

Social Law, the Environment and Development: Considerations of a Successful Story

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In honor of Antônio Angarita

Index

<i>1. Collective Rights and Their Reasons</i>	<i>3</i>
<i>2. The Normative Nature of Social Law</i>	<i>6</i>
<i>3 - Case: Environmental Development and Selectively Applying the Law</i>	<i>12</i>
3.1 Laundries in the Textile Sector in Toritama (PE).	12
3.2 Partial Conclusions Concerning the Local Productive Arrangements (LPAs) and the Law	14
3.3 Why Are Some Cases Successful and Others Not?	15
<i>4. Final Considerations</i>	<i>17</i>

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Situation I:

“The Public Prosecutor’s Office obliged the Secretariat of Education to open vacancies in schools for children in areas where natural water springs (mananciais) are located, but we are not allowed to build schools there”².

Situation II:

In the November 1998 edition of the renowned magazine The Economist, we found the front page headline for the following article “When lawsuits make policy”. The editorial of the acclaimed British magazine mentions that American hypocrisy is curious due to the fact that no other country in the world was as severe on smokers at the same time it was so tolerant of arms producers. After losing several political battles (in Congress) in terms of limiting the use of tobacco, public policy related to the sector seems to be undergoing change owing to the lawsuits filed by 18 Prosecutors in several American states. They have now reached an agreement to the tune of 206 billion dollars which will be paid out over the next 25 years. The article criticizes the fact that using lawsuits to pressure producers is a less-than-transparent and undemocratic mechanism for designing government policy. “Legislation will be replaced by litigation, deliberation, by legal threats.”

Situation III:

“The Public Prosecutor’s Office of the city of Toritama, in the Brazilian state of Pernambuco, decided not to rigorously enforce the environmental legislation which laundries were flouting (as well as the work-safety, working-conditions, and labor legislation), preferring to apply the law in a more gradual and selective manner. Instead of creating a task force so companies would simultaneously adhere to all legislation: environmental, labor and tax, in many cases, inspectors opted to “turn a blind eye” to some infringements, and those involved in the programs focused solely on those problems that businessmen themselves considered the main bottlenecks obstructing the economic growth of the sector. Cooperation between the public sector and business associations played a determining role. Business associations played a positive role, whether it was in the inspection of companies together with official inspectors (in the case of Toritama, environmental inspectors), or whether it was in negotiations with legal inspectors or development agents regarding the deadlines and requirements so as to adhere to the law. The business associations, throughout this process, came off much stronger, as local producers began to see the benefits of negotiating as a group and not individually, and the public sector’s efforts involved several public agencies.”³

² Cf. the article *Feldman vai propor lei de mananciais*, in *Folha de S. Paulo*, 24/10/96 in which the following declaration made by the State Environmental Secretariat of São Paulo was transcribed.

³ Cf.. M. Almeida, *Além da informalidade: Entendendo como os fiscais e agentes de desenvolvimento promovem a formalização do crescimento de pequenas e médias empresas*, Rio de Janeiro, agosto de 2008, available at <http://www.ipea.gov.br> – IPEA – Texto para discussão N° 1353.

Enforcement of new social rights strongly affects public policy and development strategies. What should the role of Public Civil Action⁴ (a kind of public class action) and the Terms of Conduct Adjustment or settlement (TACs, or *Termos de Ajustamento de Conduta* in Portuguese) be in enforcing public policy? How can applying and effectively implementing social rights contribute to development? What are the best ways to apply law using the logic of social law (that creates many new social rights)? Using public civil action as an instrument to impose or implement public policy constitutes one of the most interesting and troubling issues related to protecting diffuse or collective rights. When can the Judiciary branch simply determine that the State must implement public policy? How and how much can (that is, if it can) a legal decision determine that works should be carried out or public policy should assure diffuse or collective rights? How can we evaluate the efficiency of a strategy for conflict resolution by simply imposing law? To what extent can a legal order “invade” or “encroach” on the discretionary environment of the government’s political acts? This article seeks to provide some provisional answers to some assumptions within these numerous questions.

There is now in Brazil a huge range of new legal works on legal principles and their effect on constitutional law, private law, labor law, administrative law etc. Is there any essential link between expanding the importance of the legal theoretical and practical principles (which has frequently led to a “principiologal euphoria”, a kind of “grab-any-principle-you-like” attitude by scholars and lawyers⁵) and strengthening the protection of collective interests? This article seeks to argue that there is an essential *elective affinity* between expanding the use of general legal principles, the collective protection of trans-individual interests and the invention of Social Law. For this, it first develops a more general and theoretical presentation of the Social Law concept. In the second part, a concrete case is presented and analyzed (Toritama – Laundries and the environmental issue) which clearly illustrates the workings of the normative rationale, characterizing it within a local context.” With this, it seeks to highlight the usefulness of the method for case studies that articulate directly between law and development, as well as the importance of theoretically understanding the logic that regulates it.

1. Collective Rights and their reasons

It is common, today, to state that protecting trans-individual interests (or, as they are frequently referred to, the “lato sensu” collective interests) represents a new chapter in protecting rights, a crossroad in the crisis affecting the liberal due process theory. Within the

⁴ The Public Civil Action is a kind of legal action that grants to prosecutors and other legitimated agents the power to litigate in defense of collective and diffuse interests. The Public Civil Action has as its main purposes the punishment or prevention of damages regarding the environment, consumer relations, economic order and popular economy, for example. To sum it up, the Public Civil Action works as a way to protect interests that do not belong to a single individual. Its main legal provisions are the Brazilian Constitution and others statutes, such as the law 7347/85. The TAC is also established by the law 7347/85, even though it figures in other statutes as well. The TAC is a kind of agreement by which the one causing damages to certain interests (basically, the same interests that can be protected trough the Public Civil Action) promises to cease it and produce the required changes in its behavior. The same agents legitimated to file a Public Civil Ação can propose a TAC.

