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The Quality of Democracy

WHY THE RULE OF LAW MATTERS

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The rule of law is among the essential pillars upon which any high-quality democracy rests. But this kind of democracy requires not simply a rule of law in the minimal, historical sense that I will shortly explain. What is needed, rather, is a truly *democratic* rule of law that ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power. Seen thus, the rule of law works intimately with other dimensions of the quality of democracy. Without a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk. Only under a democratic rule of law will the various agencies of electoral, societal, and horizontal accountability function effectively, without obstruction and intimidation from powerful state actors. And only when the rule of law bolsters these democratic dimensions of rights, equality, and accountability will the responsiveness of government to the interests and needs of the greatest number of citizens be achieved.

Although in some of my previous writings readers may find partial attempts at the theoretical and normative justification of a democratic rule of law, here I make only passing reference to these matters. My intention is to contribute to a discussion concerning if and how something called the rule of law, or the democratic rule of law, may be conceptualized and, insofar as possible, empirically gauged. To this

end, the concluding section of this essay proposes a set of variables for the exploration of this dimension. Please note that what follows has been formulated with contemporary Latin America centrally in mind; it is of course an open question how well it might apply outside this region.

The “rule of law” (like partially concurrent expressions such as *Rechtsstaat*, *état 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 exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions including the judiciary (though other state institutions can be involved as well). By “fairly applied” 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 relative amounts of power held by the parties in such cases; and applies procedures that are preestablished, knowable, and allow a fair chance for the views and interests at stake in each case to be properly voiced. The following is a minimal but significant criterion: If A is attributed the same generic rights (and, at least implicitly, the same legal personhood and agency) as the more powerful B with whom A enters into a crop-sharing arrangement, employment contract, or marriage, then it stands to reason that A has the right to expect equal treatment from the state institutions that have, or may acquire, jurisdiction over such acts.

This implies formal equality, in two senses. First, it is established in and by legal rules that are valid (at least¹) in that they have been sanctioned following previously and carefully dictated procedures, often ultimately regulated by constitutional rules. Second, the rights and obligations specified are universal, in that they attach to each individual considered as a legal person, irrespective of social position, with the sole requirement that the individual in question has reached competent legal adulthood and has not been proven to suffer from some (narrowly defined and legally prescribed) disqualification. These rights support the claim of equal treatment in the legally defined situations that underlie and may ensue from the kind of acts above exemplified. “Equality [of all] before the law” is the expectation tendentially inscribed in this kind of equality.

There is another important point: The rights and obligations attached to political citizenship by a democratic regime are a subset of the more general civil rights and obligations attached to a legal person as a member of a given society. In addition to the well-known participatory rights to vote and run for office in fair elections, I am thinking of the freedoms (of expression, association, movement, and the like) that are usually considered necessary to the existence of a democratic regime. In many

highly developed countries, these and similar freedoms became legally sanctioned civil rights well before becoming political freedoms.

On the other hand, strictly speaking there is no “rule of law,” or “rule by laws, not men.” All there is, sometimes, is individuals in various capacities interpreting rules which, according to some preestablished criteria, meet the condition of being generally considered law. Such a situation is clearly superior to a Hobbesian state of nature or the creation and application of rules at the whim of a despot. Yet it is not enough that certain actions, whether of public or private actors, are *secundum legem*, that is, in (interpreted) conformity with what a given law prescribes. For as I illustrate below, an act that is formally according to law may nonetheless entail the application of a rule that is invidiously discriminatory or violates basic rights. Or such an act may involve the selective use of a law against some, even as privileged sectors are enjoying arbitrary exemptions. The first possibility entails the violation of moral standards that most countries write into their constitutions and that nowadays, usually under the rubric of human rights, countries have the internationally acquired obligation to respect. The second possibility entails the violation of a crucial principle of fairness—that like cases be treated alike. Still another possibility is that in a given case the law is applied properly, but by an authority that does not feel obligated to proceed in the same manner on future equivalent occasions.

These cases may be construed as being “ruled by law,” but they do not meet the criteria we normally have in mind when using the term “rule of law.” Rather, these possibilities indicate the absence, or at least serious breaches, of a reasonable application of what the rule of law is supposed to be.

