

Inequality and the subversion of the Rule of Law*

Oscar Vilhena Vieira

ABSTRACT

The idea of Rule of Law has become almost unanimously embraced in our days. For human rights advocates, Rule of Law is perceived as an indispensable tool to avoid discrimination, and arbitrary use of force. But, how does profound and persistent social and economic inequality impact the integrity of the Rule of Law? The main objective of this essay is to try to understand the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the Rule of Law: that people should be treated impartially by the law and by those responsible for its implementation.

By revising a substantive and a formalist conception of the Rule of Law, I will try to provide some explanation about why states and people would comply with the Rule of Law standards. The article will also consider the impact of extreme and persistent inequality over the Rule of Law, using my familiarity with the Brazilian experience as an example. In the final section, the focus will be on how even an incomplete Rule of Law system can be employed or challenged to empower the invisible, humanize the demonized, and bring the immune back to the realm of law.

This paper will be also published at Thomas Pogge (ed.). *A human right to be free from poverty: its role in politics*. Oxford: Oxford University Press, 2008.

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

Introduction

How does profound and persistent social and economic inequality impact the integrity of the Rule of Law? The main objective of this essay is to try to understand the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the Rule of Law: that people should be treated

impartially by the law and by those responsible for its implementation. The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, obliterates legal impartiality, causing the *invisibility* of the extreme poor, the *demonization* of those who challenge the system, and the *immunity* of the privileged, in the eyes of individuals and institutions. In synthesis, extreme and persistent social and economic inequality erodes reciprocity, both in the moral and the mutual advantage sense, thus impairing the integrity of the Rule of Law.

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

The concept of the Rule of Law

The idea of Rule of Law has become almost unanimously embraced in our days. It has served as an extremely powerful ideal for those fighting authoritarianism and totalitarianism in the last two decades, and it is considered by many to be one of the main pillars of a democratic regime.¹ For human rights advocates, the Rule of Law is perceived as an indispensable tool to avoid discrimination, and arbitrary use of force.² At the same time the idea of the Rule of Law revived by libertarians, like Hayek in the middle of the twentieth century, was espoused with fervour by international financial agencies and legal development aid institutions as a fundamental prerequisite for the establishment of efficient market economies.³ On the other side of the political spectrum, even Marxists, who in the past viewed the Rule of Law as merely a formal super-structural mechanism to preserve the power of elites, have started to recognize it as an unconditional human good.⁴ It would be hard to find any other political ideal praised by such a diverse audience. But the question is: are we all praising the very same idea? Obviously people are either talking about

different concepts of Rule of Law or emphasizing distinct virtues or characteristics of a more abstract notion of the Rule of Law.

The classical concept of Rule of Law has been subjected to severe reevaluation in the first two decades of the last century. Thinkers like Max Weber warned us of the process of deformalization of law, as a consequence of transformations in the public sphere, in *Economy and Society*.⁵ The years that followed Weber's work were marked by tense intellectual and political struggle over the capacity of the *Rechtsstaat* to comply with the new challenges posed by the social-democratic Weimar Constitution, and that can be found in the debate between conservatives such as Carl Schmitt and social democrats represented by Franz Neumann.⁶ Hayek responds to these sceptical perspectives about the Rule of Law in his influential *The Road to Serfdom*, from 1944.⁷

For Hayek, state intervention in the economy and the growing discretionary power of bureaucrats to establish and pursue social goals threatens economic efficiency; as a consequence of transformations in the functions of the state, there was a process of decline of law as a substantial instrument in the protection of liberty. The notion that the state had not only the obligation to treat its citizens equally before the law, but also to ensure substantive justice, was accompanied by the argument of new legal theorists that the traditional concept of Rule of Law had become incompatible with the new reality. Different theories of law such as positivism, legal realism or jurisprudence of interest, constructed a desubstantialized notion of law, liberating the state from the inherent limitations imposed by a substantive concept of law.

