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ESSAY

LAWYERS, RULE OF LAW, AND SOCIAL JUSTICE: A LATIN AMERICAN PERSPECTIVE

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This paper deals with two important ideas: rule of law and social justice. The question is whether these are values for lawyers and the legal system. Both concepts have a long history given that they are related to the idea of justice and a philosophical tradition going back to ancient Greece. However, my approach is to treat these ideas in terms of their present meaning and to avoid the philosophical depths by examining them from a social sciences perspective. Given the subject, however, some references to great philosophers are nevertheless inevitable.

The preliminary issue I have to deal with is whether lawyers have values at all. The profession is the victim of cruel jokes that present lawyers as soulless and greedy people. According to one of these jokes, lawyers differ from prostitutes because prostitutes sometimes do it for love. In this regard, Marc Galanter has analyzed occupational or professional jokes as a way of counteracting the perceived importance of a profession in society. This is the reason his book is entitled *Lowering the Bar* (Galanter 2005, 9–15). In the early nineteenth century the most frequent victims of jokes were priests, whose profession was of great importance at that time.

If jokes seek to cut down the powerful by revealing common deviant behavior in a profession, they also delineate the normative self-image of the profession. Jokes are like excuses. The person who offers an excuse is confessing the infraction of a norm but at the same time is reaffirming the norm (Austin 1979, 175–204). Jokes have a similar social function: they refer to a deviation from—and at the same time reaffirm—the norm.

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After these preliminary remarks I hope the reader can accept the premise that lawyers have values and that the issue is whether rule of law and social justice are values for legal professionals—especially legal professionals in Latin America, where both rule of law and social justice have a quite problematic existence. In Latin America we have, or have had, a wide array of dictators, massive human rights violations, corrupt regimes, deep social inequalities, and persistent poverty. These features are contrary to the rule of law and social justice. How important could these values be if life seems to proceed without regard to them?

Values are generally considered universal and little affected by time. I will not discuss this general perception, but in social science what counts is the way people conceive and live those values. This is the reason this paper takes a historical approach and refers to Latin America, a specific cultural area.

The first section of this paper will examine rule of law as a value and its importance for lawyers in Latin America. The second section will deal with social justice. No one doubts that justice and social justice are values, but the relation with lawyers is more problematic.

Rule of Law and Lawyers

There is a vast bibliography on rule of law (or closely related concepts like *estado de derecho*, *état de droit*, or *Rechtstaat*), and the definition itself is one of the key issues (Pereira Menaut 2003; Böckenförde 2000; Chevalier 1992). The concept is complex because it has been changing historically. For the purpose of this paper, we can apply instrumentally the contemporary meaning: rule of law implies that those invested with political power act in accordance with the constitution and legislation and especially that they respect the people's rights. There is agreement that the distribution of public power in different and coequal branches is a requisite for rule of law. There also is an increasing awareness that rule of law requires an independent judiciary powerful enough to define and impose legality and protect basic human rights.

Rule of law is a modern concept, but it has ancient roots. In Plato's *Republic*, justice is the supreme virtue and could be seen in capital characters in the life of the polis. The royal man, a philosopher-king, is the just person par excellence and he is called to rule the polis because of his direct perception of justice. This could be read as the supremacy of law defined as justice, or the rule of the just person. The major difference with rule of law is a mistrust of rules. This mistrust was persistent in antiquity and throughout the Middle Ages.

Aristotle had a good opinion of legislation: the legislative rule is "the intelligence without passion" (*Politics* III.16. 1287). But he recognized that rules could lead to deep injustices and they have to be corrected by equity

(*Nicomachean Ethics* V.10). Thomas Aquinas explicitly refused the identification of law (*jure*) with rule or legislation (*lex*), even if rule (*legibus*) could be a certain approximation to law (*Summa Theologica* IIa IIae, q.57, a.1). Both Aristotle and Aquinas recognized justice as the most important virtue (or cardinal virtue for Aquinas).

Modern legal thought is the result of a long transformative process. Thinkers from the seventeenth century completed the redefinition of law as rules. Francisco Suárez's main work is on legislation (1612) as a treatment of law. Hugo Grotius (1629) already considered rules as the primary meaning of law (*jure*). The Aristotelian concept of equity was largely misunderstood by seventeenth century scholars. The so-called school of natural law completed this transformation of law into rules (Villey 1968). In the nineteenth century the development of constitutional law became key in the transformation of law and politics. The expression of constitutional government became widespread and was the most direct antecedent of rule of law.

