



Revista de Direito Mercantil

industrial, econômico e financeiro



Vol. nº 172-173, ago. 2016/jul. 2017

RDM 172/173

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ISBN 978-65-89904-76-2



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revista de direito mercantil



EXPERT
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Revista de Direito Mercantil

industrial, econômico e financeiro

**REVISTA DE
DIREITO
MERCANTIL
industrial, econômico
e financeiro**

172/173

Publicação do
Instituto Brasileiro de Direito Comercial Comparado
e Biblioteca Tullio Ascarelli
do Departamento de Direito Comercial
da Faculdade de Direito da Universidade de São Paulo

Ano LVI (Nova Série)
agosto 2016/julho 2017

REVISTA DE DIREITO MERCANTIL
Industrial, econômico e financeiro
Nova Série – Ano LVI – ns. 172/173 – ago. 2016/jul. 2017
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FASE ATUAL: PROFS. PHILOMENO J. DA COSTA e FÁBIO KONDER COMPARATO

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REVISTA DE DIREITO MERCANTIL

Publicação trimestral da

Editora Expert LTDA

Rua Carlos Pinto Coelho,

CEP 30664790

Minas Gerais, BH – Brasil

Diretores: Luciana de Castro Bastos

Daniel Carvalho

Direção editorial:

Luciana de Castro Bastos

Diagramação e Capa:

Daniel Carvalho e Igor Carvalho

Revisão:

Do Autor

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ISBN: 978-65-89904-76-2

Publicado Pela Editora Expert, Belo Horizonte,

Pedidos dessa obra:

experteditora.com.br

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BEYOND LEGAL FORMALISM IN BRAZIL: THE LAW & POVERTY GROUP EXPERIENCE⁸⁶

Carlos Pagano Botana Portugal Gouvêa
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Abstract: Efforts in legal education have been made to adapt the curriculum, teaching methodologies, and materials to bring students attention to the matters concerning the linkages between poverty, inequality, human rights, and development. In Latin America, due to its socio and economic realities, these efforts are permanently required. The present research aims at exploring and documenting the experience of the Law & Poverty Group (LPG), founded in 2006 at the University of São Paulo Law School. More specifically, this paper discusses the implementation of the LPG approach of three interlocking cycles (formation, investigation, and intervention), considering its teaching methodologies, and multidisciplinary materials, which focuses on legal, historical, and institutional perspectives to address effectively the challenge of poverty and inequality. Ultimately, the purpose of this paper is to postulate reproducing patterns of the LPG experience, spreading critical legal thinking and action in unequal countries. This paper is structured in following three parts. First, it presents the creation of the LPG and its themes related to Legal Structuralism and the required multidisciplinary approach. Second, it presents how the conductive learning is applied in the LPG, enabling students to participate in discussions, critically understand Brazilian problems actively, and creatively produce solutions pulling away compensatory measures, blind legal transplants and one-size-fits-all models. Following, it presents LPG's projects, focusing on three

⁸⁶ For more information on the Law and Poverty Group, please access <http://www.direitoepobreza.com.br/> (in Portuguese). The present paper was prepared for delivery at the International meeting of the Law and Society Association, Mexico City, Mexico, June 20-23, 2017.

initiatives: a book, a case, and a database. Finally, it presents the LPG perspectives for the future, and what it is in for the next ten years.

Keywords: Legal Education; Legal Structuralism; Teaching Methodologies; Interdisciplinary Materials; Conductive Learning.

I.INTRODUCTION

The University of São Paulo (USP) Law School is celebrating its 190th anniversary in 2017. In 1827, the Brazilian Empire's (1822-1889) solution to create and foster the Brazilian bureaucracy and elite, cutting ties with the Portuguese crown from which the country had gained independence just a few years before, was founding two law schools, one in the southeast (São Paulo) and another in the northeast (Recife). Paintings from Pedro I and Pedro II, two Emperors of Brazil, can still be found in the walls of USP Law School.

From the early beginning, students would become the core of the State functioning: judges, lawyers, diplomats, ministers and even twelve presidents of both First Republic (1889-1930) and Second Republic (1945-1964). The history of the São Paulo Law School is in part the history of the organization of Brazilian State political and legal power. Therefore, it is not surprising that the São Paulo Law School was conceived, from its very origin, to offer legal education, create the establishment and maintain the *status quo* in a profoundly unequal country.