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

prevent the coercion of citizens for individual purposes; and (g) there should be a non exhaustive bill of rights to protect the private sphere.⁸

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

In reaction to this and other kinds of substantive formulations of Rule of Law, such as the more socially oriented one that resulted from the Delhi Congress of the International Commission of Jurists, in 1959, Joseph Raz proposed a more formalist conception, which would avoid the confusion between several social or ideological goals and the intrinsic virtues of the Rule of Law. For him, "if the Rule of Law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function".⁹

For Raz the Rule of Law in a broader sense "means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and subject to it".¹⁰ Raz's construction requires that laws should be understood as general rules, so they can effectively guide actions. In this sense law is not just a fact of power, but it needs to have a particular form. Raz, however, does not shift to the position espoused by Hayek that only abstract and general rules can constitute a Rule of Law system. For Raz, it would be impossible to govern with general rules only; any concrete system must be composed of general and particular rules, which in turn should be consistent with the general ones. To comply with the objective of a legal system that can guide individual action, Raz creates his own list of Rule of Law principles, according to which laws should be prospective, open, clear, and relatively stable; and the making of particular laws should be guided by open, stable, clear and general rules.

But these rules will only make sense if there are institutions responsible for their consistent implementation, so that law can become an effective rule to guide individual action. Raz's construction, therefore, requires the existence of an independent judiciary, because if rules are reasons for actions, and the judiciary is responsible for applying these rules, it would be futile to guide one's action by the law if the courts would take other reasons into consideration when adjudicating cases. For the same reason principles of due process, as fair hearings or impartiality should be contemplated. Rule of Law also requires that courts should have the power to review acts of the other branches of the government, to ensure conformity with the Rule of Law. Courts must be easily accessible so as not to frustrate the Rule of Law. Lastly, the discretionary powers of crime prevention agencies should not be allowed to pervert the law, in the sense that neither the prosecutor nor the police should have the discretion to allocate its resources to combat crime on other bases than those established by the law.¹¹

From this perspective, the idea of the Rule of Law is a formal concept according to which legal systems can be measured not from a substantive point of view, such as

justice or freedom, but by their functionality. The main function of a legal system is to serve as a secure guide for human action. And that is the first reason why a formalist concept of Rule of Law, such as the one formulated by Raz, receives a broad support from different political perspectives. It is extremely valuable for governments in general to count on an efficient tool to guide human behaviour. However, being instrumental to distinct political perspectives does not mean that even a formalist concept of Rule of Law is compatible with all kinds of political regimes. By favouring predictability, transparency, generality, impartiality and granting integrity to the implementation of law, the idea of Rule of Law becomes the antithesis to arbitrary power.¹² So the distinct political perspectives that embrace the Rule of Law have in common an aversion to the arbitrary use of power; and this is another explanation why the Rule of Law is embraced by democrats, liberal equalitarians, neo-liberals or human rights activists. Regardless of their differences they are all in favour of curbing arbitrary rule. In an open and pluralist society, which offers space for competing ideals of public good, the notion of Rule of Law becomes a common protection against arbitrary power.

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

Compliance with the Rule of Law

A significant problem with the kinds of conceptualisations of Rule of Law outlined above (both substantive or formalistic) is that they do not help us to understand which are the external (social, economic or political) conditions that would favour the adherence of a legal system to the idea of Rule of Law, so that both state officials and individuals would comply with the law. That is why Maravall and Przeworski are so disappointed with the kind of jurists' lists discussed above, which they regard as "implausible as a description" and "incomplete as an explanation".¹³ So the first challenge facing us is to try to understand which conditions or mechanisms trigger compliance with the Rule of Law. Why would any government with indisputable control over the means of coercion submit itself to the Rule of Law? And why would any of us comply with the law? Let's start by the first question.

Why would a ruler comply with the law?

According to Holmes, Machiavelli's main thesis on this issue is "that governments are driven to make their own behaviour predictable for the sake of cooperation. Governments tend to behave as if they were 'bound' by law, rather than using law unpredictably as a stick to discipline subject populations [...] because they have specific goals that require a high degree of voluntary cooperation [...]".¹⁴ So law will be used parsimoniously by the ruler to gain cooperation from specific groups within society, which the ruler would not have without showing some respect for their interests. As the ruler needs more support, more groups will be included under the wings of law, and in exchange for their support they will benefit from predictable treatment by the ruler.

