doispontos:
Revista dos Departamentos de Filosofia da Universidade Federal do Paraná e da Universidade Federal de São Carlos

Immunities Nebula? On the rule of law and democracy in Brazilian legal thinking*

Andrei Koerner
andreiko@uol.com.br
Universidade Estadual de Campinas – Unicamp

Valeriano Costa
Universidade Estadual de Campinas – Unicamp
vmfc@unicamp.br

Abstract: The article proposes a multidisciplinary analysis of legal thinking, aiming at a critical reflection on juridical knowledge and practices in Brazilian society. It initially goes over a critical-conceptual analysis of Guillermo O'Donnell's work on the rule of law and democracy in Latin America. Then, it adopts the notion of juridical assemblages to present different dimensions of the socio-legal research on law. Finally, it uses the metaphor of the "immunities nebula" for the proposal of discerning the positive attributes of the rule of law in Brazilian legal thinking and its consequences for democracy.

Keywords: Democracy, rule of law, political analysis of legal thinking, constitutional history, Brazilian politics, Judicial politics

*This article was translated by Renata Guerra, doctoral student in Philosophy at the Universidade de São Paulo. renataguerra@usp.br

Introduction

The provocative term on the title is a metaphor that calls into question the relationships between rule of law and democracy in Brazil to propose a multidisciplinary analysis of legal thinking, aiming at the critical reflection on juridical knowledge and practices in the social and political conditions of the historical formation of Brazilian society.

We take as given both the results of historical and socio-juridical research on the specificities of judicial institutions and practices, as well the critique of current approaches to the subject. These approaches assume either the unfeasibility or irrelevance of the rule of law among us, and this would be due to structural determinants, such as the mode of relations between social classes and ruling elites' cultural patterns, or they assume that the political and legal spheres are autonomous and independent vis-a-vis other social conditions. The latter approach is adopted by current political science analyses that discuss issues such as the judicialization of politics and judicial activism. These analyses presume a distribution of rules between legislators, governing officials, and judges in representative democracy, while in the present article we explore the consequences of O'Donnell's analyses on the impertinency of this concept.

Our purpose is to present a more general and exploratory discussion on a very important aspect of our ongoing experience. This experience has a long history and recomposes itself according to conjunctural turns of events, as in the current clashes in the Brazilian context of crisis. The rule of law discourse promoted by jurists assumes a multifaceted aspect, which translates both into uncertainty for subjects and a more general situation characterized by low effectiveness and lack of objectivity of rights in the ordering of social relations.

One could call this multiplicity as juridical discourse metamorphoses or transformations. However, it is something more frequent and uncertain, as if it were a constant composition of colors and shades, meanings and polarities, which pervade our social interactions, governmental practices, and institutional frameworks. One could recall mottos such as "for my friends, everything; for my enemies, the law", popular sayings and expressions such as that one cannot predict what comes out of a judge's pen, the wangling [*jeitinho*], and trickiness [*malandragem*]. There are historical, sociological, and common-sense explanations for this, such as cronyism, favor relations, patrimonialism, the structural duality between the equality of market relations and the inequality of interpersonal relations, etc.

One could choose between polar explanations. On the one hand, the structural analysis sees those terms as expressions of a peripheral capitalist social formation. On the other hand, the patrimonialism-based approach points to action orientations of the leaders who confuse the public good with their private interests. Accordingly, one could interpret the ambiguity and dubiousness over the law's objective meaning as the effect either of a structural feature or cultural pattern in Brazilian society. But these kinds of explanations do not open the juridical "black box", so that judicial practices and legal concepts do not become objects of analysis susceptible to research and reflection, because they are taken as given, as a surface effect or rhetorical devices of what happens "under the veneer of ideas".

The emptying of the juridical as an object of analysis and reflection is no longer a problem since in the last forty years a lot of research has been done on the subject, in Brazil, and other countries, from various theoretical perspectives and disciplinary fields. However, one risks to reproduce within this research field that rigid polarization between those who hold empirically the direct causal relation between the constant uncertainty in the application of legal norms and Brazil's structural or cultural characteristics, on the one hand, and those who, on the other hand, proceed from the premise of the autonomy of the juridical or the political; there are also those who look for evidence in specific situations of the rule of law effectiveness in political, social, or cultural conjunctures that would confirm some tendency to affirm and

expand that autonomy. Nonetheless, the indicated opposition would end up blocking what seems to us to be the main goal of research on the subject: to undertake the very uncertainty of the rule of law as an object of analysis, to research its bases, configurations, points of tension, and moments of discontinuity. In other words, we claim that violations of the rule of law do not mean its impossibility, unfeasibility, or global ineffectiveness, nor do we look for the particular events in which it takes place as signs of a gradual process in which it would supposedly being gradualy realized. Rather, we examine the combination between the rule of law enforcement and its violations as parts of a sustained whole, which is composed by a combination of assemblages rather than a system, in which juridical rules are kept in their particularity and one-off efficacy, i.e., without generalization or objectivity.

Such a configuration cannot be seen outside of its spatiotemporal shaping, namely, as historically constituted relationships (HALL, 2015). Thus, the analysis to which we submit the rule of law does not restrict itself to bringing out its negation as a result of recurring violations (the "(un)rule of law"). We insist here on the relevance of identifying and analyzing positive configurations, with specific features that are variably combined in historically determined models and norms in concrete cases, as well as situations of violations, strategic deviation, indifference, or confrontation to those models and norms.

In our view, a research program can be built around the research of what we call the "immunities nebula", characterizing it in its "juridical forms", its relations with particular structures and social (as well as political) processes, its transformations, etc. In this article, we limit ourselves to presenting some aspects of this proposition, which has as its object the legal thinking on the rule of law, its relations with the body of juridical assemblages, and its social forms. We build on the critical analysis of the theme of the "(un)rule of law in Latin America" proposed by Guillermo O'Donnell. His works are relevant for discussing empirical theories of democracy in political science, with a normative and comparative concern. In his critique of those theories, the author evinces the internal relationships between democracy and rule of law, drawing attention to the characteristics and trajectories of Latin American democracies. However, he does not elaborate on the theoretical and empirical research problems about the rule of law that his analyzes imply.[1]

The second section proposes the notion of juridical assemblages to replace those concepts of state as legality or legal system adopted by the author. The notion designates the heterogeneous set of institutions, doctrines, and pratices that comprise the term "law" in a socio-legal sense. Illustrations are presented to show the variety of aspects of the assemblages and possible dimensions for research and analysis.

The third section discusses the concepts of rule of law and (un)rule of law from the point of view of the relations between the ideal, the juridical assemblages, and society, as well as the implications of legal thinking and juridical knowledge for the rule of law and democracy. The term "immunities nebula" is proposed to designate those situations concerning lack of clarity, ambiguities and uncertainties in those relations, and possible analytical developments from it are discussed.

1. Democracy and (un)rule of law in Latin America in O'Donnell's work

Guillermo O'Donnell's work is important in Latin American thought for its treatment of the relations between democracy, State, and citizenship in a critical engagement with the empirical-analytical models of democracy adopted by comparative politics fostered and directed by North Americans in the post-World War II period.[2] In his analysis of the specificities of Latin American democracy, O'Donnell integrates not

[1] After the author's critical analysis, our scope is limited to legal thinking and juridical practices in Brazil, given that our background and intellectual goals are not in the field of comparative politics or political theory.

[2] On O'Donnell's trajectory, see Brinks et al. (2014).

only historical, sociological, and cultural references, but also proposes a critique of political science from the normative perspective of political theory. He does this by drawing on legal theory to elaborate on the relationship between the State, democracy, and rule of law.

In the 1970s he addressed the relationships between State, modernization, and capitalism in Latin America, to point out the particular character of universal presuppositions in modernization theories. At the same time, he has kept his distance from dependence theories (O'DONNELL, 1973 and 1979). In the mid-1980s, he published important comparative research on transitions to democracy in Latin America and Southern Europe in which the analysis was placed at the political regime level and focused on the strategic interactions between political actors (O'DONNELL, SCHMITTER, and WHITEHEAD, 1989). From the beginning of the 1990s, he distanced himself from the theme of consolidation of democracy, on which analysts discussed transition stages and stability criteria of the new democracies (O'DONNELL, 1996a). For him, what was at stake in the new democracies was another institutionalization, a historical process with its own dynamics and characteristics. Therefore, these could not be understood exclusively based on a comparison with consolidated democracies. One should not think of democracies as static formal or institutionalized models. In his conception, political regimes would be structured around legal rules of access and exercise of power, and *horizontal and vertical* (social, political, and administrative) accountability mechanisms (O'DONNELL, 1998). Democratic regimes would be configured as dynamic processes of democratization—and (de)democratization, which would continuously conform, stabilize, and recompose themselves.

Thus, he has called into question the core of mainstream theories of democracy in political science, opening up room for proposing a different approach. He went on to explore the relations between the political regime, its political conditions (State), and the recognition of agency capacity, all engrained in a larger set of historically constituted economic, social, and cultural factors (class structure, traditions).