Despite previous attempts through its history, stimulating critical legal thinking was not a priority in the USP Law School curricula. Legal education in Brazil focuses on traditional curricula with outdated methodological practices that are still based on the century-old lecturing style with its glossing of statutes and obsolete critique of judicial decision. The Brazilian legal field is also inundated with formalistic language often mixed with Latin and old terms, a tradition inherited from the civil code legal system and its formalism. Currently, we live the increasing massification of the Brazilian law schools, which still suffer from anachronistic and outdated methods

and almost exclusive focus on preparing students for the Brazilian Bar Association (OAB) exam rather than on developing student skills.

The process of democratization in Brazil renewed interests on potential social transformations brought through legal instruments. The Brazilian Constitution of 1988 is an example of what was considered with enthusiasm as the implementation of legal innovations with regards the protection of social and economic rights – the legal text moved away from the traditional emphasis on protecting individual rights, adopting measures in favor of social and economic rights, as well as public policies.

Nonetheless, twenty years later, the Constitution ideals remained very distant from the realities of the country and a certain mistrust on law and legal work as a venue to achieve transformation began spreading in the Brazilian society, even in the legal field. The question that arises, then, is whether the transformations of recent decades, particularly the implementation of constitutional guarantees for social and economic rights, are genuinely transformational or whether they are merely the new chapter of social transformation that fails to affect income redistribution (Portugal Gouvêa, 2013).

Currently, the insufficiency of economic theories to explain development is most evident, due to the inadequate application of compensatory measures, blind legal transplants, and one-size-fits-all models to the realities of poor countries. An alternative reflection for development requires a multidisciplinary study in which the lawyers must participate as interlocutors while recognizing the limits of its functions and roles.

Although very recent when compared to the Law School's history, the Law & Poverty Group (LPG), founded in 2006 by Professor Calixto Salomão Filho, offers an innovative narrative on the potential of legal education, reconnecting law to fundamental questions of poverty and inequality. LPG discussions bring legal analysis to the construction of structural determinants responsible for the unequal distribution of power and income in the context of developing countries. It is based on the premise that legal norms affect the allocation of resources

in a society and positively address issues related to inequality and poverty. It studies how the law aggregates a normative perspective to the development processes and to influence the directions of the economy directly.

The purpose of LPG is to promote the analysis of the Brazilian structures, identifying origins of income concentration and poverty in the process of colonization and industrialization in Brazil. LPG aims at fostering alternative solutions, rethinking traditional explanations, while recognizing the need to build a theory of development that is attentive to the reality of poor countries, through critical reasoning.

The present article explores and documents LPG's experiences, discussing its approach to multidisciplinary materials and teaching methodologies. It is organized as follows: first, it presents the embeddedness of the LPG on Legal Structuralism theory. Following, it presents how the conductive learning is applied in the Law & Poverty Group, enabling students to participate in discussions, critically understand Brazilian problems actively, and creatively produce solutions pulling away ineffective solutions. Second, it presents LPG's projects and accomplishments, focusing on three initiatives: a book, a case, and a database. Finally, some insights on challenges for the future are offered.

II. LPG EXPERIENCE: DEVELOPING TOOLS AND ACTION FOR STRUCTURAL CHANGES IN POOR COUNTRIES

LPG, which is organized as a research group and a discipline at USP Law School, is an academic effort to foster applied research and public initiatives. Since 2006, LPG focuses on how to address our most urgent challenges on poverty and inequality effectively. Its primary challenge is to present undergraduate students enrolled in the third to fifth year of Law School the creative and critical perspectives to instruments offered by law, regarding their limitations and possibilities. It is not a simple task. Presenting new angles on the connections between poverty and inequality and the legal instruments entails

a denaturalization of previous knowledge that has been cultivated through years of studies and that gradually become entrenched into the way students conceive law and legal education.

This can only be achieved through an approach rooted in a multidisciplinary view, drawing upon texts from political sciences, economy, and sociology, with a combination of global and local views on the subjects. They are fundamental to decompartmentalize and contextualize how legal instruments have developed in their historical context. Even more acutely, this critical take on law requires a delicate balance of teaching with and against the frame of norms (Rittich, 2006). That is, teaching what law is doing now, for example, how patent law has pervasive effects on the right to health, as well as showing some techniques and tools for different uses of such instruments in a way that students can understand how they can be used to promote structural changes.

