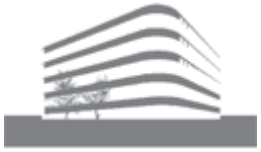

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POLYARCHIES AND THE (UN)RULE OF LAW IN LATIN AMERICA

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"Aos meus amigos, tudo; aos meus inimigos, a lei."
(*"For my friends, whatever they want; for my enemies, the law")*
(*Getulio Vargas)*

1. Introduction*

Impressed by the ineffectiveness, if not the recurrent violations, of many basic rights in Latin America, several authors in a volume I recently coedited (Méndez, O'Donnell, and Pinheiro, forthcoming) challenge the appropriateness of attaching the label "democracy" to most countries in this region. At the very least, as Juan Méndez puts it in his Introduction to the section on Lawless Violence, these failures indicate a serious "abdication of democratic authority." These doubts and challenges to the democratic condition of these countries spring, on one hand, from justified outrage in view of the dismal situation that, in terms of basic rights of the weak and the poor, most of the chapters in this volume document. On the other hand, those same doubts and challenges reflect the vague and fluctuating meanings attached to the term democracy, not only in common but also in academic usage. This problem has become more acute since in the last two decades or so the number of countries that claim to be democratic has greatly expanded, in the South and in the East. This expansion has forced democratic theory to become more broadly comparative than it was when its empirical referent was almost exclusively limited to countries situated in the Northwestern quadrant of the world. However, I have argued in recent publications[1] that, in broadening its geographical scope, democratic theory has carried too many unexamined assumptions[2], reflecting in so

* It was a privilege for me to discuss many of the ideas contained in the present text during my stay in the Fall of 1997 as a visiting professor at the Centro de Estudios Avanzados en Ciencias Sociales of the Fundación Juan March, both with members of its faculty--especially José María Maravall, José Ramón Montero, and Andrew Richards--and its graduate students. Several versions of the present paper have further benefited from comments by David Collier, Gabriela Ippolito-O'Donnell, Ary Kacowicz, Marcelo Leiras, Sebastián Mazzuca, Gerardo Munck, Héctor Schamis, and Dietrich Rueschemeyer.

[1] O'Donnell (1993, 1994, 1996, and 1997). Since these publications, as well as the present one, are part of a larger effort in which I try to analyze the specific characteristics and dynamics of new polyarchies, I apologize in advance for the various references to these works that I make here.

[2] Or, as Robert Dahl (1989, 3) put it, "These half-hidden premises, unexplored assumptions, and unacknowledged antecedents [that] form a vaguely perceived shadow theory [of democracy]".

doing the conditions prevailing during the emergence and institutionalization of democracy in the highly developed world. I also argued that, given the present range of variation among pertinent cases, some of these assumptions need to be made explicit and submitted to critical examination if we are going to achieve a theory of adequate scope and empirical grounding. In the present text, based on a discussion of the rule of law, as well as of its ramifications in terms of the conceptualization of democracy, citizenship and the state, I try to advance in this direction.

2. Polyarchy

Country X is a political democracy, or a polyarchy: it holds regularly scheduled competitive elections, individuals can freely create or join organizations, including political parties, there is freedom of expression, including a reasonably free press, and the like.[3] Country X, however, is marred by extensive poverty and deep inequality. Authors that agree with a strictly political, basically Schumpeterian, definition would argue that, even though the socioeconomic characteristics of X may be regrettable, this country undoubtedly belongs to the set of democracies. This is a view of democracy as a type of political regime, independent of the characteristics of state and society. In contrast, other authors see democracy as a systemic attribute, dependent on the existence of a significant degree of socioeconomic equality, and/or as an overall social and political arrangement oriented toward the achievement of such equality. These authors would dismiss country X as "not truly" democratic, or as a "facade" version of it.

[3] See, especially, Dahl (1989, 221). The attributes stated by Dahl are: 1) Elected officials; 2) Free and fair elections; 3)Inclusive suffrage; 3) The right to run for office; 4) Freedom of expression; 5) Alternative information; and 7) Associational autonomy. In O'Donnell (1996) I have proposed adding: 8) Elected officials (and some appointed individuals, such as high court judges) should not be arbitrarily terminated before the end of their constitutionally mandated terms; 9) Elected officials should not be subject to severe constraints, vetoes, or exclusion from certain policy domains by other, non elected actors, especially the armed forces; and 10) There should be an uncontested territory that clearly defines the voting population (for persuasive arguments about this latter point, see especially Linz and Stepan, 1996). These ten attributes I take as jointly defining polyarchy.

The contemporary literature has generated plenty of definitions of democracy.[4] If the options were limited to the two just sketched, I would opt for the first one. The definition that conflates democracy with a substantial degree of social justice or equality is not analytically useful. Furthermore, it is dangerous: it tends to deprecate whatever democracy exists, and thus plays into the hands of authoritarianism--in Latin America, we learnt this the hard way in the 1960s and 1970s. On the other hand, I am persuaded that a "politicist," or solely regime based, is a necessary but insufficient component for an adequate definition of democracy. Academic usage cannot completely ignore the historical origins and the normative connotations of the terms it adopts. The fundamental point, which I will elaborate here, is that there is a close connection of democracy with certain aspects of equality among individuals who are posited not just as such individuals, but as legal persons, and consequently as citizens— that is, as carriers of rights and obligations that derive from their membership in a polity, and from being attributed a degree of personal autonomy and, consequently, of responsibility for their actions. Whatever the definitions of democracy, since Athens until today, this is its common historical core.

In contemporary democracies, or polyarchies, citizens have, at the very least, the right to vote in competitive elections. This means that they are supposed to make a choice among no less than five options.[5] This choice would be senseless if they had not (more precisely, if they were not attributed by the existing legal/institutional framework) a sufficient degree of personal autonomy for consciously making such a choice.[6] In this sense, democracy is a collective wager: even if grudgingly, every *ego* accepts[7] that all other adult *alter* have the

[4] See the interesting account of the numerous adjectives added to the term "democracy" in Collier and Levitsky (1997). For reflections on the changing meanings of democracy in a context, France, that in several respects is closer than the United States to the Latin American tradition, see Rosanvallon (1994).

[5] Assuming that for these elections to be competitive at least two political parties are required, these options are: vote for party A, vote for party B, cast a blank ballot, cast a null ballot, and do not vote.

[6] The theme of personal autonomy and its correlates has recently elicited a lot of attention in political philosophy, but until now it has not much influenced democratic theory. The basic bibliography on this theme and a thoughtful discussion may be found in Crittenden (1992). For contributions that I found particularly illuminating on this matter, see Raz (1986 and 1994), and Waldron (1993).

