

## **Rule of Law Reforms: a Paradoxical Path to Progress**

Mariana Mota Prado

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*Abstract:* In their most recent book, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Michael Trebilcock and Ron Daniels show how rule of law reforms have a mixed – not to say disappointing -- track record of successes. Their diagnosis is that, among other things, social-historical-cultural factors and resistance of interest groups are two of the main obstacles for reforms. In this paper, I explore these two obstacles in greater depth. Regarding social-historical-cultural factors, my main argument is that early rule of law reforms can create values, practices and attitudes that might become impediments to future reforms. On the political economy front, these early reforms can strengthen interest groups that will block future reforms. As a consequence, policymakers face a paradox: robust rule of law reforms early on may undermine broader reform efforts by reducing the possibility of other necessary reforms down the road, creating a *reform trap*. I illustrate the paradox with a Brazilian case study and discuss possible strategies to address this challenge.

## **Introduction**

Beginning in the 1990s, an institutional perspective on development has become increasingly prominent in development thinking, captured in the mantra, “Institutions Matter,” or “Governance Matters.” Based on this assumption that “institutions matter”, there has been a massive surge in development assistance for institutional reform projects in developing and transition economies involving investments of many billions of dollars. Among these, law reform projects have acquired special importance. For instance, since 1990 the World Bank has supported 330 rule of law projects and spent 2.9 billion in the sector.<sup>1</sup>

However, these reforms have had mixed to disappointing results thus far, as Michael Trebilcock and Ron Daniels demonstrate in their most recent book, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*.<sup>2</sup> Discussing numerous cases of failed reforms in Africa, Asia, Latin America and Eastern Europe, they show that despite extensive evidence that institutions matter for development, we still know very little about how to conduct successful institutional reforms. And they are not alone: others have voiced similar concerns.<sup>3</sup>

Based on a wide array of case studies, Trebilcock and Daniels offer some insights on possible reasons for these failures. According to them, there are three main obstacles to reforms. First, despite political will to promote reforms, countries may lack the necessary financial, technological or human resources to implement changes. Second, there may be “social-cultural-historical factors that have yielded a set of social values, norms, attitudes, or practices that are inhospitable to even a limited conception of the rule of law.”<sup>4</sup> Third, there are political-economy based impediments. Groups of interests will resist reforms that eliminate their privileges, do not foster their interests, or do not offer any gains (material or otherwise). These groups of interests can be on the demand side, such as citizens, and on the supply side, such as judges, attorneys, and prosecutors. On the demand side, external constituencies who will not benefit from reforms and are likely to resist it are those involved with corruption, cronyism, and favouritism.<sup>5</sup> On the supply

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<sup>1</sup> David Trubek, “The Rule of Law in Development Assistance: Past, Present and Future,” in David Trubek and Alvaro Santos eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) at 74.

<sup>2</sup> Michael Trebilcock & Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008) [Trebilcock & Daniels, *Rule of Law*].

<sup>3</sup> Thomas Carothers, ‘The End of the Transition Paradigm’ (2002) 13 J. Democracy 5; Thomas Carothers, ‘The Rule of Law Revival’ (1998) 77 For. Aff. 95; Bryant Garth & Yves Dezalay, ‘Introduction’ in Yves Dezalay & Brian Garth, eds., *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002); Brian Tamanaha, *On the Rule of Law: History Politics, Theory* (Cambridge: Cambridge University Press, 2004); Brian Z. Tamanaha, ‘The Primacy of Society and the Failure of Law and Development’, St. John’s Legal Studies Research Paper No. 09-0172 (2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1406999](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999).

<sup>4</sup> Trebilcock & Daniels, *Rule of Law*, supra note 2 at 39.

<sup>5</sup> Trebilcock & Daniels, *Rule of Law*, supra note 2 at 39-40.

side, Trebilcock and Daniels argue that corrupt or incompetent judges or police officers are likely to resist reforms.

My main argument in this paper is that these obstacles can also be created by early rule of law reforms. Whenever reforms are made in installments, instead of being full-fledged reforms, institutional changes can generate two consequences: (i) create practices, values, attitudes that will block future reforms; and/or (ii) strengthen interest groups that will resist future reforms. To illustrate the problem, I discuss a case study from Brazil. The Brazilian judiciary was granted strong guarantees of independence in 1988, when the new constitution was enacted. These guarantees of independence were meant to ensure courts' ability to decide cases without being influenced by other branches of government or third parties. In the following decade after the constitution was enacted, the Brazilian judiciary was involved in numerous corruption scandals and with cases involving mismanagement of public funds. However, judges strongly resisted statutory and constitutional reforms designed to improve the functioning of the Brazilian judiciary and increase its accountability. Attempts to promote such reforms started as early as 1992, but judges' resistance was effective until 2004, when a constitutional amendment was finally approved.

If early rule of law reforms have the potential to undermine future reforms, this creates a paradox: while rule of law reforms are necessary to guarantee development, whenever they are instituted in increments or phases, initial steps towards reforms might impair further institutional improvements. To analyze this problem, which I call a *reform trap*, the paper is structured as follows. The first section of the paper provides an example, the case of Brazil, illustrating in greater detail the initial reform process and subsequent resistance to reforms briefly summarized in this introduction. The second section asks whether we can avoid reform traps by not implementing piecemeal reforms. I argue that there are situations in which comprehensive reforms might not be desirable, and other in which they might not be feasible, forcing reformers to adopt phased institutional change, which will in turn create obstacles to further reforms. The third section discusses whether there are ways out of this trap. The analysis is focused on one particular aspect of reform strategies: changing the mindset or the preferences of the group that is strongly resisting reforms. All sections of the paper draw heavily on Michael Trebilcock's invaluable contributions to the field of law and development.

### ***1. Case Study: Reforming the Brazilian Judiciary***

From independence in 1822 to the end of the latest military dictatorship in 1985, the history of the Brazilian Judiciary has oscillated between gains in formal independence and recurrent backlashes and interferences by the executive and legislative in the *de facto* independence of judges.<sup>6</sup> Breaking this pattern was one of the major concerns of the

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<sup>6</sup> Martonio Lima, 'Judiciário e Estado no Brasil: Tribunais Superiores e Juízes na Formação do Estado Brasileiro' (2000) 5 *Pensar* 5.

reformers in the 1987-8 Constitutional Assembly, who had especially vivid memories of the threats to judicial independence that occurred between 1964 and 1985.<sup>7</sup> To address this concern, the reformers decided to ensure high levels of judicial independence, both to protect the judiciary from external political interference, and to allow it to serve as an effective instrument of horizontal accountability, securing a system of checks and balances that would control potential political abuses from the executive and legislative powers.

The institutional design to guarantee judicial independence in Brazil granted financial and administrative autonomy to the judiciary and expanded its powers of constitutional review. The 1988 reforms were highly successful in securing the high level of judicial independence in the Brazilian judiciary measured by autonomous rulings on politically sensitive issues, and by its functional insulation from external interferences.<sup>8</sup> However, soon after the Constitution was enacted, the shortcomings of the model came to light. While the Brazilian institutional design brought unprecedented strength and political power to Brazilian judges and courts, this power was largely left unchecked by the lack of mechanisms to ensure accountability.<sup>9</sup> Attempts to implement a second generation of reforms, including mechanisms of judicial accountability, started as early as 1992, only four years after the Constitution was enacted. Nevertheless, it took 15 years for the first meaningful changes to be incorporated in the Brazilian system. In this section, I suggest that the difficulties of adopting a second generation of reforms in the Brazilian judiciary may have been rooted in - or compounded by - vested interests and a set of values created by the first generation of reforms. In order to develop this argument I will focus in one element of the second generation of reforms: the attempts to create external judicial oversight in Brazil.

