Current Approaches to the Rule of Law Are Not Enough for Latin America

Carolina Fernández Blanco *

Abstract

The heart of the rule of law (ROL) is the compliance of governments and inhabitants with the law. This central feature of the ROL can be described in alternative terms: if the ROL requires that the law guide governments and inhabitants, this is equivalent to the ROL demanding that the law be "efficacious". As it is identified in this paper, the most common and critical weakness of the ROL in Latin America is, unfortunately, the fragility of its most central point: governments and citizens have difficulty acting within the framework of the law. The central thesis of this work is to point out some deficiencies in traditional and non-traditional approaches to the ROL since both perspectives are quite oblivious about the efficacy problem. The paper also proposes that studies, as well as programmes and projects on the ROL, should include a serious approach to the problem of the inefficacy of the law and therefore a closer view of law-making processes, successfulness in law enforcement and, ex-post control of the efficacy of norms.

Keywords: Rule of Law. Development. Latin America. Efficacy.

0. Introduction

I. Academics and practitioners in the field of Law and Development have historically been concerned about strengthening the rule of law (ROL) in emerging or developing countries. After decades of academic debate and poor outcomes, there is a general feeling of disappointment. Nevertheless, the idea that the ROL is crucial for human and economic development has not been defeated. To overcome the mediocre results in achieving the ROL, different unorthodox[1] views have emerged.

---

* Cátedra de Cultura Jurídica, Facultad de Derecho, Universitat de Girona, Campus de Montilivi, 17003, Girona, España, *fernandezblancocarolina@gmail.com*.

[1] Frank Upham coined the term rule-of-law orthodoxy and refers to it to generically describe

For some, the target should be a minimalist version of the ROL that can be universally practicable; for others, the ROL should be built in an "inclusive" way; finally, the most pessimistic thinkers believe that the ROL is not possible without a profound cultural change. This paper offers arguments explaining why these new approaches are ill suited to strengthen the ROL in the Latin American context.

Latin American countries share some characteristics that allow a joint analysis of this topic. First, they have a common legal culture and the same legal origin. Second, since the 1980s, most of them have been liberal and relatively stable democracies; they have rigid and written constitutions containing ample bills of rights and principles. Third, nearly all the countries in the region are part of the most important human rights treaties and accept the competency of, at least, the Human Rights Committee of the United Nations or the Inter-American Court of Human Rights. Finally, and unlike what happened in Africa and Asia, very early in their histories all the countries have adopted Western development goals[2].

II. The most common and relevant weakness of the ROL in Latin America is that governments and citizens – regarding some issues but not others – have difficulty acting within the framework of the law[3]. Nevertheless, difficulties in following and enforcing the law are not as widespread as to describe Latin American countries as weak or failed states.

In Latin America, the phenomena of secret, retroactive or impracticable laws are not frequent – at least not since the end of the last dictatorships –. Likewise, a lack of clarity of the law or legislative instability are not endemic to the region, nor do the phenomena occur more frequently than in other regions. I believe that anyone who reads this work and is familiar with the Latin American context will generally agree that the most common and critical weakness of the ROL in Latin America is, unfortunately, the fragility of its most central point. On many occasions, some of which are qualitatively relevant, authorities and inhabitants do not let legal norms guide their behaviour. Although the problem is usually presented this way, it is possible to describe this feature of the ROL in different terms: if the ROL requires that the law guide governments and inhabitants, this is equivalent to the ROL de-

programmes based on the assumption that «[…] sustainable growth is impossible without the existence of the rule of law: a set of uniformly enforced, established legal regimes that clearly lay out the rules of the game» (Upham 2002: 2). This work will not refer to "orthodox" approaches. Instead, it will allude to traditional or classic views and include in this typology a broader set of perspectives. Nevertheless, the word "orthodox", or more accurately its antonym, "unorthodox", is borrowed to express the idea that a set of new ideas exist about the ROL that sometimes breaks with the foundations of the ROL as traditional theories have conceptualized it.

2 Filgueira 2009: 3.

3 See García Villegas 2011: 161-184; García Villegas 2009; Nino 2005; Fernández Blanco 2013.

manding that the law be "efficacious"[4]. "Efficacy" is understood in this paper as the state of things that is present when a particular norm (or a set of norms if they serve the same purpose, e.g., "avoiding corruption") is followed on most occasions by the majority of the relevant people for whom it is intended[5].

The weakness mentioned above is, undeniably, an enormous obstacle that undermines the core functions and virtues placed on the ROL. If this diagnosis is correct, current theories and approaches to the ROL are ill suited to solve the problem since their proposals seem to ignore concerns about how to improve the efficacy of the law[6].

III. The starting point of this work is that the ROL is a precise, accurate and entirely rational construct whose value is universal and devoid of any cultural context. Although conceptions of the ROL differ, four core features are beyond discussion. First, the heart of the ROL is the compliance of governments and inhabitants with the law ("law" means here, and in the rest of this paper, state/formal law). Without this feature, there is no ROL. Second, the law has to have certain characteristics that allow governments and citizens to be subject to it. The famous "lists" proposed by

[4] Undoubtedly, there are other serious problems related to the ROL in the region such as the (circumstantial) lack of independence or impartiality of the judiciary, the low level accountability for officials due to non-compliance with the rules or the absence of strict application of the law (which results in the violation of equality before the law in a formal sense). However, this last group of problems is, in the context of Latin America, just another symptom of the main weakness since they are the manifestation of the breach by the authorities of what various constitutional principles and rules established.

[5] Navarro 1990; Navarro and Moreso 1996: 119-139. This paper utilizes the most widely used language by Spanish-speaking law theorists. Kelsen and other authors use the term "effectiveness" to refer to what I am calling "efficacy." In addition, Kelsen uses *effectiveness* to refer to both a) the fact that the norm is *obeyed* by the individuals subjected to the legal order and b) that the norm is *applied* by the legal organs, particularly the law courts), which means that the sanction in a concrete case is ordered and executed (Kelsen 2005: 11). In Italian, the use is also different. The terms "efficacy" and "effectiveness" are usually used in the opposite way to the one used here (Pino 2012: 174; Tuzet 2016: 207).

[6] This work will focus exclusively on duty-imposing norms and prohibitions and will leave aside power-conferring rules and permissions. The analysis will concentrate on the former since power-conferring rules and permissions are only indirectly included in the main problems identified about the rule of law in Latin America. Power-conferring rules and permissions are identified precisely for not regulating behaviours, so they are satisfied with any behaviour and are not susceptible to non-compliance (Vernengo 1983: 278). However, to make sense in practice, the power-conferring rules require the surrounding presence of prescriptive norms (see Alchourron and Bulygin 1991: 236). For example, it would make little sense to allow contracts without a subsequent obligation to comply with the agreement, a general prohibition on third parties to interfere in that contractual relationship, and so on. Notwithstanding that power-conferring rules and permissions are not included in this analysis, they are of paramount importance for development and largely determine incentives for investments that are generally associated with economic development processes (see Fernández Blanco 2018a: 205).

Hayek, Fuller and Raz[7], among others, are a partial enunciation of these characteristics. Third, the ROL needs a certain political/judicial organization (e.g., judicial independence or some kind of accountability mechanism among state political actors). Finally, a feature included in any conception of the ROL is equality under the law, at least in its formal version. Beyond those core points, the path becomes more slippery and debate continues about whether the ROL requires some specific content for the law or a broader concept of equality. Nevertheless, the four undisputed core points make the ROL a precise piece of social machinery[8].

If we accept that the ROL is *a precise, entirely rational, legal-political construct*, its value and virtues are valid for any country regardless of its culture or degree of development. The ROL is in this sense a "universal good"[9]. Nevertheless, each region or country may face specific and distinct difficulties in achieving a higher degree of the ROL.

The main purpose of this work is to point out some deficiencies in traditional and non-traditional approaches to the ROL. The paper also proposes that studies, as well as programmes and projects on the ROL, should include a serious approach

[7] Hayek 1979; Fuller 1978; Raz 1979.