[7] The history of this often grudging acceptance is that of the incorporation to citizenship of urban workers, peasants, women and others. Conversely, its refusal is the stepping-stone of authoritarian rule: guardians,

same right (that is, is equal with respect to) to participate in the momentous collective decision that determines who will rule them for a time. In spite of the infinitesimal weight of each vote in such decision, the feeling of not being any longer mere subjects, but citizens exercising their equal right of choosing who would rule them, goes a long way in accounting for the huge enthusiasm that often accompanies the founding elections at the demise of authoritarian rule.[8]

This is even more clear in relation to other political rights. If, as entailed by the definition of polyarchy, I am granted the right to freely express opinions about public matters, I am presupposed to have sufficient autonomy to have such opinions (even if I am mimicking the opinion of others, it is still myself who has adopted them); this same autonomy makes me responsible for such opinions, for example, if they make me liable to a libel suit. This leads us into a second point: not only polyarchy as a political regime but the whole legal system of western (and westernized) societies is built on the premise that everyone is endowed with a basic degree of autonomy and responsibility, except conclusive and highly elaborate proof to the contrary. This is the presumption that makes every individual a legal person, a carrier of formally equal rights and obligations not only in the political realm but also in contract, tort, criminal and tax obligations, in dealings with state agencies, and in many other spheres of social life. This fact, which pertains as much to the history of democracy as it does to the history of capitalism and of the territorially-based state, means that in manifold social transactions we are presumed to be equally autonomous and responsible as the other parts in such transactions. Since Karl Marx, this kind of equality may be dismissed as "purely formal" or, worse, as a highly efficacious way to conceal the inequalities that really matter.[9] I believe this is a serious argument, but it does not cover the whole story: formal or not, these are equalities, and they have expansive potentialities for further equalization.

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enlightened vanguards, military juntas, theocracies, and the like have in common the denial, at least in the political realm, of the autonomy of their subjects.

[8] For a discussion of these elections and the collective mood that usually surrounds them, see O'Donnell and Schmitter (1986). I examined the micro motivations underlying these phenomena in O'Donnell (1986).

[9] Of course, the classic statement in this matter is Karl Marx (1972).

What I have noted is also true in relation to activities that require a higher investment of personal activity than voting or signing an already printed employment contract. For example, expressing opinions, participating in an electoral campaign or joining a political party require not only that one has the disposition to do so, but also some resources, such as time, information and even sheer energy,[10] as well as legal protections against the possibility of being sanctioned because of undertaking such activities. Lacking these propitious conditions, only some exceptionally motivated individuals carry out such activities. This also holds true in a less directly political level, such as when suing an exploitative landlord, an abusive spouse, or a police officer who behaves unlawfully. As Amartya Sen has argued, the functionings of each individual (that is, the activities that she can actually undertake) depend on the set of actual capabilities with which each one is endowed by a broad constellation of social factors.[11] If in any given case certain actions (for instance, because of deprivation of necessary resources) are not within the set of the actor's capabilities, the freedom to act in that way would be spuriously attributed to such an actor. In this sense, if in country X there exists a pervasive condition of extreme poverty (which affects many more capabilities than those based solely on economic resources), its citizens are de facto deprived of the possibility of exercising their autonomy, except perhaps in spheres that are directly related to their own survival. If the deprivation of capabilities entailed by extreme poverty means that many are hard-pressed to exercise their autonomy in many spheres of their life, then there seems to be something wrong, both morally and empirically, in posing that democracy has nothing to do with such socially-determined impediments. Actually, saying that it has nothing to do is too strong: authors that accept a regime-based definition, often warn that, if those miseries are not somehow addressed, democracy, even narrowly defined, will be in jeopardy. This is a practical argument, subject to empirical tests that, indeed, show that poorer and/or more

[10] For research on the United States that shows the importance of these and other resources in terms of various kinds of political participation, see Verba, Schlozman and Brady (1995).

[11] Sen (1992). See also Dasgupta (1993) and, from a more philosophical and also extremely interesting perspective, Raz (1994), and Taylor (1985).

inequalitarian societies are less likely to have enduring polyarchies.[12] This is an important issue, but not the one I deal with here.

3. Formal rights

The preceding discussion implies that there is an intermediate dimension between the political regime and the broad socioeconomic characteristics of a given country. As such an intermediate level, this one is bound to be influenced by both regime and socioeconomic structure, so whatever this dimension is, it is--to resuscitate an admittedly ambiguous term--relatively autonomous from these two levels. I argue that this level consists of the extent to which the rule of law is effective, across various kinds of issues, regions and social actors, or, equivalently, the extent to which full citizenship, civil and political, has been achieved by the whole adult population.

The "rule of law" (or terms which we shall see are partially concurrent, such as a Rechsstaat, Etat de Droit or Estado de Derecho) is a disputed term. For the time being let me assert that its minimal (and historically original) meaning is that whatever law there is, it is fairly applied by the relevant state institutions, including but not exclusively the judiciary. By "fairly" I mean that the administrative application or judicial adjudication of legal rules is consistent across equivalent cases, is made without taking into consideration the class, status or power differentials of the participants in such processes, and applies procedures which are preestablished and knowable. This is a minimum, but not an insignificant criterion: if ego is attributed the same equality (and, at least implicitly, the same autonomy) as the other, more powerful, alter with whom the former enters into a crop sharing arrangement, or employment contract, or marriage, then it stands to reason that she has the right to expect equal treatment from the state institutions that have, or may acquire, jurisdiction over such acts.

[12] This is borne out by the work of Adam Przeworski and his associates (1996).

This is, it is important to note, formal equality in two senses. One, it is established in and by legal rules that are valid (at least[13]) in that they have been sanctioned following previously and carefully dictated procedures, often ultimately regulated by constitutional rules. Two, the rights and obligations specified are universalistic, in that they are attached to each individual qua legal person, irrespective of his actual social position, with the sole requirement that the individual has reached adulthood (that is, a certain age, legally prescribed) and has not been proved to suffer some kind of (narrowly defined and legally prescribed) disqualifying handicap. These formal rights support the claim of equal treatment in the legally-defined situations that both underlie and may ensue from the kind of acts above exemplified. "Equality [of all] before the law" is the expectation tendencially inscribed in this kind of equality.[14] At this moment I want to note a point to which I shall return: the premises and characteristics of these rights and obligations of the legal person as a member of society (which, in the interest of brevity, I will call civil rights or civil citizenship[15]) are exactly the same as those of the rights and obligations conferred in the political realm upon the same individuals[16] by a polyarchical regime. In other words, the formal rights and obligations attached by polyarchy to political citizenship are a subset of the rights and obligations attached to a legal person.

4. A brief overview of the evolution and sequences of rights

[13] With this parenthetical expression I am sidestepping some complex issues of legal theory with which I do not need to deal here.

[14] Research in the United States shows that most people place high value on feeling that they are treated by means of fair processes by courts and the police, to an extent largely irrespective of the concrete outcome of the process, Tyler (1980). Robert Lane (1988) argues persuasively that an important, albeit neglected, topic in democratic theory is not only who gets what by what means from whom, but also how institutions treat people, the degree to which institutions are fair and respectful of the equal dignity of all individuals. Legal theorist Ronald Dworkin (1978) has made being treated "with equal consideration and respect" the hallmark of a properly ordered society.

[15] I use the term in this context with some hesitation, mainly due to the strong criticisms that, among others, Mann (1987), and Turner (1990) made to T.H. Marshall's (1950) influential scheme.

[16] With the exception of course that political rights are usually reserved for nationals.

Since Plato and Aristotle, we know that formal equality is insufficient. It soon becomes evident to political authorities that, in order for these rights not to be "purely" formal, some equalizing measures should be undertaken. The corollary of this observation has propelled, jointly with the criticisms from the left of "formal freedoms," two major achievements. One is the recognition of the need for policies aimed at generating some equalization (or, at least, to redress some egregious inequalities) so that peasants, workers, women, and other underprivileged actors may have a real chance of exercising their rights. In some countries this has led to the complex institutionality of the welfare state. The second achievement resulted from the recognition that, even if these equalizing measures were reasonably adequate for highly organized groups or constituencies with large memberships, there was still a number of situations that required, if formal equality was to be approximated at all, even more specific measures. Consequently, various kinds of social and legal aid for the poor and/or for those who for any reason have a hard time legally defending their rights became another feature, especially of highly developed countries.