Toward a Positive Definition

Advancing toward a positive definition of the rule of law is no easy matter. A first complication is that the concepts of the rule of law and of *estado de derecho* (or *Rechtsstaat*, or *état de droit*, or equivalents in other languages of countries belonging to the Roman-originated civil-law tradition) are not synonymous²—a topic to which I will return. Furthermore, each of these terms is subject to various definitional and normative disputations. Therefore, I will limit myself to some basic observations. First, in both the civil-law and common-law traditions, most definitions have at their core the view that under the rule of law, the legal system is a hierarchical one (usually crowned by constitutional norms) that aims at yet never fully achieves completeness. 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 or her actions. No one, including the most highly placed official, is above the

law. In contrast, the hallmark of all forms of authoritarian rule, even those that are highly institutionalized and legally formalized, is that at their apex sits some person or entity (a king, a junta, a party committee) that is sovereign in the classic sense of being able to make decisions unconstrained by law when the sovereign judges that there is a need to do so.

Second, to say that “the government shall be ruled by law and subject to it” and that “the creation of law . . . is itself legally regulated”³ is to imply that the legal system is an aspect of the overall social order that in principle “brings definition, specificity, clarity, and thus predictability into human interactions.”⁴ Achieving this situation, though not necessarily an unmixed blessing, is a great public good. A necessary condition for this is that the laws have certain characteristics. Many lists of such characteristics are available. Here I adopt one that legal scholar Joseph Raz espouses:

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.⁵

The first three points refer to general characteristics of the laws themselves. Each point pertains to the proper enactment and content of the laws, as well as to a fact that Raz and others stress: The laws must be possible to follow, and should not place unreasonable cognitive or behavioral demands on the addressees. The other points of Raz's listing refer to the courts and only indirectly to other state agencies. Point four requires specification: The value of independent courts (itself a murky idea) is shown, *a contrario*, by the often-servile behavior of the judiciary in relation to authoritarian rulers. But this independence may be misused—and has been misused with some frequency in democratized Latin America—to foster the sectoral privileges of judicial personnel or to allow unchallenged, arbitrary interpretations of the law. Consequently, it also seems required “that those charged with interpreting and enforcing the laws [must] take them with primary seriousness.”⁶

To this I would add that the stewards of the law must hold themselves ready to support and expand that very democracy which, in contrast to the old authoritarian order, confers upon them such independence.⁷ This is a tall order everywhere, and not least in Latin America, where a long roll of institutional innovations has shown scant success in striking a proper balance between judicial subjection and excessive judicial independence. In this region another difficult accomplishment is implied

by point six, especially with respect to overseeing the legality of acts performed by presidents who feel themselves electorally empowered to do whatever they think best while in office. I will illustrate below the denial of redress to many of the poor and the vulnerable (points five and seven). The same goes for the eighth point, particularly as regards the impunity enjoyed by police and other (so-called) security agencies, as well as violence perpetrated by private agents who often take advantage of police forces and courts that are culpably indifferent toward or even complicit in such unjust acts.

Aspects of the Rule of Law

At this point we should notice that, unlike *estado de derecho* and equivalent terms, the English-language phrase “rule of law,” defined as above, does not refer directly to any state agencies other than courts. This is not surprising given various countries’ respective traditions, including the particularly strong role that the courts have played in the political history of the United States. Nevertheless, the whole state apparatus and its agents are supposed to submit to the rule of law.

Furthermore, if the legal system is supposed to texture, stabilize, and order manifold social relations, then when state agents or even private actors violate the law with impunity, the rule of law is truncated. Whether state agents perpetrate unlawful acts on their own or give private actors *de facto* license to do so does not make much difference, either to the victims of such actions or to the (in)effectiveness of the rule of law.

The corollary of these reflections is that, when discussed in relation to the theory of democracy, the rule of law—or *estado de derecho*—should be conceived not only as a generic characteristic of the legal system and the performance of the courts, but also, and mostly, as the legally based rule of a democratic state. This entails that there exists a legal system that is itself democratic, in three senses: 1) It upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts.⁸ As long as it fulfills these three conditions, such a state is not just a state ruled by law or a state that enacts the rule of law; it is a state that enacts a democratic rule of law, or an *estado democrático de derecho*.

