What is Wrong with the Rule of Law?

Ernesto Garzón Valdés

In this paper, I wish to analyse the role of the so-called ‘rule of law’ in a democratic political system. By ‘rule of law’ I will understand simply that it is the law which governs, or in other words: that the law is effectively imposed; and by ‚democracy’ I will understand a political system based on the joint validity of two principles: ‚one person, one vote’ and ‚collective decisions are taken by majority’. To adopt these definitions implies to accept, on the one hand, that ‚rule of law’ and *Rechtsstaat* mean different things, and, on the other, what Hans Kelsen called ‚majority rule’ *(Mehrheitsherrschaft).*

A great part of legal and political philosophy in the past 200 years has focussed on the moral justification of these two means invented by men for the peaceful solution of social disagreements. I think that these efforts have failed, for reasons which are, in a certain sense, diagonally opposed: from democracy, one has expected too much, and from the rule of law, too little.

But this failure does not mean that one should therefore abandon those two instruments. It rather suggests the need to search elsewhere in order to support their full moral justification. That is what I wish to contribute to in this paper. I will start with a discussion of the problem of democracy (I), followed by that of the ‚rule of law’ (II), in order to propose what may be called some ‚moral crutches’ for both of them (III); and I will conclude with a brief consideration specifically of the Latin American case which, as is to be expected, will not be very optimistic (IV).

I.

As self-sufficient justifications of democracy, one can basically think of the following two:

i. the *utilitarian rationale*: The satisfaction of the *preferences* of a majority guarantees a maximum of social happiness. According to this view, what matters is the aggregated satisfaction of people's wants, regardless of their content and the identity of their holders. In that sense, the utilitarian version can do without a particular conception of the good. Every individual counts for one and only one, no matter what his or her moral beliefs might be. Moreover, since priority is given to people's *wants* and not to their interests, the democratic majority rule is thought to be an apt protection against possible attempts at paternalistic or, even worse, perfectionist intervention. Majority rule – or, if you wish, a majoritarian consensus – is therefore held to be an excellent antidote against dictatorships of any kind, whether malevolent or benevolent. In Jeremy Waldron's words:

> "Majoritarianism is not just an effective decision-procedure, it is a respectful one. It respects individuals in two ways. First it respects and takes seriously the reality of their differences of opinions about justice and the common good. Majority-decision does not require anyone's view to be played down or hushed up because of the fancied importance of consensus."[1]

The greater the sum of satisfied wants, the better. The consent of a majority best ensures social happiness as a whole.

ii. the *epistemic rationale*: Majorities are less prone to error. If one accepts that what is at issue are political truths, it is argued, then one must also admit that if every individual voter has a sufficient chance of coming to a correct judgment, the probability that the collective decision of the majority is correct increases with the number of voters.

This argument was first formulated in the 18th century, by the Marquis de Condorcet. It has in recent years been used explicitly by, among others, Carlos Nino. Let us look at it somewhat more closely.

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[1] Jeremy Waldron, *The Dignity of Legislation,* Cambridge: Cambridge University Press 1999, pp. 158 f.

In Condorcet's view, the search for political truth is the reason for action of the *homo suffragans*. What is at issue, he says, is the collective search for truth, or rather for what is most likely to be true. Now, it can be shown that the more people cast their votes, the smaller becomes the probability that the majoritarian decision is wrong.[2] In contrast to the utilitarian argument, however, it is important to note that Condorcet's *homo suffragans* is not supposed to express a want or interest, but a truth-judgment. In that sense, the laws adopted by a majority can be seen as a more precise reformulation of the original social contract, and as a more realistic reference to the citizens' unanimous will in that contract. This conception allowed Condorcet to reach his so often quoted conclusion:

> "A good law must be good for all men, just as a true proposition is true for everyone."[3]

Carlos Nino took as his explicit starting point what he identified as 'Condorcet's theorem.'[4] In his view, democracy is an „institutionalized surrogate" for moral discussion:

> "[D]emocracy can be defined as a process of moral discussion with a time limit."[5]
>
> "[A] process of moral discussion with a certain time limit within which a majoritarian decision must be taken [...] has greater epistemic power for providing access to morally correct decisions than any other collective decision-making procedure."[6]

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[2]Cf. Gilles-Gaston Granger, *La mathématique sociale du marquis de Condorcet*, Paris: Odile Jacob 1989, p. 97: "[T]he act of *Homo suffragans* will tend to bring to light the most probable truth in every question submitted to discussion."

[3]Quoted from Roshdi Rashed, „Commentaire", in Condorcet, *Mathématique et societé*, selection and commentary by Roshdi Rashed, Paris: Hermann 1974, pp. 13-87, p. 66.

[4]Carlos S. Nino, *The constitution of deliberative democracy*, New Haven & London: Yale University Press 1996, p. 127.

[5]Ibid., p. 118.

[6]Ibid., p. 119.

In my view, neither the utilitarian nor the epistemic argument withstands closer scrutiny.

a) Concerning the *utilitarian argument*, the claim that through votes or referenda we can know the voters' preferences has long been refuted. Ever since the formulation of the so-called 'Borda paradox' invoked by Condorcet himself, we know that this is generally impossible as soon as the choice is between more than two candidates or policies. Because in such cases, it may well be that the majority of votes falls on a candidate or policy that is nobody's first preference. Besides, it is also questionable whether people's wants should be taken into account unconditionally: it is not always true that everyone is the best judge of his or her own interests, as John Stuart Mill believed. And it also cannot be generally accepted that paternalism necessarily leads to perfectionism or dictatorship, as Robert Nozick maintains.

Besides, it is not true that the satisfaction of majority wants always means a higher *quantum* of social happiness; because that depends on their intensity too:

> "[A] mild preference on the part of a large majority of the population for preventing a minority from doing something (e. g. engaging in homosexual acts or Protestant forms of worship) might outweigh in the calculus of aggregate want-satisfaction a more intense preference on the part of the minority for doing it."[7]

b) And concerning the *epistemic value* of majority rule, it should not be forgotten that in Condorcet as well as in Nino, the pursuit of that value is subject to strong conditions.

[7] Brian Barry, *Justice as Impartiality*, Oxford: Clarendon Press 1995, p. 135. Jeremy Waldron ("Rights and majorities:Rousseau revisited," in: *Liberal Rights*. Collected Papers 1981-1991, Cambridge: Cambridge University Press 1993, pp. 392-421, pp. 396 f.) expresses a similar opinion: „Moreover, an electoral outcome can correspond only very roughly to a social utility function. Voting cannot possibly be made to reflect the intensity of the satisfaction or dissatisfaction anticipated by individuals with respect to some law."