### ***1.1 The 1988 Reforms: Judicial Independence Without External Oversight***

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<sup>7</sup> The main measures adopted by the 1964 military regime were: expand the number of Supreme Court (STF) members from 11 to 16, and force the retirement of three members considered too critical of the regime (Institutional Act 2 of 1965, also known as AI-2); allow the president to appoint all judges at higher federal courts, besides members of the STF (AI-2); suspend the guarantees of life-tenure and no-transfer of members of the judiciary, establishing that the executive could dismiss, remove, dispense or forcefully retire members of the judiciary (AI-2). Furthermore, the regime undermined the judicial capacity to exercise horizontal accountability by excluding from judicial review federal government practices and the decisions by state assemblies that canceled electoral mandates or declared the impediment of governors, deputies, or mayors; and suspended the guarantee of Habeas Corpus in cases of political crimes, crimes against national security, and against the economic order (AI-5 of 1968).

<sup>8</sup> William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport, CT, and London: Praeger, 2000) at 83 [Prillaman, *Judiciary*]; Carlos Santiso, 'Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability', Proceedings of the VIII CLAD International Congress on State and Public Administration Reform (2003) [Santiso, 'Economic']. Matthew M. Taylor, 'Citizens against the State: The Riddle of High Impact, Low Functionality Courts in Brazil' (2005) 25:4 *Brazilian Journal of Political Economy* 418 at 419. [Taylor, 'Citizens']. See also Matthew M. Taylor, *Judging Policy: Courts and Policy Reform in Democratic Brazil* (Stanford, California: Stanford University Press, 2008) [Taylor, *Judging Policy*].

<sup>9</sup> Prillaman, *Judiciary and Decay*, supra note 8 at 85-88. See also Santiso 'Economic', supra note 8.

The Brazilian 1988 constitution maintained, strengthened and incorporated a series of guarantees to protect judicial independence. To avoid political interference via financial constraints or threats, the judiciary was granted financial autonomy.<sup>10</sup> The judiciary was also granted administrative independence: higher courts were granted exclusive right to propose bills regarding the creation of new courts or changes in the composition of existing courts,<sup>11</sup> and since the 1988 constitution courts are in charge of selecting and promoting their own judges according to a meritocratic system.<sup>12</sup> The reformers also strengthened the guarantees of tenure: after two years of probation judges would have the guarantee of tenure until retirement, which is mandatory at the age of 70.<sup>13</sup> Their salaries were “irreducible”. Furthermore, judges can not be transferred from one court to another against their will.<sup>14</sup> Higher courts hold administrative disciplinary cases against lower court members, but the maximum administrative penalty is forced retirement, with the sentenced judge receiving life retirement benefits in proportion to the time worked.<sup>15</sup> In sum, the judiciary was given total control over its financial, administrative and disciplinary affairs.

During the Constitutional Assembly there were discussions on mechanisms to ensure judicial accountability, such as judicial councils formed by judicial and non-judicial members. However, these were not approved due to an organized and strong opposition of judges, who dubbed the proposal a measure of “external control” that would reduce courts’ independence.<sup>16</sup> It is reasonable for Brazilian judges to fear external

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<sup>10</sup> The Brazilian higher courts prepare their annual budget and present it directly to Congress (in the case of the federal courts) or to the state legislature (state courts), without any intermediation from the executive branch. The budget is considered within the broader legislative process in which the annual federal or state budgets are defined, but once approved the judiciary has discretion to manage the funds, defining salaries, benefits and investments.

<sup>11</sup> Andrei Koerner, “O Debate Sobre a Reforma Judiciária” (1999) 54 *Novos Estudos Cebrap* 5-10. [Koerner, “O Debate”]. Courts were also entrusted with drawing up their internal regulations and organizing their auxiliary services. The courts also establish conditions for leave, vacations and benefits - for themselves and for their auxiliary personnel.

<sup>12</sup> First, the constitution established that judicial recruitment is merit based, and prospective magistrates have to pass entrance exams administered by the judiciary itself. Second, judges are promoted to higher levels on a combined system of merit and seniority. Promotion through merit was designed to ensure that more efficient judges – judged by their own superiors – would move up quicker. On the other hand, promotion by seniority guarantees that even unpopular judges advance, circumventing potential internal political persecution. The system established lateral entrance only to the higher tribunals.

<sup>13</sup> Even though Brazilian judges were formally granted life tenure in 1824, existing infra-constitutional legislation allowed for dismissal of a judge by an administrative act following an administrative trial. In addition, under the new constitution removal processes were significantly restricted. After completing two years of probation, a judge could only be dismissed by a judicial sentence, following a judicial process before higher courts. The state superior tribunals should try lower courts, while the Superior Tribunal of Justice should try higher court magistrates. Supreme Court (STF) members should be tried by the plenary of this Court.

<sup>14</sup> *Lei Orgânica da Magistratura Nacional/Loman*, Article 26, c II.

<sup>15</sup> The quorum required to apply this maximum disciplinary penalty is robust: two thirds of the votes of the higher court’s members.

<sup>16</sup> Megan J. Ballard. ‘Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil’ (1999) 17 *Berkeley J. Int’l L.* 230 at 262 (footnotes omitted). [Ballard] (“Some members of the Constituent Assembly backed the creation of National Council of Justice, composed of judges and members of civil society, to supervise administrative aspects of the court system. That such a council

interference, given that it has happened many times in the past, including some traumatic episodes in recent Brazilian history. For instance, in 1977 the military president Geisel presented before Congress a bill to establish an “independent” judicial council (*Conselho da Magistratura*) with power to discipline judges. When Congress rejected the proposal, Geisel approved the measure by decree.<sup>17</sup> This could explain why the discourse about judicial independence had so much force within the constitutional assembly of 1987-88, and remained very much alive inside the judiciary in the following years.

In addition to judges’ resistance to accountability mechanisms, there was not much popular support for their implementation. According to Anthony Pereira, this might be explained by the fact that there was a public image of the Brazilian legal establishment as anti-authoritarian. This public image disregarded the involvement of civilian lawyers and judges in the military justice system, and was largely based on “the actions of the Bar Association in the justice and peace commissions that lobbied for an amnesty for political prisoners and protested human rights abuses in the 1970s, and the celebrity of a small group of lawyers who had defended political prisoners.”<sup>18</sup>

### ***1.2 Consequences of the 1988 reforms: mismanagement of resources and corruption***

The absence of any kind of external accountability mechanisms to oversee the use of public resources, criteria for career advancement, and a wide array of administrative and disciplinary affairs ended up enabling financial recklessness, corruption, nepotism and favoritism inside the Brazilian judiciary.<sup>19</sup> By the 1990s, cases of mismanagement of funds, granting of excessive individual benefits to judges, and corruption abounded. Santiso cites three examples of reckless expenditures in 1994: while the federal court system had a budget of about half a billion dollars, it spent over US\$ 880 million; the Higher Labor Court (TST) alone spent more than both chambers of Congress in one year; and the construction of one single luxurious building to serve as headquarters for the Superior Tribunal of Justice cost US\$170 million in 1995.<sup>20</sup>

As to individual benefits, Prillaman provides the following information:

[J]udges have established lavish institutional perks for themselves. Benefits for all federal judges include sixty days of paid vacation annually, a free furnished apartment, a car and driver, a gasoline allowance, and nearly \$4,000 annually for every judge to pay potential medical and dental bills. Senior judges also have budgeted an impressive support staff for

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would have included people outside the judiciary has caused this and similar proposals to be dubbed “external control” measures. Judges, well-organized and cohesively opposed the idea, swiftly eliminated the measure from the drafters’ agenda.”)

<sup>17</sup> Ibid. at 243.

<sup>18</sup> Anthony Pereira, ‘Explaining Judicial Reform Outcomes in New Democracies: The Importance of Authoritarian Legalism in Argentina, Brazil, and Chile’, *Human Rights Review*, April-June 2003. [Pereira, ‘Explaining’]

<sup>19</sup> Santiso, ‘Economic’, supra note 8 at 9. Prillaman, *Judiciary*, supra note 8 at 85-87.

