ABSTRACT

Weak Rule of Law as the Primary Cause of Lower-Quality Latin American Democracies

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Drawing on a deep tradition of rule of law literature, spanning from Aristotle to O'Donnell, this thesis argues that the main problem in modern Latin America is a weak rule of law evidenced by ineffective judicial systems unable to sustain vertical and horizontal accountability. A broad analysis of the necessary characteristics and conditions for democratic rule of law leads to mid-range theory on the application of these characteristics in combination with the unique challenges facing modern day Latin America. A case study of Peru examining crime rates and court systems supports gives evidence to the paramount importance of rule of law and its lack thereof within the state and the region as a whole. This lack of strong rule of law gives rise to a host of other current issues and undermines democratic institutions lowering the quality of democracy.

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WEAK RULE OF LAW AS THE PRIMARY CAUSE OF LOWER-QUALITY, LATIN AMERICAN DEMOCRACIES

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CHAPTER ONE:

Rule of Law Tradition

Latin America has been undergoing a process of democratization for the past thirty years resulting in a plethora of very different outcomes. Despite the presence of free and fair elections in these democracies, the quality of democracy varies significantly. States are not experiencing the level of high quality democracy that citizens and scholars alike anticipated. Instead, governments are faced with a wide range of problems from social movements to economic hardships. Citizens face the trespass of government on their rights. Blatant corruption within government as authority is arbitrarily exercised and rising criminal activity that threatens people's physical safety as well.

This project delves into the experience of Latin American states as they democratize in the twenty-first century. A variety of challenges abound for citizens and governments alike, which all impede the quality of democracy on the South American continent. The most significant threat to Latin American democracy is an absence of strong rule of law and the inability to sustain judicial systems capable of enforcing rule of law vertically and horizontally. Through a careful analysis of rule of law tradition ranging from Aristotle to the present, one understands the purpose and parameters of strong rule of law necessary for the protection of the natural rights of citizens. Law is not an end-all-be-all solution for creating stable democracies, thus it is also necessary to examine the pitfalls of law manipulated to serve specific interests which undermine the stability and quality of democracy. Chapter Two applies rule of law tradition and theory specifically to the case of Latin American democracies. It examines the wide range of challenges democracies face

and the correlated cause of weak rule of law. From drug trafficking to hyper-presidentialism, to lack of due process, these states have many weak areas that can be remedied by strengthening rule of law. Dahl and O'Donnell give several principles by which quality of democracy and subsequent rule of law can be determined, (Dahl; O'Donnell). Chapter Three provides a comprehensive case study of Peru, a mid to high level democracy with rule of law shortcomings. By studying the court systems and crime rates of Peru, one comes to a clearer understanding of the weakness of rule of law and how its remedy would serve to better safeguard the rights of citizens, eliminate high crime levels, and remove populist and hyper-presidentialist currents within the state. Comparing crime and the court systems to the principles established by Cicero, Dahl and O'Donnell substantially supports the claim that rule of law is ongoing at a subpar level in Peru, and negatively impacting the further democratic development needed for Peru to advance to a higher level of democracy.

An exact definition of the term "Rule of Law" has been debated since the time of Aristotle with many prominent scholars and political theorists over the past millenniums weighing in on the nuances of law and its application within a variety of government forms. Before delving into the nuances and particulars that define rule of law, Flores cautions the casual commenter that one must realize that the term 'rule of law' is not based on the dictionary definition of two very commonplace words. In his writings and equation *R*= 'Rule'; *L*= 'Law', and *RoL*= 'Rule of law'. "Instead, of believing that our knowledge of either R and L is sufficient for our understanding of *RoL* the result is that it is different to them or at least to the union of both. In a few words, if not all *R* or *L* is identical to *R* or *L* is identical to *RoL*, then for being consider[ed] as such both must have some characteristics

beyond merely being *R* and *L*," (Flores, 81). In algebraic form this observance reads: If "RoL ≠ R" and "RoL ≠ L" then "RoL ≠ R + L," (Flores, 81). Neither rule nor law is equivalent to rule of law and additionally the sum of both rule and law will not lend a definition of rule of law. In fact, Flores argues that the reverse is true: a definition for rule of law will bring clarity to the meaning of both "rule" and "law," (Flores, 82).

With this caveat out of the way, one can turn one's attention to Aristotle whose immortal questioning of whether it is best to be ruled by law or by men, sparked rule of law research that has endured for centuries. While Aristotle delves into the pros and cons of both possibilities he eventually gives stronger support for the rule of law: "It seems that someone who orders the law to rule orders God and the mind alone to rule, while someone who orders people to rule adds a wild animal. For they have desires and the heart twists the rule of even the best men. Wherefore law is mind without appetite," (Wexler and Irvine, 130).[1] Ruling a state and establishing effective governance that safeguards the rights of its citizens is not simple task with one solution that may be applied to all situations. It was not a one-size-fits-all problem in Athens's pure, direct democracy, and nor is it in the constitutional, representative democracies that exist in Latin America today. "Certainly, he [Aristotle] prefers the government of the best laws to regulate abstract and general cases with *reason*. But he does not rule out completely the government of the best men to resolve concrete and particular cases with *passion*," (Flores, 82).[2] As evidenced in modern courts, there are times when those in positions of authority must decide how best to write law or apply law. "Because they are written in general formulas, laws cannot deal with things 'as

[1] Aristotle quoted in Wexler and Irvine: Aristotle, *Politics*, 1287a28–33.
[2] Aristotle quoted in Flores: Aristotle. 1988. *Politics.* Cambridge: Cambridge University Press.

they come up'. But this is also the strength laws have. Humans have a weakness that written words do not," (Wexler and Irvine, 129). Wexler and Irvine accurately point out the paradoxical nature Aristotle speaks of: that laws cannot preside over current affairs as the world changes, and thus, in those instances rule by the best man becomes more effective than rule strictly by a written legal code. However, mankind is fallible and thus no ruler can ever be perfectly good. The established code of written laws not easily done away with protects against the tendency in men's hearts to strive for their own good in the form of wealth or power at the expense of their fellow citizens. Aristotle resolves this paradox in *Politics* stating:

> "But when the law cannot determine a point at all, or not well, should the one best man or should all decide? According to our present practice assemblies meet, sit in judgment, deliberate, and decide…. Now any member of the assembly, taken separately, is certainly inferior to the wise man. But the state is made up of many individuals. And as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual." (Flores, 83)

Aristotle's solution is the consideration and deliberation by more than one man over situations that the law cannot easily remedy upon first glance. His idea of a direct assembly over time became the modern legislature made up of elected representatives of the people which writes law, while the modern judiciary interprets the application of the law. His principle of opening up the ruling of a state beyond one individual to the ordinary citizenry remains salient despite the institutional evolution that has occurred over time.

Opening government institutions to the influence of the people prevents tyranny, not only by accurately representing the needs and desires of the people being governed, but also by safeguarding against the arbitrary abuse of authority. "Since more power can dominate less, many thinkers have wondered about how power might be channeled away

from recurrent pathological forms and tendencies, how it might be rendered at least safe and then, more positively, helpful, for those subject to it, rather than loom as a perennial source of threat and fear?" (Krygier, 5).

The problem within states is not the existence of power and authority, for it is no great stretch to ascertain the usefulness of law and order for ensuring the efficiency and effectiveness of government. Power is also necessary to guarantee rights and liberties of the citizens of a state. An anarchical state lacks capacity, and it proves dangerous to those residing in it as each man is free to take the law into his own hands. Several hundred thousand people determining what is 'just' cannot help but wreak havoc and violate natural rights. Therefore, Krygier accurately observes that the question is not how best to eliminate or reduce power, but rather how to channel power so as to protect the rights of citizens within a state and produce efficient and effective government, while still guarding against the arbitrariness of corrupt rulers. "A common thought has been that left to their own devices wielders of power cannot be relied on to avoid exercising it [power] arbitrarily, and will constantly face the temptation and in many circumstances the incentive to act in their own, rather than the public interest," (Krygier, 6). Arbitrary exercise of power is exactly what Aristotle sought to eliminate when declaring that the rule of men was inferior to the rule of law. Regardless of the tenets of one's religious traditions regarding the innate 'sinfulness' or moral corruption of mankind, all could agree that no man is perfect, and therefore no one can rule or serve a government perfectly. Krygier synthesizes a variety of literature on this topic and proposes the argument that even the potential for this arbitrary abuse of power is indeed a trespass on democracy, (Krygier, 6).[3] Even if one's ruler, may

[3] Krygier references Pettit, 1997.

indeed be the closest man to perfect that has ever existed, one can never be completely sure that one's faith in a leader is not misplaced, and arbitrary exercise or abuse of power is not, in fact, possible

Krygier discusses three ways arbitrariness occurs in states: "One form of arbitrariness is found where power-wielders are not subject to routine, regular control or limit, or accountability to anything other than their own 'will' or 'pleasure,'" (Krygier, 6). This observance necessitates other institutions that provide horizontal checks on the power of a state's leader, which in the case of a democratic country, the executive and his office. A solid constitutional base of power, (that is rule based in law) that determines the boundaries of an executive's power serves as an effective safeguard.

The second form of arbitrariness "occurs where power is exercised in ways those it affects cannot know, predict or obey when they are deciding how to act," (Krygier, 7). Law itself may exist, but as we have noted earlier the sum of 'law' and 'rule' do not make 'rule of law'. "…And it is true that if one has no way of knowing how power is to be exercised, because its grounds are secret, retroactive, too variable to know, vague beyond specification, impossible to perform…" then those in power have abused their authority in an arbitrary manner, (Krygier, 7). If law is contorted to entrap citizens in harrowing legal confrontations, then the law is simply being manipulated to further arbitrariness, and strong rule of law is absent.

The third and final form of arbitrariness that Krygier puts forth is that, "where there is no space or means made available for its targets to be heard, to question, to inform, or to affect the exercise of power over them and no requirement that their voices and interests be taken into account in the exercise of power," (Krygier, 7). This is again an instance

whereby a solid rule of law can mitigate such a threat. It is important that a democracy (in any of its forms) gives the people a guaranteed chance to be heard through processes outlined in a Constitution or other code of laws that cannot be altered arbitrarily.

Law is a means to an end, and it this case it is a means to achieve order, justice, peace, and protection of the natural rights of mankind. Law is not a magic solution, though that absolutely ensures these desired ends come about. It can easily be manipulated to achieve ends that are not desired or democratic, "because law is specifically and characteristically –at its core –a vehicle for the exercise of power," (Krygier, 18). Law can be used to establish rule of law or it can be used to further support arbitrary exercise of authority by a despotic ruler. Because of this principle, it is absolutely necessary for strong horizontal accountability in the form of a legislature and judiciary to check executive power by opening up government power to the populace.

As Aristotle states in the above feast metaphor, the collective input and decision of a group regarding what is just and right is better than the determination of right by one. Aristotle goes on to say: "Law teaches the purposes it prescribes to those who govern and leaves them to judge and pursue those purposes as in their opinion is most just, making any corrections which their experience shows to be better than what has been laid down,"(Wexler and Irvine, 133).[4] Wexler and Irvine see this Aristotelian principle as the foundation for common law and the establishment of responsibilities for the modern judiciary, (Wexler and Irvine, 133). As it is up to men to interpret the law, having more than one man to determine what is right will prove as a safeguard to tyranny, whether that is because one man's bias does not represent the opinion of the majority or because that

[4] Original quote from Aristotle, *Politics,* 1287a25–28. A variety of Aristotle's works on rule of law have been quoted and analyzed in Wexler and Irvine.

one man is power-hungry and self-serving to the detriment of all citizens. “We do not expressly say a judge is supposed to correct the law. We say a judge is supposed to apply the law; but we acknowledge that in applying the law, it may be necessary for a judge to figure out ‘what the law really means,’” (Wexler and Irvine, 133). It is not just Aristotle’s assembly that is made up of representatives of the people, but even in the judicial systems, juries are composed of ordinary citizens and in many cases judges themselves, are elected by the people. Aristotle confirms that, “In some cases, a crowd is a better judge than a single person. It is harder to corrupt a big thing, like a large body of water; so a large group of people is harder to corrupt than a small one. Where one person is overcome with anger or some other feeling [pathê] that necessarily corrupts the decision; it is much harder to make everyone angry and lead them all astray,” (Wexler and Irvine, 134).[5] Governance by “a crowd” is what gives rise to the intricacies of a legal code. However, the ‘inconvenience’ of a just legal system is always preferable to the tyranny of ‘right’ established by one man.

Rule of law is necessary because rule by man, even the best man, is still subject to extreme bias and arbitrary use of power. Rule by man does not necessitate a permanent foundation of order over time. If the law of the land changes with each “good leader,” each of whom holds a differing view of what good law and good leadership should be, than a polis (or state) will be destabilized. Cicero weighs in on the idea of rule of law:

> “Our commonwealth, on the other hand, was the product not of one genius but of many; it was not established within the lifetime of one man but was the work of several men in several generations. For, as Cato said, there had never been a genius great enough to comprehend everything, and all the ability in the world, if concentrated in a single person, could not at one time possess such insight as to anticipate all future needs, without the knowledge conferred by experience and age.” (Flores, 83)[6]

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[5] Original quotation: Aristotle, *Politics*, 1286a30–36. Quoted in Wexler and Irvine.

[6] Cicero quoted in Flores: Cicero, M.T. 1929. *On the commonwealth*. Trans. G.H. Sabine and S.B. Smith. Columbus: The Ohio State University Press.