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

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

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

This means that any approximation to the idea of Rule of Law depends not just on the expansion of rights on paper, but also, and perhaps more critically, on how consistently these rights are implemented by the state. And here is the paradox faced by several democratic regimes with high levels of social inequality. Although equal rights are recognized in the books, as a symbolic measure to obtain cooperation, governments do not feel constrained to comply with the obligations correlated to

these rights on equal terms for all society members. And since the costs of claiming the implementation of rights through the Rule of Law system are disproportionately larger for some members of society than for others, Rule of Law becomes a partial good, favouring mostly those who have power and resources to take advantage of it. In other words, the formal equality provided by the language of rights does not convert into equal access to the Rule of Law or impartial implementation of laws and rights.¹⁷ So it is possible to have rights, but not sufficient resources to claim their implementation. Therefore it is more appropriate to think of a Rule of Law not in terms of existence or non-existence, but in terms of levels of inclusiveness. Democratic process can expand Rule of Law. But even in democratic regimes, in societies with extreme levels of inequality, where people and groups possess disproportional resources and power, the Rule of Law tends to be less able to protect the poor and to make the powerful accountable to the law.

However, the control of state power and its submission to the law is not just a consequence of how power is socially distributed. In modern societies, institutions are created to shape behaviour, through numerous forms of incentives. Institutions can also be disposed to check each other. As perceived by Madison: when ambition is disposed to restrain ambition, the possibility of having government under control increases.¹⁸ Foundational moments then become very important. When competing social powers are not sufficiently strong to overcome each other, they tend to compromise in the creation of political structures with fragmented powers. The least empowered groups can benefit from the result of these elite struggles. This is the basic logic that informs modern constitutionalism.

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

Why would people comply with the law?

Cognitive reasons. The first set of reasons for individual compliance with the law is certainly cognitive, and concerns our ability to understand the basic concepts of law, like the notions of rules and rights. Without such basic cultural assumptions we cannot think about the possibility of respecting the law. This is not a trivial matter. In many societies the concept that people are endowed with equal rights, and that the law should be impartially enforced, is often contrary to day-to-day experience. Existing privileges, class and hierarchical entitlements are entrenched in different cultural systems, making the experience of generality of law unobservable. Besides understanding the structural function of basic legal concepts, it is important that people have an understanding of the basic rules that govern their own societies, and of their own obligations and rights. In societies with large concentration of poverty, and illiteracy, this condition is hardly ever achieved.¹⁹

Instrumental reasons. The second set of reasons for complying with the Rule of Law is linked to our ability to think instrumentally, to calculate risks and potential

benefits in the actions we intend to perform. People respect the law and rights of others to obtain rewards or escape punishment. Taking a narrow instrumental view, respect for the law is reinforced if disrespecting it is clearly damaging to one's pocket, freedom, image, physical well being or integrity, and if respecting it is likewise beneficial for the same reasons. To have an instrumental value, respecting the Rule of Law must make one better off. Through this instrumental reasoning, individuals seek to maximize social and economic utility. Two instrumental reasons bear discussion in this context – fear of state coercion and mutual advantage reciprocity.

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

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

Instrumental reasons for compliance with the law should therefore extend beyond the state coercion framework. People are part of social spheres, groups and communities that shape and determine their actions.²⁰ Hence a second instrumental reason for respecting the law is an expectation of reprisal or benefit from a community or a social sphere to which one belongs or circulates in. Deceit in the market or in marriage can have serious consequences. Credibility is a major asset in any group. Losing it by breaking the law could damage one's position, curtailing one's capacity to engage in new voluntary relationships with other members of that social sphere. That is why people usually act in accordance with the law even in the absence of state authority.²¹

In a mutually advantageous relationship, the golden rule is that I do not do to others what I would not like them to do to me. Not being a substantive moral principle it neither affirms nor denies the existence of a deeper moral framework. Mutually advantageous relationships, however, can help to obtain compliance with the law, but also in fragile terms. Starting from a structure of mutual advantage, in circumstances of disparity of power, individuals have an incentive to cheat: what is in my interest is that everybody else cooperates and I defect.²² Peer pressure can also be problematic, because the social environment can be infused by a culture of

non-compliance, or worse, the internal culture of obedience challenges the Rule of Law, as in the case of the mafia and other forms of organized crime enterprises. Consequently, instrumental reasons represented by coercion or mutual advantage (self-interested) arrangements cannot fully explain why people would comply with the law. However important, they are insufficient as a complete explanation.