[8] A more detailed "list" of ROL features is not regarded as necessary for this paper. The four pillars stated in the main text are enough for the proposed discussion. Nevertheless, the "precise social machinery" of the ROL is complete, in my understanding, with the reconstruction that follows. This reconstruction includes the minimum, non-contradictory requirements that give rationality to the basic structure of the ROL. The requirements are as follows. (1) The subjection of the authorities and persons to the law (or in other words, the inhabitants and the authorities must be guided by the law). (2) The impossibility of modifying the law if it is not according to procedures that were established in it. (2a) the impossibility of modifying the content of the law if there is a prohibition to do so in that sense or an obligation to maintain the content of the law. (Points (2) and (2a) are necessary consequences of the authorities' subjection to the law.) (3) For (1), (2) and (2a) to be possible, a relationship of hierarchy with at least one degree of difference between types of laws is necessary. (4) The existence of an independent law enforcement body (independent from the organs that create and execute it), and, (4a) some type of reciprocal control (accountability) between state actors when they violate the requirements established in (1), (2), (2a) and (4). (See O´Donnell 2002: 324.) (5) Laws should be public, general, clear and understandable, prospective, factually feasible and minimally stable. In order to guide the behaviour of people and officials, laws must try to create a consistent system. (6) Rules must be strictly and impartially applied to particular cases and (6b) access to justice (courts) must be broadly guaranteed. (7) Equality before the law is also part of any minimum agreement on the rule of law in force, but there is no agreement on what this equality means or how far it should reach. A few years ago, O´Donnell argued that, at this point, the consensus among political actors and thinkers was only about formal equality (O´Donnell 2002: 311-312). Today, however, acceptance of the idea of material equality is, for the moment, gradual. For example, no one would hesitate to affirm the need to create accessibility conditions for people with physical disabilities, but any discussion about affirmative action measures to create access to political positions for women will surely be more contentious. (8) All individuals (able to act) who are subject to the obligation to obey the legal order have the right/power to participate directly or indirectly in the process of creating the order itself and to integrate the bodies of political decision (point 8 is an adaptation of Bovero 2015: 49).

[9] Tamanaha 2004.

to the problem of the inefficacy of the law and therefore a closer view of the processes of law making, adjudication and ex-post control of the efficacy of norms.

1. Classic Perspectives on the ROL

In the classic group, I will include *formal* perspectives as well as *substantive* versions. The formal-classic group includes, among others, the works of A.V. Dicey, F. Hayek, L. Fuller, J. Raz, C. Nino and J. Waldron[10]. Naturally, these thinkers share some core ideas and disagree about other important ones, but we can still group them together. The formal-classic perspective supports the idea that the ROL can be achieved despite the law´s content and even if the legal system embraces unethical or unfair content[11].

One of the virtues of the ROL in this thin or formal conception is that «[…] it is a necessary condition for the law to be serving directly any good purpose at all»[12]. Thus, a system where human rights, democracy or other values are established by law but where the basic features of the ROL are not present is condemned to fail in achieving those laudable goals.

The second group of classic approaches includes those that postulate that law needs to have more than formal features but also specific content. In this group, the differences between the authors may be broader. Here we find those who think the ROL should include human rights and/or democracy[13] and/or property rights[14], and those who advocate for a view of the ROL that includes social welfare rights[15].

Ronald Dworkin is perhaps the best-known representative of the substantive approach. As I understand his work, however, it does not fit with any of the previous substantive views. Dworkin, unlike other scholars, does not think only about a list of rights or a list of political features (e.g., democracy) that the law should take into account to claim compliance with the ROL. He proposes that compliance with the ROL implies that judges should eventually recognize any moral right or duty even

---

10 Dicey 1982 [1885]; Hayek 1979; Fuller 1978; Raz 1979; Nino 2005; and Waldron 2008, 2011.

11 «It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law». (Raz 1979: 212).

12 Raz 1979: 225.

13 See, among others, Ferrajoli 1995: 864; Hierro 1996: 288; Díaz 1975: 30, Bingham 2011: 136.

14 Cass 2004: 131.

15 Ferrajoli 1995: 864; Tamanaha, 2004: 91.

though positive law does not recognize them[16].

Dworkin's primary concern is how the judges should decide about rights and duties. This unidirectional concern is not an exclusive characteristic of Dworkin's approach; authors with both formal and substantive views have focused mostly on the role of the judiciary and not on the efficacy of the law. Perhaps the only classic author to modestly approach this issue was Joseph Raz, who thinks that the ROL has two aspects: «(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. As was noted above, it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it»[17].

As stated, Raz's approach to the problem of the efficacy of the law is modest. It only proposes a set of general guidelines that, although necessary, are not enough to offer a more robust solution to how policymakers or legislators should work to accomplish the two aspects that Raz has in mind when talking about the ROL.

To sum up, neither the classic formal nor the classic substantive conceptions of the ROL provide strong arguments for discussion and debate about the efficacy of the law. As anticipated, after years of academic debates and projects to strengthen the ROL, different, renewed views of the ROL have emerged. These unorthodox conceptions are still far from addressing the problem pointed out as being most significant.

2. Unorthodox Views on the ROL also Fail to Address the Issue of the Efficacy of the Law

After the disappointing results of most of the ROL programmes carried out during the mid-1980s and 1990s in Latin America and other developing regions, a movement of critical thinking about ROL has emerged. Some of these new approaches are mentioned here as "unorthodox conceptions" of the ROL. These new

[16] «Some degree of compliance with the rule-book conceptions seems necessary to a just society. Any government that acts contrary to its own rule book very often – at least in matters important to particular citizens – cannot be just [...] But compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if rules are unjust» (Dworkin 1986: 12). «If, therefore, some case arises as to which the rule book is silent, or if the words in the rule book are subject to competing interpretations, then it is right to ask which of the two possible decisions in the case best fits the background moral rights of the parties» (Dworkin 1986: 16).

[17] Raz 1979: 214-215.

approaches are quite heterogeneous and sometimes do not even share the basic features identified as essential in classic approaches. Despite this fact, they all have something in common: they try to address the failures of the previous programmes and, in that effort, these new approaches seek to improve what they consider flawed about traditional theoretical approaches and "orthodox" programmes. I will refer separately to some of these new perspectives on the ROL[18].

2.1. *Rule of Law as a Universal Good: The Minimalist Approach*

Some authors have embraced a very thin or minimal conception of the ROL that does not even take into account the "basic" features provided by traditional formal approaches (e.g., clarity, stability, generality, prospectiveness and so on)[19]. Brian Tamanaha is one of the proponents of the idea of a "drained" ROL. He has an instrumental reason for suggesting this conception. In his work, the thin conception aims to build an approach that can be a "universal human good". I agree that the ROL is a universal human good. However, its universal value derives from being a piece of precise social machinery, as described earlier in this work.

According to this author, if the ROL were built in a minimalist way, it would be achievable in any socio-cultural environment: «A minimalist account of the rule of law would require only that the government abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral (to the extent achievable) decision maker or judiciary to hear claims or resolve disputes. These basic elements are compatible with many social-cultural arrangements and, notwithstanding the potential conflicts, they have much to offer to developing countries»[20].

In a more recent work, the author gives a more accurate description of his mini-

[18] See, among many others, Carothers 2006: 3-13; Hammergren 2002; Clark, Armstrong and Varenik 2007: 159-179; Trubek 2006; Méndez 2002.

[19] Guastini's vision of the ROL could be understood as "truly minimum" (Redondo 2009: 10), nevertheless, despite the initial formulation of what is the ROL, which is certainly laconic, the author says that the ROL has «[…] no practical import if the law does not state any substantive limits to the powers it confers». (Guastini 2002: 95). Guastini's point of departure is as follows: «By "rule of law" we shall understand the principle according to which any state act whatsoever should be subject to the law» (Guastini 2002: 95). Despite the seemingly narrow definition, Guastini clarifies that the ROL presupposes the existence of a rigid constitution. Otherwise, the legislative power would have no constitutional limits and would not govern, which is, for him, the very definition of the ROL (Guastini 2002: 95). He adds that, although the ROL is a formal principle, it would not have any practical relevance if the constitution did not impose limits on the parliament regarding the way in which laws should be sanctioned and if it did not establish a declaration or bill of rights and even, perhaps, certain principles (Guastini 2002: 95). Although the author does not opt for any particular right or group of rights that should be included in the bill of rights, his conception of the ROL quickly moves away from that first succinct version that contributes to the impression that his approach as minimalist.

[20] Tamanaha 1995: 476.

malist conception[21]. He built it taking the core idea from the pre-liberal conception where the main (and probably the only) aim of the ROL is to prevent tyranny[22]. Tamanaha supports the idea that this pre-liberal feature of the ROL needs to be combined with a requirement that is not purely pre-liberal. Otherwise, it cannot be an actual tool for preventing tyranny: the judiciary must possess some degree of independence or autonomy from the rest of the government apparatus[23].