Behind the idea of rule of law are fundamental values: freedom, understood as the recognition of an individual sphere protected from the state and politics, and equality before the law. But rule of law is itself a normative concept, a value for concrete political systems. Rule of law postulates the rulers' submission to law, but it is implausible that a political regime exists in which all functionaries act strictly in accord with the constitution and legislation, and in which all citizens' rights are scrupulously respected. Violations of human rights and corruption occur in every country. We would consider a rule-of-law country one in which there is an effort by people in power to conform to the law. This means that political power would be distributed in different branches and violations of legal rules and human rights would be judged and punished. Sometimes we use this term descriptively, but what we mean is that a certain country in a historic period is closer to the normative image. For example, we could say that present day Chile is a rule-of-law state and Pinochet's regime was not. These expressions do not mean that law did not have any importance under Pinochet. Rather, they mean that Pinochet's regime was quite far from the norm and that present day Chile is closer to the norm.

The actual practice of rule of law requires lawyers. Lawyers are the specialists in peacefully asserting claims for the protection of rights. We could imagine a working legal system without lawyers, as Victor Li (1977, 10) described Mao's China, but rule of law requires a fair number of lawyers and a judicial system receptive to the claims of rights against the state. It is not a mechanical relationship: a country with more lawyers per capita is not necessarily stronger or healthier in terms of rule of law.

The issue of the relation between lawyers and rule of law is far from simple. In a general way, rule of law could be opposed to relational capitalism (Dezalay and Garth 1997, 111) or any society where *guânxi* relations are very important. In societies organized hierarchically and where planning

is the instrument of control, law and lawyers lack importance. David S. Clark (1999, 96–98) points out that in the Soviet Union and other socialist countries in the twentieth century, the number of lawyers was very low and lawyers had very little importance as a profession or in the political scene. Nevertheless the relation among rule of law, liberal capitalism, and lawyers is complex. In most countries, lawyers are involved not only in legal practices, like advising clients on legal matters, drafting contracts, or litigating, but also in relational practices, like building networks. When social (economic and political) relations require coordination and attention to the rules, lawyers have an important role to play.

Briefly, rule of law does not require that the society be completely run by law and only by law. We should think rather that the function of law is to formalize relational practices or to put certain limits to illegal—and frequently unethical—practices. Lawyers, judges, and law professors frequently form a complex of interactions that can have an impact on the practice of politics and business. Of course, there are many intervening factors, but, as many historical examples could confirm, stronger rule of law requires a strong presence of a legal complex (Halliday, Karpik, and Feeley 2007). Rule of law is not a wild flower.

In the last few years, comparative law and society studies (Halliday, Karpik, and Feeley 2007; Tate and Vallinder 1995) have tackled the issues of the role of lawyers and judges in relation to the rule of law and political liberalism. In Latin America, from the early nineteenth century onwards, lawyers were educated in the idea of constitutional government, a direct antecedent of rule of law. Legal education was politically liberal. In all Latin American countries lawyers drafted liberal constitutions and codes. Latin American legal scholars such as Roscio, Yanes, Alberdi, Sarmiento, and many others were also leading liberal political theorists (Pérez-Perdomo 2006b, 2004).

Nevertheless, the historical experience shows that lawyers were not a scarce commodity in authoritarian regimes. Regimes like those of Porfirio Diaz in Mexico, Juan Vicente Gómez or Pérez Jiménez in Venezuela, Fidel Castro, Pinochet, and Fujimori counted on a host of lawyers who served them well. Leading jurists wrote about these regimes and offered justification of their outrageous human rights violations, as many lawyers and legal scholars in Europe served the regimes of Hitler, Mussolini, or Franco and became the theoreticians of these regimes (Müller 1991). More recently, John Yoo (2006), a contemporary American legal scholar, has justified nonjudicial imprisonment and torture of prisoners, even though the United States has a long tradition of rule of law.

The explanations for this double role of lawyers are not simple. For one thing, the relation between lawyers and politics is complex. Traditionally, lawyers were servants of the state, and they derived honor and wealth from serving the king or high officials. This was also true in Latin America.

Analyzing Colombian lawyers of the nineteenth century, Gaitán Bohórquez (2002, 23–24) calls them "hosts of the state." The identification with the state leads to the primacy of order and of working closely with those who lead the state. In addition, liberal ideas were slow in influencing legal thinking. In the early nineteenth century, constitutional law was considered a subversive subject and indeed functioned this way for people trained in the theocratic political thinking characteristic of Spain's old regime. For example, even into the mid-nineteenth century, the dean of the University of Chile Law School wanted to suppress constitutional law from the law school curriculum for being subversive. It was subversive for a theocratic society (Pérez-Perdomo 2006a).