The group is structured in three interlocking parts: formation, investigation, and intervention. This model is at the core of LPG's pedagogy, which is based on conductive learning, critical thinking and multidisciplinary approach, experimentation and methodological rigor. Throughout its ten years and more than a hundred members of the alumni community, LPG's combination of multidisciplinary, global and local views and a work with and against the legal frame, all based in fomenting students' agency and activism from the earliest years of their formation, have created a successful experience on legal education.

II.1. LPG'S MULTIDISCIPLINARY APPROACH: BUILDING TOOLS TOWARDS A CRITICAL VIEW

LPG's theoretical basis is rooted in Legal Structuralism, according to which solutions to the malfunctions of the economic system require creatively revisiting specific legal concepts. Calixto Salomão Filho, LPG's founder, affirms:

“Law is not made to compensate individuals or group of individuals. Its aim is actually to organize the functioning of society. In the economic arena, it means being able to intervene in structures of power in order to create choice and inclusion for individuals. This intervention also has its limits; it is not the scope of the law to determine the results of the economic process, but it can protect values (choice and inclusion) that are instrumental to the construction of a due economic process and the rule of law” (2012).

Legal institutions do not overcome the inequalities that arise as pervasive effects of the concentration of economic power if they do not directly intervene in such structures. They provide mere compensatory measures. Structural solutions, on the other hand, are exemplified as following by Salomão Filho:

“Development in the theory of common good, creative thinking about patents of socially essential goods and their mandatory licensing in the public interest, and new regulation of capital markets leading to the existence of fewer markets (only those where the flow and understanding of information are possible) are just some examples of how structural solutions could look” (2012).

In this context, LPG activities offer a multidisciplinary lens to engage with the normative foundations, historical policy formations, ideological forces and institutional frameworks at play in the human rights and development field.

Bearing those theoretical underpinnings, LPG’s group discussion is divided into three parts. First, students are situated in the history of the institutional and economic development of Brazil, reading works that revisit the colonial origins of the country, the relationship

between economic and political power and the development of its political institutions. This first approach exposes the historical aspects of Brazil's economic formation, by reading the classic literature on the economic structuralism and the dependency theory, and by linking these debates with ongoing dilemmas, such as authoritarianism and corruption. In this first part, students read foundational readings from Brazilian thinkers, including Celso Furtado (2007), Raymundo Faoro (2000), and Oliveira Viana (1955).

The second part of the discussion explores theories of economic and institutional development and some of the key themes and current policy debates. Here, two distinct perspectives on economic and social development are presented: the first is the stimulus of development through state economic planning, typical of post-World War II reconstruction processes; and the second is the neoliberalism, focused on institutional reforms aimed at liberalizing the economy and reducing state interventionism that characterized political and economic transformations of the end of the last century, including the discussion of the central political theory of the neoliberal reform process, that is, the elites' pact theory. Here the selected themes may include Myrdal (1968), Williamson (2000), Douglass North (1998), Joseph Stiglitz (2008), Richard Posner (1998), and Amartya Sen (2000).

In the third part, the focus shifts towards a more specific topic of analyzing economic inequality and its impact on development, combining a global and a local perspective. Here we discuss the concept of economic inequality along with its historical origins. This discussion, then, turns towards a more hands-on approach, regarding measurements of economic inequality and its limitations. To conclude the third part of group discussions, it is explored the impact of inequality on various aspects of social organization. Here, readings might have competing views on the origins of inequality, on how to measure it and how to act on them. Some examples of authors or texts read in this part are Veblen (1987), Salomão Filho (2015), Institute of Applied Economic Research - IPEA (2006), and Ostrom (1990).

LPG is designed for students interested in social and economic development, poverty, inequality, globalization and human rights issues. Therefore, it is self-consciously located in the Legal Structuralism theory, with a heterodox approach, embracing some of the discussions of human rights and development.

II.2 LPG'S PEDAGOGY, METHODS, AND TOOLS

Many of the LPG's features, including its pedagogical choices, reflect its efforts to implement a legal education model, that enables students to actively participate in discussions, critically understand Brazilian problems, pulling away from ineffective solutions. LPG can achieve such ideals by three interlocking parts: formation, investigation, and intervention.

