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# The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil

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**Abstract:** Is it possible to reconcile one of the institutional strategies to promote development, known in the literature as “the developmental state”, with contemporary democratic systems of government? If so, what are the challenges, trade-offs and potential gains that such an effort may entail? The vast literature on “the developmental state” claims that it is more likely to succeed under autocratic regimes. While a “democratic developmental state” seems possible in theory, there is very little empirical evidence to show how it would work in practice. This article tries to contribute to this debate by analyzing the case of Brazil, a country that transitioned from a military dictatorship to a democratic regime in the late 1980s, and has been moving towards increasing state interventionism since 2002. While the policies implemented by the “New Developmental State” in Brazil have been explored in the academic literature, their democratic dimensions remain uncharted. There has not been a detailed analysis about how the autocratic features that characterized the developmental states in Latin America from the 1950s to the end of the 1980s (i. e. political exclusion of the majority of groups, and control of economic policies by an elite) have played out in its renewed version. Understanding the interactions between the New Developmental State and the democratic system not only allows for a better understanding of the Brazilian case, but it also sheds light on one of the most important theoretical questions raised by the development literature: is a democratic developmental state possible? Based on the Brazilian case study, we argue that it is not hard to reconcile “the developmental state” with a thin conception of democracy, i. e. with free and fair elections. In contrast, the picture is more complex if the question is whether it is possible to reconcile developmental policies with a thicker conception of democracy that includes

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demands for transparency, protection of minority groups, a system of checks and balances, and due process. To develop this argument, this article is divided in three parts. In the first part, we provide an overview of the literature, outlining the concept of developmental state, and the tensions that the developmental state policies may create in a democratic setting. In the second part, we focus on the Brazilian case (the “new developmental state”), exploring how these tensions played out in three concrete settings: industrial policy, infrastructure sectors, and social policies. In the third part, we identify some of the research implications of the challenges identified in the Brazilian case, especially for future law and development scholarship.

**Keywords:** developmental state, Brazil, democracy, accountability, transparency

## 1 Introduction

Is there a relationship between democracy and development? The literature on the topic is vast,<sup>1</sup> and mostly inconclusive.<sup>2</sup> Our paper focuses on a related but narrower question: is it possible to reconcile one of the institutional strategies to promote development, known in the literature as “the developmental state”, with the contemporary democratic system of government? If so, what are the challenges, trade-offs and potential gains that such an effort may entail?

**Developmentalism is an institutional strategy that has economic and political dimensions.** Economically, the concept suggests that **there can be a third type of economy, which is capitalist without being based on free-market economics, and has state interventionism without centralized state control over all economic activity as in socialist economies. It involves state induced private activity in a goal-oriented fashion.** In contrast to a state that only enables the functioning of a market economy, the range of state intervention in economic activities is wider as it includes guidance, incentive and fostering of private

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1 The relationship between democracy and the developmental performance of markets and states, particularly in the developing world, has been at the heart of some of the most intense debates in economics, political science, and development studies. Cf. with See M. H. Khan, *Markets, States and Democracy: Patron-Client Networks and the Case for Democracy in Developing Countries*, 12 *Democratization*, no. 5 (2005), 704–724.

2 For a summary of the literature, see M. J. Trebilcock and M. M. Prado, *Political Regimes and Development*; *Advanced Introduction to Law and Development* (Northampton, MA: Edward Elgar, 2014). See also A. Przeworski et al., *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990* (Cambridge: Cambridge University Press, 2000).

strategies.<sup>3</sup> These activities are based on several instruments such as state-owned banks, state-owned enterprises, taxes, financial incentives, redistributive policies, and sectoral regulations.

Politically, the most effective form of developmentalism has been historically associated with authoritarian systems. In contrast, liberal market capitalism has been usually associated with democratic systems. This is not to say that developmentalism cannot be reconciled with democratic regimes. Indeed, some argue that there have been examples of democratic developmental states.<sup>4</sup> However, historical empirical evidence seems to suggest that developmentalism is more easily carried under autocratic conditions. Table 1 summarizes the possible combinations of political and economic systems and suggests that the most stable arrangements are those ones located in the main diagonal.

**Table 1:** Political systems and economic systems.

		Political system		
		Totalitarianism	Authoritarianism	Democracy
Economic system	Command economies	Soviet system	Poland (1980s)	U.S. and UK (World Wars I and II)
	Developmentalism (State Capitalism)	Italian Fascism/ German Nazism	Brazil (1970) South Korea (1960–1980) China (today)	France and Japan (post-war) Brazil and India (today)
	Market economies	Unknown	Chile (1973–1989) Spain (1939–1975)	OECD countries (today)

Source: Adapted from Schneider (1999).

A number of authors identify autocratic regimes as the most effective forms of developmentalism due to the potential institutional tensions between state

<sup>3</sup> P. Evans, “Democracy in Developing Countries”, in S. Haggard and R. R. Kaufman (orgs.), *The Politics of Economic Adjustment: International Constraints, Distributive Conflicts, and the State* (Princeton, NJ: Princeton University Press, 1992), p. 140.

<sup>4</sup> See A. Liftwich, *States of Development: On the Primacy of Politics on Development* (Cambridge: Polity Press, 2000); M. Robinson and G. White (eds.), *The Democratic Developmental State: Politics and Institutional Design* (New York: Oxford University Press, 1998); B. Schneider, “The Desarrollista State in Brazil and México”, in M. Woo-Cumings (ed.), *The Developmental State* (Ithaca, NY: Cornell Press, 1999); O. Edigheji, *A Democratic Developmental State in Africa? A Concept Paper*, Research Report no. 105, Centre for Policy Studies (South Africa, 2005).

intervention in the economy and democratic representation. **Developmentalist strategies within a democratic regime will be subjected to a series of accountability mechanisms**, such as checks and balances and electoral competition. The hypothesis is that these democratic institutions slow down the policy-making and policy-implementation process, and sometimes they may require frequent (and potentially contradictory) policy changes as decisions need to be modified to attend the demands of groups with competing and sometimes irreconcilable interests.<sup>5</sup>

These institutional tensions are informed by the fact that democracies and developmental states adopt very different (and also potentially conflicting) forms of political legitimacy.<sup>6</sup> While democratic regimes derive their legitimacy from the processes and procedural rules, the developmental state fundamentally derives it from economic outcomes, mainly GDP growth. The institutional tension between these two forms of legitimacy is most visible in cases where the developmental state actively ignores democratic procedures or excludes divergent opinions and interests as a way to pursue more effectively development policies. It may do so either by bypassing the legality controls that would allow for opposition to the projects to be voiced, or by simply not engaging with affected groups (i. e. not publicizing information about projects, and not creating any kind of consultation process to assess the impact of development policies on different groups). As a result of this tension, developmentalism has been commonly associated with authoritarian regimes (or restricted or ineffective democracies). Concrete examples include the developmental states observed in Latin America between the 1950s and the 1980s. In the cases of Brazil, Colombia, Mexico, and Argentina, there was state intervention in economy, limited political representation, widespread populism, high levels of discretion, top-down and insulated decision-making and control over political and policy choices by elite groups.<sup>7</sup>

Is this tension between democracy and the developmental state irreconcilable? Some have argued that they can be reconciled, at least in theory.<sup>8</sup> For instance, Gordon White claims that perhaps the institutional design of

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5 Robinson and White (1998), *supra* note 4, p. 8. (“... inherent in the process of constructing [a democratic developmental state] is a contradiction between the tendency of formal democracies towards an incrementalist style of policy-making on the one hand, and a set of developmental goals that often require fundamental changes in policy direction, and the prevailing distribution of socio-economic and political power on the other”).

6 Schneider (1999), *supra* note 4; A. Leftwich, “On the Primacy of Politics in Development”, in A. Leftwich (ed.), *Democracy and Development* (Cambridge: Polity Press, 1996).

7 Schneider (1999), *supra* note 4, pp. 278–279.

8 Robinson and White (1998), *supra* note 5.

democracies can be modified so as to be more easily reconciled with the developmental state.<sup>9</sup> While possible in theory, there are reasons to question if there is much empirical evidence to support the idea that “democratic development states” are feasible. First, some cases such as Japan after WWII, as well as the more recent cases of Botswana and Singapore may not be considered true democracies for being one-party-systems. At least in the Japanese case, the economic bureaucracy was shielded from the political system.<sup>10</sup> Somehow, therefore, the highly successful Japanese catch up was more a technocratic experience than a democratic one. Second, France post-WWII and more recently India may not be considered interventionist enough to be classified as developmental states.<sup>11</sup> Third, there are cases, such as Asian countries, in which the democratic transition seems to have changed the nature of developmentalism. The recent democratization of many Asian countries, such as Taiwan and South Korea, have been interpreted by some authors as examples of successful reconciliation of democracy with the developmental state.<sup>12</sup> This claim, however, is based on a modified definition of the developmental state.<sup>13</sup> Those who adopt the traditional definition of developmental state interpret the same case studies as examples of a retreat of this form of state intervention in the economy.<sup>14</sup>

The only example of a democratic developmental state that has gone unchallenged until now is Mauritius. Unlike the other cases, this one does not seem to raise disputes about being a true democracy or a true developmental state. Still, the conditions under which this case of democratic developmental state existed seems to be so unique that it is hard to be able to duplicate it anywhere else.<sup>15</sup> In sum, the empirical evidence about the possibility of a democratic developmental state still seems inconclusive.

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9 G. White, *Building a Democratic Developmental State: Social Democracy in the Developing World*, 5 *Democratization*, no. 3 (1998), 1–32.

10 C. Johnson, *The Economic Bureaucracy; MITI and the Japanese Miracle* (Stanford, CA: Stanford University Press, 1982).

11 White (1998), *supra* note 9, p. 20.

12 J. Wong, “The Developmental State and Taiwan: Origins and Adaptation”, in G. Schubert (ed.), *Routledge Handbook of Contemporary Taiwan* (New York: Routledge, 2016).

13 *Ibid.*, pp. 208–211.

14 *Ibid.*, pp. 211–212.

15 R. Sandbrook, *Origins of the Democratic Developmental State: Interrogating Mauritius*, 39 *Canadian Journal of African Studies*, no. 3 (2005), 549–581; R. Sandbrook et al., *Mauritius: Evolution of a Classic Social Democracy; Social Democracy in the Global Periphery: Origins, Challenges, Prospects* (Cambridge: Cambridge University Press, 2007); T. Meisenhelder, *The Developmental State in Mauritius*, 35 *Journal of Modern African Studies*, no. 2 (1997), 271–297, 287; Liftwich (2000), *supra* note 4, pp. 179–181; T. Mkandawire, *Thinking about Developmental States in Africa*, 25 *Cambridge Journal of Economics*, no. 3 (2001), 289–313, 303, 304, 310; D.

This makes the Brazilian case particularly interesting. In the 1990s, Latin America, as several other parts of the globe, was swept by neoliberal reforms, and developmentalism was replaced by market-oriented development strategies, with limited state intervention. However, “developmentalism” returned to the political arena in some countries in the 2000s. Following this trend, Brazil has been moving incrementally but steadily towards increased state interventionism since 2002. This shift has been described as a movement towards the creation of a potentially New Developmental State.<sup>16</sup> This “new” developmental state in Brazil differs from the old version because it has not only promoted economic development through industrial policy, but it also engaged with redistributive and welfare policies, which are now considered a central part of the development agenda. Most importantly, development initiatives in Brazil in the last decade or so have taken place under a stable democratic regime.

While the policies implemented by the “New Developmental State” in Brazil have been explored in the academic literature, their democratic dimensions remain uncharted. In other words, there has not been a detailed analysis about how the autocratic features described by multiple authors as the ones characterizing the developmental state in Latin America from the 1950s to the end of the 1980s (i. e. political exclusion of the majority of groups, and control of economic policies by an elite) have played out in its renewed version. Does the fact that the developmental goals are pursued in a democratic context change the kind of structural change and growth strategies adopted? Are development policies and democratic structures always aligned, or are there irreconcilable tensions between them?

Understanding the interactions between the New Developmental State and the democratic system not only allows for a better understanding of the Brazilian case, but it also sheds light on one of the most important theoretical questions raised by the development literature: is a democratic developmental state possible? If a developmental state is not fully compatible with representative democracy, could it be reconciled with other forms of democratic participation? For instance, could the developmental state adopt participatory channels in

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Lincoln, *Beyond the Plantation: Mauritius in the Global Division of Labor*, 44 *Journal of Modern African Studies*, no.1 (2006), 59–78, 69–70; T. Mkandawire, *Disempowering New Democracies and the Persistence of Poverty*, programme paper no. 21 for United Nations Research Institute for Social Development (Geneva, 2006), pp. 8–9; and Charity Musamba, “The Developmental State Concept and its Relevance for Africa”, in P. Meyns and C. Musamba (eds.), *The Developmental State in Africa: Problems and Prospects* (INEF R 101/2010), pp. 27, 39–41.