Furthermore, the kind of constitutional law familiar to lawyers until the mid-nineteenth century was a Benjamin Constant type of conservative liberalism. The emphasis was on the distribution of power in society and organization of the state. Constitutional rights did not have an important role and, in fact, they did not become important in Latin America as an object of study until the mid-twentieth century (Pérez-Perdomo 2006a).

Thus, lawyers may have participated in an illiberal political project, in large part because they appreciated peace and order; they were on the side of the state. Two case studies of important legal scholars are revealing. In the early twentieth century, Emilio Rabasa in Mexico and Pedro Manuel Arcaya in Venezuela, were leading jurists who supported Porfirio Díaz and Juan Vicente Gómez, respectively. In both cases, the argument for supporting dictators was historical and pragmatic: these dictators put an end to a situation of permanent civil war and brought peace and prosperity to their countries. The supposed alternative to these dictators was war and chaos. As lawyers are on the side of order, supporting the dictator was perceived as the right thing to do in these historical circumstances. We can suppose these lawyers have experienced cognitive dissonance, which they resolved via a hierarchy of values. In this case, the jurist could share the belief in law as a civilizing endeavor and, at the same time, declare his allegiance to a dictator and justify human rights violations because a particular social situation requires putting security before freedom and rights. This line of reasoning is not very different from Yoo's argument based on the importance of strengthening the executive branch in times of grave terrorist menace (Yoo 2006).

These examples should not lead us to overlook the numerous lawyers who have opposed dictators or have fought for human rights; lawyers who have acted according to the values of the profession in which they were socialized. Some have done so at enormous personal cost. These lawyers demonstrate how powerful the values shared by a professional group can be.

It is important to remark that even if the politically liberal ideas communicated by courses like constitutional law and administrative law have

not changed from the nineteenth century onwards, the most recent trend is a more serious allegiance of lawyers with democracy and rule of law (Pérez-Perdomo 2006b, 188–189; Pérez-Perdomo 2007, 349; Couso 2007). For example, many lawyers and the Ordem dos Advogados Brasileiros actively opposed the military dictatorship in Brazil. In Chile, Uruguay, and Argentina many lawyers, under the umbrella of the Catholic Church and with the help of international organizations, used the court system to document human rights abuses and put pressure on dictatorial regimes or in-transition-to-democracy regimes for punishment of human rights violations (Lutz and Sikkink 2001; Sikkink 2005). In Venezuela, most lawyers, including the Colegio de Abogados de Caracas and the deans of law schools, have issued numerous declarations against Chavez's authoritarian policies (Pérez-Perdomo 2007, 353). International fora like the Inter-American Court of Human Rights and the International Criminal Court could strengthen the fight for legality and rule of law (Sikkink 2005). This recent trend of strengthening traditional values requires additional explanation. Perhaps the growing importance of markets, international investments, and international organizations has changed the job market for lawyers and fortified their independence and liberal values.

Rule of law is the modern translation of formal equality, or equality before the law, as the first constitutions put it. The central idea is that all citizens are equally free and special privileges are unacceptable. In this sense, equality and legality, two ideas important to understanding the rule of law, are particular expressions of justice. But formal equality could be compatible with extreme material inequalities, including the deep poverty of an important part of the population. This is the issue of social justice, and the question is whether lawyers have been sensitive to this value.

Social Justice and Lawyers

Justice, as analyzed by Aristotle and Aquinas, is to treat equally those who are equal, and unequally those who are unequal. For ancient and medieval thinkers, people were not equal but hierarchically organized. Aristotle justified slavery (*Politics*, I.5.1254a) and Aquinas, serfdom (*Summa Theologica*, IIa IIae, q.57, a4). A hierarchical society recognizes the privileges exclusive to some members, but privileges also carry important obligations. Slavery and serfdom were viewed as "just" institutions, with important consequences regarding how slaves and serfs have to be treated. We should be aware that Aquinas considered serfs as part of the household (*Summa Theologica* IIa IIae, q.57, a.4; q.65, a.2), and the first obligation of the master was to teach them. Nevertheless, the point is the recognition of inequality. It was a worse crime to injure a magistrate or high official than to injure a metic or slave (Aristotle, *Nicomachean Ethics* V.4).