In the first semester, students are devoted to their formation, a careful group discussion of books, papers, and other scholarly production. Its overall goal is to equip students with competing views on themes – like human rights, development, poverty, and inequality – and to conduct them away from a comfortable position of complete assimilation of all tasks rendered to them. Through weekly debates, mainly in the form of Socratic discussions, students exert their abilities to review classical texts, create a dialogue with their peers and engage in high-level debates. Most of the texts that are discussed in the formation cycle were presented in the previous item.

One noted characteristic of the formation cycle is that students are continually demanded to formulate critical views. They must add a historical account and context, as well as new and competing views of societies and the origins and maintenance of poverty and inequality, eroding their common sense in legal instruments. Students slowly confront and test their previous views with new perspectives and angles, and by the end of the semester, the formation unit of the three interlocking cycle is complete, creating a common language – regarding substance and proceedings – between all LPG's members.

It means that students have a common ground, which facilitates the next steps of the cycle, the investigation, and intervention.

The investigation and intervention units last for six months and require an entirely different dynamic from the group. Professors usually choose a theme that students will be devoted and divide them into groups of three or four, each one investigating one aspect of a more significant theme or even completely different subjects. The investigation part prepares students for the intervention. It provides hands-on experience in researching a problem with the clear intent of reaching outside the academia, of creating and developing knowledge that can be used or recycled by authorities and civil society to promote structural actions.

Through theoretical and empirical research, students can provide authorities, from public prosecutors to regulators with a new intake of a given phenomenon. This is a considerable ambition of LPG, and it is not always easy to achieve. After a semester of discussing theoretical approaches, students often settle for abstract discussions on inequality and development. They can see problems, but not always to find ways to solve them. The intervention cycle is based on their ability to use all accumulated knowledge to solve a specific topic, which is rather challenging. There is no given format on the paths they should take, the instruments they will use or the data they will collect. All of this is created by the students, under the supervision of Professors and academic coordinators, who are graduate students with experience in applied research. Some examples of products deriving from the investigation and intervention units are described in Section III.

The intervention cycle shows different performance rates from groups throughout the years. Some students find this cycle extremely difficult to develop and do not make substantial progress in a year. Others do not have difficulties and advance on topics and subjects presented to them. It is a permanent challenge and a source of experimentation on how to improve intervention measures, preserving

the cycle characteristic of learn-by-doing as well as advancing as much as possible on researches and interventions.

The interdependence between its interlocking cycles illustrates the way in which LPG is structured as a discipline and a research group. Understanding the law requires much more than memorizing rules, it also demands, at a minimum, securing a critical understanding of the theories that either animate those rules or could be used to change them. It also requires an appreciation of how the rules influence behavior and the capacity to predict how they have been (or would be) applied to real controversies.

Thus, each cycle plays an essential role in connecting these two activities: the formation cycle develops the activities of LPG's discipline, putting students in the same starting line with a common background that gives them the tools they need to develop the investigation cycle. Second, the investigation cycle functions as applied researches and an instrument for the intervention cycle. Students are then required to create and develop knowledge that can be used to promote structural change. At last, the intervention cycle develops public initiatives, which aims at encouraging students to have a direct dialogue capable of generating change in legal and economic structures.

The conductive learning approach holds that students are much more likely to master and retain information and ideas when they put them to use – solving problems, debating their merits and applications, among others (Hake, 1988). The most important of the LPG's dimensions that reflect this fundamental principle is the discussion-based format of the formation cycle. During the discussions, students are not only required to denaturalize their previous knowledge but also to imagine law as a tool for social change while recognizing that it is a factor of maintenance of the *status quo*.

This epistemological view is deeply invested in the agency of students, in their ability to reason creatively. Most of them start LPG with low levels of criticism towards the activities they perform at the law school, whether it is reading a text or formulating contracts. They are used to the mere assimilation of the texts and assignments.

Many of them show uneasiness to new perspectives that may bring doubts on their career, as researchers, lawyers or judges. Nonetheless, through a careful learning process, based on support, practice and examination students can rapidly develop critical views – this has been the case for many students that have passed LPG. Each year, Professors coordinating LPG would combine and experiment different venues to show gaps, conflicts, and ambiguities brought by legal instruments and their consequences, while investing in the agency of students, in their ability to think beyond the natural order of things.