⁵ I developed this topic in another paper, *Interpretação da boa-fé nos contratos brasileiros: Os princípios jurídicos em uma abordagem relacional contra a euforia principiológica* published in the book *Direito, Racionalidade e Instituições*, Ronaldo Porto Macedo Jr e Catarina Barbieri (coord), Saraiva, São Paulo, 2012.

principle-private mind frame that was and still is in effect in our procedural law, the individual was conceived as a holder of rights (subjective). Law, by and large, was a creation of this same individual by means of contractual freedom. As a result of this, legal (procedural) individualism materialized as a natural and much-needed consequence. That is, only the subject or the supposed individual of material law can legitimately propose efforts to protect it. Interest has not only become an asset owned by the individual, but also an asset whose value is dependent upon the legal and social circumstances and relations in which it took part. The right to sue was understood as individual and private property. This concept is very similar to the idea of the right to sue and to claim preclusion (res judicata), whose effects cannot surpass the individual plaintiff.

For this liberal, civil, procedure law, some basic rules have been challenged by new collective rights procedural law. Among them some rules have been put in check such as: 1) the rule which “offers the plaintiff the right to define the litigation, as he wishes”, or, in other words, handing over “the destiny of the lawsuit, in certain aspects, to the desires of the litigating parties; 2)- the principle that states that invoking legal protection is an individual right depending on the protection of not only the interests, in a conflict, but also on the actual and exclusive (free) initiative of the subject himself, and, except in extreme cases, the judicial initiative is prohibited; 3)- the principle of equality (procedural isonomy), according to which, in the classic constitutional formula, parties are considered equal in the eyes of the judge, and neither plaintiff or defendant can have partial treatment; 4)- the “nul ne plaide par procureur” (no one pleads by counsel) rule, following which no one is normally entitled to sue for himself based on somebody else's right, except in some special cases which emerged gradually in case law; 5) - principle of the limited authority of claim preclusion (res judicata), determining that a legal decision, as a rule, only affects the parties that are legally represented, and does not affect third-parties outside the lawsuit.”⁶

Modern collective procedural law altered these rules, allowing representative organs to protect trans-individual and group interests (not solely individuals), assuring positive discrimination aimed at effective access to the legal system, redefining the limits of claim preclusion (res judicata) and expanding the active role of the judge in handling the case. Some reasons have been traditionally presented to explain these transformations. Among them, it is possible to detect three large groups of reasons, to wit:

a) The need to rationalize the legal process⁷. For such an explanation, the collective protection of interests is largely due to the need to implement more economical and swifter formulas to end conflicts and use case law. Thus, if previously in an individual lawsuit it was necessary to protect each right, now this is possible through one claim meeting the jurisprudential requirements of a wide spectrum of interests and rights. A remarkable example

⁶ Cfr. A. H. Benjamin, *A insurreição da Aldeia Global contra o processo civil clássico: apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor*, in *Ação Civil Pública*, Edis Milaré (coord.), RT, 1995, p. 78.

⁷ For example, among others, José Carlos Barbosa Moreira, J. C. B. Moreira, *Ações Coletivas na Constituição Federal de 1988*, in *Revista de Processo* n° 61. São Paulo: Editora Revista dos Tribunais, janeiro-março, 1991, p.187-200; J. C. B. Moreira, *Ação civil pública*, *Revista Trimestral de Direito Público*, n° 3, São Paulo, 1993, p. 187-203 e ^a M. C. Ferraz, E. Milaré, N. Nery Júnior, *A ação civil pública e a tutela jurisdicional dos interesses difusos*, São Paulo, Saraiva, 1984.

of this viewpoint can be seen in a class action in favor of homogenous individual interests put forth by the consumer defense council favoring thousands of interested parties. In this same vein of transformations focusing on procedural rationalization, recently the Direct Action of Unconstitutionality and the Direct Action of Constitutionality were created in Brazilian Law, and today, a version of the *stare decisis* principle, or the rule of precedence, in the Higher Appeals Courts was accepted.

b) Other authors have emphasized the expansion of mass society and the appearance of a new kind of claim for the interests of a group or of a collective nature⁸. Such a phenomenon leads to the existence of interests that no longer belong to individuals or to clearly-defined groups of individuals, “individualizable”, but rather to a frequently indefinable group of interested parties. So it happens in diffuse and collective rights. An example of this situation can be found in the environmental issues involving the direct interest of a few and the indirect interest of everybody, including future generations.

c) Lastly, some authors have emphasized the existence of a new rationality, directly from Social Law, the contemporary legal experience. The crisis in Liberal Law and the invention of Social Law have lent a new rationality and nature to the new law, with impacts on the consolidation of trans-individual rights.

Evidently, these explanatory aspects on the collective protection phenomenon are complementary and not antithetical. Nevertheless, it is common for authors that deal with the issue to place more emphasis on the two former aspects than on the latter, which I will now focus my attention on.

Innumerable legal theorists have been studying the topic of changing rights in the modern world. Norberto Bobbio suggests in his frequently didactic synthesis that we are experiencing a new era of rights. According to this author: “Man’s rights are also, undoubtedly, a social phenomenon (...) this multiplication (of man’s rights) took place for three sets of reasons: a) because the quantity of goods deemed worthy of protection has increased; b) because ownership of some typical rights was extended to several subjects belonging to humans; c) because humans themselves are no longer considered generic beings, or abstract beings, but are seen under the specificity and concreteness of their variable ways of living in society, such as a child, an elderly person, a sick person etc. in substance: more assets, more subjects, more status for individuals. (...)”

Related to the first process, we have passed from the right to freedom – the so-called negative freedoms, religion, opinion, the press etc., – to political and social rights, which require the State’s direct intervention. Concerning the second, we have gone from considering the human individual uti singuli (singular), which was the first subject to which natural (or moral) rights were attributed – in other words, a “person” –, to subjects other than the individual, such as the family, ethnic or religious minorities, or humanity as a whole (as in the current debate among moral philosophers on the rights of the future generation to survival);

⁸ Antônio H. Benjamin, op. Cit.

and, besides the human individuals considered in a singular fashion or within the several real or ideal communities that they represent, even for other subjects belonging to humans, like animals. (...) Concerning the third process, the generic man – that is, man as a man – to the specific man, or taking the wide-ranging social status into account, based on several criteria for differentiation (gender, age, physical conditions), each of which reveals specific differences, which do not allow equal treatment and equal protection. Women are different from men; children from adults; adults from the elderly; the healthy from the sick; the temporary sick from the chronically ill; the mentally ill from other sick people; the physically able from the disabled etc.")⁹.