In the case of Condorcet, who in this followed Locke, there was a certain continuity between the idea of the social contract and that of the respect of „natural rights" and majority rule. That is why Condorcet could say that the laws are not

> "the expression of the arbitrary will of the greater number, but like truths deducted by reason from the principles of natural law and adopted as such by the majority."[8]

However, Condorcet knew perfectly well that in reality,

> "In the particular instance of exercizing the right to vote, the voter is exposed to the interplay of interests, passions, corruption and error [...] Even if the effect of these causes is small, it is in any case enough to make the fundamental hypothesis of the model illusory."[9]

One must, therefore, distinguish between the vote as an empirical fact, that is, the psycho-social phenomenon of voting, and the ideal conception of voting as a way of discovering the truth:

> "There is a great number of important questions that are complicated or subject to the workings of prejudice and passions, on which an uneducated person is likely to have a wrong opinion. Hence, there is a great number of points on which the greater the number of voters, the greater will be the fear that the majority will reach a wrong decision. A purely democratic constitution will then be the worst of all for all matters on which the people do not know the truth.[10]

Thus, for the model to work, the voters' decisions must

> "always be taken under certain conditions (or constraints). The number of voters, the required majority, the way of deliberation, the voters' education and illustration [...], are necessary conditions for the definition of the decision situation. The truth of a decision depends not only on the voters, but on the conditions under which the vote is cast, on the form of assembly [...] as well as on its decision-making procedure."[11]

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[8]Quoted from Roshdi Rashed, „Commentaire", in Condorcet, *Mathématique et societé*, op. cit., p. 68.
[9]Ibid., p. 76.
[10]Ibid. p. 74.
[11]Ibid., p. 70.

In this respect, Condorcet mentioned the following ideal conditions:

> "Let us assume, first of all, that the assemblies consist of voters whose minds are of equal sharpness and who are equally illustrated; and let us assume that none of the voters has influence over the others' votes, and that all express their opinion in good faith."[12]

> "[Let us assume that all voters have] equal wisdom, an equal sharpness of mind, of which they make equal use, that all are motivated by an equal sense of justice, and finally that each votes on his own terms, as would be the case if none had over another's opinion greater influence than that which he has received himself."[13]

This is very similar to the conditions listed by Nino, for democratic discussion really to be an institutionalized surrogate of moral discussion – prerequisites rarely satisfied in real parliamentary debate or in popular elections. These prerequisites are, among others, that

> i. "all participants are required [...] to justify their proposals to the others,"
> ii. the positions taken must be "real and genuine,"
> iii. the discussion must be "authentic,"
> iv. propositions must be acceptable „from an impartial point of view,"
> v. they may not consist of a „mere expression of wants or description of interests,"
> vi. they may also not be a "mere description of facts, such as a tradition or custom,"
> vii. the requirement of universality must be satisfied, and
> viii. propositions, when normative, may not be "only prudential or aesthetic," but must be of a moral kind.[14]

Another condition mentioned by Nino which often does not seem to be satisfied in real life is that

> "In a working democracy, it is essential that the majority never be a definite group of the population but only a construction which refers to individuals who change constantly according to the issue at stake."[15]

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[12]Condorcet, *Mathématique et societé*, op. cit., p. 152.
[13]Quoted from Roshdi Rashed, "Commentaire," in Condorcet, *Mathématique et societé*, op. cit. p. 71.
[14]Carlos S. Nino, *The constitution of deliberative democracy*, op. cit., pp. 121 f.
[15]Ibid., pp. 126 f.

Somewhat later, Nino again states the conditions which are to ensure the epistemic capacity of collective discussion and majoritarian decision-making. They are, he says,

> "that all interested parties participate in the discussion and decision; that they participate on a reasonably equal basis and without any coercion; that they are able to express their interests and to justify them on the basis of genuine arguments; that the group has a proper size which maximizes the probability of a correct result; that there are no insular minorities, but the composition of majorities and minorities changes with the issues; and that people are not extraordinarily excited by emotions."[16]

Obviously, by accepting the constraints mentioned by Condorcet or Nino, one leaves the realm of the mere causal efficacy of a procedure for the aggregation of votes, and enters that of constraints on the very act of casting a vote. *Homo suffragans* thus is converted into *homo suffragans restrictus*. The model of *homo suffragans irrestrictus* satisfies neither the purposes of the utilitarian approach nor that of the epistemic version of democracy.

This immediately raises questions about the restrictions this implies for the pursuit of individual wants and interests of those participating in the political game of democracy. Concerning their source, there are only two possibilities: they are either self-imposed, or have an external origin.

In the history of political thinking, several versions of the idea of self-imposed constraints have been proposed. Let me briefly mention the most important ones:

[16]Ibid., p. 129.

i) The first alternative is that of Jean-Jacques Rousseau. His main concern with the design of a morally acceptable political system was how individual autonomy – which, he thought, obtains in the state of nature – can be preserved. In his view, the task was the following:

> "To find a form of association which defends and protects with all the power of the community every member's integrity and property and in which everyone, in joining himself to all others, still obeys no-one but himself and remains as free as before."[17]

In order to reach this goal, what is necessary, Rousseau says, is

> "the total surrender of every member with all his rights to the community as a whole. Because [...] when everyone surrenders completely, the condition is the same for everyone, and since the condition is the same for everyone, no-one has an interest in making it burdensome for the others."[18]

"Total surrender" here means, above all, to give up one's *amour propre* (while preserving, of course, one's *amour de soi-même*), and it implies that the 'general will' is accepted as the only criterion for the moral correctness of each 'particular will'. In other words, the citizen of Rousseau's republic is a subject who willingly refrains from pursuing his individual preferences whenever they are incompatible with the common good. As already mentioned, in contrast to the utilitarian proposal, Rousseau's voters are supposed to express their opinions about what will best serve the common interest, instead of their own personal preferences. That is not an easy task

[17] Jean-Jacques Rousseau, *Du Contrat Social; ou, Principes du Droit Politique*, in: *Oeuvres complètes*, Paris: Gallimard, vol. III, pp. 347-470, p. 360: "'Trouver une forme d'association qui défende et protège de toute la force commune la personne et les biens de chaque associé, et par laquelle chacun s'unissant à tous n'obéisse pourtant qu'à lui-même et reste aussi libre qu'auparavant.'"

[18] Ibid., p. 361: ... l'aliénation totale de chaque associé avec tous ses droits à toute la communauté. Car, premièrement, chacun se donnant tout entier, la condition est égale pour tous, et la condition étant égale pour tous, nul n'a intérêt de la rendre onéreuse aux autres."

> "because the particular will tends by its nature to privilege, and the general will to equality."[19]

But that it is difficult does not mean that it is impossible. It is not infrequent that citizens are willing voluntarily to renounce the pursuit of their selfish interests and to comply with moral norms in their political conduct. We only need to think of the costs of voting which the democratic citizen accepts even if this brings him neither immediate nor long-term benefits, or many people's willingness to help others, or their voluntary acceptance of the welfare state with all the sacrifices it implies in terms of taxes. In all these cases, citizens restrain their natural tendencies and autonomously accept a political or legal norm in the strong sense, that is, they adopt it, make it their own, and adhere to it for moral reasons. This, then, is the state of affairs Robert Paul Wolff seems to allude to when he says:

> "Insofar as everyone does his best to realize the general good, the collectivity is a genuine moral and political community."[20]

In such a community, *all* members are *always* authentic democratic citizens. However, from an empirical point of view, Rousseau's requirement that everyone must voluntarily give up his egoism before a democratic community can arise is rather unrealistic. Rousseau himself acknowledged this when he said:

> "If there existed a people of gods, it would govern itself democratically. But such a perfect government is not fitting for men."[21]

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[19]Ibid., p. 368: "Car la volonté particulière tend par sa nature aux préférences, et la volonté générale à l'égalité."