Like human rights, development is a vast and potentially all-encompassing field. For this reason, LPG stands up for an approach that prioritizes critical thinking and multidisciplinary studies. Students must be able to understand the multi-layered Brazilian reality and to couple their legal expertise with knowledge of political sciences, economy, and sociology. They must be able to grasp the specific nature of their contribution to the designing and achieving structural changes. This feature is complementary to the idea that pedagogic progress requires experimentation, which is fostered by giving teachers freedom and plasticity to try different approaches.

Finally, in Brazil, the issue of methodological rigor plays a crucial role, as it is prevalent to find work with no methodological accuracy, where the researchers are only willing to prove a point defending one side. Without rigor, students do not seek to test their hypothesis of research, but only to validate it. For this reason, LPG takes methodological rigor seriously, often asserting students must wrestle with the most challenging questions in this field.

The combination of all pedagogic premises, including the formation, intervention and research cycles, has been key to LPG's longevity and relevance. Its experience in bringing new perspectives to address the challenge of poverty and inequality effectively is reflected not only on the teaching methodologies employed but also in the projects developed and accomplishments received through the years, as the next section outlines.

III. LPG'S PROJECTS AND ACCOMPLISHMENTS: BOOK, CASE, AND DATABASE

Over the past ten years, LPG has gathered meaningful results: publications, events, and reports to public agencies on issues related to inequality and their legal structures. To ground this discussion, we provide here a brief description of several matters on which LPG has worked.

In 2007, LPG produced, together with the Institute of International Trade Law and Development (IDCID), the book “Intellectual Property Rights and Public Health: The Universal Access to Antiretroviral Drugs in Brazil”, which is a collection of scientific articles written by Professor Calixto Salomão Filho, Professor Maristela Basso, Fabrício Polido and Priscilla César. This collection examines some of the significant issues involved in the relationship between access to health and intellectual property rights, particularly in the debate on access to antiretroviral drugs and the sustainability of the Ministry of Health's National Program of HIV/AIDS after more than a decade of Law No. 9,313/1996, which organizes the free distribution of medicines to HIV and AIDS patients. Calixto Salomão Filho analyzes the hypothesis of the legality and fairness of compulsory licensing from the antitrust perspective. He detects the relationship between patent law, competition law and the public interest, starting with a brief historical view of the problem, followed by the economic function of patents, and the consequences to the legal discipline of compulsory licensing of antiretroviral drug patents.

In that same year, LPG co-sponsored the Conference “Law and Development in Latin America: Legal and Institutional Innovation,” a First Collaborative Research Project of the Latin American Legal Scholars Network, which occurred at the University of São Paulo Law School. The Conference was also co-sponsored by the University of São Paulo Law School, the Brazil Studies Program, David Rockefeller Center for Latin American Studies at Harvard University, the European Law Research Center at Harvard Law School, and São Paulo Stock Exchange

(BOVESPA). Calixto Salomão Filho – LPG founder and coordinator – participated in the opening panel, named “Law and Development: Present, Past, and Future,” together with David Kennedy, David Trubek, and Grandino Rodas. Carlos Portugal Gouvêa, one of the Conference organizers and an LPG coordinator, participated in the panel “Policy Investment in the Industry, Agriculture, and Environment.”

In 2008, LPG produced the “Law and Poverty Series,” a collection of scientific articles written by the group’s undergraduate and graduate students, and organized by Brisa Ferrão. This first edition was dedicated to the study of the structures of the different dimensions of the Brazilian economic cycles. The result was presented in four articles: “Commercial Companies in the Colonial Brazil: Monopoly and Income Concentration”; “The Oligopolistic Regime of the Coffee Cycle: Coffee Valorization Policies and its Negative Impact on the Urban Strata”; “Institutional Reforms and the ‘Economic Miracle’”; and “Sugar, Intern Market, and Wealth Concentration in Brazil (1750-1850)”. This collection sought to encourage the exercise of transforming theoretical hypotheses into an empirical analysis, a challenging experience for law students, but essential for the development of this LPG’s line of research. This project received the support of Ford Foundation and IDCID.