From the mid-1990s until his death, in 2011, he published a series of articles whose themes are condensed in his book *Democracy, agency, State* (O'DONNELL, 2010). The themes are mainly the internal conceptual critique of proceduralist or minimalist theories of democracy and the analysis and reflection on the historical trajectory of Latin America and the democratic regime that has been institutionalized here. At the same time, he worked out theoretically and normatively on democracy, human rights, peace, and development, synthetized in the theme of the quality of democracy, as recognized by the Vienna Conference Declaration in 1993. In the early 2000s, he proposed the analytical framework for the United Nations Development Program (UNDP) project whose aim was to create indicators to assess the state of democracy in each country of the region. This work, which would later be included in the collection *The Quality of Democracy* (O'DONNELL, 2004), complemented his empirically oriented analysis of the dynamics and obstacles of democracy in Latin America.[3]

From the critique of minimalist theories to the expanded theory of democracy

In his conceptual critique of minimalist theories of democracy, O'Donnell was interested in working out an empirical-analytical concept of democracy capable of integrating the specificities of non-Western democracies, which were not reducible to the historical trajectories of the oldest and most institutionalized democracies of the "Northwestern quadrant" (Western Europe and North America) (O'DONNELL, 1999). In his approach, an expanded concept of democracy would have to understand broader social conditions and take into account the effects of long-term processes constituting different democratic dynamics. With this, he not only broke the theoretical unity of the minimal definition of democracy but

[3] On the relationships between the normative and empirical dimensions of his work, see Whitehead (2014).

also proposed a reconstruction of the concept of democracy, relating it to agency and the State, which he did in his later works (CULLEL, 2014).

For the sake of conceptual parsimony, minimalist theories establish restrictive conditions for the definition of democracy focused on the selection of leaders in competitive, free elections with a broad electorate, and alternation of power among institutionalized political groups. O'Donnell (2010, 1999) shows the implicit premises of those theories, which comprise three points: democracy as a juridically institutionalized regime, its micro-foundation in an agency capacity, and its macro-conditions related with the State. He accepts the criteria employed in minimalist definitions but adds that elections should be decisive and institutionalized, which means, in short, that the outcomes will be accepted and the winners will govern, and new elections will take place according to the anticipated schedule for an indeterminate future. Therefore, democracy is a political regime (cf. O'DONNELL, 2010, p. 20) whose rules of the game are stable and valid for the future, to which all adapt their expectations and strategies. To be competitive, elections presuppose a set of civil liberties and political citizenship rights of voters, whose roots are in socially institutionalized civil rights.

In minimalist conceptions of democracy, the unity of analysis is the voter, but it is presupposed that he or she is the holder of a complex of rights as a political citizen, bearing also other rights (civil, civic rights) that are implicit in this statute, which are nonetheless necessary for him or her as a member of the national political community, whose recognition and effectiveness are given. This complex of rights means the recognition of the universalistic and egalitarian agency of citizenship rights and this is the fundamental point of O'Donnell's theory. His basic argument is that "democracy [...] entails a view of the human being as an agent who has achieved [...] the title to be recognized, and legally backed, as the holder of rights" in a broad sense. Human beings as rights-bearing agents are the micro-foundation that engrains the empirical and normative aspects of democracy (O'DONNELL, 2010, p. 1; WHITEHEAD, 2014). The agent is "a being endowed with practical reason and moral discernment; i.e. she uses her cognitive and motivational capabilities to make choices that are in principle reasonable in terms of her situation and goals", about which she is in principle the better judge (id., p. 33). The status of a rights-bearing citizen means the recognition of the agency capacity of all individuals, regardless of social conditions, with some legal exceptions, to make reasonable decisions that can have important consequences (id., p. 25). From a political point of view, democracy is an "institutionalized wager" whose implication is that everyone must accept that anyone else participates as a voter or candidate and, if elected, governs for the duration of his or her term (id., p. 25).

The democratic regime is a constitutive part of a process of State formation to which it is historically subsumed (MANN, 1992). O'Donnell defines the State as an attributive (non-voluntary) territorially based association with institutions that organize social relations, holds a monopoly on the legitimate authorization of the use of physical coercion and usually has supremacy in controlling the means of coercion (O'DONNELL, 2010, p. 51-2). He distinguishes four dimensions for an analysis of the State: the organizational one, the set of bureaucracies, which concerns the effectiveness of the State in its territory; the legal system dimension, which refers to the effectiveness of its norms to order social relations; the collective identity one, a "we" that prevails over the various partialities and provides the State with credibility; finally, the territorial dimension, which concerns the regulation of internal/external relations and refers to the filtering of the State (id., p. 53-4).

Democracies in Latin America

The contrast between democracies in Latin America and older, "Northwestern" democracies is central in several of his publications in the 1990s (O'DONNELL, 1991, 1994, 1996a and 1998). The differences

encompass political, social, and cultural aspects and appear at the three levels of the regime, the State, and the citizenship. Latin American democracy elects its leaders by delegation, which is different from representative democracy, the State realizes itself in a heterogeneous and unreliable way, configuring situations of incomplete or limited statehood. For this reason, rights effectiveness is precarious for large swathes of the population and vast regions of the territory, which leads him to qualify its citizenship as a low-intensity one.

A key concept in O'Donnell's analysis is that of "delegative democracy", analytically built as contraposition to "representative democracy" (O'DONNELL, 1991, 1994, 1998). Representative democracy would be characterized as a regime that combines the three traditions of Western political thought: popular election (democracy), protection of rights (liberalism), and virtuous government exercised for the public good (republicanism). However, these traditions are institutionalized not only in rules, organizations, and legal procedures but also in a *democratic ethos,* which guides the actions and expectations of both leaders and citizens. A central aspect of his approach to representative democracy concerns public control (accountability) (O'DONNELL, 1998). Representative democracies are specifically distinguished from delegative democracies by an institutionalized network of accountability procedures and organizations, both horizontal and vertical. This network is crucial to ensure that the actions of governors and citizens are guided by the rules and principles configured by the mentioned three traditions. Horizontal controls are institutions within the State that comprise the separation of powers, but also a broad set of organizations specialized in controlling government activity, i.e., independent agencies such as Audit Courts and the Public Prosecutor's Office. Vertical controls are of two kinds: on the one hand, periodically free elections with a vast possibility of participation and contestation, whose occurrence is necessary for a regime to be classified as democratic. On the other hand, social controls, such as social movements, trade unions, and free press, all of which present demands, exert pressure on the government, and resist any attempts by those in power to overreach. There would then tend to be the predominance of a universalistic *ethos* of respect for rules and separation between public and private interests.

Democracy by delegation[4], in Latin America and other regions, is organized by three different political notions, because liberal and republican traditions are weaker, and the democratic one is also less present (O'DONNELL, 1996a and 1998). In the mid-1990s, O'Donnell argued that, despite some Latin American political regimes being classified as "stable democracies" (Colombia and Venezuela), these presented important differences from their counterparts in the "Northwest". In the former, elections, even if relatively competitive and periodical, have practically configured forms of delegation of the exercise of power to the leader who considered himself authorized to govern as he saw fit, as the exercise of his will, against which legal norms and controls would be obstacles. This is because these delegated democracies would have innocuous horizontal accountability organizations and weak vertical social accountability networks. They would also be weakened by the particularist and privatist *ethos* and orientations of action, which would favor patrimonialist practices in the state, co-optation, and clientelism over significant sectors of the electorate. Finally, they would also be limited by the feeble population's capacity for organizing itself, resulting from poverty, low educational levels, as well as traditional conceptions about the relations of command and obedience.

O'Donnell formulates the empirical type of delegative democracy to characterize an extreme and unstable situation in those regimes. In serious economic or political crises, political leaders with salvationist airs emerge (such as Menem, Collor, and Fujimori, and one can undoubtedly include Bolsonaro) who seek to govern by decree, based on movements (and not parties), who speak directly to the mass of the population claiming a delegation of unlimited power, and therefore see as obstacles the institutions with

[4] We adopt this term to differentiate it from the "delegative democracy" type explained below.

which their powers are divided as well the control procedures (O'DONNELL, 1991; 1994; O'DONNELL, IAZZETTA, and QUIROGA, 2011).

As emerging regimes from processes of State formation, representative (but also delegative) democracies are conditioned by their respective States' historically constructed capacities for territoriality and centralization (MANN, 1992). That is, effectively democratic regimes are supposed to be capable of ordering social relations and controlling conflict situations that emerge in their territory.