Nevertheless, it is worthy of note that the positivation, or formal recognition, of these new rights for groups is not the complete synthesis of the nature of Social Law, which incorporates a new form of legal rationality. We must then clarify how we process and constitute the new rationality.

2. The Normative Nature of Social Rights

It is impossible to understand the modern legal experience, especially as of the end of the 19th century, without connecting it to the phenomenon of the positivation – that is, the emergence of statutes as a paradigm of legal norm – of the law. The positivation of the law characterizes the moment in which law is defined based on its own system, based on itself. This idea is clearly explored by Kelsen when he affirms that the validity of a norm depends exclusively on the existence of a legal system which has the authority to formally recognize the law. An enunciation is only legal to the extent that it follows other legal enunciations and a legal judgment rule of a normative nature. The normative nature, nonetheless, qualifies it as having a nature that is necessarily positive. In short, according to this conception, rights are defined using what is recognized as being legal.

Society at the end of the 19th century is characterized by a legal organizational framework based on a new epistemological approach in relation to the preceding classic period. A new way to socialize risk, different from what used to take place within the classic liberal line of thought, which understood it as a merely over-sized misfortune, is based on the generic and broad legal principle of a solidarity nature. Classic liberal law, founded on the idea of exchange, is replaced with the notion of solidarity **agreements**, founded on the idea of fair distribution or equal allocation of both the onus and social profit. In this sense, Social Law is more and more the result of a balance between conflicting interests formalized into an accord that will always imply mutual sacrifices.¹⁰

In the Welfare State with welfare aspects, forms of solidarity are created and have begun regulating conflict. Solidarity stems to losses, suffering, combating the exploitation of

⁹ Bobbio, Norberto *A era dos direitos (The age of rights)*, Ed. Campus, 1992.

¹⁰ For example, think of the concept of *abusiveness* present in Brazil's new Consumer Code. Such a concept is socially definable in accordance with a criterion of constantly changing normality that is relative to an indeterminable context "a priori". In the same way, the ideas of "*excessive cost*" (or overburdensomeness) (Article 51, § 1, III of the Consumer Code) or "*fair balance*" (Article 51, § 4 of the Consumer Code) refer to a socially changeable measure in accordance with a standard of normality.

the weak etc., which vie for social pacification. This characteristic of Social Law implies the abandonment (at least partially) of the classic liberal conception of formal equality among all individuals.

With such considerations, it is possible to synthesize Social Law, as a synthesis of the new Age of Rights, as follows¹¹:

1) Social Law is the "law of inequalities" (if we understand equality in the formal and liberal meaning), the law of privileges, the discriminatory law, the law of groups, the law that seeks to socialize the social risks and losses, which vary in accordance with the social groups and situations involved.

2) The law can no longer be a mere expression of an individual's guarantees, becoming guarantees for those in a category or group (such as, for example, for consumers¹², tenants, workers etc.). On the other hand, it is certain that the universal aspect of the word "equality" has become an instrument for domination, oppression and maintaining inequalities. Social Law is the law of inequalities, opposite to the Kantian paradigm of Universal Justice. Within this new context, Social Law becomes an instrument of the government and administration to the extent it guides the criteria to give legitimacy to social policies and to accords for economic cooperation. Special rights and privileges are distributed in line with political and economic systems of checks and balances.

3) Social Law is essentially contradictory and polemic (in the etymological sense of the Greek word "polemos", warfare). There is no one single right, as that contemplated in liberal doctrine, but rather rights, as there is not just one Norm, but rather a regime of normalities that are provisionally and flexibly integrated. With that, it becomes customary to say that we are in the age of rights and not in the age of right, as Bobbio¹³ affirmed. For that same reason, Friedrich Hayek's criticism of the supposed contradictions of Social Law is understandable¹⁴. Within the liberal (or Hayekian) premises of this philosophy on what is rationality, Social Law can only appear intrinsically contradictory and as a product of the "constructivist illusion".

¹¹ This is based widely on the concept developed by F. Ewald, *A Concept of Social Law*, in *Dilemmas of law in the Welfare State*, Berlin, European University Institute, 1985. F. Ewald, *Foucault. A Norma e o Direito*, Lisboa, Vega, 1993; F. Ewald, *L'État Providence*, Paris, Grasset, 1986. I developed this topic even more in the book *Contratos Relacionais e Defesa do Consumidor*, Revista dos Tribunais, São Paulo, 2a ed., 2006 (Translated into Spanish, *Contratos Relacionales y Defensa Del consumidor*, Buenos Aires, Ed. La Ley, 2006 – revised edition).

¹² It is for this reason that the generic concept itself of consumer is losing its effect in certain contexts, in which it has become necessary to distinguish between the types of consumer. To overcome such difficulties, the Scandinavian doctrine has developed concepts under "need orientation". Cf. T. Wilhelmsson, *Critical Studies in Private Law*, Netherlands, Kluwer Academic Publishers, 1992. This classification creates subgroups within a category, increasingly expanding the unstable nature of classification system in Positivist Law.

¹³ An example of this evidence is the actual name of the recent work published by Norberto Bobbio on the matter, *A Era dos Direitos*, Rio de Janeiro, Campus, 1992.

¹⁴ As explained so precisely by liberal thinker Collingwood: "A fair price, a fair salary, a fair interest rate are contradictory in the terms themselves. The matter of knowing how much a person should receive in exchange for his goods or work is absolutely meaningless", Apud, F. Hayek, *Direito, Legislação e Liberdade*, Ed. Visão, 1985, vol. II, p. 101.