<sup>16</sup> D. M. Trubek et al. (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (New York: Cambridge University Press, 2013).

development initiatives that allow for direct and deliberative democracy, and also create room for transparency and accountability?

We address these questions as follows. In the first part, we provide an overview of the literature, outlining the concept of developmental state, and the tensions that the developmental state policies may create in a democratic setting. In the second part, we focus on the Brazilian case (the “new developmental state”), exploring how these tensions played out in three concrete settings: industrial policy, infrastructure sectors, and social policies.<sup>17</sup> In the third part, we highlight some of the research implications of the challenges identified in the Brazilian case, especially for future law and development scholarship.

## 2 The democratic developmental state: a chimera?

The Developmental State is a **term coined by Chalmers Johnson** in 1982 to describe Japanese industrial policy from 1925–1975.<sup>18</sup> Despite the fact that he focused only on the interventionist policies of the Japanese Ministry of International Trade and Industry over a 50-year time-span, Johnson’s concept has become widespread and has traveled very far in development circles. It has been fruitfully used to analyze a wide variety of distinct institutional arrangements of state intervention in the economy. Indeed, the developmental state seems to have existed in one form or another in Brazil, India,<sup>19</sup> Israel,<sup>20</sup> Mexico,<sup>21</sup> South Korea<sup>22</sup> and Taiwan.<sup>23</sup>

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**17** Our analysis does not include the most recent events in Brazil, such as the economic crisis that started in 2015 and the impeachment process that started in 2016 as these are not relevant to our analysis. While one could argue that these may be evidence that the democratic developmental state is not sustainable or has failed, we are trying to address a different question: whether developmentalism and democracy can be reconciled, even if for a short period of time.

**18** Johnson (1982), *supra* note 10.

**19** R. Mukherji, “Is India a Developmental State?”, in Y. Chu (ed.), *The Asian Developmental State* (New York: Palgrave Macmillan, 2016), pp. 217–236.

**20** D. Levi-Faur, *The Developmental State: Israel, South Korea, and Taiwan Compared*, 33 *Studies in Comparative International Development*, no. 1 (1988), 65–93.

**21** Schneider (1999), *supra* note 7.

**22** A. H. Amsden, *Asia’s Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989).

**23** R. Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 1990); Y. Wu, *Comparative Economic Transformations: Mainland China, Hungary, the Soviet Union and Taiwan* (Stanford: Stanford University Press, 1994).

Johnson's concept of a developmental state not only provided new lenses through which to analyze a wide variety of institutional arrangements in Asia, Latin America and Africa, but also fueled controversies. On the economics side, the controversy revolved around the centrality of the state versus the market in fostering growth in Japan during the period analyzed by Johnson. On one hand, there were those who regarded interventionism as a problem. As one free-market scholar put it, "imagine how much Japan would have grown if the state had not intervened".<sup>24</sup> On the other hand, some associated the economic growth with interventionism.<sup>25</sup> Johnson himself has declared that his book was not trying to make such determination until the editor at Stanford University Press asked him to add a conclusion indicating whether the model was replicable in other countries.<sup>26</sup>

The second controversy sparked by the concept is **whether the developmental state was compatible with democracy. While** one may dispute whether Japan was a democratic or an autocratic society in the period analyzed by Johnson (1925–1975),<sup>27</sup> other cases of developmental states found in Asia and Latin American were operating under the auspices of autocratic regimes.<sup>28</sup> As a result, some authors concluded that one could not be detached from the other. Johnson has denied a necessary connection between the developmental state and authoritarianism, but he **has also acknowledged that the industrial policies promoted by a developmental state are likely to be incompatible with the type of representative democracy that exists in the United States.**<sup>29</sup> The main reason for such incompatibility is the fact that the developmental state needs to have autonomy, discretion and power to mobilize resources and people to a common (and usually a long term) goal in a way that is not feasible in a representative democracy. In the Japanese case, according to Johnson, such capacity was derived from its "soft authoritarianism".<sup>30</sup>

<sup>24</sup> K. Zinsmeister, *MITI Mouse: Japan's Industrial Policy Doesn't Work*, 64 *Policy Review* (1993), 28–35.

<sup>25</sup> See C. Johnson, "The Developmental State: Odyssey of a Concept", in M. Woo-Cumings (ed.), *The Developmental State* (Ithaca, NY: Cornell University Press, 1999), p. 41.

<sup>26</sup> *Ibid.*, p. 48.

<sup>27</sup> Johnson (1999), *supra* note 25, pp. 50–51.

<sup>28</sup> Schneider (1999), *supra* note 4, p. 278.

<sup>29</sup> Johnson (1999), *supra* note 25, p. 48.

<sup>30</sup> Johnson (1982), *supra* note 10. Thanks to this claim, many book reviews have interpreted Johnson's support of the Japanese practices as support to some form of fascist regime that would promote economic growth. See e. g. C. Howe, *Reviewed Work: MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975, by Charlmers Johnson*, 47 *Bulletin of the School of Oriental and African Studies*, no. 1 (1984), 188; Murray Sayle, *Japan Victorious*, 32 *The New York Review of Books*, no. 5 (28 March 1985), 33–40, 39–40.

While autocracies can use force to generate the mobilization required in a functional developmental state, Johnson argues that there are other means of promoting such mobilization. According to him, one of these means is legitimacy. Not the type of legitimacy earned in a competitive electoral process, but the one obtained by uniting the population around one single goal and delivering the results it desires to achieve. Johnson calls this “revolutionary legitimacy” as the population will voluntarily mobilize to support the government, instead of being coerced to do so. But Johnson himself acknowledges that such government cannot be democratic,

if one means by democracy some form of state accountability to representatives of the majority of citizens combined with respect for the rights of minorities (...). The leaders of the developmental state do enjoy legitimacy in the sense that their claim to political power is based on some source of authority above and beyond themselves. They differ in this sense from authoritarian rulers whose continued rule depends on their monopoly of force remaining a genuine monopoly. (...) Legitimacy occurs from the state’s achievements, not from the way it came to power.<sup>31</sup>

In the same way that Johnson’s concept of developmental state suggested a third type of economic system that was neither free-market capitalism nor state controlled socialism, this passage seems to suggest that the developmental state can also be a **third type of polity**. In other words, in the developmental state polity there is political legitimacy (unlike autocratic states) but the accountability is not **ex-ante (through democratic elections or other kinds of checks and balances)**. Instead, the development state relies on **unchecked discretion and insulated technocratic knowledge, in search for ex-post legitimacy, based on outcomes**. The question is whether such polity has ever existed. Johnston argues that Japan between 1945 and 1975 was operating under the revolutionary legitimacy described above, but as he himself acknowledges the issue remains largely unexplored.<sup>32</sup>

The Asian catch-up process seems to provide further empirical evidence associating the **developmental state with autocratic regimes**. The political economy of the Asian developmental states was organized around an authoritarian and **corporatist approach**. These political systems strengthened the state’s capacity to unilaterally define economic policies, and to augment state ability to steer market operations by “(1) **redistributing agricultural land** in the early postwar period; (2) **controlling the financial system** and making private financial capital subordinate to industrial capacity; (3) maintaining stability in some of the main

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<sup>31</sup> Johnson (1999), *supra* note 25, pp. 52–53.

<sup>32</sup> *Ibid.*, pp. 53–54.

economic parameters that affect the viability of long-term investment, especially the exchange rate, the interest rate, and the general price level (...).<sup>33</sup>

These observations are in line with Chalmers Johnson's findings in his study on the Japanese model. In "MITI and the Japanese Miracle", Johnson points out that the government of Japan at the time, though not a dictatorship, was politically shielded in areas related to development. The decisions taken by development agencies such as the Ministry of Industry and International Trade – MITI, were technocratic, and not integrated with political parties. Thus, Japan may have had a democratic system in the parliament, but economic decisions related to development policies were insulated from party politics and the participatory system of democratic representation. As Johnson describes:

Nevertheless, it must be pointed out that the effective operation of the developmental state requires that the bureaucracy directing economic development be protected from all but the most powerful interest groups so that it can set and achieve long-range industrial priorities. A system in which the full range of pressure and interest groups existing in a modern, open society has effective access to the government will surely not achieve economic development, at least under official auspices, whatever other values it may fulfill. The success of the economic bureaucracy in preserving more or less intact its preexisting influence was thus prerequisite to the success of the industrial policies of the 1950's.<sup>34</sup>

This idea of autonomy and **insulation of decision-makers** in the developmental state, as originally formulated by Johnson, was later challenged by Peter Evans in 1995. In his seminal book, *Embedded Autonomy*, Evans unpacks the complexities of state and civil society relations, showing that the developmental state actually forges alliances with certain interest groups to achieve key development goals and to reap political support along the way. This state is not as autonomous or entirely insulated from civil society as Johnson had initially suggested. The autonomy of the developmental state needs to be reconciled and to coexist with proper coordination with key social actors, thus the idea of embeddedness. Along the same **lines, in 1998 Weiss suggested that government interdependence is key to understand the operation of the developmental state.** In this regard, she reminds us that negotiations with business groups and their cooperation in policy implementation is a key element of success for a developmental state.<sup>35</sup>

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33 R. Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (2nd ed., Princeton, NJ: Princeton University Press, 2004), p. 27.

34 Johnson (1982), *supra* note 10, p. 44.

35 L. Weiss, *The Myth of the Powerless State* (Cambridge: Polity Press, 1998).

While Evans and Weiss have challenged the notion that the successful developmental states need to be isolated from direct influences and pressures from civil society, they have not gone as far as to assert that such a state would be fully compatible with a democratic regime. On the contrary, both of them have focused on state-business relations, where a small and economically powerful elite keeps the state in check.<sup>36</sup> The problem is that elites do not necessarily act with the public interest in mind, let alone with a revolutionary mentality. Interestingly, Johnson acknowledged this risk:

There is a powerful argument that can be made against industrial policy (...). The real objection is not to its use as an alternative to or a displacement of market forces but that it is more commonly used to protect vested interests than to achieve national development. The state can structure market incentives to achieve development goals, as the Japanese case clearly illustrates, but it can also structure them to enrich itself and its friends at the expense of consumers, good jobs, and development.<sup>37</sup>

While one can dispute if this selective interaction between state and economic elites is positive or negative, this still does not answer the question about the possible compatibility between the developmental state and a stable representative democracy. Indeed, Evans has been criticized for not considering the political regime in his analysis,<sup>38</sup> and Weiss may be accused of doing the same.

To date, there seems to be very little empirical analysis of the institutional arrangements that characterize a democratic developmental state.<sup>39</sup> Instead, the concept appears in the academic literature as an abstract normative idea or hypothesis. For example, Robison and White have used the notion of embedded autonomy to propose a possible way of structuring a democratic developmental state.<sup>40</sup> Such a state is an autonomous developmental state that adopts an inclusive approach to public policy-making. In this regard, White has coined the concept of ‘inclusive embeddedness’: “the social basis and range of accountability of democratic politicians goes beyond a narrow band of elites to embrace

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**36** Evans has more recently expanded his analysis as to include not only state-business relations, but also other less organized and less powerful social groups. See P. Evans, “What will the Twenty-First-Century Developmental State Look Like? Implications of the Contemporary Developmental Theory for the State’s Role”, in S. Wing-kai Chu and S. Wong (eds.), *Repositioning the Hong Kong Government: Social Foundations and Political Challenges* (Hong Kong: Hong Kong University Press, 2012), p. 39–42.

**37** Chalmers Johnson, “Developmental State: The Odyssey of a Concept”, in Meredith Woo-Cumings (ed.), *The Developmental State* (Ithaca, NY: Cornell University Press, 1999), p. 48.

**38** M. Woo-Cumings, *The Ties that Bind? Autonomy, Embeddedness, and Industrial Development*, 10 *Political Power & Social Theory* (1996), 307–319.