In addition to the legal system itself, there are a number of state institutions that are directly related to a democratic regime. Thus the legal system is not just a set of rules but a system properly so called, which interlaces legal rules with legally regulated state institutions. In turn, a democratic legal system is a species of this genus, with two main

features: It enacts and backs the rights attached to a democratic regime; and it holds all officials and institutions in the state (and indeed in society) at large answerable to the law—no one is *de legibus solutus*. In an *estado democrático de derecho*, everyone is subject to the legal authority of one or more institutions—the legal system closes, in the sense that no one is supposed to be above or beyond its rules. In turn, this characteristic is intimately related (as the tradition of liberal constitutionalism recognized early) to the protection of political and other rights. Absent the safeguard of universal answerability to the law, there would exist some ultimately uncontrollable power or powers that could unilaterally curtail or simply take rights away.

In a democracy, rulers are supposed to submit to three kinds of accountability. One, vertical electoral accountability, results from fair and institutionalized elections, through which citizens may change the party and officers in government. Another kind of vertical accountability, of a societal kind,⁹ is exercised by groups and even individuals who seek to mobilize the legal system to place demands on the state and the government aimed at preventing, redressing, or punishing presumably illegal actions (or inactions) perpetrated by public officials. Still a third kind of accountability, which I have labelled horizontal, results when some properly authorized state institutions act to prevent, redress, or punish the presumably illegal actions (or inactions) of public officials.¹⁰

Note, however, that these types of accountability differ in an important way. Vertical or electoral accountability must by definition exist in a democracy. The degree and effectiveness of societal and horizontal accountability, by contrast, vary across cases and time periods. These variations are relevant to attempts to assess democratic quality. The lack of a vigorous and self-assertive society, for instance, or the incapacity or unwillingness of certain state institutions to exercise their prescribed authority over other state institutions (especially elected officials) is a telltale sign of low-quality democracy.

Another important measure is the effectiveness of the legal system at actually bringing a beneficial degree of order to social relations. This is a function of the interactions among the elements that compose this system. At one level, which we might call “interinstitutional,” the authority of a judge dealing with a criminal case would be nil were it not joined, at several stages, by that of police officers, prosecutors, defense attorneys, and so on, as well as by, eventually, higher courts and prisons. Horizontally, in a democratic legal system no state institutions or officers are supposed to escape from legal controls regarding the lawfulness of their actions. In a third, territorial, dimension, the legal system is supposed to extend homogeneously across the space delimited by the state—there must be no places where the law’s writ does not run. In a fourth dimension—that of social stratification—the legal system must

treat like cases alike irrespective of the class, gender, ethnicity, or other attributes of the respective actors. In all these dimensions, the legal system presupposes what Juan J. Linz and Alfred Stepan call an “effective state.”¹¹ In my terms, it is not just a matter of appropriate legislation but also of a network of state institutions that converge to ensure the effectiveness of a legal system that is itself democratic. The weakness of this kind of state is one of the most disturbing characteristics of most countries in Latin America.

Regarding the relationship between democracy and the state, it is important to note that by assigning various political rights to citizens, democracy construes them as agents. In addition, the citizens are carriers of subjective rights that are legally assigned on a boundedly universalistic basis. Now I add that this legal system, beginning with its highest (that is to say, constitutional) rules, establishes that the citizens, as they make their voting decisions in fair elections, are the source of the authority exercised over them by the state and the government. Citizens are not only the carriers of certain rights; they are the source and the justification of the very claim to rule upon which a democratic polity relies when making collectively binding decisions. Contemporary democracy hardly is *by* the people; but it certainly is *of* the people and, because of this, it should also be *for* the people.

That they derive their authority from the citizenry is quite obviously true in respect to holders of elected governmental positions. It is also true of all other state officials insofar as, in a democracy, they derive their authority from the highest—elected—powers of the country. Furthermore, the jurisdiction and obligations of those state officials are determined by the same legal system that subjects all public officials, elected and not, to horizontal accountability. Finally, everyone, including those who are not political citizens (nonadults and foreigners), is construed as an agent by the legal rules that regulate civil and social relationships.

It follows that an individual is not, and should never be seen as, a subject, a supplicant of the good will of the government or the state. This individual—an agent and carrier of a bundle of civil and eventually also social rights, whether she is or is not a political citizen—has a legally grounded claim to be treated with full consideration and respect, and on an equal basis with everyone else. Furthermore, this treatment must be based on the application of laws and regulations that are clear, knowable by the citizens, and enacted in ways that accord with democratic procedures.

