

imposition of externalities and risks will ever more become a two way street as no state or group of states, however rich and mighty, will be able effectively to insulate itself from external influences: from military and terrorist attacks, illegal immigrants, epidemics and the drug trade, pollution and climate change, price fluctuations and scientific-technological and cultural innovations. It is then increasingly in our interest, too, that stable democratic institutions shall emerge in the developing countries — institutions under which governmental power is effectively constrained through procedural rules and basic rights. So long as large segments of these peoples lack elementary education and have no assurance that they will be able to meet even their most basic needs, such democratic institutions are much less likely than explosive mixtures of religious and ideological fanaticism, violent opposition movements, death squads and corrupt and politicised militaries. To expose ourselves to the occasional explosions of these mixtures would be increasingly dangerous and also more costly in the long run than the proposed GRD.

This prudential consideration has a moral side as well. A future that is pervaded by radical inequality and hence unstable would endanger not only the security of ourselves and our progeny, but also the long term survival of our society, values and culture. Not only that such a future would, quite generally, endanger the security of all other human beings and their descendants as well as the survival of their societies, values and cultures. And so the interest in peace — in a future world in which different societies, values and cultures can coexist and interact peacefully — is obviously also, and importantly, a moral interest.

Realising our prudential and moral interest in a peaceful and ecologically sound future will — and here I go beyond my earlier modesty — require supranational social institutions and organisations that limit the sovereignty rights of states more severely than is the current practice. The most powerful states could try to impose such limitations upon all the rest while exempting themselves. It is doubtful, however, that today's great powers can summon and sustain the domestic political support necessary to see through such an attempt to the end. And it is doubtful also whether they could succeed. For such an attempt would provoke the bitter resistance of many other states, which would simultaneously try very hard, through military build-up, to gain access to the club of great powers. For such a project, the 'elites' in many developing countries could probably mobilise their populations quite easily, as the examples of India and Pakistan illustrate.

It may then make more sense for all to work toward supranational social institutions and organisations that limit the sovereignty rights of all states equally. But this solution can work only if at least a large majority of the states participating in these social institutions and organisations are stable democracies, which presupposes, in turn, that their citizens are assured that they can meet their basic needs and can attain a decent education and social position.

The current geopolitical development drifts toward a world in which militarily and technologically highly advanced states and groups, growing in number, pose an ever greater danger for an ever larger subset of humankind. Deflecting this development in a more reasonable direction realistically requires considerable support from those other 84 percent of humankind who want to reduce our economic advantage and achieve our high standard of living. Through the introduction of the GRD or some similar reform we can gain such support by showing concretely that our relations to the rest of the world are not solely devoted to cementing our economic hegemony and that the global poor will be able peacefully to achieve a considerable improvement in their circumstances. In this way and only in this way can we refute the conviction, understandably widespread in the poor countries, that we will not give a damn about their misery until they will have the economic and military power to do us serious harm. And only in this way can we undermine the popular support that aggressive political movements of all kinds can derive from this conviction.

## Conclusion

We are familiar, through charity appeals, with the assertion that it lies in our hands to save the lives of many or, by doing nothing, to let these people die. We are less familiar with the here examined assertion of a weightier responsibility: that most of us do not merely let people starve but also participate in starving them. It is not surprising that our initial reaction to this more unpleasant assertion is indignation, even hostility — that, rather than think it through or discuss it, we want to forget it or put it aside as plainly absurd.

I have tried to respond constructively to the assertion and to show its plausibility. I do not pretend to have proved it conclusively, but my argument should at least raise grave doubts about our common-sense prejudices, which we must in any case treat with suspicion on account of how strongly our self interest is engaged in this matter. The great moral importance of reaching the correct judgement on this issue also counsels against lightly dismissing the assertion here defended. The essential data about the lives and deaths of the global poor are, after all, indisputable. In view of very considerable global interdependence, it is extremely unlikely that their poverty is due exclusively to local factors and that no feasible reform of the present global order could thus affect either that poverty or these local factors. No less incredible is the view that ours is the best of all possible global orders, that any modification of it could only aggravate poverty. So we should work together across disciplines to conceive a comprehensive solution to the problem of global poverty, and across borders for the political implementation of this solution.