Moral reasons. Morality has been neglected by most recent analyses of the efficacy of the law, especially those advanced by formalist legal thinkers or rational choice researchers.²³ In this sense, Lon Fuller's claim that moral reciprocity is a fundamental element for the existence of a legal system becomes particularly interesting.²⁴ The establishment of the Rule of Law would be considerably easier in those societies in which individuals value others and their rights to the same extent that they value themselves. These rights, equally distributed, are not a present from heaven, but a social construction; a decision made by the community to value individuals on equal terms, and to ground the exercise of power on these basic rights.²⁵ This means that collective decisions are only valid if they derive from the will of autonomous individuals, and if they respect the sphere of human dignity delineated by these same rights.²⁶

This is a system governed by rules, in which each citizen is given the status of a right holder, granted a sphere of protection as a person in contact with other citizens and the state, the latter being also subject to the reciprocity principle. In this sense, the self-restraint that implies respect for the rights of others is the fundamental basis for the generalization of expectations that leads to the establishment of the Rule of Law. As these expectations of respect for everyone's rights become generalized, the establishment of an authentic Rule of Law also becomes possible.

One can argue, however, that reciprocity always has a utilitarian origin, that is, my respect for others does not arise from the fact that I ascribe them some value (Kantian reciprocity), but from the fact that we have entered into a non-aggression pact that serves our interests (Hobbesian reciprocity).²⁷ As I have argued above there is a difference between moral reciprocity based on the notion of human dignity and mutual advantage reciprocity, based on strategic calculation. Going back to the traffic light example, according to the moral notion of reciprocity, I would stop my car because I firmly believe that other drivers or pedestrians have the same right that I have to cross the junction, therefore I have a correlated obligation to stop. In a community bound by moral reciprocity, based on rights, law would be easier to implement. It goes without saying how difficult it is to obtain or build moral reciprocity in a modern and consumer oriented society characterized by profound social and economical disparities among its members.

The idea of morality, however, could be more formal, as in contractual authors like Rousseau. In this case, the moral justification for compliance with the law does not derive from the fact that a given legal system is in harmony with a pre-established set of values entrenched by rights. Compliance is due to the fact that citizens, themselves, under a special fair procedure, produced the laws regulating social relationships and the public sphere. The fairness of the procedure would guarantee that maximization of self-interest will be neutralised, so people could

deliberate in terms of public good, which creates a moral obligation on all citizens to accept those results.²⁸ If we follow Rousseau's Rule of Law theory here, not only must procedures be fair, but also the outcome should be delivered through a specific means to secure impartiality. That is: general laws. It is likewise important to stress that procedural justice is not limited to processes that lead to the enactment of general laws, which would be accepted by all participants in the political process, but also on how these laws are implemented by the state. Again following Rousseau, one of the major causes of the decline of democracy is the distortion of the enforcement of general laws by magistrates that tend to advance their own private interests to the detriment of the general will expressed by the law.²⁹ So the fairness of implementation of laws is as important as the fairness of the production of laws. If the enforcement is not carried out with impartiality, in accordance with the due process standards set forth by the law itself, the Rule of Law will lose its authority, and consequently people will not take it as an acceptable guide to their action.³⁰

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

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

Inequality and the Rule of Law

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

Brazilian legal system. Therefore all the substantive and procedural guarantees of the International Bill of Rights are part of the Brazilian legal system.

According to the Brazilian Constitution, the law is the only instrument that can impose legal obligations on individuals, laws being considered those normative acts enacted by Congress procedurally and substantively in accordance with the constitution. Every person is “equal before the law”, without any distinction. Laws should be prospective, entering into force only after their publication; retroactive laws are just admitted if they benefit individuals. There are no secret laws. In case of emergency the president can enact provisional measures that have to be approved by Congress to become law, within a period of sixty days; otherwise they lose their efficacy since enactment. In sum, although many Brazilian laws would not pass Hayek’s test of generality, since many of them have a specific and individualized purpose, as do many laws enacted in any post-liberal society, they certainly would be acceptable according to Raz’s formulation about the concept of law, where particular rules are admissible if they are consistent with general rules. I also believe that Brazilian laws can in general be considered understandable, not contradictory and reasonably stable.

In relation to the institutions responsible for the implementation of law, the Brazilian legal system could also formally be considered to be in accordance with Raz’s requirements. The constitution embodies a system of separation of powers, differentiating between those with the responsibility to create and to apply the law. As in many contemporary systems the separation of powers is not as sharp as in the Montesquieu model; the executive has powers to regulate, and to make administrative adjudication in particular areas. The judiciary holds extensive power to review legislation and administrative acts that conflict with the constitution. The legislature has more power than to simply enact general and abstract laws; it can control the executive and investigate malpractice. But certainly this flexible notion of separation of powers is no looser than the one admitted by many other democracies.