Insofar as state institutions effectively recognize these rights, these institutions may be deemed democratic, or at least as behaving consistently with the duties that democracy imposes upon them. Indeed, this is arguably the most difficult aspect of democracy. When it comes to fair elections and the exercise of political rights, citizens normally find

themselves placed on a level of generic equality. In dealing with state institutions, however, individuals (whether citizens or not) often find themselves placed in situations of sharp de facto inequality. They may face bureaucracies that act on the basis of formal and informal rules which are seldom transparent or easily understandable, and that make decisions (and omissions) which often have important consequences for their "subjects." It is a sad law of human nature that, when individuals are placed on the upper side of sharply unequal relationships, they tend to forget that their right to exercise authority derives from those "below," who are carriers of rights and should be treated with full consideration and respect. This is a problem everywhere. It is more serious and systematic when the subject of these relationships is one of those afflicted by severe and extended poverty and inequality. These ills breed a social authoritarianism that is sadly reflected in the way that too many state institutions treat too many citizens. This is, to my mind, another crucial dimension of the quality of democracy. In Latin America, with its deep and persistent inequalities, this dimension is one where contemporary democracies fall most gravely short.

The rights of political and civil citizenship are formal, in the double sense that they are supposed to be universal and that they are sanctioned through procedures established by the rules of authority and representation inherent in a democratic regime. The political citizen of democracy is homologous to the civil citizen of the universalist aspects of the legal system: The rights of associating, expressing opinions, moving freely, entering into contracts, not suffering violence, and expecting fair treatment from state agencies are all premised on individuals who share the autonomy and responsibility that make them, as both civil and political citizens, legal persons and agents of their own actions. This is a universal premise of equality that appears in innumerable facets of a democratic legal system. It underlies the enormous normative appeal that democratic aspirations have evinced, even if often vaguely and inconsistently expressed, under varied historical and cultural conditions.

Flaws in the Rule of Law

Yet even in countries where aspirations for democracy have been satisfied by the inauguration of democratic regimes, the rule of law may be compromised. Indeed, most contemporary Latin American countries, like new democracies in other parts of the world, are cases where national-level democratic regimes coexist with undemocratic subnational regimes and severe gaps in the effectiveness of basic civil rights. Major ways in which the rule of law may be hindered in Latin America include:

Flaws in the existing law. In spite of progress recently made, there still exist laws, judicial criteria, and administrative regulations that discrimi-

nate against women, members of indigenous peoples, and various other minorities, and which often force defendants, detainees, and prison inmates to endure conditions that are repugnant to any sense of fair process.

Flaws in the application of the law. “For my friends, everything; for my enemies, the law.” This sentence, attributed to Brazil’s President Getúlio Vargas (1930–45, 1950–54), expresses an attitude typical of dictatorships. The discretionary, and often exactingly severe, use of the law against the political enemy or the vulnerable can be an efficient means of oppression. The other side of this is the manifold ways in which, even in a democracy, the privileged manage to exempt themselves from the law. There is an old Latin American tradition of ignoring or twisting the law in order to favor the strong and repress the weak. When a shady businessman said in Argentina, “To be powerful is to have [legal] impunity,”¹² he expressed a presumably widespread feeling that to follow the law voluntarily is something that only morons do and that to be subject to the law is not to be the carrier of enforceable rights but rather a sure signal of social weakness. This is particularly true—and dangerous—in encounters that may unleash the violence of the state or 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, to say nothing of the legal impunity that they too often obtain.

Flaws in the relations between state agencies and ordinary citizens. This defect is related to the preceding. Perhaps nothing underlines better the deprivation of rights of the poor and vulnerable than when they interact with the bureaucracies from which they must obtain work, or a work permit, or retirement benefits, or simply (but sometimes tragically) when they have to go to a hospital or police station. For the privileged, this is the far side of the moon, a place they deploy elaborate strategies to avoid. For those who cannot escape this ugly face of the state, there is not only the immense difficulty of obtaining what nominally is their right. There is also the indifferent, if not disdainful, manner in which they are treated, as well as the obvious injustice entailed when the privileged escape these hardships. The distance between this kind of world and a truly democratic ethos of respect for equal human dignity may be gauged by observing the grievous difficulties that usually ensue for anyone who, lacking the “right” social status or connections, nonetheless dares to approach these bureaucracies not as a supplicant begging for favors, but as the bearer of a right.