[20]Cf. Robert Paul Wolff, op. cit., p. 56.

[21]Jean-Jacques Rousseau, op. cit., p. 406: "S'il y avait un peuple de dieux, il se gouvernerait démocratiquement. Un gouvernement si parfait ne convient pas à des hommes."

ii) The second proposal I wish to present is David Hume's idea of the citizen as a subject whose interest in the common good is provoked through sympathy.

Because of sympathy, Hume tells us, „the minds of men are mirrors to one another."[22] Therefore, sympathy fosters what has been called „the socialization of egoism,"[23] that is, the adoption of a benevolent attitude. By way of sympathy, I penetrate into my fellow-man's mind and even adopt his point of view in judging his actions and sentiments. To the extent that I share the feelings of another, it will interest me whether he is happy or miserable. I put myself in another's shoes, not out of 'compassion' *(Mitleid)*, but because I share his feelings *(Mitgefühl)*.[24] According to Mackie, this empathy leads us not only to adopt the other's point of view, but even to adopt the standpoint of an impartial observer.[25]

It is out of sympathy that we approve of the natural virtues (meekness, beneficence, charity, generosity, clemency, moderation and equity)[26] as well as of the artificial one (justice). Sympathy thus „becomes the foundation of his [Hume's] whole moral theory."[27] For instance, although the *practice* of justice is based primarily on self-interest, its *characterization* as moral is based on our „sympathizing identification with the public interest."

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[22]David Hume, *Treatise of Human Nature* (quoted from the Penguin edition, ed. Ernest C. Mossner)., Book II, Part II, Sect. V. Of our esteem for the rich and powerful, p. 414.

[23]Cf. Johannes Rohbeck, *Egoismus und Sympathie. David Humes Gesellschafts- und Erkenntnistheorie,* Francfort/New York: Campus 1978, p. 126.

[24]Cf. J. L. Mackie, *Hume's Moral Theory*, London: Routledge & Kegan Paul 1980, p. 120.

[25] Cf. ibid., pp. 85 and 120.

[26]Hume, *Treatise* Book III, Part III, Sect. I, p. 629.

[27]Mackie, op. cit., p. 5.

It is the artifice of sympathy, Hume thinks, which enables people to keep their selfish inclinations and yet to socialize their egoism, that is, to constrain the pursuit of their self-centered preferences for the sake of greater tolerance and benevolence. Sympathy thus makes us more moral. Without it, the existence of public morality could not be understood. And, of course, the more we sympathetically identify with the public interest, the more the conflict between our autonomy and the heteronomous imposition of the rules of justice is reduced. That is why we are willing to accept the artificial virtue of justice even if in some cases it may require a sacrifice of our immediate interests.

In a democratic community of 'sympathetic' Humean citizens, outcomes of votes are by definition the expression of a 'socialized egoism' and constitute an approach to the discovery of the 'political truth'. It therefore seems plausible to say that such a community, in which members restrict their selfish impulses for the sake of the common good, is a *moral* community.

Hume was convinced that his proposal is more realistic than that of his French contemporary – that 'little nice man', as he characterized Rousseau[28] – since the tendency to sympathy is part of human nature itself and therefore according to Hume's conception it is possible to explain how egoism can be overcome without having to assume the existence of supernatural entities such as a 'general will.' However, given the limited scope of sympathy which Hume himself admitted, even if one accepts the possibility of communities constituted by 'sympathetic' citizens willing to accept the principles of democracy, they would have to be

[28]Cf. n. 38 of the editor of the Spanish version of Hume's *Treatise*: *Tratado de la naturaleza humana*, transl. Félix Duque, Barcelona: Editora Nacional 1981, p. 66.

relatively small and culturally homogeneous. And that means that Hume's proposal suffers from the same inconveniences as Rousseau's version, concerning the case of democracy for a large and heterogeneous population.

iii) The third proposal I wish to discuss here is that of *reasonable* citizens, capable of refraining from the unilateral imposition of their own conceptions of the good. This has been postulated as a solution to the problem of reaching democratic agreements precisely in such populous and heterogeneous societies. Among its most prominent advocates are John Rawls and Brian Barry. In Rawls's model, the democratic citizen must not necessarily be a moral agent, as Rousseau required, or a 'sympathizer', as Hume thought. He only needs to be reasonable.

As is well-known, the criterion of reasonableness plays a main role in Rawls's theory of the justification of political systems:

> "[...] the idea of the reasonable is more suitable as part of the basis of public justification for a constitutional regime than the idea of moral truth. Holding a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster political division."[29]

Rawls's conception of political justice does not need the concept of truth – which means that it is epistemically more modest than the version on the line Condorcet-Nino –, and contents itself with the idea of the reasonable since that idea „makes an overlapping consensus of reasonable doctrines possible in ways the concept of truth may not."[30]

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[29] John Rawls, *Political Liberalism*, New York: Columbia University Press 1993, p. 129.
[30] Ibid., p. 94.

The central thesis of Rawls's *Political Liberalism* is that a theory of justice is justified if it can be accepted by any reasonable person. As is commonly known, Rawls establishes a difference between practical rationality and reasonableness that goes back to Kant. A purely rational agent lacks what Kant has called a „predisposition for moral personality." The reasonable agent, in contrast, possesses that capacity:

> "The disposition to be reasonable is neither derived from nor opposed to the rational but it is incompatible with egoism, as it is related to the disposition to act morally.[31]

Based on his concept of reasonableness, Rawls formulates what can be called the *thesis of reasonable people* which, in his view, confers moral quality on a political system.

In his book *Justice as Impartiality*,[32] taking as his starting point Thomas Scanlon's conception of the original position, Brian Barry too uses the idea of reasonableness in order to define his conception of justice:

> "A theory of justice which makes it turn on the terms of reasonable agreement I call a theory of justice as impartiality."[33]

Both in Rawls and in Barry, reasonableness is a constraint on egoism, that is, on the unconditional pursuit of one's own preferences. A democracy made up of reasonable citizens would, they think, reach the highest possible degree of justice and would therefore be internally justified. Its legitimacy derives from the „disposition to act morally" that motivates its members.

[31]Ibid., p. 49, n. 1.
[32]Brian Barry, Justice as Impartiality, Oxford: Clarendon 1995.
[33]Ibid., p. 7.

