

DEBATES

Castles in the Air: States and the Rule of Law in Latin America

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Already twenty years ago Guillermo O’Donnell argued that we cannot fully understand the state if we simply “conflate [it] with the state apparatus, the public sector, or the aggregation of public bureaucracies” (O’Donnell 1993: 1356). As important as these more concrete manifestations of stateness, he argued, is the set of social relations, or order, which the state enacts in its law and backs with its promise of coercion. “The legal system is a constitutive dimension of the state and of the order that it establishes and guarantees over a given territory” (Id.). In this respect, O’Donnell was clearly correct. Law defines the organization that is the state, assigning roles and obligations in the bureaucracy. Law, plus the informal rules the state permits and enforces, is constitutive of the state in the sense that it establishes state purposes, defines challenges and challengers, and establishes the entitlements, rights and obligations of residents. The clear implication of this is that the extent to which the law “rules”—that is, the extent to which the state’s order is in fact complied with—is an essential dimension of state capacity.

Many discussions of the rule of law have tended to proceed, on the conceptual level, on the premise that the rule of law is a monolithic phenomenon (see, e.g., North et al. 2009). In Latin America, scholars have acknowledged its territorial dimension—since many Latin American states self-evidently fail to extend their control over the entire national territory—but only rarely have they addressed its functional dimension—that is, the variation across different functional legal regimes. When the literature focuses on the failure of a particular legal regime—control of corruption, violence and crime, human rights violations, the lack of adequate mechanisms to enforce contracts and collect on debts—it typically does so without incorporating these particular treatments into an overall discussion of the rule of law or even of state capacity in general.

Closer attention to what we mean by the rule of law can help place these disparate discussions of state capacity into a single framework. While it may fall short of normative ideals, for most descriptive and

social scientific purposes, a minimalist definition of the rule of law is most appropriate.¹ Such a minimalist definition should include a vertical dimension, of course: the effective application of rules by the state to its citizens—what might be called rule *by* law (Holmes 2003). But it must also include a horizontal dimension, involving effective compliance with the rules by citizens in their dealings with each other. Thus, the vertical dimension of the rule of law is violated when the police carry out extrajudicial executions and when taxpayers fail to pay; the horizontal one when employers violate their employees’ labor rights, or kidnappers hold their victims for ransom. We can capture both dimensions in one definition: the rule of law is prevalent to the extent that regulated interactions (a) among citizens or (b) between them and the state are structured by preexisting laws. The definition does not require the law to be fair or just; its only substantive requirement is that these laws be preexisting – the alternative would allow a ruler to dress up arbitrary, ad hoc, rule in legal clothing.

So far so good, but how does this help bring all the possible violations of the law into one conceptual landscape that engages with discussions of state capacity? Once we highlight the two dimensions of the rule of law, it is obvious that the state’s order is comprised of different types of legal regimes that vary depending on whether the obligations run vertically or horizontally, and on the direction in which they run.²

Each of these cells poses very different challenges for the state, and responds to a different set of constraints. In the bottom row, it is private actors who will resist enforcement efforts, and thus social group resources should matter directly. In this row, politics still matters but indirectly,

Table 1: Classifying legal regimes, by the direction of duties owed between state and citizens, with examples

		DUTY OWED TO	
		The state	Private actors
DUTY OWED BY	The state	“Horizontal accountability:” anticorruption laws, separation of powers, limits on executive power	Constitutional rights, administrative law, human rights
	Private actors	Criminal law, ³ taxation	Contracts, torts (including many of the harms caused by violations of criminal law), property law, family law, business law

through the politics of state creation, because it conditions the extent to which resources matter. At the top of the table, on the other hand, it is state actors who are resisting compliance, and thus, politics should matter directly and resources indirectly (because they shape the politics of state resistance). On the left side of the table, where duties are owed to the state, state enforcement capacity matters more, while on the right, where duties are owed to private actors, social group resources are the most important variable. Clearly, then, our discussion of what produces state capacity in regard to the rule of law should respond to this diversity as well.

In the space available I can only make some broad suggestions to expand on this observation. In the lower left corner, the enforcement task should pose greater logistical challenges, because the state must monitor behavior and generate compliance across a vast array of social realities, many of them far removed from state supervision. As we move up toward duties owed by state actors, the violations become more visible, but the challenge becomes increasingly political, dependent on a true separation of interests within the state and the government. Here, some state actors—say, prosecutors and judges—must monitor others—say, cabinet ministers and presidents. This is a problem of politics more than resources.

As we move from left to right in the table, on the other hand, toward duties owed to private actors, enforcement again becomes less a function of state capacity to monitor, since the private beneficiaries of the duties should more easily recognize that their rights have been violated. Here enforcement becomes more dependent on the resources private actors can bring to bear upon those who owe them a duty. At the same time, of course, it is incumbent on

the state, in defense of its order, to provide the resources and venues for these actors to claim and secure their rights.

