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THE DISCOURSES ON INSTITUTIONAL REFORMS
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Rule of law and development: the discourses on institutional reforms in the justice system

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1. Introduction
This paper aims to put forward and discuss a few points. They are meant to be provocations for further debate. It is a partial result of a research I have been developing on the use made of expressions such as rule of Law, état de droit and legal security, by several actors, in an effort to justify the implementation of reforms of the justice system in developing countries.

The research project relates to two agendas.

The first agenda deals with judiciary reform projects and the discourses that sustain them. By judiciary reform I mean the reforms that take place at three different levels: institutional reform – with a wider scope, usually done through constitutional changes –, reforms made by changing administrative procedures of the tribunals and changes in the procedural laws.

The second agenda relates to the criteria for measuring the efficiency and the effectiveness of the institutions of the justice system.

My hypothesis is that to draw a panorama of the different meanings given to the expression rule of law may help us find out the extent to which rule of law interferes in the evaluation of the performance of the judicial system and, at the end, with development and the performance of democracy.

This article carries the result of my first approximation effort with the discourses on the need for the rule of law.

My starting point is the documents of the international development agencies. I intend to discuss (show) the way in which the expression is used and the meaning given to it.

The question is whether rule of law is a unique expression with variable definitions or a set of diverse concepts covered by a single expression.

Economists, political scientists, lawyers and international organisms concerned with development use the expression in different ways.

Several reform programs for the judicial systems have been initiated in many different countries since the 1980's.

The goal of such reform programs is to ensure greater efficiency to the work of the institutions, whether in developed countries or under-developed ones, whether in old democracies or in new ones, such as those in Latin America and Eastern Europe.

Virtually everywhere a reflexion on the way justice institutions, more specifically the judiciary, administer social disputes has become a prerequisite for good democratic government.

In some way this democratic challenge is linked to the possibility of generating social and economic development and ensuring the état de droit, or the rule of law for some.

Let me say right away that I establish a difference between rule of law and état de droit.

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For international agencies that finance economic development in countries with fragile economies, this idea presents itself not only as a possibility but rather as a necessary project that needs to be implemented.

For these actors economic development and democracy are only possible in an environment where the rule of law prevails. In this sense, the existence of efficient, effective institutions which have transparent decision making procedures are necessary features for a stable democracy and the promotion of economic and social development.2

To this discourse of the international agencies one must add that of the economic community made up by bureaucrats and scholars who believe that a high degree of predictability is needed in a legal order. This presupposes an efficient judiciary, whose decisions are effective. Without this, it is thought that it is not possible to attract investments for the financing of development.3

In the field of political science, the need for an efficient judiciary appears more closely linked to the performance of democracy. Thus, democratic regimes possessing an efficient judicial system, transparent in its decision making, capable of imposing the empire of law and the \( \text{état de droit} \), able to locate and punish cases of corruption or abusive behavior by the administration, are likely to be more successful.

Cases in which citizenship rights are violated, or where there is failure to apply the law, where access to the judiciary and to fair trials is difficult or where judicial decision are not effective, are indications of the vulnerabilities of democracy.4

In the legal Field the discussion appears in several ways.

The first relates to the administration of justice. Legal sociology studies have identified the need for efficient judiciaries in order for citizenship’s rights, especially access to justice, to be protected.5

The second is found in the field of procedural law, where an efficient judiciary is considered to be essential for the protection of procedural guarantees under an \( \text{état de droit} \).6

The third is to be found in the Law and Economics Field. According to this view, the efficiency of the judiciary is important for its ability to maximize existing resources and for its capacity to implement decisions under economic contingencies.7

Beyond the question of democratic performance and economic development, the link between all the above mentioned analyses is the recognition of a need for legal security as a principle of rule of law or of \( \text{état de droit} \).

It is true that both rule of law and \( \text{état de droit} \) demand legal security and general, clear and predictable laws.8

The paradigm that gave birth to the concept of \( \text{état de droit} \) is the liberal one, which presupposes a certain role for the state and for its institutions in the guarantee of individual rights.