Of course, the ‘overlapping consensus’ reasonable citizens are thought to reach can also be regarded as a weak – and therefore somewhat more realistic – version of Rousseau’s idea of consensus: After all, not everyone in a democratic society is indeed reasonable. There are also such unreasonable people as, for instance, perfectionists, advocates of slavery,[34] Thomists, Nietzscheans, and Roman Catholics, whom, Barry, says, one can only „try to defeat [...] politically and, if necessary, seek to repress [...] by force.”[35]

In any case, Rawls’s theory as well as Barry’s use the criterion of reasonableness as a criterion of correctness with respect to political justice in multicultural societies which are, however, homogeneous in the sense that their members are willing to refrain from the imposition of their own conceptions of the good in order to reach a reasonable social peace. Both theories claim to be neutral with respect to different conceptions of the good. This neutrality, it is assumed, does not itself presuppose any conception of the good. One could say that, in a certain sense, it is self-standing, and precisely because of this it „appears as the solution to the agreement problem.[36] The only thing it requires, Barry says, is that social agreements “can reasonably be accepted by people who are free and equal.”[37] And Rawls too requires that the parties to reasonable agreements are „free and equal citizens.”[38]

Rawls’s and Barry’s proposal of the reasonable citizen has certain advantages over the Humean model because the scope of reasonableness is not conditional on cultural or ethnic homogeneity. What can

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[34]Ibid, p. 196.
[35]Ibid, pp. 168 f.
[36]Ibid., p. 168.
[37]Ibid., p. 112.
[38]John Rawls, *Political Liberalism*, op. cit., p. 55.

be doubted, however, is its alleged moral neutrality: it seems to me that the requirement that the values of liberty and equality must be respected in a society of reasonable citizens implies an axiological commitment which cannot itself be subject to reasonable agreement since it is presupposed by such an agreement. Besides, there is the question whether an agreement is reasonable when it is reached by reasonable people, or whether, *vice versa*, people are reasonable insofar as their agreements are. I think Gerald Gaus is right when he observes:

> "Instead of deeming a belief reasonable if it is arrived at by a reasonable person, the political liberal may directly invoke standards for the reasonableness of beliefs themselves."[39]

Thus, would it not perhaps be better to abandon the idea of neutrality and concentrate instead on the possibility to look elsewhere for support of the justification of democracy? Let me briefly mention one attempt that can, I think, be interpreted in that sense:

iv) In a recent article, Amy Gutmann and Dennis Thompson propose to base the justification of democracy on citizens' deliberative activities:

> "Deliberative democracy is a conception of democratic politics in which decisions and policies are justified in a process of discussion among free and equal citizens or their accountable representatives. On our view, a deliberative theory contains a set of principles that prescribe fair terms of cooperation. Its fundamental principle is that citizens owe one another justifications for the laws they collectively impose on one another. The theory is

[39]Gerald Gaus, "The Rational, the Reasonable, and Justification," in: *The Journal of Political Philosophy* 3:3 (September 1995), pp. 234-258, p. 253; quoted from Lewis Yelin, Yelin reviews Gaus, in: *Brown Electronic Article Review Service*, eds. Jamie Dreier/David Estlund, http://www.brown.edu/Departments/Philosophy/bears/homepage.html, posted September 19, 1995, p. 253.

> deliberative because the terms of cooperation that it recommends are conceived as reasons that citizens or their accountable representatives give to one another in an ongoing process of mutual justification. The reasons are not merely procedural ('because the majority favors it') or purely substantive ('because it is a human right'). They appeal to moral principles (such as basic liberty or equal opportunity) that citizens who are motivated to find fair terms of cooperation can reasonably accept.'[40]

The appeal to moral principles means that the ideal of neutrality is abandoned: „neutrality is undesirable and unattainable.'[41] This suggests that those principles provide the framework for the conduct of deliberative citizens; but then the justification of democratic procedures does not seem to arise through an application of the procedures themselves (as the passage quoted above claims), but to be external to them. However, this conclusion is perhaps premature, considering that elsewhere the authors explain:

> "First, the content of the principles themselves is partly shaped by moral discussion in the political process. [...] Second, the constraints on the principles of liberty and opportunity themselves – in particular, limited resources – are less fixed than is often assumed. Moral debate in politics can reveal new possibilities and suggest new directions, making realization of the principles more feasible than was previously thought. Because deliberation has the potential for improving collective understandings of liberty and opportunity, the conditions of deliberation are an indispensable part of any perspective committed to securing liberty and opportunity for all.'[42]

And:

> "In deliberative democracy, [...] the search for justifiable answers takes place through arguments constrained by constitutional principles, which are in turn themselves developed through deliberation.'[43]

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[40]Cf. Amy Gutmann and Dennis Thompson, „Why Deliberative Democracy is Different" in: *Social Philosophy & Policy* 17:1 (Winter 2000), pp. 161-180, p. 161.

[41]Ibid., p. 162.

[42]Amy Gutmann and Dennis Thompson, *Democracy and disagreement,* Cambridge, Mass.: Harvard University Press 1996, p. 224.

[43]Ibid., p. 229.

In any case, I must admit that I find it difficult to understand where the constitutional principles which constrain the arguments in democratic deliberation are thought to come from. Gutmann and Thompson's deliberative citizens have a disquieting similarity with that baron who tried to pull himself out of a swamp by his own hair.

I have dwelled on these different attempts to justify democracy by focussing on the conduct of the citizens – which I have deliberately sketched in a very broad and therefore somewhat distorted outline – because I wanted to show their deficiencies and the need to look for external support.

The 'rule of law' seems to be a main candidate for providing it.

II.

As in the case of democracy, I will start with a minimalist conception of the term 'rule of law': it is to mean the rule of general provisions (laws) which ensure the predictability of certain consequences of human behaviour by determining the deontic status of acts in a society.

The argument I wish to consider here is the following: Since we cannot confide in the angelical, sympathetic, reasonable or deliberative nature of the members of society and must always reckon with the existence of the diabolic, antipathetic, unreasonable or impulsive, would it not be better to rely on the artifice of law which invariably applies to everyone and can therefore free us of the uncertainty deriving from

man's not very reliable nature? In other words: Would it not be better to replace the 'rule of men' by the 'rule of laws', to use a well-known formula coined by Norberto Bobbio?[44]

From Plato and Aristotle over Hobbes and Locke all the way to Kant, distrust in human nature has been the main foundation of the moral justification of the state, as a normative artifice designed to ensure people's peaceful survival. While Plato saw the salvation of the *pólis* where the rulers are „servants of the laws,'"[45] and Aristotle believed that it is best for the government of a community to avoid the passion „which every human soul necessarily possesses" and therefore to rely on the law, because in law such passion "does not exist at all.'"[46] Kant is the thinker who seemed to have been most clearly aware of the fact that real moral beings cannot be conceived as detached from all personal, empirical properties. Kant knew that citizens are persons of blood and bones, with weaknesses and virtues, and therefore he argued in favour of a political system that can function even for a society of egoists, if only they are willing to live in society. His notion of 'asocial sociability' (*ungesellige Geselligkeit*)[47] condenses that idea. To quote Kant's well-known formulation:

> "The problem of establishing a state [...] has a solution even for a nation of devils (provided they are rational), and that problem is the following: 'To give an order to a multitude of rational beings, who all together require general laws for their survival but each one of which is willing to exempt himself from them, and to design a constitution for them in such a way that, although in their private purposes they oppose each other, yet they will con-

[44] Cf. Norberto Bobbio, „Governo degli uomini o governo delle leggi?" in: id., *Il futuro della democrazia*, Torino: Einaudi 1984, pp. 148-170.

[45] *Nómoi* 715 d.

[46] *Política* 1286.

[47] Immanuel Kant, „Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht", in: *Werke*, Francfort/M. : Insel 1964, vol. VI, pp. 31-50, p. 37.