<sup>20</sup> Santiso, ‘Economic’, supra note 8 at 9.

themselves. [...] More than forty-five functionaries support each individual Supreme Court justice, while sixty-five support each justice on the Supreme Labor Tribunal.<sup>21</sup>

In the late 1990s cases of judicial corruption came to light, despite significant difficulties in gathering information about the judiciary's internal practices, due to a pervasive culture of secrecy.<sup>22</sup> The most publicized case related to the construction of the São Paulo Regional Higher Labour Court (TRT/SP). Judge Nicolau dos Santos Neto, then president of TRT, was accused and eventually sentenced for leading a scheme that diverted to private bank accounts (including his) more than US\$ 90 million dollars from funds allocated to the construction of the Court's headquarters.<sup>23</sup> This and other cases led the Senate to create a congressional commission of inquiry (in Portuguese, *Comissão Parlamentar de Inquérito* or CPI) to investigate abuses in the judiciary. The commission conducted investigations of the case of the TRT/SP and other eight cases from April to December 1999. The findings revealed the extent of the problem: commissioners found evidence of nepotism, financial irregularities, and corruption in both higher courts and lower courts in the states of Paraíba, Rio de Janeiro, Mato Grosso, Goiás, and Amazonas.<sup>24</sup>

### ***1.3 Resistance to Reforms from 1988 to the late 1990s***

Attempts to implement reforms began shortly after the 1988 Constitution was enacted. Many of these proposals aimed at creating greater mechanisms of judicial accountability. Nevertheless, the first meaningful judicial reform was approved only in 2004 (Constitutional Amendment 45), after seven years of intense political pressure. Why did it take so long to implement reforms that would bring more accountability to the Brazilian judiciary?

Trebilcock and Daniels advance three sets of potential impediments that may hamper the implementation of rule of law reforms in developing countries: technical or resource-related impediments; socio-cultural-historical factors and political economy problems.<sup>25</sup> In the first case, the main stakeholders would show political will, but the lack of financial, technological or human capital would impede the implementation of reforms. This is hardly the case of the Brazilian reforms. The federal courts in Brazil are "well funded as a whole, with the highest budget in purchasing power parity terms per inhabitant of all the federal systems in the Western hemisphere."<sup>26</sup> Moreover, the reforms

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<sup>21</sup> Prillaman, *Judiciary*, supra note 8 at 86.

<sup>22</sup> A journalist's investigative book provides a series of examples of how difficult it was to gather information on cases of corruption in the judiciary. Frederico Vasconcelos, *Juízes no Banco dos Réus* (São Paulo: Editora Publifolha, 2005).

<sup>23</sup> Matthew M. Taylor & Vinicius C. Buranelli, 'Ending Up in Pizza: Accountability as a Problem of Institutional Arrangement in Brazil' (2007) 49:1 *Latin American Politics & Society* 59 at 71.

<sup>24</sup> The information is available at the Senate's website. Agência Senado de Notícias, *Comissões*, 12/17/1999, online: <http://senado.gov.br/agencia/verNoticia.aspx?codNoticia=8580&codAplicativo=2>.

<sup>25</sup> Trebilcock & Daniels, *Rule of Law*, supra note 2 at 39.

<sup>26</sup> Taylor, *Judging Policy*, supra note 8 at 37.

discussed here to ensure more accountability would not require significant additional funds. Thus, reforms in Brazil were not impeded by lack of resources.

Trebilcock and Daniels show that a series of social values, norms, attitudes and practices, which they loosely classify as socio-cultural-historical factors, may form a hostile environment for implementing reforms. A strong belief in the higher value of judicial independence vis-à-vis accountability within the judiciary may have played a role in the resistance offered by judges to reforms after 1988. This was possibly combined with a positive public perception of the judiciary as a protector of human rights and the public interest. There are also reasons to believe that vested interests of members of the Brazilian judiciary (political-economy-based impediments) also played an important role. In this section, I build on Trebilcock and Daniel's typology of obstacles to reform, to hypothesize that in Brazil these impediments were paradoxically created or significantly strengthened by the 1988 reforms.

As early as 1992, there have been proposals to create some form of external oversight of the judiciary.<sup>27</sup> More intensive debates occurred during the constitutional review process of 1993, where twelve of the eighteen proposals for judicial reform included some form of external oversight of the judiciary.<sup>28</sup> However, these proposals were not carried forward. Like most other proposals of reform during the 1993 process of constitutional review, the discussion about constitutional reforms was clouded by the political turbulence following a corruption scandal involving 29 members of congress.<sup>29</sup> But even in this convoluted political context, judges and courts employees' resistance played an important role in preventing these reforms from going forward by claiming that such reforms would pose a threat to judicial independence.<sup>30</sup> This position of the judiciary contrasted with broad support from other sectors of Brazilian society. The

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<sup>27</sup> In 1992, Deputy Hélio Bicudo proposed a fifteen-member council to oversee the judiciary within his broader package of reform proposals. From the 15 members, only two would be from outside the judiciary: one lawyer appointed by the Brazilian Bar Association (OAB) and one member appointed by the Prosecutor's Office (Ministério Público). Other proposals included, inter alia, the elimination of all lower federal courts and the military courts, changes in the system for promoting judges and substituting life appointment for the STF and STF from life-long to limited periods. See Keith Rosenn 'Judicial Review in Brazil: Developments under the 1988 Constitution' (2000) Sw. J. L. and Trade A. 291-319. [Rosenn, 'Judicial Review']

<sup>28</sup> According to Prillaman, the proposals focused on different aspects, some emphasizing the need to publicize the internal procedures for promotion and discipline, others advancing the need for some form of external oversight. See Prillaman, *supra* note 2.

<sup>29</sup> Timothy J. Power, *Why Brazil Slept: the Search for Political Institutions, 1985-1997*, Paper presented at the 1997 meeting of the Latin American Studies Association, Guadalajara, Mexico. ("The 1993 revision was paralyzed by a major corruption scandal involving 29 members of Congress. Investigations dragged on into the middle of the year, by which time the election campaign of 1994 had already begun to heat up. Congressional leaders eventually euthanized the special assembly, putting to rest 5 years of hopes for constitutional reform. Of 30,000 proposals presented [...], only five were enacted as constitutional amendments").

<sup>30</sup> Prillaman, *supra* note 2 at 97.

executive branch, most parliamentarians, the Bar Association, civil society organizations, and trade unions all vowed support for external oversight.<sup>31</sup>

After 1993, proposals for judicial reforms continued to be put forward by congressional representatives. In 1995 José Genoíno, member of the Worker's Party, presented a proposal to create state councils and a national council, which would oversee the judiciary in budgetary and administrative matters.<sup>32</sup> The Chamber of Deputies presented an alternative proposal in 1996 to create a National Council of Justice to oversee internal rules and receive complaints against the judiciary.

Nevertheless, most judges continued to oppose the idea and none of the proposals was implemented. Ballard provides the details of judges' resistance:

Members of the Association of judges for Democracy unanimously oppose any type of control that would interfere with the liberty of each judge to render his or her decisions. A survey of judges indicated that 86.5% of judges oppose external control over the judiciary. The Association of Judges of Brazil (Associação dos Magistrados do Brasil, or AMB) lobbied against external oversight, calling the measure unconstitutional "nonsense" and claiming that it devalued judges. Likewise, most STF justices oppose external control on the grounds that it impairs judicial independence and have instead proposed a series of "internal controls" by a council made up of appellate judges.<sup>33</sup>

With a system that had allowed so many privileges and overlooked so many acts of judicial misconduct, it seems plausible to assume that vested interests played an important role in explaining the position of the judiciary.