O'Donnell's historical-comparative analysis has shown important differences between "Northwestern" and Latin American democracies. In the former, there was a long-term historical process whose outcome are a great concentration on the means of physical coercion (professionalized armies), the creation of administrative means (professionalized bureaucracies), the expropriation of the means of legality and jurisdiction by the king, which promoted the centralization of law (independent judiciary power), the creation of strong national identities, and the centralized territorial control by the nation-state. As a result, both the modern State and the democratic regime are historically (almost) concomitant, their convergence having unified States and governments with their populations, a process in which the nation provided the cultural basis of political citizenship and the State. In these cases, the State became the promotor and guarantor of citizenship, the place for the recognition of rights by the state legal order and its implementation of rights through bureaucracies (O'DONNELL, 2010, p. 62-71; 83-4; 91).[5]

In Latin America, comparatively, States have a mediocre performance, although unevenly, on these four dimensions. First, their bureaucracies seem unable to control (and even occupy) the entire national territory, and when they do, they show low effectiveness. The legal system is unevenly enforced and socially biased. This is why the perception of citizens (especially the poor) regarding the capacity of States and governments to implement some notion of the common good is also very negative. Finally, their performance is no better when we look at their ability to manage their borders, as well as their insertion into the economy. These countries' State formation process presents unarticulated histories, structurally heterogeneous societies polarized social spaces, and frailty in the formation (recruitment) of its bureaucracy and the imposition of a legality that is considered legitimate. For all these reasons, according to O'Donnell, democracy in these countries is unable to produce egalitarian and leveling effects, remaining adrift between a fragmented society and an inefficient State (id., pp. 146-8; 155).

Concerning the differences in agency capacity, the author conceives them as differences in the degree of effectiveness of citizenship rights and social living conditions. The voter exercises his or her right as a political citizen, which in turn presupposes the citizen *tout court*, the member of the national community with a complex of recognized and institutionalized rights and obligations. But to exercise these rights, statehood conditions are necessary, i.e., it is required that social relations within the territory are regulated by state organizations and that the legal system orders action orientation and their social interactions. Furthermore, citizens should have adequate living conditions, education, and capacity for agency provided by the effectiveness of civil, social, and cultural rights.

O'Donnell provides a long-term historical excurse to show how, from the dawn of modernity, the gradual expansion of rights occurred in the "Northwest" until the institutionalization of contemporary constitutional democracy (id., ch. 2). In other regions there was an "abrupt" expansion of the right to suffrage, whose outcome was political instabilities, authoritarian regressions, and precariousness of

[5] An alternative view of this process can be found in Charles Tilly (1996). For him, the process of European State formation involved the complex (and variable) articulation between coercion (State) and capital (market) resulting in the transformation of forms of domination from what he called "indirect government" (traditional State) to "direct government" (modern State). In this approach, as in O'Donnell, citizenship and democracy are emerging and not autonomous processes (TILLY, 2013).

rights. But in all democracies worldwide there have been exclusions, limitations, and discriminations, in a historical process of struggles for the recognition of rights (id., p. 48).

In Latin American, there is a paradoxical situation, in comparison to the classic trajectory of rights recognition (cf. MARSHALL, 1950), given that formal recognition of rights is relatively broad, but characterized by precarious effectiveness. Here a kind of low-intensity citizenship takes place in which individuals are legally and materially excluded from access to rights. State law is thus substituted by local and traditional rules, imposed by peripheral groups who take over spaces that should be submitted to State control (TOKMAN and O'DONNELL, 1998; O'DONNELL, 1996b). There are several legality gaps, in a different order than the legal one, in which local rulers and middlemen select and determine which conducts are valid. Homogenous legal norms do not produce the same effects for persons situated in different contexts, creating problems that affect the performance of the democratic regime itself (O'DONNELL, 2010, p. 120-3). In Latin America, civil rights extension was incomplete when the democratization or expansion of political rights took place. There are discriminatory and inequitable laws, whose application is arbitrary and has no universal effectiveness. Exemptions and privileges for the powerful are combined with the rigors applied against the poor. The relations of the bureaucracy with ordinary citizens are asymmetric, characterized by treatment that is not respectful of human dignity, and access to the Judiciary and due process is limited and expensive. In other situations, there is pure and simple illegality, given that the State is not able to occupy the territory, or, although it is formally present, the bureaucracy is not able to regulate social relations and thus legality does not become a reference for the government of actors' conducts in their interactions. In other situations, laws are enforced, if at all, intermittently and differentially in large parts of the state territory. State law is confronted by "informal rules" imposed by private power groups that dominate entire regions, both in isolated rural areas and on the outskirts of large conurbations. Therefore, there is a constant negotiation between formal legality and informal rules. Moreover, the "informal rule systems" are punctuated by arbitrary interventions by the formal system, which sustain a world of extreme violence. In many cases, even formal sub-national systems (State, provincial, departmental, and municipal governments) are entangled with "informal rule systems" coexisting, in turn, with polyarchic national systems (O'DONNELL, 1999: 311-4; 1996b)[6].

Thus, incomplete statehood, the ineffectiveness of the legal system, and low-intensity citizenship synthesize the situation of (un)rule of law, which complements the regime of democracy by delegation. The term rule of law permeates the State, the regime, and the agency capacity since it revolves around forms of *accountability* (regime), bureaucratic regulation and ordering of social relations (State), and citizenship (agency).

Rule of law

O'Donnell defines rule of law as a political ideal or a normative horizon[7]. He foregrounds the systematic and formal dimensions of the concept. Thus, after pointing out the diversity of definitions and historical experiences to which the term "rule of law" refers in several languages, he assumes that its basic idea is that of a government ruled by laws, not by human beings. The common kernel of all legal systems could be reduced to a set of hierarchical norms, which would tend (and aim) completeness; formal rules would define the relationship between those norms; that rulers should be submitted to the laws just like everyone

[6] Other authors are more optimistic. Edward Gibson (2013) argues that the democratization of national governments in Latin America is only a first step in spreading democracy throughout the national territory. Based on case studies in Mexico and Argentina he concludes that subsist authoritarian subnational "enclaves" that often deny access to civil and political rights to local citizens.

[7] The term rule of law has distinct meanings related to legal traditions and political trajectories in different countries (see, for example, COSTA and ZOLO, 2006; HEUSCHLING, 2002; CHEVALIER, 2003)

else, and that anybody should be subjected to the same rules in all situations, without exception, i.e., that no one should be *legibus solutus*. (O'DONNELL, 2010, p. 94-5)

He points that in the common law tradition, definitions given to rule of law focus on courts, while in different languages the same term encompasses all State institutions, tendentially all social relations. As an ideal, the rule of law has very effective institutional and social implications. By definition, however, it is always incomplete and therefore carries a lower degree of reality. The degree of its realization is relative to the scope of democracy in the State and society, and it follows that the greater the scope and effectiveness of the rule of law, the stronger will be the State and the democratic regime it contains (id., pp. 97-8; 111).

He points out that the rule of law's crucial attribute to the legal system is that it "enclosures" everyone under the law, there is no one outside its rules nor can anyone ignore them. It is a useful fiction because neither the rulers nor other citizens can dispose of the rules, which are made up into a system, an articulated, hierarchized, and consistent body of rules endowed with formal unity. Its fictional character has many consequences: rulers and state officials have their rights, different from those of citizens (the use of coercion), but their use is strictly regulated; the difference between public and private becomes strict and controlled; the legal system not only protects individual rights but also empowers citizens to exercise collective rights. The legal system supports and sanctions peaceful means of collective decision-making that enable citizens' autonomous agency. Hence, it requires fair procedures that are available to all and legally institutionalized. Another consequence would be that citizens have expectations regarding the performance of rulers and officials for the common good and have instruments to control them. Tension would be brought about by law itself whose indeterminate rules and dialectical or argumentative procedures would set in opposition the expectation of stability of rules and citizens' participation to change laws, or to alter the dominant meanings attributed to it (id., p. 102-3).

O'Donnell clarifies that his exposition on the rule of law is not carried out in the field of the theory of law. However, it reveals important aspects of state legality in democracy (id., p. 93, n. 1; CULLEL, 2014, p. 311). He also discusses the relations between rule of law and citizenship, with emphasis on the ambivalence of egalitarian state legality and the role of the State as the organizer of inequality, given by capitalist exploitation, discrimination, and social power relations. He presents the relationship between State as bureaucracy and legality, because of the relevance of legal controls over internal relations within bureaucratic organizations.

Throughout the chapter on the State as legality, he makes caveats and observations about the non-realization of the rule of law and its implications for the practice of law but does not develop the point. The issue is developed in only two paragraphs, in which he takes the view of sociological realism in which law is reduced to sets of decisions made by officials and judges, which may conform more or less to the principles of the rule of law.

> [...] there is no such a thing as, literally, "the rule of the law." What actually exist are decisions made by authorized officials facing situations quite often amenable to various legal and/or factual interpretations, or judges who may not be willing to fairly apply the existing law, and/or be socially prejudiced, and/or who have legal conceptions that depart from basic democratic principles or values. (O'DONNELL, 2010, p. 108).