**39** See *supra* notes 8–13 and accompanying text.

**40** Robison and White (eds.) (1998), *supra* note 5.

broader sections of society”.<sup>41</sup> Along the same lines, Evans, in response to criticisms, has argued in favor of a larger societal participation and influence in economic policies defined by the developmental state.<sup>42</sup> This, however, is another normative proposal. Thus, there seems to be consensus that a democratic developmental state should elicit cooperation and consensus from civil society partners. The mechanism may be similar to the one used before with a small business elite, but the difference is that now it involves a larger group, with potentially conflicting interests. In sum, the concept of a democratic developmental state has been explored in the academic literature, but the debate remains, as mentioned, largely theoretical.<sup>43</sup>

The purpose of this paper is to ask if there are any empirical insights that can contribute to what seems to be a very theoretical debate to date. While there are case studies of democratic developmental states, as Manor points out, there are no empirical studies discussing and assessing how developmental states tried to handle development-democracy dualities, such as top-down versus bottom-up initiatives, continuity versus innovation, confidentiality versus transparency.<sup>44</sup> The purpose of this paper is to use a case study to analyze the institutional design of institutions promoting developmental policies, and their interaction with democratic institutions. The question is whether there are institutional arrangements that allow a democratic developmental state to mitigate potential tensions and conflicts between developmentalist goals and democratic principles.

To develop such an investigation, it is necessary to define first what we mean by a democratic regime. As one of us has explored with another co-author

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<sup>41</sup> G. White, “Constructing a Democratic Developmental State”, in M. Robinson and G. White (eds.), *The Democratic Developmental State: Political and Institutional Design* (Oxford: Oxford University Press, 1998), p. 31.

<sup>42</sup> P. Evans, *In Search of 21st Century Developmental State*, paper no.4 given at Centre for Global Political Economy (CGPE), University of Sussex (Brighton, December 2008).

<sup>43</sup> White (1998), *supra* note 41. For theoretical discussions focused on particular regions or countries, see e.g. D. A. Omoweh, *The Feasibility of the Democratic Developmental State in the South* (Dakar: Codesria, 2012); O. Edigheji (ed.), *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges* (Cape Town, South Africa: HSRC, 2010); A. Mohammed, *Democracy, Governance, and Development in Ghana, 1993–2008: Ghana in Search of a Democratic Developmental State* (LAP LAMBERT, 2012). See also O. E. Edigheji, *The State, State-Society Relations and Developing Countries’ Economic Performance*, thesis for the degree of Philosophiae Doctor, Norwegian University of Science and Technology, Trondheim (Norway: NTNU, 2007).

<sup>44</sup> J. Manor, “Democratization and the Developmental State: the Search for Balance”, in M. Robinson and G. White (eds.), *The Democratic Developmental State: Political and Institutional Design* (Oxford: Oxford University Press, 1998), p. 125.

previously, there is no consensus on precisely how to define or measure democracy.<sup>45</sup> While some authors adopt ‘thin’ definitions, focusing on basic and mostly procedural features, others propose ‘thick’ definitions of democracy, which graft a wide range of substantive and procedural elements onto the concept. An example of a thin concept is one that equates democracy with competitive and fair elections. A thick definition would also include other features, such as individual freedoms, a system of checks and balances, protection of the rights of minorities, an independent judiciary, and rule of law.<sup>46</sup> As Manor points out, **most definitions of democracy will go beyond the requirement of free and fair elections, encompassing also mechanisms of checks and balances (the executive branch is controlled by the legislature) and expectations of transparency and accountability (which takes place through the judiciary and other accountability institutions), as well as forms of social participation and control.** The question then is which specific aspects of the democratic regime are in tension with developmental institutions and policies?

In sum, there is a heated theoretical debate about whether the developmental state could operate inside an established democratic regime. While there are hypothetical proposals indicating what this state could or should look like, and a few case studies of examples of democratic developmental states, there is no empirical analysis on how the particular institutional arrangements of a developmental state have been reconciled (or not) with the multitude of institutional features that characterize a democratic regime. Using Brazil as a case study, this is the analysis we develop in the next section.

### 3 Case study: Brazil as a democratic developmental state

The first phase of the developmental state in Brazil was characterized by political authoritarianism and technocratic insulation. It was also a period of high levels of economic growth and structural change: the so-called Brazilian “miracle”, which occurred between 1967 and 1973, boasted growth rates of 10 % per year and was followed by aggressive import substitution industrialization

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<sup>45</sup> Trebilcock and Prado (2014), *supra* note 2.

<sup>46</sup> For an example of a thin definition, see J. Schumpeter, *Capitalism, Socialism, and Democracy* (2nd ed., New York: Harper, 1947), p.269. For an example of a thick definition, see L. Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (New York: Henry Holt, 2008).

policies of the commanding heights of the economic, which were designed to promote industrialization (1974–1985).<sup>47</sup> In addition to an autocratic regime, the country experienced a high level of political centralization starting in 1974, when the Economic Development Council (CDE) became the decision-making body for economic issues, operating without any official mechanisms of dialogue with civil society.<sup>48</sup>

With the end of the military regime, this scenario changed. The Brazilian Constitution of 1988 created a new political order, ensuring not only electoral competition, but also broad civil and political rights. In addition, the Constitution established checks and balances (separation of powers) and accountability mechanisms to control governmental institutions, strengthening the powers for the Public Prosecutors Office (*Ministério Público*)<sup>49</sup> and the Federal Accounting Court (*Tribunal de Contas da União*). Both institutions have been extremely active in imposing constraints on the executive branch.<sup>50</sup> The Constitution also established functional guarantees for the judiciary, such as tenure and financial independence, thus creating institutional conditions for the judiciary to serve as a veto player vis-à-vis government decisions.

From an economic perspective, Brazil adopted a series of liberalization reforms in the 1990, such as privatizing state-owned utility companies, introducing antitrust enforcement, signing TRIPS agreements, and restricting industrial policies. However, the neoliberalism of the 1990s did not fully dismantled Brazil's developmental state structures. On the contrary, important state-owned companies such as the state-owned oil company (*Petrobras*) and Bank of Brazil (*Banco do Brasil*) were not fully privatized. Moreover, the

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<sup>47</sup> Schneider (1999), *supra* note 7, pp. 288–291.

<sup>48</sup> Chaired by the Brazilian President, the CDE was the highest-level authority of the developmental bureaucracy, operating mostly through deliberative meetings, including more than twenty formal meetings per year from 1975 to 1979, in addition to the informal ones. Relevant policy makers such as BNDES, which provided business financing, IBGE (the Brazilian Institute of Geography and Statistics), which produced data and indicators, the National Monetary Council, responsible for monetary regulation, and the Interministerial Committee on Prices, which regulated the relative prices, were directly connected to the CDE. See A. Nervo Codato, *Sistema Estatal e Política Econômica no Brasil pós-64* (São Paulo: Huitec, 1997), pp. 116–123.

<sup>49</sup> E. Carvalho and N. Leitão, *O Novo Desenho Institucional do Ministério Público e o Processo da Judicialização da Política*, 6 *Revista Direito GV* – São Paulo, no. 2 (2010), 399–421.

<sup>50</sup> For instance, the Public Prosecutors Office has challenged 17 out of 20 infrastructure projects in the Amazon region in court. Some of these challenges have forced the government to either cancel or completely redesign the projects. The same has happened with projects overseen by the Federal Accounting Court. See R. Pires and A. Gomide, *Burocracia, Democracia e Políticas Públicas: Arranjos Institucionais de Políticas de Desenvolvimento*, paper for discussion no. 1940 (IPEA, 2014), pp. 35–36.

Brazilian Development Bank (BNDES) maintained its sources of compulsory savings, such as the Worker's Support Fund.<sup>51</sup> Also, privatizations were heavily supported by the State, and BNDES financed a significant portion of the acquisition of state-owned companies by private investors. The state was so close to the private sector that the 1990s reforms have been described as an example of crony capitalism.<sup>52</sup>

The Brazilian developmental state resurfaced in full force in the early 2000s.<sup>53</sup> From 2003 to 2010, Brazil increased state's intervention in the economy by resuming efforts to implement industrial policies and strengthening the role of state-owned companies (e. g. *Petrobras* became a protagonist both in oil exploration and in structuring the oil supply chain).<sup>54</sup> BNDES substantially increased its participation in private companies and the federal government invested heavily in infrastructure through the growth acceleration program (*Programa de Aceleração do Crescimento*), which included the transposition of São Francisco river and the Belo Monte hydroelectric complex.

This second phase of the Brazilian developmental state was, however, very different from the “developmentalism” that took place between the 1967 and the early 1980s. One important difference is the developmental agenda, which was broader and more inclusive than the earlier version with social policies and distributive concerns.<sup>55</sup> Another difference, and one that is especially relevant for this article, is that the new state activism had to maneuver within the confines of the wide range of institutional constraints imposed by the 1988 Constitution described earlier. While there has been interesting research about

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51 The Worker Support Fund (*FAT*) is an unemployment compensation fund that lends money to BNDES. These loans are often below market rates. The Brazilian Federal Constitution earmarks 40% of the Worker Support Fund to BNDES.

52 S. G. Lazzarini et al., *What do Development Banks Do? Evidence from Brazil, 2002–2009*, working paper no.12–047 given at Harvard Business School (8 December 2011). About crony capitalism, see S. Haber (ed.), *Crony Capitalism and Economic Growth in Latin America: Theory and Evidence* (Hoover Press, 2002).

53 G. Arbix and S. Martin, *Beyond the Developmental State, Beyond Neoliberalism: Inclusionary State Activism without Statism*, paper given at the 2010 Workshop “States Development, and Global Governance”, University of Wisconsin-Madison (Wisconsin, 2010), available at: <[http://law.wisc.edu/gls/documents/paper\\_arbix.pdf](http://law.wisc.edu/gls/documents/paper_arbix.pdf)>; D. Trubek, D. R. Coutinho and M. G. Schapiro, “Towards a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions”, in H. Cissé et al. (eds.), *The World Bank Legal Review, Vol. 4: Legal Innovation and Empowerment for Development* (Washington, DC: The World Bank, 2012).

54 *Ibid.*

55 Trubek et al. (2012), *supra* note 53.

the new developmental state policies in Brazil,<sup>56</sup> we still do not know whether and how this state activism has been reconciled and whether it has been adequately coordinated with Brazil's democratic system.

To analyze the relationship between the Brazilian developmental state and the country's democratic institutions, we are adopting a thick definition of democracy.<sup>57</sup> Brazil has successfully reconciled its developmental policies with electoral politics. Indeed, the Brazilian Developmental Bank was directly controlled and closely aligned with the priorities of the directly elected Brazilian president. The social and distributive policies implemented by the federal government during this period of time can be considered a response to electoral demands. Moreover, there were attempts to effectively align regulation of public utility sectors with the policy priorities of the democratically elected president. Thus, there does not seem to be as much to question about the reconciliation of developmentalism and one feature of the democratic system: fair and competitive elections. In contrast, if one considers how developmental policies in Brazil were reconciled with demands for transparency, protection of minority groups, a system of checks and balances, and due process, the picture is more complex. This will be the focus of this section.

To investigate how the developmental state was reconciled with this thicker conception of democracy, this section will explore the institutional reforms and policy changes that have been implemented by the Brazilian developmental state in three areas: i) **development financing**, such as the Brazilian development bank (BNDES), a legacy from the 1950s developmental state; ii) **regulatory agencies for infrastructure sectors**, a legacy from the neoliberal reforms from the 1990s; and iii) social policies, which were consolidated and expanded in Brazil in the 2000s. The first set comprises the Central Bank, the Brazilian Development Bank and the Treasury. The second set comprises the independent regulatory agencies that regulate infrastructure sectors, such as ANATEL (the Regulatory Agency for Telecommunications) and ANEEL (the Regulatory Agency for Electricity). The third focuses on the redistributive policies managed by the Federal administration, especially the conditional cash transfers (*Bolsa Família*). We conclude that many of the tensions indicated in Section 1 of this paper have

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56 L. C. Bresser-Pereira, "From Old to New Developmentalism in Latin America", in J. A. Ocampo and J. Rios (eds.), *The Oxford Handbook of Latin American Economics* (Oxford: Oxford University Press, 2011); E. Diniz, *É Possível um Novo Modelo do Estado Desenvolvimentista no Brasil?*, 2 IPEA – Boletim de Análise Político-Institucional, no.2 (2012), 17–21; R. Boschi, *Estado Desenvolvimentista no Brasil: continuidades e incertidumbres*, 2 Ponto de Vista, (2010), 1–34.

57 See *supra* note 51 and accompanying text.

materialized in the Brazilian case, but the intensity and form has varied from sector to sector.