Moreover, in 2008, LPG initiated the research “Discrimination in Access to Breast Cancer Drugs in Brazil,” coordinated by Calixto Salomão Filho and Brisa Ferrão. It analyzes the Brazilian treatment against breast cancer offered by the Universal Health System, as well as the relationship between the right to health and intellectual property rights in Brazil. This research was further used in the Trastuzumab case, which is better explained below (item III.2). In 2008, LPG published the book “Concentration, Structures, and Inequalities: The Colonial Origins of Poverty and Poor Income Distribution,” which will also be further explained in details (item III.1).

In the following year, 2009, LPG developed the research “Capital Markets and Economic Inequality,” under the coordination of Calixto Salomão Filho and Carlos Portugal Gouvêa. It concluded that regulation

has become so relevant in the modern society that its interest is no longer limited to corporate finance and investor protection. In fact, problems in capital market regulation can lead to large-scale crises such as the 2008 crisis, creating extremely adverse conditions for the protection of economic and social rights.

Under the coordination of Calixto Salomão Filho, Carlos Portugal Gouvêa, and André Rainho, in 2010 and 2012, respectively, LPG started the two pieces of researches “Legal Reforms and Social and Economic Inequality” and “Democratization of the University: Effects and Regulation of Affirmative Actions in Higher Education.” The first developed an innovative discourse on the issue of social inequality, valuing legal aspects that lead to its maintenance or overcoming, and the second examined the constitutionality of laws providing quotas for particular social groups in the processes of admission of students to undergraduate courses of public universities, based on the Federal Supreme Court Decision Appeal No. 597285.

In 2013, LPG returned to the research on breast cancer, the right to health, and intellectual property rights in Brazil to write a motion that was further presented to the General Prosecutor’s Office of Brazil to serve as the basis for a class action based on price discrimination and abuse of intellectual property rights. In parallel, LPG started the empirical research that aims to create a universal and standardized database with the purpose of solving the problem of the absence of consolidated data on the judicialization of the right to health in São Paulo. These last two initiatives are coordinated by Calixto Salomão Filho, Carlos Portugal Gouvêa and Lílían Cintra de Melo will be the subject of the next sections. Most recently, in 2016, along with the initiatives related to the right to health, LPG initiated a promising investigation into the relationship between corruption and economic concentration in the infrastructure sector. Calixto Salomão Filho, Carlos Portugal Gouvêa, and Raquel de Mattos Pimenta coordinate this new project.

We will describe here in details three examples of LPG’s successful projects. These examples are intended to demonstrate

the central characteristics of the types of projects LPG considers as structural solutions. The three activities relate directly or indirectly to the two general purposes that LPG pursue: using the law as an instrument of social justice and helping students develop or reinforce innovative legal skills. The first LPG example is a book, followed by a case and empirical research.

III.1.BOOK “CONCENTRATION, STRUCTURES AND INEQUALITIES: THE COLONIAL ORIGINS OF POVERTY AND POOR INCOME DISTRIBUTION”

The first LPG initiative we want to highlight is the book “Concentration, Structures and Inequalities: The Colonial Origins of Poverty and Poor Income Distribution,” written by Calixto Salomão Filho, Brisa Ferrão e Ivan César Ribeiro and published in 2008. Its primary purpose is to empirically demonstrate, based on the collection of historical statistical data, the relationship between power concentration and poverty growth.

The book structure is based on the definitions of the economic cycles proposed by Celso Furtado in “Economic Formation of Brazil.” Based on theoretical studies and the collection of statistical data on the cycles of sugar cane, gold, and coffee, the book identifies structural components of different productive activities developed in Brazil throughout its history. After the identification of the cycles’ respective structures and the empirical variables capable of measuring them, an empirical test was elaborated with the objective of verifying the existence of similarities and differences between the mentioned activities, in what refers specifically to the influence of concentrating structures in institutional designs, and to test the possible correlations between these structures and the Brazilian inequality and poverty.

The research presented in the book was conducted in three phases. In the first, the theoretical bases were developed in the form of an article on colonial monopoly. In the second, a database with

historical data related to the Brazilian colonial cycles was elaborated. In the third and last phase, empirical tests and appropriate econometric models were formulated to verify the theoretical hypotheses proposed. As a conclusion, the book presents an alternative explanation for the patterns of development, poverty, and social inequality observed among former colonies. Legal and economic structures are suggested as the main cause for the poor economic performance of these countries, side by side with institutional and geographical causes.