This is because law's production is impregnated with power relations and, therefore, social and political struggles unfold in its various moments, from the process of creating legal norms to their interpretations and implementation. At the same time, rules produce normative effects even after power relations have faded, without impairing the continuity of struggles to resignify and direct them toward specific ends (id., p. 108-9).

So there is a field of power relations in the (re)production of norms, a field which is more or less permeable to democratizing forces and rule of law principles, generating more or less favorable effects on the effectiveness of citizenship rights and the democratization of the state bureaucracy.

Objections and issues

Since the 1990s, O'Donnell has repeatedly addressed the issue of the (un)rule of law in Latin America and its relevance for democracy. He makes room for reflection and analysis about these relations but develops them only from the point of view of democratization, because—despite pointing out frailties and obstacles of the rule of law—he gives only a few indications about what would be the legal system, the legal tradition, or the form of legality that has been conformed here. On multiple occasions, he states that it would be up to inter or transdisciplinary studies or the field of legal sociology to analyze these issues (O'DONNELL, 1999, p. 315, n. 51; 2010, p. 93, n. 1). In what follows, we raise a general objection and formulate some questions in countercurrent to his analyses, so to elucidate how we propose to approach them.

The general objection is that O'Donnell assumes a notion of a formal rule of law that equates with a democratically based legality whose rules conform to a complete, comprehensive, and egalitarian system. However, this is a representation of law produced by legal and political theory and has limited correspondence with "the law" currently enforced and practiced in any society. Furthermore, the validation of legal norms through the democratic process, their formal qualities, and their implementation by exempt and controlled bureaucracies are insufficient to think of the relations between rule of law and citizens' autonomy in our societies. Thus, it is necessary to think of the rule of law not only as effective democratic legality, but also to reflect on its relationships with normative production in society. We return to this point in the next section.

O'Donnell argues that in "Northwestern" democracies there was an expansion and institutionalization of civil rights in a long-term process before the expansion of political citizenship rights in the late 19th century. The historical experience of democracy in Latin American democracies (and other regions) would be that of the previous, or at least simultaneous, expansion of political citizenship rights with civil rights during the democratization process in the 1980s of the 20th century. But the partial expansion of political rights without the effectiveness of civil rights took place in Latin America in earlier periods and goes back to the times of Independence. What would be the characteristics of law or legal tradition in Latin American countries in the long period between the creation of liberal-oligarchic states at the time of Independence and democratization? Another point is that O'Donnell sees the frailty of civil rights for most of the population basically as a result of a lack of effectiveness due to the factors mentioned above. But at the same time, he points to conceptual inventions, legal statutes, or casuistic rules of arbitrary bureaucrats (including judges) who apply them in a biased way. Beyond the effect of lack of effectiveness of rights, how could one think about these legal materials and their relationship to the rule of law?

Finally, he discusses the relations between democracy and rule of law based on the formal qualities of the legal system, in which the difference between democracies in Northwest and Latin America would be a matter of degree of effectiveness. If he succeeded in pointing out that nowhere do legal practices and the conditions of citizenship correspond to those qualities, he left open how to empirically research the problem. In any case, he discusses the rule of law as a function of two related points: on the one hand, the institutionalization of an egalitarian, non-arbitrary positive system of legal rules (among other features) that the State can ensure throughout its territory and spheres of social activity; on the other hand, the mediation of these social relations through this legality in such a way that it is ensured for all—or most—the agents who live in it. In both senses, the central point is that individuals' ability to have agency must be legally recognized and effectively ensured. Thus, the law appears under two aspects: state legality and

its effectiveness in social relations. What other dimensions and qualities of law should be considered in this space between legality and effectiveness?

In short, on the one hand, the notion of (un)rule of law had, for O'Donnell, the role of empirically specifying a particular set of democratic "cases" that have combined increasingly competitive electoral political regimes with precarious effectiveness of civil rights and, on the other hand, the critical role that has led him to expand the analytical concept of democracy. In assuming the universal recognition of agency capacity as a distinctive feature of the formation of Western democracies that served as the basis for sustaining the rule of law in civil society, he adopted the subject's entitlement of rights regarding the tradition formed in Europe from the Enlightenment onward. However, he did not discuss how the recognition of civil rights became historically and sociologically embedded in the formation of European law. For O'Donnell's theoretical purposes, the point would not be especially problematic, not only because this was not his intent, but also because there is a comprehensive production on the subject. But his treatment of the expansion of the concept of democracy has opened, as if in counterpoint, the following issue: how should one think about the characteristics of the set of juridical assemblages of the (un)rule of law in Latin America, as a historical formation, in a situation of legal recognition (full, conditioned, or exceptional) of rights and their non-effectiveness?

Thus, the following questions arise: How to think of juridical materials which are formed in an (un) rule of law situation? What are the characteristics of the juridical knowledge constructed here? How has an (un)rule of law tradition of legal thinking been formed and modified, with its concepts, doctrines, techniques, and arguments? What are its characteristics, limits, etc.? We will not answer these questions in this article, but we will present some dimensions for analysis that arise at the interfaces of sociological-political research, history of legal thinking, and socio-legal studies. The analytical focus on the notion of the *immunities nebula* aims to propose a way of researching the positive attributes of the (un)rule of law in Latin America in its relations with juridical assemblages, in particular with the thought and knowledge that is produced by and from legal practice.

2. Rule of law and legality in juridical assemblages

O'Donnell defines the rule of law as a political ideal or normative horizon that produces quite real effects, but with varying degrees of historical realization or effectiveness. This effectiveness would be realized through the following series: rights as recognition of agency capacity, rule of law ideal, legal system, State's capacity for regulating social relations, and legal order as shared normative experiences.

A distinct way of thinking about the relation between idealizations, the construction of objective relations, identities, expectations, and behaviors, is to conceive of that political ideal as a form of problematizing government relations and acquiescing/resisting multiplicity in society (FOUCAULT, 1990, p. 11; 2004, p. 4). These relationships take place as a strategic field of interactions and are realized through observation, programming, and reflection on how to conduct oneself and others in such a way as to compose the set of possibilities for action by each other. In these terms, the rule of law is the name given to the problematization of the legal and normative programming of conduct that aims to rationalize and program its exercise, according to certain principles, with a certain field of exercise, procedures, and objectives. Certain instances of discourse production are established in which particular subjects are authorized to speak on their behalf, use their instruments, and aim at certain effects. In other words, the rule of law as a mode of problematization is present in various places, but its singularities and positive forms are relative to the dynamics of the exercise of government and forms of resistance to it. The historical variety of the rule of law appears in its effective constructions in societies, whose differences are not thought of as a function of degrees of effectiveness, but of their conditions and trajectory.

The comparative purpose becomes less about placing them on a scale organized according to an ideal and more about understanding these singularities in their trajectory, context and conditions. The relations of the rule of law with legality, legal practices, and social relations are not thought of as a one-dimensional game between the rule of law vector, which aims at the realization of principles of freedom, equality, equitable treatment, etc., and other vectors that act in the opposite direction, and that are sustained by local bosses, private interests, or patrimonialist conceptions that are based on unequal social relations. The relations are in a multidimensional play, in which different pieces of knowledge and power relations compete, which are internal and external to the State. The rule of law dimension presents itself as a force concerning other forms of exercising power, traditions, interests, etc., but also as a form of reflection and object of disputes between different political-constitutional projects.

The "law" of a given society, from the perspective of its concrete manifestations, does not correspond to the image of unity, completeness, and autonomy of the legal order, nor is a closed compact composed of logic, coherence, and justice which could be instrumentalized by subjects who can deflect them from its final goal. It is best understood as a combination of "juridical assemblages" composed of pieces of knowledge, authorized agents, institutions, techniques, and formal and informal arrangements. These assemblages are composed of distinct subsets and layers, created at different times and according to models, whose forms are more or less approximate to their original or formal models and which produce effects more or less relevant (HUNT, 2013).[8] The degree of integration and coherence of those juridical assemblages is always imperfect, diversified, and permeated with tensions and contradictions, conforming to different compositions at different times.

The term "juridical assemblages" names a field in which a particular symbolic power is exercised, a differentiated sphere of social relations in which both the control of given resources and the instance of discourse enunciation endowed with authority are under dispute. They are composites, more or less coherent, with their varied layers and internal differentiations and combinations of tolerated legalities and illegalities. Juridical assemblages comprise several dimensions, already worked on in international and Brazilian socio-legal studies: their institutional arrangements, their agents, their conformation as a differentiated field or sphere, as a space of struggles with differential power of the class fractions, as a type of knowledge produced about the law, as a shaper of "sensibilities".