#### ***1.4 The Creation of the External Judicial Council in 2005***

In the late 1990s, there was a partial change in the position of some associations of judges and part of the judiciary started to accept the idea of a mechanism of control, but the resistance to the inclusion of representatives of non-judicial professions persisted.<sup>34</sup> This was coupled with the election of President Luis Ignacio Lula da Silva (Lula) in 2002, who made judicial reform one of his priorities. Since 1992, Lula's party (the Workers' Party) was, amongst political parties, the most active proponent of judicial reform and of mechanisms for social control and political accountability of courts.<sup>35</sup> In 2003, Lula created a Secretary for Judicial Reform within the Ministry of Justice, to advance the government's proposal for reform, which included increasing judicial

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<sup>31</sup> Prillaman says that "by 1994-95, 74 percent of the Congress declared itself in support of external controls on the judiciary, while 72 percent of the public expressed similar views". Ibid. at 94. See Ballard, *supra* note 16.

<sup>32</sup> Each council would be composed of members of the judiciary, plus lawyers and citizens, as in some other Latin American countries. The executive immediately supported the proposal.

<sup>33</sup> Ballard, *supra* note 16 at 263.

<sup>34</sup> Ibid. at 264.

<sup>35</sup> See Ballard, *supra* note 16.

accountability in the form of external oversight.<sup>36</sup> It was against this backdrop that the external judicial council was approved in December 2004 and implemented in 2005. The council is responsible for applying disciplinary action and overseeing the budget and administrative matters. It is also responsible for compiling and publishing statistics about the workload and productivity of the judiciary.

Initially, members of the judiciary sought to oppose the idea of non-professional members in the council, but they were eventually defeated. The council is composed of nine judges, two lawyers and two laymen appointed by the legislature. Despite having the majority of representatives in the Council, judicial resistance continued after the council was created. The Association of Brazilian Magistrates challenged the constitutionality of the constitutional amendment creating the council, arguing that the inclusion of members from outside the judiciary offended the principles of separation of powers and independence of the judiciary. The Brazilian Supreme Court affirmed its constitutionality (7 votes against 4).<sup>37</sup>

### ***1.5 Summary***

In the transition to democracy, concerns about judicial independence prevailed in the constitutional reforms implemented in Brazil. The consequence is that the Brazilian judiciary became extremely independent but not very accountable. Over time, increasing misuse of resources and accumulating corruption scandals raised concerns about accountability. My analysis focused on the creation of an independent judicial council. Since 1992, there has been increasing pressure to implement such a council. However, the judiciary strongly resisted the suggested reforms for many years. This resistance was based on three factors, all connected with early reforms. First, there was a strong belief in the value of judicial independence, as this became the predominant mentality at the time of the early reforms, defining practices and attitudes of the members of the judiciary since 1988. Second, self-interested judges were not willing to restrain themselves by granting to other branches the ability to restrain the power they were initially granted. Third, excessive independence combined with lack of accountability opened up space for corruption and other vicious practices, and those benefiting from these practices did not want to surrender their benefits.

## **2. Is it possible to avoid Rule of Law Paradoxes and Reform Traps?**

The problem of a rule of law paradox, described in the previous section, is caused in part by the decision to implement sequenced or piecemeal reforms. Could we conclude that avoiding sequenced or piecemeal reforms is the best strategy to avoid the reform trap

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<sup>36</sup> The government's agenda had three goals: modernization of administration; changes in infra-constitutional legislation; and constitutional changes. In addition to accountability, the agenda also included effectiveness and access to justice.

<sup>37</sup> ADIN EC 45/2004.

created by early reforms? In principle, avoiding sequenced reforms is the most effective strategy to avoid the problem. However, those promoting more ambitious reforms need to be attentive to some of the risks of comprehensive and all-encompassing reforms (section 2.1). And although this might be the solution in principle, in some cases, sequenced reforms might be the only option available to reformers (section 2.2).

Michael Trebilcock and I developed the first argument in a recent paper entitled *Path Dependence, Development and the Dynamics of Institutional Reforms*. The first section will discuss it in the particular context of judicial reforms. The second section unpacks the mechanisms that could produce a problem that Michael and I briefly mention in our paper: path dependence can constrain the choices of reform strategies and make some reform options unavailable.<sup>38</sup> This seems to be what happened in the Brazilian case, as I argue in more detail below.

### ***2.1 Yes, just avoid piecemeal reforms***

The problem faced by Brazilian reformers back in 1988 was not a trivial one. How to balance judicial independence and judicial accountability is a question that generates much controversy both in the literature and in practice. Scholars have raised questions regarding what type of independence is to be promoted and protected<sup>39</sup> and how much independence is desirable.<sup>40</sup> These two goals are in permanent tension because accountability mechanisms that allow for control and punishment can always be misused, reducing the level of independence of courts.<sup>41</sup> As a consequence, reformers are left with the challenge of striking a delicate balance between these two goals, given that both

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<sup>38</sup> Mariana Mota Prado and Michael Trebilcock, “Path Dependence, Development, and the Dynamics of Institutional Reform”, *University of Toronto Law Journal* 59 (2009) at 370 (“Even in abnormal times, it is unlikely that all pre-existing economic, social, and cultural factors that create costs for switching to new institutional regimes can be ignored”) [Prado & Trebilcock].

<sup>39</sup> Owen M. Fiss, ‘The Right Degree of Independence’, in *Transition to Democracy in Latin America: The Rule of the Judiciary*, ed. Irwin P. Stotzky, (Boulder: Westview Press, 1993) at 55. See also Christopher Larkins, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ (1996) 44 *Am. J. Comp. L.* 605, p. 623.

<sup>40</sup> See Prillaman, *supra* note 2 at 17. See also Jorge Correa Sutil, ‘The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy’, in *Transition to Democracy in Latin America: The Rule of the Judiciary*, ed. Irwin P. Stotzky, (Boulder: Westview Press, 1993) at 89. (stating that judicial independence is regularly tempered by the inclusion of impeachment procedures in many constitutions).

<sup>41</sup> Rogelio Pérez-Perdomo, ‘Judicial Independence and Accountability’, Paper prepared for the *Meeting Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century*, World Bank, Washington (Junio 5-7, 2000). [http://www4.worldbank.org/legal/legop\\_judicial/ljr\\_conf\\_papers/Perez-Perdomo.pdf](http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Perez-Perdomo.pdf) (“in practice, any accountability system can be misused to punish independence, particularly if there is double standard at work, or different yardsticks for judges depending on their connections to the wielders of political power.”) [See also Michael Trebilcock, ‘What makes poor countries poor: the role of institutional capital in economic development’, in Buscaglia & Cooter (eds.), *The Law and Economics of Development* (JAI Press, 1997) (showing that there is an inherent tension between institutional autonomy and institutional accountability in other areas as well, such as bureaucracy).

independence and accountability are key components for a functional judiciary.<sup>42</sup> In other words, reformers can be at crossroads when trying to balance conflicting policy goals.<sup>43</sup> In these cases, a reformer has at least two options: (i) try to promote both goals simultaneously, trying to strike a balance between them; or (ii) temporarily favour one goal over the other. While the former will lead to full-fledged, all encompassing reforms, the latter will lead to piecemeal and sequenced ones.