Flaws in access to the judiciary and to fair process. Given my previous comments, I will not provide further details on this topic, which has proved quite vexing even in highly developed countries.¹³ Across most of Latin America, the judiciary is too distant, cumbersome, expensive, and slow for the poor and vulnerable even to attempt to access it.¹⁴ And if they do manage to obtain judicial access, the available evidence

often points to severe and systematic discrimination. Criminal procedures in particular often tend to disregard the rights of the accused before, during, and after trial.

Flaws due to sheer lawlessness. This is the issue that I emphasize more in my previous work, where I argue that it is a mistake to conflate the state with its bureaucratic apparatus.¹⁵ 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 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 stability to social relations. In many countries of Latin America, however, the reach of the legal state is limited. In many regions, not only those geographically distant from the political centers but also the peripheries of

large cities, the bureaucratic state may be present in the form of buildings and officials paid out of public budgets, but the legal state is absent: Whatever formally sanctioned law exists is applied intermittently, if at all. More importantly, this intermittent law is encompassed by the informal law enacted by the privatized—patrimonial, sultanistic, or simply gangsterlike—powers that actually rule those places. This leads to complex situations involving a continuous renegotiation of the boundaries between formal and informal legalities, situations in which it is vital to understand the interplay between both kinds of law and the uneven power relations that develop. The resulting informal legal system, punctuated by temporary reintroductions of the formal one, supports a world of extreme violence, as abundant data from both rural and urban regions show. These “brown areas” are subnational systems of power that have a territorial basis and an informal but quite effective legal system, yet they coexist with a regime that, at least at the national political center, is democratic.

The problems that I have summarized indicate a severe incompleteness of the state, especially its legal dimension. Sadly, in many cases in Latin America and elsewhere, this incompleteness has increased during democratization, thanks to economic crises and the sternly antistatist economic policies that have prevailed over the past two decades. There is evidence, too, that this deficiency has been fostered by the desire of national politicians to shape winning electoral coalitions by including

candidates from the perversely privatized areas to which I have referred. These local politicians use the votes they command and the institutional positions they attain at the center in order to reproduce the systems of privatized power they represent. Not incidentally, in Argentina and Brazil, legislators from these “brown” areas have shown a keen interest (with frequent success) in dominating the legislative committees that appoint federal judges in those same regions—surely an effective way of removing their fiefs from the reach of the legal state.

Thus we see that in many new (and not so new) democracies, in Latin America and in other regions, there exist numerous points of rupture in formal legal systems. To the extent that this is true, the rule of law has only intermittent existence. In addition, this observation at the level of the legal state is mirrored by numerous violations of the law at the social level, which jointly amount to a truncated, or low-intensity, citizenship. In these countries, many individuals are citizens with respect to political rights but not in terms of civil rights. Indeed, they are as poor legally as they are materially.

At present, many international and domestic agencies support the expansion of the rule of law as they conceive it, and legions of experts are busy with various aspects of this task. In principle this is not bad news, but there is a danger due to the strong orientation of the resulting legal and judicial reforms toward the perceived interests of the dominant sectors. Typical areas of reform include domestic and international commercial law, some aspects of civil law, and the more purely repressive aspects of criminal law. This may be useful for attracting investment, but it tends to produce a “dualistic development of the justice system,” centered on those aspects

that 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.¹⁶

For societies that are profoundly unequal, these trends may 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 favoring their interests.

Dimensions of a Democratic Rule of Law

As the preceding discussion implies, the relevant question concerning the rule of law and democracy should address the various dimensions and degrees along which the attributes of a democratic rule of law, or *estado democrático de derecho*, are present or absent in a given case. This requires convenient analytical disaggregations of the various as-

pects that the rule of law in general, and the democratic rule of law in particular, include. The next step is to identify the empirical indicators (variables or standards) that may allow a mapping of levels and variations along the various dimensions that have been defined. These tasks, of course, are fraught with difficulties. I believe, however, that it is possible to achieve some reasonable approximations of at least some of the dimensions of interest, a task that I address below.