The analysis of institutional arrangements envisages rules, agents, interests, forms, and opportunities for action in the set of juridical assemblages. They are about how the different institutional roles are organized; their relative attributes, resources, and positions; their identities and structuring of careers and internal hierarchies; and their openness or insulation from other institutions or state and social actors. This approach is the most widespread in international political science (GILMANN and CLAYTON, 1999) and has resulted in Brazil in numerous studies on judicial institutions (ARANTES, 1997 and 2002; KERCHE, 2007; KOERNER and FREITAS, 2013; MACIEL and KOERNER, 2014). An important theme is that of the relations between the legal field and public policies, in which research is conducted on how judicial institutions and actors welcome, resist, conform, or reconfigure state policies in various fields. A particularly discussed theme has been that of the "judicialization of health policies" in which research has initially shown the passage from the non-acceptance of demands to the voluntaristic intervention of jurists and judges, followed by cooperation between actors and institutions that led to new institutional arrangements and coordinated policies (FANTI, 2010; OLIVEIRA, 2015; WANG, 2014). In issues of a structural nature, such as land conflicts and enslaved labor, the tendency is that government policies for the enforcement of rights encounter divisions and resistance in judicial institutions, which lead to the neutralization or minimization of the achievement of the objectives sought by those policies (INATOMI,

[8] O'Donnell (2010, p. 105-6) makes this point, but does not elaborate on it.

2016). The same seems to happen, but to a lesser extent, with policies that produce the precarization of rights, which encounter divisions and resistance in judicial institutions, but tend to prevail.

As for the actors, research in the field of juridical elites has examined their profiles, family origins, forms of selection, internal hierarchies, and gender relations (BONNELLI, 2002 and 2008; SADEK, 1998; VIANNA, 1997). In this respect, the issue of the traditional profile of the legal elite and other workers in the field is contrasted to the new configurations of the legal professions resulting from the internationalization of the professions, the organization of large corporations, the massification of legal education and the effects of the so-called "competition industries" (ENGELMANN, 2011 and 2017; FONTAINHA et al, 2018; ALMEIDA, 2010 and 2016; CUNHA, 2007).

The symbolic power of the field of law refers to the jurists' monopoly of the right to utter the law, that is, the good distribution (*nomos*) or the good order of society. These agents have certain attributes for entering the differentiated field, at the same time that they are in constant dispute for that power, holding differentiated positions and capacities (BOURDIEU, 1986, p. 4). In Brazil, the specificities of the historical trajectory and the mode of differentiation of the field of law concerning the field of state power were pointed out, in particular, that it is not the field of law internal logic that defines the dominant positions in it, since the dispute for them is permeated by jurists' relations with the field of power. Moreover, the law-enacting logic is not determined only by categories and rules internal to the field, since in them are expressed material contents and specific objectives that are intertwined with the logic of other fields (ENGELMANN, 2011 and 2017; VANNUCCHI, 2016a, and 2016b).

The jurists' social power is related to the production of law as part of a set of struggles and alliances between class fractions for the elaboration of hegemonic discourse on the societal order. Law is not a unitary phenomenon that can be "deduced" from class interests or positions, and thus the political analysis of law demands the evaluation of the possibilities in each specific legal field and situation concerning the sustaining of class domination in society at large (HUNT, 1993, p. 90-1). In particular, the question arises of how the production of law by jurists is more or less open to the demands, pressures, and forms of mobilization of subordinated or discriminated social groups. The production of law can define or obscure social categories; it can stabilize or destabilize social expectations; it can maintain or undermine social norms of coexistence; and it can strengthen or weaken social consensuses, as well as alleviate or exacerbate social tensions (MACAULAY, 1987).

The symbolic effects of legislation pertain to the more general topic of law in social relations. They are referred to as the constitutive power of juridical knowledge and practices with which social relations are configured into an objective web of norms that are taken as given by agents and thus structure their normative self-comprehension, action orientations, and expectations (BRIGHAM, 1996; HUNT, 1993, p. 252; MERTZ, 1994). Structuring takes place through localized knowledge, relations, and processes, through the way agents imagine, understand, and act in the social world (GEERTZ, 1983). But legally recognized rights are the result and object of social struggles, which take place in processes of political mobilization and counter-mobilization, and can be both instruments of resistance and domination (MERRY, 1995; SILBEY, 2005). The demand for rights, for the re-signification of those already recognized, or for state actions that make them effective, presupposes the articulation of public discourses, with foundations, tactics, and explicit propositions with which agents conform and reconfigure their individual and collective identities as citizens (HUNT, 1993, p. 107; MCCANN, 2006 and 2010; MACIEL, 2011 and 2015).

On juridical knowledge, in the 1980s and 1990s, the power effects of juridical doctrines were discussed based on epistemology, the critique of ideology, and the semiology of power (COELHO, 1991; MIAILLE, 2005; WARAT, 1995). It has been argued that juridical doctrines develop abstract constructions that

attribute unity, coherence, and certainty to legal notions, which have the character of pieces of knowledge that conceptually organize the exercise of state power and capitalist exploitation. They validate these relations by their position of competent speech, the naturalization of social relations, the justification of existing arrangements, and the conformist training of jurists. At the same time, they conceal and invert the relations of power and exploitation, as well as the power struggles that pervade the practice of law. The notions of legal norm and system or order are central to these constructions since the former is taken as a given and is integrated into a set that gives it coherence and unity.

A poorly researched topic within socio-legal studies in Brazil is how jurists exercise their specialized speech about the law. Their *ethos*, the procedures, techniques, and styles of their decisions, as well as how they read, articulate concepts, elaborate arguments, formulate their interpretations of laws, approach situations, and construct cases (CARBASSE and DEPAMBOUR-TARRIDE, 2010; GARAPON and PAPADOPOULOS, 2003; GOLDSWORTHY, 2006; JACOB, 1996; MACCORMICK and SUMMERS, 1991, 1997). Comparative research allows us to understand Brazilian legal practice beyond simple oppositions such as self-restraint and activism of judges or the system of sources of law of the civil law and common law traditions (MENDES, 2010). Here we have two important developments. On the one hand, the incorporation of normative self-comprehension and the "sensibilities" of laymen to the law as practiced by jurists. Complementarily, how citizens relate to state law, how they identify their opportunities and resources, and how they relate to state legality and what they consider right or wrong according to a "good" construction of the world order, life, and society (LIMA, R.K., 2009). On the other hand, how is the *habitus* or *ethos* of jurists constituted in their condition as agents endowed with knowledge and power resources of their own in their specialized field, in their relations with the field of state power, and, finally, as a differentiated sector of the population, possessing a literate knowledge and with the ability to provoke their effects on the conduct of other agents? A research topic in which these issues have been discussed is that of access to justice, where there are numerous and long-standing findings of disputes among jurists and the dissonance between the criteria and objectives of judicial institutions with the expectations and normative self-comprehension of citizens (GARCIA, 2018; INATOMI, 2009; MOREIRA-LEITE, 2003).

In short, if the rule of law as a formal and complete legal system is not realized anywhere, it is not only a matter of differences in the degree of its effectiveness. The differences refer to the set of "juridical assemblages", to the way they have been historically constituted and are exercised today, in their relations with state power and social relations. In this sense, the assemblages may be analyzed as regimes formed by historically constituted configurations of the legal instance, sector, or field in each country or society.

3. Immunities nebula?

Let us return to the definition of the rule of law adopted by O'Donnell. It is a formal definition, formulated by Joseph Raz (1977)[9], which lists eight features, divided into two parts: that which comprises the first three and refers to the attributes of the laws and that which concerns the courts and criteria of their practice. Features 5, 6, and 8 do not relate to attributes of the rules or institutions, but to how the rules are put into effect so that those attributes are preserved. The most far-reaching is judicial control so that the rules for recognizing and applying laws are general and forward-looking, made clear so that arbitrariness is avoided. Raz assumes a practical point of view, that of the authority of laws so that individuals obey

[9] The characteristics are: 1. Laws should be prospective, open, and clear; 2. Laws should be relatively stable; 3. The making of particular laws should be guided by open, stable, clear, and general rules; 4. The independence of the judiciary must be guaranteed; 5. Principles of natural justice must be observed (such as open and fair court hearings and the absence of bias in proceedings); 6. Courts should have review powers [...] over the implementation of the other principles; 7. Courts should be easily accessible; and 8. Crime prevention agencies should not be allowed to use their discretion to pervert the law (RAZ, 1977, pp. 198-201, and O'DONNELL, 2010, p. 95).

them, the condition being that they make sense to them. Law is a form of organization that must be used appropriately to guide the conduct of individuals, while, for them, the law must be able to guide their behavior if it is to be obeyed. Thus, the characteristics of the rule of law focus both on the attributes of laws and institutions and on how to exercise them. We explore these aspects in two points: the relations between the rule of law ideal, the formal characteristics of rules and their effectuation, and the consequences for the rule of law of how rules are practiced by jurists.

The rule of law is usually defined as a normative ideal of the "government of laws" as opposed to the government of men. In general, the form of the rules and the manner of producing them are assumed as criteria. The criteria mentioned above are generality, anteriority, and stability, and they are elaborated by open procedures, because of common interests, they respect a list of rights, and they are formed by processes of democratic collective deliberation. In contrast, the government of men would be exercised by orders or commands produced by rulers according to their private deliberation or discretion, and which may have particular objects, specific situations, or be posterior to events, may aim at private interests (or privately defined as common interests).