Cicero concurs with Aristotle's ideas preferring rule of law over rule of men. As he so well articulates, it is impossible for one man in the scope of his lifetime to determine the exact measure of what is good and right and transcribe this into a set of laws that could comprehend every future evolution of the world. Those alive in Cicero's day could never comprehend the technological advances of the 21st century and the laws necessary to regulate those advances in order to ensure the protection of a state's citizenry, whether it be air traffic regulations or rules of engagement for nuclear warfare. The modern solution of opening up governance to the will of the people, as stated above, is through the separation of powers and the electoral process. Waluchow states that, "they [citizens] can each be seen to contribute, in their own unique ways, from their own unique perspectives, and within their unique contexts of decision, to the achievement of a morally sensitive and enlightened rule of law... judicial review sets the stage for a "dialogue" between the courts and the legislature... [and] is best viewed not as an imposition that thwarts the democratic will but as one stage in the democratic process," (Flores, 86).[7] With a judiciary and legislature working together to write and apply laws that both provide order and justice while not encroaching upon rights of the people, a democracy is well-equipped to combat arbitrary exercises of power and support strong rule of law. Flores references Atienza's principles for quality legislation and judicial review: "Hence, a (good) legislator- and a (good) adjudicator- knows and must know: the intricacies of our language (Rl); the details of our existing legal system - its past, present and future (R2); the minutiae of our scheme of ends, interests, purposes and values (R3); the ins and outs of their possible consequences

[7] Waluchow quoted in Flores: Waluchow, W.J. 2007. *A common law theory of judicial review. The living tree*. Cambridge: Cambridge University Press.

and effects (R4); and, the niceties of every single principle of justice (R5)," (Flores, 89). The man equal to the task should be considered the best and voted into office, ensuring the 'dialogue' between powers produces strong rule of law.

Opening government power to the will of the people is an essential tenant to both strong rule of law and a democratic state. However, this opening can give opportunity to a dangerous abuse of democracy: majoritarianism. Hamilton states: "'Give all the power to the many, they will oppress the few. Give all the power to the few they will oppress the many. Both therefore ought to have power, that each may defend itself against the other.' In other words, democracy is more than the government of the majority. In a pure or true democracy the power is neither in the majority nor in the minority but in all the people," (Flores, 95).[8] This concept by Hamilton again pays tribute to the inherent wickedness in the hearts of men. Even opening government to the will of the people does not fully guard against the tyranny of the majority or the arbitrary will of a majority. John Stuart Mill in *On Liberty* finds it necessary to elaborate profusely upon the concept of the majority and role individual duty to society plays in conjunction with individual freedom of choice and will. Mill states:

> The will of the people, moreover, practically means, the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority: the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power. The limitation, therefore, of the power of government over individuals, loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. (Mill, 7)

[8] Hamilton is quoted in Flores: Hamilton, A. 1985. Speech, June 18, 1787. In *Selected writings and speeches of Alexander Hamilton,* ed. M.J. Frisch. Washington, DC: American Enterprise Institute.

Law once again is shown not to be a magic solution to the problem of arbitrary power exhibited in one tyrannical ruler, but yet again an agent of power. Power vested in the hands of the people and displayed through elected officials is a better alternative to the despotic ruler, but it still can be manipulated to misrepresent the will of minority groups of citizens. As no state is purely homogenous in ethnicity, age, gender, religion or political affiliation, minority groups will always be present, and creators of government and those in power must take necessary precautions to make democracies representative of more than just an oppressive majority.

> "The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practice[d] is the government of the whole people by a mere majority of the people, exclusively represented. The former synonymous with the equality of all citizens; the latter. strangely confounded with it, is a government of privilege, in favor of the numerical majority, who alone possess practically any voice in the State. This is the inevitable consequence of the manner in which the votes are now taken, to the complete disfranchisement of minorities." (Flores, 95)[9]

Avoiding majoritarianism is done through carefully crafted legal mechanisms. By writing laws protecting minorities, from equal opportunity employment to non-discriminatory voting rights, and treating all persons with dignity before the law, both the judiciary and legislature can ensure than minority oppression is not occurring masked as democratic rule of law.

Common themes of rule of law and their existence within a democratic state is a good indication of the strength of rule of law and in turn the strength of the democracy itself. Hayek summarizes Cicero with 8 principles delving into the many facets of democratic rule of law:

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[9] Mill quoted in Flores: Mill, J.S. 1958. *Considerations on representative government*. Indianapolis: Liberal Arts Press.

> "(1.) The conception of general rules… (2.) The conception of obedience to law in order to be and remain free…and (3.) The conception of the judge as a law that speaks/with voice and of the law as a speechless/voiceless judge… (4.) The conception of equality before the law, which implies: (4a) Isonomy as an equal application to all; and (4b) The principle "like cases must be treated alike"…(5.) The conception of a duty to obey the law, including authorities and officials; (6.) The conception of legal certainty or security… (7.) The conception prohibiting the creation of *ad hoc* tribunals and retroactive legislation or *ex post facto*; and (8.) The conception of a due process of law, which includes principles such as *audi alteram partem*, i.e. "let no one be a judge in its own cause" and enforcing the analogous 'let no one be a legislator in its own cause.'" (Flores, 86)[10]

"The conception of general rules" refers to the actual presence of law being codified and written to then be applied to a state. In short, laws exist. Furthermore, many thinkers and philosophers perceive a sort of natural law of inalienable rights that should not be violated either by mankind or by government. Written law stems from this idea of natural laws and natural rights. Mills argues, that "…the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of one another; or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights," (Mills, 141). The main premise behind the existence of rule of law rests on this concept of not harming others or not violating what "ought to be considered as rights." There are certain expectations and requirements for living in harmony within a democratic society and written laws makes these expectations known. In fact this concept is considered so paramount that for the American Constitution, a hallmark of global democracy, to be

[10] Hayek sums up Cicero's many thoughts on rule of law into these 8 principles. Hayek's work is quoted in Flores, but also expounded upon by Flores. Hayek, F.A. 1960. *The constitution of liberty*. Chicago: The University of Chicago Press.

ratified, drafters were forced to include a Bill of Rights which ensured man's natural rights would not be oppressed in this new form of government. For example, the only time United States Supreme Court jurisprudence allows restrictions to be placed on the natural right of the 'free exercise of religion' is in regards to "the times, the places, and the manner… and in many other respects safeguard the peace, good order and comfort of the community," as established in *Cantwell v. Connecticut*, and when one person's free exercise does harm to another individual, (Cantwell v. Connecticut, 42). In the above example, the only permitted trespass of personal liberty is when it intentionally harms others and on its time, place and manner, which is generally explained with an analogy that proselytization of religion is a natural right, but screaming your religious views through a bullhorn at three o'clock in the morning to your neighborhood is not permissible. Cicero's second rule is closely tied to the first. Not only must law be written, but there is an expectation of adherence to said law. There is no use in law that the populace does not find worthy of their respect. Rules that are not accepted as a standard by which to behave are no better than mere scribbles on a page if their existence does not affect change nor safeguard the rights of citizens. In this instance the people must believe that the laws on the books are good and just for the purpose of safeguarding rights and maintaining order so that citizens may live a prosperous life. This combined substantive due process and respect for the inalienable rights of all mankind show the foundation for Cicero's first and second principles of rule of law.

Cicero's third principle regarding the judiciary's role in interpreting the law shows that strong rule of law breeds hierarchical relationships in the legal system with both vertical and horizontal accountability. "This means that the relationships among legal rules are themselves legally ruled, and that there is no moment in which the whim of a given

actor may justifiably cancel or suspend the rules that govern his or her actions," (O'Donnell, 34). A "legally ruled" legal system is one that has a set structure for making laws, amending laws, and the exercise of judicial review. In the scope of this principle, the role of the law and the judiciary is known, accepted, and a judge exercising judicial review as the mouthpiece of law is respected and obeyed. Within a democracy rights are further safeguarded by utilizing separation of powers; giving the task of writing laws and the task of interpreting those laws to two different branches of government. Neither branch is considered to be more powerful and each of which contain checks on the other's power providing a balance to governmental structure ensuring that, above all, potential for tyranny is tempered, while rule of law and the rights of citizens are respected and protected. Schmitter and Karl concur: "For democracy to thrive, however, specific procedural norms must be followed and civic rights must be respected. Any polity that fails to impose such restrictions upon itself, that fails to follow the 'rule of law' with regard to its own procedures, should not be considered democratic," (Schmitter & Karl, 183). The general governmental form then is: a constitution holds the highest laws of the land and determines the "procedural norms" required for legislation, the quota required to pass a bill, the standards for those elected to office, and the guidelines for writing every other 'procedural' structure necessary for function of government. Thus, Cicero's third principle ensures corruption within government is limited in terms of procedural activity.

His fourth principle, "The conception of equality before the law," includes both "isonomy" and "*stare decisis"*. Flores notes, "The Elizabethans borrowed from the Greeks the word *isonomia* meaning "equality of laws to all manner of persons": i.e. governed and governors, poor and rich (and, nowadays, in a constitutional democracy applicable to ...

believers and non-believers, foreigners and nationals, heterosexuals and homosexuals, men and women, and so forth)," (Flores, 84). It is from the Greek we receive the English word "isonomy" with an equivalent meaning. Isonomy, as Flores explains it, is the legal pillar prohibiting the moral flaw of discrimination. And while classism, racism, and all other forms of discrimination are sure to exist in the hearts of some people, and may never be eradicated, they should not exist within the scope of law and participation in government. One's right to vote should never be conditioned on one's ethnicity, religion, gender or any other characteristic, but should be found grounded in one's status of citizenship. No country is a purely homogenous state. Men and women, Jews, Muslims, Hindus, and Catholics, billionaires and those living below the poverty line, and right-wing, left-wing or any combination thereof will all reside within the boundaries of a single state. Each person comes to the political table with an equal share that is not based in his or her personal identity as one individual could contain any number of characteristics from race to religion. So many potential combinations exist, to rest one's legitimacy as a citizen on any given combination would essentially result in anarchy. To once again use the example of religion and the United States' Supreme Court: Justice Kagan dissents in *Town of Greece v Galloway*, which upholds a prayer before a town hall meeting as legitimate. Kagan argues:

> Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture… The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV— government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting? (*Town of Greece v. Galloway,* 63)

This extraordinarily pointed question by Justice Kagan applies beyond the sphere of religion to a person's ethnicity, socioeconomic status, career or gender. One's participation in government is contingent upon one's status as a citizen and no citizen should be discriminated against based on any other personal characteristic. While personal biases and distinguishing traits may affect one's tendency to vote 'yay' or 'nay,' this is to be expected and is not relevant to the topic at hand. No two people are exactly alike in thought and belief and this diversity breeds cultural depth. The point to be understood though, is that one comes to the table as an American, Pole, Salvadorian, Kenyan or Thai first and foremost, and as a woman, Hindu, or teacher second. It is the title of citizenship that grants a common denominator to a diverse people group, and the principle of equality of all before the law that solidifies the unification of citizens necessary for effective governance.

Cicero's fifth principle, "The conception of a duty to obey the law, including authorities and officials," is the other side to the same coin, any and everyone should be subject to the same prosecution and punishment without fear of retribution. The law extends to the executive, gang-members, high-ranking military leaders, and government officials as well as the common citizen. Just as citizens should not be discriminated against for any reason, so also should people in power not be exempt from rule of law based on their privileged position. "In a few words, the idea of the rule of law as the "government of/under laws" implies that everyone, including the monarch or sovereign, must be under the law," (Flores, 84). To reiterate Aristotle's great question, we see yet again that if 'rule of law' is preferable to 'rule of men', then even the greatest of men must be subject to the rule of law. Also important, is citizens knowing that authorities will be held to the same laws they are held to. After all, if the highest authority or leader of the state is not obligated

to abide by national law for their own personal benefit, why then should the common man be expected to forfeit potential personal gain by following the rule of law that those in power certainly do not abide by? In addition to gross corruption, when rule of law does not apply to leaders or is not equally applied to all persons, it can have dangerous affects leading to deconsolidation of democracy. "[As] citizens of democracies are less and less content with their intuitions; they are more and more willing to jettison institutions and norms that have traditionally been regarded as central components of democracy; and they are increasingly attracted to alternative regime forms," (Foa & Mounk, 237). When corruption becomes a way of life, citizens are more willing to seek solutions outside of democratic institutions since those institutions have become tyrannical and rule of law has simply become law manipulated to serve only those in power, not to guarantee the people a voice in their government. This disillusionment with ineffective governance caused by a lack of democratic institutions, combined with economic hardship only contribute to the rising waves of violence and crime in many areas of the world. Those in authority already used to circumventing the law then use extralegal solutions to solve problems of crime and violence which causes citizens' faith in the effectiveness of democracy to erode even further. Therefore, "crime does have the potential to erode the quality of democracy by eroding public support for rule of law" and crime affects rule of law more when it is politicized, (Smithey & Malone, 167). This vicious cycle will only continue until rule of law is either reestablished or the democracy implodes. "One of the great advantages of life under government is the provision of a legal system to deliver justice, rather than leaving us to seek our own vengeance. The essential legitimating claim for state power hinges on its ability to provide protection and justice," (Smithey & Malone, 154). O'Donnell says

three characteristics are visible in states where Cicero's fourth and fifth principles are present. "In three senses: 1.) It upholds the political rights, freedoms, and guarantees of a democratic regime; 2.) it upholds the civil rights of the whole population; and 3.) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate legally established controls on the lawfulness of their acts," (O'Donnell, 36). Citizens' civil and political rights are equally available to all; corruption in the legal system is rare and surprising; people have an overall faith that their opinions will not be suppressed, their vote coerced, or their leaders corrupted.

Cicero's sixth and seventh principles are interrelated, "the conception of legal certainty or security…" and "the conception prohibiting the creation of *ad hoc* tribunals and retroactive legislation or *ex post facto*…" These principles when looked at together essentially mean that rule of law is preestablished and known to all citizens, and that law is not being manipulated to people's detriment. "In the conduct of human beings towards one another, it is necessary that general rules should for the most part be observed, in order that people may know what they have to expect; but in each person's own concerns, his individual spontaneity is entitled to free exercise," (Mills, 144). According to Mills, laws should be made known so that citizens "know what to expect." Being a citizen is a right, but it also comes with duties, also known as agreeing to esteem the rule of the land as the substantiated, valid guideline for all behavior. This is not to be oppressive as Mills is careful to caveat; "individual spontaneity" is still alive and well in most areas of one's actions, but the boundaries of such 'spontaneity' are defined by the legal standard of the state. O'Donnell also elaborates on the importance of preestablished and known laws.

> Whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions including the judiciary …By 'fairly applied' I mean…that judicial adjudication of legal rules is consistent across equivalent cases; is made without taking into consideration the class, status, or relative amounts of power held by the parties in such cases, and applies procedures that are preestablished, knowable, and allow a fair change for the views and interests at stake in each case to be properly voiced. (O'Donnell, 33)

Here O'Donnell not only demonstrates the necessity of Cicero's sixth and seventh principles, but also shows how all of Cicero's rule of law principles work together. In this particular reference one sees the interplay of rules four (isonomy and *stare decisis*), five, six, and seven and how it is only in their combination that one can obtain a bird's eye view of the overall effectiveness of democratic rule of law. Authorities cannot expect compliance to unknown standards, and while, actions can be criminalized after they have occurred, those who have committed said actions cannot be charged with a crime if the law did not exist at the time of the action. Such use of *ex post facto* law is not part of strong rule of law, but rather an indication that rule of law is diminishing and the law is being manipulated for the arbitrary purposes of those in power.

Cicero's eighth and final principle, "The conception of a due process of law," is by no means last based on its importance. Due process is a paramount institution within democracies and necessary for strong rule of law. Due process is the blanket term for the judicial rights of citizens and includes, but is not limited to, presumption of innocence until proven guilty, free and fair trial before a jury of one's peers, access to quality legal representation and the opportunity to 'have one's day in court' and defend their presumed innocence. This principle, is truly the culmination of all aspects of rule of law exhibited

within a democracy. An established law, not easily altered, that is respected and known by citizens, written within a constitution based on natural, unalienable rights, that treats all citizens (including rulers) equal before said law, is itself legally ruled and prohibits manipulation of the law, such as using *ex post facto* laws, results in a court system that respects the rights of individuals. Thus, Cicero in his eight principles sums up the necessary aspects of rule of law within a democracy.

Rule of law is by far preferable to rule of men, and throughout time this principle has proven accurate. The natural arbitrary tendency of man prevents the security of citizens' rights. This being true, opening government institutions of power to the people helps check arbitrary power. This is not only demonstrated through the election process of an executive, but also through the existence of separated powers of government where laws are written by the legislature and interpreted by the judiciary. While opening government to the many, legislatures must ensure that majoritarianism does not occur, where minority factions, sure to always exist, are not being oppressed. After all, law is not equivalent to rule of law and it can easily be manipulated to look like democratic rule of law, when in reality it is merely a tool used to serve the interests of a tyrant or an oppressive majority. Cicero establishes eight principles inherent in rule of law that when found in a democracy indicate strong rule of law. The rule of law should be known to all citizens expected to abide by it. And likewise, intricate laws should not be manipulated to incriminate individuals who were intentionally kept in the dark of a law's existence. This also prevents an abuse of power in which authorities could detain dissenting party members or activists, create a law and then charge said person on "legal grounds" maintaining the appearance of democratic rule of law. Citizens (or government authorities) cannot 'take the law into their

own hands'; laws must be enforced by appropriate police and judiciary officials. Equality before the law is imperative in any democracy and is a point of major concern in Latin America. Citizens' rights within democracies should be inherent based on their citizenship, however that is attained, and should not be subject to change based on their gender, socioeconomic status, ethnicity, religion, or political affiliation. A poor, Quechua, Muslim, woman should have the same access to representation, deliberation before the court, and sentencing as a peninsular, upper-class, Catholic, man would have. Furthermore, each citizen should have access to representation and a chance to advocate for himself; each person should be innocent until proven guilty by a free and fair trial before the designated court system of his state. Each citizen, from the common farmer to the president, should be bound by the same set of laws, and judicial adjudication should those laws be violated.

These eight principles delineated by Cicero, and expounded upon by Hayek, create a foundation for examining modern day rule of law and modern day democracy. If a state is missing any one of these aspects rule of law it is not being exhibited in a fully democratic sense. The world has since developed from the pure Athenian democracy of Aristotle's days or the Republican model of Cicero's time. Democracy in all its varieties presents as a much more complex subject, within modern day Latin America. Each state has a different history and culture, holds a plethora of different people groups who speak different languages and adhere to different faiths. Each state's economy is dependent on different means of production and profits from different resources. Constitutions and court systems are all structured uniquely. Furthermore, each state has a different political past to reconcile with and many problematic political or social currents to tackle. Modern democracy must account for these factors and evolve to serve the citizens of each state in protecting their

rights and freedoms. Flores correctly argued that ‘rule of law’ does not equal the sum of its parts, (Flores, 81). The modern observer should also bear in mind that democratic rule of law, also, does not equal the sum of its parts. One does not reach a comprehensive or correct definition of ‘democratic rule of law’ by adding together the definitions of ‘democracy’ and ‘rule of law’. Without diving into the current realities of democratic rule of law, one is ill-equipped to comprehend the interplay of rule of law with current social and political issues in Latin America, which based on the variable factors mentioned above, will determine the strength of rule of law within each state, and which determines the quality of the democracy.

CHAPTER TWO

Democratic Rule of Law in Modern Latin America

Modern day Latin America poses a mixture of states most of which are in the process of democratic consolidation. This process has been on-going since the "Third Wave of Democracy" (Huntington, 1991), arrived in Latin American in the 1990s, and states have been wading through authoritarian pasts, foreign relations, the Financial Crisis of 2008, emigration, and their place on the world stage as re-emerging democracies. In the struggle to consolidate democracies or rather, consolidate them with strong institutions, the countries of Latin America face several challenges including gross levels of economic inequality, lack of capital and lack of exports in finished goods, and underdeveloped technological and manufacturing bases to spur further industrialization. Beyond the economic sector, these states also face enormous challenges to the very nature of democracy: Censorship, imprisonment of dissenters, lack of strong institutions ensuring civil and political rights, the rise of left-wing and right-wing populism and hyper-presidentialism, excessive impeachments, lack of state capacity, and authoritarian legacies of extreme human rights abuses. All of these items individually pose significant threats to the growth and establishment of democracy in Latin America, but unfortunately many of these countries have a multitude of these factors to contend with as they strive toward democratic consolidation. The above issues can all be viewed as problematic outcomes resulting from a weak rule of law, or even lack of rule of law in some instances.

The re-emergence of democracies around the world in areas such as Latin America and Eastern Europe is commonly referred to as 'The Third Wave of Democracy and it "began in Portugal in 1974 and reached Latin America via the Dominican Republic in 1978," (Mainwaring and Pérez-Liñán, 115). This process of democratization occurred throughout Latin American from 1978 to the early 1990s. Since then, states pursued an avenue of democratic consolidation, where countries sought to 'consolidate' or build democratic institutions for the stability of their state and the protection of citizens' rights. Given the previous era of authoritarian regimes in the region, this has been no easy task. Each state has a different history with democracy. Some are returning to previous traditions, while others are engaging with democratic traditions for the very first time. States must draft democratic constitutions, create free and fair elections for executives and members of Congress, institute a just judiciary that applies law fairly and equally across the entire state, create democratic institutions from party systems to the existence of free press (where opposition rhetoric isn't responded to with prison time), rectify the gross human rights abuses committed by the previous regime, and balance the need for military protection with the previous behavior of the overreaching militaries. Additionally, somehow these new democracies must convince citizens that despite government previously doing the opposite of all these factors, this new form of government will indeed safeguard their rights and freedoms as citizens. "The new and fragile democracies that have sprung up since 1974 must live in "compressed time." They will not resemble the European democracies of the nineteenth and early twentieth centuries, and they cannot expect to acquire the multiple channels of representation in gradual historical progression as did most of their predecessors," (Schmitter and Karl, 80). This is an enormous undertaking and each

state's trajectory of democratic consolidation since 1990 evidences the challenge of building a successful democracy. In analyzing the relative successes or failures of democracy within Latin American states, one would be wise to remember the relative novelty of this institution in the region. Democracy in "compressed time" cannot and will not resemble the processes found in long standing democracies such as the United States, or the United Kingdom.

There is no cookie cutter mold for democracy, and therefore it will look different in each state. "The specific form democracy takes is contingent upon a country's socioeconomic conditions as well as its entrenched state structures and policy practices…Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives," (Schmitter and Karl, 76). These characteristics presented by Schmitter and Karl are what make democracies different from one another. Competition and cooperation while necessary in all democracies, will show up very differently in each one. Some democracies operate with two-party systems, while others operate with multi-party systems that cooperate to form coalitions. Competition and cooperation may also extend beyond party lines and even beyond the formal structure of government. Competition and cooperation exist between parties in relation to legislation over pressing national issues, from the military to the environment. Furthermore, citizens engage in informal democratic competition and cooperation daily through the rights of free speech, free press, and free assembly, and this dialogue is vital for the health of a democracy. From the outside looking into the arrival of the Third Wave in Latin America, many scholars thought that with the installation of free and fair elections

within states, democracy would be re-established and all states would have the necessary tools for becoming high-quality democracies. “Some even consider the mere fact of elections---even ones from which specific parties or candidates are excluded, or in which substantial portions of the population cannot freely participate--as a sufficient condition for the existence of democracy,” (Schmitter and Karl, 78). The reality that has since appeared in Latin America in the last thirty years has shown otherwise. As Schmitter and Karl note above, the appearance of elections can be extremely deceiving when used as an indicator of high-quality democracy. Elections may not be completely free to all individuals and may only allow certain contingents of people to hold office. The plethora of issues that each new democracy must wade through has since helped government officials and scholars recognize that in order to consolidate democracy that will last, much, much more is required than simply holding elections. Schmitter and Karl argue further that the hopes and expectations for Latin American democracies have been misguided beyond the hope that elections would provide an easy solution for instant democratization and economic prosperity. “Instead, what we should be hoping for is the emergence of political institutions that can peacefully compete to form governments and influence public policy, that can channel social and economic conflicts through regular procedures, and that have sufficient linkages to civil society to represent their constituencies and commit them to collective courses of action,” (Schmitter and Karl, 87). All of society must be reoriented for states to become fully democratic. Expecting the existence of elections to produce a high-quality democracy is illogical; elections may serve as a catalyst for further change, but they cannot create lasting democracy without coexisting with democratic, governmental institutions.

Schmitter and Karl note that certain procedural norms must be in place in order for democracy to exist and thrive. They offer the "'procedural' minimal conditions" put forth by Robert Dahl as a basis for necessary democratic institutions, (Schmitter and Karl, 81):

> "1) Control over government decisions about policy is constitutionally vested in elected officials.
>
> 2) Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon.
>
> 3) Practically all adults have the right to vote in the election of officials.
>
> 4) Practically all adults have the right to run for elective offices in the government....
>
> 5) Citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined....
>
> 6) Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
>
> 7) . . . Citizens also have the fight to form relatively independent associations or organizations, including independent political parties and interest groups.
>
> 8) Popularly elected officials must be able to exercise their constitutional powers without being subjected to overriding (albeit informal) opposition from unelected officials.
>
> 9) The polity must be self-governing; it must be able to act independently of constraints imposed by some other overarching political system." (Schmitter and Karl, 81)[11]

These conditions presuppose many factors. One sees that elections are indeed a large factor, but they are far from being the only factor. Dahl discusses elections in conditions two, three, four, and eight, and seeing that Dahl thought it necessary to devote four of his nine conditions to elections, one can clearly gather that there is more to democratic elections then their mere existence. In addition to universal suffrage, elections must occur

[11] Dahl is quoted in Schmitter and Karl: Robert Dahl, *Dilemmas of Pluralist Democracy* (New Haven: Yale University Press, 1982), 11.

"frequently" meaning a power-hungry individual cannot retain power for an immeasurable amount of time and coercion to vote for a specific candidate or party is relatively nonexistent. These two conditions help to guard against the "electoralism" fallacy, which portrays the existence of elections as the sole necessary condition for the presence of democracy, even if said elections limit suffrage or are vulnerable to manipulation or coercion, (Schmitter and Karl). Furthermore, we see in condition eight, that elected officials being able to hold the office they were chosen for, is just as vital as constituents being able to freely vote for the candidate of their choice. "Citizens are expected to obey the decisions ensuing from such a process of competition, provided its outcome remains contingent upon their collective preferences as expressed through fair and regular elections or open and repeated negotiations," (Schmitter and Karl, 82). Even if the candidate one did not support is elected to office, one's status as a citizen necessitates that the election results are to be respected regardless of one's personal feelings of animosity or differing views on policy issues. "Momentary losers will respect the winners' right to make binding decisions," (Schmitter and Karl, 82). This is one of the tradeoffs of democracy, a government chosen 'by the people' means that the citizens must respect the fact that not all of their fellow persons may agree with their views.

Dahl's conditions five, six and seven remark on the ability of citizens to interact with information and informal institutions. Citizens have the right to not agree with the policies made by government officials, and they also have the right to freely make those views known, whether through dialogue, protests, media, or any other means of communication. The problem that exists in Latin America today is that while citizen's in some states may technically have the right to freedom of speech or freedom of association,

they may still face retribution for speaking out against abuses of office by power-hungry individuals or leaders. This applies to both speech, and freedom of the press. Media sources should be independently owned and not fear serious punishment for printing or dispersing information that does not follow the party line of the executive currently in office. The beauty of democracy is the allowance for differences both personally and politically. These differences allow competition between factions which provide a check on potential abuses of government. Stomping out this competition through imprisonment or more covert methods, such as financial ownership of media outlets, violates citizen's rights and cannot be present within a high-quality democracy.