The piecemeal approach is intuitively very appealing, as it seems straightforward, avoiding a “broad based effort that strains state capability and risks getting bogged down in too many initiatives at once.”<sup>44</sup> Or, as Michael and I put it, “attempting too much might be a recipe for achieving too little.”<sup>45</sup> However, favouring one goal over the other (even if temporarily) has significant risks. In judicial reforms, for instance, if judicial accountability is favoured, there is a higher risk that external forces will attempt to influence the decision making of judges, which may encourage them to rule in favour of what is popular, politically acceptable or even personally advantageous.<sup>46</sup> On the other hand, if greater independence is promoted, the danger comes from judges who are too free and thus use their position to pursue personal, professional or political agendas at the expense of the rule of law.<sup>47</sup>

Prillaman provides concrete examples of these problems by examining the cases of judicial reforms in Argentina, Brazil and El Salvador. These cases illustrate how the strategy of tackling one goal at a time means that while one area is being strengthened, the other areas remain unreformed and flawed and ultimately end up undermining the reform efforts by creating what he calls ‘negative synergy’. His conclusion is that the assumption that one positive reform inevitably leads to another is fundamentally flawed.<sup>48</sup> In contrast, Prillaman uses the case of Chile to support all encompassing reforms. In Chile, reformers tackled what Prillaman describes as the major components of judicial reform – independence, effectiveness and access -- at the same time all the while maintaining some balance with judicial accountability. He states that under this approach, “no setback was overwhelming and no isolated reform was undermined by the unreformed aspects of the courts; in short, there was no negative synergy as in the other cases.”<sup>49</sup> What I am calling the *rule of law paradox* is this “negative synergy”.

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<sup>42</sup> For a map of the arguments in favour of greater independence, or greater accountability see G. Allan Tarr, ‘Creating and Debating Judicial Independence and Judicial Accountability,’ paper prepared for the 2006 convention of the American Political Science Association, August 30-September 4, 2006. [Tarr]

<sup>43</sup> For a more detailed discussion on how reformers and policymakers can be constrained by conflicting policy goals, see Mariana Mota Prado, *Policy and Politics: The Privatization of the Electricity Sector in Brazil*, J.S.D. Dissertation, Yale Law School. October 2008, chapter 8.

<sup>44</sup> Prillaman, *supra* note 2.

<sup>45</sup> Prado & Trebilcock, *supra* note 39 at 367.

<sup>46</sup> Tarr, *supra* note 43.

<sup>47</sup> *Ibid.* See also John A Ferejohn and Larry D Kramer, ‘Independent Judges, Dependent Judiciary: Institutionalising Judicial Restraint,’ 77:4 NYU L. Rev. (October 2002). (arguing that if judges are completely free from oversight, either by other government departments or by voters, we cannot ensure the proper functioning of the judiciary because “judges have friends and financial interests and ideologies; they have loves and hates and passions and prejudices.”).

<sup>48</sup> Prillaman, *supra* note 2.

<sup>49</sup> *Ibid.* at 138.

As this paper suggests, piecemeal reforms impose yet another risk: early reforms favouring judicial independence can impose significant obstacles to the pursuit of judicial accountability in the future. This is what I am calling a *reform trap*. And the risk is not exclusive to judicial reforms but extends to other piecemeal reforms. For instance, Susan Rose-Ackerman argues that if anti-corruption reforms are not implemented early on in post-conflict societies it might be hard to break a vicious cycle of corruption down the road.<sup>50</sup>

Prillaman argues that there is a reduced risk in full-fledged reforms because they are more effective in avoiding undesired consequences. However, Prillaman's argument ignores the fact that reforms often succeed because self-reinforcing mechanisms help keep institutional changes in place.<sup>51</sup> While comprehensive judicial reforms can work quite well, as they did in Chile, they also involve many moving parts, and it is hard to predict how these moving pieces will interact. Thus, Prillaman is correct in pointing out that institutional mechanisms in sequenced reforms will not be *necessarily* self-reinforcing, i.e. there is no certainty that some reforms will always follow others. Yet, this also applies to comprehensive reforms: there is no guarantee that they will necessarily produce the predicted outcome. Indeed, Prillaman has only the case of judicial reforms in Chile to support his point. His criticism of piecemeal reforms seems to rely largely on a counter-factual: if Brazil and Argentina had done what Chile did, they would have a better judiciary today. My point here is that there are no guarantees that the Chilean reforms would achieve similar results in other countries. Another concern is that the effects of all-encompassing reforms, when they do not succeed, can be quite disruptive, and sometimes hard to reverse.<sup>52</sup>

There is no question, however, that the particular option adopted in the Brazilian reforms created a rule of law paradox and a reform trap. One might ask, however, whether Brazilian reformers had any other option. Could they have chosen between comprehensive and sequenced reforms, as Prillaman seems to assume? This is the question the next section tries to answer.

## ***2.2 No, piecemeal reforms are the only feasible strategy***

In our paper *Path Dependence, Development and the Dynamics of Institutional Reforms*, Michael Trebilcock and I analyze the advantages of piecemeal reforms vis-à-vis all encompassing reforms during what we call “normal times”. Our conclusion is that ambitious reforms are unlikely to be feasible and to succeed during normal times because they will engender greater disruption and therefore more resistance. The scenario is different during abnormal times (which include times of economic collapse, major

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<sup>50</sup> Susan Rose-Ackerman, ‘Corruption and Post-conflict Peace-Building’ (2008) 15 Ohio N.U.L. Rev. 328.

<sup>51</sup> For an explanation of self-reinforcing mechanism and their role in institutional reforms, see Prado & Trebilcock, *supra* note 39 at 350-53.

<sup>52</sup> *Ibid.* at 367 and ff.

political crises, civil wars, and military invasions) because the credibility and legitimacy of the incumbent elites may be weakened, and established patterns of social behaviour may be disrupted. In such cases, more ambitious and comprehensive reforms may become possible. However, Michael and I acknowledge that even in abnormal times, there might be path dependency problems. All pre-existing economic, social, and cultural factors may still create obstacles for reforms (what we describe as switching costs to new institutional regime).<sup>53</sup> In this section, I want to explore some of the pre-existing economic, social and cultural factors that may create obstacles for reform in abnormal times. More specifically, I discuss which factors can make ambitious and comprehensive reforms not feasible even during times when there is supposedly a “window of opportunity” for major reforms. To develop this analysis, I will focus on the Brazilian case.

Anthony Pereira has analyzed the importance of path dependence in constraining the choices of rule of law reformers in transitional countries. He showed how the prior authoritarian changes in the legal and judicial systems influenced, constrained or facilitated subsequent democratic or post-authoritarian judicial reforms.<sup>54</sup> Like Prillaman, he looked at the cases of Argentina, Brazil and Chile arguing that judicial reforms in these countries were influenced by path dependency. In the Brazilian case, for instance, Pereira claims “the Brazilian military regime of 1964-1985 was gradualist in its approach to the law, and had a high degree of civilian-military consensus in the legal sphere. It was not highly repressive in its deployment of lethal violence, and this combination of factors contributed to a gradualist and consensual transition in which judicial reform was not placed high on the political agenda.”<sup>55</sup> The case of Brazil contrasted with more violent dictatorships in Argentina and Chile. According to Pereira, “the fact that the number of people affected by the repression was much less, in per capita terms, than in Argentina and Chile, also diminished the possibility of a backlash against the judiciary in the post-transition era.”<sup>56</sup> Argentina is a case in which transitional reforms were specifically used as a backlash against the legal and political establishment.

Building on Pereira’s argument, I want to suggest that path dependence will limit reform options because it will influence (if not determine) the structure of the bargain at the time of reforms. Judicial reforms in Brazil during the 1987-1988 constitutional assembly can be characterized as a bargaining process between a group demanding reforms, and another group resisting reforms (those proposing and those resisting more accountability). Although this would be an accurate description of the situation after the 1988 constitution was enacted, it might not be the best description of the bargaining process during the constitutional assembly. At that point, both groups wanted reforms to happen and point in dispute was what that one group wanted greater independence, and another group lobbied for more accountability.

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<sup>53</sup> Ibid. at 370.

<sup>54</sup> Pereira, ‘Explaining’ supra note 18 (“like their democratic successors, they had visions and projects of ‘political justice’, although these visions and projects turned into nightmares for many of their opponents.”)

<sup>55</sup> Ibid.

<sup>56</sup> Ibid. at 7.