The new approach presented suggests that the effects of structures on poverty and income inequality occur through economic concentration. In fact, results concerning the cycles of sugar cane, gold, and coffee support the proposition of the importance of the economic history, especially of the colonial phase, for the understanding of the formation of structures is also emphasized. The book was published in print and electronic versions. The electronic version can be found at LPG's website.

LPG received the support of Ford Foundation, IDCID, the University of São Paulo Law School, the Brazilian Institute of Geography and Statistics, the Meteorological Institute of Brazil, the Brazilian Agricultural Research Corporation, and the Superior Electoral Court.

III.2 THE TRASTUZUMAB CASE

LPG developed years of research on breast cancer, access to medicine, and discrimination. In 2013, LPG's research detected discriminatory pricing in the public purchases market for Trastuzumab (Herceptin®). In 2012, the National Commission for the Incorporation of Technologies of the Universal Health System approved the incorporation of Trastuzumab for the treatment of initial and locally advanced breast cancer with epidermal growth factor receptor type two (HER-2 + factor). In this opportunity, among other constraints to the incorporation of Trastuzumab to the Universal Health System (SUS), the drug price was agreed with the Ministry of

Health as approximately R\$3,426.20 Brazilian Reais, with the purpose of increasing access.

Nevertheless, LPG empirical evidence demonstrates that some State Health Secretariats paid the Trastuzumab price above of R\$8,206.00 Brazilian Reais, more than twice the price paid by the centralized purchase from the Ministry of Health. Consequently, the price discrimination practiced in the national market harms to the Brazilian Treasury and, subsequently, the public interest, as federal public funds are transferred to States for the acquisition of Trastuzumab at exorbitant prices that are well above from what was agreed with the Ministry of Health. This unlawful practice also prejudices the Unified Health System (SUS) policies, violates Article 196 of the Brazilian Constitution⁸⁷, and makes clear the discrimination suffered by patients with the HER-2 + factor in violation of the fundamental rights of non-discrimination provided for in Article 5, XLI and XLII of the Constitution⁸⁸.

In 2013, LPG presented its Trastuzumab research on the abuse of dominant position and intellectual property rights to the General Prosecutor's Office of Brazil to serve as the basis for a class action against the pharmaceutical companies selling such products. In this case, LPG pushed for structural solutions that included payment of damages due to abuse of the dominant position and intellectual property right and compulsory licensing as a way to provide access to the drug, by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Brazilian Industrial Property Law.

At the beginning of 2015, LGP published the Research Note "Breast Cancer: Access to Drugs and Nondiscrimination" in an

87 Article 196 of the Brazilian Federal Constitution: "[h]ealth is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery.

88 Article 5, XLI of the Brazilian Federal Constitution: "law shall punish any discrimination which may attempt against fundamental rights and liberties". Article 5 XLII of the Brazilian Federal Constitution: "the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law.

electronic version⁸⁹. Following this publication, in April 2015, the investigation was initiated as Inquiry No. 1.16.000.000699/2015-87. On June 27, 2016, the Class Action No. 003377819.2016.4.01.34000 was proposed demanding the return to the public coffers of R\$107.1 million Brazilian Reais due to abuse of the abuse of dominant position and intellectual property rights practiced by the laboratory manufacturer of Trastuzumab, as well as compulsory licensing of the drug. In March 2017, the case had been filed with the Court for decision. This might become a leading case that may substantially reduce the cost of Trastuzumab to the most disadvantaged communities in Brazil.

III.3 DATABASE WITH HISTORICAL DATA ON THE JUDICIALIZATION OF THE RIGHT TO HEALTH IN BRAZIL

Article 196 of the Brazilian Constitution provides that “[h]ealth is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery.” Many individual lawsuits have been filed under this Article of the Constitution. Given this scenario, LPG started empirical research on the judicialization of the right to health in Brazil and the role of the Judiciary. It hypothesizes that the current phenomenon disorganizes the Unified Health System (SUS), excludes the poorest of the poor, and often results in simple compensation without altering the structures that perpetuate inequality in Brazil.