4) Social Law has a political dimension. Since, in a *normative society* (in a Foucauldian sense), norms have a measurability principle of a political nature, policy is transformed into a universal currency that makes economics and politics measurable, which paves the way to contemplate, for example, the existence of governmental priority in building a hospital or a highway, in building a school or preserving the environment. From a sociological standpoint, such a phenomenon has been considered a 'judicialization' of politics and politicization of justice¹⁵. From the point of view of political science and democratic theory, this implies expanding not only the debate on how current the classic theory on the three-way separation of powers is (suggested in situation II), but also the reach of public debate on rights (suggested in situation III and analyzed later).

Despite the notion of balance having surfaced in Ancient Times, it takes on a new meaning within the scope of Social Law¹⁶. It is present in Aristotle's and Plato's¹⁷ concept of distributive justice. Yet, different to how it appears in Plato's conception, in modern times the balance does not define an essence, but rather a pragmatic and polemic conception of justice that is more strongly articulated by the general principles of law. I believe it is possible to highlight five main characteristics of the judgment rule (*regle de jugement*)¹⁸ installed by the notion of balance.

1) In first place, it designs a kind of reasoning that takes into account the relation between two or more terms. Within the scope of contractual law, for example, it matters to know not only if the consent is valid and if the offer was accepted and other formal requirements met, but it also matters to evaluate the fairness of the contractual relationship. The problem with equivalence of the "*causae*" surpasses the problem of consent. An example of this is the application of the principle of good faith as a mechanism to control and mitigate excessive advantages, abuse of power or the disadvantageous situation of one of the parties. Another example is the growing acknowledgement of the annulment of contracts for their cost or excessive burdensomeness (Articles 39 and 51 of the Brazilian Consumer Law). Within the scope of Brazilian Consumer Law, for example, such an idea is evident to the extent the mere protection of consent is not able to guarantee the fairness of the contract. It matters to take into consideration the *cost*, which cannot be excessive (abnormal). With this, the concept of *excessive cost* is important in concretely acknowledging the context in which the contract is established.

In environmental law, several issues related, for example, to imposing the efficiency of a norm for environmental protection (as in the example in situations I and III), reveal the rights to housing, environmental protection, rights to education, health etc., involve a type of

¹⁵ Cfr. R. P. Macedo Jr, *A Evolução Institucional do Ministério Público Brasileiro* in M. T. Sadek, (ed), *Uma Introdução ao Estudo da Justiça*, São Paulo, IDESP, 1995.

¹⁶ For the difference between the concept of "Equity" and the modern concept of balance as used in the paper, see F. Kessler, G. Gilmore and A. Kronman, *Contracts: Cases and Materials*, Third Edition, Boston, Little Brown Company, 1986, p. 10 and P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford University Press, Oxford, 1988., p. 512 et ss.

¹⁷ Cf. Aristóteles, *Ética a Nicômacos*, Trad. Mário da Gama Kury, Brasília, Universidade de Brasília, 1985, especially Book V. De Platão, see *A República*, Lisboa, Calouste Gulbenkian, s/d.

¹⁸ Concept developed by François Ewald op. Cit. I developed this argument in my book *Contratos Relacionales y defensa del consumidor*, op. Cit..

understanding of legal rationality that it is not limited to merely acknowledging the existence of a valid norm recognized by the competent authority. With this, if an eviction notice were issued in an invaded area (in São Paulo Metropolitan area it is estimated that there are close to one million, eight hundred thousand people living in areas where natural water springs (mananciais) are located and protected, where the construction of housing would not be permitted), it would most certainly be considered excessive, abusive, disproportionate and, for that reason, contrary to the law.

Both in the example of consumer rights and in the aforementioned environmental example, the notion of excessiveness refer directly and necessarily to notion of normality. Excessiveness is abnormal and such a concept is self-reflexively defined and refers to the context of the game in which legal meanings are formed. The axis for the legal reasoning is transferred from the abstract, general and transcendental concept of Good and Evil to the concept of social relations, generating a phenomenon that can be described as the socialization of the judgment. This socialization is carried out by contemplating the general principles of law which, as Ronald Dworkin and others point out, the principles do not obey the logic of all or nothing, but imply, rather, some type of equilibrium or weighting¹⁹.

2) Secondly, reasoning for balance should be flexible and adaptable to social change. As explained, the principle of balance is not defined by pre-established criteria. With this, all principles are relativized in relation to one another. Principles are self-reflexive, since they refer to a measure of themselves which varies according to the variations of normality and of normativity²⁰. In this exact dimension, the concept of legal *normality* is similar to the concept of *normality* in the health area. The concept of *excessiveness*, for that reason, is similar to the concept of *pathology*. Excessive cost is “legally pathological” to the extent that it surpasses the boundaries of normality in the “legal game”. In the same way, excessiveness in abiding by the law, often recognized by some as the mere ineffectiveness of the law, also begins to be seen as a legally “abnormal”, “legally pathological” response, and, as such, contrary to the law.

3) In third place, reasoning in terms of balance takes it for granted that fairness is the distribution and allocation of advantages and benefits. In the liberal conception, fairness in a contract is established by conforming to the rules of the economy and the market. There is no other reason that the concept of “fair price”, of a medieval origin, has always seemed so ridiculous to liberal thought²¹. The market price, for a liberal, is neither fair nor unfair. Business is unfair if it opposes the rules of the liberal game, the game of the market. Similarly, in a game of cards, winning a lot or losing a lot will also be deemed fair or unfair. Fair will be the conduct of the player that does not flout the rules of the game. However, if one of the players has a better chance at winning due to his astuteness, experience, malice, knowledge of his partners or adversaries etc., this would not be considered unfairness in the game, even though it may imply an imbalance in favor of one of the players. The substantive imbalance in the game is not transformed into unfairness because, for the liberal game, what matters are the formal rules of the game, not the substantial inequality. Fortune, luck, or nature cannot be classified as fair or unfair.

¹⁹ R. Dworkin, *Taking Rights seriously*, Cambridge (MA): Harvard University Press, 1977.

²⁰ Normativity is a principle in which something is valued, thus giving it preference.