As mentioned above, and as stated by Tamanaha, the requisites are universal because they cannot be objectionable even in societies that do not embrace a liberal ideology. The pre-liberal conception of the ROL plus judicial independence are acceptable for both liberal societies whose primary orientation is the freedom of individuals to pursue their own vision of the good and non-liberal societies where the community shares a common vision of the good[24].

In Tamanaha's construct, liberal requisites (public rules declared in advance, with the qualities of generality, equality and certainty) apply to Western societies and non-Western societies in some spheres but not in others. For example, the liberal rule of law might be useful, even in non-Western societies, in situations of interaction between strangers, as is the case in megalopolises, since other social ties and forms of restraint are often thin[25]. This conception holds that excluding the liberal features to some spheres of non-Western society will be less disruptive of existing relationships and social bonds, because the ROL can be alienating and destructive when they clash with surrounding social understandings[26].

As presented by Tamanaha, the minimalist approach seems to be only a (partial) solution for non-Western cultures, or in the best case, to some spheres of Western societies where traditional rules govern and, in addition, where freedom to pursue one's own visions of the good are not accepted or are not the primary aim of society. Genuine doubt surrounds the existence of such a sphere or community in the Latin American context. It is undeniable that native peoples or a remote rural community may have strong social ties and perhaps a different set of informal norms. Differences can even be found regarding some formal norms (e.g., related to land tenure), but except for some marginal cases, those communities have assimilated essential values of Western culture. We cannot assume that they will be better off if the law (whatever kind of law, including their own rules) is, for example, retroactive, secret, incomprehensible, and so on. What is more, it is doubtful that the pre-liberal requisites are achievable excluding the liberal ones. Does the law really limit the sovereign if it is applicable retroactively? Is it reasonable to subject officers to

21 Tamanaha 2002, 2004: 137-141.
22 Tamanaha 2002: 10.
23 Tamanaha 2002: 16.
24 Tamanaha, 2002: 10.
25 Tamanaha 2002: 29-30.
26 Tamanaha 2002: 30.

potential responsibilities if the law is unclear or if it is secret? In addition, the second requisite in Tamanaha's proposal (i.e., that the government should treat citizens with basic human dignity) is also difficult (if not impossible) to achieve if we neglect the "liberal" part of the rule of law.

Furthermore, although the idea of averting tyranny is of course commendable, if we limit the ROL to the prevention of tyranny it will not meet expectations regarding its relationship with development.

Beyond the preceding comments, Tamanaha's perspective does not explore the cornerstone of the ROL problem in Latin America. His proposal provides no answers about how to improve the first feature of the pre-liberal conception, namely, the limitation of government activity by law (i.e., the efficacy of the law). The author accepts that he has no "legal" solution for it and that, in fact, it is a matter of culture or a *mysterious* condition: «For the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary and proper aspect of their society. This attitude is not itself a legal rule. It amounts to a shared cultural belief»[27]. In addition, he says, that successful implementation of the rule of law is simply a pervasive belief on the part of the populace and officials[28], and these pervasive attitudes and believes, are «[…] the mysterious quality that makes the rule of law work»[29].

As presented by Tamanaha, the minimalist version of the ROL is, in conclusion, not a universal human good since it depends on something present in some countries but not in others. Coincidently, societies that have difficulties achieving higher levels of the ROL are the ones in which the pervasive cultural trait is not present. Finally, in Tamanaha's view, this effort to overcome the problem of cultural diversity or cultural relativism is disappointing since cultural traits are an unapproachable problem, at least from a legal perspective. Ultimately, how this author deals with the first pre-liberal feature places him not far from the cultural thesis (see below section 2.3) because the only way to cope with the problem of the inefficacy of the law is to change the culture in some way.

2.2. *Legal Empowerment: The Inclusive Approach*

If Tamanaha wanted to succeed in making the ROL a universal human good, the main concern of the so-called *inclusive approach* is to make the ROL work to alleviate poverty[30]. I share the idea that the ROL is essential for poverty alleviation

[27] Tamanaha 2012: 246.

[28] Tamanaha 2004: 119.

[29] Tamanaha 2004: 141.

[30] Before beginning to explain the principal characteristics of the inclusive approach, it is important to say that it is related to an initiative known as legal empowerment of the poor (LEP) that was hosted by the United Nations Development Program (UNDP) from 2005 to 2009. Currently, LEP

but disagree with the way this approach is developed[31].

The inclusive approach does not reject the Western model and implicitly assumes that it is achievable in any cultural environment. This acceptance allows it to include concerns about human rights, property rights and other features usually linked with Western ideals.

According to this approach, «The rule of law […] refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency»[32].

The Western-oriented vision of the inclusive ROL eliminates the first criticism of Tamanaha's work: the inclusive approach is useful for Latin America precisely for its conception of human autonomy and freedom.

The main challenge that the inclusive approach makes is that there is a paucity of proof that the rule of law in its orthodox approach necessarily reduces poverty[33]. To overcome the disbelieve, they offer a set of ideas about ROL programmes that can be summarized as follows[34]:

a) A review of the kind of institutions for which ROL programmes are designed. The inclusive approach claims that donors should pay attention not only to state institutions but also to civil society (NGOs, religious institutions, community-based organizations). Civil society institutions can play an essential role in delivering justice to the poor[35].
b) People should have access to justice not only through the formal system but also by having easy access to alternative dispute resolution (ADR) and informal, hybrid or non-state mechanisms[36].

---

initiatives are associated with some World Bank projects, to the International Development Law Organization (IDLO), to the Australian Agency for International Development and to the Open Society Foundations. Legal empowerment can be characterized as the use of rights and laws specifically to increase disadvantaged populations' control over their lives (Golub 2013: 5).

31 See Fernández Blanco 2018b: 83-110.

32 Kennedy 2008.

33 In this section when referring to "orthodox views" or similar terms we are not alluding to traa ditional or classic approaches to the ROL described in section 2, but to the narrow content attributed to this term by F. Upham (2006) see *supra* note 1.

34 The list only covers the principal features directly related with the ROL. Claims and concerns linked with other spheres of LEP are not included.

35 Golub 2006: 123-125.

36 Chapman and Payne 2013: 25; Domingo and O´Neil 2014: 14-15; Golub 2006: 117 ff.

c) Customary norms and legal pluralism should be taken into account. Accepting a society ruled by multiple sources of law requires a broader concept of legal operators. As a result, lawyers and judges should not be the only ones involved in dispute resolutions. Paralegals, for example, can navigate more easily across normative boundaries[37].
d) Top-down and bottom-up processes are necessary for generating effective reforms and for creating legal tools accessible to all citizens so that they can protect their assets and use them to create trust, obtain credit, capture investment, access markets, raise productivity and protect their rights[38].

It is beyond the scope of this work to conduct a general analysis of the inclusive approach. Instead, the focus will be on the potential problems or contributions regarding the ROL.

The idea of citizen participation in the process of law making (see above point (d)) is interesting from several perspectives: first, even indirectly, this approach has sought alternatives to achieve efficacy in implementing reforms; second, public participation in the law-making process could be the right path to achieve efficacy of norms. However, the law-making process has not been central to the promotion of most of the work and programmes carried out under the auspices of this approach.

Major concerns of the inclusive approach remain, as in some of the classic versions, with regard to conflict resolution. The innovation is the interest that this approach has demonstrated in the access to conflict resolution by poor or disadvantaged people. Notwithstanding the commendable objective and the acute understanding of the problem, this is the area where the approach generates significant doubts.

My understanding of the ROL is that it is hardly separable from state activity and responsibility. Of course, states can admit ADR in their territories, but it is difficult to assimilate it as a component of the rule of law itself. Replacing public adjudication for some private or non-public ADR model seems to be vanishing from at least some state duties. This is not an ideal solution to the problem of strengthening the ROL. The questions are relatively obvious: How can we ensure impartiality or independence, or other procedural guarantees, in processes entirely removed from the state apparatus? What kind of review or appeal can be guaranteed? What guarantees that these methods of conflict resolution satisfy one universal and rational criterion regarding the standard of proof?

In addition, the idea of having a justice system accessible to the non-disadvantaged or the non-poor populations, and other kinds of dispute resolution systems that serve only or mainly poor, disadvantaged or native populations is not a satisfactory option. It is especially at odds with the expectation that every person is

[37] Domingo and O´Neil 2014: 21.
[38] Commission on the Legal Empowerment of the Poor 2008: IV.

entitled, with full equality, to the same set of procedural guarantees. Guaranteeing access to justice for everyone under a state's jurisdiction is a duty of the state, and it should be addressed in a way that does not create second-class conflict resolution for disadvantaged inhabitants.