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

There is today a growing awareness that law - and rights - still play a very minor role in determining individual or official behaviour. According to the 2005 Latinobarometro Report, there is a large amount of distrust in the capacity of the state to impartially implement its legislation and, more problematically, only 21% of Brazilians respect the laws themselves.³¹ According to Guillermo O’Donnell most countries in Latin America were not able to consolidate a Rule of Law system after transition to democracy. He argues that extreme inequality throughout the region is one of the major obstacles to an impartial implementation of the Rule of Law. Brazil, as one of the most unequal countries in the continent, could be characterized as an *Unrule of Law* system instead of a law empire.³²

Democratisation and liberalization were not sufficient to overcome entrenched obstacles to the implementation of the Rule of Law in Brazil. The failure to significantly improve the distribution of resources and break the very hierarchical Brazilian social fabric have kept law from performing its role as reason for actions

for several sectors of Brazilian society. Brazil stands as the 8th largest economy in the world, according to recent revaluation of Brazilian Gross Domestic Product. However it holds one of the worst records in terms of wealth distribution (0,584 gini index). According to IPEA, a research institute linked to the Ministry of Planning, 49 million people are poor in Brazil, and 18.7 million are in a condition of extreme poverty. In the last decade the richest 1% of the population shared almost the same wealth as the poorest 50%. These, among many other indicators of the gross inequalities within Brazilian society, have a strong effect on the impartiality required from institutions responsible for implementing the law in the country. As in many countries with this configuration, the Brazilian state is usually sweet to the powerful, insensible to the excluded, and harsh to those who challenge the hierarchical stability of society.

Invisibility, demonization and immunity

The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, causes *invisibility* of the extreme poor, *demonization* of those who challenge the system, and *immunity* of the privileged, obliterating legal impartiality. In synthesis, extreme and persistent social and economic inequality provokes the erosion of Rule of Law's integrity. Law and rights under such circumstances can often appear as a farce, an issue of power for those who are among the lucky few negotiating the terms for those excluded.

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

Besides misery itself, and all its deplorable consequences in terms of rights violations, one of the most dramatic expressions of invisibility in Brazil is the extremely high rates of homicides that victimize predominantly poor populations. As the World Health Organization presented in its last report on violence, Latin America holds the worst record in terms of homicide rates on the planet. Brazil, one of the most violent countries in the region, accumulated more than 800,000 deaths by intentional homicide in the last two decades.³³ More people become victims of homicide every year in Brazil than in the Iraq war.³⁴ It is important to say that the vast majority of those killed are poor, uneducated, young black men who used to live in the Brazilian social periphery.³⁵ As cautiously demonstrated by Fajnzylber, Lederman and Loayza,³⁶ there is a robust causal relation between inequality and violent crime rates across countries.

When added to other crime rates, and the fact that many poor neighbourhoods in large cities are controlled by organized crime with the complicity of state officials, these figures send the message that law is not able to serve as a reason for action in some environments, and most of all, that legal constraints, such as the criminal legal

system, are insufficient to protect vulnerable groups within society. Obscene levels of impunity, besides allowing human losses among the poor not to receive an appropriate response from the legal system, reinforce the perverse notion that these lives are not valuable. This vicious circle of elevated levels of violent criminality and impunity brutalizes interpersonal relationships and reduces our capacity of compassion and solidarity.

But if invisibility can be accepted in traditional societies it becomes a troublesome trend in a democratized regime and consumer-oriented context. For some of those who have not experienced being treated with equal concern and respect by those responsible to implement the law and by society in general, there is no reason to act in accordance with the law. In other words, for those raised under invisibility in non-traditional societies there are less moral or instrumental reasons to comply with the law. In challenging invisibility through violent means these individuals start to be perceived as a dangerous class, to which no protection of the law should be granted.

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

To understand *demonization* we turn our attention to gross human rights violations. The persistence of the arbitrary use of force by state officials, or other armed groups with official complicity, against *demonized* people like suspects, ordinary criminals, inmates, and even members of social movements is well recorded every year by local and international human rights organizations. The press database of the Centre for the Studies of Violence of the University of São Paulo, registered more than six thousand cases of arbitrary use of lethal force by the Brazilian police from 1980 to 2000. Each of these cases resulted in at least one death.³⁷

According to the Human Rights Watch 2006 Report, “police violence – including excessive use of force, extra judicial executions, torture and other forms of ill-treatment – persists as one of Brazil’s most intractable human rights problems”.³⁸ In 2006, the police, just in the state of Rio de Janeiro, killed more than one thousand people.

