Conceptions and Frameworks: Key Trends on the Rule of Law in Latin America

di Martín Aldao and Laura Clérico

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1. Latin America, like the rest of the world, does not escape the apparent tension between a formal and a material concept of the rule of law (second part). The formal concerns with the abuse of public power as shown by the many dictatorships that have plagued the region and the subsequent transitions (third part). The material concerns social conditions, the paradigmatic case being Colombia's 1991 constitution, but also previous welfare policies and recent constitutional case law (fourth part). Notwithstanding, from the end of the 20th century onwards, the question of frameworks became gradually more relevant in the region: that is to say, neither the formal nor the material conception of the rule of law can be accurately accounted for without its conditions of possibility. Since the 2000s, it has become increasingly clear that it is necessary to question the frameworks of these conceptions as both took for granted that nation-states were the ultimate guarantors of the rule of law. However, in Latin America, states face political, financial, and economic forces (Lasalle 1942) that condition their capacity to guarantee the rule of law. This is why a third trend, complementary to the previous ones, appears (third part). If the state is to guarantee the rule of law, then this requires making these frameworks visible – and accountable. The regulation of global actors and local elites is inseparable from the discussion on both, the formal and the material concepts of the Rule of Law.

2. The rule of law in the formal sense is understood in other parts of the world as opposed to the rule of an autocrat. Its devices are the principle of legality, division of powers, formal equality, due process, and judicial independence. The competence of state organs must be based on the law and there is no public power above the law. This conception has been and continues to be, of enormous importance in a region that has suffered grave human rights violations. Despite its relevance, the formal conception of the rule of law has never been able to account for the structural inequality (both in terms of redistri-

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bution and in terms of recognition and participation) that has always permeated the región (Lautenbach 2013). Time and again, the labor movement, indigenous and Afro-descendant communities, feminist and diversity movements have risen up against these shortcomings. These struggles have achieved several victories, such as the incorporation of human rights, democracy, and the social rule of law as essential elements of the concept in Latin America.

A third movement raises the question of the interference of global powers – political, financial, and economic – on the capacity of states to guarantee a democratic material oriented rule of law. A new challenge is thus posed by the need to regulate the interactions between local elites, the global financial architecture, and multinational extractivism.

3. Most Latin American states were formed during the 19th century under the control of liberal or conservative elites (Gargarella 2004), thus recognizing the rule of law and many of the institutions of liberal constitutionalism throughout the region. However, this has not been an obstacle to the persistent emergence of dictatorships and practices that violate the most basic principles of the rule of law.

In this context, we are interested in highlighting the *Juicio a las Juntas* (Trial of the Juntas) which took place in Argentina in 1985. It served as the starting point for an unprecedented effort by the judiciary to account for the massive and systematic human rights violations (enforced disappearances, torture and executions, among others) committed by a military dictatorship.

In December 1983, a couple of days after the restoration of democracy in Argentina, the elected government revealed its program to deal with the systematic violations of human rights during the military dictatorship. In 1984, the Argentine Truth Commission (CONADEP) published the *Nunca Más* (Never Again) report. Relevant human rights treaties, notably the American Convention on Human Rights (ACHR) were ratified, and the jurisdiction of the Inter-American Court of Human Rights (IACtHR) was accepted (in September, 1984 by the 23.054 Act). Overriding a self-amnesty act, members of the ruling military juntas were prosecuted. It is relevant in terms of the rule of law that although initiated in the military courts, and given the lack of progress by the Supreme Council of the Armed Forces, the case was finally brought before the civilian courts. On 9 December 1985, the National Chamber of Appeals on Federal Criminal and Correctional Matters handed down the sentence in the 13/84 case, convicting five of the nine indicted military chiefs of the three military juntas that ruled *de facto* in Argentina from 1976 to 1983. The case shows that enforced disappearances, torture, and executions perpetrated by low or middles level officers were part of a systematic plan crafted and implemented by members of the Junta leaders. It also found that these practices violated fundamental legal rights and «subverted the principal values of positive law». Aditionally, the Chamber addressed the cloak of impunity deployed by the military through the concealment of evidence, the omission of denunciation, and the falsity or reticence of the information provided to the justice system.