Dahl's ninth condition touches on state autonomy, capacity and legitimacy. This entails the ability of a state to successfully rule itself without undue influence from external or internal actors. This means that there are no other states, international organizations, or international financiers behind the scenes pulling strings determining how states should be run, what policies should be implemented, who or what party holds power, or how finances should be allotted. Autonomy, capacity and legitimacy are vital for a state's citizenry to hold any faith in their government. If the government is not truly democratic in this aspect, why should any citizen abide by corrupt policies that are not for their protection of rights, but rather for the profit of the political elite? Furthermore, autonomy and capacity extend internally; no sect of the population, ethnic nation, or criminal organization should be exercising power in one sector of the country. Whether this occurs outright, or is a behind-the-scenes occurrence with nominal state authority recognized, it is a gross violation of democracy and dangerous conflict of interests that if left unattended could cause the entire state to shatter.

But institutions and elections both must have a foundation in order to be a success, which Dahl puts forth in his first condition: that government authority in a democracy must rest on a constitution and the rule of law. For government to function properly, "patterns must be institutionalized that is to say, the various patterns must be habitually known, practiced, and accepted by most, if not all, actors. Increasingly, the preferred mechanism of institutionalization is a written body of laws undergirded by a written constitution, though many enduring political norms can have an informal, prudential, or traditional basis," (Schmitter and Karl, 76). Schmitter and Karl are advocating for a written constitution and a promulgated rule of law. They note that not all lasting norms are through the formal government sector, as ideals of democracy and rule of law are furthered by the informal sector as well. However, the existence of rule of law is the cornerstone to high quality democracy, and when combined with free, fair, and frequent elections, as well as democratic institutions, states reorient themselves towards a path of democratic consolidation.

Rule of Law as shown is indeed a nuanced idea, and due to its many aspects and intricacies found within each state a pure definition can be quite difficult. Krygier suggests first examining these themes of rule of law within the context of established traditions: "They compete with other traditions, often over generations: think of monarchists and republicans; conservatives and revolutionaries; moderates and zealots; absolutists and advocates of tempered power," (Krygier, 5). His observation is astute; rule of law looks extremely different depending on the form of government it is found within. For the purposes of this project rule of law will be defined and examined within the context of representative democracies, where "A democracy, in our view, is any political regime in

which 1) free and fair elections choose the lawmakers and the head of government; 2) there is nearly universal adult suffrage except among immigrant non- citizens; 3) the state protects civil liberties and political rights; 4) armed actors including the military, criminal organizations, and paramilitary groups do not significantly influence government policies," (Mainwaring and Pérez-Liñán, 115). When it comes to democracy, the rule of law is a hallmark institution absolutely necessary to safeguard against tyranny, and all four of these tenants support the need for a strong rule of law either directly or indirectly. "So there is no single understanding of the rule of law that captures it all. But there are constellations of themes, preoccupations and tendencies, some long-lived. The stakes can be high, and it makes sense to draw on traditions of thinking about how to play well for them," (Krygier, 5). The second defining factor in examining the strength of rule of law within a state is the presence of common, universal themes that are essential to the very existence of rule of law. O'Donnell presents several of these modern themes:

> Whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions including the judiciary …By 'fairly applied' I mean…that judicial adjudication of legal rules is consistent across equivalent cases; is made without taking into consideration the class, status, or relative amounts of power held by the parties in such cases, and applies procedures that are preestablished, knowable, and allow a fair change for the views and interests at stake in each case to be properly voiced." (O'Donnell, 33)

The common themes of rule of law that Krygier refers to and their existence within democratic state, are good indicators of the strength of rule of law and in turn the strength of the democracy itself.

Rule of law within the democratic regimes of Latin America is, in and of itself, a very problematic concept that is exacerbated by its existence and interplay with a whole host of other very complex, problematic concepts. O'Donnell therefore, corroborates

Cicero's rule of law principles and applies those principles to contemporary Latin America. Democratic rule of law should still ensure that law is pre-established and known, *ex post facto* laws do not exist and application of law is done by a legally ruled judiciary. *Stare decisis* exists as well as the assurance that all citizens are equal before the law. This equality also ensures that while the poor or lower class are not forgotten about, those in power are also not exempt from the law of the land. And finally, there is ample room for dissenting opinion regarding certain practices, and people have an opportunity to participate in government to affect change without fear of retribution. O'Donnell also states that there is a clear difference between 'rule of law' and "estado democrático de derecho," or a democratic rule of law. He states: "1) It upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts," (O'Donnell, 36).[12] These three ideals are extremely important and in many cases some aspect of one of these ideals is either missing or weakened in many Latin American states. Now these may seem to be a natural state of democracy that one would just assume exists where modern democracy exists, but O'Donnell elaborates on some of the many flaws in the rule of law that within Latin American democracies. He states there are "flaws in the existing law" and "flaws in the application of the law," (O'Donnell, 39-40). There are many outright flaws in law that still allow for discrimination and human rights abuses. Additionally, the law is consistently misapplied in many regions or specific types of cases. "The discretionary, and often

[12] Quoted by O'Donnell: see Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, Colo.: Lynne Rienner, 1998).

exactingly severe, use of the law against the political enemy or the vulnerable can be an efficient means of oppression," (O'Donnell, 40). Law can be manipulated to oppress opposition or to grant special favors to those in power. There also exist "flaws in the relations between state agencies and ordinary citizens" and "flaws in access to the judiciary and fair process," (O'Donnell, 40). O'Donnell is clear to point out that a very systemic prejudice exists within the government in regards to the civil and political rights of minorities and the lower class. Because there are so many perverse flaws with established law or the application of said law, this spills over into state agencies and citizens are further discriminated against. One can see the "grievous difficulties that usually ensue for anyone who, lacking the "right" social status or connections, nonetheless dares to approach these bureaucracies not as a supplicant begging for favors, but as the bearer of a right," (O'Donnell, 40). This idea of a citizen being a "bearer of a right" is a foreign concept to those working for the state, and it is this disdainful attitude that makes citizens so wary of their government. Instead of a robust feeling of pride in one's participatory government, one can only feel disparaged when interacting with state agencies. Such treatment does not make citizens feel as if their government is 'for the people', but rather impresses the idea that if one's voice is not heard in everyday interactions with the government, then is one's voice ever heard by this supposedly democratic government? Does one's vote really matter? Can an ordinary citizen truly have any impact in this so-called democratic regime? Conversely, does the government listen to the opinions of its people whatsoever if it treats them with such disdain in day-to-day interactions? The answer to these questions is overwhelmingly negative.

With such misapplication of law and mistreatment from state authorities over minute matters, it is no wonder that access to the judiciary in this scenario is also highly problematic. “Across most of Latin America, the judiciary is too distant, cumbersome, expensive, and slow for the poor and vulnerable even to attempt to access it,” (O’Donnell, 40). This is a sad reality in many parts of Latin America and even in some democracies that have existed for centuries. Coupled with the fact that “Criminal procedures in particular often tend to disregard the rights of the accused before, during, and after trial,” it is another clear picture of subverted rule of law. Finally, O’Donnell states that there are “flaws due to sheer lawlessness,” (O’Donnell, 41). In many states rampant crime and lawlessness exist due to the inabilities of the court system, with its potential systematic corruption, to firmly apply law in the consistent adjudication of small and large crimes. Courts are not set up to be supremely efficient and therefore, the case load is overwhelming for prosecutors and certain cases may fall through the cracks. Additionally, those involved in organized crime may hold enough power, or those for whom they work for, may have enough sway to obtain lenient sentences. O’Donnell mentions another issue with lawlessness; not only do organized crime rings dealing in narcotics or human trafficking exist, but they may hold an exorbitant amount of power in their sphere of influence. O’Donnell terms these spheres of influence “brown areas,” (O’Donnell, 41). “These “brown areas” are subnational systems of power that have a territorial basis and an informal but quite effective legal system, yet they coexist with a regime that, at least at the national political center, is democratic,” (O’Donnell, 41). This lack of state capacity is extremely concerning as the democratic system of law and order has been effectively replaced while still technically existing under the umbrella of law. “…[Which] is encompassed by the

informal law enacted by the privatized—patrimonial, sultanistic, or simply gangsterlike—powers that actually rule those places," (O'Donnell, 41). A democratic state that does not have the capacity to remove sultanistic or gangster-like mini-regimes from its own territory does not give its citizens any great confidence that the state truly has the capacity to safeguard the rights of people. Thus, one concludes form the various flaws within the legal systems of many Latin American democracies, that "the rule of law has only intermittent existence," (O'Donnell, 41). Unfortunately, democracies in Latin America do not simply have rule of law issues to delve into and find solutions for, but rather these rule of law issues are compounded with a variety of other economic and social factors, further sparking the need for strong rule of law

Since the Third Wave of Democracy arrived in Latin America, each state has been tasked with consolidating democracy resulting in a broad range of outcomes. Some states have been enormously successful with very few rule of law issues present, while other states have reverted back to authoritarianism and lawlessness. However, the majority of states within the region fall somewhere in the middle of this spectrum. Mainwaring and Pérez-Liñán list four categories by which to describe the quality of democracy, and the correlating democratic institutions, including rule of law, present within each state: "Democratic Erosions," "Democratic Stagnation," "Stable Democracies with Shortcomings," and "High Quality Democracies," (Mainwaring and Pérez-Liñán). The authors place "Venezuela, Bolivia, Ecuador, Honduras and Nicaragua" under the title of "democratic erosions," (Mainwaring and Pérez-Liñán, 116). They note that each country is entrenched in a different place on the continuum of democracy with certain states, such as Venezuela under Chávez thoroughly authoritarian, while others are seeing a regime turn-

around that is steering the country towards a more democratic path, although much remains before states such as Honduras could truly be called a democracy again. "If we define a "democratic erosion" as a decrease in Freedom House scores of at least ten points…we find four such cases: Honduras (which went from 68 in 2002 to 51 in 2013), Mexico (78 to 66 over the same period), Nicaragua (66 to 53), and Venezuela (59 to 38)," (Mainwaring and Pérez-Liñán, 116).[13] The authors place "Colombia, Guatemala, Haiti and Paraguay" in the category of "Democratic Stagnation", (Mainwaring and Pérez-Liñán, 118). Once again the path each of these states have taken towards democratic consolidation has not been equal and as a result each fall somewhere on the spectrum of democratic stagnation. Some states may retain authoritarian influences while others simply lack the economic capacity to continue consolidation. For this cluster of states, "Their Freedom House scores are middling. Elections are competitive and vote counts largely fair, yet citizens suffer from limits on the exercise of their rights," (Mainwaring and Pérez-Liñán, 118). This is an instance where the electoralism fallacy comes into play. States may indeed have free and fair elections, but that in and of itself is not enough to say with any confidence that these states have proven to guard citizens' rights of free speech, free press, or legal agency against the dangers of hyper-presidentialism, authoritarian tendencies, or discrimination against minorities. "Brazil, Mexico, Argentina, Peru" as well as "the Dominican Republic, El Salvador and Panama," are grouped in the "Stable Democracies with Shortcomings" category, (Mainwaring and Pérez-Liñán, 120). "National elections in these countries are free and fair, the playing fields are mostly level, and these central governments generally

[13] The authors note that while Mexico has had a dramatic drop in its Freedom House score, "We are not convinced that democracy has declined sharply enough in Mexico since 2002 to make it a case of national-level erosion," and therefore, Mexico is not placed in the category of 'democratic erosions', (Mainwaring and Pérez-Liñán, 116).

respect opposition rights, and 'Breakdowns or severe erosions of democracy seem unlikely,'" (Mainwaring and Pérez-Liñán, 120). The protection of individual freedoms is far more likely in these countries, and democracy has become institutionalized. However, as the cluster title suggests, these states are not without their problems: "Marginalized people such as the poor and the indigenous often find that their rights are respected unevenly at best. Organized crime—along with paramilitary and militarized state responses to it— severely limits democracy…" (Mainwaring and Pérez-Liñán, 120). This cluster still deals with equal application of the law and "brown areas" within their territories. Further institutionalization and increased state capacity is needed for these states to increase their quality of democracy.

The authors' final category of "High-Quality Democracies" contains "Chile, Costa Rica, and Uruguay," (Mainwaring and Pérez-Liñán, 122). These countries are generally unproblematic: "…The electoral playing field is even, most citizens enjoy effective political rights and civil liberties, governments generally do not display intolerance or attempt to curb op- position rights, and military and police forces are under civilian control," (Mainwaring and Pérez-Liñán, 122). This is not to say that they do not still have institutional problems that will need to be addressed in the coming years, for time has proven that democracy with all of its arguably moral benefits, has yet to produce a perfect state with perfect equality before the law, perfect representation, or perfect economic opportunities. Nevertheless, these three states do not face the large rule of law issues found in neighboring countries. The authors' posit the success of democracy in these three states to their democratic backgrounds. "Costa Rica has the world's longest-standing democracy outside the advanced industrial world, dating back to 1949 or 1953…", and while Chile

and Uruguay both experienced coups in 1973 with authoritarian regimes holding power for quite some time, “the long democratic heritage of both countries helped political leaders to rebuild democracy on a solid footing after the transitions,” (Mainwaring and Pérez-Liñán, 122). This idea corroborates the idea put forth by Schmitter and Karl, that contemporary democracies in Latin America today exist in ‘compressed time’. Therefore these authors would agree that it is unrealistic to expect the degree of high-quality democracy found in the Western World or in Costa Rica, Chile and Uruguay in other contemporary Latin American democracies that do not have this longer history of democracy. Mainwaring and Pérez-Liñán conclude that “the overall result is likely to be democratic drift: Things are unlikely to get dramatically worse for Latin American democracy as a whole, but they are also unlikely to get dramatically better,” (Mainwaring and Pérez-Liñán, 126). I strongly disagree with this conclusion. While the result of the last thirty years of democratic consolidation may appear as democratic drift, thirty years is not enough time to reach a concrete conclusion, given that the only high-quality democracies in the region have a much longer history with democracy. Furthermore, Latin American politics are extremely dynamic and in the last year alone democracy has taken a dramatic turn for the worse in both Peru and Chile. While this is certainly not the turn of events that scholars or citizens of these states were hoping for, it is nevertheless evidence of the continually changing nature of Latin American politics. This dynamic nature also confirms that given the right institutional changes, there is no evidence that states could not evolve into higher-quality democracies. The institutional change needed is a strengthening of the democratic rule of law to combat the political problems facing these states today.