The overall result of these changes has been a movement away from the universalism of the law, in view of situations that were deemed as demanding, for reasons of formal and substantive equalization, that legal rules specifically aimed at certain social categories be implemented. These decisions were in part the product of political struggles of the groups thus contemplated, in part the result of preemptive paternalistic state interventions, in a mix that has varied across countries and time.[17] These processes have led, from the right and the left, as well as from some communitarians, to stern criticism of the resulting "legal pollution."[18] I want to stress, however, that in this matter sequences are important: these criticisms imply that in the highly developed countries, the particularization of the legal

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[17] There is a large literature on this matter; within the works that stress the legal aspects of this topic I found particularly useful Preuss (1988 and 1996), Cotterrell (1989), Offe (1987a and 1987b) and Habermas (1988 and 1996).

[18] As expressed by Teubner (1986). Actually, the issue is more complicated, and confusing. Attacks on the present legal systems of highly developed countries refer both to its remnants of "formal" universalism and to the innumerable pieces of particularized legislation issued not only by legislatures but also by administrative agencies, basically in the context of regulation and welfare policies. Unhappiness about these systems is broadly shared, but there is no agreement about why and in what direction they should be changed.

system was historically based and premised on the previous extension of formal, universalistic legislation. Some of the harshest critics of these legal systems seem to forget that their very possibility of challenging those systems (even before courts) without personal risk is grounded in formal rights that persist quite vigorously in spite of the "legal pollution" that has taken place. We shall see that this is rarely the case outside of the highly developed world, and draw some consequences.

Habermas[19] has proposed a useful typological sequence. He notes that in most European cases, under absolutism a state emerged which generalized the concept of the legal person as a carrier of "bourgeois" rights, typically embodied in civil and commercial codes. This was a first step toward the generalized juridification of society which, I add now following Max Weber,[20] was at once the process of formation of national states and of the expansion of capitalism. The second step was that of the *Rechsstaat* (or *estado de derecho* in its original meaning), which established "the constitutional regulation of executive authority [under] the principle of administrative legality," even though individuals were not yet granted political rights, including the right to elect their rulers. This happened at a third stage, sometime during the 19th century, when through varied processes the adult male population acquired full political rights. The fourth stage that Habermas notes is that of the welfare state and its concomitant rights, which advanced in social democratization but entailed a deep erosion of the legal universalism of the previous stages. Actually, this developmental typology does not fit well several of the European cases it purports to embrace, and does not fit at all other important cases, such as the United States. However, it is useful in two respects. The first, on which Habermas and other German authors have elaborated,[21] is that the above referred processes of social change have included a dimension of intense juridification, that is "the *expansion* [by means of] the legal regulation of new, hitherto informally regulated social situations [and] the *densification* of law, that is the specialized breaking down of global [that is, universalistic, O'Donnell] into more individuated legal

[19] Habermas (1988); for a more detailed discussion see Habermas (1996).

[20] Weber (1978). For an analysis of Weber's sociology of law and its elective affinities with the development of capitalism, see Kronman (1983).

[21] See, especially, the works cited in fn.15.

definitions." (204, emphasis in the original). The increased complexity of the bundles of rights and obligations attached to the concept of a legal person is an expression of this process. This, in turn, has been the product of the emergence of states that attempt to order social relations over their territory in several ways, an extremely important one of which is their own legislation.

The second aspect which I find useful in Habermas'[22] scheme is that it serves to highlight a crucial difference on which I want to insist: the expansion and densification of civil rights in highly developed countries basically took place well before the acquisition of political and welfare rights. Truly, this admits important exceptions, most prominently the much slower and, to a large extent, the different sequencing of the extension of rights to women and to various racial minorities.[23] But even with these caveats the difference stands: in most contemporary Latin American countries, now that the political rights entailed by this regime have become generally effective, the extension of civil rights to all adults is very incomplete.

5. Latin America

Now we can go back to our hypothetical country, the polyarchy X. It is, as noted, highly inequalitarian and a large part of its population lives in poverty. It is also one in which the rudiments of a welfare state exist. However, this welfare state is much less articulated than the ones of highly developed countries, its performance is even less satisfactory, it has grown almost exclusively by means of paternalistic state interventions, and it barely reaches the very poor.[24] Putting some flesh to my example, what I have just described applies, with

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[22] And the developmental typology, in this respect not too different, of T.H. Marshall (1950).

[23] In relation to women's rights, see especially Walby (1994).

[24] On the characteristics of the welfare state in Latin America the basic works are Mesa-Lago (1978) and Malloy (1979); see also Malloy (1991). For analyses of the contemporary situation of Latin America in terms of poverty and inequality, see the studies included in Tokman and O'Donnell (1998).

differences that are irrelevant for the purposes of the present text, to the contemporary polyarchies of Latin America--and, for that matter, to various new polyarchies in other parts of the world. But within this shared background there is a big difference that sets apart Costa Rica and Uruguay[25] from the rest. In these two countries there exists a state that long ago (and in spite of the authoritarian interruption suffered by Uruguay) established a legal system that, by and large, functions in ways that satisfy, across its whole territory and in relation to most social categories, the preliminary definition of the rule of law I gave above. These are countries where the rule of law is reasonably effective; their citizens are full ones, in the sense that they enjoy both political and civil rights.

This is not the case of the other Latin American countries, both those that are new polyarchies and those--Colombia and Venezuela--that have been so for several decades. In these countries, as I have discussed in other texts[26] huge gaps exist, both across their territory and in relation to various social categories, in the effectiveness of whatever we may agree that the rule of law means. In what follows I briefly depict these failures.[27]

Flaws in the existing law: In spite of progress recently made, there still exist laws and administrative regulations that in various ways discriminate against women[28] and various minorities,[29] and that establish for defendants in criminal cases, detainees, and prison inmates conditions that are repugnant to any sense of fair process.[30]

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[25] In this sense Chile is a marginal case. Various kinds of civil rights are more extensive and effective in this country than in most of the rest of Latin America. However, not only the political constraints imposed by the constitution inherited from the Pinochet regime but also a judiciary, also inherited from this period, that is highly penetrated by authoritarian views, lead me not to classify this country jointly with Costa Rica and Uruguay.

[26] O'Donnell (1993 and 1997a).

[27] From other angles, these failures are abundantly if dismally detailed in Méndez et al., (forthcoming).

[28] See Mariclaire Acosta, "Overcoming the Discrimination of Women in Mexico: A Task for Sisyphus," and the "Comment" to this chapter by Dorothy Thomas, ibid.

[29] See Jorge Dandler, "Indigenous Peoples and the Rule of Law in Latin America: Do They have a Chance?," and Peter Fry "Color and the Rule of Law in Brazil," as well as the respective "Comments" to these chapters by Shelton Davis and Joan Dassin, ibid.

[30] See Juan Méndez, "Introduction to Section II," and Nigel Rodley, "Torture and Conditions of Detention," ibid.