However, just as the concept of democracy is an imprecise one, the concept of \( \text{état de droit} \) has been changing with the different functions that the state has taken after the second half of the twentieth century, as it started to guarantee and promote social rights besides de individual ones.

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4 O'Donnell, 1998a, p. 52.
5 Falcão, 2006; Faria, 1989.
6 Watanabe, 1999.
8 Raz, 1977.
This process has occurred in different ways in different countries. If we think in terms of legal families or cultures, differences are also expressive.

2. The international agencies and the rule of Law project
According to the dominant discourse, if countries want to have economic development they must implement the rule of law.

The rationale behind this discourse is that under-developed countries are not able to finance their development process by themselves. They need, therefore, international investments. In order to attract foreign investors they need to provide legal predictability and trustworthy institutions.

The question is: what is the definition of the rule of law in use that leads to such conclusions?

In the agenda of international agencies – World Bank, US Aid, Interamerican Bank for Development – and in the agenda of countries like Canada, Germany, Sweden and Japan, one can find no less than 57 variables that are indicated as parameters to evaluate the existence of the rule of law. They include confidence in the institutions of the state, the independence of the judiciary and its functioning, the level of criminality, the effectiveness of contracts, the guarantee of property rights – including intellectual property –, access to drinkable water. 9

This extremely varied panorama of criteria to identify the existence of the absence of rule of law shows that there are different objectives and agendas that different actors are trying to promote and different reforms they are trying to implement. If not that, at least it shows that there is no consensus on the meaning of the expression and its use.

The participation of international agencies in development programs that focused on Law is not new. In the 60’s and 70’s the movement known as Law and Development was based on the idea that Law is an important instrument for development.

After 20 years, what seems to be happening is that the Law and Development Project, in light of its failure and lack of energy, is being replaced by rule of law programs.

Is it true, however, that the resurrection of this concept of liberal extract and its use to evaluate and analyze democracy and the functioning of the justice system, happens only because a previous project has failed?

Why does the reform movement and the push for the rule of law matter so much and cost almost US$ 4 billion in ten years – 1993 to 2002 - , spent in more than 330 projects in over 100 different countries? What makes the rule of law worth so much effort?

In order to try to answer these questions, I have made some methodological and theoretical choices that will allow me to get to some initial conclusions.

My choices may not be sufficient for a profound discussion on the premises or on the parameters of the rule of law. I make them, however in order to respond to the challenge posed to me, as a researcher and as someone who has decided to study the role of the judiciary and of the justice system, by the resurgence and the centrality that the concept of rule of law has acquired lately.

My first choice is not to equate rule of law and état de droit.

État de droit is an expression that carries an ideal with content and rules that does not mean democracy. It cannot be reduced to being the same thing as a situation of rule of law.

As I see it, état de droit relates to the organization of the state in legal terms. It corresponds to a model of state in which the most important aspects of power are concentrated in

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the government; in which power must be moderated through a certain number of laws and rules. Among those laws is the Constitution, the highest norm in the legal order, which gives the state an institutional design that does not necessarily result in a situation of rule of law.

My suggestion is that rule of law is a situation with a close relationship to the common law type legal order, which gives the judiciary a central political role as it interprets and guards the constitution, as it judicially reviews the actions of the other powers of the state and as it serves as a direct source for the law.

In the rule of law conception the independence of the judiciary must be preserved for the political role it exercises and not as the ‘mouth that says the law’ as Montesquieu conceived it in his separation of powers.¹⁰

The liberal thinkers who refer to the rule of law put the judiciary in a differentiated place, even alongside the law. (?) It is in this sense that one can say that the rule of law is one virtue Law may possess but it is no the only one.¹¹

If we conceive the rule of law as a situation rather than as an institutional model, as I do, its existence depends much more on the way societies behave in their relation to the political powers and on the way rules are interpreted and implemented. Its definition may vary with time and depending on the objectives sought.