### 3.1 The case of BNDES

The developmental state relies on state-owned, especially development banks to spur local capitalism.<sup>58</sup> The World Bank indicates that despite the massive privatization that took place in greater part of the world in the last 30 years, state-owned banks continue to play a key role in domestic financial systems.<sup>59</sup> They represent 25% of assets in the banking sector globally, and they are even more significant in countries described as coordinated and hierarchical market economies, as opposed to those characterized by liberal market economies.<sup>60</sup>

Brazil is an example of this trend. BNDES is the second most important source of corporate financing in the Brazilian financial system, second only to the self-financing of companies. In 2014, the Bank accounted for 15% of the financing of business investment (gross fixed capital formation).<sup>61</sup> Between 2001 and 2010, represented on average 26% of all corporate financing to industry and infrastructure.<sup>62</sup> The contrast with the Chinese economy shows the significance of these numbers. The volume of credit held by Chinese Development Bank represents 12.4% of Chinese GDP and is equivalent to 8.0% of total credit available in that economy, while BNDES' credit represents 11% of Brazilian GDP, but corresponds to 21% of the credit available in the financial system.<sup>63</sup> Table 2 illustrates the importance of BNDES in the Brazilian economy.<sup>64</sup>

58 A. H. Amsden, *The Rise of the Rest: Challenges to the West from Late-Industrializing Economies* (New York: Oxford University Press, 2001).

59 J. Luna-Martinez and C. Vicente, *Global Survey of Developmental Banks*, Policy Research Working Paper no. 5.969 (Washington, DC: The World Bank, 2012), p. 2.

60 The distinction between liberal and coordinated market economies is established by P. A. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001). The concept of hierarchical capitalism is developed by B. R. Schneider, *Hierarchical Capitalism in Latin America: Business, Labor, and the Challenges of Equitable Development* (New York: Oxford University Press, 2013).

61 L. Coutinho, *Organização e Desempenho*, presentation given at the Comissão de Assuntos Econômicos, Comissão de Serviços de Infraestrutura, Senado Federal (Brasília, 14 April 2015), available at: <[http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes\\_pt/Galerias/Arquivos/empresa/download/apresentacoes/Coutinho\\_CAE\\_14\\_04\\_2015.pdf](http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/empresa/download/apresentacoes/Coutinho_CAE_14_04_2015.pdf)>, accessed 20 April 2015.

62 J. Ferraz, A. Alem, and R. Madeira, *Contribuição dos Bancos de Desenvolvimento para o Financiamento de Longo Prazo*, 40 Revista do BNDES (2013), 5–42, 32.

63 *Ibid.*

64 L. Coutinho, *Investimento, Financiamento, e o BNDES*, presentation given at BNDES (27 August 2013), available at: <<http://www.bndes.gov.br/SiteBNDES/export/sites/default/>

**Table 2:** Sources of corporate financing in industrial and infrastructure sectors in Brazil.

Year	Retained earnings (%)	BNDES (%)	External sources (%)	Equity (%)	Bonds (%)
Average 2001–2010	45	26	14	6	9
2011	48	27	7	1	17
2012	43	25	12	2	18
2013	44	25	11	1	18

Source: BNDES.

State-owned banks are not well regarded in the academic literature. Qualitative analysis points towards numerous unsuccessful cases, where state-owned banks suffered from a large set of broader institutional malaises from corruption to soft budgeting.<sup>65</sup> Often these cases emphasize that these financial institutions have to circumvent broader governance failures and institutional weaknesses that might compromise their economic performance. Along the same lines, quantitative studies suggest that the government involvement in the financial sector usually provokes more setbacks than good results.<sup>66</sup> This conclusion is particularly true when the government not only exercises regulatory influence, but also is the owner of the banks. BNDES, however, seems to be an exception to the rule.

Unlike other state-owned banks, BNDES presents good economic results. It has been able to insulate itself from corruption and it is a relevant source of resources to Federal Government.<sup>67</sup> Its performance indicators fare well not only in comparison with other development banks, but even with national private banks (see Table 3 *infra*). BNDES' results are positive on profitability, return on assets and return on equity. Moreover, it seems like a very efficient bank: despite

[bndes\\_pt/Galerias/Arquivos/empresa/download/apresentacoes/Coutinho\\_CAE\\_270813.pdf](#), accessed 20 April 2015.

<sup>65</sup> See G. Caprio et al. (eds.), *The Future of State-Owned Financial Institutions* (Washington, DC: Brookings Institution, 2004).

<sup>66</sup> R. La Porta, F. Lopez-de-Silanes, and A. Shleifer, *Government Ownership of Banks*, 57 *The Journal of Finance*, no. 1 (2002), 265–301. R. La Porta et al., *Law and Finance*, 106 *Journal of Political Economy*, no. 6 (1998), 1113–1155. R. La Porta et al., *Legal Determinants of External Finance*, 52 *The Journal of Finance*, no. 3 (1997), 1131–1150; R. La Porta et al., *Investor Protection and Corporate Governance*, 58 *Journal of Financial Economics*, no. 1–2 (2000), 3–27.

<sup>67</sup> In 2011, 2012, and 2013, BNDES paid to the Treasury respectively 57%, 56% and 47% of dividends on its net income. See *Auditoria do Balanço Geral da União* (TCU. Brasil. 2013),

**Table 3:** Performance indicators of Brazilian and International Development Banks.

z	BNDES	BB	Itau	Bradesco	World Bank	BID	KfW (Germany)	BDC (China)
ROE (%) (Return on equity)	13.5	16.3	19.4	19.8	-2.5	2.3	4.6	16.7
ROA (%) (Return on assets)	1.0	0.9	1.7	1.8	-0.3	0.5	0.2	1.1
Employees	2.881	111.628	93.175	95.520	12.335	2.000	4.383	8.732

Source: BNDESNote: *Apresentação Institucional: Área Financeira* (BNDES, 2015), available at: <[http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes\\_pt/Galerias/Arquivos/empresa/download/AF\\_DEPCO\\_Portugues.pdf](http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/empresa/download/AF_DEPCO_Portugues.pdf)>

having less than three thousand employees it disbursed around three times the amount disbursed by the World Bank, approaching US\$ 60 billion in 2013.<sup>68</sup> As a result, it became the most important regional bank in Latin America, surpassing the Inter-American Development Bank.<sup>69</sup>

This is not to say that BNDES has not been criticized. Free-market economists believe that BNDES crowds out private banking, distorting what would otherwise be a functional private sector.<sup>70</sup> Development scholars argue that the bank does not boost new comparative advantages, as it should.<sup>71</sup> Non-governmental organizations denounce the exclusive nature of public financing, which benefit only a few, and also question the non-environmentally friendly policies adopted by the bank.<sup>72</sup>

Moreover, and particularly relevant for this paper, some argue that BNDES' impressive results have been reached at the expense of greater accountability. While BNDES has increased in importance since the early 2000s, it has been

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available at: <[http://portal.tcu.gov.br/tcu/paginas/contas\\_governo/contas\\_2013/fichas/3.3?%20Receita%20de%20Dividendos%20\(ficha%203\).pdf](http://portal.tcu.gov.br/tcu/paginas/contas_governo/contas_2013/fichas/3.3?%20Receita%20de%20Dividendos%20(ficha%203).pdf)>.

68 This value considers the exchange rate as US\$ 1.00 to R\$ 3.00.

69 Lazzarini et al. (2011), *supra* note 52.

70 *Ibid.*

71 M. Almeida, *Desafios da Real Política Industrial Brasileira do Século XXI*, paper for discussion no. 1452 given at Instituto de Pesquisa Econômica Aplicada (IPEA, 2009), available at: <[http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=4988?%3Atd-1452-desafios-da-real-politica-industrial-brasileira-do-seculo-xxi&catid=272?%3A2009&directory=1&Itemid=1](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=4988?%3Atd-1452-desafios-da-real-politica-industrial-brasileira-do-seculo-xxi&catid=272?%3A2009&directory=1&Itemid=1)>.

72 *O BNDES e sua Política Socioambiental: uma crítica sob a perspectiva da sociedade civil organizada* (São Paulo. ONG Repórter Brasil, 2011), available at: <[http://reporterbrasil.org.br/documentos/BNDES\\_Relatorio\\_CMA\\_ReporteBrasil\\_2011.pdf](http://reporterbrasil.org.br/documentos/BNDES_Relatorio_CMA_ReporteBrasil_2011.pdf)>.

forced to operate in a very different political environment than the one that existed when the Bank was created in 1952. At the time, Brazil had a democratic system, but with much less inclusion than today. For instance, the democratic regime in place from 1946 to 1964, did not allow the illiterate to vote, which excluded much of the adult population.<sup>73</sup> Moreover, the civil society was poorly organized and the Public Prosecutors' Office's powers were restricted to criminal prosecution. All this changed significantly with the 1988 Constitution.

While the broader political and institutional environment surrounding BNDES has changed, the bank's internal structures have not. Since its inception, the Executive branch defines BNDES' agenda through non-statutory mechanisms, of which the most important is the political nomination of bank's managers. This institutional arrangement intentionally insulates BNDES from democratic politics as it is accountable only to the executive branch, and more specifically to the President. Congress does not deliberate on the Bank's funding, which remains off budget to this day. The following passage is a good summary of the BNDES insulation:

While the Bank does consult with the legislative branch, offering bi-annual reports and appearing before congressional committees, there are few formalized mechanisms through which a legislator can exert influence or impose accountability. Congress cannot wield the "power of the purse" and threaten to withhold funding until a certain issue is addressed. The executive normally has to explain to Congress the purpose for which requested funds are used, but this is not true in the case of the BNDES. The executive can transfer money from the National Treasury to the BNDES without explanation or external review. The business community, despite being the Bank's largest client base, also possesses no legitimate channel in which it can influence Bank policy. An official representative of the business community does not sit on the *Diretoria*, nor do they have access to a meaningful lever of power.<sup>74</sup>

Not surprisingly, there have been increasing complains regarding the lack of transparency and political insulation of BNDES since the early 2000s. For instance, one NGO called Platform BNDES is demanding the right to scrutinize the lending policies and practices of the bank.<sup>75</sup> The NGO succeeded, in part, in forcing the bank to disclose data. Until 2006, there was no information available about the value of contracts and their beneficiaries. Initially, BNDES resisted,

<sup>73</sup> Schneider (1999), *supra* note 7, pp. 288–291

<sup>74</sup> S. Colby, *Searching for Industrial Policy Solutions Searching for institutional solutions to industrial policy challenges: A case study of the Brazilian development bank*, doctoral thesis, The Johns Hopkins University (2013), pp. 81–82.

<sup>75</sup> P. Spink, *The Art of Getting in the Way: Five Years of the BNDES Platform*, study paper no. 13, International Budget Partnership (2013), available at: <<http://internationalbudget.org/wp-content/uploads/BNDES-Platform-Full-study.pdf>>.

arguing that privacy protection clauses in banking regulations justified non-disclosure. However, in 2008 BNDES started disclosing financial information related to its 50 biggest projects. The information was related to the amounts disbursed, the objectives of financial operations and their value.<sup>76</sup> Between 2008 and 2015, BNDES made more information about other projects available, and the database was no longer limited to the 50 biggest projects. From 2015 onwards, it has amplified the amount of data released per operation. Nowadays, besides the value, the client and purposes, it includes the interest rates and consequently the subsidies embedded in each agreement. The only area that remains non-transparent is the agenda setting process, which is still defined inside the Executive cabinet of BNDES.

In the same vein, another NGO, Conectas Human Rights, presented in 2014 a detailed report on the limited participation of civil society in BNDES' governance structures.<sup>77</sup> The report points out the non-involvement of social groups in the definition of the bank's policy objectives. The general guidelines that orient BNDES lending priorities, such as its operational policies, are not subject to any kind of social control. Also, there is no provision demanding public hearings in connection with policy-lending. As a result, affected groups face severe restrictions to any opposition to development projects financed by the Bank that affect them.<sup>78</sup> This is a specially pressing issue in the infrastructure sector, to the extent that several governmental projects might generate significant social costs, such as relocating entire communities for the construction of a hydroelectric dam.

This deficiency in providing better mechanisms of social control contrasts with other development banks. The World Bank, the Asian Development Bank and the Inter-American Development Bank, for example, established internal governance structures to avoid human rights violations and minimize or mitigate the damage caused to local communities by their projects.<sup>79</sup> In many of BNDES projects, it is the Public Prosecutors' Office that has been giving voice to these groups by presenting judicial challenges to these projects.<sup>80</sup> Even though BNDES might be accountable to courts, while those international banks might not, there is a question about whether individual judicial challenges is the most effective way to make it accountable to Brazilian society.

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Development for the People? BNDES Financing and Human Rights* (São Paulo. Conectas. 2014), pp. 53–70.

<sup>78</sup> *Ibid.*, p. 86.

<sup>79</sup> J. A. Fox and L. D. Brown, *The Struggle for Accountability: the World Bank, NGOs, and grassroots movements* (Cambridge, MA: MIT Press, 1998).

<sup>80</sup> *Development for the People? BNDES Financing and Human Rights* (2014), *supra* note 79, p. 25–28.