Application of the law: As the epigraph of this paper makes clear, the discretionary, and often exactingly severe, application of the law upon the weak can be an efficient means of oppression. The flip side of this is the manifold ways by which the privileged, whether directly[31] or by means of appropriate personal connections,[32] exempt themselves from following the law. In Latin America there is a long tradition[33] of ignoring the law or, when acknowledging it, of twisting it in favor of the powerful and for the repression or containment of the weak. When a shady businessman recently said in Argentina, "To be powerful is to have [legal] impunity,"[34] he expressed a presumably widespread feeling that, first, to voluntarily follow the law is something that only idiots do[35] and, second, that to be subject to the law is not to be the carrier of enforceable rights but rather a sure signal of social weakness.[36] This is particularly true, and dangerous, in encounters that may unleash the violence of the state or of powerful private agents, but an attentive eye can also detect it in the stubborn refusal of the privileged to submit themselves to regular administrative procedures, not to say anything of the scandalous criminal impunity they often obtain.

Relations of bureaucracies with "ordinary citizens." Although this is part of the preceding observation, it bears independent comment. Perhaps nothing underlines better the deprivation of rights of the poor and socially weak than when they interact with the bureaucracies from which they must obtain work, or a working permit, or apply for retirement

[31] The work of Roberto DaMatta (1987), especially his analysis of the expression "Você sabe con quem está falando?" is an excellent illustration of this.

[32] In O'Donnell (1996 and 1997), I stress the importance that particularistic relationships of various kinds have in the social and political functioning of these countries.

[33] The colonial times' dictum "La ley se acata pero no se cumple" ("The law is acknowledged but not implemented") distils this tradition. This is not an exclusively Latin American phenomenon. For post-communist countries, including central european ones see, among others, Krygier (1997), Czarnota and Krygier (1997), and Solomon (1997). But, as in Latin America, aside from keen observations, as yet I have not seen systematic attempts to link these phenomena to the workings of the respective regimes.

[34] Clarín, May 10,1997, 8.

[35] Or naïve foreigners or potential suicides, as would be the case if when driving they would follow the formal rules of transit; I have commented on this theme in O'Donnell (1984).

[36] This important but often neglected point is discussed in DaMatta (1987 and 1991), and Neves (1994).

benefits, or simply (but often tragically) when they have go to a hospital or a police station.[37] This is, for the privileged, the other face of the moon, one that they mount elaborate strategies and networks of relationships to avoid.[38] For the others, those who cannot avoid this ugly face of the state, it is not only the immense difficulty they confront for obtaining, if at all, what nominally is their right; it is also the indifferent if not disdainful way in which they are treated, and the obvious inequality entailed by the privileged in skipping these hardships. That this kind of world is far apart from the basic respect for human dignity demanded among others by Lane and Dworkin[39] is evinced by the fact that, if one does not have the "proper" social status or connections, to act in front of these bureaucracies as the bearer of a right, not as the supplicant of a favor, is almost guaranteed to cause grievous difficulties.

Access to the judiciary and to fair process. Given what I have already said, I will not provide further details on this topic,[40] that has proved quite vexing even in highly developed countries. In most of Latin America the judiciary (except when it undertakes criminal procedures that often are careless of the rights of the accused before, during and after the trial) is too distant, cumbersome, expensive, and slow for the underprivileged to even attempt accessing it. And if they do manage to obtain judicial access, not surprisingly the evidence available points to severe discriminations. [41]

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[37] The terrible and recurrent violence to which the poor are subjected in many parts, rural and urban, of Latin America has been analyzed with particular detail and eloquence in the work of Paulo Sérgio Pinheiro and his associates at the University of São Paulo; see, especially Pinheiro (1994), and Pinheiro and Poppovic (1993). See also Caldeira (1998). About the police see Chevigny (1995) and of the same author , "Defining the Role of the Police in Latin America," and the "Comments" by Jean-Paul Brodeur in Méndez et al., (forthcoming). A fascinating, if dismal, ethnographic account of police behavior in Brazil may be found in Mingardi (1992).

[38] Which may go a long way to explain why the current efforts to enhance the workings of the state apparatus have been so neglectful of this side. I discuss this matter in Tokman and O'Donnell (1998).

[39] Lane (1988), and Dworkin (1978).

[40] On this matter see Jorge Correa Sutil, "Judicial Reforms in Latin America: Good News for the Underprivileged?," and Alejandro Garro, "Access to Justice for the Poor in Latin America," in Méndez et al., (forthcoming). See also Domingo Villegas (1994 and 1997), and Fruling (1995).

[41] In addition to the works already cited in the present section, it bears mentioning that in a survey I took in December 1992 in the metropolitan area of São Paulo (n: 800) an overwhelming 93% responded "no" to a question asking if the law was applied equally in Brazil, and 6% didn't know or didn't answer. In a similar vein, in a survey recently taken in the metropolitan area of Buenos Aires (n:1,4000, Guzmán Heredia y Asociados) 89% of respondents indicated various degrees of lack of confidence in the courts, 9% expressed they had some confidence, and only 1% said they had a lot of confidence.

Sheer lawlessness: This is the issue on which I placed more emphasis in a previous work (1993), where I argue that it is a mistake to conflate the state with its bureaucratic apparatus. Insofar as most of the formally enacted law existing in a territory is issued and backed by the state, and as the state institutions themselves are supposed to act according to legal rules, we should recognize (as continental European theorists have long recognized,[42] and anglosaxon ones ignored) that the legal system is a constitutive part of the state. As such, what I call "the legal state," that is, the part of the state that is embodied in a legal system, penetrates and textures society, furnishing a basic element of previsibility and stability to social relations.[43] However, in most countries of Latin America the reach of the legal state is limited. In many regions, not only those geographically distant from the political center*s* but also those in the peripheries of large cities, the bureaucratic state may be present, in the guise of buildings and officials paid out of public budgets. But the legal state is absent: whatever formally sanctioned law there exists is applied, if at all, intermittently and differentially. More importantly, this segmented law is encompassed by the informal law enacted by the privatized[44] powers that actually rule those places. This leads to complex situations, of which unfortunately we know too little, but which often entail a continuous renegotiation of the boundaries between these formal and informal legalities, in social processes in which it is (at times literally) vital to understand both kinds of law and the extremely uneven power relations that they breed.[45] The resulting dominant informal legal system, punctuated by

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[42] See, for example, Bobbio (1989).

[43] Or, as Rawls puts it (1971, 236), "the law defines the basic framework within which the pursuit of all other activities takes place."

[44] I use the term "privatized" to indicate that these actors often are private actors acting jointly with others that have some kind of state employment but who gear their behavior toward goals that have very little to do with such affiliation.

[45] Blanca Heredia (1994), Roberto DaMatta (1991), and Domingo Villegas (1994) point out the complex manipulations of the intersections between formal and informal legal systems that are required by successful social navigation in this kind of world. Interesting studies of this kind of navigation by subordinate sectors may be found in de Souza Santos (1977), Holston (1991), and Holston and Caldeira (1997). However, as Marcelo Neves (1994) stresses, through these processes enormous power differentials are expressed and reproduced. For a few examples among many of the degree to which various kinds of privatized (and basically criminal) systems of territorially-based power exist, see Human Rights Watch/Americas (1993 and 1997), CELS (1995), Medina Gallego (1990), Comisión Colombiana de Juristas (1997), and Montenegro and Zicolillo 1991.

arbitrary reintroductions of the formal one, supports a world of extreme violence, as abundant data, both from rural and urban regions, show. These are subnational systems of power that, oddly enough for most extant theories of the state and of democracy, have a territorial basis and an informal but quite effective legal system, and coexist with a regime that, at least at the center of national politics, is polyarchical.