The primary objective of the research is the creation of a universal and standardized database that will provide consolidated data on the phenomenon in São Paulo. The empirical research universe encompasses all demands for medicines before the Court of the State of São Paulo (TJSP for its acronym in Portuguese). In 2015, LPG started unprecedented partnerships with the TJSP, the TJSP

89 Refer to http://www.direito.usp.br/pesquisa/nota_informativa_medicamentos.pdf

Support Center for Judges, Public Treasury section (CAJUFA), the TJSP Comptroller's Office, and the São Paulo State Attorney's Office (PGE-SP, for its acronym in Portuguese) for ample and full access to the records of the demands under study.

Initially, a preliminary study defined the research variables and relevant information, which were divided into three types: plaintiffs' data, procedural data, and medicines data. Also, the research information gathering was systematized into three phases: TJSP website (e-SAJ), in loco, and PGE cases. First, researchers surveyed e-SAJ (www.tjsp.jus.br/esaj) to detect all available online cases already decided (total of 2,817 cases). Subsequently, researchers analyzed in loco all physically available cases at the Public Treasury section of TJSP (total of 873 processes). Lastly, researchers had access to PGE's lists with all demands for medicines, from 2009-2015, against the State of São Paulo. Based on these lists, researchers found 3,828 cases available.

The empirical research partial results indicate that, regarding plaintiffs' gender, there is a slight prevalence of women. Still referring to plaintiffs, 74% of medical prescription are private, 71% of plaintiffs are represented by private lawyers, and 98% of these lawyers are paid. From the plaintiffs' profile, it is possible to affirm there is a prevalence of higher classes presence, with access to private lawyers and to the private health system. It is worth mentioning that, according to the data gathered, 77% of full and free-of-charge legal assistance requests, under Article 5, LXXIV of the Brazilian Constitution, were granted. Although this number appears to be in contradiction to the plaintiff's profile described above, the lack of compulsory income proof provided in Article 4 of Law No. 1,060/1950 for request and approval of the benefits of full and free-of-charge legal assistance is one of the reasons for this apparent contradiction.

Concerning the medicines, 76% of the demands are related to drugs not registered or listed in the Universal Health System (SUS). It means drugs that have not been included into SUS and are not available for all and free-of-charge. As to the most requested drugs, 64% of the

analyzed cases requested insulins, 12% Interferon pegylated and 10% Sofosbuvir. About diseases, there is a higher incidence of diabetes, which represents approximately 80% of the cases. The discrepancy between the percentages of diabetes' incidence (number of patients) and requested insulins exists because its treatment requires only one drug in most cases, while in other diseases cocktails use two or more drugs. Diabetes, cancers, hepatitis C, renal insufficiency, hypertension, multiple sclerosis, Alzheimer's and cerebral palsy sum approximately 95% of all diseases identified in the study.

Portugal Gouvêa affirms that *“social and economic rights in Brazil have been appropriated by privileged economic groups with the result that the constitutional protection of those rights is no longer carrying its function to reduce economic inequality”* (2013). LPG's empirical research presents data seems to corroborate with that hypothesis, indicating that individual demands for medicines are related to groups of the population that already has access to justice and the private health system.

The data also draws attention to the importance of structural measures for the most prevalent diseases and demanded drugs. This research is still ongoing, and LPG aims to understand its relationship with inequality and, in the future, propose structural measures to empower SUS and the Brazilian health policy. On November 28, 2014, LPG received the PRCEU Award for the activities developed under this initiative.

IV. WHAT'S IN FOR THE NEXT TEN YEARS

The LPG mains purpose is to use the law as an instrument of social justice and assist students to develop or reinforce creative and innovative legal skills to submit proposals for structural reforms capable of modifying social and economic organizations of developing countries, marked by structures of power that concentrate power and income. These proposals need to be fostered by initiatives that include

as a priority the guarantee of human rights, especially economic and social rights.

Legal education in Brazil often does not encourage activities that stimulate students' activism from the earliest years of their formation. In this sense, LPG initiatives are pioneers and of utter importance, due to its ability to deliver projects that promote dialogues among academia, civil society, and government authorities, improving and expanding the forms in which legal professionals operate in Brazil.

While recognizing that LPG is embedded in the culture and limitations of USP Law School, by analyzing its projects, ultimately, the purpose of this paper is to postulate reproducing patterns of LPG's experience, so it can be replicated, with adaptations, throughout Latin America and the Global South, spreading critical legal thinking and action in unequal countries.

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