> strain each other in such a way that in their public behaviour the result is precisely the same as if they did not have such bad inclinations.[48]

The 'rule of law' guarantees collective certainty and the equal treatment of all classes of acts and actors the laws refer to, because of their universal form. It also puts an end to the simultaneous imposition of norms based on diverging individual opinions. The law cuts such disputes short by stipulating for everyone what individual and collective conduct should be like, and its validity is independent of the content of its provisions. As long as they have been issued according to the principles of democracy (i. e., 'one person, one vote' plus majority-rule), that seems to be the best one can hope for in a society which does not want to live in uncertainty or under the ever-changing arbitrary will of its rulers. But that is a conclusion which does not directly derive from the previous, because it must be remembered that

> "the Rule of Law is not simply the principle that officials and citizens should apply and obey the law even when it disserves their own interests. It is the principle that an official or citizen should do this even when the law is – in their confident opinion – unjust, morally wrong, or misguided as a matter of policy. For the enactment of the measure in question is evidence of the existence of a view concerning its justice, morality, or desirability which is different from their own; *someone* must have been in favor of the law or thought it is a good idea. In other words, the law's existence, together with the individual's own opinion, is evidence of *moral disagreement* in the community on the underlying issue."[49]

[48] Immanuel Kant, „Zum ewigen Frieden. Ein philosophischer Entwurf", in: *Werke*, cit., p. 224: „Das Problem der Staatserrichtung ist [...] selbst für ein Volk von Teufeln (wenn sie nur Verstand haben) auflösbar und lautet so: 'Eine Menge von vernünftigen Wesen, die insgesammt allgemeine Gesetze für ihre Erhaltung verlangen, deren jedes aber ingeheim sich davon auszunehmen geneigt ist, so zu ordnen und ihre Verfassung einzurichten, daß, obgleich sie in ihren Privatgesinnungen einander entgegen streben, diese einander doch so aufhalten, daß in ihrem öffentlichen Verhalten der Erfolg eben derselbe ist, als ob sie keine solche böse Gesinnungen hätten.'"

[49] Jeremy Waldron, *The Dignity of Legisation*, Cambridge: University Press, p. 37.

This observation by Waldron is relevant for our topic: If a moral justification for democracy is to be found in the 'rule of law' and if the existence of laws is a reflection of the existence of *moral disagreement*, then it is of utmost importance to inquire about what kind of moral disagreement we are dealing with. Surely, this disagreement cannot go beyond certain limits which define what is *not* negotiable even for citizens willing to socialize their egoism – to use Hume's phrase once again.

The 'rule of law', in the sense in which I here understand it, cannot by itself determine what those limits are – after all, as Hobbes said, „*auctoritas non veritas facit legem*". The certainty guaranteed by the 'rule of law' is perfectly compatible with morally repugnant regimes. One needs only to think of the Nazi regime and its laws for "ethnic purity" which provided what has been called a "calculable inequity"[50] for Germans of Jewish origin.

Even Plato already realized that if the laws are issued by an authority, the only way to avoid injustice is to give that authority moral quality. It therefore comes as no surprise that to the question which opens the first book of the *Nómoi*, "Is it a god or a man who issues your laws" Clínias straighforwardly replies "A god, if we are to speak with full justice." The idea of a legislator-god as a means to link *auctoritas* to *veritas* for centuries also marked the Jewish-Christian legal and moral discourse. When that solution is rejected, one must search for rational criteria of justice which may provide arguments in favor of reducing the power of rulers and the shortcomings of the 'rule of law.' Now, such criteria could not be derived from a democratic procedure based merely on a majoritarian consensus, nor from a legal order

[50]Hans Buchheim, *Política y poder,* Barcelona/Caracas: Alfa 1985, p. 173.

whose only function is the termination of a hypothetical war-like state of nature. One must look elsewhere for the „moral crutches“ which can guarantee a morally acceptable course of democracy and the imposition of fair laws.

III.

The basic idea underlying the recourse to ‘crutches’ is that the moral legitimacy of a legal or political system must not be confused with that system’s stability. Legitimacy depends on the compatibility of a system’s principles and rules with the principles and rules of a critical ethics, whereas stability depends on the moral quality of citizens. In order to ensure legitimacy, legislative power must be constrained. In contrast, whether citizens behave morally is primarily a matter of political and moral education. Here, I will only consider the question of legitimacy.

Obviously, in order to prevent authorities from violating with their decisions the constraints of what is morally acceptable, barriers against their power must be erected. They must not be allowed to succumb to the temptation of indulging in legislative egoism – in what, paraphrasing Macaulay, could be called ‘despotism by election.’ As William Nelson remarked:

> “More generally, if we suspect that we will find it difficult to resist temptations, that can be a ground for precommitment strategies; and one form of precommitment is simply to avoid having the right to succumb to the temptation. Constitutional limits on legislative authority can be viewed as precommitment strategies of this sort.”[51]

[51] William Nelson, „The Institutions of Deliberative Democracy“, in: *Social Philosophy & Policy* 17:1 (Winter 2000), pp. 181-202, p. 196.

The limits we are looking for have usually been set in liberal constitutions with a social component. In them, the 'rule of law' of anglo-saxon origin gave way, first, to the *Rechtsstaat* (literally: the 'state of rights' or 'state based on rights') which to the principle of certainty added the respect of individual rights,[52] and subsequently to the *sozialer Rechtsstaat* (i. e. the 'social state of rights') which acknowledges the duty of the state to protect the weaker sectors of society.

It is precisely these principles and rules which give the republican – or, if you prefer, the liberal-democratic – order its moral quality and ensure its moralizing function. In other words: It is *not* that the 'off limits' area would come about because citizens are moral agents or sympathize with the common good; rather, it is the other way round: only the existence of that sphere creates the conditions for people to be able to become moral citizens. The morality of citizens (where it exists) is owed to that 'off limits' sphere, not *vice versa*. And therefore, a morally acceptable exercise of liberty is not that which results from abolishing the state as such, with all its power, as the anarchists claim, or from reducing that power as radically as neo-liberals advocate; quite to the contrary: it can only happen by effectively implementing the institutional 'off limits' of individual basic rights. That is, I think, the meaning of Emile Durkheim's frequently cited and somewhat paradoxical-sounding assertion that *The stronger the state, the freer the citizen*.

Where this has been done, the law has acquired the moralizing function Kant referred to. The solution to the problem of political morality, he argued, is not to be looked for in the moral quality of *citizens* but in that of the *norms* of the legal system. That is why he could say:

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[52]Cf. Waldron, op. cit., p. 7.

> "in their outward behaviour [people] do come very close to what the idea of law prescribes, although the cause of such behaviour is certainly not their internal morality (just as a good state constitution is not to be expected from such morality but rather, inversely, the good moral conformation of a people from the former)."[53]

And specifically with respect to democracy, when basic rights are secured then the second of the two fundamental principles of democracy, i.e. 'majority rule', is converted into the rule of the 'majority principle'. By this I mean that majorities are subjected to the constraints imposed by the 'off limits' area of basic rights which are immune to majority-decision. Of course, for the stability of such a system the attitude of citizens and representatives towards it is important. If people do not adopt an 'internal point of view' (in H. L. A. Hart's sense) towards the majority principle and the rules deriving from it, no constitutionally fixed 'off limits' can be actually effective and no 'eternity clause' (like that of art. 79.3 of the German Basic Law) will be able to prevent the downfall of democracy. With this, we are touching on the question of whether a sovereign can be legally constrained, which I will not consider at this point.