Hyper-presidentialism, populism, lack of horizontal accountability, lack of constitutional supremacy, majoritarianism, weak judiciaries, systemic inequality, and lack of state capacity are all current issues existing in a variety of combinations within contemporary Latin American democracies. All of these complex institutional problems inhibit high-quality states from consolidating into high-quality democracies fully, stem from a weak rule of law and weak legal institutions that encompass all of the ideals put forth by Cicero and Dahl. Dahl's very first principle advocates for a constitutional foundation that the entire democratic system should rest upon. The authority rests upon the highest law of the land, which is a constitution or other written body of laws. These constitutions determine the electoral system and leadership style for a state, the vertical and horizontal accountability of the executive, judicial and legislative branches of government, establishes checks and balances, and often safeguards the rights of citizens. Constitutions must be structured in such a manner that they do all of these things, and where no part can be arbitrarily changed by any individual or party seeking power. "Presidents Evo Morales of Bolivia and Rafael Correa of Ecuador,…have followed Chávez's lead and used constitutional assemblies to write new basic laws featuring wider presidential powers, weakened accountability mechanisms, and more generous allowances for presidential reelection," (Mainwaring and Pérez-Liñán, 117). In the Bolivian, Ecuadorian and Venezuelan examples, one sees the exact opposite of what is constitutionally necessary for strong rule of law to exist in contemporary democracies. Sufficient checks and balances should exist that prevent any override of the constitution. Honduras gives an example of an opposite extreme. "President Manuel Zelaya… moved to hold a referendum on drafting a new constitution. Most of Congress objected, and the

courts declared that he was violating the constitution," (Mainwaring and Pérez-Liñán, 118). This new democracy was so concerned with protecting their constitutional supremacy that they staged a non-violent coup and removed Zelaya from Honduras in the middle of the night. "…Zelaya lost to an opposition that preemptively took a radical stand, with democracy breaking down in the process," (Mainwaring and Pérez-Liñán, 118). The established legal system and legislature held so much fear over the possibility of a return to authoritarianism from Zelaya's blatant rejection of constitutional supremacy, that they staged a 'democratic' coup This goes to show any deviation from law itself, even if it's to protect a tenant of the law such as constitutional supremacy, is still a deviation from rule of law and causes a breakdown of democracy.

Maduro, Zelaya, Correa, and Chavez are all examples of hyper-presidentialist leaders overstepping the boundaries of their executive position as put forth by the constitutions of their respective states. This is, unfortunately, a common occurrence in contemporary Latin American politics and whether it is credited to a left-over practice from authoritarian pasts or the rising wave of both left and right-wing populism in the region, nevertheless hyper-presidentialism is one of the biggest factors stemming from a breakdown in rule of law. "What distinguishes democratic rulers from nondemocratic ones are the norms that condition how the former come to power and the practices that hold them accountable for their actions," (Schmitter and Karl, 76). In the case of democracies, rulers come to power through conditions outlined in a written body of laws through a very specific electoral process. The problem that exists within Latin America is extremely charismatic leaders, riding the rhetoric of populism in many cases, campaign as the 'savior of the people' and present themselves as an anti-elitist who simply wants to better the life

of the common man. They promise many alluring things if elected, such as the guarantee of various rights for minority groups and redistribution of wealth, while painting those in power as corrupt individuals abusing authority for their own personal gain. The populist, hyper-presidentialist claims to be a president of the people and for the people. These words are usually equated with ideals of 'true' democracy; the reality, however falls quite short of true democracy. Instead of these executives delivering promised freedom and prosperity, they take office and alter whatever Constitutional provision necessary in order allow for their "reelection" and then tamper with those "free and fair elections" where the only outcome is that the executive stays in power for an extended period of time. Ecuador under Correa lends a perfect example:

> Within hours of his inauguration in January 2007, Correa announced a constitutional assembly. In March, the congressional opposition to Correa removed the head of the country's highest electoral court. In response, this court canceled the mandates of 57 opposition lawmakers. The government had the resulting, more pliant Congress dismiss all nine judges of the Constitutional Tribunal, who had ruled against Correa's plan. The new constitution enhanced presidential powers and allowed presidential reelection. (Mainwaring and Pérez-Liñán, 118)

Correa did not deliver on his democratic promises, but rather manipulated the legal system to destroy constitutional supremacy and thus undermine rule of law.

States with such overreaching executives lack horizontal accountability. Constitutions must be structured so that the people through their representatives vote on constitutional changes of such magnitude within a legislative system independent from the hands of a potentially power-hungry ruler. There must be horizontal checks on the judiciary, legislature, and executive branches; although, in the case of Latin America, it is the executive branch that tends to overstep its allotted responsibilities. Thus it is paramount that Latin American countries focus on constructing legislative, and even more

importantly, judicial branches of government that cannot be shut down by an overreaching executive. Freedom House further comments on the importance of the judicial branch in a 2019 report entitled "Democracy in Retreat": "In any democracy, it is the role of independent judges and prosecutors to defend the supremacy and continuity of constitutional law against excesses by elected officials, to ensure that individual rights are not abused by hostile majorities or other powerful interests, and to prevent the politicization of justice so that competing parties can alternate in office without fear of unfair retribution," (Freedom House). When strong judiciaries, uninfluenced by the executive, do not exist, there is no one to defend constitutional supremacy from a hyper-presidentialist leader intent on abusing power. "One of the crucial differences between higher- and lower-quality democracies in Latin America is the degree to which governments respect opposition rights. If the president manipulates courts or if courts allow government abuses, opposition rights go out the window," (Mainwaring and Pérez-Liñán, 124). Weak judiciaries can exist in two forms. Either they are trampled by the executive in power and potentially dismantled or they work with the executive to serve corporate interests and the interests of the most powerful. One option removes all judicial power, and the other option concretes corruption into the judiciary; both are equally dangerous in maintaining rule of law.

When judicial systems become ineffective in safeguarding the rights of the people and applying the law in a democratic manner, states start to lose capacity. A lack of full state capacity occurs where rule of law exists nationally, but may not reign in all provinces/regions equally. Some regions may have other actors exercising authority in place of weak state institutions and/or may be under control of paramilitary groups, gangs,

or be so riddled by corruption that rule of law is ineffective or nonexistent. "Under national-level democratic regimes, Argentina, Brazil, Mexico, and Peru have all hosted hybrid regimes on parts of their territory," (Mainwaring and Bizzarro, 109). These miniature regimes existing within the boundaries of (lower-quality) democratic regimes are what O'Donnell refers to as 'brown areas'. "In many regions,…the bureaucratic state may be present in the form of buildings and officials paid out of public budgets, but the legal state is absent: Whatever formally sanctioned law exists is applied intermittently, if at all," (O'Donnell, 41). The lack of legal state is what allows other groups to move in and formulate their own set of legal practices. These are often extremely dangerous and not actually rooted in any form of rule of law.

Violations of constitutional supremacy made by hyper-presidentialist executives who have removed horizontal accountability not only diminish the rights of citizens, but their actions remove state capacity and render the state ineffective, leaving power vacuums to be filled by crime and violence, all of which adds to the fact that military intervention in government continues left over by authoritarian predecessors. "Criminal organizations have undercut democracy at the local level, especially in poor urban neighborhoods. Residents of neighborhoods that are controlled by criminal organizations cannot exercise freedom of speech or other basic democratic rights; they cannot vote freely and fairly; and they might not be able to vote at all," (Mainwaring and Bizzarro, 109).[14] Beyond the very danger of crime and violence that exists from rampant lawlessness or organized drug or human trafficking, crime and violence serve to undermine democracy at its most basic level. In Columbia, "Drug money has a corrupting influence on electoral campaigns and

[14] Schedler quoted by Mainwaring and Bizzarro: Andreas Schedler, "The Criminal Subversion of Mexican Democracy," *Journal of Democracy* 25 (January 2014): 5–18.

within Congress—as of October 2012, 119 members of the 268- seat national legislature were under investigation for their close links to paramilitary forces, and another 40 had already been sentenced for crimes related to links to the paramilitary," (Mainwaring and Pérez-Liñán, 119). Thus violence and crime undermine the very tenants necessary for a strong rule-of-law and a high-quality democracy.

Democratic rule of law is more than the sum of its parts and defining it incorporates many factors seen in the modern, democratic state and applied through the legal system. Latin American democracies as they navigate democratic consolidation must wrestle with previous histories of authoritarian regimes and human rights abuses as they seek to build a future that respects and safeguards citizens' rights. A survey of these states shows mixed results of democratization since the 'Third Wave' arrived in the 1990s. Some states are thriving, some are moderately successful, others have stagnated and regressed into authoritarian practices, while still others have failed a democratization all together. Furthermore, Latin America face a plethora of challenges including hyper-presedentialist leaders, populist tides, increasing violent crime, successful organized crime rings, and an alarming lack of horizontal accountability. While these democracies should not be judged by the same standards as those states who have successfully promulgated democracy for centuries, careful analyzation shows the correlation between these problems of democratization and a weak rule of law. Without a strong democratic rule of law that adheres to Cicero and Dahl's principles, a democracy cannot be considered high-quality. Mainwaring and Pérez-Liñán only describe three Latin American democracies as "high quality," (Mainwaring and Pérez-Liñán, 122). Thus, a systematic evaluation of crime and the court systems of each lower quality democracy is necessary to ascertain what change

needs to occur for democracies to move out of stagnation into growth so as to safeguard the rights of citizens and move to reconcile the authoritarian mistakes of the past era.

Peru serves as a perfect case study for examining the quality of rule of law within a Latin American democracy that is still on a path of consolidation. Mainwaring and Pérez-Liñán delineate Peru as a "stable democracy with shortcomings," (Mainwaring and Pérez-Liñán, 120). The authors comment on this state in particular: "Here, too, despite many problems—the party system remains weak and rates of social exclusion are stubbornly high—democracy has notched important achievements, including rapid economic growth and a sharp reduction in poverty," (Mainwaring and Pérez-Liñán, 121). Peru is not considered a high quality democracy, but it also is not considered a failing one. It has seen many marked successes in its last twenty years of democracy including steady economic growth, as mentioned above. While it is nearly impossible to isolate variables within dynamic states, the democratic rule of law as evidenced by crime rates and the functioning of the court system, is easier to examine, without being muddled by the gross economic issues or radical social issues that exist within other lower quality states in modern Latin America. Thus, Peru's court system and crime rates serve as a case study for this project to evidence the need for strong rule of law to move a democratizing state from a classification of a democracy with shortcomings to a high-quality democracy.

CHAPTER THREE

Crime and the Court Systems of Peru: A Case Study

Extraordinarily incompetent justice systems in conjunction with high levels of violence and crime serve to severely undermine rule of law in many modern Latin American states. Rule of law issues may still present themselves on quite a few other national stages, including, but not limited to hyper-presidentialist leaders, renewed fervor for populist ideals, systemic discrimination and inequality, and lack of constitutional supremacy. While these are indeed pressing issues worthy of in-depth research, this project, however, will seek to focus on the connections between rule of law and crime and the court systems in Peru. Both of these topics contain a variety of factors that affect the rule of law this state. Judicial systems contain many moving parts from their constitutionally delegated roles, to the establishment of hierarchical courts, to the appointment of justices, to the concepts of judicial review and *stare decisis*, to codified criminal court proceedings, respect of the rights of due process and presumed innocence, and appropriate representation for defendants. These categories all pertain to the institution of democratic concepts, however there are many more questions to be asked regarding the ability of these concepts to exist independently. Are justices appointed based on merit or their connections to a current executive? How rampant is corruption and are powerful players (such as those involved in major criminal organizations) able to pay-off judges or obtain lenient sentences for those who work for them? If a judge wishing to uphold the law and protect the inalienable rights of citizens, ruled against the party line of a multitude of powerful players,

would he be subject to backlash, removal from his position or still worse, bodily harm? Within Peru, where rule of law does not exist within the judicial system as it should in a high-quality democracy, are those in power taking the necessary steps for judicial reform? Is democratic rule of law a priority and if so, is change occurring or is judicial reform just a hot ballot item that a candidate rides to victory and then forgets about once elected? All of these questions are extremely important when analyzing the court systems of Latin America, and all of these invariably tie into the question of crime within these states and its effect on court systems, the judiciary and democratic rule of law. A careful analysis of Peru is necessary to ascertain where the state falls within continental statistics, what types of crime the state experiences most frequently and the level of violence associated with said crimes, and the accuracy of reported criminal activity. When examining organized crime, the focus will center on the role criminal organizations play in subverting rule of law within Peruvian society, the people and narcotics being trafficked, whether said organizations have exercised considerable influence over judicial institutions, and if such paramilitary forces and criminal organizations have essentially replaced the national government and created brown areas within the state. A study of brown areas in Peru will also determine if government been pushed out radically or simply proven so ineffective that it is replaced in a desperate bid to create some fashion of "law" and order. These sub-points regarding crime establish the need to analyze the interplay between crime and the court system in order to establish the quality of democratic rule of law within Peru.