As I have defined it, a full democratic rule of law has not been reached in any country—and arguably it might be undesirable to do so. Furthermore, against the somewhat positivistic inclinations of earlier legal views, today practically all theories about law—despite their differences in other respects—hold that, like any other rule, the actual meaning or intent of the laws are defined by the dominant or authorized interpretations.¹⁷ The “proper” interpretation of laws and, indeed, constitutions is one of the great topics around which political battles are fought. Contrary to technocratic and positivistic views, we should never forget that the law, in its content and application, is largely (like 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. Societal change, as well as unending struggles for the acquisition of new rights and the reinterpretation of old ones, makes the rule of law, especially the democratic rule of law, a moving horizon.

For these reasons I believe that, in assessing the rule of law and its linkages with democracy and democratic quality, one should begin by defining a point below which, though there may be some rule *by* law, there is no rule *of* law. Having established more or less approximately such a cutting point, what lies above it is a multidimensional continuum showing the degrees (or levels) to which, along the various dimensions into which the concept has been disaggregated, it may be said that the rule of law exists, especially in its incarnation as a democratic rule of law.

The dimensions discussed below are a preliminary attempt to disaggregate relevant dimensions that may be, at least in principle and with various degrees of approximation, empirically mapped. Furthermore, you may notice that this listing reflects the various aspects of the (democratic) rule of law that I discuss above.

The suggestions that follow come from a larger work in which we try to assess the finality of democracy, a theme of which, indeed, the rule of law is an important component. For reasons of space, I must refer to this work for details.¹⁸

The dimensions of a democratic rule of law as suggested here are as follows:

In relation to the legal system. First, we may look at the degree to which the legal system extends homogeneously across the entire territory of the state—the “brown” areas discussed above in reference to Latin America are clear signs of gaps. In addition, there is the degree to

which the legal system behaves uniformly relative to various classes, economic sectors, and other societal groupings. Also, the rule of law entails the enactment and application of rules that prohibit and eventually punish discrimination against the poor, women, foreigners, and various minorities. Especially of concern in many Latin American countries is the degree to which the legal system deals in a respectful and considerate manner with indigenous communities and their legal systems and cultures. Finally, there should be generalized recognition of the supremacy of the constitution, and a supreme or constitutional court that effectively interprets and protects it.

In relation to the state and the government. First, we must examine the extent to which there exists a state that exercises effective and law-bound control over its whole territory. Second, there should exist adequately authorized and empowered state institutions for the exercise of horizontal accountability, including in relation to cases of presumed illegal actions (or inactions) by elected officials. Finally, state institutions should treat all individuals with due consideration and respect, and there must be adequate mechanisms for the prevention and redress of situations that ignore this requirement.

In relation to the courts and their auxiliary institutions. The judiciary must be free of undue influences from executive, legislative, and private interests, and if this is the case, the judiciary must not abuse its autonomy for the pursuit of narrowly defined corporate interests. There should be reasonably fair and expeditious access to courts, differentiating by kind of courts. We should also examine the degree to which courts recognize, and to what extent and in what kind of cases, international covenants and treaties, including those on human, gender, childhood, economic, social, and cultural rights. A democratic rule of law should also entail reasonably effective arrangements for ensuring that the poor, the illiterate, and otherwise deprived persons and groups have access to courts and to competent legal counsel. The police and other security forces must respect the rights of all individuals, and individuals should not be held in prison or subject to other ills in violation of basic rules of procedural fairness. Finally, the prisons should be in conditions adequate to the human dignity of the inmates.

In relation to state institutions in general. A democratic rule of law requires that all state institutions beyond merely the courts treat everyone with fairness, consideration, and respect. The rules that regulate state institutions should be clear, publicly available, and properly enacted. Finally, prompt and effective mechanisms must be in place to prevent, stop, or redress state violations of citizens' rights.

In relation to the social context. Beyond the right to associate in directly political organizations, the right of participation must exist, with at least the civil rights (and eventually the labor rights) of members being upheld. Furthermore, adequate rights and guarantees must

exist for the functioning of diverse social organizations and for the exercise of vertical societal accountability.

In relation to civil and human rights. In terms of assessing the extent to which rights are violated, one should investigate the numbers, social position, gender, age, and geographical location of individuals who are victimized by physical violence, including domestic and police-perpetrated violence. Furthermore, data could be collected on the number and geographical locations of various crimes, especially homicides, armed robberies, and sexual and family violence. Finally, foreigners should be assigned the same civil rights as citizens, should be allowed at least at the local level to participate in political affairs, and should be treated by state agents and citizens with due consideration and respect.