Modern legal and political philosophy from Hobbes onwards postulates equality, and equality before the law was written into practically all modern constitutions and declarations of rights. But declarations do not erase social inequality, they just ignore it: wealthy and homeless people have the same right to sleep in the streets. Legality is completely indifferent to deep social differences.

Social justice focuses on the material situation of people. It is the modern version of distributive justice of ancient times, but at the same time, turns it on its head. The central idea is that law and the state should favor people with social disadvantages in order to promote a more equal society in material or social terms through, for example, the promulgation of rules favorable to those categories of people who are socially disadvantaged. Regulations protecting workers, renters, consumers, women, and minorities are inspired by social justice ideas, and these are common in most twentieth-century legal systems. Welfare states generally tax wealthy people more heavily and provide subsidies to the poorer ones. This approach is in some sense a return to the idea of treating equally persons who are equal, and unequally persons who are unequal, but this approach presents important challenges to law and the rule of law. First of all, the focus itself is destructive of formal equality and presents important challenges to the rule of law. When you give privileges to a minority group, the regulation discriminates against others: equality before the law disappears. On the other hand, privileges could have a hidden cost: for example, a regulation very favorable to workers could produce a reduction in employment. Lastly, the legislation becomes increasingly complex and challenging to comprehend, and problems of access to justice arise. A favorable situation in legislation does not necessarily result in an improvement in social terms.

The operation of the legal system itself can limit or even destroy the search for material equality embodied in legislation. Galanter has shown that much protective legislation is watered down by the operation of the legal system's machinery. The legal system has a structure that produces an outcome by which "the haves come out ahead." The "haves" are the organized actors who can invest important resources in shaping the rules and fighting the convenient battles (and avoiding the inconvenient ones). Complex law requires well-prepared lawyers who will be prone to serve powerful organizations, businesses, and wealthy individuals. These legal actors frequently are "repeat players" and have an advantage over "one-shotters" (Galanter 1974, 97–104) or the "*ciudadanos de a pie*," in the Spanish expression. As an example, imagine that I have a lawsuit against Ford Motors and that this lawsuit is very important for me but I have limited resources to invest in it. My capacity to maintain a long and expensive legal case is minimal. In contrast, Ford Motors has an army of lawyers who can evaluate different options and strategies, and it could pay for a long case if litigation is the option the Ford Motors' lawyers consider the most convenient for

their business interest. If they prefer to negotiate or settle the case, their capacity for negotiation is far greater than mine. In other words, I am too little and lack the organization necessary to win a case against Ford Motors. I would be at a structural disadvantage even if the law protects me as a consumer.

The legal system thus imposes structural limitations on the search for social justice through law. Recent history of law shows two different ways to overcome the structural resistance. One is revolution: in the twentieth century several countries opted for socialist revolutions, a way of attempting the redistribution of wealth in society through nationalization, expropriation, distribution, or just allowing invasions of private property. José Manuel Delgado Ocando, an important scholar and later a constitutional judge in Venezuela, wrote on the ethical obligation of socialist lawyers to support revolution, even in violation of the principles of rule of law (Delgado Ocando 1979). In his actions as constitutional judge supporting the consolidation of the Chávez regime, Delgado Ocando showed what he meant. Revolutions usually lead to authoritarian regimes. Supporting authoritarian regimes under the justification that they promote material equality could lead to a situation very similar to that of the lawyers and legal scholars who supported authoritarianism or dictatorship with the justification of peace, order, or security. Social justice then becomes the enemy of rule of law.

The second way in which structural resistance could be overcome is through changes that affect the economy of the profession and result in the erosion of structures, as described by Galanter (1974). The number of lawyers has grown exponentially, and entrepreneurial lawyers have made impressive efforts to create demand among people who were once excluded. These include so-called cause lawyers, the many NGOs staffed by lawyers (and frequently run by them) who use lobbying and litigation to challenge the rules or to force fulfillment of the promises present in the rules. The "class action" is a novelty that allows aggregation of claims and facilitates individuals to assert their rights against big corporations.

Cause lawyers are an important change in the ethos of the profession. They are not lawyers who wait in their office for the call or visit of a client. Rather, they identify a good cause and promote it, "producing" their clients. Very frequently the professional codes of ethics forbid solicitation. Cause lawyering has an important difference: the interest of cause lawyers is not to get clients, but to promote a cause. Money and clients are not the principal motivation. Most frequently cause lawyers are organized in nonprofit organizations, but obviously lawyers raise money and are paid for their work (Sarat and Scheingold 2006).