ADRs are aimed at resolving conflicts; this is not analogous to "delivering justice". A conflict can be settled in a way that does not result from the application of existing rules (be they formal, informal or traditional). In ADRs, it is not even required that the resolution be "fair". An unfair solution accepted by both parties or established by the paralegal or informal adjudicator is, in fact, a conflict resolution whether or not the disadvantaged person (or the most disadvantaged person) is defeated. Thus, not only does the ADR model leave aside the application of norms as a necessary rationale for adjudication, nothing intrinsic or inherent to ADRs guarantees that the most vulnerable are specially considered. Therefore, ADRs may be, in the best case, a broader opportunity for *formal access* to an instance of conflict resolution, but nothing guarantees that the adjudication is fair, consistent and impartial.

The ADRs, for the reasons set forth above, are not intended to set general parameters for the resolution of similar cases. Conflict resolution in ADRs is aimed at particular cases and is sometimes achieved through mechanisms that are not universally established. Thus, equality (which, at least in its formal version, is what integrates even formal approaches to the rule of law) is affected. In addition, in Latin America, the main objective of most of the procedural codes in public and private law is the search for truth. This objective is in no way necessarily or contingently present in the spirit of the ADRs. The former characteristic of the ADRs also results in an obstacle to the realization of a basic conception of equality because some citizens may have access to truth-finding processes while others might access ADRs that focus only on conflict resolution.

In short, the most consistent way to guarantee formal and substantial access to justice under any rule of law paradigm is to promote that the arm of justice of the state system goes further and is accessible to everyone[39].

Although some works of the inclusive approach are well aware of the risk of welcoming and developing legal pluralism, the risk is not carefully assessed. Legal pluralism is a double-edged sword, especially for this perspective built entirely on Western values and assuming that the ROL should be understood in a broad fashion that includes, among other features, human rights, equality and property rights.

Besides, it seems to be that the ROL has by definition (whatever definition of it is adopted) a particular relationship with formal norms. The formal legal order is only one subset of the different subsets of norms that structure any society, including the most developed ones. Nevertheless, recognition of this fact does not support

[39] A more extensive criticism of ADRs can be found in Mattei and Nader 2008; Giabardo 2017a, 2017b; Ferrer and Fernández Blanco 2015.

the notion that the ROL should have some function or relationship with norms that are not part of the subset of formal norms. Non-formal norms that do not oppose formal norms are one normative phenomenon that simply coexists with the formal system but with which the ROL has almost no relationship.

Finally, the inclusive approach is mainly focused on inter-personal or private law-guided relationships (the only ones that ADRs can settle and the ambit where legal pluralism is recognizable). This fact itself is not a disadvantage; the problem is that vertical relationships, those in which one or more state actors are involved, are practically disregarded in this perspective. The previous fact is, of course, a significant weakness in the effort to build a ROL conception that is actually inclusive of disadvantaged people.

2.3. The Cultural Counteroffensive: Culture Rules

The third and final unorthodox approach considered in this paper, unlike the previous ones, does not try to make theoretical adjustments to the concept of the rule of law or propose pragmatic innovations in its implementation. What it does put in serious doubt is that all cultures are compatible with the unquestioned version of the rule of law[40].

This cultural counteroffensive also has its roots in the poor results of ROL programmes carried out during the 1980s and 1990s: most of those programmes neglected cultural traits and therefore the ROL projects were implemented by transplanting successful institutions from the developed world to Latin America and other emerging countries. In addition, they had only one recipe that was assumed to work in every country. ROL programmes were designed in the unhappily famous "one-size-fits-all" fashion. The "discovery" of cultural diversity and the implausible success of transplanted institutions, plus the senseless of applying one recipe to every society, are behind the origins of this cultural counteroffensive in thinking about the ROL. Unfortunately, they provide only a partial and unsatisfactory response to these problems.

Samuel Huntington, in his book *Who Are We?* (2005), argues that the degree of development reached by the United States of America originates primordially from shared cultural qualities and religious traits (Anglo-Protestantism) and has a weak link with the political organization defined by the constitution and the other legal institutions of the country. In line with these thoughts, other authors, including Huntington, have dedicated much work to the cultural traits of developing coun-

[40] Before continuing, it is necessary to stipulate what we mean by "culture" or "cultural traits". Rosa Brooks' definition is acceptable. Brooks understands "culture" as the widely shared myths, assumptions, behavioural patterns, customs, rituals and social and historical understandings of a group (Brooks 2003:2286, footnote 50).

tries and have concluded, in the same vein, that there is little sense in promoting legal reforms when in fact it is "culture" that governs institutional changes. Therefore, the path to establishing the ROL and generating development begins with changing the culture. Then, formal laws might possibly be relevant.

Rosa Brooks, in her criticisms of orthodox ROL programmes, affirms, «The rule of law is not something that exists "beyond culture" and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture, yet the human-rights-law and foreign-policy communities know very little – and manifest little curiosity – about the complex processes by which cultures are created and changed»[41].

Even stronger is the following assessment of Lan Cao: «Although law does have an expressive function and thus certain laws make certain statements which could in turn influence social norms, this capacity to affect preferences and beliefs through law is questionable in countries where the rule of law is itself weak. For those countries, law is insufficient and culture change will be needed»[42].

As Amy Cohen remarks, this neo-cultural interventionist approach deploys a conceptualization of culture paradoxically analogous to the conceptualization of law that the turn to culture was intended to correct[43].

The idea that culture or cultural traits can interfere in the ROL and development is not new. Many authors (from Max Weber to the first wave of law and development practitioners and academics) have expounded it. Later, the so-called Washington Consensus and the processes of transition from socialism to market economies in Eastern Europe were quite indifferent to cultural diversity. The energetic rebirth of the cultural perspective is nevertheless broader and more in-depth, and it promotes wider interventionism than some previous, similar perspectives. Unlike the first wave of law and development practitioners, the focus is no longer on changing the idiosyncrasy of the legal elites (judges, lawyers, law professors). It envisions a more tentacular reach into the population – a shift in agents from Third World elite judges, lawyers, and legislators to virtually everyone[44].

I share two fundamental ideas of this approach, but only in their initial standpoints. First, it can be assumed that the cultural approach supports the idea that the ROL itself is almost a non-malleable or adaptable ideal. As mentioned previously, one of the starting points of this paper is that the virtues and benefits of the ROL are culturally blind and, although some features of the ROL can be discussed, the four core characteristics presented in the Introduction are not subject to any reduction

41 Brooks 2003: 2285.
42 Cao 2007: 360-361.
43 Cohen 2009: 516.
44 Cohen 2009: 516.

or obliteration. Nevertheless, recognizing that the basic features of the ROL are not negotiable is not the same as saying that "programmes" or "projects" to strengthen it should be built without taking into account cultural differences or specific problems that are present in each society. This marks an important difference: the cultural approach does not seem to accept that the ROL can be strengthened using different tools that are better suited to each culture. The cultural determinism behind this leads to the view that some cultures are inherently "good" and some inherently "bad" at achieving the ROL and/or development, and the only solution is to change the latter to make them suitable for ROL[45]. This determinism even stops them from exploring the idea that different tools can be used in each society to implement or strengthen the ROL: whereas the ROL is not adaptable, practical perspectives are not culturally blind and should be designed in a customized way.

The second point of the cultural approach that I initially agree with is that culture is not unchangeable. Cultures and cultural traits have transformed themselves since time immemorial and will never stop. In addition, there is nothing inherently wrong in changing cultural traits in a purposeful way (for example, to change discrimination against women in a given society). Nevertheless, a broader set of tools can transform cultural traits far beyond the proposed "cultural interventionism". Myriad unpremeditated or deliberated mechanisms can drive cultural changes. Among those mechanisms, the law – when it is efficacious – is a powerful tool, but so are scientific information, technological advances, economic booms, deliberation and so on.

The main problem of this approach is the specific weight that it places on "culture." Culture or cultural traits can be as influential as other features of a given society. As Amartya Sen has pointed out, «Our cultural identity is only one of many aspects of our self-realization and is only one influence among a great many that can inspire and influence what we do and how we do it. Further, our behavior depends not only on our values and predispositions, but also on the hard facts of the presence or absence of relevant institutions and on the incentives – prudential or moral – they generate»[46].