²¹ This aspect was highlighted by F. Hayek, *Direito, Legislação e Liberdade*, op. cit., vol. II, p. 94 e ss.

In environmental law, this distributive nature of the decision-making process is evident in the importance given to reasoning focused on impact and cost allocation for public policy. Any type of evaluation between the impact on the natural environment (for example, in the issue of environmental protection) is taken into consideration when this protection involves an impact on the social situation, housing and access to other social rights which the population illegally occupying regions must endure.²².

4) In fourth place, the idea of balance implies an idea of scale and counterweights. The balance is maintained because one point balances out the other. The operation is, nonetheless, problematic, because, contrary to the market – in which there is price measuring –, it is difficult to quantify values and fairness. There are conflicts in which one can find a confrontation of immeasurable metaphysical values, such as, for example, conflicts between the right to housing and environmental law (referred to in situation I), or conflicts between the right to life, to health, to social security and the capitalist market's demands for efficiency. Reasoning in terms of balance presumes a principle of equality, the possibility to determine a relative quantity for each value, that is, a general measurement. The idea of balance presumes a collective evaluation method, which, in turn, requires a sociological perspective on judgments, which relies on some kind of “sociologization of judgment”. Sociology has become the realm of knowledge that enables the establishment of a measurement and a social equivalent to calculate values and interests, and to solve resulting conflicts. Sociology is the fundamental focus of Social Law, and not a philosophy that seeks universal and transcendental measurement criteria. Evidently, there lies the polemic, explicit and intrinsically political nature of Social Law. Examples of such a dimension can be found in the creation of the mechanisms for participation, control and balance of power in legal relations, in general, and in contractual relations, in particular. Within the scope of employment contracts, job security guaranteed for union leaders is an example. In corporate law, the mechanisms that guarantee controlling rights to shareholders is another example. Within the scope of environmental law, public hearings and Environmental Impact Reports (EIR) are common examples. Reasoning for balance is reflexive reasoning. The judgment rules (*regles de jugement*), that is, judging pursuing the social equilibrium, follow the self-reflexive model of Norm, which always refers to a normality. With this, “who states normal states the fairness” (“qui dit normal dit le juste”) Social Justice is defined as normal, reasonable, balanced.

It is evident that normality will always seem purely arbitrary to the eyes of a radical liberal like Hayek. After all, what are the limits to normality? Given the self-reflexive nature of the norm, there can be no general theoretical answer to this question. It is possible, however, to measure the objectivity of normality with the help of quantitative methods (for example, probability or cost-benefit), statistics and to find the principles of justice and balance present in the varying realms of contractual law and the many applicable contexts.

5) Lastly, it is worth highlighting that in the bosom of the “Welfare State”, which tries to contemplate market-economic logics together with the redistribution principles such as

²² This type of evaluation of impacts, economic and non-economic costs, investments, etc., was well explored in the TVA case, discussed by the US Supreme Court, which involved building barrier that would endanger a small fish known as a “Snail Darter” (cfr. *Law's Empire* from Ronald Dworkin)

balance and solidarity, there is room for the coexistence of rules for liberal and social decisions. With this, within the scope of regulating market relations, the principle of autonomous will remain in effect, even though it is now subordinate to and mitigated by the principles of Social Law. Once again, within the scope of environmental law, constituting a measure to “conciliate interests”, often to “limitlessly negotiate with legality” or to “selectively apply environmental law”, as well as the essentially controversial concept of sustainable development itself (which more and more serves as an idea of regulating to protect the environment), are all examples of the same phenomenon.

It is important to point out that such considerations suggest acknowledging that there is no general and abstract formula to establish a precise limit of “normality” in a concrete case. This is even more so the case when it comes to the matter of applying law to the issue of development in its varied reasons and forms (economic development, for example, expanding capacities, along the lines of works by Amartya Sen and Martha Nussbaum²³), etc. In this case, balance, consideration and prudence when applying the law become so complex that a methodology aimed more so at case studies and identification of similarities among successful experiences seems like a more appropriate course²⁴.

²³ Cfr. M. C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge, Cambridge University Press, 2000, M. C. Nussbaum, e A. K. Sen, (eds.) *The Quality of Life* Oxford, Clarendon Press, 1193, A. K. Sen, *Commodities and Capabilities*. Oxford, Oxford University Press, 1985.

²⁴ Cfr. M. Almeida, *Understanding incentives for clustered firms in Brazil to control pollution: the case of Toritama (PE)*, Brasília, 2005; M. César; E. Tavares, *Pólo de lavanderias de jeans no oeste Pernambucano. Histórias de sucesso: indústria têxtil e de confecções, madeira e móvel*. Brasília, Sebrae, 2006. p. 55-76; S. Coslovsky, *Stitching it together: how public prosecutors produce compliance and promote economic growth in Brazil*. São Paulo, Massachusetts Institute of Technology (MIT), 2007; M. E. J. Lazarte, *Successful public sector enforcement of environmental standards in the Toritama jeans industry in Pernambuco*. Brazil, 2005; D. North, *Institutions, institutional change and economic performance*. Cambridge, Cambridge University Press, 1992; M. Oliveira, *Da pirataria à formalidade: o renascimento de Jaraguá. Histórias de sucesso: experiências empreendedoras*. Brasília, Sebrae, 2004; R. PIRES, *Bringing the law and the firm together: labor inspectors and the reconciling of social protection with economic development in Brazil*. Cambridge, Massachusetts Institute of Technology (MIT), 2007; H. Schmitz, *Global competition and local cooperation: success and failure in the Sinos; Valley, Brazil in World Development*, 1999, v. 27, n. 9, p. 1.627-1.650; J. Tendler, *Small firms, the informal sector, and the Devil's deal*. IDS 2002, Working Paper, v. 33, n. 3; R. B. A Duarte (org.) *Histórias de sucesso: indústria: têxtil e confecções: madeira e móvel*, Brasília: SEBRAE, 2006; M. D. O. Pereira and M. S. M. J. Queiroga *A Contabilidade ambiental nas lavanderias do setor têxtil de Pernambuco*, Faculdade do Vale do Ipojuca – FAVIP; R. Pires, *The craft of compliance: labor inspectors and the reconciling of economic development with social protection in Brazil*, November, 9, 2007 MIT – Dept. of Urban Studies and Planning paper; IEL-MG/Sindiemg 2003. *Diagnósticos das Indústrias de Fogos de Artifício de Santo Antonio do Monte*, Belo Horizonte: Instituto Euvaldo Lodi and Sindicato das Indústrias de Explosivos no Estado de Minas Gerais; E. Lee, *Why Did They Comply While Others Did Not? Environmental Compliance of Small Firms and Implications for Regulation*, PhD Dissertation, Department of Urban Studies and Planning, Massachusetts Institute of Technology, 2005; E. G. Noronha, L. Turchi, *Política Industrial e ambiental institucional na análise de arranjos produtivos locais*, IPEA Texto para discussão n. 1076, março de 200; R. Pires, *Bridging Economic Development and Social Protection: an examination of labor inspectors' behavior and enforcement practices in Brazil*, Massachusetts Institute of Technology, Working Paper, 2007; M. E. J. Lazarte, *Successful public sector enforcement of environmental standards in the Toritama Jeans industry in Pernambuco, Brazil*, Masters Thesis, Massachusetts Institute of Technology, 2005; J. Tendler, *The rule of law, economic development, and modernization of the state in Brazil: lessons from existing experience for policy and practice*, Research Proposal to World Bank Office, Brazil (Brasília) and UK Department for International Development (DfID/Brasília), 2006b.