The problems I have summarized in the present section indicate a severe incompleteness of the state, especially of its legal dimension. In most cases, in Latin America and elsewhere, this incompleteness has increased, not decreased, during the periods of democratization, at the rhythm of economic crises and of the sternly antistatist economic policies that prevailed until recently. There is some evidence, too, that this deficiency has been fostered by the desire of national politicians to shape winning electoral coalitions and, consequently, to include candidates from the perversely "privatized' areas to which I am referring.[46] As Scott Mainwaring has noted with reference to Brazil, these politicians behave as "ambassadors" of their regions, with very few policy orientations except obtaining resources from the center for these regions.[47] It also pertains to the logic of the situation that these politicians use the votes they command and the institutional positions they attain at the center for assiduously helping the reproduction of the systems of privatized power from which they represent. As an example of this, and interestingly for the arguments I am making here, at least in the two countries I know more closely in this respect, Argentina and Brazil, legislators from these regions have shown a keen (and often successful) interest in dominating the legislative committees that appoint federal judges in those same regions; this is surely an effective way of further cutting out their feuds from the reach of the legal state.

It is difficult to avoid the conclusion that the circumstances I have just described should profoundly affect the actual workings of these polyarchies, including its institutions at the center of national politics. Admittedly, however, this conclusion is based on a sketchy

[46] See O'Donnell (1993) for a description and discussion of these "brown" areas, territorially-based systems of domination barely reached by state law that can cover huge extensions, sometimes bigger than a middle-sized European country (see that is, Veja 1997, and Comisión Colombiana de Juristas, 1997).

[47] Mainwaring and Samuels (1997). For concurrent observations about Argentina see Gibson and Calvo (1996), and Gibson (1997).

description of complex issues. This is due in part to space limitations and in part to the fact that the kind of phenomena I have depicted has been documented by some anthropologists, sociologists and novelists, but with few exceptions[48] has not received attention from political scientists. Insofar as political scientists are supposed to have special credentials for describing and theorizing democracy and democrac*ies*, this neglect is problematic. It is obvious that for these purposes we need knowledge about parties, congress, presidencies and other institutions of the regime, and the many current efforts invested in these fields are extremely welcome. However, I believe that knowledge about the phenomena and practices I have sketched above is also important, both per se and because they may be surmised to have significant consequences upon the ways in which those regime institutions actually work and are likely to change.[49]

Furthermore, inattention to these phenomena leads to the neglect of some problems and interesting questions, even at the level of the typological characterization of the regime itself. In the cases to which I am referring, the rights of polyarchy are upheld by definition. However, while this is true at the national level, the situation in peripheral areas is sometimes quite different. The scarcity of research on these areas does not allow me to make assured generalizations, but it is clear from the works already cited, as well as from abundant journalistic information and various reports of human rights organizations, that some of these regions function in a less than polyarchical way. In these areas, for reasons that will not occupy me here, presidential elections and those for national legislatures (particularly those

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[48] Mainly, to my knowledge, the already cited works of Paulo Sérgio Pinheiro and his associates, as well as Fox (1994 and 1995); Novaro (1994); and Pereira (1997). For vivid sociological descriptions of situations of legal statelessness see Parodi (1993) and Zermeño (1996).

[49] I suspect that another reason for this neglect is that the institutional level of the regime lends itself more readily to empirical research than the phenomena I pointed out above. Political scientists are not trained to observe the latter, and the usually highly disaggregated and qualitative kind of data (often of an ethnographic character) it tends to generate is of difficult interpretation, especially in terms of their implications for the functioning of national level politics. Furthermore, insofar as some of these phenomena bear relationship with legal matters, they also require knowledge that is seldom provided in our discipline,[49] while the lawyers that study these informal legal phenomena, are also few and marginal in their own discipline. In settings where career and promotion patterns place a prize on working on mainstream topics and approaches, the transdisciplinary skills required by these phenomena and, at least for the time being, the difficulties in translating findings into solid and comparable data sets, discourage this type of research.

[50] See, especially, Stepan (1997), and Mainwaring (1997).

that are held simultaneously with the former) are reasonably clean. But elections for local authorities are much less pristine, including not a few cases marred by intimidation and fraud. Worse, with the exception of Costa Rica and Uruguay and, in this matter, also of Chile, in all the countries I am reasonably acquainted with these problems have tended to worsen, not improve, during the existence of the present polyarchies. Furthermore, many of these areas are rural, and they tend to be heavily overrepresented in the national legislatures.[50] This highlights the question of who represents and what is represented in the institutions of the national regime and, more specifically, of how one conceptualizes a polyarchical regime that contains regional regimes that are not at all polyarchical.[51]

6. On the rule of law (or *estado de derecho)*

At this point we must refine the initial definition of the rule of law. It is not enough that certain acts, whether by public officials or by private actors, are ruled by law; i.e., that they act *secundum legem*, in conformity with what a given legislation prescribes. These acts may entail the application of a discriminatory law and/or of one that violates basic rights, or the selective application of a law against some while others are arbitrarily exempted. The first possibility entails the violation of moral standards that most countries write into their constitutions and which nowadays, under the rubric of human rights, these countries have the internationally acquired obligation to respect. The second possibility entails the violation of a crucial principle of both fairness and the rule of law, that like cases be treated alike.[52] Still another possibility is that in a given case the law is properly applied, but that this results from the decision of an authority that is not, and does not feel itself, obligated to proceed in the same way on future equivalent occasions. The effectiveness of the rule of law entails certainty and accountability. The proper application of the law is an obligation of the respective authority: it is expected that normally it will make the same decision in equivalent situations and, when this is not the case, that another, properly enabled, authority will sanction the

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[51] We may remember that the secular authoritarianism of Southern states in the United States, interweaved with a national polyarchical regime, generated an interesting literature, that may be usefully reexamined by political scientists working on the kind of case I am discussing here; see, among other works, the recent book by Hill (1994) and the literature cited therein.

[52] See Ingram (1985).

preceding one and attempt to redress the consequences. This is tantamount to saying that the rule of law is not just a congerie of legal rules, even if all have been properly enacted; it is a *legal system*, a set of rules that has several characteristics in addition to having being properly enacted. This argument will occupy us in the rest of the present section.

The concepts of the rule of law and of *Estado de Derecho* (or *Rechsstaat*, or *etat de droit*, or equivalent terms in other languages of countries belonging to the continental law tradition) are not synonimous. Furthermore, each of these terms is subject to various definitional and normative disputations.[53] In view of this, here I must limit myself to some basic observations. To begin with, most definitions have a common core: the view that the legal system is a hierarchical one (usually crowned in constitutional norms) that aims at, although it never fully achieves, completeness.[54] This means that the relationships among legal rules are themselves legally ruled, and that there is no moment in which the whim of a given actor may justifiably cancel or suspend the rules that govern his performance.[55] Nobody, including the highest placed officials, is de *legibus solutus*.[56] It follows that "the government shall be ruled by law and subject to it,"[57] including "the creation of law [which] is itself legally regulated."[58] The legal system, or the legal state, is an aspect of the overall social order that, when working properly, "brings definition, specificity, clarity, and thus predictability into human interactions."[59]

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[53] For discussions centered on the United States see especially Shapiro (1994), and on continental Europe, Troper (1992), Chevalier (1994), and Hamon (1990).