Peru boasts a rich topography with mountains, coastline, desert and rainforest, it contains a large indigenous presence, with significant sectors of citizens of African and Japanese descent as well. Backpackers come from all over the world to travel to Cusco to

hike the Inca Trail up to Machu Picchu, to boat across Lago Titicaca, to view the rainbow mountains and to see the Nazca Lines. From the headwaters of the Amazon to the surf in Lima, Peru holds a variety of tourist attractions. But even the steady stream of tourists know that theft is prevalent and to place an extra hold on one's bag at all time, and not be out alone after dark. Beyond the scenery and opportunity for epic photos, Peru is largely considered a middle-ranked state across the board in comparison to its Latin American neighbors. Life expectancy is 74.7 years, literacy is 94.4% of the population, infant mortality falls at 16.7/ 1000 live births, and the unemployment rate is 6.9%, (CIA World Factbook). Some areas of concern show that 22.7% of the population lives below the poverty line, GDP per capita is only $13,500, the Shining Path is still alive and well, and a significant portion of northern Peru is used to produce coca leaves, (CIA World Factbook). And while, one can chew these leaves in the airport to relieve motion sickness, the majority of this plant's uses are not focused on its medicinal value, but rather turned into cocaine, making "Peru…the world's second largest producer of coca leaf, though it lags far behind Colombia…[and] cultivation of coca in Peru was estimated at 44,000 hectares in 2016," (CIA World Factbook). These statistics do not shed much light on crime and the court system within Peru, which will be further analyzed in this chapter. These statistics, however, do serve to relatively compare Peru to its South American neighbors and demonstrate the economic and cultural background that exists within the country. This provides a foundation of knowledge necessary to examine rule of law within the state without becoming bogged down in the details of outside variables which could also influence crime and court systems. This is not to say that economic factors do not influence the rule of law; they absolutely do. Poverty, wealth distribution, sustainability, resource

allocation, financial markets, corporate growth, and many more categories of the Peruvian economy could be individually studied at their intersection with the legal system. However, the purpose of this project seeks to examine Peru's democratic rule of law as shown by its court systems and its criminal activity. While small economic factors may trickle in, they are not the primary focus of this study. For example, this chapter will touch on the equality of all before the law, regardless of socioeconomic class, but it does not seek to survey those in poverty and proscribe a solution to remedy said poverty. The intersection of economy and rule of law both in this example and the project at large is in narrowly defined instances.

Further comparison shows that Peru, much like many of its neighbors, has an authoritarian past that influences the present. Authoritarian regimes seek to dismantle democratic rule of law often superseding democratic checks and balances on power, while heightening the strength of the executive branch at the expense or elimination of the legislature and judiciary. Furthermore, said regimes usually involve the military in oppressing all dissent. This is indeed the case for Peru, but unlike surrounding states, Peru's authoritarian period occurred much more recently with Fujimori coming to power in the early 1990s. Many authoritarian rulers a decade or so previous, gained support for their ability to restore order to states with radical parties or failing economies. Fujimori gained popularity and was elected to power on a different side of the same coin: the need for judicial reform. However, this idea of 'judicial reform' was not at all democratic and not what one would immediately think of when hearing the term. Landa states that, "This reform started with decrees removing the Supreme Court justices and the judges of the Superior Courts from office…At the same time, legislation expressly forbade the initiation of *amparo* (judicial review) proceedings to review the situation of the judges," (Landa, 3).

Fujimori essentially manipulated the legislature to ensure that any supreme court could not review his blatant constitutional violations. This ruse of judicial reform was certainly not what people had in mind when looking at problems within the judiciary. Citizens wanted to end corruption and ensure the equal protection of rights, not destroy the Supreme Court. Fujimori, then drafted a new Constitution in 1993 which did include some legitimate judicial reform, but also transferred power from the Supreme Court into several different courts including the National Magistrates Council. "However, the implementation of the new institutions and constitutional organisms was also limited by government development legislation which curbed their constitutional powers," (Landa, 3). Thus it would seem that Fujimori simply 'threw a bone' to the general populace by nominally instituting reform that was technically curbed by the legislature. "Along with the abdication of judicial authority in favour of the prevailing political and military powers, it can be said that judicial processes continued to show marked levels of corruption as well as a distinct lack of respect for the rights of due process and the judicial tutelage of the people," (Landa, 4). In 1995, "Law No. 26623 created the Judicial Coordination Council" and this council was run by a former military commander and was given an enormous amount of authority when it came to all matters judicial, (Landa, 4). This authority was of course abused, as I would assert, it was meant to be. Fujimori was blatantly looking to increase his own authority and establish 'reforms' that allowed him greater control of government areas not relegated to the purview of the executive branch.

Landa reports: " …Approximately 75 per cent of Peru's judges are insecure in the exercise of their positions and thus susceptible to political intervention and active or passive jurisdictional dependence. As a rule, this holds true at all levels of the justice

administration, from the highest to the lowest courts," (Landa, 5). Thus, the judicial system under this authoritarian regime could not provide a consistent consensus on rule of law within Peru. Justices this insecure in their jobs or susceptible to corruption could not be counted on to apply the law equally to all parties regardless of race, ethnicity, political affiliation or socioeconomic status. Furthermore, judicial review had been eliminated and *stare decisis* was out of the question. "The NCM could not appoint the justices to the Supreme Court or judges to any other because the National Magistrates Academy (NMA), responsible for training the judges for their higher appointment, was subordinate to the Executive Commission…," (Landa, 5). And being that the executive in power was the authoritarian Fujimori, the opportunity and likelihood for training and appointing unbiased judges to prominent courts was extremely slim. A … "lack of confidence, both in general and within specialist circles, [existed] due to the fact that the judicial players — legal guilds, jurists, universities and litigants — do not take part in the fundamental decisions of the reform process," (Landa, 6). Landa again evidences the manipulative aspect of Fujimori's 'judicial reform' process. Why were those who understood fully the intricacies of Peruvian law and the courts not consulted in an attempt at their betterment? It was not with the intent of actual legal reform, but rather political manipulation that Fujimori sought to institute change. After all, 'reform' that allowed the executive to control the judiciary, was just what he needed to consolidate power and accomplish his own personalistic agenda. After a disgraceful legal episode, several justices resigned and "the World Bank suspend[ed] and later cancel[ed] a US$22.5 million loan," (Landa, 7). This embarrassing episode unfortunately had the opposite effect, causing Fujimori to attempt more control in order to avoid such financial and reputational losses, (Landa, 7). This incident shows what

happens when rule of law is not treated as a foundation for democracy independent of changing opinion.

Landa refers to this as the "politicisation of the justice system," and its effect in Peru was costly indeed, (Landa, 8). Politicizing the justice system removes the impartiality that is necessary for a judicial system to remain just. While, it is a valid point that even in the most successful democracies with robust civil societies, the decisions handed down by a Supreme Court or other equally prestigious courts, may be regarded as unpopular by a particular party or may even carry a profound political effect. That political impact or degree of popularity does not determine the decision made by said court. A decision is made based upon a Constitution, a written code of laws, and judicial precedent, all of which exist in an impartial sphere beyond the realm of whatever wind sways the masses, or the executive. This was not the case in the instance of Peru under Fujimori: "The solution to social conflicts has moved progressively from the political arena to the courts. This has produced the judicialisation of politics, judges finding themselves constitutionally obliged to rule on and act as arbitrators in matters of great political consequence," (Landa, 8). Peru lacked strong party systems beyond Fujimori, and with parties changing every election cycle, there was no arena for political grievances to truly be aired in a public forum, and thus such political conflicts were shuffled to the judiciary to resolve. Naturally, this entangled the judiciary in a realm it was never meant to be a part of, and resulted in profound amounts of political pressure being placed on members of various courts to decide matters in a way that align with the political views of those in power.

Additionally, a current of legal positivism swept through the judicial system creating even more disturbing trespasses of the rule of law. Legal positivism was very

closely tied to the politicization of justice within Peru: "That is to say that the arguments and proofs of its pre-judgement of cases are not valued or are purposefully not considered. This has created a judicial arena outside normal procedure and the media has, in effect, become a de facto judge in Peru," (Landa, 11). This is not an example of judicial corruption, but instead a case where judges whose very job description calls for impartiality, are instead required to solve political or social disputes or are so intensely pressured by those in power, that their verdict are predetermined with no opportunity for change. Two very significant results come to light from this twisting of the judicial system. First, "This has produced a vacuum and a failure in the administration of justice, as seen in the haphazard and unrealistic sentencing. Sentences are obscure and elliptical, making it impossible for the interested party to understand and the rights conceded or denied depend more on the judge than the law," (Landa, 11). This is a violation of citizens' rights to live by preestablished and known laws and ones that adhere to some structure of *stare decicis*. Secondly, "In part, this dramatic situation is simply explicable in terms of the lack of judicial independence and the minimal professional training of many judges… As a result, public opinion predictably takes the view that the judges apply the law with an iron fist against their enemies and with a velvet glove for their friends," (Landa, 12).[15] This arbitrary application of law with regards to sentencing is in direct contradiction with the principles of both Aristotle and Dahl. Sentences should be decided based on judicial precedent or *stare decisis* grounded by constitutional law. Furthermore, judges should be free from media pressure to hand down verdicts, and citizens should be confident in knowing their sentencing or lack thereof is due to an impartial trial before a jury of their peers consistent

[15] Oliviera and Oliviera quoted by Landa: Raúl Olivera and Manuel Olivera (1985) *Corrupción en el poder judicial y el ministerio público*, p. 44.

with every like case and not based on who they know or do not know. Such a justice system riddled with corruption only produces lawlessness as citizens lose all hope in their ability to attain justice and seek extralegal means of solving their problems. Thus, one observes that this 'legal reform' put forth by Fujimori served to produce the exact opposite effect by placing the judiciary under control of the executive, writing a new Constitution, and placing judges in the position to decide cases based on popular opinion and fear of being removed from office if they sided against the interests of powerful state players.

While Fujimori did much to corrupt democratic rule of law within Peru, he has been out of power for almost twenty years now. "Since 2001, elections have been clean, presidents have refrained from abusing their powers, and influential observers such as Freedom House have confirmed the country's democratic credentials," (Vergara and Watanabe, 148). Great strides have been taken to improve both horizontal accountability and democratic judicial reform. Nevertheless, Fujimori's actions in the 1990s still affect the quality of democratic rule of law in Peru when examining crime and court systems. "Political parties, Congress, the judiciary, and other key democratic institutions all suffer distrust bordering on rejection. Peruvian presidents draw the least popular support of chief executives anywhere in Latin America, despite the country's better than average performance on a number of objective indicators," (Vergara and Watanabe, 148). These "objective indicators" Vergara and Watanabe refer to are the statistics stated by the CIA World Factbook. Economically, Peru is thriving and has been consistently growing since Fujimori's abdication. However, the necessary deep-rooted change needed to produce a more impartial and corruption-free judiciary, as well as the institutions necessary to reduce crime, have not shown the remarkable growth political scientists hoped the reemergence

of democracy would bring to the state. Vergara and Watanabe cite a lack of vertical accountability as the cause to this perceived executive apathy: "The three presidents whom Peruvians have elected since 2000 each called for change while running, only to embrace the status quo after winning… The economy has benefited from this "preferential option for stability," but ironically, the presidents themselves have not," (Vergara and Watanabe, 152). Peruvians may be climbing the class ladder due to economic growth and stability, but when it comes to measures of growth in judicial fairness and rights as well as declining growth in crime, the equivalent numbers simply do not exist. The authors state that, "…weak vertical accountability combined with strong technocrats also blocks the introduction of major reforms in other areas. Crime, for instance, has steadily become a larger problem," (Vergara and Watanabe, 155). If horizontal accountability is as healthy and corruption free as this article suggests, why is crime still steadily rising and criminals persisting unpunished? Judicial reform and horizontal accountability in the justice system are not as high as they first appear to be.

Not only do Peruvian authorities get to battle a recent history with authoritarianism, the legal practices of which are still negatively impacting citizens, but they also must engage with the consequences of the far-left guerilla group, the *Sendero Luminoso* (Shining Path), and its connection with the massive cocaine production within Peru. During the height of its power from the mid-1980s to the mid-1990s, the Sendero Luminoso managed to exercise a significant amount of power and authority in several regions of Peru, to the point that those areas could be classified as "brown areas," per O'Donnell's definition given in chapter two, (O'Donnell, 41). While, this movement does not wield the competing state authority it once had procured, it does still exist today. Bruce Kay classifies the

Shining Path as an example of “chronic insurgencies” defined as “movements that last for years or even decades yet neither topple a regime nor suffer complete defeat by the state. These groups may not manage to seize state power, but they do mobilize support, control territories, and unleash social energies that shape polities in profound, if more subtle, ways than revolution,” (Kay, 98). Sendero is presently much weaker and controls only a fraction of the territory it once did, choosing to focus on its ability to profit off the coca trade instead of further its former political goals. Nevertheless, its very existence shows diminished state capacity and the strength of rule of law within the state, or lack thereof. The chronic insurgency of the Shining Path found its origins in far left ideology, but found its ability to exist and gain power from the weakness of the Peruvian state as it transitioned from authoritarianism to democracy, and then back to authoritarianism again. “This article, [The Rise and Fall of “King Coca” and the Shining Path], argues that the scope and intensity of political violence in a democratizing society are influenced not by structural factors that spur discontent, by increasing poverty or inequality, but by regional opportunities arising from state weakness that favor the formation of coalitions against the state,” (Kay, 97). Such indeed was the case for Peru; the period of regime transition left many gaps where normal state functions were not being fulfilled, and thus, these gaps were filled by outside actors who did have enough legitimacy and authority to provide effective governance in an area. “Consequently, citizens living in comparatively "stateless" areas have a different relationship with the regime than those residing in areas where the state has an assertive presence, and are relegated to what O'Donnell (1994) calls ‘low-intensity citizenship,’” (Kay, 99). While citizens did not have high quality citizenship or strongly impassioned ties to their own state, they also did not necessarily have strong ties to “Sendero's ideology,

rooted in Maoism and indigenous communism, [which] fell outside the leftist mainstream," (Kay, 102). The lack of state presence or capacity in the Upper Huallaga Valley left a power vacuum that in the region that needed to be filled by someone. "With few civic associations and weak ties to national politics, the valley was poorly positioned to advocate its legitimate political needs on the national level. Among those needs were order, stability, and protection for its growing population of coca cultivators," (Kay, 102). Prior to the Sendero's presence, this vacuum was filled by drug lords who exploited residents of the area and ruled with deadly violence, (Kay, 102). The SL then made a brilliant foray into the drug trafficking arena, managing to secure for themselves an enormous market share of coca production, thus effectively jumpstarting the economy in the region and financing their own political goals.