The problems faced by BNDES are not unique. In recent years, a significant number of developing countries have experienced a transition from authoritarian regimes to democratic ones. In the majority of these cases, this transition has produced a peculiar political economy environment in which the recent implemented political democracy have to cohabit with long-standing economic apparatus inherited from the developmental period.<sup>81</sup> Thus, the contemporary challenge of some state-owned financial institutions is twofold. At same time that they are expected to perform efficiently, they are also asked to subject themselves to social control and to embrace a more inclusive agenda. It is a non-trivial task to constitute an autonomous and highly competent technocracy, while making it also politically accountable and socially responsible.

In the case of BNDES, as stated earlier, there was alignment between the Presidential policy preferences and the BNDES priorities. Thus, electoral accountability was not in tension with the BNDES policies and practices. The lack of consultation with groups (often minorities) affected by large scale infrastructure projects has prompted the public prosecutors' office to intervene on behalf of these groups, asking courts to issue injunctions that stalled projects. This is an example on how individual rights, and protection of minorities can be in tension with developmental projects. Moreover, to use Manor's terminology, the duality confidentiality versus transparency is particularly acute in the BNDES case. The demands for greater transparency are in direct tension with the bank's prerogative to keep strategic information confidential.<sup>82</sup> As described earlier, the developmental state derives its legitimacy from results, not from processes. Thus, the idea that the bank needs to justify and explain its plans before implementing them seems to be, to some degree, in tension with the traditional *modus operandi* of the developmental state.

Therefore, BNDES may be responsive to the electoral cycle by its direct connection with the executive branch. However, it operates in tension with a thick concept of democracy: the pursuit of economic growth is achieved at the expense of procedural legitimacy, as political voices, either from the Congress or from the civil society, are not heard in the process.

### 3.2 Infrastructure and regulation of public utility services

While the previous section explored the tensions between an old institutional structure of the Brazilian Developmental State, the BNDES, and the new political

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<sup>81</sup> *Ibid.*, p.90–92.

<sup>82</sup> In some cases, BNDES has responded to these demands by arguing that disclosing certain types of information would violate bank secrecy and the privacy of its clients.

environment in Brazil, this section turns to a more recent institutional context. Independent regulatory agencies (IRAs) related to infrastructure sectors were implemented in the mid 1990s, as part of a package of neoliberal reforms to promote development under the Washington Consensus. In conjunction with a massive privatization process, the government created these IRAs to foster an economic environment attractive to private investors in sectors as varied as electricity, telecommunications, water and transportation. Designed to be insulated from electoral politics, thanks to staggered and fixed terms of office for commissioners, financial autonomy, and collegial decisions,<sup>83</sup> the IRAs ultimately curtailed common practices that supported the Brazilian Developmental state in the 1960s and 1970s. One of these practices was direct political intervention in infrastructure sectors. In such interventions, the regulatory framework was often used to tackle economic concerns that were not necessarily related to the sector (e. g. reducing the price of electricity, oil and telecommunication tariffs to control inflation).<sup>84</sup>

How did the New Developmental State in Brazil interact with these neoliberal institutions? Empirical data shows that the IRAs went through important transformations after 2003. More specifically, operational and financial guarantees of independence have been weakened thus allowing for increased presidential influence over regulatory agencies. While most of the literature does not explicitly link these transformations to the rise of the Developmental State,<sup>85</sup> this section assumes that the two were connected. Most importantly, we argue that the New Developmental State in Brazil has reversed many of the neoliberal reforms implemented in the 1990s without using regular democratic channels, and thus these changes in the IRAs were insulated from any form of accountability.

Three mechanisms were used by the Brazilian President to reduce the independence of regulatory agencies. First, the President has reduced the amount allocated to IRAs by Congress via executive decrees. This undermined IRAs' financial autonomy, which was guaranteed by alternative sources of

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**83** For more details about these reforms, see M. M. Prado, *The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil*, 41 *Vanderbilt Journal of Transnational Law*, no. 2 (2008), 435–503.

**84** *Ibid.*

**85** An important exception is F. de Sa e Silva and D. M. Trubek, *Lawyering in New Developmentalism: Legal Professionals and the Construction of the Telecom Sector in the Emerging Brazil (1980s-2010s)*, University of Wisconsin Legal Studies Research Paper no. 1371 (Wisconsin, 21 December 2015), Portuguese version: *Advogando no novo Desenvolvimento: profissionais do direito e a construção do sector de telecomunicações no Brasil emergente (dos anos 1980 aos anos 2010)*, 3 *Revista de Estudos Empíricos em Direito*, no. 2 (2016), 14–52.

funding, which were not part of the Executive fiscal accounts (and thus outside of Presidential control). Data from 1997 to 2008 show that the reductions were consistent and pervasive, and were mostly implemented through executive decrees (the *Reserva de Contingência*), although they varied from agency to agency (Table 4).

**Table 4:** Budget withholding (Contingenciamento) of the Brazilian IRAs (1997–2008).

Agency	N	Minimum (% of budget)	Maximum (% of budget)	Mean	Stand dev
ANA (Water)	8	2.94	17.31	12.45	5.42
ANAC (Aviation)	2	11.15	16.09	13.62	3.49
ANATEL (Telecommunications)	11	0.81	3.52	2.27	0.86
ANCINE (Cinema)	5	29.88	44.18	36.61	5.39
ANEEL (Electricity)	11	0.93	20.53	8.07	6.40
ANP (Oil & Gas)	11	1.69	3.67	2.42	0.63
ANS (Health Care)	9	3.46	24.29	9.18	6.38
ANTAQ (Water Transportation)	7	21.33	61.11	41.73	15.61
ANTT (Ground Transportation)	7	11.01	16.93	13.57	2.19
ANVISA (Health & Safety Inspections)	10	1.71	4.01	2.73	0.80

Source: Batista da Silva (2011, 57).

As Silva explains: “[T]he figures shown represent the portion of the budget that is withheld, considering the size of the agency’s initial budget. The agency most affected by this practice is ANTAQ [Regulatory Agency for Water Transportation], where the average *contingenciamento* is 41.73. Conversely, the agency least affected in ANATEL [Regulatory Agency for Telecommunications], with an average *contingenciamento* of 2.27”.<sup>86</sup>

Second, the President controlled IRAs’ commissioners through resignations. Over 1997 and 2008 out of 152 directors, 25 resigned before the end of the mandate.<sup>87</sup> The number of resignations is relatively high (16%), and at least

<sup>86</sup> M. Batista da Silva, *Independence after Delegation? Presidential Calculus and Political Interference in Brazilian Regulatory Agencies*, 5 *Brazilian Political Science Review*, no. 2 (2011), 39–74.

<sup>87</sup> *Ibid.*, 54.

some seem related to Presidential attempts to directly influence the agency.<sup>88</sup> This suggests that “[a]lthough an important guarantee of independence, the lack of removal power by the President may be ineffective. The President can still find ways to “convince” commissioners to resign”.<sup>89</sup>

Third, these resignations were combined with vacancies, which occur when an opening in one of the seats at the board of the IRA (due to a resignation or the end of a fixed term) is not occupied by a new commissioner, remaining vacant. Such vacancies can negatively affect the operation of regulatory agencies by (i) increasing the workload for each commissioner, what may either create delays or reduce the time available for deliberations; (ii) reducing the diversity of points of view; and in some cases (iii) depriving the agency from the minimum decision quorum required by law, what may imply that the agency is fully paralyzed by not having the minimum number of commissioners required by law. Data from 1997 to 2008 show that the numbers of vacancies in Brazilian IRAs have been significant (Table 5):

**Table 5:** Vacancy on the board of the Brazilian regulatory agencies by days (1997–2008).

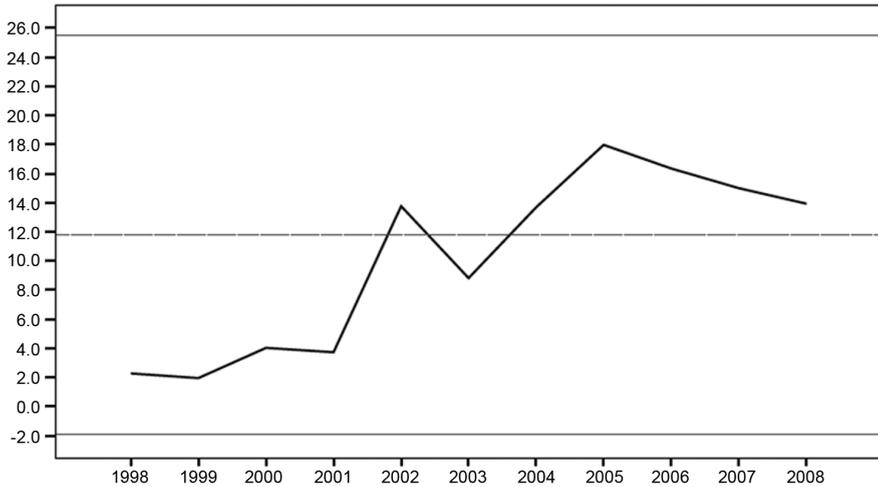
Agency	N	Minimum (days)	Maximum (days)	Mean	Stand dev
ANA (Water)	9	0	324	61.11	106.753
ANAC (Aviation)	3	0	116	47.00	61.049
ANATEL (Telecommunications)	12	0	365	128.33	134.660
ANCINE (Cinema)	6	76	365	214.83	130.824
ANEEL (Electricity)	12	0	226	52.08	90.767
ANP (Oil & Gas)	11	0	365	202.82	167.398
ANS (Health Care)	10	0	273	110.20	106.208
ANTAQ (Water Transportation)	8	0	317	136.50	149.500
ANTT (Ground Transportation)	8	0	352	92.88	140.030
ANVISA (Health & Safety Inspections)	10	0	300	121.90	110.308

Source: Batista da Silva (2011, 55).

<sup>88</sup> For instance, the chairman of the telecommunications agency (Luiz Guilherme Schymura) resigned in January 2004, after a series of conflicts with President Lula, Prado (2008), *supra* note 83, 474.

<sup>89</sup> *Ibid.*, 470.

While these trends have started at least 5 years before the rise of the New Developmental state in Brazil (around 2003), the graphs below show that the use of these mechanisms significantly increased after 2003 (Figures 1 and 2).<sup>90</sup>



**Figure 1:** Evolution of annual budgetary *contingenciamento* (withholding of budgetary appropriations as a percentage of agencies total budget as approved by Congress).

Based on a calculation that combines a series of variables, Silva concludes that the overall level of presidential influence on Brazilian IRAs has significantly increased since 2003 (Figure 3).

While reducing the level of independence of regulatory agencies in Brazil, these three mechanisms were not subject to any kind of democratic control or any other form of accountability.

The contrast with the government's first attempt to formally reduce the independence of IRAs is clear. In 2003, the government announced their intention to enhance formal ministerial control over the agencies and established an interministerial working group to discuss the governance of regulatory agencies. As a result of the report produced by this working group,<sup>91</sup> a bill was sent to Congress in 2004 (PL 3,337/2004), which became known as the "general law of regulatory agencies". The bill proposed a series of changes in the powers and governance structure of regulatory agencies, creating a unified regulatory

<sup>90</sup> Silva (2011), *supra* note 86.

<sup>91</sup> *Análise e Avaliação do Papel das Agências Reguladoras no Atual Arranjo Institucional Brasileiro* (Relatório do Grupo de Trabalho Interministerial – Presidência da República. 2003).

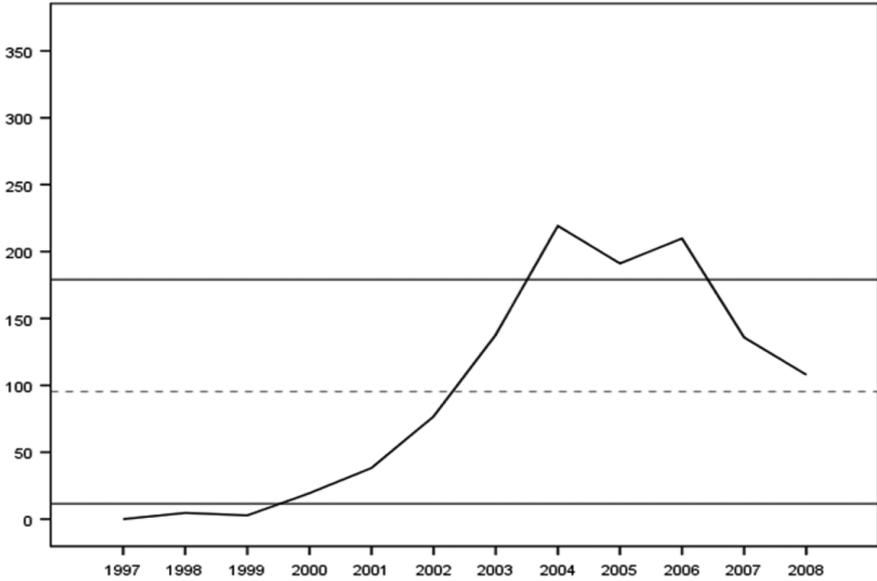


Figure 2: Annual vacancies in Brazilian Regulatory Agencies (in days).