[54] For arguments about the tendencial completeness of legal systems made from various theoretical perspectives, see Dworkin (1978), Hart (1961), Ingram (1985), and Kelsen (1945 and 1961). This is also one of the main attributes of legal-rational law in Weber's conception (1978).

[55] It goes without saying that this is an idealized description, which is not fully satisfied by any country. But the degrees and frequency of departures from this norm entail important differences across cases.

[56] In contrast, the distinctive mark of all kinds of authoritarian rule, even those that are highly institutionalized and legally formalized (a *Rechsstaat*, in the original sense of the term), have somebody (a king, a *Junta*, a party committee, a theocracy, or what not) that is sovereign in the classic sense: if and when they deem it necessary, they can decide without legal constraint.

[57] Raz (1977, 196).

[58] Hart (1961, 97).

[59] Finnis, (1980, 268).

For producing such a result, a necessary condition is that the laws have, in addition to the ones already noted, certain characteristics. Among the many listings of such characteristics that have been proposed here I adopt that espoused by Raz:

> *"1. All laws should be prospective, open and clear; 2. Laws should be relatively stable; 3.The making of particular laws ... must be guided by open, stable, clear, and general rules; 4. The independence of the judiciary must be guaranteed; 5. The principles of natural justice must be observed (i.e., open and fair hearing and absence of bias); 6. The courts should have review powers ... to ensure conformity to the rule of law; 7.The courts should be easily accessible; and 8. The discretion of crime preventing agencies should not be allowed to pervert the law."* [60]

Points 1 to 3 refer to general characteristics of the laws themselves; they pertain to their proper enactment and content, as well as to a behavioral fact that this author and others stress: the laws must be able to be followed, which means that they (and those who interpret them) should not place unreasonable cognitive or behavioral demands on their addressees. The other points of Raz's listing refer to courts, and only indirectly to other state agencies. Point 4 requires specification: that the "independence of the courts" (itself a murky idea[61] that I will not discuss here) is a valuable goal is shown, *a contrario*, by the often servile behavior of these institutions in relation to authoritarian rulers. But this independence may be used only to foster sectorial privileges of the judicial personnel, or unchallenged arbitrary interpretations of the law. Consequently, it also seems required "that those charged with interpreting and enforcing the laws take them with primary seriousness,"[62] and, I add, that they are attuned to the support and expansion of the polyarchy that, in contrast to the authoritarian past, confers upon them such independence. Obtaining this is a tall order everywhere, including indeed in Latin America. In this region, no less harder accomplishments are implied by point 6, especially with respect to overseeing the legality of actions of presidents who see themselves as electorally empowered to do whatever they see fit

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[60] Raz (1977, 198-201). For similar listings see Finnis (1980) and Fuller (1969).

[61] For an apposite discussion see Shapiro (1987).

[62] Fuller (1969,122).

during their terms.[63] The actual denial to the under privileged of points 5 and 7 I have already mentioned and is amply illustrated by the works I have cited. The same goes for point 8, especially in relation to the impunity of the police and of other (so called) security agencies, as well as of violence perpetrated by private agents, jointly with the often indifferent, if not complicit, attitude of the police and the courts towards these acts.

At this point we should notice that the English language expression, "rule of law," and the type of definition I have transcribed do not contain any direct reference, as do *estado de derecho* and its equivalents, to state agencies other than courts. This is not surprising given the respective traditions, including the particularly strong role that the courts played in the political development of the United States.[64] Nevertheless, it is the whole state apparatus and its agents that are supposed to submit to the rule of law, and in fact I already noted that most of the egregious transgressions of whatever legality exists are committed during interactions of these agents with the poor and weak.

Furthermore, if the legal system is supposed to texture, stabilize, and order manifold social relations,[65] then not only when state agents but also when private actors violate the law with impunity the rule of law is at best truncated. That state agents perpetrate unlawful acts on their own or that they *de facto* license private actors to do so, does not make much difference, either for the victims of such actions or for the (in)effectiveness of the rule of law.

The corollary of these reflections is that, when conceived as an aspect of the theory of democracy, the rule of law, or the *Estado de Derecho*, should be conceived not only as a

[63] In O'Donnell (1994) I labelled as "delegative" these plebiscitary, inherently anti-institutional views and the kind of regime they tend to generate.

[64] Skowronek (1982), and Skocpol (1992).

[65] Or, as in cogent remarks about the deficiencies of the rule of law in contemporary Central Europe, Krygier (1997, 47) puts it: "At a bare minimum … the point of the rule of law --and its great cognitive and normative contribution to social and political life--is relatively simple: people should be able to rely on the law when they act. That requires that it exists, that it is knowable, that its implications be relatively determinate, and that it can be reliably expected to set bounds within which all major actors, including the government, will act."

generic characteristic of the legal system and of the performance of courts. Rather, in this context the rule of law should be seen as the legally-based rule of a democratic state. This entails that there exists a legal system that is itself democratic, in three senses. First, in that it upholds the political freedoms and guarantees of polyarchy. Second, because it upholds the civil rights of the whole population. And third, in that it establishes networks of responsibility and accountability[66] that entail that all agents, private and public, including the highest placed officials of the regime, are subject to appropriate, legally established controls of the lawfulness of their acts. As long as it fulfills these three conditions, such a state is not just a state ruled by law; it is a democratic legal state, or an *estado democrático de derecho*.

I want to insist that the rights of political and civil citizenship are formal, in the double sense that they are universalistic and that they are sanctioned through procedures that are established by the rules of authority and representation resulting from a polyarchical regime.[67] The political citizen of the polyarchy is homologous to the civil citizen of the universalistic aspects of the legal system: the rights of voting and joining a political party, of entering into a contract, of not suffering violence, of expecting fair treatment from a state agency, and the like, are all premised on individuals who share the autonomy and responsibility that makes them legal persons and autonomous agents of their own actions. This is a universalistic premise of equality that appears in innumerable facets of a democratic legal system. It underlies the enormous normative appeal that, even if often vaguely and inconsistently expressed, democratic aspirations have evinced under the most varied historical and cultural conditions.

[66] Because of space restrictions and because I have discussed this issue quite extensively in a recent work (O'Donnell 1998), in the present text I will make only passing reference to accountability. However, I hope it will be clear that I consider accountability, including what I term the "horizontal" kind (that is, the control that some state agents exercise over the lawfulness of the actions of other such agents) one of the three constitutive dimensions of the democratic rule of law.

[67] Recently Habermas (1996) has insisted on this aspect as a central characteristic of law in contemporary democracies.

7. Inequalities, the state, and liberal rights

It might be argued that I am taking an excessively convoluted road for justifying the rule of law, when it can be sufficiently justified instrumentally,[68] by its contribution to the stability of social relations, or by arguing that its deficiencies may be so severe as to hinder the viability of a polyarchy. These are sensible arguments, and nowadays there is no dearth of them, especially in terms of the contribution that appropriate legislation makes to private investment and, supposedly, ultimately to economic growth. Presently various international agencies are willing to support this goal, and legions of experts are busy with various aspects of it. However, I am persuaded that, irrespective of its beneficial consequences, a proper justification of the rule of law should be grounded on the formal but not insignificant equality entailed by legal persons that are attributed autonomous and responsible agency (and on the basic dignity and obligation of human respect that derive from this attribution, although I have not elaborated this point)[69].