Kay states: "…In 1983, Peru became the world's leading exporter of cocaine paste," and "Through the "air bridge" with Colombia, the valley was thus integrated into a billion-dollar export market, the fortunes of which depended on a thriving external demand," (Kay, 101). The demand certainly existed, and while the United States poorly waged a war on drugs, the coca market grew and Sendero was able to not only gain and keep control of the region, but the movement was also able to gain a substantial profit, with little, initial government resistance. "The areas where state weakness and economic resources intersect provide rich opportunities for guerrillas to coalesce with regional actors and to acquire power disproportionate to their numbers, even in societies that ostensibly favor ballots over bullets," (Kay, 99). This is certainly the case for Peru in the mid-1980s, and Sendero effectively filled the power vacuum providing its own form of government, law and order, and effectively creating a brown area within Peru. "The absence of state authority in the

region allowed the guerrillas to perform statelike functions, from protection and "law" enforcement to conscription and taxation," (Kay, 103). Furthermore, "Besides protecting growers, Sendero performed an intermediary role, acting as a kind of armed union for the growers, forcing traffickers to pay higher prices for coca than farmers could negotiate for themselves. The guerrillas also enforced a restrictive social order-punishing drug users, closing down bars and brothels…" (Kay, 103). The situation in Peru is a prime example of what happens when state capacity is weakened and does not extend throughout the entire state leaving other actors to take on the functions the state should be performing. One of governments' major tasks, of course, is applying the law to its citizenry or meting out justice in some fashion. The 'rule of law' established by the Sendero is in no way democratically done, however, it is more than the Peruvian government could manage to accomplish at the time, and therefore, could be considered more effective for the region. "Peru's internal conflict between the insurgent group Shining Path (Sendero Luminoso) and the army between 1980 and 2000 produced an estimated 69,280 deaths and disappearances, 80 percent of which were young men of indigenous descent," (Boesten and Fisher, 2). This atrocious death toll stretching over twenty years, was able to continue because of Sendero's advantageous position within the country. The guerillas gained massive wealth for their part in the production of coca leaves and coca paste. This wealth allowed them to mobilize and gain the enormous traction that would not have been possible without access to such resources. "The point is not that rebel support may be reduced to rational calculations, or that socioeconomic factors, identity, cultural ties, and ethnic hatreds play no role in the spread of violent conflict. The argument is that however prominently it figures in the origins of rebellion, discontent cannot account for its

persistence. Even amid widespread discontent, rebels who lack the resources to wage war face uncertain prospects," (Kay, 100). The eventual decline of the cocaine market, proved Kay's hypothesis to be quite accurate. Lack of access to coca profits from the cocaine industry demobilized the Sendero movement. While the movement has never been fully eradicated, it did greatly decline in power with the arrest of prominent leaders such as Guzman. Furthermore, the government has since been able to strengthen state capacity. The combined history of Fujimori's authoritarian policies and manipulation of justice and the continued existence of a guerilla group financed by drug trafficking that for some time served as the "law" and quasigovernment within regions of the state, creates a dangerous cocktail of issues. The modern day Peruvian government must find a way to rectify these past influences as they seek to decrease crime and corruption, while increasing the capacity and trustworthiness of the judicial system.

Peru is not overrun by rampant lawlessness and has made significant strides towards combatting certain areas of crime and trafficking, however, in addition to justice system failures, the state does have some significant issues to still work towards in the next few years to be considered a high quality democracy within Latin America. Peru shows weaknesses in combatting crime when evaluating its police training, presence of corrupt officials, (police, prosecution, political figures, and so forth), and its ability to mobilize its resources to lend a valiant effort towards eliminating crime. Sexual violence, domestic abuse, robbery, narcotics trade, and the trafficking of persons for forced labor and sexual exploitation are consistent issues within Peru. "Police reported identifying 1,600 suspected victims [of trafficking] in 2018—including 287 children and 1,313 adults—compared with 1,229 suspected victims identified in 2017. The public ministry reported 882 suspected

victims in 2018; of these, 738 were female and 144 were male, and at least 374 were children. It was unclear to what extent police and prosecutors' statistics overlapped," (Trafficking in Persons Report, 378). The Trafficking in Persons Report by the US State Department for 2019 lends valuable data to the issue of human trafficking within Peru, but it also showcases a persistent failure of the Peruvian government in their inability to provide comprehensive data that gives a full understanding of various crimes within the state. Thus, statistics provided anywhere in terms of Peruvian crime are valuable for a baseline of research and analyzation, but they cannot be relied upon as providing the full reality of Peruvian crime. Despite insufficient reporting, there is enough data to evidence that trafficking is a prevalent issue in Peru. "Traffickers exploit Peruvian and foreign men, women, and children in forced labor in the country, principally in illegal and legal gold mining and related services, logging, agriculture, brick-making, unregistered factories, counterfeit operations, organized street begging, and domestic service," (Trafficking in Persons Report, 380). Furthermore, the Shining Path continually rears its ugly head, currently in the form of trafficking: "The narco-terrorist organization Shining Path recruits children using force and coercion to serve as combatants or guards, and it uses force and coercion to subject children and adults to forced labor in agriculture, cultivating or transporting illicit narcotics, and domestic servitude, as well as to carry out its terrorist activities," (Trafficking in Persons Report, 380). According to the Instituto Nacional de Estadística e Informática (INEI), 111,428 incidents of family violence in the form of physical assault were reported in 2018, (INEI). This was an alarming increase from only 76,011 counts from 2017, and the biggest jump in domestic violence cases that have been steadily increasing since 2013, (INEI). Peru also reports psychological family aggression

in a separate category. For the year 2018, 97,308 cases were reported, a significant increase of over 20,000 from the prior year, (INEI). Peru reported 11,137 "people detained for illicit trafficking and consumption of drugs for the year 2018," (INEI). While this number is high, it is down from the 13,174 people detained for the same crime in the preceding year, (INEI). In 2018, Police and government authorities seized 14,732 kg of basic cocaine paste, 20,550 kg of hydrochloride cocaine, 21, 773 kg of marijuana, 0 kg of poppy latex (down from 14 kg the previous year), and 2 kg of heroin for a total of 57,057 kilograms, (INEI). Another recurring crime is theft of both person and property, and in 2018 19,084 thefts of vehicles were reported, (INEI). This number aligned with the upward trend seen over the past four years of increased vehicle robberies, (INEI). The National Institute of Statistics and Information keeps information on a number of "generic crimes" ranging from "crimes against life, body and health," "crimes against the environment," "crimes against the state and national defense," "crimes against honor," "crimes against humanity," and many others totaling twenty-two categories of generic crimes, (INEI).[16] In all but four of these categories, crime has risen, (INEI). This general category encompassing all of these crimes is representative of the larger, pervading growth in crime that has occurred in Peru over the last three to four years.

This background of crime statistics within Peru lends valuable information when examining the current judicial system and its ability to uphold rule of law democratically, per Dahl's principles. It should once again be noted that Peru, despite the issues tackled in this project, is a mid-range democracy. It is thriving economically and great strides have been taken to remedy judicial problems, tackle organized crime and re-institute a rule of

[16] Categories are translated from Spanish

law that could be considered democratic. Where Peru falls short of high-quality democracy is found within the legal system and political sphere. Corruption prevents democratic application of law or allows police officers to turn a blind eye to certain criminal activities; political pressure does not allow judges to apply the law equally across all classes of persons; and in other cases, certain crimes are codified in such a manner as to make righting wrongs an almost impossible task. Freedom House gives Peru a 72/100 ranking labeling it as "free," (Freedom House, 2019). However, in the categories of "Functioning of Government" and "Rule of Law" Peru scores only 50%. These two categories prevent Peru from scoring higher, where "The judiciary is perceived as one of the most corrupt institutions in the country," (Freedom House, 2019). In 2018 "recorded tapes revealed five judges trading reduced sentences or judicial appointments in exchange for bribes," and this very recent scandal resulted in an overhaul of the judicial system, where "the body which selects and appoints judges, [was replaced] with a new National Board of Justice, whose members would be voted on by the public and restricted to one five-year term," (Freedom House, 2019). This five-year term is an unusual arrangement, not often seen in constitutional democracies which usually allow justices to serve for much longer. This mere five years compared to the lifetime appointment of justices in the United States shows how little faith the Peruvians have in their judicial system. Freedom House also gave Peru a 50% score in the category of due process. "Constitutional guarantees of due process are unevenly upheld. Lawyers provided to indigent defendants are often poorly trained, and translation services are rarely provided for defendants who do not speak Spanish," (Freedom House, 2019). As 17.1% of the population primarily speak a language other than Spanish, and many do not speak Spanish at all, this leaves a significant portion of the

population without access to their own legal system, (CIA World Factbook). Not only is due process not respected when citizens do not have access to legal representation that speaks a language they are able to communicate, but almost a fifth of the population has no real access to their government whatsoever, and are severely limited in their ability to exercise their rights as equal citizens. “Discrimination against indigenous populations and Afro-Peruvians is pervasive. LGBT+ people face discrimination, hostility, and violence,” (Freedom House, 2019). In addition to not being able to fully exercise their rights, these minority groups still face intense discrimination.

In the field of human trafficking the United States’ Trafficking in Persons Report showed several other rule of law problems. “NGOs and government officials reported official complicity in trafficking crimes and widespread corruption in Peruvian law enforcement and judicial systems severely hampered anti-trafficking law enforcement efforts. Some judges and prosecutors may have accepted bribes to downgrade trafficking charges to lesser crime,” (Trafficking in Persons Report, 378). The same corruption issues found at the top of the political food chain are also found in the police forces responsible for the actual legwork of stopping and preventing human trafficking. With such corruption occurring it is no wonder that, “poor communication and mistrust between police and prosecutors at both the national and regional level severely hampered anti-trafficking law enforcement efforts,” (Trafficking in Persons Report, 378). All levels of government are aware of the ongoing corruption of officials and thus mistrust runs rampant further endangering victims. Beyond corruption, it seems that disorganization and a need for legal restructuring exists. “MIMP classified children based on the charges filed in their legal cases; because MIMP labeled many child sex trafficking victims as sexual exploitation

victims, they could not access specialized trafficking victim services," (Trafficking in Persons Report, 379). The law is not set up to best serve those against whom injustices have been committed. Seeing these obvious flaws, Peruvian legislators need to reexamine the way they classify trafficking crimes to ensure that victims are able to pursue justice to the fullest extent of the law against their rapists and traffickers, as well as take advantage of recovery services, some of which the state finances. These disorganized laws preventing adequate justice in human trafficking also are preventing justice in ongoing sexual assault cases from the twenty years of conflict between the Peruvian state and the Shining Path. "Rape in war is internationally viable for prosecution under the International Criminal Court's jurisdiction on crimes against humanity, according to the Rome Statute of 1998," however, "Victims of previous violations of human rights in Peru must depend on domestic courts to translate evolving international law and ideas about transitional justice into national judiciary processes," (Boesten and Fisher, 4). The authors in a report on "Sexual Violence and Justice in Postconflict Peru" for the *United States Institute of Peace* examine the utter lack of justice for victims of wartime rape and how this is currently perpetuating a system of crime within Peru. "Nevertheless, little is done to address the situation, and perhaps consequently, postwar sexual and domestic violence is extremely high and largely unpunished in Peru," (Boesten and Fisher, 2). Boesten and Fisher are not off-base with their hypothesis as Peru's National Institute of Statistics and Information (INEI) reported high levels of sexual assault and family violence that is only increasing. It is widely known that many victims of sexual assault or rape do not come forward with their testimony because they feel societal shame or cannot afford a lengthy legal battle that does not guarantee a financial victory or one that places their abuser behind bars for a long time.

And while providing victims with resource is an important topic, it is not the primary point of concern here. The primary issue is the structure of the legal system that is not functioning to rectify past injustices and prevent new ones, not new social programs not in existence.

> In Peru the TRC [Truth and Reconciliation Commission] registered 538 reports of rape. Of these, only sixteen were investigated and presented for public prosecution; of those sixteen cases, three were accepted by the pretrial chambers, while the other thirteen continue in preliminary investigation with the public prosecutor. As of May 2012 one case awaits trial in Lima and another awaits trial at the Inter-American Court of Human Rights. The other cases show no movement. (Boesten and Fisher, 6)

The cause of this stagnation according to the authors is threefold. First, Boesten and Fisher cite a disorganized legal code that is cannot be weaponized against crime efficiently. "Prosecutors and judges tend to define cases of rape as a common crime instead of a violation of human rights and a crime against humanity… [which] according to many prosecutors [is] not worth prosecuting, as common rape crimes have a statute of limitations of nine years and carry only a four-year sentence," (Boesten and Fisher, 6). If judges are defining rape out of context than twenty-year old rapes in a warlike environment are unable to be prosecuted and criminals walk free with no repercussions of their crimes against humanity. Secondly, evidence of rape is called into questions, especially when such crimes have occurred years prior (Boesten and Fisher, 6). The reality is physical evidence does disappear, however "the ICC has developed investigative protocols clearly indicating that the context of war, especially if systematic rape is observed, should be part of the evidence," and that prosecutors have "dismissed psychological evidence," (Boesten and Fisher, 6). Lack of physical evidence of a thirty year old rape charge is not reason enough to dismiss claims of wartime rape, and instead of prosecutors and judges doing everything in their power to rectify evil within their state by examining every form of evidence

available, they have become complicit to such heinous acts against humanity. Finally, the authors note that "perpetrators of sexual violence" are being protected rather than held accountable for their actions, (Boesten and Fisher, 6). It seems as though many soldiers operated under false identities and thus cannot be prosecuted, however, women coming forward with allegations are in possession of the real identities of their attackers and yet the military is resistant to allow archived files to be used in prosecution of these criminals, (Boesten and Fisher, 6). The Peruvian legal system is not structured in such a way as to give victims of crime the most benefits. "The application of international human rights law in Peru may help public prosecutions, as international law offers a clear legal framework to identify violations of human rights and supports the prosecution of perpetrators of sexual violence," (Boesten and Fisher, 8).While I do not assert that legislators' intent was to aid and abet criminals, the disorganized structure has inadvertently done just this.