Instead, let us come back to the question raised in the title of this paper. My answer to it is: it depends. If we interpret the term 'rule of law' in the minimalist sense, then the rule of law is clearly insufficient to guarantee a system that can receive unconditional moral approval. But if we interpret 'rule of law' as referring to a system in accordance with the conception of liberal constitutionalism, i. e. in the sense of a *sozialer Rechtsstaat* (a 'social state of rights'), then my answer is:

[53]Ibid., p. 39: „[...] daß [die Menschen] sich doch im äußeren Verhalten dem, was die Rechtsidee vorschreibt, schon sehr nähern, obgleich das Innere der Moralität davon sicherlich nicht die Ursache ist (wie denn auch nicht von dieser die gute Staatsverfassung, sondern vielmehr umgekehrt von der letzteren allererst die gute moralische Bildung eines Volks zu erwarten ist)."

'Nothing is wrong with the rule of law!'

This having been said, let me now conclude this paper by taking a look at the relationship between democracy and the 'rule of law' particularly in Latin America.

IV.

In a memorable novel by the Cuban author Alejo Carpentier, the First Magistrate of an imaginary, but very realistically drawn Latin American country nicely summarizes the attitude of more than a few of the subcontinent's rulers towards the constitutional rule of law in the following sentence:

> "as we say down there, 'theory is always fucked up by practice' and 'a leader with balls doesn't subject himself to papers.'"[54]

Presidents Hugo Chávez Frías in Venezuela and Alberto Fujimori in Peru are recent examples for the persisting validity of the fictitious First Magistrate's observation:

*Chávez, in his unpredictable 'dialogues' with Simón Bolívar (d. 1830) for whom he allegedly always reserves a seat at his side, has proved to subscribe to a heroic-mystical interpretation of art. 3 of the Venezuelan Constitution which says:

> "The government of the Republic of Venezuela is and always will be democratic, representative, responsible and alternating."

And in order to be able to appeal to the 'papers' in promoting his conceptions, in 1999 he imposed a constitutional reform which produced a tailor-made new constitution fitting snugly to his authoritarian idea

[54] Alejo Carpentier, *El recurso del método,* Madrid: Siglo XXI 1976, p. 31: „como decimos allá, 'la teoría siempre se jode ante la práctica' y 'jefe con cojones no se guía por papelitos.'"

of democracy – a constitution which, with a bit of luck, will allow him to govern the fate of Venezuela for the next twelve years or so.

*And Fujimori, while invoking the values of democracy and universal suffrage, is just now attempting to perpetuate himself in power, despite international protests against the electoral fraud in the first round of the recent elections.

A quarter of a century lies between the writing of the First Magistrate's sentence and the conduct of these two presidents. But things haven't changed much: the latter are typical examples of the peculiar interpretation of democracy and of the 'rule of law' which is effective until this very day in large parts of Latin America.

Concerning the establishment of a politically democratic and socially just order, Latin America continues to be the continent of disenchantment and frustration. The beginning of the 21st century finds many of its countries worse off than at the beginning of the 20th century. One only needs to think of the well-founded hopes raised by the *Mexican* Revolution, which in 1917 promulgated the first constitution in the world with a truly social content;[55] or the establishment of a democratic and acceptably liberal republic in *Argentina* in 1916, which hoped for the political integration of second-generation immigrants; or the end of the civil wars which had marked political life in *Colombia* during the 19th century. At the

[55]Take, for instance, art. 123 which stipulated a working day of eight hours, the prohibition to employ children younger than 12 years of age, a fully paid leave of absence for women during the last three months of pregnancy and the first month after giving birth, extra resting time during the period of lactation, the introduction of a minimal wage „sufficient to satisfy the normal needs of a worker's life, his education and his honest pleasures", equal pay regardless of sex or nationality, the non-distrainability of the minimum wage, the establishment of Popular Insurance Funds covering disability, unemployment, accidents, and death, and the right to go on strike and to lock out.

other end, the recent development in Chiapas, the growing social exclusion in Argentina caused by the uncontrolled neo-liberalism of the Menem administration, or the dissolution of institutions in Colombia are current realities testifying to serious institutional failure. Fujimori's *Peru* and Chávez's *Venezuela* are indeed not very encouraging as models of democratic reassurance. At the same time, the *Cuban* Revolution, once greeted with such great legitimate expectations, has been displaying alarming symptoms of authoritarian degeneration; the *Chilean* democracy, only recently restored, could, according to the government's own declarations, have been endangered by the extradition of a former dictator of paradigmatic dimensions; and, *Haiti*, the country that can claim the glory of having issued one of the first democratic constitutions in the world,[56] remains today one of the poorest countries in the world, with one of the worst records of misery and destitution.

Because of such facts, Latin America has been unhappily characterized as an institutionally paradoxical continent. Indeed, it came to independent life under the auspices of the best European traditions of the 17th and 18th centuries: the liberal theory of John Locke as reflected in the Constitution of the United States; the Spanish process of enlightenment which, despite its incomplete secularization, was marked by the genuine wish to establish the rule of reason in political and economic relations; and, of course, the egalitarian message of the French Revolution. It was reasonable to think that this continent, despite the

[56] I mean the Constitution of 1801 which, among others, contained the following provisions: 'Art. 3: Servitude has been abolished forever. All men are born, live and die free [...]'; 'Art. 5: There is no other distinction than that of virtue and talent, no other superiority than that given by the law for the exercise of a public office. The law is the same for everyone, in punishment as well as in protection.'

doubts formulated by Hegel, was destined to become one more triumph on the march of reason in history and to put into practice the ideal of a perfect state organization.

Instead, the countries of Latina America have become useful laboratories for the falsification of just about all theories about the development of democracy, thus causing the perplexity of political scientists who have felt obliged to take recourse to concepts such as 'democracy sui generis,', 'anomy,' or 'defective democracy,' in order to explain the peculiar fate of these societies. The reasons for that institutional failure have been the subject of numerous studies about which I will not say anything here. I only wish to consider briefly, in a very fragmentary way, the role the law – seen from the theoretical perspective both of a normative order and of an order regulating social behaviour – might have played in the attempts to establish a democractic system. This will lead me to suggest, by way of conclusion, greater caution concerning the chances of success of the constitutional reforms undertaken in some countries of the region as part of the transition from dictatorship.

In the political history of Latin America, constitutions have played the almost 'metaphysical' role – to use a well-known observation by Pablo González Casanova – of an ideology that is available and dismissable *ad libitum*, depending on the needs of the moment. The constitution thus has become something like a „last resort for arguments" *(Argumentationsreserve)* to be invoked by governments and political parties, with the additional advantage of the emotive charge of the expression "constitutional law."

The constitution has thus been converted into an essential element of political mythology. It is invoked, particularly in times of crisis, in order to blur the existing discrepancies between professed values

and actual behavior, but that does not mean that its principles do indeed have any practical relevance.[57] And when for some reason it is considered inconvenient to keep referring to the same, existing text, then the constitution is reformed, as a demonstration of a strong political will apparently intent on changing reality.

In many Latin American countries, the constitutional order has turned out to be of little relevance for the legitimation of the conduct of those in power. Even democratically elected presidents, such as Carlos Menem in Argentina, carry out their functions as if they were *de legibus solutus*, on a rather strange interpretation of the so-called 'free mandate.' For them, not even the minimal controls implied by the 'rule of law' in the weak version I presented earlier exist. They enjoy what can only be called 'impunity.'