If we apply this train of thought to the analyses of the international agencies, we will identify an absence of a clear and perceptible option for a definition of the rule of law.

In several documents it seems as if the definition is assumed as something known to the reader.

This is the case for documents from different agencies as it is the case for documents of the same agency. Sometimes, within the same agency, it is possible to see that development projects involving the rule of law vary according to the projects objective and to the political actors involved.

The use of the expression rule of law varies according to i) the agencies position in relation to the main funding governments, ii) its track record in financing certain types of projects, more specifically since the 1960’s, iii) the receiving country of the project and the acceptance or resistance of the civil society and of legal operators within the country.

Despite this variation in the use of the expression as a justification for the reform projects it is possible to identify two types of reform that build on the criteria used to establish the degree of rule of law in different countries: i) reforms for democracy and ii) reforms for economic development.

In reforms aimed at establishing democracy which target eastern European, sub-saharian and middle-eastern countries the demand for the rule of comes to ensure: i) that the justice system be accessible and function according to equitable principles; ii) that the law be applied to government and subjects alike and iii) that citizens trust and use criminal justice.

These are extensive reform programs. They deal with and act upon several institutions in different levels of the state bureaucracy and organizations of civil society, from tribunals, choice and training of judges to law schools and NGOs.

Within this larger group of reforms, there is a smaller one with greater penetration in Latin America. It relates to Human rights programs based on slow and gradual movement towards democracy without undergoing traumatic breaking from authoritarian regimes. Reform of criminal

¹⁰ MONTESQUIEU,
¹¹ RAZ, 1977
laws and minorities' treatment appear as important, in these cases, for the implementation of the rule of law.

The UNDP – United Nations Development Program, the Ford Foundation and organizations from Northern Europe, more specifically the Scandinavian countries, fund certain programs within this group, with greater intensity after 1990.

The main focus of this network is capacitating civil society organizations to act and intervene in criminal legislation reform and in the functioning of the prison system.

The other main group of reforms, relating to implementation of the rule of Law for the market development, appear in a less politicized way but at the same time in a more ideological mind frame.

I explain: its initial discourse appears to have its focus on the structural reform of the state in order for it to become more modern and then, at a second moment, move towards the need for a better administration of justice for reforms in the commercial legislation of a liberal type.

Programs of this type are accompanied by politics created and applied in accordance with the Washington Consensus and are guided mainly by the World Bank and its related agencies. These programs focus on central European and Mediterranean countries, Eastern Europe, Central and Latin America.

The two main groups of reform for the implementation of the rule of Law, described by Álvaro Santos in his work on the World Bank\(^\text{12}\), appear with greater force after the end of the 1980's and beginning of the 1990's, as an alternative to the Law and development movement.

In fact, much more a substitution of the former agenda than an alternative, because the theoretical matrix that supports the rule of law movement is the same as the law and development movement, with the addition of a few criteria out of the Washington Consensus.

This theoretical matrix is the Modernization Theory with a liberal tendency.

In this theoretical context, development is a unique and inevitable process of evolution and social differentiation which will, at the end, produce economic and political institutions that are similar to those of the central countries.

The result of this process is the creation of a free market economic system, of political institutions within a liberal democracy, which will guarantee rights. This, is thought, would constitute the rule of law.

Therefore, regardless of the definition of rule of Law, the expression is used exclusively with the objective of legitimizing a package of reforms aimed at this kind of development.

In the modernization process, as they incorporate the expression rule of law into their discourse, as a way to legitimize the process, the international agencies are able to gather support from the diverse actors from different areas and from different ideological background as they manage to appear apolitical and to be recognized as agents that do not improperly interfere in the domestic agendas of the states.

In situations of political transition and democratic consolidation, under the globalized market pressure, the reform program concerning the relationship between the state and society that signals with the possibility of establishing the rule of Law will rarely be opposed by civil society or by political actors.