If this description is accurate, the structure of the bargaining process during the constitutional assembly is analogous to what Amartya Sen call “cooperative conflicts” in the household context. Sen shows that the husband and wife have a relationship of “cooperative conflict”, where they want to remain together due to the benefits derived from this cooperative relationship, but at the same time there are points in which their interests conflict.<sup>57</sup> Thus, family decisions will reflect balancing of common interests and bargaining over conflicting ones. The outcome of the bargaining process can be fairly egalitarian or not.<sup>58</sup> This idea of “cooperative conflicts” is analogous to the reform process in Brazil because at the time of the constitutional assembly judicial reforms were beneficial both to judges and interest groups that lobbied for accountability.<sup>59</sup>

What can tip the balance in favour of one party in the bargaining process? According to Sen, in the household context the relative bargaining power of each of the parties involved will affect the outcome (unequal bargaining power is more likely to lead to unequal outcomes).<sup>60</sup> This relative bargaining power is in part determined by the relative position of each party in the “status quo” position.<sup>61</sup> As Sen puts it, “a more favourable placing in the breakdown position would tend to help in securing a more favourable bargaining outcome.”<sup>62</sup> This could explain some of the unequal distributional outcomes within households as in many countries some women could end up with no income and/or no wealth if divorce takes place. The breakdown position could also explain the judicial reform in Brazil, as the judicial branch did not have much to lose by simply maintaining the *status quo*. In comparison with other judiciaries in Latin American, the Brazilian was one of the most independent of the region during the military dictatorship.<sup>63</sup> And in the Brazilian case the preferences of the judiciary are

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<sup>57</sup> Amartya Sen, ‘Gender and Cooperative Conflict’, in I. Tinker, *Persistent inequalities: Women and world development* (Oxford University Press, 1990). [Sen, ‘Gender’]

<sup>58</sup> For Sen, the idea of cooperative conflict explains some of the causes of female inequality and distills the reasons why it is so difficult to tackle problems such as unequal distribution of food and unequal access to education and health care within the household.

<sup>59</sup> The closeness of the analogy is particularly striking if one considers that in both cases it is not an “if question”, but a “how question”. In judicial reforms, we are not asking whether we should be proceeding with reforms or not. Instead, the question is among all the possible alternative arrangements and particular power allocations, which is the most desirable one. The same happens within the household. As Sen explains, “[w]omen seeking a better deal within the family are not proposing, as an alternative, the possibility of living without families. The bone of contention is whether the sharing of the benefits within the family system is seriously unequal in the existing institutional arrangements, compared with what alternative arrangements can be made.” Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Cambridge University Press: 2006) at 135-136.

<sup>60</sup> Sen, ‘Gender’ supra note 58 at 133.

<sup>61</sup> A bargaining process only takes place if two parties decide to cooperate because they can achieve something that they consider better than the “status quo position”. Failure to cooperate maintains the status quo. It also requires different cooperative arrangements that are ranked by the two parties in exactly opposite ways. If the parties decide to cooperate, and there is only one possible cooperative arrangement that is better for both, there is no bargaining. In the commercial mentioned earlier in the text, for instance, both parties are better off with the sale, but for the seller higher price is better than lower price, and for the buyer lower price is better than higher price. In this case, parties have incentives to cooperate because they want the sale to happen, but the bargaining process will determine the price. Ibid.

<sup>62</sup> Ibid. at 135.

<sup>63</sup> Anthony Pereira, ‘Of Judges and Generals: Security Courts under Authoritarian

particularly relevant because Congress deferred most of the judicial reforms of the 1988 Constitution to a group of experienced legal actors that included members of the judiciary, the Brazilian Bar Association, and human rights groups.<sup>64</sup> It is also relevant to note that in the transition to democracy, a political compromise guaranteed that the judiciary would absorb magistrates in the higher courts that had been politically connected to the military regime.<sup>65</sup> Thus, among the members of the judiciary there were people who had ties with the previous military regime.<sup>66</sup> This also reinforces the idea that there is a path dependent component in the political economy of rule of law reforms even during abnormal times.

As to social-cultural-historical factors, Sen identifies three that influence the outcome of the bargain within the household: perceptions of interest, conceptions of productive labour, and notions of legitimacy.<sup>67</sup> It is possible to find analogous factors to explain the 1988 judicial reform in Brazil. As to perception of interest, citizens did not seem to think that they were being deprived of anything by not having control or even access to information about what the judiciary was doing.<sup>68</sup> As mentioned earlier, Pereira suggests that the Brazilian legal establishment had a public image of being anti-authoritarian.<sup>69</sup> Second, as to conceptions of productive labour, some reformers argued that there was a hierarchy of values between independence and accountability in which the former trumps the latter. The argument goes as follows: given the technical nature of the judicial function,<sup>70</sup> methods of judicial accountability are nothing but undue political interference. Finally, notions of legitimacy seem to have also affected the bargain in the 1988 judicial reforms.<sup>71</sup> As Prillaman observes, “[i]n Brazil, unlike in Argentina and

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Regimes in Argentina, Brazil, and Chile’ in Tom Ginsburg & Tamir Moustafa (eds.), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

<sup>64</sup> Prillaman, supra note 2 at 79-80.

<sup>65</sup> Santiso, ‘Economic’, supra note 8. Taylor, ‘Citizens’, supra note 8. Taylor, *Judging Policy*, supra note 8 and Prillaman, supra note 2.

<sup>66</sup> Koerner, ‘O Debate’, supra note 11.

<sup>67</sup> In very simplistic terms, these three factors can impact the bargain as follows: depending on their perceptions of interest, which are very much culturally defined, women might lack a perception of personal welfare and this may be combined with a greater concern for family welfare; regarding conceptions about productive labour, some common social conceptions advance the idea that women’s unpaid work within the household is hierarchically inferior than paid worker outside the household; as to notions of legitimacy, women might not feel entitled to an additional share of the household wealth.

<sup>68</sup> It is important to distinguish between perceptions of interest and actual interests. The lack of strong popular demand for accountability mechanisms should not be interpreted as a sign of an actual interest (an assessment of whether more accountability would be better or not), but instead as merely citizen’s *perceptions* of their own interest in the particular context of Brazil, where the dictatorship was not so violent. Sen, ‘Gender’ at 126. As Sen describes “there is much evidence in history that acute inequalities often survive precisely by making allies out of the deprived.(...) It can be a serious error to take the absence of protests and questioning of inequality as evidence of the absence of that inequality (or of the nonviability of that question)”.

<sup>69</sup> Supra note 18 and accompanying text.

<sup>70</sup> This assumption comes from the idea that judges are highly educated professionals with specialized and expert knowledge in their field of practice. Subjecting these professionals to non-technical and non-expert control is often perceived an undue and unnecessary interference in their jobs.

<sup>71</sup> According to Sen, the problem here is that unlike commercial bargain, within the household there is ambiguity with perceptions of interest and notions of legitimacy. For instance, within the household, getting food for herself can be conceived as a benefit to the mother and a cost to the rest of the family, who

Chile, reformers could not tap a sense among political elites that the judiciary had failed to protect democracy from the military and was somehow tainted by an authoritarian past. While a perception that the judiciary as inefficient was widespread, reformers had difficulty linking democratization with judicial reform.”<sup>72</sup> This illustrates an ambiguous notion of legitimacy that negatively affected the groups demanding greater accountability. In sum, the outcome of the bargain in judicial reforms is related to social-cultural-historical factors that are path dependent.

In sum, path dependence could affect the choice of strategies that reformers might have even during abnormal times. More specifically, there are situations in which a particular sequence of events will, at the same time, open up a window of opportunity for reforms, but grant reformers no option but to opt for sequenced reforms and to favour one of two conflicting goals. This is largely what seems to have happened in the Brazilian case. The Brazilian reformers do not seem to have extensively debated the pros and cons of sequenced and all-encompassing reforms. Instead, they seem to have adopted the only option that was politically feasible at the time.