In the final part of this article, I present a model case in terms of dimensions, complexities and issues involved in a successful case directly comprising the issue of development and law. This case calls into play the previous inspiration of political concern for social transformation which enhanced the Law and Development experience and theoretical insights, and highlights some of the ambiguities and tensions involved in the matter of “ineffective law”.

3. Case: Environmental Development and Selectively Applying the Law²⁵

3.1 Laundries in the Textile Sector in Toritama (PE)

Toritama is a city situated in the an area known as the Agreste Setentrional in the state of Pernambuco in Brazil, some 167 km from Recife, the capital of the state. According to the Brazilian Statistics and Geography Institute (IBGE), in 2006, the population of the city was twenty-six thousand, eight hundred and twenty-five (26,825) inhabitants, covering an area of 34.8 km². The city began producing leather shoes as its main economic activity, reaching its peak in the 1970s, manufacturing large numbers of products made of leather and/or rubber, moving on to jeans, which became its main economic activity. Currently, Toritama has the lowest poverty rate (27.32%) among the 1,800 municipalities in Brazil’s Northeast.

Currently, Toritama is well-known for its hub of laundries that have appeared with the support of the jeans manufacturers in the region. The laundries carry out activities, including bleaching, dying, softening, drying, centrifugation, starch removal and adding finishing

²⁵ There is currently a growing bibliography of case studies that suggest similar development standards, compliance and/or “negotiation of legality”, which corroborates the core argument of this paper in the sense that there is a new Standard of rationale in Social Law, whose correct understanding is vital to build a strategy to reflect on and build a new model of Law and Development. Among these cases, it is possible to mention the LPAs in Nova Serrana (MG), Jaraguá (GO), Salvador (the Cordeiros do Carnaval case). Cfr. Combating piracy and reducing unregistered work in *Jaraguá (GO)*, where the percentage of people earning half the minimum wage went from 57.83% in 1990 to 30.68% in 2000. In this city, the default on pirated computers sent several companies bankrupt. The business association together with SEBRAE began promoting a fair of locally-made goods which encouraged some companies to develop their own brands and to get their paperwork in order. The municipality, today, is in the top 30 with the highest local tax collection, among 230 municipalities in the state of Goiás.

More and more workers are registered in *Nova Serrana (MG)*. This city has fewer than 100,000 inhabitants with the largest growth in registered work in Brazil from 1995 to 2005. In this municipality, businesspeople were not only aided by SEBRAE to build a trade union headquarters, but also helped by the state government to acquire a CAD/CAM machine. The trade union helped companies cut costs and to get credentials legally in order.

Santo Antônio do Monte (MG): a city that was famous for deaths of workers in the production of fireworks, today, guarantees the safety of fireworks imported from China. In this case, work inspectors help businesspeople improve the production process by using safer chemical products and the companies implement health and work safety norms. Today, a laboratory in this city certifies all imported fireworks to Brazil in terms of safety.

Another paradigmatic study, which returns to these cases and analyzes others, is that of S. V. Coslovsky, *Compliance and competitiveness: how prosecutors enforce labor and environmental laws and promote economic development in Brazil*, PHD Submitted to the Department of Urban Studies and Planning for the degree of Doctor of philosophy in urban and regional planning at the Massachusetts Institute of Technology, Sept. 2009; M. Lesley, *Making law matter: environmental protection and legal institutions in Brazil*, 2008.

touches. Therefore, in all operations, water and chemical products are used, which brought about serious environmental damage.

According to Mansueto Almeida “(in 2008), apparel manufacturers in Toritama are responsible for 15% of the jeans produced in Brazil. The municipality has 133 formally registered companies that employ 1,480 registered workers, of which 82% are in companies with up to 50 employees. The city’s main problem at the end of the 1990s was the laundries’ daily release of a mix of bleach, dye and detergents into the Capibaribe River, equivalent to 4.5 million liters of water.”²⁶ The extreme level of pollution made it unfeasible for the river water to be used for domestic consumption, and the growing production of jeans in the city increased not only the demand for, but also the price of water for the laundries and households. Laundries in the region generally do not use filters on their chimneys, which spread a strong odor due to the wood that was burnt there. There was no care taken with waste products, packaging used was thrown into the environment, with no effort made to preserve the environment. Local businesspeople also refused to invest in pollution control. Some because they had no idea of the real damage caused; others did not invest because economically it was not feasible.”²⁷

According to the several reports and studies carried out, in 2001, the local prosecutor of the State Prosecutor’s Office (MPE) decided to apply environmental legislation in the city, because some citizens had filed lawsuits due to pollution caused by the laundries and the media had published some articles which revealed the high level of pollution in the city, which attracted more inspection from the state environmental agency. To implement this initiative, several public and private institutions took part, involving themselves in the program being run by the State Prosecutor’s Office in Pernambuco and the State Agency for the Environment and Water Sources (CPRH) in Pernambuco. This program began in 2003 and after just two years, more than 90% of the laundries in the city (close to 60) were working within the law, thus generating a noticeable improvement in health conditions, environmental protection and tax collection in the municipality.