In this sense, it is possible to stress even more the above mentioned point, that the expression rule of Law is only used as a legitimizing device for reform packages and that, whatever the content of the concept, it will serve to legitimate a certain development policy.

\(^{12}\) SANTOS, 2006.
This point is also supported by the fact that in the international agencies agenda reform of the state appears before the rule of law. During the 1980’s, the agencies started to conceive a series of recommendations aimed at development which are called structural recommendations.

These recommendations correspond exactly to the Washington Consensus agenda: i) fiscal reform, ii) end of exchanged control, iii) market liberalization, iv) property rights protection v) end of subsidies vi) privatization.

The expression rule of Law appears for the first time in 1989 in a USAid report and, in 1990, in a letter of the Inter American Bank for development. Both documents dealt with the sub-saharian crises and with the need for a minimum of governance and rule of law in order that development assistance may reach the concerned countries.

In these documents, it is possible to see that the definition of rule of law and of governance – rather than government – makes no mention to the political regime. This allows the involvement of the agencies in reform projects of any nature without political opposition.

The same reason is behind the large number of criteria to identify the absence of the rule of Law, including, corruption, organized crime, burocracy, inefficiency of contracts and bad administration of natural resources such as water.

This also explains the focus on the functioning of the justice system and on the performance of its institutions: there is no need to engage in any political confrontation or to interfere in the state public policies.

Other than that, what one thinks of the rule of Law as based on the common law legal tradition, clearly the judiciary takes on an extremely central role. This may be an explanation for the great concern over the functioning of the justice system. It may also explain why regional actors incorporate the same discourse, as it is the case with Brazilian economists.

The more recent agendas of the international agencies continue to follow this same path, as they seem to continue to indicate that the common law legal culture is more efficient in the protection of property and contracts and in providing predictability for investments and for the market.

The reports and indexes based on the doing business model and produced against the background of the Modernization theory – according to which if institutions in emerging countries did function exactly as they do in developed ones, these countries would develop – function as letters of recommendation. Besides that, these programs continue to look at the judiciary as the principal locus for the settlement of disputes.

These two last affirmations show my discomfort with the excessive preoccupation with the functioning of the justice system and its institutions and with the linking between the efficiency of justice and economic development.

When we are discussion implementation and deepening of democracy, if we speak of the efficiency of the justice system and its institutions, this is done with the purpose of guarding the citizenship rights and ensuring maximum access to justice and efficacy of the dispute settlement system.

As we move the focus towards the efficiency of the judiciary in order to guard property and contracts, the justice system and the judiciary cease to be a place to resist the violation of rights and to guard the rights of citizens.

The Brazilian case is specially interesting because Brazil does not appear as a focal point for any important judiciary reform program. International agencies act only in a subsidiary manner and in non-central projects that aim at altering the system. Despite this, the discourse on the need for efficacy and efficiency of the judiciary is lead by national actors with access to the academy, to the legal institutions, to the government, and with the ability to influence public policy.
One of the important research trends, which has been appearing in studies on democracy and constitutionalism, is strongly influenced by the neoinstitutionalism and by the open criticism to the law and specially to the constitutions as obstacles to governability and to the good functioning of the institutions.

3. Final considerations

i) International development agencies do not have a sure and consensual definition of the rule of law;

ii) The absence of such a definition is due to the need international agencies have to justify and legitimize the way they work and preclude resistance to their reform packages/programs;

iii) In this sense, the use of the expression rule of Law is a rhetorical tool that is convenient for any chosen course of action;

iv) The idea of development behind the reform packages of the international agencies (regardless of the concept/definition of development) was inspired by the Modernization Theory according to which only the rule of law situation provides/guarantees development;

v) Under this theoretical construct, rule of law is a situation rather than a model of state, a model conceived from the starting point of common law type legal order and a liberal democracy tradition of a common law;

vi) I believe that by conceiving the rule of Law as a situation it is possible to try to evaluate the efficiency and the performance of the democratic institutions and of the institutions of the justice system.

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