### ***3. Getting Out of Reform Traps***

Section 1 highlighted how sequenced reforms can back fire largely undermining the broader reform goals (*rule of law paradox*) and creating obstacles to future reforms (*reform trap*). Section 2 suggested that avoiding sequenced reforms might be a solution, but in certain cases avoiding sequenced reforms is not a feasible option due to a series of path dependent constraints on reforms that include social-cultural-historical factors and political economy problems. This section discusses whether there is a way out of this reform trap. More specifically, it tries to hypothesize which factors might have played a role in breaking the deadlock in Brazil, and how they may shed light on potential solutions for the problems created by sequenced reforms.

My discussion will be primarily focused on factors that could make the interest group resisting reforms to modify their preferences. In this regard, the concern is different from strengthening the weaker side of the bargain.<sup>73</sup> For instance, Trebilcock

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will be deprived of that food. If the mother decides to give that same food to rest of the family, this can be seen as a cost to her (individually), but it can also be seen as a benefit to her, as she is properly feeding her family. In this context, it is harder for the mom to conceive what is more legitimate, taking the food for herself or depriving herself to the benefit of the family. The same thing can be conceived in judicial reforms.

<sup>72</sup> Pereira, ‘Explaining’, supra note 18 at 9.

<sup>73</sup> For instance, in the analysis of the bargaining process within the household, Amartya Sen suggests that the following factors favour women in the division of benefits within the family:“ (1) they can earn an outside income; (2) their work is recognized as productive (this is easier to achieve with work done outside the home); (3) they own some economic resources and have some rights to fall back on; and (4) there is a clear-headed understanding of the ways in which women are deprived and a recognition of the possibilities of changing this situation. This last category can be much influenced by education for women and by

and Daniels suggest that strengthening groups that are demanding reforms can be a way of overcoming political resistance.<sup>74</sup> If we consider that reforms are bargains, this is a strategy to strengthen the weaker side of the bargain. However effective they might be, these strategies should not preclude us from asking the other question that I am proposing here: are there circumstances that could make those who are resisting reforms change their views and their positions? Trebilcock and Daniels proposed the first hypothesis and part of the third hypothesis I discuss below. The other two are my additions to the list, and are particularly relevant for this paper because they could explain why judges reduced their resistance to the idea of having external control of the judiciary in Brazil.

### ***3.1 Reducing the costs incurred by vested interest groups***

One way to mitigate resistance of certain groups of interest to reforms is to reduce the costs incurred by them if reforms are implemented. As Daniel and Trebilcock explain, “if the many actors who are currently involved in a country’s rule of law institutions legitimately fear that they will be summarily displaced or the illegitimate perquisites of public office eliminated when new institutions are created, then their resistance to reform is likely to be all the more intense.”<sup>75</sup> Reducing the costs that these actors will incur is likely to reduce their resistance to reforms. One way to reduce the costs to inexperienced and ill-trained individuals is to provide a combination of training, increased compensation, and accountability mechanisms. Another way is to offer transitional assistance such as buy outs, early retirement benefits, relocation and job training subsidies.<sup>76</sup>

While these might be effective strategies in some cases, they do not seem applicable to reforms traps such as the one that existed in Brazil. In that case, the initial bargain over reforms was based on a significant inequality in the bargaining power of the parties involved. In this sense, there would be very little that could be offered to the vested group in terms of benefits to ease the transition: retraining will not reduce the costs that judges will incur by becoming more accountable, their salaries are one of the highest in the country,<sup>77</sup> and it is hard to envision a buy out process similar to offering

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participatory political action.” Amartya Sen, ‘More Than 100 Million Women Are Missing’, *The New York Review of Books* v. 37, n. 20 (December 20, 1990).

<sup>74</sup> Ronald Daniels and Michael Trebilcock, ‘The Political Economy of Rule of Law Reform in Developing Countries’, 26 *Michigan J. Int’l L.* 99 (2004-2005) at 129-133 (items 2 to 5). [Daniels & Trebilcock, ‘Political Economy’]. See also Prado & Trebilcock, *supra* note 39 at 370-371. Along the same lines, Susan Rose-Ackerman suggests that enhancing private organizational capacity can reduce the tension between the benefits of democratic accountability and the risk of rent-seeking interest groups using these mechanisms to their own benefit. Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999), at 122-174.

<sup>75</sup> Daniels & Trebilcock, ‘Political Economy’ *supra* note 75 at 133.

<sup>76</sup> *Ibid.* at 133-134.

<sup>77</sup> The Brazilian judiciary has the highest salaries for public service in the country. Among the three branches in Brazil, the judiciary has the highest average salary for top positions (i.e. justices, state ministers, congressional representative and the President of the Republic). In fact, in December 2006 Ministers of the Brazilian Supreme Court were earning two times more than Congressional Representatives, and three times more than the President of the Republic. In local currency, respectively R\$

shares in the privatized companies to workers. The only suggestion that seems potentially applicable to the Brazilian reform trap is the offer of early retirement benefits, which had the potential of changing the composition of the group. This is the topic to which I turn next.

### ***3.2 Changing the composition of vested interest groups***

One important aspect of the reform process (or resistance to it) is the role of ideas. As Daniels and Trebilcock state “[we are not] anxious to treat political reform as being the sole byproduct of lobbying activity by affected individuals and groups. Rather, we believe that ideas do matter in the domestic political process.” While their analysis focuses on the role of ideas in reinforcing “the lobbying efforts of certain pro-reform lobby groups”, I will ask whether ideas can also play a role in mitigating resistance of vested interest groups. As suggested earlier in this article, many actors within the Brazilian judiciary believed that judicial independence trumps any form of external accountability. Thus, mitigating the resistance of this group may require changing their opinion and values regarding judicial independence.

One way to change the values of a group is by changing its composition. As older judges who were connected with the military regime retire and younger judges, who were born and raised during the democratic period, start to join the judiciary, the balance might start tipping in favour of greater accountability even within groups inside the judiciary. Indeed, based on opinion polls, Joaquim Falcão shows that there is significant divergence in opinion regarding judicial independence between young and older judges (in Portuguese *juízes e desembargadores*). The opinions also diverge regarding control of corruption and abuses: while 71% of the young judges are against nepotism only 58.4% of older judges think that nepotism should be forbidden in the judiciary.<sup>78</sup> Since 1988, the number of younger judges has progressively increased in the judiciary: by 2005, 28.4% of the judges were 40 years-old or younger, and 53.1% was comprised of judges up to 50 years of age.<sup>79</sup> According to Falcão, younger judges are more sensitive to the increasing popular demand for ethical conduct and protection of the public interest in different branches of government. This could, at least in part, explain why some actors within the judiciary changed their position and decided to support some form of external control in

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24,500, R\$ 14,000, and R\$ 8,800. The salary is also much higher than the average salary in the country. According to the World Bank, the value of judges' salaries in Brazil in 1999 was over thirty times the average salary in the country. “Court Performance around the world – a comparative perspective”. World Bank Technical Paper 430, July 1999, p. 23. Available at <http://www4.worldbank.org/legal/leglr/>. In 2004, the Inter-American Development Bank reaffirmed this conclusion: justices of the Brazilian Supreme Court earn as much as 20.8 times more than the average Brazilian. Nelson Marconi, Laura Carrilho and Claudia Helena Cavalieri, *La Remuneración de los Altos Dirigentes del Sector Público un Análisis sobre los Países de América Latina y el Caribe*, October, 2004. Centro Latinoamericano de Administración para el Desarrollo - CLAD and BID. Available at [http://epoca.globo.com/rev\\_eletronica/ep446/judiciario.pdf](http://epoca.globo.com/rev_eletronica/ep446/judiciario.pdf).