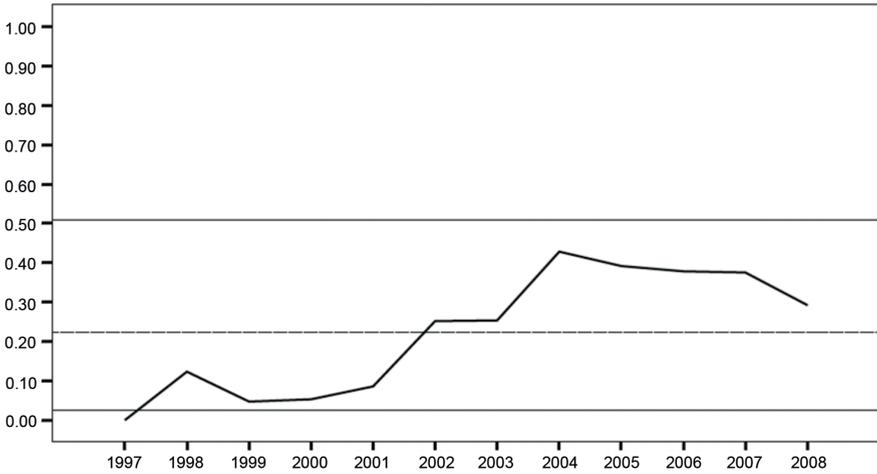


Figure 3: Overall level of presidential influence on Brazilian Regulatory Agencies.

Note: This table reflects an index of independence, based on three variables: turnover (number of directors who handed over their seat before the end of their terms); vacancy (number of days that the agency has operated without at least one of its directors); and *contingenciamento* (portion of the budget retained by the government). All these variables were normalized to be added to the index. Silva (2011, 58–59).

framework for Brazilian IRAs. Among the changes proposed, two are specially relevant: the possibility of reappointing commissioners, and a contract between the sectorial ministries and the IRAs to define regulatory goals, the failure of which would lead to sanctions, including budgetary cuts.

After significant criticism, both these provisions (reappointment of commissioners and contracts with sanctions that included budgetary cuts) were removed from the bill. The term “contract” was replaced by the term “plan”, and this negotiated plan would not have sanctions attached to it. In other words, the specific reforms in the second version of the bill, which was submitted to Congress, were not as intrusive as the first ones. Some have interpreted this as a result of the President’s doubts about how to best deal with IRAs,<sup>92</sup> but one cannot safely discard the hypothesis that the bill effectively amounted to efforts to impose President control over infrastructure sectors.<sup>93</sup> Indeed, even in its softer version, the bill never became law because it faced resistance from the regulatory agencies themselves, their association (Brazilian Association of Regulatory Agencies, ABAR) and the association of companies directly or indirectly operating in regulated sectors (ADBID).<sup>94</sup> The bill could be, in practical terms, interpreted as a failed attempt return to a model of state intervention that was dismantled by the neoliberal reforms of the 1990s.

Interestingly, shortly after the failure of this bill, the use of the mechanisms described earlier significantly increased. Thus, the budgetary cuts, resignations and the vacancies described earlier could be interpreted as strategies designed to allow for the operation of the New Developmental State in infrastructure sectors. Indeed, both Lula and Dilma’s presidencies were characterized by

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<sup>92</sup> There is a lot of uncertainty as to President’s Lula preferences vis-à-vis IRAs. A detailed analysis of newspaper articles regarding the relationship between Lula and the regulatory agencies in 2003 and 2004 shows that month by month the preferences of the President seem to change. They oscillate between the more radical discourse against regulatory independence and the regulatory state and a more moderate discourse of reconciling some of his policy preferences with the existence (and added value) of regulatory agencies. E. Nunes et al., *Agências Reguladoras e Reforma do Estado no Brasil: Inovação e Continuidade no Sistema Político-Institucional* (Rio de Janeiro: Editora Garamond, 2007), pp. 258–262.

<sup>93</sup> M. P. Veríssimo, *Comentários aos anteprojetos de lei sobre agências reguladoras*, 2 *Revista de Direito Público da Economia*, Belo Horizonte, no. 6 (2004), 27–41, available at: <<http://bdjur.stj.jus.br/dspace/handle/2011/28799>>; M. M. Prado, *O contrato e o plano de gestão no projeto de Lei n. 3.337/04: controle desejável e justificado ou influência política indevida?*, 6 *Revista de Direito Público da Economia*, no. 22 (2008), 115–139. But see Silva (2011), *supra* note 86, 64, interpreting this bill as a compromise (“Lula went from a position contrary to the model to a position of recognizing their role, but defending reformulations such as those seen in the project of the ‘general law of regulatory agencies’”).

<sup>94</sup> Silva (2011), *supra* note 86, 58.

greater state intervention in the telecommunications sector, designed to align sectoral regulation with the government's industrial and social policies.<sup>95</sup> Some of this intervention was implemented through executive decrees that operated in tension with the existing legislation, such as the ones creating Broadband Internet policies for public schools and residences. Such decrees effectively changed the regulatory governance of the telecommunications system: "strict rules and limited state regulation on businesses, while never completely implemented in the sector, gave way to open-ended bargaining across the state-market divide as government seeks to engage private parties in attempts to meet developmental goals in industrialization, social welfare, and democratic participation."<sup>96</sup> Having IRAs that were not very independent may have facilitated the implementation of these policies. In other words, there seems to be reasons to believe that much of the President's resistance to the original design and the role performed by independent regulators may have been informed by substantive concerns about the executive branch's ability to perform strategic interventions in the Brazilian economy.

The problem is that changes related to the governance structure of regulatory agencies were implemented despite the fact that Congress did not approve an official proposal for reform. After the failed attempt to have these changes approved through regular legislative channels (a bill), the executive branch adopted informal and *ad hoc* policies and practices in connection with increased state activism. While these acts may have been substantively guided by legitimate concerns with the best form of state intervention in the economy (including distributive concerns) and may not have been illegal from a procedural perspective, they were certainly in tension with Brazil's system of checks and balances.

The tension here, to use Manor's terminology, is between innovation and continuity. Democracies are not design for fast paced, innovative change. On the contrary, a system of checks and balances slows down policy and institutional change and sometimes blocks it. These democratic mechanisms are therefore in tension with fast paced innovation required to implement some developmental policies. In this particular case, Congress has prevented the Brazilian president from tinkering with the institutional design of regulatory agencies to allow them to be more closely aligned with Presidential policy preferences. This has not stopped the President for implementing some of these measures, but these changes were not subjected to any form of democratic control.

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<sup>95</sup> See *supra* note 83.

<sup>96</sup> de Sa e Silva and Trubek (2015), *supra* note 85, 52 (for a detailed analysis of this tension).

### 3.3 Social policies

Historically, social protection for vulnerable groups of informal workers in Brazil was mostly philanthropic, predominantly managed by private institutions with some public funding. These policies were often confused with charity and because of that, social assistance was primarily considered an incidental and secondary social policy of the Brazilian government. In many administrations, this task was managed directly or indirectly by first ladies – wives of presidents, governors and mayors.<sup>97</sup> Since its return to democracy, Brazil has been slowly changing this trend, making social protection official state policy and incrementally building its welfare state. The 1988 Constitution established economic and social rights and outlined a new legal and institutional framework for social policies. The new constitution created and defined, *inter alia*, the building blocks of the new social assistance system, still not fully institutionalized.

In the 1990s the policies set out in the constitution began to be implemented. This enabled certain social and economic rights to gradually acquire a greater degree of effectiveness. New institutions, entities and agencies of social policy began to coexist with former political organizations, rules and habits and, in parallel with the construction of a framework of social assistance. Our analysis will focus in particular in the *Bolsa Família* Program (BFP), a social assistance policy – a conditional cash transfer – that was structured and consolidated at the federal level in 2003.

The objectives of the BFP are to fight hunger and encourage food and nutritional safety, promote access of poor families to public services (particularly health care, education and social assistance), and combat poverty and inequality. Concretely speaking, the BFP consists of a conditional cash transfer policy. To be eligible, families must have a monthly per capita income ranging from around US\$ 35 to US\$ 70. To actually receive these cash transfers, the

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<sup>97</sup> See J. C. Cardoso Júnior and L. Jaccoud, “Políticas sociais no Brasil: “Organização, Abrangência e Tensões da Ação Estatal”, in Luciana Jaccoud (Org.), *Questão social e políticas sociais no Brasil contemporâneo* (Brasília: IPEA, 2005). On the advances in the social assistance agenda, see L. Jaccoud, P. Hadjab and J. R. Chaibub, *Assistência social e segurança alimentar: entre novas trajetórias, velhas agendas e recentes desafios (1988–2008)*, 17 Políticas sociais: acompanhamento e análise. (Vinte anos da Constituição Federal), no. 1 (2009), 175–250. On the history of social policy in Brazil, see S. M. Draibe, *Uma nova institucionalidade das políticas públicas? reflexões a propósito da experiência latino-americana recente de reformas dos programas sociais*, 11 São Paulo em perspectiva, no. 4 (1997), 3–17; S. M. Draibe, “Brasil: Bolsa Escola y Bolsa Família”, in E. Cohen and R. Franco (Coords.), *Transferencias con corresponsabilidad: Una mirada latino-americana* (México: SEDESOL, 2006); and E. Fagnani, *Política social no governo Lula (2003–2010): perspectiva histórica*. 192 Texto para Discussão – UNICAMP (2011), 1–29.

eligible families must meet some conditionalities, such as sending their kids to school and for regular health check ups. In less than ten years, the BFP has become the largest program of its kind, with 45 million beneficiaries (more than 15 million families – about one in four Brazilian families).<sup>98</sup>

Along with actual increases in the minimum wage, rural pensions, monetary stability and the BPC (*Benefício de Prestação Continuada*, a monthly stipend paid to the elderly and people with disabilities), the BFP has been considered one of the catalysts of the reduced income inequality in Brazil from the early 2000s until recently. From 2001 until 2008 both poverty and income inequality, measured by the Gini coefficient, have been decreasing at an unprecedented pace in Brazil.<sup>99</sup> In 2011, the Gini coefficient was 0.59. Then it dropped steadily, reaching 0.55 in 2008. Over this period, the income of the 10 % of the poorest individuals rose six times faster than the income of the 10 % of the richest ones.<sup>100</sup> In 2009, the Brazilian Gini, one of the highest in the world in the late 1980s,<sup>101</sup> declined to 0.54. Over the same period, the economy grew, on average, as little as 3.3 % per year. According to data from 2012, Brazil has witnessed a downward trend in income inequality since 2001. In addition to BFP, other factors associated with this decline in inequality include increases of minimal wages (above inflation), increased spending on education, investments in technical and professional training, accessibility to microcredit programs, and changes in social security mechanisms.<sup>102</sup>

**98** See Sergei Soares, *Bolsa Família: A Summary of Its Impacts*. 137 International Policy Centre for Inclusive Growth *One Pager*, (2012), 1.

**99** To measure income distribution and inequality in Brazil, two indicators are used: the Gini index, which measures the individual distribution of income, and the share of labor income in the Gross Domestic Product (GDP), which measures the functional (or global) distribution of income. In the Brazilian case, the Gini index is based on the PNAD (National Household Sample Survey), from the Brazilian Institute of Geography and Statistics (IBGE). As almost all of the income declared in the PNAD corresponds to labor incomes and public transfers, it should be noted that the inequality measured by the Gini is not entirely adequate to reveal the distribution of income among workers on the one hand, and company owners, bankers, landlords, owners of rental properties and owners of public and private bonds, on the other hand. Cf. D. R. Coutinho, “Decentralization and Coordination in Social Law and Policy: The Bolsa Família Program”, in D. M. Trubek et al. (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (New York: Cambridge University Press, 2013).

**100** See Serguei Soares, *O ritmo da queda da desigualdade no Brasil é aceitável?*, 30 *Revista de Economia Política*, no. 3 (2010), 364–380, 375.

**101** The Brazilian Gini coefficient peaked at 0.63 in 1989. See <http://www.indexmundi.com/facts/brazil/gini-index> (last accessed on 19 November 2013).