That situation of being excepted from, or of circumventing, the controls imposed by the 'rule of law' usually extends to the larger group of citizens who have close connections to whoever happens to be in power. The clearest description of that situation has been given by mafia boss Alfredo Yabrán who, before killing himself on May 20, 1988, had benefitted from close ties to high-level government circles in Argentina and who once said in an interview: „Power means impunity."

Under the protection of that impunity, subsystems for the distribution of burdens and benefits can grow on the margins of the formally valid system – a kind of 'alternative regime' the existence of which clearly manifests the pathological state of the official legal order. In the words of Guillermo O'Donnell:

[57] On the conception of a political myth, cf. Kenneth M. Coleman, „The Political Mythology of the Monroe Doctrine", in: John D. Martz and Lars Schoultz (eds.), *Latin America, the United States, and the Inter-American System*, Boulder, Col.: Westview 1980, pp. 95-114.

> "if the legal system is supposed to texture, stabilize, and order manifold social relations, then not only when state agents but also when private actors violate the law with impunity, the rule of law is at best truncated. Whether state agents perpetrate unlawful acts on their own, or *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.'[58]

And what is worse: impunity is, of course, only the manifestation in the judicial sphere of a much broader phenomenon, namely: corruption. The ubiquity of corruption in Latin American justice systems is so notorious that more than a few legal and social scientists think that the term 'anomy' is the most appropriate for describing the situation. According to the 1997 Corruption Index elaborated by *Transparency International*, among the 17 countries (out of a list of 52) perceived as the most corrupt, seven are Latin American: Uruguay, Argentina, Bolivia, Mexico, Brazil, Colombia and Venezuela. It is perhaps interesting to note that in four of these, constitutional reforms have been undertaken in the 90's.

In a bitterly ironic essay, a few years ago Arnaldo Kraus considered the question whether Mexico could function without bribery. His answer was:

> "My starting point is that the vice of corruption is a historically entrenched evil among us: one is born and grows up with it and in it. With the long entrenched, it is as with what one inherits: it is impossible to shed. [...] Bribery is ubiquitous in Mexico: it exists in the highest levels of government, in private enterprise, in the streets, in the schools, in entertainment. In everything. It is so firmly entrenched [...] that many activities could not go on without it: its existence is indispensable.'[59]

[58]Guillermo O'Donnell, „Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion", in: Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro (eds.), *The (Un)Rule of Law & the Underprivileged in Latin America,* Notre Dame, Ind.: University of Notre Dame Press 1999, pp. 303-337, p. 318.

[59]Arnoldo Kraus, „Soborno: mal endémico", in: *La Jornada* (México DF), 4 Oct. 1995, p. 14.

And in the introduction to a book with the suggestive title *A la puerta de la ley. El Estado de derecho en México (At Law's Door. The Rule of Law in Mexico)*, edited by Héctor Fix Fierro in 1994, we read:

> "It is not by accident that we Mexicans see the law as something relative, always subject to oscillations and changes, depending on where the wind is blowing from. Mexico has laws, but it is not really a *Rechtsstaat*."[60]

At the other extreme of Latin America, in Argentina, Carlos Nino found no better formula to describe the reality of his country than *Un país al margen de la ley (A country on the edge of the law).*[61]

In view of this situation, it is hardly surprising that even today there are still declarations urging the need for the effective implementation of basic human rights. For example, in a recent publication about the demands of the indigenous population of Guatemala, one can read that one of the basic claims is

> "The creation of mechanisms that will guarantee the right to life."[62]

That at this point in history it is still necessary to include such a sentence in the demands of an ethnic group is a scandal. Besides, it is one more proof of the fact that in some Latin American countries the legal order is not effectively imposed, and of the static and immoral nature of some Latin American societies.

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[60]Héctor Fix Fierro (ed.), *A la puerta de la ley. El Estado de derecho en México*, Mexico-City: Cal y arena 1994, p. 10.

[61]Buenos Aires: Emecé 1992.

[62]Cf. María Teresa Coello Puente and Rolando Duarte Méndez, „La participación del movimiento maya en el proceso de paz guatemalteco", in: Raquel Barceló, María Ana Portal and Matha Judith Sánchez (eds.), *Diversidad étnica y conflicto en América Latina. Organizaciones indígenas y políticas estatales*, Mexico-City: Universidad Nacional Autónoma de México 1995, pp. 231-250, p. 246.

The possible causes of the limited effectiveness of constitutionally established legal institutions are difficult to pin down. Joel G. Verner lists seven different causes which range from the predominance of the executive branch, over the Roman and Hispanic traditions of applying the law, to the way how the members of the public administration are selected.[63] There is some truth in all of these proposals of explanation; besides, they all have something in common: they invariably involve a merely rhetorical adhesion of those in power to the normative order. An interesting consequence of all this are the permanent attempts to resort to new norms in order to counter the oblivion or violation of existing ones.

In any case, the examples I have presented show how unrealistic it is to speak of the effective validity of a legal order in accordance with the constitution in a good many Latin American countries. What exists, instead, are heterogeneous sets of rules and ways of conduct as sectoral practices, depending on one's social, economic, or political position. Rather than the 'rule of law,' what we can perceive are various strategies for avoiding the law's application and for moving freely 'on the edge of the law.' This applies all the way across society, from the powerful to the weakest. The former benefit from impunity; the latter try to obtain a minimum of security, avoiding as far as possible any contact with public authorities, or paying the price of bribery. In many parts of Latin America, an observation made in 1888, more than a century ago, by Manuel González Prada is still true today:

[63] Cf. Joel G. Verner, „Independence of Latin American Supreme Courts“, in: *Latin American Studies* 16 (1984), pp. 463-506, pp. 468 ff.

> "There is a telling fact: well-being is greater in the counties most removed from the great estates, more order and peace is enjoyed in the villages less frequently visited by the authorities."[64]

In the paper already quoted earlier, Guillermo O'Donnell offers a description of a wide-spread attitude which is as correct as it is depressing:

> "[F]irst, to voluntarily follow the law is something that only idiots do [*n.*: Or naïve foreigners or potential suicides, as would be the case if, when driving, one would follow the formal rules of traffic] 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."[65]

And the deficient implementation of the constitutional order is accompanied by economic policies – the neo-liberalism common to many Latin American countries – which tend to weaken the role of the state even more. But that is a problem I will not say anything about since that has been excellently done by Owen Fiss.

Given that Latin American constitutions unanimously proclaim the adhesion to democracy and to the firm 'rule of law', I finally wish to recall two necessary and perhaps even jointly sufficient conditions for a constitution to have effective binding force.

i) The first condition is the acceptance of the constitutional text from the 'internal point of view,' i.e. not merely for reasons of expedience.

It is precisely that attitude of genuine acceptance which is lacking in large parts of Latin American societies. Those who are in power see the constitution as an instrument of domination or as a means toward

[64] Manuel González Prada, „Nuestros indios", in: id., *Páginas libres. Horas de lucha*, Caracas: Ayacucho 1987, pp. 332-343, p. 343.