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

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

mitigated by the fact that the authorities were often aware and warned him of the conditions he would discover. He could only sympathize with the common statement he heard from those herded inside, to the effect that 'they treat us like animals and they expect us to behave like human beings when we get out'.³⁹

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

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

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

Immunity is also a pattern for those involved in corruption. Even though Brazil received an overall moderate rating in the Global Integrity Index, published every year by Transparency International - it was ranked as number sixty-two among the nations analysed - the unmet challenge of impartial implementation of the laws cannot be ignored. In the last two decades there have been hundreds of scandals involving politicians, businesses, and members of the judiciary. The enormous majority end in impunity for those involved. In the last ten years, from the twenty-six cases of corruption involving members of the House of Representatives that arrived at the Supreme Court, no one was found guilty. At this exact moment the majority of Supreme Court justices declared unconstitutional the anti-corruption law that allowed politicians and other public officials to be tried by first instance judges.⁴⁰ If this decision is sustained by the Court plenary it is estimated that more than fourteen thousand legal charges against officials around the country will be summarily closed,

amplifying the perception that the law does not apply to the powerful in the same way that it is enforced against the disenfranchised.⁴¹

Disproportional distribution of resources among individuals and groups within society subverts institutions, including the work of those agencies with the responsibility to implement the law. An analysis of the Brazilian penitentiary census shows that only the poor and uneducated are selected by the Brazilian criminal system to be incarcerated. That is the conclusion of Glaeser, Scheinkman and Shleifer, after an econometric analysis of the impact of inequality on institutions of justice: “inequality [...] enables the rich to subvert political, regulatory, and legal institutions of society for their own benefit. If a person is sufficiently richer than another, and the courts are corruptible, then the legal system will favour the rich, not the just. Likewise, if political and regulatory institutions can be moved by wealth and influence, they will favour the established, not the efficient”.⁴² As stated by experience of the Brazilian Deputy General Federal Attorney, “corruption is a direct consequence of the perverse concentration of income in Brazil”.⁴³ The conclusion is that impunity, although a general phenomena in Brazil, is more prominent for the privileged ones.

The erosion of law’s authority

As the Brazilian experience shows, extreme levels of social and economic inequality that polarize the poor on one side and the affluent on the other create a severe obstacle to the integrity of the Rule of Law. By fomenting gross power disparities within societies, inequality places the poor in a disadvantaged position, in which they are socially marginalized in the eyes of those in a better situation as well as in the eyes of state officials, who are captive to the interests of those who have more power in society. This creates a hierarchical society, where second-rate individuals cannot achieve a real status of full citizenship and are not fully recognized as right holders (even though they may formally be so). Discrimination, in this sense, tends to loosen the reciprocity bonds within the community, softening the feeling of moral obligation by the powerful towards those who are excluded. Once they cease to be perceived as valuable subjects, it doesn’t take much to deprive them of the set of rights that protects other citizens. Therefore, one can hardly achieve reciprocity in a society where major hierarchies and inequalities among individuals exist. Consequently, the law will hardly be effective as an instrument of social organization and pacification.

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

Deprived of social and economic status, the invisible individuals start to be socialized in a way that leads them to place themselves in a position of inferiority vis-à-vis the immune individuals and to accept the arbitrariness of public authorities. They cease to expect that their rights will be respected by others or by the institutions with the responsibility to implement the law. Those who react to this degrading position become a threat and are treated as enemies. At the same time, immune individuals do not consider themselves bound to respect those they consider inferior or enemies. The same applies to co-opted authorities. In this situation, a large number of people are below the law while a group of privileged individuals is beyond the control of the state. In this manner, the state, which was supposedly responsible for the application of formal mechanisms of social control, pursuant to the law and by its means of coercion, begins to reproduce socially generalized standards. The result is that the state is negligent with the invisible, violent and arbitrary towards the moral outcasts, and docile and friendly towards the privileged that place themselves above the law. So even though you may have a legal system that complies with the several “excellences” related to the formality of law, the lack of a minimum of social and economic equality will inhibit reciprocity, thereby subverting the Rule of Law.