Furthermore, in the present context of Latin America the type of justification of the rule of law one prefers is likely to make a big difference in terms of the policies that might be advocated. In particular, there is the danger derived from the fact that nowadays legal and judicial reforms (and the international and domestic funding allocated to support them) are strongly oriented toward the perceived interests of the dominant sectors (basically domestic and international commercial law, some aspects of civil law, and the more purely repressive aspects of criminal law)[70]. This may be useful for fomenting investment, but it tends to produce a "dualistic development of the justice system," centered on those aspects "that

[68] For discussion of various kinds of justification of the rule of law see Radin (1989).

[69] In this sense, Raz (1977, 204/5) is on the mark when he asserts that “the rule of law provides the foundation for the legal respect for human dignity.”

[70] We should also consider a discernible trend toward hardening the criminal justice system against "common" suspects. In another pertinent issue, human rights organizations have expressed serious concerns about procedures that violate almost any principle of fair trial, adopted--with assistance from foreign agencies that would not dream of establishing similar procedures in their own countries--against suspects in the drug trade.

concern the modernizing sectors of the economic elite in matters of an economic, business or financial nature... [while] other areas of litigation and access to justice remain untouched, corrupted and persistently lacking in infrastructure and resources."[71] For societies that are profoundly unequal, these trends may very well reinforce the exclusion of many from the rule of law, while further exaggerating the advantages that the privileged enjoy, by means of laws and courts enhanced in their direct interest. In contrast, the substantive justification of the rule of law I am proposing here leads head on into the issue of how it applies, or does not apply, to all individuals, including those who have little direct impact on private investment.

Two comments are now in order. One, empirical and already made, is that although there are variations from case to case with which I cannot deal here, many new polyarchies, in Latin America and in other regions, exhibit numerous points of rupture in the legal circuits I have delineated. To the extent that this is true, we must reckon that in these cases the rule of law has only intermittent and partial existence, if any. In addition, this observation at the level of the legal state is the mirror image of numerous violations of the law at the social level, which elsewhere I have argued amount to a truncated, or low-intensity, citizenship.[72] In the countries that concern us, many individuals are citizens with respect to their political rights, but they are not citizens in terms of their civil rights.

The second comment is theoretical. In the preceding pages we reached implicitly an important conclusion that now I wish to highlight. There is one and only one specific difference of polyarchy with respect to other regimes[73]: it is that the highest positions of the regime (with the exception of courts) are assigned as the consequence of elections that are free, fair, and competitive. The various other rights and guarantees specified in the definition of this regime are derivative of the former, i.e. they are prudentially assessed and inductively

[71] Domingo Villegas (1994 and 1997), as well as the already cited chapters of Correa Sutil and Garro in Méndez et al., forthcoming.

[72] O'Donnell (1993).

[73] Neither elections per se, universal adult voting, the temporal limitation of mandates, the division of powers, or anything else is exclusive of polyarchy. For an enlightening discussion on this matter see Sartori (1987).

derived conditions for the existence of those kinds of elections.[74] For its part, the specific characteristic of the rule of law as an attribute of the legal side of a democratic state, in contrast to all kinds of authoritarian rule, is the existence of a full network of legally-defined accountabilities that entails that nobody is *de legibus solutus*. The first specific characteristic pertains to the political regime, a polyarchy; the second one to the state, or more precisely to the face of the state that is embodied in a democratic legal system. Both are based on the same type of (formal) rights and attributions of human agency, and both are the product of long historical processes, originated in the Northwestern quadrant of the world, of the extension of political and civil rights.

For these reasons I believe that, even if it opens intricate conceptual problems of which we are spared if we reduce democracy solely to a regime attribute,[75] we must think, in addition to the latter, of the democraticness of the state, especially of the state conceived in its legal dimension. At this level the relevant question refers to the various degrees, actors and dimensions along which the three attributes of a democratic rule of law, or *Estado de Derecho*, are or are not present in a given case. Democracy is not only a (polyarchical) political regime but also a particular mode of relationship, between state and citizens,[76] and among citizens themselves, under a kind of rule of law that, in addition to political citizenship, upholds civil citizenship and a full network of accountability.

Another conclusion flows from this discussion. As I have defined it, the full effectiveness of the rule of law has not been reached in any country. It is a moving horizon, since societal change and the very acquisition of some rights triggers new demands and aspirations, while the continued effectiveness of those that have been won can never be taken

[74] I suspect that this (probably unavoidable) prudential and not analytical derivation is the reason for the endless disputations about the proper attributes of polyarchy, even among those that agree on the usefulness of this and similar concepts. I elaborate on this and related matters in work currently in preparation.

[75] Parsimony is a virtue of theory, but it should not be achieved at the expense of its proper scope. On a related matter, I am under the impression that the rising interest on the "quality" of democracy (see among others Linz and Stepan, 1996, and Diamond, 1996a and 1996b) expresses concerns and intuitions pointed in the direction I have been discussing here. In this sense, the present text may be seen as an effort to conceptually refine and make more empirically amenable the connotations of the term "quality" as used in this context.

[76] This point is argued by Schmitter and Karl (1991).

for granted. Seen from this angle democracy loses the static connotations that it tends to have when conceived solely as a regime, and shows that it is itself that moving horizon (and, for this reason, in spite of innumerable disappointments with its actual workings, the source and referent of intense normative appeal). If this is correct, our intellectual endeavors should be properly conceived as being about a theory of endless and always potentially reversible democratization, rather than about democracy *tout court*.

At this point the reader has surely noticed that I made only passing references to issues of socioeconomic inequality. This is not because I consider these matters unimportant. Rather, in the first section I mention the main inconveniences generated by including overall equality (or any substantive measure of social welfare) into the definition of democracy. But I added that the intermediary level I was going to delineate is not independent of the broad structural characteristics of society. To begin with, Costa Rica and Uruguay (which, as already mentioned, are the only Latin American countries where, jointly with political rights, civil rights and horizontal accountability are reasonably effective) suggest that one of the directions of causation runs from these rights to social structure. These countries are among those that in Latin America have the lower proportion of poor. More significantly, Costa Rica and Uruguay have the least unequal income distribution in Latin America (except, presumably, Cuba). Finally, jointly with another relatively old but presently shaky polyarchy, Colombia, these countries, in sharp contrast with the rest, emerged from the past couple of decades of economic crisis and adjustment with basically the same (Costa Rica), or even a slightly improved (Uruguay), income distribution.[77] Although this is another matter on which much research is needed, it seems that enjoying full citizenship fosters patterns of inequality that are less sharp, and socially and politically less crippling, than in countries where, at best, only full political rights are upheld.

On the other hand, the apparently strongest link, albeit most difficult to assess, is the causal direction that runs from an inequalitarian socioeconomic structure into the weakness of political and, especially, civil rights. There are, to my mind, two main factors. One, rather

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[77] See Altimir (1997).

obvious, is the dramatic curtailment of capabilities entailed by deep inequality and its usual concomitant of widespread and severe poverty. The second, which seems to me as important as it is overlooked, is that the huge social distances entailed by deep inequality foster manifold patterns of authoritarian relations in all kind of encounters between the privileged and the others. One consequence is the enormous difficulty of the former for recognizing the latter as their equally autonomous and responsible agents. This pervasive difficulty, that an attentive eye can easily discover in these countries,[78] is a major obstacle to the attainment of full citizenship. Structural inequality is a problem everywhere. Yet it is more acute in Latin America, a region that not only shares with others widespread poverty but also has the most unequal income distribution of all. Rights and guarantees are not "just there;" they must be exercised and defended against persistent authoritarian temptations, and for this the capabilities that society furnishes to its members are crucial.