## NOTES

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Many economists reject this statistic as misleading, claiming that the comparison should be made in terms of purchasing power parities (PPPs) rather than market exchange rates. However, market exchange rates are quite appropriate to highlight international inequalities in expertise and bargaining power as well as the increasing avoidability of poverty which is manifest in the fact that just one percent of the national incomes of the highest-income countries would suffice to raise those of the lowest-income countries by 74 percent.

To compare standards of living, PPPs are indeed appropriate. But general-consumption PPPs, based as they are on the prices of all commodities weighted by their share in international consumption, substantially overstate the purchasing power of the poor relative to the basic necessities on which they are compelled to concentrate their expenditures. This is so because poor countries tend to afford the greatest price advantages for commodities (services and other "non-tradables") which their poor citizens cannot afford to consume. By using PPPs that average out price differentials across all commodities, economists inflate the nominal incomes of the poor as if their consumption mirrored that of the world at large. For a detailed critique, see S. Reddy & T.W. Pogge, 'How *Not* to Count the Poor', 2002. Unpublished working paper, available online at <[www.socialanalysis.org](http://www.socialanalysis.org)>, accessed on January 8, 2007. Even if one takes PPPs at face value, the increase in global inequality is alarming: Over a recent five-year period, "world inequality has increased [...] from a Gini of 62.8 in 1988 to 66.0 in 1993. This represents an increase of 0.6 Gini points per year. This is a very fast increase, faster than the increase experienced by the US and UK in the decade of the 1980's. [...] The bottom 5 percent of the world grew poorer, as their real incomes decreased between 1988 and 1993 by ¼, while the richest quintile grew richer. It gained 12 percent in real terms, that is it grew more than twice as much as mean world income (5.7 percent)": B. Milanovic, "True World Income Distribution, 1988 and 1993: First Calculation Based on Household Surveys Alone", *The Economic Journal*, Vol. 112, 2002, p. 88.

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23. *Ibid.*, §36.
24. *Ibid.*, §41 and §37.
25. The World Bank estimates that, in 2001, 1089 out of 6150 million human beings lived below the international poverty line, which it currently defines in terms of \$32.74 PPP 1993 per month or \$1.075 PPP 1993 per day (Shaohua Chen and Martin Ravallion, "How Have the World's Poorest Fared Since the Early 1980s?", *World Bank Research Observer*, 2004, Vol. 19, No. 2, pp. 147-153.). "PPP" stands for "purchasing power parity," so people count as poor by this standard when their income per person per year has less purchasing power than \$393 had in the US in 1993 or less purchasing power than \$550 have in the US in the year 2006 (available online at <[www.bls.gov/cpi/](http://www.bls.gov/cpi/)>, accessed on January 9, 2007). Those living below this poverty line, on average, fall 28.4 percent below it (Shaohua Chen and Martin Ravallion, *op. cit.*, pp.152 and 158, dividing the poverty gap index by the headcount index). So they live on approximately \$394 PPP 2006 per person per year on average. Now the \$ PPP incomes the World Bank ascribes to people in poor developing countries are on average at least four times higher than their actual incomes at market exchange rates. Thus the World Bank equates India's *per capita* gross national income of \$460 to \$2,450 PPP, China's \$890 to \$4,260 PPP, Nigeria's \$290 to \$830 PPP, Pakistan's \$420 to \$1,920 PPP, Bangladesh's \$370 to \$1,680 PPP, Ethiopia's \$100 to \$710 PPP, Vietnam's \$410 to \$2,130 PPP, and so on (World Bank, *World Development Report 2003*, Oxford University Press, New York, 2002, pp.234-235). Since virtually all the global poor live in such poor developing countries, we can then estimate that their average annual per capita income corresponds to at most \$100 at market exchange rates. The aggregate annual income of the poorest fifth of humankind is then about \$109 billion at market exchange rates or roughly 0.3 percent of the global product.
26. Cf. R. Nozick, *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p. 231.
27. In the 1996 Rome Declaration on World Food Security, 186 governments made the solemn promise "to eradicate hunger in all countries, with an immediate view to reducing the number of undernourished people to half their present level no later than 2015". More than half the period has passed with little or no reduction in the numbers of poor and undernourished people. But there is progress of a sort: The goal has been diminished. The UN Millennium Declaration promises "to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger," using 1990 as the baseline. With world population estimated to increase by 36% in the 1990-2015 period, the sought reduction in the number of poor and undernourished people between 1996 and 2015 is now not 50% but merely 19% (T. Pogge, "The First UN Millennium Development Goal: a Cause for Celebration?", *Journal of Human Development*, Vol. 5, No. 3, 2004, pp. 377-397; Spanish translation by David Álvarez García "El Primer Objetivo de Desarrollo de la ONU para el Milenio: ¿Un Motivo de Celebración?"). In the face of 18 million poverty-related deaths per year, the official go-slow approach is morally unacceptable and the lack of efforts toward implementing this approach appalling. It should also be said that the World Bank's severely flawed poverty measurement method