As Mansueto Almeida points out, “It is possible that the continuous growth in Toritama since 2000 was helpful in getting laundries to adhere to environmental legislation. But it is also certain that part of this growth resulted from solving the pollution problem, as the laundries managed to reduce costs by recycling water, which was made possible by implementing a cleaning system that met environmental legislation standards. Some of the city’s indicators were clearly affected, such as, for example, the swift rise in GDP (9.23% p.a. from 2002 to 2005) and the lowest poverty rate among the cities in the Northeast, after the island Fernando de Noronha,”²⁸

²⁶ For a detailed study of the case involving the solution to the laundries’ pollution problem in Toritama, see Almeida (2005), Lazarte (2005), César e Tavares (2006) op. Cit.

²⁷ Cf..M.Almeida, *Além da informalidade: Entendendo como os fiscais e agentes de desenvolvimento promovem a formalização do crescimento de pequenas e médias empresas*, Rio de Janeiro, agosto de 2008, available <http://www.ipea.gov.br> – IPEA – Texto para discussão N° 1353.

²⁸ M. Almeida, op. Cit.

Toritama has companies typically characterized as local productive arrangements (LPAs), that is, small family businesses, with no appropriate physical-operational structure. “In these places, there was no environmental inspection, and taxes, when collected, were low. There was a lack of labor inspectors. In such an “unregulated” environment, economic growth for unregistered companies caused an increase in pollution and in the number of unregistered workers. Besides this, since economic growth in these places took place at the same time as massive tax evasion, municipal governments were unable to meet the local demand for health, education and infrastructure. This form of growth is acknowledged in development literature as *low road*, in which economic growth is not sustainable, and disrespects labor and environmental standards.”²⁹

The Toritama example is emblematic of common practices in other municipalities, in which public policy to foster sectors based on granting subsidies and no inspection is what Judith Tendler refers to as a “Deal with the Devil”³⁰, in which state incentives end up increasing not only benefits and incentives for unregistered work, but also, and quite often, disrespect for labor, environmental, tax rules etc. Frequently, these practices involving tolerance or lenience were carried out under the guise that several companies (especially small and medium-sized firms) would not be able to financially cover the costs of such regulations. Owing to this, these policies (many of which were conscientious and well-intended) understood that it would be better to have unregistered companies generating jobs than simply “obstructing development”.

3.2 Partial Conclusions Concerning the Local Productive Arrangements (LPAs) and the Law

Empirical research on Toritama and other studies suggest that the “negotiated” way, “normalized” by applying law is one of the fundamental elements for the success of the development policy in these municipalities. This, however, gave rise to some curious contradictions with relation to the traditional understanding of law and the legal obligation of several agents. Following this traditional path, failing to act when faced with an infringement of the law, or acting selectively and gradually, means the public agent could be charged with a civil servant crime and malfeasance, besides disciplining him/her for not performing or making the best efforts to enforce the repressive legislation.

As Mansueto Almeida affirms, “when you acknowledge that the work of law enforcement agents is highly discretionary, you need to understand when these agents decide to apply the law so as to produce positive results for the companies (more conformity together with more competitiveness), differently from the traditional approach of “command-and-control”, in which agents apply the law through coercion, issuing fines to companies that do not adhere to the norms and issuing legal orders to close down unlawful companies. It is important to understand this because it is the work of these inspectors that will establish the transaction costs in the economy, because these agents operate in a different way in each municipality in Brazil. Therefore, the solution to the debate on how to improve the business

²⁹ Op. Cit.

³⁰ J. Tendler, *Small firms, the informal sector, and the Devil's deal*. IDS 2002, Working Paper, v. 33, n. 3.

environment to boost the growth of companies is a discussion that depends, necessarily, on how legislation is formed in the local environment: how the work of the prosecutors, IRS inspectors, labor inspectors, agents form the environmental secretariats etc. is carried out in different municipalities and how much the inspectors' work is *in* or *out* of tune with the work of development agents (agents from SEBRAE - Brazilian Micro and Small Business Support Service and the development secretariats) when it comes to fostering local development. In other words, it is important to identify how the prosecutors or the labor inspectors apply the law in an LPA, what kinds of companies and sectors the inspectors are choosing to inspect, the type of policies and fiscal exemptions are being granted by the development agents to local companies in any given place and not others etc.³¹

Studying a case such as Toritama reveals that competitiveness can result in two different strategies: the *low road* or the *high road* strategies³². In the former strategy, companies seek cost reduction and do not comply with labor and environmental norms. Meanwhile, in the *high road* strategy, companies take on the costs involved in complying with labor and environmental norms, but still remain competitive. In this case, the key to maintaining competitiveness is to make work more productive, improve company organization and better employ technology. A case such as Toritama is useful in understanding how companies gradually leave an unlawful situation (*low road*) moving towards a lawful situation (*high road*) as a result of the efforts of economic development agents and law inspectors.

Mansueto also reveals that “even if companies adapt to the law, there is still the possibility of different results over the long term. In one case, companies may begin to comply with the law, but inspectors are required to continuously monitor them, because following the law does increase production costs. In these cases, we say that complying with the law does not result in immediate advantages in terms of competitiveness for companies and inspection is the main mechanism to implement the law in LPAs and neighboring cities. Nevertheless, in some cases, it is possible that the process of adapting to the law becomes self-regulatory, when regulating companies increase their competitiveness and access to high added-value markets, which in many cases reduces the need for labor and environmental inspectors to monitor them, for example. In these cases, applying the law may cause a multiplying effect in the entire local economy.”³³

The argument used, therefore, is that there are strong reasons of a consequentialist nature that can justify “negotiating with legality,” taking into account *forward-looking* criteria. Such a procedure would follow the same logic as the aforementioned Social Law, to wit, that applying and interpreting law would become instruments, in a sense, political, to manage law “enforcement” strategies.