Furthermore, "Judges did not receive adequate training on trafficking. Officials reported judges often reduced sex trafficking charges to lesser crimes; required proof of force, fraud, or coercion for child sex trafficking offenses; or disregarded victims' ages and failed to apply relevant penalty provisions applicable in child trafficking cases," (Trafficking in Persons Report, 378). It is not just a disorganized law system that needs to be re-codified in order for justice to be served in cases of human trafficking, but advanced training is of utmost necessity. Traffickers who have committed heinous crimes against humanity and children should not be walking away free or with reduced sentences because judges are taking such issues lightly, due to systemic bias or insufficient training in these areas. 'Proof' must be redefined; physical evidence of rape is not always attainable and judges, logically knowing this, must not reduce criminal charges because of a lack of

'proof'. "Local observers reported some officials were reluctant to identify and refer suspected trafficking victims due to fears of retaliation by traffickers. Police and prosecutors had difficulty identifying indicators of trafficking among women in prostitution, and officials had difficulty distinguishing between trafficking and similar crimes, including sexual exploitation and forced labor." (Trafficking in Persons Report, 378). A state where the police feels unable to make arrests of persons trafficking children and other vulnerable populations for sex or manual labor, are in no way exhibiting a government system in which a democratic rule of law exists. Traffickers should not hold this much power in a democratic state where police are scared to uphold the law. Furthermore, the lack of correct training seems to extend beyond judges to prosecutors and law enforcement, which is not just a failure of the state to become a better democracy, but it is an inexcusable failure to citizens who are in clear danger of being exploited, raped, and even killed. Thus, Peru needs to concentrate its efforts to further reform its judicial system by eradicating corruption, reorganizing its legal system to be more usable when prosecuting criminals, and institute more extensive training programs with updated standards for evidentiary standards and application of law for prosecutors, judges, and police forces in order to better protect Peruvian citizens.

CHAPTER FOUR

Concluding Remarks on the Strength of Peruvian Rule of Law

The Peruvian state has made many advances since the authoritarian regime of Fujimori in the 1990s to become a democracy worthy of respect from the international community and its own citizens. The economy has consistently grown over the last twenty years and increased primary resource exports, a steady influx of tourism, and a plethora of free trade agreements have improved the wealth and prosperity of Peruvians. In addition to economic successes, Fujimori currently sits in prison, human rights abuses from his rule are continually being rectified, and democratic institutions grow stronger every year. Recent presidents have worked to increase the rights of citizens, combat drug usage and production, reduce violent crime, increase minority rights, and extend state capacity into regions formerly, or still, occupied by the Shining Path narco-terrorist organization. The last twenty years of improvements have earned Peru the status of 'free' by Freedom House and a strong reputation within Latin America as a state that is on a firm trajectory to a stable democracy with unending opportunity for success with democratic ideals providing a strong foundation (Freedom House).

However, Peru has not reached the category of "high-quality democracy" and still remains in the "stable democracy with shortcomings" category delineated by, Mainwaring and Pérez-Liñán, (Mainwaring and Pérez-Liñán, 122). Democracy has not had enough to time to so firmly imbed its principles within the Peruvian government and society, that the state is not without its fair share of problems leftover from the previous

authoritarian regime. Elections may be free and fair, but executives are not popular with constituents, lack of strong party legitimacy creates uncertainty in elections, and executives are still capable of overreaching the bounds of their authority. Lack of horizontal accountability, discrimination of ethnic minorities (of which exists a substantial percentage of the population), rising tides of populism, corruption in the judiciary, lack of adequate training of law enforcement, and steadily increasing crime rates are all cause for concern when evaluating the quality of democracy in Peru. Each of these issues may play out differently within society affecting citizens in a variety of ways, from access to adequate legal representation, to concern over personal security, to sparking mass demonstrations. However, the root cause of each of these issues is found in a weak rule of law, as evidenced by Peruvian crime rates and the capacity of court systems to mitigate these issues. A careful analysis of Peru's crime concerns and judicial capacity to enforce a strong, democratic rule of law clearly shows that much work remains to be done for Peru to move to the category of "high-quality democracy," (Mainwaring and Pérez-Liñán). According to the standards put forth by Cicero, Dahl and O'Donnell. Peru's rule of law is found to be lacking.

Peru is not in violation of all of these principles, but it is in violation of enough of them to clearly determine the weakness in its rule of law tradition. Cicero's first and second principles include the existence of written law and citizen's respect and adherence to said laws. Peru as a modern, thriving democracy has a written Constitution and legal code. And while the country is not undone by anarchy, the rising crime rates evidence that law is not given the respect that is expected within a democracy. Narco-trafficking and the fact that brown areas controlled by Sendero still exist in present-day Peru further support the lack

of respect for law and the state's failure to strengthen rule of law in this area. Cicero's third principle requires a strong judiciary, where vertical and horizontal accountability exist to check arbitrary abuses of power. When laws themselves are legally ruled and judicial review is encouraged, a balance of power is created that stops overreaching leaders in positions of authority from becoming too influential. Fujimori did much to destroy horizontal accountability in the name of judicial reform and the Peruvian state has had to work to come back from such a disruption of democratic ideals. Horizontal accountability has increased since the early 2000s, but it is still lacking, and vertical accountability even more so. This category is nowhere near a complete failure for Peru, but it is not a complete success by any means either. Cicero's fourth principle examines isonomy and *stare decisis*, neither of which are up to par. Discrimination towards minorities is a an ever-present occurrence according to Freedom House and *stare decicis* does not exist to such a level that it provides a stable basis for legal precedent. *Stare decicis* was practically nonexistent during the Fujimori era, and this is not the current situation, but it is not so secure in its existence to not cause concern. The fifth principle requires the extension of law to all citizens including those in power. The executive is bound by the same laws and requirements as the everyday man. Unfortunately, this is not always the case in Peru and enough corruption exists within the judiciary to offer lenient sentences to influential players such as corporate executives and organized crime leaders. Principles six and seven require laws to be pre-established and known and forbid the use of *ex post facto* laws. Peru largely passes this category. However, if citizens are being denied access to due process because they do not speak Spanish and no one can translate, I wonder at those citizens' ability to understand the law of their state and would be concerned at the ease of which this

sect of the population could be manipulated by law in regions of the state where democratic rule of law is weak and corruption is high. Cicero's final principle requires the existence of due process for all citizens, and Peru substantially fails this category. Overall Peru fails, on some level, in the majority of these categories. Certainly not every category is an outright and absolute failure, but each category brings up areas of serious concern. If scored out of eight, with failure defined as any trespass within a single category, Peru only passes 2/8 categories. This is only 25%. I propose that this percentage lends a fully accurate view on the strength of rule of law, as each category would need to be evaluated and scored individually on a numerical scale that contains more options than pass or fail, yes or no, 1 or 0. But, I would argue this score lends valuable insight into the state of democratic rule of law within Peru and specific areas of weakness.

O'Donnell gives four problematic areas in which rule of law issues present themselves in Latin American democracies: "Flaws in the existing law," "Flaws in the application of the law," "Flaws in relations between state agencies and ordinary citizens," and "flaws in access to the judiciary and fair process," (O'Donnell, 39-40). Peru displays persistent flaws in existing law and in the application of that law. The example of sexual assault survivors from the Fujimori era who have not received justice for the crimes committed against them, shows the various ways law needs to be rewritten in order to be most effective in rendering justice and protecting the rights of citizens. Insufficient training of judges and law enforcement embeds the issues of application flaws further into the legal history of Peru, which in turn, weakens rule of law, and weakens democracy as a whole. When victims are not receiving justice for sexual assault (or other crimes), crime continually is rising across the board, and judicial corruption endures, then clearly flaws

exist in relations between state agencies and citizens and in fair process. Peru, as a relative democratic success within modern day Latin America is still plagued by systemic rule of law problems. Rule of law creates the backbone for the very existence of democracy and by allowing these flaws in the law to persist, Peru is weakening the quality of its democratic government. As a result, citizens are more likely to turn to alternative regime forms, which has already begun. The populist movements sweeping through the continent have not left Peru untouched. The hyper-presidentialist leaders of these anti-elitist, populist movements will revert Peru back to a regime form it has toiled to escape from. Ignoring rule of law issues within Peru cannot help but yield any other effect.

This project therefore argues that the most significant threat to Latin American democracy is an absence of strong rule of law and an inability to sustain judicial systems capable of enforcing rule of law vertically and horizontally, respecting the natural rights of citizens, and affording equality of all before the law in regards to due process. Rule of law is the most crucial issue within Latin America today. The concept itself has been studied since Aristotle determined that rule by a preestablished code was superior than the rule of man. After all, the arbitrary exercise of power by one man always remains a possibility and thus rule of law is preferable to being required to follow a code of conduct created by an unjust man. Furthermore, even the most just man with all the best intentions is still susceptible to mistakes and cannot possibly determine the legal needs of the future. Thus rule by law, even though it is hindered by the lengthy process of changing the code or writing new laws, is always preferable than rule by man. In order to avoid tyrannical rule, democracies open themselves up to being ruled by many and law becomes a tool to legally rule itself as branches of government are formed. The judiciary and legislature work

together to establish justice within a democratic state. Allowing citizens to take part in government prevents the misuse of law to trespass upon the natural rights all men are born having. Through the separation of powers, electoral process, and practice of judicial review citizens take control of their own governance safeguarding their rights, while still ensuring that arbitrary exercises of power are checked. Defining rule of law is difficult, and its simplistic terminology is misleading as rule of law is not defined by the sum of its parts. Cicero, however, lays out eight principles to examine within each state to assess the quality of its rule of law. Applying these eight principles to modern day Latin America lends valuable insight into the state of both rule of law and democracies on the continent. The third wave of democracy that arrived in Latin America in the 1990s, after a frightening bout with authoritarianism, was a welcome relief to the democratic world, but it was not without its challenges. States in the region have faced difficulties in reestablishing democratic institutions, removing corrupt leaders from power, and restoring citizens' faith in the ability of a government form that can, indeed, protect and preserve their rights as citizens. Currently states are still battling with these issues as well as economic inequality, far-left and far-right variants of populism, hyper-presidential leaders, organized crime, trafficking of narcotics and people, lack of horizontal accountability, excessive corruption, authoritarian legacies of human rights abuses, limited state capacity and weak rule of law. Mainwaring and Pérez-Liñán place states in one of four categories, but they only place three of Latin America's countries in the category of "high quality democracy," (Mainwaring and Pérez-Liñán, 122). While being excluded from this category does not mean a state is in a horrible condition, it is concerning that only three states have achieved high-quality democracy. Many scholars assumed that once free elections came to the

continent, the above issues would be rectified. This has proven to not be the case. Instead Dahl offers eight conditions for thriving democracies to exist. Government authority must be grounded in a Constitution; elections are "frequent and fair" without "coercion"; universal suffrage exists and most citizens have the right to become a government official; freedom of the press exists and citizens are not punished for exercising this right; freedom of expression exists "without the danger of severe punishment"; democratic societal institutions exist and citizens can express dissent on matters without fear of retribution; election results are respected even if results are divided by a narrow margin; and no one is behind the scenes pulling strings to control the government, (Schmitter and Karl, 8). If these characteristics exist within a state, it can be classified as having the democratic institutions necessary to promulgate strong democracy. O'Donnell also expresses the need for high state capacity to eliminate "brown areas," where nonstate actors may have control of a sub-region of the state, having taken over the normal functions of the government providing some sort of 'law' and order, (O'Donnell, 41). In order to combat the recurring issues in Latin American democracies, policy makers, government officials, and scholars alike need to concentrate on the weak rule of law that exists in each of these states.

Peru provides an excellent case study, as the state is neither perfectly democratic nor falling apart. With an intense history of authoritarian control and large brown areas controlled by the Sendero Luminoso, it has overcome a great many challenges in reestablishing democratic institutions. But the state is no stranger to the continental wide issues of populism or hyper-presidentialism that are welcomed by citizens who have seen the failures of their government to provide strong democratic rule of law. Examining crime levels and the competency of the judicial or court system of Peru shows just how weak the

rule of law truly is. Corruption of officials, a weak judiciary that the public is highly distrustful of, un-remedied human rights abuses left over from the Fujimori era, extensive brown areas controlled by Sendero used to fuel narcotrafficking of coca for cocaine production, an alarming increase of crime, especially domestic abuse, lack of judicial and prosecutorial training, and a current legal code that makes prosecution unbelievably difficult, all impede a strong rule of law. This weakness in the judiciary does nothing to assure citizens their rights of due process will be respected when they must interact with the legal system .This method of analysis is quite effective in identifying key areas policy makers and legislators should turn their attention towards in order to prevent anarchy, tyranny, majoritarianism or arbitrary abuse of power, spur competition and cooperation, safeguard citizens' rights, and strengthen rule of law and Peruvian democracy as a whole.

Thus this project has shown through a history of democratic rule of law spanning from Aristotle to the present day, a strong rule of law is necessary for the formation and continuation of democracy. Modern day Latin America is rife with political problems as states seek to build democratic states from the ashes of authoritarian legacies. The root cause and, conversely the solution to these problems lies in a weak rule of law foundation as is shown by an analysis of crime and the court systems of Peru.

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