leads to a gross understatement of the number of people living below its \$1/day poverty line (S. Reddy & T.W. Pogge, 'How *Not* to Count the Poor', 2002. Unpublished working paper, available online at <[www.socialanalysis.org](http://www.socialanalysis.org)>, accessed on January 8, 2007). Moreover, this poverty line is, of course, grotesquely low. (Just imagine a family of four living on \$2200 per year in the US or on £1100 in the UK.) The World Bank provides statistics also for a more adequate poverty line that is twice as high: \$786 PPP 1993 (\$1100 PPP in 2006 or roughly \$275 in the typical poor country) per person per year. 2735 million people — nearly half of humankind — are said to live below this higher poverty line, falling 42 percent below it on average (Shaohua Chen and Martin Ravallion, "How Have the World's Poorest Fared Since the Early 1980s?", *World Bank Research Observer*, 2004, Vol. 19, No. 2, pp., 153, then 152 and 158, again dividing the poverty gap index by the headcount index). The aggregate annual income of these people is then about \$440 billion at market exchange rates or about 0.9 percent of the global product. Their aggregate poverty gap is about \$330 billion per year, 0.75 percent of the global product. The GRD thus would suffice to bring all human beings up to the World Bank's higher "\$2/day" poverty line.

**28.** Of this amount, under 10 percent is typically spent on poverty eradication or "basic social services" United Nations Statistics Division, *Millennium Development Goals Indicators*, (available online at <[mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=592&crd=>](http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=592&crd=>), accessed on January 9, 2007) — defined as basic education, primary health care (including reproductive health and population programs), nutrition programs and safe water and sanitation as well as the institutional capacity for delivering these services. Adding to this the \$7 billion citizens spend annually on eradicating severe poverty through international NGOs, we arrive at a grand total of \$18 billion annually. This amounts to 1/18 of what would be needed to eradicate severe poverty, to 1/37 of our annual peace dividend, and to 0.05% of our national incomes or \$18 annually from each citizen of the affluent countries.

**29.** Cf. World Bank 2006, *World Development Report 2007*, p. 289. The annual global product (sum of all gross national incomes) was \$44983 billion per year in 2005. Of this, 79 percent belonged to the richest countries containing 15.7 percent of humankind (ibid.). The US alone, with 4.6 percent of world population, accounts for 28.8 percent of global product (ibid. — and the US still managed to renegotiate its share of the UN budget from 25 down to 22 percent).

**30.** The end of the Cold War enabled the high-income countries to cut their aggregate military expenditure from 4.1 percent of their gross domestic product in 1985 to 2.2 percent in 1998 (United Nations Development Programme (UNDP), *Human Development Report 1998*, Oxford University Press, New York, 1998, p. 197; Ibid., *Human Development Report 2000*, Oxford University Press, New York, 2000, p. 217).

The peace dividend these countries reap can then be estimated at \$675 billion (1.9 percent of their current aggregate annual GDP of \$35529 billion in the year 2005 — World Bank 2006, *World Development Report 2007*, p. 289).

**31.** S. Drescher, *Capitalism and Antislavery: British Mobilization in Comparative Perspective*, Oxford, Oxford University Press, 1986.

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