I am not persuaded that an "anti-rule-of-law" cultural trait actually exists as such: the evidence we have is only that certain laws are not efficacious, but we don´t know for sure if it is a cultural trait that obstructs their efficacy, or is it just that those laws are inadequately designed or ineffectually applied. In addition, even if we accept that such an "anti-rule-of-law" cultural trait exists, it cannot be an invincible hurdle. This idiosyncrasy can be – and in fact, many times is – neutralized when the law is designed correctly. In Latin American countries there are thousands of examples in which citizens and officers act according to what is established by law

[45] For a deeper criticism, see Sen 2004: 37-58.
[46] Sen 2004: 66.

and, thus, those rules are efficacious. Even in those spheres where the attachment to the law is especially weak include examples of well-designed acts that have been successful.

3. Some Ideas about How to Improve the ROL in Latin America

From classic perspectives to unorthodox views of the ROL, the core idea that "citizens and government must act within the framework of the law" is primarily associated with only one side of the problem, i.e., the citizens' and governments' attitude towards the law. The other side, "the legal side", is largely ignored.

Considered individually or jointly, the ROL "lists", however essential, establish only the minimum features that a law has to have to allow citizens and governments to follow it. The features proposed in the lists do not address the other central problem: for the ROL to exist people should not only be able to follow it, they must *actually* follow it. This criticism is directed not only at the formal or thin views; the substantive approaches did not demonstrate genuine concern about efficacy at all. They were and are involved mostly in discussions about the ontology of rights and their fundamentals, but rarely are they aimed at promoting or discussing efficacy as a critical factor.

On the other side of this indifference to efficacy, other groups of legal theorists have often been concerned with the efficacy of the law. Nonetheless, they usually approached it from a theoretical perspective. Contributions to discuss and clarify what is efficacy and how to distinguish it from the effectiveness and efficiency of the law are well developed but, unfortunately, it seems that the ROL world and the world of "efficacy" have never overlapped.

The rough and incomplete ideas that this paper explores to solve the efficacy problem can be grouped into three blocks: a) legal ideas about law-making processes; b) ideas about successful application of the law and c) ideas about the evaluation of the law after its implementation[47].

3.1. *First Block: Legal Ideas about the Law-Making Processes*

Traditionally, legal theory has been quite oblivious to the law-making process because there was a partially false assumption that legislative processes and the design of law are highly political issues and, consequently, legal theory has little to

[47] In this section, I will quote and discuss several authors and take into account some of their proposals. Nevertheless, I will not offer a critical view of their works because the aim of the section is only to present some ideas recently raised in the academic arena and to see how they can be connected with the issue of strengthening the efficacy of the law.

contribute to them. Fortunately, this is slowly changing, and several law perspectives have approached the topic. As Jeremy Waldron explained, it is not that legislatures are suffering from overall academic neglect, but in jurisprudence, at any rate, we have not bothered to develop any idealistic or normative picture of legislation[48].

Luc Wintgens, from a different angle, pointed out that this situation could be viewed from two perspectives. The "law" perspective justification was usually that: «Law has its own method of study, called legal dogmatics or, more broadly, legal theory of different sorts. The way law is created through the process of legislation does not appear on the screen of the legal theorist»[49]. Meanwhile, from the legislative side, the reasons given were as follows: «The legislator is a sovereign actor within political space, and cannot be bound to rules, at least not in the sense a judge is. If he were, he would not be a sovereign. On this view, the constitution is a political programme that steers legislation, not a set of binding rules for the legislator. As a result, the legislator is not considered a legal actor, only a political actor. Legislation then is a matter of politics: In severing law from its political origin, law-making is not a matter of legal theory»[50].

Nowadays the rigid conceptions presented above are slowly changing, and different perspectives have started to focus on the role of legislators and the legislative process from a legal perspective. Without intending to show a complete map of these perspectives, some of them are as follows:

- A rational theory of legislation is gaining terrain in legal-academic spheres as well as in the legislative field. One key aspect of this approach is to achieve a higher degree of law-efficacy through a rational law-making process[51]. This concern may be translated into a set of duties for legislators, including, at least, the necessity of arguing during the deliberation about potential problems associated with the efficacy of the future law in subjective and objective dimensions[52]. The subjective dimension should include, for example, reports on the degree of "demand" for a certain law by the group that will benefit from it and the degree of "disapproval" that is estimated in the group that supports the costs of the new law. It may also include the evaluation of informal norms that the new act is trying to neutralize and explanations about the incentives that the new law is generating to overcome informal rules. Finally, any ex-ante evaluation has to face the problem of the new potentially dysfunctional, informal rules and how to prevent them[53]. Those are only some preliminary ideas that should be expanded

48 Waldron 1995: 644.
49 Wintgens 2006: 1.
50 Wintgens 2006: 5.
51 See Oliver-Lalana 2008; Atienza 1997: 36 et seq.; Fernández Blanco 2018a: 347 ff.
52 Atienza 1997: 37.
53 Several explanations are usually given for why a norm has low efficacy (for example, techni-

and polished. The objective dimension may include, for example, the organizational structure that the new legal rule or set of rules needs to be efficacious or the financial issues that could challenge its efficacy.

- Another possible approach is to focus on strengthening the procedural side of legislative work. There are compelling reasons to believe that a direct relationship exists between deliberation and efficacy. Of course, the deliberation process that is the aim of this proposal should be serious, not just feigned, and considered practically and not in an idealistic, unrealistic or overoptimistic fashion. As Ekridge, Frickey and Garret explain, «Deliberation shapes and changes public preference on issues; it allows lawmakers to modify, amend or discard proposals on the basis of new thinking and information; and it facilitates the development of civic virtue in citizens. Deliberation, thus, is an end in itself, and it serves the larger instrumental purpose of improving public policy»[54].

Deliberation is an ideal epistemic situation[55] that not only increases moral reasons to obey the law but also provides it with "democratic authority"[56]. Deliberation has both intrinsic and instrumental value. The instrumental value lies in the fact that a number of individuals may bring a diversity of perspectives to bear upon issues under consideration, and that they are capable of pooling these perspectives to come up with better decisions than any one of them could have on their own[57]. Nevertheless, deliberation is not easy to achieve – especially in highly diverse legislatures. For that reason, Waldron proposes that the focus should be oriented to create a set of procedural rules for deliberation[58].

To sum up, it seems that deliberative processes enhance the likelihood of creating and designing efficacious laws. It is also clear that meaningful deliberation is not going to happen in a natural way, especially in highly diverse legislatures.

---

cal-legislative problems that prevent its comprehension or difficulties in its enforcement). For some years, a significant contribution from political science and economics has provided other explanations for why a rule may have low efficacy: the tension or competition generated between legal norms and other non-formal rules. Societies work simultaneously with several normative subsets, and formal norms are only one of those subsets (Coleman 1990). It is possible to identify informal institutions that interact with formal institutions and have consequences on the efficacy and/or the effectiveness of legal norms. That is, informal rules can affect the reasons for compliance. Thus, for example, the presence of informal norms can diminish the fear of a sanction by reducing the possibility of being discovered in noncompliance and promoting a behaviour different from that indicated by the legal norm. In other cases, this tension can diminish the utility of complying with the rule because it is more costly to comply with than the alternative behaviour promoted by the informal rule.

54 Ekridge, Frickey and Garret 2007: 70.

55 Estlund 2007: 18.

56 Estlund 2007: 32-33; 145-169.

57 Waldron 1995: 655.

58 Waldron 1995: 660.

Therefore, one way to promote and strengthen deliberation processes could be through the establishment of procedural institutions for ordering and formalizing deliberation.

- The third and last idea about the law-making process is in some ways more theoretical than the previous two, but on no account is it unthinkable to translate it into realistic and viable projects. Some authors remark that for a law to be efficacious (or similar terms with the same or similar meaning), it has to be intelligible to the population for whom it is intended[59]. Intelligibility, in the way Postema uses it, is a deeper and broader concept than the one included, for example, in Fuller´s list, which only requires that rules must be "understandable" or in Hayek and Raz's lists when they refer to the "clarity" of laws. Intelligibility is linked with the *meaningfulness* that a certain law would have in the society or the group that it is intended to govern. In a similar sense, Berkowitz, Pistor and Richards explain that «[…] for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law»[60].