**102** According to recent data from the National Household Sample Survey (PNAD) of 2012, since 2001 we have witnessed a downward trend in income inequality. In January 2012, the Gini coefficient reached 0.519. To Neri, “labor income accounted for 66.86 % of the decline in

Along with the reduction in inequality, there has been some qualitative progress in terms of state capabilities to forge social policies for development. As of 1988, the social assistance agenda – traditionally associated with clientelism, philanthropy and charity – has fostered a set of institutional changes related to decentralization, intersectoral coordination, participation and social control. The ministries of poverty fighting, education and health, for instance, created interaction and coordination procedures to implement BFP, and also established managerial processes through which federal initiatives could reach the local level (Brazil has more than 5,500 municipalities), in charge of identifying and selecting the eligible population to enroll BFP. Social instances of popular participation and social control have been boosted in the social assistance field and recent efforts have tried to expand their role so as to include BFP beneficiaries.

However, in concrete and real terms, the BFP technical (related to policy effectiveness) and political capabilities (related to democratic legitimacy) are not built or fostered simultaneously and with the same intensity. BFP participatory institutions are still in their institutional infancy, with little capacity to actively influence policymaking, providing feedbacks and conceiving policy adjustments. Recognized for its innovations in the technical and administrative capabilities, BFP has been failing in the task of adding value to legitimacy, as it mobilized means to implement decisions in a predominantly centralized manner at the federal level, without actual and consistent participation at the local spheres and communities.<sup>103</sup>

A possible reason as to why the technical dimensions of the program have not developed in sync with the political dimension is that, in the first ten years of the BFP, technical capabilities were more pressing than political ones. This is so because, as officials directly involved in its creation report, BFP needed to be kicked off rather quickly, especially in its early years. One of them said that it was necessary to rely on a speed “that only centralized decision-making is

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inequality from 2001 to 2008. Then we had social programs, especially the Bolsa Família and its predecessor – Bolsa Escola –, which accounted for 17 % of inequality reduction, while pension benefits accounted for 15.72 % of the income distribution”. See M. Cortes Neri (Coord.), *A geografia das Fontes de Renda*, paper published by the Center for Political Sciences – Fundação Getúlio Vargas (Rio de Janeiro, 2010), available at: <<http://www.fgv.br/cps/docs/geofonte.pdf>>, accessed 9 October 2013.

**103** As reported by the Ministry of Social Development, agencies of social control specifically established for the BFP represent only 39 % of the existing agencies of social control. See D. R. Coutinho, *Targeting Within Universalism? The Bolsa Família Program and the Social Assistance Field in Brazil*, 47 *Verfassung und Recht in Übersee*, no. 1 (2014), 43–61.

capable of providing.”<sup>104</sup> Specifically, it was necessary to design an effectively new program that did not bring the burden of negative experiences – whether connected to the unsuccessful experience of the Zero Hunger Program, or to the clientelism historically ingrained in social assistance. Building on the lessons learned from previous local experiences of cash transfers and by emulating mechanisms developed in other policies, the BFP focused on building the means by which good targeting parameters could be reached, as opposed to the cases of “leakage” that occurred in the past.<sup>105</sup> As a result, during the second half of the 2000s, in pursuit of speed and consistency, government officials relied on centralized intra-bureaucratic structures.

To a certain extent, some aspects of democratic legitimacy – those connected to the challenge of designing, implementing and coordinating policies in interaction with civil society – are in tension with some aspects of technocratic effectiveness in the BFP. The program has been recognized from a technical and administrative perspective as a successful experience (innovative, flexible and effective), but when it comes to political capabilities, “it is still carving out its paths of legitimacy”.<sup>106</sup> In this context, the Bolsa Família case typically epitomizes a top-down versus bottom-up tension (to refer once more to Manor’s dualities): the federal-level technocratic management, which is more organized and effective than the state and local levels, ultimately compromised potential

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**104** *Ibid.*, 58.

**105** In that context, starting in 2003 and in the following years, it was realized that it would be necessary to respond immediately to political demands and promises to fight hunger and poverty. This became even more pressing when stronger criticism of the Zero Hunger Program arose. Fragmentation, lack of focus and excessive bureaucratic procedures were some of the criticisms expressed about the Zero Hunger Program. On the criticisms addressed to the Zero Hunger Program, see M. C. Yazbek, *O Programa Fome Zero no contexto das Políticas Sociais Brasileiras*, 18 São Paulo em Perspectiva, no. 2 (2004), 104–112; and A. Hall, *From Fome Zero to Bolsa Família: Social Policies and Poverty Alleviation under Lula*, 38 Journal of Latin American studies, no. 4 (2006), 689–709, 696.

**106** On certain attributes that translate the BFP technical capabilities – institutional innovation, orchestration, coordination and flexibility, see K. Lindert et al., *The Nuts and the Bolts of Brazil’s Bolsa Família Program: Implementing Conditional Cash Transfers in a Decentralized Context*, Social Protection Discussion paper no. 0709 (World Bank, 2007), p. 31; F. Veras Soares, R. Perez Ribas, and R. Guerreiro Osório, *Evaluating the Impact of Brazil’s Bolsa Família: Cash Transfer Programs in Comparative Perspective*, 45 Latin America Research Review, no. 2 (2010), 173–190; F. Veras Soares, *Brazil’s Bolsa Família: A Review*, 46 Economic & Political Weekly, no. 21 (2011), 55–60; R. M. Bichir, *Mecanismos Federais de Coordenação de Políticas Sociais e Capacidades Institucionais Locais*, Doctorate Dissertation, Universidade Federal do Rio de Janeiro (Rio de Janeiro, 2011); and Coutinho (2014), *supra* note 104.

forms of direct societal mobilization, involvement and deliberation in the interest of timely policy implementation.

### 3.4 Case study summary

In Brazil, BNDES, regulatory agencies and *Bolsa Família* are governmental institutions and polices designed and adapted to solve long-standing structural problems in the fields of finance for development, and utilities regulation, and poverty and inequality. They were all designed to be effective in implementing important development policies in different areas, some of them working in conjunction with the New Developmental State *modus operandi* (as BNDES and BFP), some requiring some adaptations to do so (regulatory agencies). The previous sections have shown, however, that **either the daily operation** of these institutions, or **the steps towards their implementation**, or the **reforms required** to promote necessary adaptations, **did not operate in harmony or in full compliance with all mechanisms of democratic control**.<sup>107</sup>

On the one hand, the three institutions analyzed in this section were strongly aligned with the preferences of an elected political figure, the President. While this had been historically the case for BNDES, it required some changes in the case of regulatory agencies, and it was a novelty in the case of BFP. This alignment brings a great deal of electoral legitimacy to the policies implemented by these institutions, but it also limits their legitimacy to an *ex ante* authorization for the elected president to implement policies. If one adopts a thin definition of democracy (free and fair elections), then the three case studies can certainly be considered as a case of a successful reconciliation of developmentalism and democracy. However, as many authors points out, most definitions of democracy will go beyond the requirement of free and fair elections, encompassing also mechanisms of checks and balances (the President is controlled by parliament) and expectations of transparency and accountability (which takes place through the judiciary and other accountability institutions), as well as forms of social participation and control. It is the tension with these other democratic control mechanisms that our three case studies illustrate.

The Brazilian examples on industrial, regulatory and social policies show that the goal of conceiving and implementing development initiatives to simultaneously foster policy effectiveness and full democratic **legitimacy is far from trivial**. Often the technical imperatives of achieving predetermined goals and delivering measurable,

<sup>107</sup> Despite the efforts to implement a “National Policy for Social Participation”, which was formally created through the Executive Order n. 8,243 in 2014 (Brazil).

concrete policy outcomes come at the expense of democratic control mechanisms that countervail centralization, discretion and unchecked decision-making. On the one hand, more insulation from political and societal instances of control can boost institutional innovation. On the other hand, it can ignore or reduce transparency, public participation and accountability.

From a descriptive perspective, **one might argue that the Brazilian developmental state was only possible because Brazil, like other countries in Latin America, is not yet a full democracy.**<sup>108</sup> If this is the case, we are still lacking an empirical example of successful conciliation of the institutional dimensions of developmentalism and (a thick conception of) democracy. Considering that democratic regimes are not created overnight, and some will never become full-blown democracies, there is also a normative question that remains unanswered: would be preferable to subject the technical dimensions of developmental policies to faulty political processes, often characterized by patronage and clientelism, or to keep these insulated until the democratic system has matured.



## 4 Challenges for the law and development scholarship

Despite showing that the goal of promoting at the same time democracy and development is far from trivial, **the Brazilian example discussed in the previous section does not allow us to conclude that these would be irreconcilable.** As much as development is a long-term project, so is democracy. It is not simply a question about whether state-owned banks foster innovation, or regulatory frameworks bring investment for infrastructure sectors, or conditional cash transfer policies reduce inequality or poverty. It is a question about the institutional environment in which these state-owned banks, these regulatory agencies, and these social policies are operating. Showing that the operation of BNDES, the reforms to Brazilian IRAs, and the implementation of BFP were not sufficiently reconciled with the new democratic structures that exist in Brazil does not mean that it is impossible to do so. The question is how these institutions could be better adapted to their surrounding institutional environment over time, to become more legitimate without losing policy effectiveness.

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**108** J. Mendez, P. Pinheiro and G. O'Donnell (eds.), *The (Un)Rule of Law and the Underprivileged in Latin America* (Notre Dame, IN: Notre Dame University Press, 1999), p.33 (arguing that Latin American countries are polyarchies, i. e. countries with free and fair elections but lacking other democratic guarantees, such as the rule of law).

The first step in this process is to allow for a more coordinated and integrated dialogue between those who are concerned with specific development goals (often technocrats and economists) and those who are concerned with procedures and fairness (often lawyers and political scientists). Under such dialogue, the developmental state, as a “classic” concept, could be revisited and considered in light of contemporary democratic expectations. Only with creative institutional design the legitimacy deficits that compromise the developmental state can be potentially mitigated, without imposing costs to democracy.

To allow for a productive dialogue legal scholars are more than ever challenged to provide institutional solutions to particular development-democracy tensions. With that in mind, law – in its substantive form, but also through procedural and institutional manifestations – can be seen as a “technology” to create and strengthen different types of democratic channels (representative and participatory, *ex ante* and *ex post*, corporate and societal) in development policies. For law to operate as an effective technology, however, legal scholars need to be informed of and concerned with effectiveness as much as they are with fairness. Creating such dialogue, however, is not a trivial exercise: the two discourses can either be operating as completely isolated silos,<sup>109</sup> or one may be prevalent in discourse while the other prevails in practice.<sup>110</sup> Designing effective ways of overcome the long-existing obstacles for this dialogue is one of the most pressing challenges for law and development scholarship.

In the case of BNDES, for instance, the injunctions brought by the Public Prosecutor’s Office (Ministério Público or MP) to give voice to affected groups has often stalled projects, and sometimes forced their cancellation. An example is the recent MP’s work in overseeing major infrastructure projects executed by the federal government and financed by BNDES.<sup>111</sup> Many infrastructure projects have been challenged in court by the MP, leading to shutdowns and project redesigns.<sup>112</sup> On the one hand, some redesigns have been positive as they have forced BNDES to consider the interest of affected groups and the environment. On the other hand, the MP can stall or intervene at any stage of the project, and sometimes significant

**109** H. Alviar, *Rethinking Law and Development in Colombia: How a Dynamic Approach Could Overcome the Chasm Between Law and Ideas of Economic Development*, this special issue.

**110** S. Graben, *Nested Regulation in Law & Development: Identifying Sites of Indigenous Resistance and Reform throughout the Americas*, this special issue.

**111** Spink (2013), *supra* note 75, pp. 30–31.

**112** For an example, see the case of Belo Monte in A. C. Bracarense et al., *Enfrentando os Desafios Político Institucionais de Belo Monte: uma análise dos pontos de tensão antes, durante, e depois do licenciamento ambiental da Usina Hidroelétrica de Belo Monte* (Clínica de Direitos Humanos e Empresas – FGV).

investments have already been made and are likely to be lost if the project is cancelled. The losses could be avoided if the changes had been requested earlier. Instead of this zero sum game, where there is only one winner, one could think of more constructive ways in which public prosecutors could engage with BNDES (and other similar agencies) earlier, guaranteeing that affected groups will have a voice before ground is broken.