Moreover, though the so-called laws of impunity (the laws of *Punto Final* [1986] and *Obediencia debida* [1987], as well

as the subsequent pardons [1989 and 1990]), put the prosecution of those responsible on hold, in 2003 the Supreme Court of Justice declared the unconstitutionality of these laws and ordered the reopening of the cases (precisely in 2003 Congress, through the 25.779 Act, declared null and void the impunity laws. In 2005, the Supreme Court confirmed their unconstitutionality in the "Simón s/privación ilegítima de libertad" ruling). At the time of writing this chapter, Argentina has 320 trials with sentences and 1.153 convictions for crimes against humanity. Since 1983, these mega cases historically analysed the responsibilities of the Armed and Security Forces for kidnappings and enforced disappearances, executions, torture, and the appropriation of children (born in captivity). In recent years, new issues have begun to be tried such as sexual-based violence (63 trials), violence against children (98 trials), economically motivated crimes (13 trials), civilian intelligence staff (39 trials), civil liability (88 trials), death flights (17 trials), and others (121 trials).

The *Juicio a las Juntas* (Trial of the Juntas), as stated by Marina Franco, went «beyond its limits, it ended up creating innovative justice scenarios like no other country in the region could» (Franco 2015). Additionally, it helped strengthen the idea of the rule of law in the region. It also showed that it is possible to confront systematic violations of human rights committed by the military through trials and through the law.

4. Among the main precedents of the social or material dimension of the rule of law are the 1917 Constitution of Querétaro and the 1949 Constitution of Argentina. Moreover, the presence of elements of the Social Rule of Law can be found in several Latin American constitutions and this is no coincidence because they more or less echo the social constitutionalism of Querétaro and the conquests of the organized workers' movements in the region: Peru, 1979; Nicaragua, 1987; Brazil, 1988; Colombia, 1991; Paraguay, 1992; Venezuela, 1999; Ecuador, 2008.

Among these, the 1991 Colombian Constitution stands out, being the first clear example of the social question addressed not from politics but from law, and addressing social rights as fully enforceable. This is undoubtedly due to the adoption of a material perspective on equality, openly addressing the segregated trait of latin american societies and the structural inequality that obstructs the effective enjoyment of their rights for many people. In particular, it is within the framework of Colombian constitutional law that the legal relevance of the Social Rule of Law will be first made explicit. This is no coincidence.

In a paradigmatic way, the Colombian Constitution of 1991 enshrines the social rule of law. This occurs in interaction with the ideas developed in this respect by Herman Heller (Interview with one of the advisors to the Constituent Convention in Colombia. Our interlocutor prefers to remain anonymous); and is made explicit in a paradigmatic sentence of the Colombian Constitutional Court (CCC), which will also take a leading position in the jurisprudential development of the formula of the social rule of law in the region.

Thus, the Colombian Constitutional Court, will mark the tension between the abstract *formula* of the rule of law and present the material-social formula as overcoming the former: The social

state of law arises «as a form of opposition to the old abstract vision of liberal constitutionalism – by that time already considered outdated and worn out in the face of the advent of social revolutions and industrialisation – and will introduce the adjective social in the classical conception of the rule of law to recover the ideas-values to which this formula was originally associated when it served as an instrument in the struggle of Americans and French against absolutism, namely: social justice, equality, freedom, general welfare and even, happiness» (Colombian Constitutional Court, Judgement T-622/16 par. 4.2).

And taking as a reference to the Bonn Basic Law of 1949, «which defines the State as "democratic and social" (Article 20), governed by the principles of the "republican, democratic and social rule of law" (Article 28)[31], it upholds the "great transformation that placed from that moment onwards the obligation on the State and its institutions to satisfy individual needs that cannot be met by civil society and with that, the construction of a Social State that will henceforth ensure the provision of such basic services and benefits"» (Colombian Constitutional Court, Judgement T-622/16 par. 4.3). The Constitutional Court concludes that «Heller found an alternative way to overcome the classical conception of rule of law and correct its limitations in terms of the new social demands. Thus was born a novel form of state organization that we know today as the social state under the rule of law, whose purpose is to "create the social assumptions of equal freedom for all, that is, to abolish social inequality"» (Judgement T-622/16 par. 4.3).

In short, state subjection to the law (rule of law) in the Social State of Law requires taking into account the effective material conditions for the effective enjoyment of rights in order to achieve – and now paraphrasing the Colombian Constitutional Court – «social justice and human dignity through the subjection of public authorities to the principles, rights and social duties of a constitutional order» (Judgement C-1064/2001).