Veronica Rodríguez Blanco, although not interested specifically in the law-making process but in law authority and normativity, developed some similar ideas as the ones expressed above[61]. She asserts that a deeper engagement with practical reason and practical knowledge is vital for understanding the authority and normativity of the law: «[…] Agents engage in intentional action and show their engagement with practical reason when they comply with legal rules. Consequently, legislators and judges as law creators need to advance formulations of the law that make possible this practical engagement, if they wish their legal rules to be followed. This is especially true when legal rules require the performance of complex actions over time»[62]. The author continues with her idea as follows: «When legislators and judges create legal directives and legal rules they operate like the writers of instruction manuals though at a more complex level. They need to ensure that the addressees will decide to choose to comply with the legal rules or directives and thereby bring

[59] Postema 2008.

[60] Berkowitz, Pistor and Richards 2003: 167. These authors use the word "effectiveness" in the way I use "efficacy".

[61] Although Rodríguez Blanco's main concern is not about law making and efficacy, she accepts that the conclusions of her book may also be useful for that task: «[…] the most controversial legal process or *actuality* is neither the legal decision making nor the legislating, but rather the idea of following and complying with legal norms and rules. The book will concentrate mainly on the latter but I envisage that the conclusions of this book can be extended to the activities of legislating and judging». (Rodríguez Blanco 2014: 36).

[62] Rodríguez Blanco 2014: 23.

about the intended state of affairs […] Thus for the addressees with certain rational capacities and in paradigmatic cases, understanding the grounding reasons as good-making characteristics of the legal rules and legal directives will enable them to decide or choose to comply with the rule and will guide them through the different series of actions that are required for compliance with the rules and directives»[63].

The idea that legislators should pay attention to the role of practical reason is as appealing as the argument that they should make clear the grounding reasons for the law. This set of ideas is not hard to translate into a set of guidelines for legislators and programmes aimed to strengthen the ROL.

3.2. Second Block: Successfulness in the Application of the Law[64]

For several obvious reasons, the proposals presented in the first block are not a silver bullet to achieve a higher degree of efficacy. One compelling reason for this relative scepticism is that no matter how well designed a legal rule is, if there are no consequences for breaching it, its guiding power decreases substantively.

Law enforcement has a dual instrumental function in terms of the efficacy of the law: the first one occurs when, in a particular case after the law was broken, the state, through law enforcement mechanisms, mandates that in that particular case the rule infringed is made efficacious. For example, law enforcement may involve returning things to the *status quo* previous to the breach or may force those who have broken the law to comply with it (e.g. to pay evaded taxes). Additionally, this kind of relationship between enforcement and efficacy may have a deterrent (or incentive) effect on a person that was condemned or declared liable (special deterrence)[65].

The second relationship is perhaps more interesting and engulfing. When law enforcement is efficacious and efficient, deterrence will occur in a more general way (general deterrence), the more important channel to improve efficacy. Naturally, law enforcement can be more or less influential in general deterrence depending on the kind of legal rule. Some social norms are so deeply established that the general deterrence effect may be less visible. On the other hand, the efficacy of legal rules

[63] Rodríguez Blanco 2014: 72.

[64] The successful application of the law may be identified with the second Kelsenian meaning of effectiveness (in their use of the language, here called efficacy) (i.e., that the norm is *applied* by the legal organs, particularly the law courts, which means that the sanction in a concrete case is ordered and executed (Kelsen 2005: 11)). Note that the second sense used by Kelsen can be directly inversely related to the first one: where the law is efficacious (or effective) in the first sense, the necessity for efficacy (or effectiveness) in the second sense decays; inversely, when the efficacy in the first sense is low, the second sense becomes more relevant.

[65] Friedman 1975: 67-73.

with no social attachment, or that are perceived as unfair, useless or outdated, can be related more directly and proportionally with their enforcement. Cannibalism is not expected to increase if the enforcement fails, but parking meter payment infractions will definitively increase without enforcement[66].

Variations in the success of the law enforcement system sometimes create different scenarios that may lead to generalizations or inferences related to culture and its impact on law breaking (or more generically, inferences between cultural traits and the ROL). Those different scenarios could be a problem of general deterrence, not a cultural one. Take the example of Uruguay and Argentina, two neighbouring countries that share virtually all their cultural traits, whose economies were initially developed in the shadow of smuggling, and that enjoy very similar income and geopolitical situations. These two countries, however, seem to exhibit a profoundly different "culture of breaking the law". My modest appreciation is that such cultural differences about respect for the law do not exist or, at best, they are minimal: the primary cause of differences between both societies is success in law enforcement, which generates a higher level of compliance with legal rules in Uruguay[67]. By no means does this comparison between Uruguay and Argentina intend to present substantial evidence in favour of the position held in this paper, but it is still relevant, as an example of the abuse of explanations concerning the cultural issues criticized in section 2.3.

3.3. *Third Block: Evaluation of Law Efficacy*

The last set of ideas about improving the efficacy of law relates to the need to *evaluate* legal rules when they are already in force. These ex-post evaluation mechanisms can be implemented in several ways. Simple statistical measurements and/or regression analyses are probably the most traditional tools to evaluate efficacy and, sometimes, effectiveness[68]. Often, when the legal reform is radical, simple statistical measurement could be enough to determine behavioural responses to the change (efficacy) and to link these responses to specific changes in the social or economic arena (effectiveness). Nevertheless, when the reform is not sufficiently drastic, it is challenging to link the cause (legal reform) unequivocally with the results (identified social or economic changes that are the purpose of the legal reform). In such

[66] Friedman 1975: 68.

[67] According to the World Justice Project Rule of Law Index 2019, Argentina scores 0.58 (out of a maximum of 1) and Uruguay 0.71. Argentina ranks 12/30 and Uruguay 1/30 in the Latin American and Caribbean region, and globally they rank 46/126 and 23/126, respectively.

[68] Briefly, "effectiveness" as used here is the ability of a particular law to reach the social or economic objectives that led to its enactment. Naturally, this approach to the concept of effectiveness leads to another discussion that I will not address in this paper: the right methodology, if any, to determine the purposes or objectives of a given law.

situations, in the best case, a sense of correlation may be obtained, but it would not be possible to prove a cause-effect relationship.

Statisticians overcome the difficulty to establish "cause-effect" relationships by adding control variables. To explain it simply, if those variables exhaust all non-random factors then the cause-effect is proven, but if there is an omitted variable, the coefficient will be biased. Sometimes it is difficult to avoid bias because the available data may be incomplete or because the researchers' theoretical accounts of which variables correlate with the dependent and independent variables are incomplete[69].

Randomized impact evaluations are a third way to approach law evaluation. Although disputed, and not free from difficulties, this alternative is gaining ground as a governance tool in domestic and international ambits. The methodology of randomized studies or trials was initially developed in the hard sciences and is widely used in the pharmaceutical industry. The core idea is to select a population with similar qualities (therefore, "comparable") and divide the group in two: the first group (treated group) is receiving the new drug or treatment under evaluation and the other group is receiving a placebo or continuing with the standard treatment or drug. This methodology, at the end of the last century, was used by economists to evaluate the impact of development programmes and other public policies. Development programmes and public policies are almost always carried out under the framework of a specific law. Some scholars therefore proposed that it was possible and desirable to evaluate broader kinds of laws using randomized trials (not just laws relating to states' public policies or development programmes)[70].

This methodology is growing as an innovative way to evaluate the efficacy, effectiveness and the efficiency of the law. Naturally, it is not feasible to evaluate all laws using this method. For example, imagine that a new law is enacted to promote greater central bank independence[71]. It is, of course, beyond the possibilities of a controlled random evaluation to assess the efficacy or the effectiveness of this set of legal rules. Nevertheless, other laws have been evaluated under this methodology, and the results are of great interest not only for the evaluated policy but also for the design of future policies.

The story of the PROGRESA programme (subsequently renamed as "*Oportunidades*" and now called "*Prospera*")[72] in Mexico is the story of the official birth and growth of conditional cash transfers (CCT). It may be illustrative of the kind of results obtained from a randomized evaluation and it may demonstrate how I connect efficacy with the results of these trials. PROGRESA offers grants, distrib-

[69] Abramowicz, Ayres and Listokin 2011: 940.

[70] Abramowicz, Ayres and Listokin 2011: 940.

[71] Duflo 2004: 342.

[72] "Oportunidades" was renamed and adjusted in 2014. The new programme is called "Pross pera." In 2018 "Oportunidades" reached 24.13% of the Mexican population, around 31 million people (Source CEPAL).

uted to women, conditional on children's school attendance and preventative health measures (nutrition supplementation, health care visits, and participation in health education programmes).