The normative ideal of the rule of law allows one to assume a perspective of observation and evaluation of concrete situations. One evaluates the quality of the laws and how they translate into legal forms or statutes. The absence of those laws and legal forms would be a state of lawlessness or the rule of men. There are various intermediate situations, such as the exercise of arbitrary or tyrannical power in violation of laws; autocratic rule by law, the State using general, clear, and stable laws to achieve its objectives (legal state); the police state (*Polizeistaat*) where the government uses regulatory norms without respect neither procedural form nor the rights of citizens.[10]

From the point of view of effectiveness, there would be several situations among two opposite poles, the first as that in which the ideal of the rule of law is realized because it is clearly translated into legislation, legal practices, knowledge, and social relations, and the second as that in which, on the contrary, that ideal is contradicted and no effects are visualized. They would be "constellations" contrasted with "black holes". O'Donnell's (un)rule of law designates a set of intermediate cases of incomplete or low effectiveness. They are, as we have seen, situations in which the normative ideal has little strength, the state bureaucracy has low effectiveness and state legality is deficient, has low effectiveness in regulating society, and has low objectivity in ordering individual's social interactions. But, as we stated in the previous section, to analyze these intermediate situations, it is necessary to consider law from a sociological point of view that takes into account other dimensions beyond the effectiveness of state legality.

The second point made at the beginning of the section concerns the effects of legal practice on the rule of law. We pose the following question: what happens if courts endowed with independence (4.), use (at least in part) the procedures of natural justice in their judgments (5.) and have powers of judicial review of legal statutes and other governmental orders (6.) interpret laws (with the support of legal doctrine) in such a way that the characteristics of the rule of law concerning laws (1. and 2.) are not realized or that the general attributes of laws and the criteria for their application (6. and 8.) are contradicted? From Raz's point of view, we would be facing nonconformity with the rule of law and the discharge of the individuals' obligation to obey them.

For O'Donnell, the situation would be a case of (un)rule of law. He contemplates the possibility and attributes it to factors such as the lack of adherence of judges to democratic principles, the particular interests of judges or jurists, external pressures, etc., which result in the non-effectiveness of laws in social

[10] Other criteria would be the reference standard of the norm (natural law, liberties, historical, etc.), the relationship with the addressees, the extent of the rights) (COSTA and ZOLO, 2006; DIAZ, 1972; TAMANAHA, 2004).

interactions (O'DONNELL, 2010, p. 96-7). This is true. But there may be deviations from the rule of law, caused not necessarily by jurists' non-adherence to the principles of the rule of law, nor from the effects of particularistic orientations contrary to the public interest, nor even from a lack of institutional or social conditions for independent or technically informed decision-making. Returning to a question posed earlier, if Latin American democracies know an abrupt passage to democracy based on a broad notion of agency and implying the generalization of the rule of law, what would be the characteristics of the "legal tradition" that has been formed in the two hundred years since Brazilian Independence? What is the positive conformation of thought that has reflected and programmed the knowledge in the juridical assemblages?

It is a matter, then, of researching legal thinking and juridical knowledge, i.e., the principles, concepts, criteria, and judgment techniques elaborated by jurists that do not produce the attributes of clarity and stability of laws (1. and 2.) and that produce norms for themselves without these characteristics (3.). The jurists' constructions partially recognize and defend the characteristics of the rule of law, whose combination counteracts or inhibits its general effect. In these terms, we suggest the hypothesis that legal thinking performs a way of problematizing the rule of law in which it reflects and programs juridical knowledge in such a way that it reproduces particularistic interpretations of the rules, reinforces the inefficiency of state bureaucracies, amplifies the ineffectiveness of state law in regulation, and deepens its low objectivity in ordering the conduct of individuals in their social interactions. Thus, we propose to research aspects of Brazilian legal thinking and juridical knowledge that reveal these ambivalences, opacities, and uncertainties.

Based on the discussion of these two points, we can see that the Brazilian legal experience is one of the intermediary historical situations in which the rule of law ideal is realized in a partial and very differentiated way. It includes a set of juridical assemblages that take on varying conformations according to the sub-areas of law, territorial spaces, domains of social relations, and fields of power relations. These differential realizations are produced by jurists and reinforced by the way they reflect and program their knowledge and practices. For the observer, the relations between normative ideal, state legality, and social relations present themselves with distinct degrees of sharpness and certainty as he directs his gaze in different directions. We suggest that this interplay between the rule of law, its realizations, and its multiple opposites configures a "immunities nebula".

In Brazilian Portuguese[11], "nebula" means: 1. Covered with clouds or dense vapors; 2. Somber, sad, threatening, cloudy, nebulous, clouded; 3. Without transparency, turbid; 4. Poorly defined, indistinct; 5. Unintelligible, obscure, enigmatic, mysterious, foggy. As a noun, nebula also means 1. A celestial body with the appearance of a whitish spot; 2. A stellar mass still in the process of condensation; 3. A universe in formation.

"Immunity" means: 1. The condition of not being subject to some burden or charge, exemption; 2. Natural or acquired resistance of a living organism to an infectious or toxic agent; 3. Rights, privileges, or personal advantages that someone enjoys because of the position of function he or she holds.

Similar to the concept of State, the term "nebula" refers to a stable situation characterized by certain attributes and relations, but unlike the "architectural" properties of the rule of law, they are barely discernible to the observer, although they are well known and practiced by agents. In a socio-legal sense, nebula designates the set of organized spaces with variable geometry, in which state legal norms are permeated by other normativities and social logics, and in which state power and social powers combine in the production of law and the use of force. They are exercised in different ways according to the condition of the agents, determined by color, gender, sexual orientation, income or occupational activity, and ties to landowners.

[11] We use the Brazilian Portuguese dictionary *Aurélio* (FERREIRA, 1986).

Rights entitlement is associated with agent or national status or with capabilities of general categories of individuals (or collectivities). Rights entitlement has obligations as its correlates, in particular the recognition of the rights of other citizens, and duties to the public and the State. In contrast with rights, immunities do not imply the recognition of obligations vis-à-vis others or their rights, because they are unilateral, received, or exercised by way of exemption, exception, or privilege concerning general norms. They mean the particularized protection against violations, uncertainties, and risks that can affect other agents or be caused by them. The protection of subjective rights carried out by the Judiciary assumes the character of granting (or rejecting) immunities since its judgments produce norms that are always particularized and uncertain, which is incapable of producing general references and endowed with objectivity for the agents. We have then a situation of particularized, privileged, and non-reciprocal protections for some, whose counterpoint are violations, deprivations, and poverty for others.

The notion of "immunities nebula" arises when, for the observer, there is little clarity about the relationship between the ideal of the rule of law, the juridical assemblages, and social relations. It is a situation that, as a whole, is barely discernible, since it presents luminous clusters of immunities of greater or lesser magnitude, but also empty or dark clusters in which the protections are not realized. It designates a permanent (or slowly changing) social situation, whose elements are steadily maintained and related. It takes into account not only the point of view of state rules and their effectiveness but the way of thinking about and practicing the set of juridical assemblages and their effects on society. The rule of law ideal is present in the formal aspects of the State's legal-constitutional architecture, actualized to some extent in its legality, bureaucracies, and declarations of rights. But these general elements are refracted by the assemblages' juridical pieces of knowledge and practices, with the result that rules and forms lose their attributes of generality, clarity, etc. and they configure an objective weave that combines privileges and violations that agents assume in their interactions. Particularism and violations, inequality and non-reciprocity complement to the extent that the relations between each agent and others are permeated by unclear rules. In this way, it is this combination, and not general principles, legal norms, or doctrinal discourses, that appears to the agents as the law assured by the State, as the order put as an objective norm and that they take as given in their interactions.

Thus, the immunities nebula refers to this optical effect produced by the conformation of juridical assemblages and its consequences for social practices. The notion has no analytical or descriptive intent and serves only to pose the question of how such a situation is (re)produced and critically discuss the factors that produce it; for although nebulous, it is a social situation determined by knowable factors, which can be analyzed and explained. It invites us not to think of norm and fact, legality and arbitrariness, conformity and violation of the law, privilege, and exclusion in opposite terms but to try to understand their emeshedness. To think of the differential character of the effectiveness of rights not in terms of institutional forms, as discrete events or effects of social structure, but as the result of legal practices and power relations that take place in a given social and historical configuration. The incompatibility of legal terms and sociological concepts is a well-known obstacle for those who research law from the point of view of legal practices and social normativities. For this reason, it is necessary to assume a perspective and develop a vocabulary of our own.