Conclusion

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

This reconfiguration of legal systems around the developing world has also been a consequence of civil society pressures. Forged during the struggle against arbitrary rule and strengthened throughout democratisation, civil society organizations are a key player in denouncing abuses, making governments more accountable, and providing alternative polices to alleviate major social problems. Just as an example, the number of non-profit organizations in Brazil has more than doubled in recent decades. From the two hundred and seventy thousand civil society organizations legally established in the country, almost one fifth are dedicated to the “development and protection of rights”.⁴⁴ The question, therefore, is how these new players are using their institutional or social power to challenge formal Rule of Law systems to

become more impartial, overcoming their inability to apply the law in equal terms to all its citizens.

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

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

Lawyers and judges cannot do much to change society; in fact they are normally interested in reinforcing the *status quo*. But they can have some impact when challenged by other social actors. As the recent experience of many extremely unequal countries like India, South Africa, Brazil or Colombia shows, the legal community in general and courts in particular can, in some circumstances, be responsive to the demands of the poor when they seek redress through the legal system.⁴⁵ Therefore any attempt to make use of the law to improve the Rule of Law itself presupposes that there is political and social mobilization backing it. Owing to some formal egalitarian characteristics of the Rule of Law, as discussed above, interests that would be squashed in a pure political arena can gain some status in a more legally infused environment. Although legal institutions are also extremely vulnerable to subversion by the powerful, they can eventually produce short circuits in the political system. In translating a social demand into a legal demand we move from a pure power competition to a process where decisions must be justified in legal terms. And the need for legal justification reduces the space for pure discretion. In these circumstances the legal system can give public visibility, in terms of rights recognition, to those who are disregarded by the political system and by society itself. In the same direction, generality of law, transparency or congruency claimed by the idea of Rule of Law can trap the privileged, bringing them back to the realm of law.

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

NOTES

*I would like to acknowledge Denise Dora and Leslie Bethel for all the support received from the Ford Foundation and the Centre for Brazilian Studies at Oxford University where, as Sergio Vieira de Mello Human Rights Fellow, in 2007, I had a stimulating environment to produce this essay. I also would like to acknowledge Thomas Pogge for generously authorizing me to preprint this essay written for a volume commissioned to him by UNESCO, and due to appear in 2008, by Oxford University Press. Finally I would like to thank Michael Ravvin for his extremely acute reading and editing of this essay.

1. G. O'Donnell, "Why the Rule of Law Matters", *Journal of Democracy*, vol. 15, n. 4, 2004, pp. 32-46.
2. O. V. Vieira, "A violação sistemática dos direitos humanos como limite à consolidação do Estado de Direito no Brasil" in: Celso Campilongo (org.), *Direito, cidadania e justiça*, São Paulo: Revista dos Tribunais, 1995.
3. T. Carothers, *Promoting the Rule of Law Abroad in Search of Knowledge*, Washington D.C., Carbegie Endowment for International Peace, 2006, pp. 3-13.
4. E. P. Thompson, *Senhores e Caçadores*, Rio de Janeiro, Paz e Terra, 1987, p. 357.
5. M. Weber, *Economia y Sociedad*, 2nd edn., México, Fondo de Cultura Económica, 1984, pp. 603-620.
6. R. M. Unger, *O Direito na Sociedade Moderna: contribuição à crítica da Teoria Social*, São Paulo, Civilização Brasileira, 1979, pp. 225-228.
7. F. A. Hayek, *O Caminho da Servidão*, São Paulo, Instituto Liberal, 1990.
8. *Ibid.*, pp. 87-97.
9. J. Raz, *The Authority of Law: essays on law and morality*, New York, Clarendon Press, 1979, p. 211.
10. *Ibid.*, p. 212.
11. *Ibid.*, pp. 216-217.
12. *Ibid.*, p. 220.
13. J. M. Maravall & A. Przeworski (org), *Democracy and the Rule of Law*, Cambridge, Cambridge University Press, 2003, p. 1.
14. S. Holmes, "Lineages of the Rule of Law", in J.M. Maravall & A. Przeworski, *Democracy and the Rule of Law*, Cambridge, Cambridge University Press, 2003, p. 20.