In the lower row, therefore, where private actors have to comply with duties to the state and each other, it seems likely that the problem has to do with the distribution of resources. The rule of law here becomes a function of the relative capacity of the different social groups (defined by the law) to resist each other or the state. Sometimes it is the challengers who are exceptionally strong—as when organized crime or a guerrilla force challenges both the state and other citizens. Sometimes it is the claimants who are exceptionally weak, as when deeply marginalized communities find their rights violated and have little access to justice or even knowledge of those rights. The problem here is political only indirectly: the state could, given the right politics of state creation and resource allocation, dedicate more resources to assisting claimants in their demands or to confronting the challengers.

Given these premises, we might imagine that the northeast quadrant, when private actors seek to vindicate rights against the state, poses the greatest challenge. Marginalized populations with limited resources with which to engage legal enforcement mechanisms will likely struggle to make their rights effective vis-à-vis state actors. Moreover, in order to succeed, these claimants must engage one part of the state—the courts, prosecutors, or an ombudsman, perhaps—to monitor another. These legal regimes pose all the resource problems of the southeast cell and all the political problems of the northwest cell. The theoretical challenge comparativists have just begun to take on is to work through these diverse regimes and find consistent, coherent explanations

for the failures and successes we observe across the region today.

So where, empirically, are the main failures and main successes? It is evident that one of the greatest challenges to the rule of law and the state in Latin America today is found in well organized, well funded, outside challengers—the drug cartels in Mexico, the *maras* in Central America. These groups are overwhelming state resources and tearing the fabric of state order. Even ordinary crime, below the level of the great cartels and organized gangs, seems on the rise in many countries. And it remains true that judiciaries are slow and inefficient in processing ordinary civil claims. On the other hand, in the seemingly more intractable area of horizontal accountability and restraints on state actors, many countries in Latin America, even those that struggle with violence and organized crime, have made great strides. Mexico, for all its problems with violent drug cartels, and Colombia, for all its history of state challengers, have made significant strides in strengthening the institutions that act to guarantee and enforce duties owed by the state, even for disfavored and marginalized populations. Costa Rica, Argentina, and Brazil have all seen increasingly active high courts. Across the region, courts are working more effectively on horizontal accountability than ever before in the region's history. The burgeoning literature on the judicialization of politics is ample evidence of these changes.

If I am right about the nature of the challenges in each cell, these successes suggest that many countries are slowly getting the politics of law right. Increasing political diversity and the creation of true separation of interests within the state is leading to a greater capacity to hold state actors to their obligations to each other

and their citizens. But the dramatic failures on the horizontal dimension—across the entire bottom row of Table 1, in fact—indicate that the deep imbalances in resources across different social groups continue to bedevil the rule of law. Clearly, until something happens to interrupt the vast amounts of money and guns that flow into organized crime groups, it will be very difficult to establish the rule of law there, without an equally massive investment into state repressive capacity. The problem, of course, is that this has a strong potential to skew the balance of power between the repressive forces and ordinary citizens, shaking the foundations of the rule of law in the northeast quadrant. We would once again purchase security at the expense of uncontrollable state violence.

Latin American states-as-law today find themselves at a crossroads. They are increasingly carrying the hopes of many, leading to the judicialization of politics, increased legal mobilization, and more success in the case of duties owed by state actors. At the same time, they are often discredited by their failure to effectively confront powerful outside challengers and resolve conflicts among citizens. When this happens, the rule of law constructs impressive edifices of constitutional jurisprudence and rights on the vertical dimension, with increasing violent crime and citizen insecurity on the horizontal dimension. In these cases the rule of law is in danger of becoming a fairy tale castle, beautiful to look at, but floating high in the air, without a solid foundation in the horizontal dimension where most ordinary citizens meet the law on a daily basis. The challenge for state builders is to ground these floating castles in everyday reality without tearing them down in the process.

Endnotes

- ¹ The lack of substantive requirements in a thin definition allows us to examine various interesting questions, including, for example, whether the rule of law, regardless of the law's substantive justice, eventually leads to more democracy, or more justice, or more regard for human rights. Although the ultimate goal might be to develop, as O'Donnell (2010) suggests, a democratic rule of law, or a more just rule of law, this definition is more suitable to empirical investigations of the effects of the rule of law.
- ² The table and surrounding discussion is taken from "The State, Concepts and Dimensions," forthcoming in *Revista de Ciencia Política*, published by the Universidad Católica de Chile.
- ³ Criminal law "verticalizes" what are essentially horizontal duties among citizens, by giving the state the right to punish violations.

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