<sup>78</sup> Joaquim Falcão, ‘O múltiplo judiciário’, in Maria Teresa Sadek, *Magistrados: uma imagem em movimento* (Rio de Janeiro: Editora FGV, 2006) at 125-127.

<sup>79</sup> Ibid.

the late 1990s in Brazil.<sup>80</sup> If this is true, incentives for early retirement might speed up the process of “rejuvenating” the ideas within an institution that is resisting reforms.

Falcão also calls attention to the fact that younger judges did not have much voice within the hierarchical structures of the judiciary, but they acquired significant political power by joining professional associations (i.e. a civil society organization that aggregates members of a certain profession).<sup>81</sup> Associations of judges were an institutional innovation, not predicted by the 1988 constitution. Nevertheless, the associations became politically relevant by representing judges in discussion of bills and proposed reforms before Congress, and they also brought judges’ voice to the media. Their internal structure does not reflect the judicial hierarchy and therefore younger judges can have positions of power. Nowadays, these associations are so close to the opinions and preferences of younger judges that older judges are considering creating an association of their own to better protect their interests.<sup>82</sup> These associations seem to have been a driving force in reducing judicial resistance to greater levels of judicial accountability. As Ballard explains:

Despite widespread opposition of judges, both the AMB [Brazilian association of Magistrates] and another group of judges, the Association of Federal Judges (AJUFE), recently capitulated to the idea of external control. [...] The AMB stated its willingness to consider an oversight council made up of judges but conceded that lawyers could play a role in selecting judges. The federal judges organization went a step further when it stated in January 1999 that it would support an oversight body to manage administrative questions.<sup>83</sup>

This is an example of an institutional innovation that gave voice to younger judges within the Brazilian judiciary. Thus, “rejuvenating” a resistant institution with fresh blood and new ideas might require some creative measures that will empower new members and allow them to voice their preferences more effectively.

### ***3.3 Making Information Available***

Daniels and Trebilcock suggest that rule of law reformers need to prioritize meaningful, independent and transparent monitoring of performance, to assess if institutions are operating in an efficient, non-corrupt and accountable manner.<sup>84</sup> On the one hand, the Brazilian experience largely confirms the assumption that secrecy and lack of accountability will lead to mismanagement of resources, abuses and corruption. On the other hand, it also shows why reformers might not be able to implement the mechanisms of accountability that Trebilcock and Daniels deem advisable. The question I ask in this section is whether availability of information may help to mitigate resistance and may

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<sup>80</sup> No study has yet been conducted to assess whether younger judges played an active role in promoting accountability within the judiciary in Brazil.

<sup>81</sup> Koerner, ‘O Debate’, supra note 11.

<sup>82</sup> Falcão, supra note 80 at 130.

<sup>83</sup> Ballard, supra note 16 at 264.

<sup>84</sup> Daniels & Trebilcock, ‘Political Economy’, supra note 85.

create an opportunity for a second generation of reforms. In Brazil, corruption scandals and information about nepotism and mismanagement of resources were important instruments in shifting the balance of powers in favour of groups lobbying for greater judicial accountability. One needs to be mindful of the fact that obtaining information without institutionalized mechanisms of accountability might be a costly endeavour.<sup>85</sup> But it might be worth the effort because availability of information may help mitigate resistance of vested interest groups.

One of the reasons why availability of information may allow for a second generation of reforms is because making the information about corruption, mismanagement and abuses public creates reputational costs for the actors involved. According to Daniels and Trebilcock, these reputation costs reduce their incentives to manifest a preference for the maintenance of the status quo.<sup>86</sup> This seems to describe at least in part what happened in Brazil. Some authors suggest that the increasing lack of popular support and legitimacy may explain why there was a partial change in the position of judges. In particular, in the late 1990s, the series of scandals involving members of the judiciary -- which led to the creation of a parliamentary commission (CPI) to investigate corruption and other forms of judicial misconduct – further undermined the public trust in the courts, which had already been declining throughout the years.<sup>87</sup> Judges who are not involved in mismanagement of resources, favouritism and corruption may have decided to differentiate themselves from the rest of the judiciary by adhering to the proposal of greater accountability. Thus, reputational costs could potentially explain why parts of the judiciary started to favour proposals for an external judicial council in the late 1990s.

Another reason why availability of information may help mitigate resistance to reforms is related to the fact that there are also social-cultural-historical factors that create obstacles to reforms. The reputational costs hypothesis separates the rent-seeking judges from the others. In this regard, it shows that availability of information makes it costly to resist reforms for those who were previously benefiting from the status quo. This addresses the political economy problem. In contrast, the social-cultural-historical factors suggest that a series of honest judges did not defend greater independence due to self-interested reasons. Instead, they truly believed in the value of judicial independence and sincerely considered greater judicial accountability a bad institutional arrangement. It is harder to explain a shift in position of this principled resistance, but it might be connected with availability of information. One hypothesis is that an honest judge who highly valued independence could be forced to reconsider this value (if it was not merely voiced opportunistically) in light of all the information suggesting systemic abuse, favouritism and rampant corruption in the judiciary, and by deliberating over concrete proposals of reform with interested parties.<sup>88</sup> If values and interests are viewed as dynamic and

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<sup>85</sup> See note 22 above and accompanying text.

<sup>86</sup> Daniels & Trebilcock, 'Political Economy', supra note 85.

<sup>87</sup> Taylor, 'Judging Policy', supra note 8 at 43. See also Ballard, supra note 16.

<sup>88</sup> For a similar argument in another context, see Jedediah Purdy, "Climate Change and the Limits of the Possible," 18 *Duke Env'tl. L. & Pol'y F.* 289.

endogenous to the political process, availability of information can incentivize people to rethink and to reconceive their values.

## **Conclusion**

Institutions matter for development. However, we know very little about how to go about institutional reforms that will be long lasting and conducive to development. The rate of failure in rule of law reforms is high, generating more and more disappointment. Michael Trebilcock's work has contributed a great deal to our understanding of why this happen. In his latest book with Ron Daniels, he has mapped the obstacles to institutional reforms in general, and rule of law reforms in particular. The book sheds light on the reasons why rule of law reforms have gone awry in the four continents. This paper largely builds on the map of obstacles provided by Trebilcock and Daniels to discuss the paradoxical situation in which early reforms backfire, undermining the entire reform effort and creating obstacles for second-generation reforms (*reform trap*).

Focusing my analysis on the specific case of judicial reforms in Brazil, I have tried to illustrate which circumstances might create such reform traps, and discuss possible strategies to overcome this problem. My analysis is based upon a recent article co-authored with Trebilcock where we discuss how path dependence creates obstacles for reforms. While the article extensively discussed reforms during "normal times", this paper focused instead in the dynamics of reform during "abnormal times". After showing that path dependence can constrain the choice of reforms strategy even during abnormal times, I discuss some of the suggestions that Trebilcock and Daniels have made to overcome obstacles to reforms, adding some of my own.

It is nearly impossible to talk about law and development today without engaging with Michael Trebilcock's scholarship. Trebilcock has made significant analytical contributions to the field, suggesting useful maps of the problems, and has also provided invaluable guidance regarding the way to move forward. The field of law and development is highly practical and has the potential to improve institutions in developing countries and consequently improve the lives of the two billion people throughout the world who live in poverty and deprivation. Those, like Trebilcock, who contribute to this field are not simply engaging in academic debates, but are also dealing with issues that may also contribute to making this world a better place for some of its most impoverished citizens.

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<http://www.law.duke.edu/shell/cite.pl?18+Duke+Envtl.+L.+&+Pol%27y+F.+289#H1N4> (suggesting that although politics is sometimes the vehicle for pre-existing pursuits of interest, it is also sometimes the source of new understandings of the relevant interests of the actors involved. According to Purdy, the deliberation, struggle, and problem-solving of politics can change how those who participate understand and experience their own motives).