15. T. H. Marshall, *Cidadania, Classe Social e Status*, Rio de Janeiro, Zahar Editores, 1967.
16. R. Bendix, *Nation-Building and Citizenship*, Los Angeles, University of California Press, 1964, p. 92.
17. I thank Persio Arida for this observation.
18. A. Hamilton, J. Madison & J. Jay, *The federalist papers*, New York, Bantam Books, 1988, ch. 51.
19. In this respect it is important to notice that the level of knowledge about the political constitution in South America is very low; just 30% of Latin Americans know something/much about their fundamental law, and only 34% have knowledge about their duties and obligations, *Latinobarometro*, 2005, p. 14.
20. D. J. Galligan, *Law in Modern Society*, Oxford, Oxford University Press, 2007, pp 310-326.
21. R. C. Ellickson, *Order Without Law: how neighbors settle disputes*, Harvard, Harvard University Press, 1991, pp. 281-283.
22. B. Barry, *Justice as Impartiality*, Oxford, Oxford University Press, 1991, p. 51.
23. G. Becker, "Crime and Punishment: An Economic Approach", *Journal of Political Economy*, v. 76, 1968, pp. 169-217.
24. L. L. Fuller, *The Morality of Freedom*, 2nd edn., New Haven, Yale University Press, 1969, pp. 21-25.
25. J. Habermas, *Between Facts and Norms: contributions to a discourse theory of law and democracy*, Cambridge, The MIT Press, 1996, p. 119.
26. *Ibid.*, p. 82.
27. H. Reiss, *Kant: political writings*, 2nd ed., Cambridge, Cambridge University Press, 1996.
28. J. J. Rousseau, *The Social Contract*, London, Willian Benton, 1955, pp. 339-340.
29. *Ibid.*, p. 418.
30. Tom Tyler, *Why people obey the Law*, Yale University Press, 1990.
31. *Latinobarometro*, 2005. p.17.
32. G. O'Donnell, "Poliarquias e a (in)efetividade da lei na América Latina", *Novos Estudos*, Cebrap, 51, 1998, pp. 37-57.
33. IBGE 2005.
34. United Nations estimates that 34,000 Iraqis lost their lives in 2006 against 46,000 in Brazil.
35. S. Adorno, N. Cardia & F. Poletto, "Homicídio e violação de direitos humanos em São Paulo", *Estudos Avançados*, vol. 17, n. 47, 2003, p. 60.
36. P. Fajnzylber, D. Lederman & N. Loayza, "Inequality and violent crime", *Journal of Law and Economics*, vol. XLV, 2002, pp. 1-40.

37. S. Adorno, N. Cardia & F. Poletto, 2003, op. cit., p. 49.
38. *Human Rights Watch, Word Report*, 2007, p. 185.
39. Nigel Rodley, available at <[www.unhchr.ch/Huridocda/Huridoca.nsf/0/b573b69cf6c3da28c1256a2b00498ded/\\$FILE/g0112323.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/b573b69cf6c3da28c1256a2b00498ded/$FILE/g0112323.doc)>, accessed on April 23, 2007.
40. Case brought by the former President Fernando Henrique Cardoso, through Reclamacao 2138.
41. In Brazil more than 50% the population would not agree that that justice will be achieved even if takes a long time, *Latinobarometro*, 2005, 25.
42. E. Glaeser, J. Sheinkman & A. Shleifer, "The Injustice of Inequality", *National Bureau of economic Research*, 9150, 2002, p. 3.
43. Carvalho, cited by Carlos Tautz, *Reporter's Notebook: Brazil, Transparency International*, 2006.
44. IPEA 2005, p. 35
45. R. Gargarella (org.), *Courts and Social Transformation in New Democracies: an institutional voice for the poor?*, Hampshire, Ashgate Publishing Limited, 2006.

Address: Rua Pamplona 1197, casa 4
São Paulo – SP 01405-030 Brazil
Email: oscar.vilhena@conectas.org

OSCAR VILHENA VIEIRA

Holds a Ph.D. and a Master degree on Political Science from the University of São Paulo (Brazil) and a Master of Laws from the University of Columbia (US). Vieira is a Professor of Constitutional Law at Fundação Getúlio Vargas' Law School (FGV) and Coordinator of the Graduate Program on Development and Human Rights at the same institution (Brazil). He is also Conectas Human Rights' Legal Director.

Replied from **Sur - Revista Internacional de Derechos Humanos**, São Paulo, n.6, p.29-51, 2007.