Much has been said and written lately concerning the rule of law. To this large amount of discourse I would like to add the regretful observation that at times the rule of law (or at any rate, the rhetoric of the rule of law) has been employed in the service of authoritarian ideologies. In earlier times, in countries riven by severe inequality as so many in Latin America have been (and too often still are), practices associated with the law were not used in the service of fairness, but rather to entrench sharp inequalities and the manifold social ills associated with them.

Here I have tried to specify the proper sense and context within which the rule of law may be truly said to be consistent with democracy. In doing so, I have also tried to indicate some dimensions of law-based rule that can help us understand what makes it effective and how it relates to other aspects of the performance of countries that include a democratic regime among their institutional set. Of course, much more remains to be done, in theory and in practice. That much is sure.

NOTES

1. With this parenthetical expression I am sidestepping some complex issues of legal theory that I do not need to deal with here.

2. For a flavor of these differences in relation to common-law countries, see Ian Shapiro, *The Rule of Law. Nomos XXXVI* (New York: New York University Press, 1994). In relation to civil-law countries see Michel Troper, "Le Concept de l'Etat de Droit," *Droits: Revue Française de Théorie Juridique* 15 (1992): 51–63; and Leó Hamon, "L'Etat de Droit et Son Essence," *Revue Française de Droit Constitutionnel* 4 (1990): 699–712.

3. Joseph Raz, "The Rule of Law and Its Virtue," *The Law Quarterly Review* 93 (1977): 196; Herbert L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 197.

4. John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 61.

5. Joseph Raz, "The Rule of Law and Its Virtue," 198–201. For another influential

listing that is similar to Raz's but disagrees on some theoretical matters that need not detain us here, see Lon Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969).

6. Lon Fuller, *Morality of Law*, 162.

7. For a cogent analysis of this and related matters, with a focus on Latin America, see Ernesto Garzón Valdés, "Derecho y Democracia en América Latina," *Anales de la Cátedra Francisco Suárez* 33 (1999): 133–57; and Ernesto Garzón Valdés, "El Papel del Poder Judicial en la Transición a la Democracia," *Isonomía* 18 (2003): 27–46.

8. This is another topic upon which I do not need to elaborate here; see Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, Colo.: Lynne Rienner, 1998).

9. Catalina Smulovitz and Enrique Peruzzotti, "Social Accountability in Latin America," *Journal of Democracy* 11 (October 2000): 147–58.

10. For discussion of horizontal accountability, I refer to my chapters in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State*, and in Scott Mainwaring and Christopher Welna, eds., *Democratic Accountability in Latin America* (New York: Oxford University Press, 2003).

11. Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996), 37.

12. *Clarín* (Buenos Aires), 10 May 1997, 8.

13. In relation to the United States, see Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9 (1974): 95–160; and Joel Grossman, Herbert Kritzer, and Stewart Macaulay, "Do the 'Haves' Still Come Ahead?" *Law & Society Review* 33 (1999): 803–10.

14. It bears mentioning that in a December 1992 survey that I did in the metropolitan area of São Paulo (n=800), an overwhelming 93 percent responded "no" to a question asking if the law was applied equally in Brazil, and 6 percent did not know or did not answer. In a similar vein, in a survey taken in 1997 by Guzmán Heredia y Asociados in the metropolitan area of Buenos Aires (n=1,400), 89 percent of respondents indicated various degrees of lack of confidence in the courts, 9 percent expressed they had some confidence, and only 1 percent said they had a lot of confidence.

15. Guillermo O'Donnell, "On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries," *World Development* 21 (1993): 1355–69.

16. Pilar Domingo, "Judicial Independence and Judicial Reform in Latin America," in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State*, 169.

17. Apposite reflections on this matter in Fred Dallmayr, "Hermeneutics and the Rule of Law," in Gregory Leyh, ed., *Legal Hermeneutics: History, Theory, and Practice* (Berkeley: University of California Press, 1992).

18. See Guillermo O'Donnell, Jorge Vargas Cullell, and Osvaldo M. Iazzetta, eds., *The Quality of Democracy: Theory and Applications* (Notre Dame: University of Notre Dame Press, 2004). This book comments on the valuable and pioneering "Audit on the Quality of Democracy" in Costa Rica, reported in the chapter by Vargas Cullell.