A good example is provided by lawyers interested in protecting the environment. Juan Martín Carballo (2008) analyzes the case of the Riachuelo River in Argentina, a highly polluted area. The legal and political

aspects of the case do not concern us here, but rather the involvement of many lawyers and NGOs. Their activity had an impact, and there is no doubt that public policies and economic interests were affected. In this new situation, the "haves" do not come out ahead all the time.

A different option is litigation in another country. Litigants have become "like migratory birds" (Gómez 2005, 284), choosing the country and jurisdiction they perceive to be more sympathetic to their claim. Ecuadorian Indians suing oil companies in New York, or Venezuelan SUV owners suing carmakers in Florida, are examples of this trend. In the latter case, analyzed by Manuel Gómez (2005, 289–297), we see the collaboration between Venezuelan and American lawyers trying to recover damages for Venezuelan car owners from a U.S. carmaker in cases of serious car accidents.

University law schools are part of the trend. Several Latin American universities have created quite specialized legal clinics. Some of these clinics address the needs of indigenous people, poor women, and other disadvantaged groups. The clinic is generally part of community development that creates the demand for legal services. These projects have united the political liberal values of legal education and the legal profession with a stronger dedication to helping disadvantaged people.

Are all these new trends in the practice of law and in legal education related to social justice? The answer is yes. They try to equilibrate distribution in society and promote social good. And they do it affirming the importance of law and rule of law. Critics are likely to remark that many lawyers are not motivated by social justice but by greed or need, that many of these lawyers make their living with these new activities, and that they have created new markets for their services. This leads to a discussion of the morality of intentions and the morality of results and, in general, of the social context of ethics.

The Social Context of Ethics

Generally, ethical norms are formulated as if they were universal and atemporal, but, in fact, they refer to a social context. In the lawyers' old codes of ethics several obligations appeared, such as pro bono work for poor people or the prohibition against outside employment, including working for other lawyers. These rules arose in societies in which lawyers had an important social position and means of fortune independent of their professional activity. The lawyer was conceived as an independent professional who offered direct services to the public (or through solicitors, in still more stratified societies). Payment to lawyers was not formulated as a salary or price for the service rendered, but as an honorarium—a kind of gift that gave honor to the one who made it as well as to the receiver. When business became more complex and required an enormous volume of legal work, the

law firm and the in-house counsel appeared (Van Houtte 1999). Do not think this was an easy change. There was a lot of noise from ethical purists. For example, in continental Europe, law firms were not authorized until late into the twentieth century, and, until recently, in-house counsels were considered "hired guns" (Spangler 1986, 16), an expression that suggests that other lawyers are more independent from their employer.

The ethical issues I have discussed in this paper generally did not appear in the code of ethics, at least in those of the traditional kind. Rule of law and social justice were not mentioned. In Europe and Latin America of the eighteenth century there was no question of being committed to rule of law. Of course, at that time, such a thing did not exist in those regions. In the Spanish Empire particularly, all lawyers were considered Crown functionaries. This role provided honor and eventually money, but lawyers were expected to collaborate in important cases in a quasi-police function, as in a case of *lèse majesté* in late eighteenth-century Venezuela (Pérez-Perdomo 2006c). On the contrary, to defend such a case not only was inconvenient for a lawyer's career but also raised important ethical dilemmas.

The historical perspective allows the comprehension of the traditional connection of lawyers with the state, consolidated with the fact that the state was the principal employer for lawyers. This economic relation is still true; the difference is that the development of business and civil society allows more independence to lawyers.

The new forms of lawyering, in which lawyers, mostly through NGOs, reach previously excluded clients, are improper under the traditional code of ethics. This expansion of the market makes economic sense in a situation in which the profession seems to have saturated the offer of legal service, but the traditional view hides a satisfaction with a society in which "the haves" always come ahead. If NGOs and lawyers give voice and teeth to people that previously did not have them, they are working for social justice.

Is a behavior ethical if we can find economic (or egoistic) reasons for it? Intentions are important in the ethical analysis: an individual ethical action is not good if there is not a good intention. But justice is a social virtue, as Aristotle and Aquinas pointed out. Aquinas went further and called it a "*medium rei*," something that happens in reality and in which factual, social situation counts more than intentions (*Summa Theologica* IIa IIae, q.58, a.10). It is important for scholars to provide the ethical analysis of trends and actions. It is our job to show when a good action is good and why, but it would be unscholarly to ask for a behavior when this behavior was not socially plausible or condemn lawyers when they create a market for their service. At the end of the day both Aristotle and Madonna would recognize we are all material people in a material world.

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