In 1998, when Mexican government officials launched the programme, they made a conscious decision to take advantage of the fact that budgetary constraints made it impossible to reach the 50,000 potential beneficiary communities of PROGRESA all at once, and instead started a pilot programme in 506 communities. Half of those were randomly selected to receive the programme, and baseline and subsequent data were collected in the remaining communities[73]. The evaluations showed that PROGRESA was effective in improving health and education. Comparison between PROGRESA beneficiaries and non-beneficiaries shows that children had about a 23 percent reduction in the incidence of illness, a 1 to 4 percent increase in height, and an 18 percent reduction in anemia[74]. In addition, the comparison showed an average increase of 3.4 percent in enrolment for all students in grades 1 through 8 in the treated group. The increase was largest among girls who had completed grade 6: 14.8 percent[75].

At present, almost all countries in Latin America have a CCT programme, and countries outside the region have also adopted this policy. The laws enacting programmes like PROGRESA or other CCTs are complex aggregates of different types of legal rules (duty-imposing rules, power-conferring rules, prohibitions and so on). These legal rules and prohibitions are addressed to a variety of persons. For example, selected households have the right to enrol in the programmes; women have the right/obligation to receive the money each month; parents have the duty of sending their children to school and vaccinating them; budget administrators have the duty of making funds available each month; officers of the social security system have the duty of selecting households using a set of standards; school principals have the duty of accepting new students; and at the same time a cluster of particular and general prohibitions are established for beneficiaries and officers. It works like sophisticated machinery that requires all (or almost all) addressees to act within the framework of the law in order for it to work.

One result of the impact evaluation is the direct reflection of the efficacy of the law (compliance with duties and prohibitions): an increase in primary school enrolments directly reflects the efficacy of some legal rules (officers provided the budget on time, parents sent their kids to school, and schools accepted new students). Other results show more accurately the effectiveness of the law and, indirectly, its efficacy. The 23 percent reduction in the incidence of illness is a case in point: when effectiveness is reached, efficacy is an assumed pre-condition in almost all cases.

---

73 Gertler and Boyce 2001.
74 Gertler and Boyce 2001.
75 Duflo 2004:345.

4. Conclusions

During the 1980s and 1990s, ROL programmes in Latin America were mainly aimed at a highly instrumental goal: achieving the objectives promoted by the so-called Washington Consensus. This instrumental purpose is perhaps the reason why the ROL programmes were fragmented and, at best, designed only to reform specific institutions perceived to be failing or that did not resemble their counterparts in countries that embodied a successful rule of law. Those programmes did not target directly – and in the best cases only did so indirectly – the core value of the ROL: the idea that governments and citizens should operate within the framework of the law. Probably for this reason, programmes and reforms had poor outcomes and even more mediocre effectiveness in generating the free and healthy market that was at the heart of the Washington Consensus. Nevertheless, more than 20 years after those ROL programmes ended, neither the theory nor the pragmatic approaches have taken into account that the main feature of the ROL what have failed categorically.

References

Abramowicz, M., Ayres, I and Listokin Y. (2011). *Randomizing Law*, «University of Pennsylvania Law Review» 159, 4, 929-1005.

Alchourron, C. and Bulygin, E. (1991). *Análisis Lógico y Derecho*, Madrid, Centro de Estudios Constitucionales.

Anoop, S. et al. (2005). *Stabilization and Reform in Latin America: A Macroeconomic Perspective of the Experience since the 1990.* IMF Occasional Paper 238, Washington DC, IMF.

Atienza, M. (1997). *Contribución a una teoría de la legislación,* Madrid, Civitas.

Berkowitz, D, Katharina P. and Richard J.F. (2003). *Economic Development, Legality, and the Transplant Effect*, «European Economic Review» 47, 165-195.

Bingham, T. (2011). *The Rule of Law*, London, Penguin Books.

Bovero, M. (2015). *Seguridad Jurídica y Democracia: una perspectiva teórico política* in Cruz, C., Fernández Blanco, C. and Ferrer, J. (eds.), *Seguridad Jurídica y Democracia en Iberoamérica*, Madrid, Marcial Pons.

Brooks, R. (2003). *The New Imperialism: Violence, Norms, and the Rule of Law*, «Michigan Law Review», 101,7, 2275-2340.

Cao, L. (2007). *Culture Change*, «Virginia Journal of International Law», 357, 3-71.

Chapman, P. and Payne, C. (2013). *You Place the Old Mat with the New Mat: Legal Empowerment, Equitable Dispute Resolution, and Social Cohesion in Post-Conflict Liberia, «Justice Inititiatives».*

Carothers, T. (2006). *The Problem of Knowledge* in Id., *Promoting the Rule of Law Abroad: in Search of Knowledge*, Washington D.C., Carnagie Endowment for International Peace, 16-28.

Carothers, T. (1998). *The Rule of Law Revival*, Foreign Affairs, 77.

Cass, R. (2004). *Property Rights Systems and the Rule of Law*, in Colombatto, E. (ed), *The Elgar Companion to the Economics of Property Right*, Oxford, Edward Elgar Publications, 131–163.

Cecchini, S., Madariaga, A. (2011). *Programas de Transferencias Condicionadas. Balance de la experiencia reciente en América Latina y el Caribe*, «Cuadernos de CEPAL», 95, CEPAL, ONU.

Clark, J., Armstrong, P., Varenik, R. (2007). *The Collapse of the World Bank´s judicial reform project in Peru*, in Lindsey. T. (ed.) *Law Reform in developing and transitional states*, New York, Routlege, 159-179.

Cohen, A. (2009). *Thinking with Culture in Law and Development*, «Buffalo Law Review», 57, 511-586.

Coleman, J. (1990). *Foundations of Social Theory*, Cambridge (Mass.), Harvard University Press.

Commision on the Legal Empowerment of the Poor. (2006). *Making the Law Work for Everyone.* Vol. I, United Nations Development Program, New York, UNDP.

Commision on the Legal Empowerment of the Poor. (2008). *Making the Law Work for Everyone.* Vol. II, United Nations Development Program, New York, UNDP.

Dhaliwal, I., Duflo, E., Glennerster, R., Tulloch, C. (2011). *Comparative cost-effectiveness to inform policy in developing countries*, Working paper, MIT Abdul Latif Jameel Poverty Action Lab. Cambridge (Mass.).

Dicey, A.V. (1982 [1885]). *Introduction to the Study of the Law of the Constitution*, London, McMillan and Co.

Díaz, E. (1975). *Estado de Derecho y sociedad democrática*, Madrid: Cuadernos para el Diálogo.

Duflo, E. (2004). *Scaling Up and Evaluation*, in Bourguignon, F. and Pleskovic, B. (eds.) *Annual World Bank Conference on Development Economics 2004: Accelerating Development*, Washington DC: World Bank, 341-369.

Dworkin, R. (1986). *A Matter of Principles,* Oxford, Clarendon Press.

Ekridge, W., Frickey, P. and Garret, E. (2007). *Legislation,* St. Paul (Miness.), Thomson/West.

Estlund, D. (2011). Democratic Authority. A Philosophical Framework (2008), tr. Cast. *La autoridad democrática. Los fundamentos de las decisiones políticas legítimas,* Buenos Aires, Siglo XXI editores.

Fernández Blanco, C. (2013). *Derecho y Desarrollo, una visión desde América Latina y el Caribe.* Buenos Aires, Editores del Puerto.

Fernández Blanco, C. (2018a). *Un aporte jurídico a los debates sobre instituciones y desarrollo. Aproximación desde problemáticas compartidas por los países de América Latina*, available in http://hdl.handle.net/10803/482041.

Fernández Blanco, C. (2018b). *El Estado de Derecho y la Seguridad Jurídica como herramientas para la lucha contra la pobreza en América Latina*, in Fernández Blanco, C., Ferrer Beltran, J. (eds.), *Seguridad Jurídica, Pobreza y Corrupción en Iberoamérica,* Madrid, Marcial Pons, 83-110.

Ferrajoli, L. (1995). *Diritto e ragione. Teoria del garantismo penale* (1989), tr. cast. *Derecho y Razón. Teoría del garantismo penal*, Madrid, Trotta.

Ferrer Beltran, J., Fernández Blanco, C. (2015). *Proyecto sobre Indicadores de Seguridad Jurídica en Iberoamérica*, in Cruz, C, Fernández Blanco, C. and Ferrer, J. (eds.), *Seguridad Jurídica y Democracia en Iberoamérica*, Madrid, Marcial Pons.

Filgueira, F. (2009). *El desarrollo Maniatado en América Latina: Estados superficiales y desiguales,* Buenos Aires, Clacso-Crop.