We should take into account that the law, in its content and in its application, is largely (as is the state of which it is a part) a dynamic condensation of power relations, not just a rationalized technique for the ordering of social relations.[79] If, on one hand, poverty and inequality signal the long road to be traversed for the extension of civil citizenship (not to say anything of the achievement of less unequal societies) what I have just said about the law suggests a point of hope and a broad strategy. The point is that being the carrier of formal rights, social or political, is at least potentially an aspect of empowerment of individuals and their associations.[80] This has been recognized throughout the world in innumerable struggles of subordinate sectors which have aimed at the legal validation of the rights they claimed.

[78] I invite some unscientific but relevant observations: look at any kind of interaction between individuals placed in high and low social locations in Costa Rica and Uruguay, and compare these interactions with similar ones in other countries that have a long tradition of deep inequality. The highly deferential, often servile, attitude you will see in the latter you will very rarely see in the former. Argentina is a somewhat deviant case of past relative equalitarianism, similar to Costa Rica and Uruguay, that still reverberates in these kinds of interactions; but it was achieved under populism, not democracy and, in contrast to the latter, was sharply reversed in the past two decades. For further discussion of these matters see O'Donnell (1984).

[79] There is an interesting parallelism between the claims of a-political technical rationality made by some jurists and by many mainstream economists. As we know, the latter are enormously influential and the former are becoming so, especially under the auspices of instrumentally-inspired efforts to enhance the legal systems of new polyarchies.

[80] For arguments in this respect see Cohen and Arato (1992), Habermas (1996), and, even though he focuses on constitutional rules while here I am referring to the whole legal system, Holmes (1995).

With this they contributed to the process of intensive juridification I mentioned before, and made of the law a dynamic condensation of the power relations at play. In spite of the criticisms that formal rights have elicited from various quarters, it seems clear that, when conquered and exercised, they provide a valuable foundation for struggling for other, more specific and substantive, rights.

This is true even if we should remember another point that I cannot elaborate here: this same legal system is the law of a capitalist society and, as such, it textures and guarantees some social relations that are inherently unequal. But, irrespective of how unequal a given relationship is, if *ego* can impose her civil and political rights to others, she controls capabilities that helps protect her and project her own agency, individual and collective, into the future.[81] Jointly with the political freedoms of polyarchy, civil rights are the main support of the pluralism and diversity of society. As a consequence, and even if in some situations it may be true in relation to the bureaucratic state, it is wrong to think of the legal state as in a zero-sum position in relation to society. Quite the contrary, the more the former extends itself as the democratic rule of law, the more it usually supports the independence and strength of the latter. A strong democratic legal state--one that effectively extends its rule over the whole of its territory and across all social sectors--is a crucial correlate of a strong society. Conversely, the ineffectiveness of civil rights, whether under authoritarian rule or under a weak legal state, hinders the capability of agency that the law nominally attributes to everyone.

It is time to remember that civil rights are basically the classic liberal freedoms and guarantees. This leads to an apparently paradoxical situation: the Latin American cases I have been discussing may be properly called democratic, in the sense that they uphold the democratic rights of participation entailed by polyarchy, but they scarcely exhibit another component of the democracies existing in the highly developed world, the liberal one.

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[81] This characteristic of autonomy as agency projected toward the future is stressed by Raz (1977 and 1994).

Furthermore, for reasons I cannot discuss here[82], another important component, republicanism, is also weak in these cases. A consequence on which I want to insist is that, insofar as we are dealing with cases where the liberal component of democracy is weak while at the same time the political rights of polyarchy are effective, in most of Latin America and elsewhere there is a reversion of the historical sequence followed by most highly developed countries. As applied to the former cases, the implicit assumption of the effectiveness of civil rights and of accountability, made by most extant theories of democracy, is untenable. Rather, as I have been insisting, the absence or marked weakness of these components, as well as of republicanism, should be explicitly problematized by any theory that purports to embrace all presently existing polyarchies. Without sliding into the mistake of identifying democracy with substantive equality or welfare, our theories must come to terms with the great practical and analytical importance that in each case has the relative effectiveness of not only political but also civil citizenship and accountability--or, to put it in equivalent terms, the extent to which a polyarchical regime coexists with a properly democratic rule of law (or a *estado democrático de derecho*). For this purpose, as I have also been insisting, even though it greatly expands the scope and complexity of the analysis, it is necessary to conclude that a solely regime-based focus is insufficient.

These reflections pose what is perhaps the curious task of democratic, progressively oriented politics in Latin America: to undertake liberal struggles for the effectiveness of formal, universalistic civil rights for everyone. Even if in the origins of polyarchy liberalism sometimes (and often throughout the history of Latin America) acted as a brake on democratic impulses, in the contemporary circumstances of this and other regions of the world, the more promising democratizing impulses should come from demands for the extension of civil citizenship. This, of course, is worthy in itself. It is also the road to the creation of areas of self-empowerment of the many who nowadays are truncated citizens. In the horizon of these hopes is, if not necessarily or in the foreseeable future, a much less inequalitarian society, one that through the generalization of the democratic rule of law would

[82] I discuss this theme in O'Donnell (1998), including its implications in terms of weak horizontal accountability.

become a decent one--one, as Margalit put it, "in which the institutions do not humiliate people."[83]

8. Concluding remarks

The reader has had to bear with me the oddity of a lexicon that speaks of democracies that are democratic *qua* polyarchies but are not democratic, or are very incompletely so, as seen from the angle of the rule of law and the legal state; of cases that are usually called "liberal democracies" but which are scarcely liberal; of regimes that are polyarchical at the national but sometimes not at the subnational level; and of democracy pertaining as much to the legal face of the state as to the regime. In addition to my scarce literary talents, the reason for this awkwardness is that our vocabulary has been shaped by the restricted theoretical scope resulting from the implicit assumptions mentioned at the beginning of this paper and discussed subsequently. In spite of these shortcomings, I hope I have shown that the themes of the state, especially the legal state, and of the effective extension of civil citizenship and of accountability under the rule of law, should be conceived as much a central part of the problématique of democracy as is the study of its (polyarchical) regime.

I believe that it is in this context that some political aspects of the rich, fascinating, and often justifiably somber chapters of a forthcoming edited volume on the (un)rule of law in Latin America[84] should be interpreted. Most of the Latin American countries to which these chapters refer to are polyarchies. Having reached this condition is, indeed, extremely important progress in relation to the utter arbitrariness and violence of the authoritarian systems that in most cases preceded those polyarchies. In this specific, regime-centered sense, I do not share the reluctance of some of the volume's authors in calling these cases "democracies," although I prefer to label them polyarchies, or political democracies. On the

[83] Margalit (1996, 1).

[84] Méndez, O'Donnell and Pinheiro (forthcoming, 1999).

other hand, as these same authors make abundantly clear, the achievement of a fuller democracy that includes the democratic rule of law is an urgent and, under the circumstances spelled out in the volume, huge and apparently distant achievement. That the struggles toward this goal may be grounded, as they should, in the political freedoms of polyarchy, signals the potential of this kind of regime, even if marred by truncated citizenship and weak accountability.

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