[65] Guillermo O'Donnell, op. cit., p. 312.

the satisfaction of their own immediate personal ends. Examples of this are constitutional reforms motivated primarily by an interest in strengthening the position of the president or in making his reelection possible. And those who are in no elevated position also do not adopt the internal point of view, because they know very well that the provisions they would be most interested in are not taken seriously by those responsible for their implementation. That attitude is reflected very graphically in a corruption so endemic that it has become an indispensable element of social relations, as Arnaldo Kraus affirmed for the case of Mexico.

The situation thus constitutes a fatal vicious circle which it is extremely difficult to break because no-one is willing to take the first step. Moreover, under the circumstances, that is an entirely rational attitude: whoever tried to break out of it would risk not only to be called 'naïve' or an 'idiot', if at the bottom, and 'suicidal', if at the top; he would also risk losing all orientation in the existing 'legal penumbra'[66] or 'legal morass,'[67]

The internal point of view implies the voluntary self-subjection to the norms. Adopting it means, following H. L. A. Hart, not to 'feel obliged' to comply with normative provisions, but to believe that one 'has the obligation' to do so. The content of a norm one accepts internally thus constitutes an ultimate reason for one's social conduct. And since all normative systems constrain freedom, compliance with the norms of such a system always implies a loss of individual decision-making power and a constraint on the satisfaction of certain preferences. That is, of course, not something easily accepted.

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[66]Horacio Verbitsky, *Hacer la Corte. La construcción de un poder absoluto sin justicia ni control*, Buenos Aires: Planeta 1993, p. 165.

[67]Amadeo Frúgoli, „Se acata pero no se cumple", in: *La Nación* (Buenos Aires) 3 June 1998, p. 19.

This psychological obstacle for a way out of the fix is accompanied by 'ecological' problems which make the effective implementation of constitutional provisions even more difficult.

ii) After all, the second necessary condition for the functioning of a democratic order is the existence of a homogeneous society, in the sense that each and every one of its members must be able to satisfy its basic needs, i. e. to exercise the rights formally conferred on it by the constitution. Here, I am of course not speaking of constitutional provisions which make absolutely no sense or are impossible to comply, such as art. 52 of the Colombian Constitution newly reformed in 1991:

> "Everyone's right [...] to practice sports is recognized. [...] The state will support these activities [...]

Since one must assume that what is meant is the practice of the sport each individual prefers, it is hard to imagine how the recognition of that right could be put into practice, since that would include not only playing soccer in the street with a ball made of rags, but also a 'champagne taste' for such sports as golf, surfing, or horseback riding. This could perhaps be called a case of *excessive normative benevolence*.

On the other hand, art. 54 of the Venezuelan Constitution of 1961 said:

"To work is a duty of every able-bodied person."

That provision is worse than the previous. In a country which, according to reports by the Inter-American Development Bank, in 1997 had an official unemployment rate of 12,8%[68] (with unofficial estimates being much higher) and which in its constitution also propagates a market economy (arts. 95 ff.), a provision of that kind means that a substantial part of the population is condemned to live outside the law, for reasons which are entirely becond the control of the addressees of that constitutional duty. This could therefore be called a case of *normative malevolence*.

The social and economic homogeneity presupposed for a well-functioning representative democracy has nothing to do with these two extremes. The point rather is the legal recognition of everyone's individual dignity as an autonomous subject with a *right to equal consideration and respect*, to say it with a formula much used in current theories of justice. This, in turn, presupposes the existence of conditions under which the exercise of that right is possible. Most Latin American constitutions, from the Mexican Constitution of Apatzingán (1814) to the most recent ones, contain provisions guaranteeing those fundamental rights. That the situation of institutionalized injustice in the countries of the subcontinent persists until today can therefore not be attributed to the fact that the respective constitutional norms do not exist; rather, it is their continued non-compliance which has made Latin American societies so extremely 'exclusive'. That is a phenomenon even the most inept observer cannot fail to perceive. One does not need to refer to statistics or empirical surveys to confirm what everyone knows only too well. That the people are well aware of the fact that what is missing is an inclusive social homogeneity in the sense explained

[68]Cf. the IDB's online database at http://database.iadb.org.

above is very clearly expressed by Alfonso de León, a rural worker from La Pijal Ycaltic in Chiapas, when he summarizes the aspirations of Chiapateco indians:

"what we want is that there is room for all of us in society."[69]

The adoption of the internal point of view towards democracy and the establishment of a homogeneous society are two necessary conditions for the full effectiveness of a legal order as prescribed by most existing Latin American constitutions. What remains open is the question whether their conjunction is also sufficient. Here, one must proceed with caution. The history of false expectations in the institutional development of Latin America is long and instructive, especially concerning the failure of predictions which confuse necessary with sufficient conditions. John J. Johnson and his prophecies, formulated in 1958, about the stability of Latin American democracies is a paradigmatic case in point.[70]

But however that may be, given that in Latin America none of the two necessary conditions is currently satisfied, we can postpone the analysis of what would be perfect and, for the time being, content ourselves to work on what is absolutely necessary.

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If the description of the political and social reality in Latin America, as I have sketched it here, is accepted as correct, and if one admits that, as Alf Ross observed,

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[69]Cf. Carlos Fuentes, "Las dos democracias son una sola," in: *El País* (Madrid), Feb. 22, 1994, p. 13.

[70]Cf. John J. Johnson, *Political Change in Latin America*. The emergence of the Middle Sectors, Stanford University Press 1958. On Johnson's error, cf. Ernesto Garzón Valdés, „La paradoja de Johnson. Acerca del papel político-económico de las clases medias en América Latina," in: *Sistema* (Madrid) 56 (Sept. 1983) pp. 131-147.

> "legal politics is about the causal connection between the normative function of the law and human behaviour, that is, about the possibility of influencing human action through the apparatus of legal sanctions,"[71]

then I think one must also accept the following:

i) As long as the necessary conditions mentioned above are not satisfied, the role of the legal order for the creation or reassurance of democracy in Latin America will be extremely reduced; but

ii) since existing Latin American constitutions list in their provisions precisely those rights and duties the effective validity of which is a prerequisite for the satisfaction of those conditions

iii) the problem of the relation between law and democracy in Latin America is not so much that of a need for new constitutions, but rather that of the effective application of the existing ones, with the help of legal policies which make it possible for a causal relation between the norms' prescriptionsn and human behaviour to arise.

That would be a more economical and also a morally more honest way than the repeated convocation of constitutional assemblies. I know that, given the predominant political culture in the region which is accustomed to empty rhetoric, deceptive manipulation and the cover-up of injustice, it is not an easy task. But there is no other way.

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[71] Alf Ross, *On Law and Justice*, quoted from the Spanish translation by Genaro R. Carrió, *Sobre el derecho y la justicia*, Buenos Aires: Eudeba 1963, pp. 318 f. [my own re-translation].

And if you now ask me: ‘What is wrong with the rule of law in Latin America?’, my answer is: In large parts of the subcontinent, *everything* is wrong with the rule of law. The law is only a ‘paper’, totally unable to fulfil the moralizing function Kant attributed to it.

I do, however, wish to end on an optimistic note: In the last year of the 20th century, in the extreme south of Latin America, elections brought to power an administration which, according to all available data, is seriously trying to undertake the difficult task of effectively implementing the democratic majority principle and ensuring the constitutional rule of law. Let us hope that they succeed.