3.3 Why Are Some Cases Successful and Others Not?

³¹ M. Almeida, op. Cit.

³² F. Pyke; W. Sengenberger, *Industrial districts and local economic regeneration*, Geneva: International Institute for Labour Studies (ILO), 1992.

³³ M. Almeida, op. Cit.

Despite the severe complexity and the combination of factors in cases such as that in Toritama and other similar cases³⁴, it is possible to identify more than one constant in the “virtuous” implementation practices in law, even at the risk of partially disobeying the law.

For Mansueto, “the main difference between the cases studied and others in which companies continue to disrespect the law (environmental, labor and tax) is the way inspectors and development agents have worked together, not always in coordinated efforts, to foster sectorial development and inspect the companies. The problem is not always the legislation, which is generally ambiguous and vague, but rather the way law inspectors interpret and apply environmental, labor or tax legislation, and whether the inspectors have the support of development agents to help coerce companies to implement changes to their production process, making the transition to becoming a registered firm easier.” These characteristics can be explained by describing a process that involves three connected factors, to wit:

1) Selective concession of subsidies: the process, in some cases, began with businesspeople demanding subsidies and exemptions from state and municipal governments. However, instead of indiscriminately conceding subsidies, the state and municipal government, together with SEBRAE, took a different route, fostering policies that, to some extent, eased investments so that Municipal Administrations could adapt to the law.

2) Applying the law gradually and selectively: in the cases reported on in this paper, inspectors applied the law partially and gradually. In none of the cases studied was there a task force to prompt companies to make adjustments to simultaneously meet all legislation: environmental, labor and tax. On the contrary, in several cases, inspectors opted to “turn a blind eye” to some infringements, and those involved in the programs focused solely on those problems that businessmen themselves considered the main bottleneck to economic growth in the sector. It is interesting to note that the solution in Toritama was not the most efficient from the environmental perspective since the water thrown out by the laundries is still considered polluted under the standards set in Brazilian legislation. Nonetheless, implementing low-cost technology enabled companies to reduce pollution in the water by 50% in less than two years. As in other cases, the “best” solution was simply not feasible, and that reached is known in economics as a *second-best solution*³⁵.

3) Cooperation between the public sector and business associations: business associations played a positive role, whether in terms of direct inspection of companies together with inspectors (from the environmental area in the Toritama case), whether in negotiations with law inspectors and development agents concerning deadlines and requirements to adhere

³⁴ See note 24.

³⁵ Mansueto draws attention to the fact that D. Rodrik, *Thinking about governance*, in *Governance, growth and development decision making*. Washington, The World Bank, 2008. p. 17-25, presents a similar argument on what the economic literature calls a *second best solution* to financing development in poor countries. “According to Rodrik, ‘in a second-best (i.e., real) world, the nature of the binding constraint and their interactions with other distortions will influence the desirable arrangements’. With this, when fostering institutional reforms to promote economic development, Rodrik believes it will be difficult to copy the best solutions that work in developed nations. I believe the same could be said when combating unregistered work in developing countries: there is no great institutional arrangement.”

to the law³⁶. Business associations, throughout this process, came off fairly strong as local producers began to see the benefit of negotiating as a group and not individually, and the efforts made by the public sector involved several public agencies.

The Toritama case reveals an apparent paradox, in which applying the law selectively and gradually, which to many may be characterized as an example of the “law’s ineffectiveness”, turned out to be a “second best” strategy, which, once again paradoxically, faced with the lack of another feasible positive strategy, was in fact the best strategy. As such, it ends up becoming “policy”, “negotiated” by applying the specific law to a rationale of Social Law. It also ends up becoming the best strategy for interpreting and applying the law when seeking development.

4. Final Considerations

Protecting the collective interests is something impregnated by the controversial and contradictory nature of Social Law. Public Civil Action, the Terms of Conduct Adjustment (TACs), as mechanisms falling under the protection of collective interests, are not only the most rational or suited to a mass society as a whole, but they are also legal tools which agents, especially NGOs and the Public Prosecutor’s Office, are using to expand the spaces for public debate on Social Justice, in particular in public policy, the prime means for it. This means that Public Civil Action has become a policy instrument that influences the management of public policy. Also, the means to making it operational are brought about and brought to life through the decision-making rules founded on the general principles of law. It also means that it has become an instrument of political struggle, informed and shaped by public opinion, and not solely for the implementation of equity rights. By means of such mechanisms, an institutional interaction involving the Public Prosecutor’s Office and the Environmental Secretariat in Pernambuco, in cooperation with trade unions and NGOs, has created an institutional space for “street level regulators” to operate successfully in implementing a virtuous strategy for environmental protection, as well as social and economic development. Such experiences have shown and led to new spaces for reflection, whether this is on the normative rationale of Social Law in specific contexts, or whether it is for relevance of complementing local legal spaces when articulating between law and development. They suggest new perspectives for understanding the meaning, the causes and the efficiency of selectively implementing legality in contexts that are successfully implementing development strategies.

³⁶ The role of the Commercial and Industrial Association in Toritama (ACIT) was also important in helping the prosecutor, the environmental inspector and the laundry owners reach a consensus concerning the TAC so that each laundry could adhere to the environmental legislation. The president of ACIT organized meetings between businesspeople and prosecutor to debate regulatory alternatives for the laundries. In the beginning, the prosecutor and the environmental agency considered relocating the laundries from residential areas to a specific industrial area, to be defined by the city council, where a water treatment system would be built. However, during negotiations between the businesspeople and the public agents, the prosecutor agreed to maintain the laundries in the city and to adopt low-cost technology that was presented to them, and which could be customized to suit the size of each laundry. Mansueto, op. Cit.