The various meanings of the notion also serve to indicate the problem of researching and analyzing it, since, as we approach the nebula, it ceases to be a kind of spectacle of lights and shadows to become a fog within which we have few references to orient ourselves. As citizens and researchers, we find ourselves faced with a web of situations with normative dimensions and tense and contradictory concrete situations that we practically have to deal with. Some guidebooks can take us to tourist spots, with more or less pleasant landscapes, but in them, we will only have a partial view of arranged things.

Conclusion

In this article we did not question O'Donnell's analyses of the internal relations between democracy and the rule of law or argue against his concern with the specificities of Latin American democracies. We also did not put into discussion the theses on the extension of the rule of law as the universal recognition of agency, that no one is *legibus solutus*, and that democracy makes room for the expanded participation of social groups in the production of the norm and its contestation. What we questioned is his analysis of the relationship between formal rule of law, the legal system, and the problem of its effectiveness in society. The discussion pointed to the need to assume a socio-legal point of view to analyze the law in its various dimensions, bringing about a special focus on the relations between legal thinking and juridical practices, aiming at a reflection centered on the production of juridical knowledge.

There can be—and this is true—a legal tradition that is reproduced by juridical knowledge that does not realize the attributes of the rule of law, and does so in its name. This performance is not necessarily the aim of actors who pursue particular interests or have ill-considered purposes, nor is it the direct effect of "external" pressures for particularistic application or intentional distortions of norms. It is a general and collective, "systemic" effect, produced by their way of practicing and problematizing juridical assemblages. This production generates crises that may lead to paralysis and "heroic" attitudes, but do not break the deadlock, reproducing the ambiguities and uncertainties of the immunities nebula.

Our discussion opened the conceptual "Pandora's box" that O'Donnell was so keen to avoid. It distances us from the parsimony advocated by comparative political theories based on the assumption of some objective criteria for identifying and researching democracies. But the aspects of juridical assemblages highlighted serve as analytical dimensions for socio-legal and political science research that integrate the dimensions of democracy and law in singular countries studies and may serve as a basis for comparative analyses.

The discussion on the nebula of immunities proposes a political analysis of legal thinking to carry out a theoretical and historically informed critique of legal knowledge in Brazilian society. This is not a genetic argument of the "evils of origin" type, nor is it a continuist argument, much less the attribution of the evils of the Republic to an elite of jurists. It is not intended to produce a synthesis of "law and society in Brazil" or legal thinking in peripheral capitalism. The theme of the rule of law is strategic because its specificity allows for analyses in long historical periods; it is central since it is disseminated in a diversity of fields of knowledge and legal practices; and, finally, it is critical, since legal thinking poses itself as a problematization, as a mode of distancing from and reflection, upon those pieces of knowledge and practices. The intellectual work begins by questioning how legal thinking programs the government of our conduct by law, posing the question of its fruitless effects on democracy and citizenship in Brazil.

Bibliographical References

ALMEIDA, F. 2010. *A nobreza togada: as elites jurídicas e a política da Justiça no Brasil*. São Paulo. Tese (doutorado em ciência política). PPGCP/USP, Universidade de São Paulo.

_____. 2016. Os Juristas e a Política no Brasil: Permanências e Reposicionamentos. *Lua Nova*, São Paulo, n. 97, pp. 213-252, jan-abr.

ARANTES, R. B. 1997. *Judiciário e política no Brasil*. São Paulo: Sumaré/FAPESP.

_____. 2002. *Ministério Público e Política no Brasil*. São Paulo: Sumaré.

BONELLI, M.G. et al. 2002. *Profissionalismo e política no mundo do direito: as relações dos advogados, desembargadores, procuradores de justiça e delegados de polícia com o Estado*. São Carlos: EdUFSCar.

_____. 2008. Profissionalização por gênero em escritórios paulistas de advocacia. *Tempo Social*, São Paulo, v. 20, n. 1, pp. 265-290.

BOURDIEU, P. 1986. La Force du Droit (Eléments pour une sociologie du champ juridique). *Actes de la Recherche en Sciences Sociales*, Paris, v. 64, pp.3-19, setembro.

BRIGHAM, J. 1996. *The Constitution of Interests - Beyond the Politics of Rights*. New York: New York University Press.

BRINKS, D. & BOTERO, S. 2014. Inequality and the Rule of Law: Ineffective Rights in Latin American Democracies. In: Brinks, D. *et al* (eds.). *Reflections on Uneven Democracies: the legacy of Guillermo O'Donnell.* Baltimore: John Hopkins UP, pp. 214-239.

BRINKS, D. *et al.* (eds.). 2014. *Reflections on Uneven Democracies: the legacy of Guillermo O'Donnell*. Baltimore: John Hopkins UP.

CARBASSE, J.-M. e DEPAMBOUR-TARRIDE (eds.). 2010. *A Consciência do Juiz na Tradição Européia*. Belo Horizonte: Tempus.

COELHO, L. F. 1991. *Teoria Crítica do Direito*. Porto Alegre: Sérgio Antônio Fabris. COSTA, P.; ZOLO, D. (eds.). 2006. *O Estado de Direito - História, Teoria, Crítica*. São Paulo: Martins Fontes. CHEVALIER, J. 2003. *L´Etat de droit*. Paris: Montchrétien.

CULLEL, J. V. 2014. Democracy and Democratization: Guillermo O´Donnell's Late Attempt to Rework Democratic Theory. In: Brinks, D. *et al* (eds.). *Reflections on Uneven Democracies: the legacy of Guillermo O'Donnell.* Baltimore: John Hopkins UP, pp. 287-311.

CUNHA, L. G. et al. 2007. Sociedades de advogados e tendências profissionais. *Revista Direito GV*, São Paulo, v. 3, n. 2, pp. 111-137.

DIAZ, E. 1972. *Estado de Direito e Sociedade Democrática*. Lisboa: Iniciativas Editoriais. DOBRY, M. 1992. *Sociologie des Crises Politiques*. Paris: FNSP.

ENGELMANN, F. 2011. Estudando e definindo elites jurídicas. *Paper apresentado no Colóquio Elites História e Método,* Porto Alegre: PPG História PUCRS.

_____ (org.). 2017. *Sociologia Política das Instituições Judiciais.* Porto Alegre: CEGOV/UFRGS ed.

FANTI, F. 2010. *Políticas de Saúde em Juízo: um estudo sobre o município de São Paulo. São Paulo, Dissertação (mestrado) PPGCP-FFLCH/USP.*

FERREIRA, A.B.H. *Novo Dicionário da Língua Portuguesa*. Rio de Janeiro: Nova Fronteira, 2nd edition.

FONTAINHA, F. *et al.* 2018. Os três poderes da elite jurídica: a trajetória político-partidária dos ministros do STF (1988-2013). *Revista de Ciências Sociais*, Fortaleza, v.49, n.2, pp.93-131.

FOUCAULT, M. 1990. *The history of sexuality*: The use of pleasure (v. 2). Trans. Robert Hurley. New York: Vintage Books.

_____. 2004. *Naissance de la Biopolitique - Cours au Collège de France, 1978-1979.* Paris: Gallimard, Seuil. GARAPON, A. e PAPADOPOULOS, I. 2003. *Juger en France et en Amérique.* Paris: Odile Jacob.

GARCIA, E. P. 2018. *"Não cause, concilie": os sentidos da política de conciliação em um Centro Judiciário de Solução de Conflitos e Cidadania em Campinas-SP*. Campinas. Dissertação (Mestrado), PPGCP-IFCH/ Unicamp.

GEERTZ, C. 1983. *Local Knowledge - Further Essais in Interpretive Anthropology*. New York: Basic Books.

GIBSON, E. 2013. *Boundary Control: Subnational Authoritarianism in Federal Democracies*. Cambridge: Cambridge UP.

GILLMAN, H. C.; CLAYTON, C. (eds). 1999. *Supreme Court in American politics: New Institutionalist Interpretations*. Lawrence: University of Kansas Press.

GOLDSWORTHY, J. (ed.). 2006. *Interpreting Constitutions - A Comparative Study*. Oxford: Oxford UP.

HALL, P. 2015. Politics as a Process Structured in Space and Time. In: Tulia Falleti, Orfeo Fioretos, and Adam Sheingate. *The Oxford Handbook of Historical Institutionalism.* NY: Oxford UP.

HEUSCHLING, L. 2002. *Etat de Droit, Rechtsstaat, Rule of Law*. Paris: Dalloz. HUNT, A. 1993. *Explorations in Law and Society - Toward a Constitutive Theory of Law*. Londres: Routledge.

_____. 2013. Encounters with juridical Assemblages: reflections on Foucault, law and the juridical. In: GOLDER, B. (Ed.). *Re-reading Foucault: On Law, Power and Rights*. Londres: Routledge, pp. 64-84.

INATOMI, C. C. 2009. *O Acesso à Justiça no Brasil: a atuação dos Juizados Especiais Federais Cíveis*. Campinas. Dissertação (Mestrado). PPGCP-IFCH/Unicamp.