Another key to the social rule of law in Latin America refers to the form of its implementation (we present them as isolated for analytical reasons, however, the tend to overlap in practice). Firstly, during the twentieth century, through the development of large health, education, sanitation, transport, and housing social systems. Although this model has been implemented more or less partially in the countries of the region (Aponte Blank 2012) and has been severely weakened by neoliberalist policies such as deregulation, privatization, and austerity, it has achieved a high degree of legitimacy which is still present today in the regional social imaginary.

Since the '90s, it has been partially restored through constitutional law in two ways. Firstly the neo-constitutional way, with an emphasis on the active role of constitutional jurisdiction and the development of a highly innovative legal toolbox (Clérico, Ronconi and Aldao 2013). For example, among others, Ruling T-025/04 of the Colombian Constitutional Court, which formulates for the first time the thesis of the «unconstitutional state of affairs» to refer to the structural and systematic violation of the fundamental rights of more than three million people affected by armed violence in Colombia and in a situation of forced displacement. In this judgment, the Court is quite explicit about

the limits of a formal conception of equality and the law: «The rule of law thus evolved from a liberal democratic state to a social democratic one, also animated by the aim that the material prerequisites of freedom and equality for all are effectively secured. Among the factors assessed by the Court to define whether an unconstitutional state of affairs exists, it is worth highlighting the following: *i*) the massive and widespread violation of several constitutional rights affecting a significant number of people; *ii*) the prolonged omission of the authorities in fulfilling their obligations to guarantee the rights; *iii*) the adoption of unconstitutional practices, such as the incorporation of the tutela action as part of the procedure to guarantee the violated right; *iv*) the failure to issue legislative, administrative or budgetary measures necessary to prevent the violation of rights; *v*) the existence of a social problem whose solution involves the intervention of several entities, requires the adoption of a complex and coordinated set of actions and demands a level of resources that requires a significant additional budgetary effort; *vi*) if all persons affected by the same problem were to resort to the *tutela* action to obtain the protection of their rights, this would result in greater judicial congestion» (T-025/04). Secondly, by Andean constitutionalism, with an emphasis on a broad normative recognition, which expressly opposes the Washington Consensus recipe book. Bolivia and Ecuador, usually grouped under the "New Latin American Constitutionalism" label, have undergone serious constitutional changes which include redrafted and enlarged Declaration of Rights, the explicit adoption of interculturality or even plurinational, and the expansion of participation mechanisms, among others, all of them oriented toward an institutionalization of the empowerment processes that nurtured these constitutions. These processes, deep and still in progress, albeit promising, cannot be properly judged today, but nonetheless raise the hope for a reframing of our constitutional texts that account the struggles of people still living in deep inequality (Aldao, Clérico and Ronconi 2017). An example of this could be seen in the Plurinational Constitutional Court of Bolivia's (TCP) ruling 684/2010-R on the right to water, which recognizes the popular uprising known as the *Guerra del Agua* (Water War) as a milestone of the constitutional process. Another key reading is the dynamic nature of the concept of the social rule of law in Latin America. It is porous to current challenges and is also impacted by the phenomenon of the interamericanisation of social rights.

In short, the key to the material interpretation of the rule of law in the region has led to its transformation as a social rule of law and, at the same time, to keep it open to be porous to the new challenges presented to the effective enjoyment of rights. Thus, if in the formal Rule of Law the authorities are legally bound to the structuring principles of legality, equality, due process, etc.; in the Social Rule of Law all this is strongly complemented by the subjection to achieve material equality, the effectiveness of the rights and duties of all, particularly as a mandate that guides the tasks of the State in order to correct existing inequalities, promote inclusion and participation and guarantee the effective enjoyment of rights to disadvantaged persons or groups. All of this is strengthened by the shift made

by the Inter-American Court of Human Rights towards the direct enforceability of social, economic, cultural, and environmental rights; and by the interpretative developments of the Committee on Economic, Social and Cultural Rights, among others, which have had a strong impact on the region.