The second step in this process is **to bring politics back to the front and center of development discourse.** Developmental state institutions are in clash with democratic ones because they operate under a very different kind of political dynamic. Instead of being insulated from politics, they were instead sheltered from distributive and fairness demands that characterize democratic societies. The tensions are, therefore, not exclusive of the democratic developmental state. As Morgan and Dubash show, the independent regulatory agencies were designed to be “insulated from politics” so as to be able to exercise their expertise. However, when transplanted into countries with high levels of inequality and pressing redistributive demands, they became sites for struggle and contestation.<sup>113</sup> Thus, the developmental state is not the only institutional arrangement that conceived of itself as insulated from politics. The neoliberal state did that too, preaching independence of central banks and regulatory agencies, just to find itself surprisingly immersed in a series of political struggles, brought to the fore, to a certain extent, by democratic structures.

In the specific case of the Brazilian IRAs, bringing politics back in means basically asking if it would be legitimate for a democratically elected president to revert institutional arrangements that guarantee the independence of IRAs, in order to promote developmental policies. And if so, how? Does congressional approval of proposed legislation is required to move away from regulatory independence? Or is something not explicitly illegal, but also not fully scrutinized by the system of checks and balances acceptable? Ultimately, the question here is to what extent is democracy the appropriate medium to navigate this hard negotiation between an institutional arrangement that is not based primarily on distributive concerns (IRAs), and one that is more likely to be (the New Developmental State).<sup>114</sup> And if democracy is the right medium to navigate that, what kind of democracy would be the preferable? One could think that direct participation of civil society in regulatory decisions, or partisan representation

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<sup>113</sup> N. K. Dubash and B. Morgan (eds.), *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford: Oxford University Press, 2013).

<sup>114</sup> For a suggestion that a conversation between the literature on the developmental state and debates over the role of regulatory agencies could potentially be extremely fruitful, see Dubash and Morgan (2013), *supra* note 113, p. 17.

in the agencies can bring democratic legitimacy to sectoral regulation. But then, what is the process to decide which of these is preferable? Does this decision needs to be democratic as well? And what if the implementation proves faulty – e.g many participatory mechanisms in IRAs have favoured industry to the detriment of consumers?

The **third step** in this process is to **bring consistent and plural methodological approaches to reconcile efforts of combining effectiveness and legitimacy in development policies and their specific institutional structures.** For this purpose, the very notion of institutional arrangements – legal norms, institutions and processes that define the way in which processes and actors are coordinated in specific policy fields – is a useful interdisciplinary tool. Such arrangements, as seen above, can be technical – in the sense that they are designed to deliver policy goals effectively – or political, in the sense that they aim at allowing room for participation, accountability and transparency. Possible combinations of technical and political institutional features include, amongst several other subtle possibilities:<sup>115</sup>

- Effective and legitimate arrangements (++)
- Effective and non-legitimate arrangements (+-)
- Non-effective and legitimate arrangements (-+)
- Non-effective and non legitimate arrangements (--)

In the case of Bolsa Familia, existing institutional arrangements – both at the local (in 5500+ municipalities) and at the federal level – are still being assessed to determine whether legitimacy can be reconciled with effectiveness. Given its decentralized structure, participation and accountability mechanisms that potentially strengthen legitimacy seem to be more promising at the “top”, i. e., at the federal level, where strategic policy decisions are taken. A model is the so-called “National Conference on Social Assistance”, that take place bi-annually and gather thousands of stakeholders and direct beneficiaries of social policies in the country.<sup>116</sup> While the social assistance policy in Brazil is managed separately from Bolsa Familia, the Conferences could be reconceived and

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**115** See A. Gomide and R. Pires, “Capacidades Estatais e Democracia: a Abordagem dos Arranjos Institucionais para a Análise de Políticas Públicas”, in A. Gomide and R. Pires (eds.), *Capacidades Estatais e Democracia: a Abordagem dos Arranjos Institucionais para a Análise de Políticas Públicas* (Brasília: IPEA, 2014).

**116** The National Conferences on Social Assistance gathers participants from all over the country to analyze, propose and approve guidelines for the management and financing of the Brazilian social assistance system (*Sistema Único de Assistência Social, SUAS*).

redesigned to explicitly address Bolsa Família's accountability and transparency issues. This would create institutional synergies, and potential policy and analytical gains.<sup>117</sup> While promising, studies devoted to address such issues are still rare and methodologically incipient in Brazil.

It was not until recently that law and development scholarship embraced democracy as an end in itself, in addition to considering it a means towards other development ends.<sup>118</sup> Paradoxically enough, however, despite the fact that institutional arrangements in development initiatives have law embedded on them, law and development scholars have not yet created manageable references to measure the degree – in terms of form and quality – of participation, accountability, and transparency mechanisms. The task of mapping institutional arrangements with the purpose of assessing their democratic deficits and inquiring into how to reduce such deficits over time while not impairing effectiveness is, therefore, still unexplored territory. This is an open research avenue for law and development scholars. The Brazilian case raises important questions about to what extent law and development – which we see both as a field of study and as applied institutional engineering – can help in reconciling the core tenets of a developmental state with democratic regimes.

Legal scholars are the ones who, arguably, have the expertise to technically “fix” institutional bottlenecks that affect the degree of legitimacy behind such initiatives. On the one hand, if law and development scholars embrace the democratic development challenge as a relevant part of their agenda, they are specially well equipped to provide legal-institutional analysis, criticism and proposals for reform. On the other hand, if law and development scholars fail to engage with this challenge, democratic deficits, as well as effectiveness problems, might ossify and become hard to change. Therefore, there is a need for more scholarly work able to convert theoretical assumptions about potential synergies between effectiveness and legitimacy into concrete institutional solutions and adjustments in democratic developmental states. The three steps proposed here are, we hope, moving in this direction.

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**117** By the same token, at the local level, where Bolsa Família and the social assistance field are more deeply intertwined (especially in cities with a poorer administrative capacity, that heavily depend on the pre-existing structures of social assistance, that are more institutionalized and stronger in terms of policy community), there seems to be room for effectiveness-legitimacy synergies in terms of institutional arrangements, but that requires that Bolsa Família works more closely with social assistance structures. This argument is further developed in D. R. Coutinho, *Capacidades Estatais no Programa Bolsa Família: o desafio de consolidação do sistema único de assistência social*, paper for discussion at IPEA (Rio de Janeiro, August 2013). TD – Texto para Discussão Ipea 1852 (2013).

**118** Trebilcock and Prado (2014), *supra* note 2.

## 5 Conclusion

Development scholars such as Evans and Sabel argue that participation can potentially foster effectiveness in development policies, as opposed to the claim that it raises transaction costs, reduces the implementation speed and creates insolvable conundrums that jeopardize the efficient achievement of goals.<sup>119</sup> According to these authors, the inescapable trade-off between effectiveness and legitimacy is false. Democracy and development can reinforce each other with desirable qualitative gains. Rodrik, along the same lines, argues that democracy is a meta-institution to build good policies for development.<sup>120</sup>

Our analysis challenges this assumption, suggesting, along the same lines as Pranab Bardham, that democracy and development have a complex relationship,<sup>121</sup> and that the institutional dimensions of the developmental state, which are sometimes in tension with political concerns, have not been properly addressed in the academic literature.<sup>122</sup> How can a country successfully reconcile democracy and development? To answer this question, it is necessary to define what kind of democratic and what kind of development institutions we are talking about. Democratic regimes are institutional beasts, and so are development strategies.

In an attempt to offer a contribution to this debate, this paper turned to two very specific institutional arrangements – the developmental state and democratic regimes – to inquire about the possibility of reconciliation. There is a vast literature discussing whether a democratic developmental state is feasible. Even if one adopts

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**119** See P. Evans, *The Korean Experience and the 21st Century Transition to a Capability Enhancing Developmental State*, paper given at the Korea International Co-operation Agency (KOICA) – UN Research Institute on Social Development (Seoul, 2011), p. 10; P. Evans, *Além da “Monocultura Institucional”: instituições, capacidades e o desenvolvimento deliberativo*, 5 *Sociologias*, no. 9 (2003), 20–63; P. Evans, *Development as Institutional Change: The Pitfalls of Monocropping and the Potentials of Deliberation*, 38 *Studies in Comparative International Development*, no. 4 (2004), 30–52; C. F. Sabel, “Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability”, in E. Engelen and M. Sie Dhian Ho (eds.), *De Staat van de Democratie: Democratie voorbij de Staat* (Amsterdam: Amsterdam University Press, 2004). See also, Edigheji (2007), *supra* note 43. In Brazil this claim (effectiveness and participation as mutually reinforcing policy goals) has been made by Gomide and Pires (2014), *supra* note 115, p. 15.

**120** D. Rodrik, *Institutions for High-Quality Growth: What They are and How to Acquire Them*, 35 *Studies in Comparative International Development*, no. 3 (2000), 3–31, 5.

**121** Pranab Bardham, “Democracy and Development: A Complex Relationship”, in I. Shapiro and C. Hacker-Cordon (eds.), *Democracy’s Values* (Cambridge: Cambridge University Press, 1999).

**122** Pranab Bardham, *State and Economic Development: The Need for a Reappraisal of the Current Literature*, 54 *Journal of Economic Literature*, no. 3 (2016), 862–92.

the traditional definition of developmental state,<sup>123</sup> different definitions of democracy make it challenging to determine whether the developmental state is incompatible with the democratic state. Thus, instead of asking if a democratic developmental state is feasible, it seems more productive to ask what institutional aspects of a democratic regime would the developmental state be more or less compatible with. This reframed question allows us to identify the tensions between developmental institutions and different aspects of the democratic system, such as elections, checks and balances, protection of minorities, and due process.

As the concrete example of Brazil illustrates, there are **still fundamental tensions between the result-oriented nature of the developmental state and the procedural legitimacy required in democratic regimes**. On the one hand, Brazil is a full democracy: free elections have been taking place regularly since the late 1980s, an independent judiciary has been actively enforcing institutional guarantees, a free press is operating and formal democratic processes are being institutionalized over time. On the other hand, despite incipient efforts, the Brazilian contemporary developmental state shed light on repeated failures when it comes to establishing more substantive participatory channels, accountability standards and deliberative *loci* for development policies. The three examples we discussed in this paper (development finance, infrastructure regulation, and social policies) evidence that the task of reconciling the developmental state with democracy has barely even started.

In light of that, our assumption is that development policies with unbalanced effectiveness-legitimacy arrangements can and should be revisited and potentially modified to become more democratic and open. This exercise requires scholars to assume, however, that the puzzle of reconciling democracy with development policies (in the cases where they seem to be in tension with each other) is primarily institutional in nature. As stated above, this assumption reveals intricate but promising challenges to the law and development scholarship, such as: what kind of institutional arrangements should be created to infuse political checks and participatory controls able to “open” the decision-making process in a developmental state without killing the type of pro-activeness and agility that characterize the developmental state? Can policymakers conceive or reform legal-institutional arrangements that offset the risks of insulation and private interest capture, thus catalyzing public-private synergies and coordination? Similarly, can there be *ex post* accountability and transparency requirements that mitigate discretion so that non-elected policymakers can be held accountable for their decisions?

Questions such as these are of empirical nature and demand context-based assessments. But they also demand a reinigorated theory about the role of law

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**123** For authors that have proposed abandoning Chalmers Johnson’s traditional definition, in favor of a broader one see: Wong (2016), *supra* note 12.

and development (and law and development scholars) in expanding state institutional capabilities crucial to development from a democratic point of view. Dualities such as top-down versus bottom up initiatives, continuity versus innovation, confidentiality versus transparency, discretion versus deliberation, ex ante reasons versus ex post justifications can be taken as analytical references to be discussed in concrete and applied terms.<sup>124</sup> Particular institutional arrangements enmeshed in developing policies can, in light of such theoretical premises, be scrutinized with the purpose of assessing how inclusive, participatory, accountable and transparent they are when it comes to their legal structures and underpinnings. As a result of collective research efforts, an enriched *corpus* of ideas, normative assumptions and qualitative assessments could increasingly emerge and take shape, with significant gains to the broader field of development studies and to democratic development itself.

In summary, we should avoid throwing the baby away with the bath water: the democratic developmental state is not only a useful concept, but also an institutional long-term and collective construction that is not intrinsically inimical to democracy. However, **for the idea of a democratic development state not to be a chimera, it should not be conceived as a ready-made package that can be implemented anywhere and will be operational from one day to the next.** As any institution building effort, the democratic developmental state is a complex task that needs to be built incrementally and be adapted to the context in which it is operating. The challenge, however, is primarily one of institutional engineering, for which law and development should have much to contribute.

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<sup>124</sup> Manor (1998), *supra* note 44, p.125 (showing that there has not been empirical studies devoted to discussing and assessing how developmental states tried to handle three types of development-democracy dualities: top-down versus bottom-up initiatives, continuity versus innovation, confidentiality versus transparency). See also Bardham, *supra* note 121.