_____. 2016. *A atuação do Poder Judiciário nas políticas de erradicação do trabalho escravo rural no Brasil contemporâneo*. Campinas. Tese (Doutorado). PPGCP-IFCH/Unicamp.

JACOB, R. (ed.). 1996. *Le Juge et le Jugement dans les Traditions Juridiques Européenes*. Paris: LGDJ.

KERCHE, F. 2007. Autonomia e discricionariedade do Ministério Público no Brasil. *DADOS – Revista de Ciências Sociais*, Rio de Janeiro, v. 50, n. 2, pp. 259-279.

KOERNER, A. e FREITAS, L. B. 2013. O Supremo na Constituinte e a Constituinte no Supremo. *Lua Nova*, v. 88, p. 141-85. Disponível em: www.scielo.br/scielo.php?pid=S0102-64452013000100006&script=sci_arttext

LIMA, R. K. 2010. *Sensibilidades jurídicas, saber e poder: bases culturais de alguns aspectos do direito brasileiro em uma perspectiva comparada,* [Online]. Anuário Antropológico, II. Disponível em: http://journals.openedition.org/aa/885. Acesso em 23 setembro 2019.

MACAULAY, S. 1987. Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spector Sports. *Law & Society Review*, Amherst, v. 21, n. 2, pp. 185-218.

MACIEL, D.A. 2011. Ação coletiva, mobilização do direito e instituições políticas: o caso da campanha da Lei Maria da Penha. *Revista Brasileira de Ciências Sociais*, São Paulo, v. 26, n. 77, pp. 97-112.

_____. 2015. *Mobilização de Direitos no Brasil: grupos e repertórios,* [Online]. DS/FFLCH/USP. Disponível em: http://sociologia.fflch.usp.br/sites/sociologia.fflch.usp.br/files/Mobiliza%C3%A7%C3%A3o%20de%20direitos%20D%C3%A9bora%20A%20Maciel%20_%20LAPS.pdf. Acesso em 20 setembro 2019.

_____ e KOERNER, A. 2014. O processo de reconstrução do Ministério Público na transição política (1974-1985). *Revista Debates*, v. 8, n. 3, set.-dez., pp. 97-117.

MANN, Mi. 1992. O poder autônomo do Estado: suas origens, mecanismos e resultados. In: HALL, J. (ed.). *Os Estados na História*. Rio de Janeiro: Imago.

MARSHALL, T. H. 1950. *Citizenship and Social Class and Other Essays*. Cambridge: Cambridge UP.

MCCANN, M. 2006. Law and Social Movements: Contemporary Perspectives. *Annual Review of Law and Social Sciences*, v. 2006, n. 2, pp. 17-38. doi: 10.1146/annurev.lawsocsci.2.081805.105917.

_____. 2010. Poder Judiciário e Mobilização do Direito: uma perspectiva dos 'usuários'. *Revista EMARF, Cadernos Temáticos: Seminário Nacional sobre Justiça Constitucional*, Rio de Janeiro, pp. 175-196, dezembro.

MACCORMICK, N. e SUMMERS, R. (eds.). 1997. *Interpreting Precedents - A comparative Study*. Aldershot: Ashgate-Dartmouth.

MACCORMICK, N. e SUMMERS, R. (eds.). 1991. *Interpreting Statutes*. Farnham: Ashgate.

MENDES, R. L. T. 2010. Verdade real e livre convencimento: O processo decisório judicial brasileiro visto de uma perspectiva empírica. *DILEMAS: Revista de Estudos de Conflito e Controle Social,* Niterói, v.5, n.3, p.447-482, jul-set.

MERRY, S. E. 1995. Resistance and the Cultural Power of Law. *Law & Society Review*, Amherst, v. 29, n. 1, pp. 11-26.

MERTZ, E. A. 1994. New Social Constructionism for Sociolegal Studies. *Law and Society Review*, Amherst, v. 28, n. 5, pp. 1243-1266.

MIAILLE, M. 2005. *Introdução Crítica ao Direito*. Lisboa: Estampa.

MOREIRA-LEITE, A. 2003. *Em tempo de conciliação.* Niterói: EdUFF.

O´DONNELL, G.. 1973. Modernization and bureaucratic-authoritarianism: Studies in South American politics. Berkeley: Institute of InternationalStudies, University of California.

_____. 1979. Desenvolvimento Político ou Mudança Política? In: PINHEIRO, P. S. (Ed.). *O Estado Autoritário e Movimentos Populares*. Rio de Janeiro: Paz e Terra, pp. 23-95.

_____. 1991. Democracia delegativa? *Novos Estudos CEBRAP*, São Paulo, v. 31, pp. 25-40, outubro.

_____. 1994. Delegative Democracy. *Journal of Democracy*, Baltimore, v. 5, n. 1, pp. 55-69, janeiro.

_____. 1996a. Another institutionalization: Latin America and elsewhere. *Working Paper n° 222,* Kellogg Institute for International Studies - University of Notre Dame, Indiana.

_____. 1996b. Poverty And Inequality In Latin America: Some Political Reflections. *Working Paper n° 225,* Kellogg Institute for International Studies - University of Notre Dame, Indiana.

_____. 1999. Polyarchies and the (Un)Rule of Law in Latin America: a Partial Conclusion. In: MENDEZ, J. *et al* (eds.). *The (Un)Rule of Law & the Underprivileged in Latin America*. Indiana: Notre Dame U.P, pp. 303-337.

_____. 1998. Horizontal Accountability in New Democracies. *Journal of Democracy*, vol. 9 no. 3, p. 112-126. *Project MUSE*, doi:10.1353/jod.1998.0051._____. 2000. Democracy, Law and Comparative Politics. *IDS Working Paper n° 118,* Institute of Development Studies, Sussex, junho.

_____. 2004. *Quality of Democracy*. Indiana: University of Notre Dame Press.

_____. 2010. *Democracy, Agency, and the State: Theory with Comparative Intent.* Oxford: Oxford UP.

_____, LAZZETTA, O. *et al.* (eds). 2011. *Democracia delegativa*. Buenos Aires: Prometeo.

_____, SCHMITTER, P. C. & WHITEHEAD, L. (eds.), 1989. *Transitions from authoritarian rule: Latin America; with a foreword by Abraham F. Lowenthal*. Johns Hopkins University Press.

OLIVEIRA, M. R. et al. 2015. Judicialização da saúde: para onde caminham as produções científicas?. *Saúde em Debate [online]. 2015, v. 39, n. 105 , pp. 525-535. Disponível em:* https://doi.org/10.1590/0103-110420151050002019. Acesso em 20 Maio 2020

RAZ, J. 1979 [1977]. The Rule of Law and its Virtue. In: J. Raz (Ed.). *The Authority of Law - essays on Law and Morality.* Oxford: Clarendon, p.210-229

SADEK, M. T. 1998. Magistrados: uma imagem em movimento. *Revista Brasileira de Ciências Sociais*, São Paulo, v. 13, n. 38.

SILBEY, S. 2005. After Legal Consciousness. *Annual Review of Law and Social Science*, v. 1, pp. 323-368. Disponível em: https://www.annualreviews.org/doi/abs/10.1146/annurev.lawsocsci.1.041604.115938, acesso em 25 maio 2020.

TAMANAHA, B. Z. 2004. *On The Rule of Law: History, Politics, Theory*. Cambridge: Cambridge UP. TILLY, C. 1996. *Coerção, Capital e Estados europeus 1990-1992.* São Paulo: Edusp.

_____. 2013. *Democracia*. Petrópolis: Vozes.

TOKMAN, V. E.; O'DONNELL, G. (Eds.). 1998. *Poverty and Inequality in Latin America*. Indiana: Notre Dame UP.

VANNUCCHI, M. A. 2016a. Advogados e corporativismo de classe média no Brasil pós-1930. *Passagens. Revista Internacional de História Política e Cultura Jurídica*, Rio de Janeiro, v. 8, n. 3, pp. 506-525.

_____. 2016b. O corporativismo dualista: conselhos profissionais e sindicatos no Brasil, 1930-1964. *Estudos Ibero-Americanos*, Porto Alegre, v. 42, n. 2, pp. 471-99.

VIANNA, L. W. *et al.* 1997. *Corpo e alma da magistratura brasileira.* Rio de Janeiro: Revan.

WANG, D. W. L. et al. 2014. Os impactos da judicialização da saúde no município de São Paulo: gasto público e organização federativa. *Revista de Administração Pública, São Paulo, v. 48, n. 5, p. 1191-1206.*

WARAT, L. A. 1995. *O Direito e sua linguagem - 2a Versão*. Porto Alegre: Sérgio Antônio Fabris.

WHITEHEAD, L. 2014. "A mí, si, me importa": Guillermo O´Donnell's approcach to theorizing with normative and comparative intent. In: BRINKS, D. *et al* (eds.). *Reflections on Uneven Democracies: the legacy of Guillermo O'Donnell*. Baltimore: John Hopkins UP, pp .333-351.