Friedman, L.M. (1975). *The Legal System. A Social Science Perspective,* New York, Russell Sage Foundation.

Fuller, L. (1978). *The Morality of Law,* Londres- New Haven, Yale University Press.

García Villegas, M. (2009). *Normas de Papel. La cultura del incumplimiento de reglas*, Bogotá, Siglo del Hombre Editores.

García Villegas, M. (1993). La eficacia simbólica del derecho. Examen de situaciones colombianas, Bogotá, Uniandes.

García Villegas, M. (2011). *Ineficacia del derecho y cultura del incumplimiento*, in Rodríguez Garavito, C. (coord.) *El derecho en América Latina. Un mapa para el pensamiento jurídico del Siglo XXI*, Buenos Aires, Siglo XXI, 161-184.

Gardner, J. (1980). *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*, Wisconsin, University of Wisconsin.

Gertler, P., Boyce, S. (2001). *An Experiment in Incentive-Based Welfare: The impact of PROGRESA on Health in Mexico*, Berkeley, University of California.

Giabardo, C. (2017a). *Private Law in the Age of the 'Vanishing Trial',* in Barker, K., Fairweather, K. and Grantham, R. (eds), *Private Law in the 21th. Century*, Oxford, Hart publishing, 547-560.

Fairweather, K., Grantham, R. (2017b). *Should Alternative Dispute Resolution Mechanisms Be Mandatory? Rethinking Access to Court and Civil Adjudication in an Age of Austerity*, «Exeter Law Review» 44, 25-36.

Golub, S. (2013). *Legal Empowerment Approaches and Importance*, Justice Inititatives.

Golub, S. (2006). *A House without Foundations*, in Id. (ed), *Promoting the Rule of Law Abroad. In Search of Knowledge*. Washington DC: Carnegie Endowment for International Peace.

Guastini, R. (2001 [2002]). *Implementing the Rule of Law,* «Analisi e Diritto», 95-103.

Hammergren, L. (2002). *Do Judicial Councils Further Judicial Reform? Lessons from Latin America*, Working Paper no. 28, Washington D.C., Carnagie Endowment for International Peace.

Harrison, L., Huntington S. (2000). *Culture Matters*, New York, Basic Books.

Hayek, F. (1979). *The Constitution of Liberty*, San Francisco, China Social Science Publishing House.

Hierro, L. (1996). *El imperio de la ley y la crisis de la ley*, «DOXA, Cuadernos de Filosofía del Derecho» 19, 287-308.

Huntington, S. (2005). *Who Are We?*, New York-Londres, Simon and Schuster.

Jeammaud, A. (1984). *En torno al Problema de la Efectividad del Derecho*, «Crítica Jurídica», 1, 5-15.

Kelsen, H. (1960). *Reine Rechtslehre*, tr. Eng. *Pure Theory of Law* (Second Edition) (2005), New Jersey, The Law Book Exchange.

Kennedy, A. (2008). *Rule of Law*, LEP Commission Discussion Paper, quoted by the Commision on the Legal Empowerment of the Poor.

Mattei, U., Nader, L. (2008). *Plunder. When Rule of Law is Illegal*, Massachussets, Blackwell Publishing.

Méndez, J. (2002). *Reforma Institucional: el acceso a la justicia. Una introducción,* in Méndez, J; O´Donnell, G. and Pinheiro, P. (eds.), *La (in)efectividad de la ley la la exclusión en América Latina*, Buenos Aires, Paidos, 223-227.

Merryman, J. (2003). *Memorias de SLADE*, in Fix-Fierro, H., Friedman, L. and Pérez Perdomo R., *Culturas jurídicas latinas de Europa y América en tiempos de globalización*, México D.F., UNAM, 749-769.

Navarro, P. (1990). *La eficacia del Derecho*, Madrid, Centro de Estudios Políticos y Constitucionales.

Navarro, P., Moreso, J.J. (1996). *Aplicabilidad y eficacia de las normas jurídicas*, «Isonomía», 5, 119-139.

Nino, C. (2005). *Un país al margen de la ley, estudio de la anomia como componente del subdesarrollo argentino* (4th. edition), Barcelona, Ariel.

O´Donnell, G. (2002). *Las Poliarquias y la (in)efectividad de la ley en América Latina*, in Mendez, J., O´Donnell, G. y Pinheiro, S.P, *La (in)efectividad de la ley y la exclusión en América Latina*. Buenos Aires: Paidos, 305-336.

Oliver-Lalana, D. (2008). *Los argumentos de eficacia en el discurso parlamentario*, «DOXA, Cuadernos de Filosofía del Derecho», 31, 533-566.

Pilar D., O´Neil, T. (2014). *The Politics of Legal Empowerment,* London, ODI.

Postema, G. (2008). *Conformity, Custom and Congruence: Rethinking the Efficacy of Law*, in Kramer, M., Grant, C., Colburn, B. and Hatzistavrou, A. (eds.), *The Legacy of H.L.A. Hart*, Oxford- New York, Oxford University Press, 45-66.

Rao, V., Walton, M. (2004). *Culture and Public Action: Relationality, Equality of Agency, and Development*, in Rao, V. and Walton, M. (eds.) *Culture and Public Action*. Stanford: Stanford University Press, 3-36.

Raz, J. (1979). *The Authority of Law: Essays on Law and Morality*, Oxford, Clarendon Press.

Redondo, M.C. (2009). *Sobre Principios y Estado de Derecho*, in Redondo M.C., Sauca J.M. and Andrés Ibañez P., *Estado de Derecho y decisiones judiciales*, Madrid: Fundación Coloquio Jurídico Europeo, 9-39.

Rodríguez Blanco, V. (2014), *Law and Authority under the Guise of the Good,* Oxford, Hart Publishing.

Sen, A. (2004). *How Does Culture Matter?*, in Rao, V. and Walton, M. (eds.), *Culture and Public Action,* Stanford, Stanford University Press, 37-58.

Tamanaha, B. (2012). *The History and Elements of the Rule of Law*, «Singapore Journal of Legal Studies», 232-247.

Tamanaha, B. (2011). *The Primacy of Society and the Failures of Law and Development*, «Cornell International Law Journal», 209, 44, 216-247.

Tamanaha, B. (2007). *A Concise Guide to the Rule of Law*, Legal Studies Research Paper. Series Paper no. 07-0082 St. Johns University, Queens, NY, St. Johns University.

Tamanaha, B. (2004). *On the Rule of Law: History , Politics, Theory*, Cambridge,Cambridge University Press.

Tamanaha, B. (2002). *The Rule of Law for Everyone?,* «Current Legal Problems» 55, 1, 97–122.

Tamanaha, B. (1995). *The lessons of Law and Development studies (review)*, «The American Journal of International Law», 89, 2, 470-486.

Trubek, D. (2006). *The 'Rule of Law' in Development Assistance: Past, Present, and Future*, in Trubek, D and Santos, A., *The New Law and Economic Development, a Critical Apprisal,* New York, Cambridge University Press, 74-94.

Upham, F. (2002). *Mythmaking in the Rule of Law Orthodoxy,* Working Paper no. 30, Washington, Carnagie Endowment for International Peace.

Upham, F. (2006). *Mythmaking in the Rule-of-Law Orthodoxy*, in Carothers, T. (ed.), *Promoting the Rule of Law Abroad. In Search of Knowledge*, Washington DC, Carnegie Endowment for International Peace, 75-104.

Vernengo, R. (1983). *Sistemas Normativos dinámicos y la idea de libertad jurídica*, in Bulygin E. *El lenguaje del derecho. Homenaje a Genaro Carrió*, Buenos Aires, Abeledo Perrot, 273-279.

Waldron, J. (2011). *The Rule of Law and the Importance of Procedure*, in Fleming, J. (ed.), *Getting the Rule of Law*. New York: New York University Press, 3-31.

Waldron, J. (2008). *The Concept and the Rule of Law*, «Georgia Law Review», 43, 1-61.

Waldron, J. (1999). *The Dignity of Legislation*, Cambridge, Cambridge University Press.

Waldron, J. (1995). The Dignity of Legislation", «Maryland Law Review», 54, 2, 633-665.

Weber, M. (1991). *Die protestantische Ethik und der Geist des Kapitalismus* (1904-1905), tr. Cast. *La ética protestante y el espíritu del capitalismo,* Tlahuapan, Puebla, Premia.

World Bank (2005). *Economic Growth in the 1990s: Learning from a Decade of Reform,* Washington D.C, World Bank.