5. In Latin America, taking social rule of law seriously means highlighting the diagnosis that this is one of the most unequal regions in the world. This inequality places millions of people in a position of asymmetrical power. This asymmetry operates in practice and on a daily basis, obstructing the effective enjoyment of the rights of people living in structural inequality. The social dimension of the rule of law has a transformative mandate. Through a set of constitutional mechanisms and empowering key actors, it aims to make visible, interpellate and transform the different factors that make up the structure of inequality. But it is only recently that the role of international financial institutions and multinational corporate powers have been put in the spotlight when addressing human rights violations of people living in structural inequality. Additionally, we have in mind the distinction between normal and abnormal justice (Fraser 2008). For example, the former UN Special Rapporteur about public debts and Human Rights, Juan Pablo Bohoslavsky, highlights that very high levels of debt underscores the scale of the choice «between fulfilling fully financial obligations or ensuring the debtor countries populations' human rights»; and stressing that IMF instead of promoting mechanisms for significant and generalized debt relief, promotes fiscal austerity and other deeply contested policies as recent agreements show such as those with Ecuador, Egypt, Jordan, Pakistan and Ukraine. Also that IMF's disregard for human rights is «anachronistic and indefensible», and that international human rights law provides concrete and specific standards that must limit and shape IMF policies, even in technical areas. Thus, the challenges to concretise the postulates of the Social State of Law in the region must include a look at the frameworks in which the struggles for equality are played out.

If the state is to guarantee the rule of law and material equality, then this requires making the frameworks visible. To make these power factors visible is to put on the table the fact that the question of regulating these global actors is inseparable from the discussion on the rule of law. Otherwise, the state ends up being the guarantor of the Law of Empire, that is, of the real factors of power (the global financial architecture and multinational extractivism in articulation with local elites) (Cañete Alonso 2020).

As we write this chapter, the Colombian state is being sued at International Centre for Settlement of Investment Disputes (ICSID) for suspending the operation of the Cerro Cerrejón mining company following a series of rulings by the Colombian Constitutional Court (Suárez Ricaurte 2022). Cerrejón is one of the largest coal mines in the world, currently operated by a conglomerate of multinational companies. Forced displacement of local populations for the purpose of expanding extractive activities has been registered since at least 1983, in a conflict that has been brought to court numerous times (T-528/92, T-256/15, T-466/16, T-704/16, T-302/17).

Finally, in 2017, the communities obtained from the Constitutional Court the declaration of an unconstitutional state of affairs, the state's duty to control economic activities and its interference with human rights, and the mandate to halt the project (CCC, SU-698/17).
However, two years after the local ruling ordering the cessation of extractive activities in the territory, the GLENCORE corporation is suing Colombia before ICSID claiming that the measures adopted by the Constitutional Court are «discriminatory, inconsistent, unreasonable and arbitrary, which deny investors fair and equitable treatment» (ICSID ARB/21/30).
At the same time, another period of austerity policies demanded by international lending agencies is looming over the region, with all the impact this has on the human rights of large sectors of the population (Bohoslavsky, Cantamutto and Clérico 2022), thus generating greater inequality to the detriment of one of the pillars of the social rule of law.

6. Both the dictatorships of the 20th century and the serious violations of rights of human rights defenders, especially in the context of extractive projects or structural financial reforms, have been and are linked to sectors of the economic elites and have impacted on the possibilities, well-being and rights of the most vulnerable sectors in the region.
In this sense the three rule of law movements must be understood as mutually implicated. The loss of formal rule of law (criminalisation, arbitrary arrests, harassment, extrajudicial executions) has rarely been random, but has been concentrated in certain sectors that represented or represent an obstacle to very specific interests: The massacres perpetrated against indigenous peoples during the 19th century with the aim of expanding the agricultural frontier. The persecution of the most dynamic sectors of the labour movement by governments during the 20th century. The systematic – and transnational – plans of repression by the region's dictatorships during the second half of the 20th century. The deployment of armed groups operating with impunity in the territories richest in natural resources.
The weakening of the formal rule of law has almost always been functional to the weakening of social justice, and vice versa, the development of social justice and the expansion of material guarantees to the entire population has always functioned as an antidote to dictatorships. Similarly, the interference of global finance and extractive corporations in the states of the region has always tended to generate conditions beneficial to the reproduction of capital, and detrimental to the reproduction of life (Fraser, Arruzza, and Bhattacharya 2019).
In other words, the weakening of any one of the three dimensions of the rule of law has a negative impact on the others.

Martín Aldao
University of Buenos Aires – CONICET
Instituto A.L. Gioja
Av. Figueroa Alcorta 2263, C1053
CABA
maldao@derecho.uba.ar

Laura Clérico
University of Buenos Aires – CONICET
Instituto A.L. Gioja
Av. Figueroa Alcorta 2263, C1053
CABA
lcleric@derecho.uba.ar

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