1. Between Law and History: The Problematic Concept of Estado de Derecho.

This essay is a response to a feeling of disquiet that arises out of the diverse uses that the concept of Estado de Derecho presents in contemporary Argentina. It is easy to recognize this uneasiness whenever one comes across an article in a law journal or reads a daily newspaper. There is a tendency to use this concept as a means of justifying or criticizing various administration measures, court judgments, or even juridical opinions. It is clear that in this respect, what is happening in Argentina is happening all over the world, and its cause is that the concept has such a positive connotation that no one (neither politicians, nor jurists) would even dare say that their decisions are made against the Estado de Derecho-Rechtsstaat or rule of law (1). If we analyze the performativity of this topic from the


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perspective of rhetoric, we clearly see that the mere mention of this term within the context of the discourse automatically recalls several positive associations. In other words, once the phrase is invoked, the whole argumentation quickly falls away in order to pay tribute to this emotionally loaded concept. The concept is self-immunizing and can be used as a means of closing off all forms of argumentation. This characteristic could explain the inflationary use of this *topos* as well as the consequent liquation of its meaning in the present (2).

For a jurist, this is even more problematic because there is a tendency to define this concept by using some typical positivist or dogmatic strategies. Therefore, it is quite common to find definitions of *Estado de Derecho* as *imperio de la ley*; colloquially speaking, this means that if there is a law or a court decision — regardless of the content — the administration must follow it. Within the logic of juridical thought (more practical than theoretical), this « learned by heart » understanding works perfectly. On the one hand, judging the measure would only seem to require that a jurist compare the law with the jurisdictional decision. On the other, it closes off the question concerning the political meaning of the concept and its historicity.

For a Spanish-speaking jurist, however, the problem is much more difficult. If we take a closer look not at the form of the argument but at the concepts themselves, things become blurry. What does *imperio de la ley* mean? It has been translated as « rule of law » by some constitutionalists, but for others, the meaning is *principio de legalidad* (*Herrschaft des Gesetzes*). The trivial use of the term is not only disconnected from historical and political thinking, it is clear that it also flattens out the density of diverse legal traditions in this particular way of circular thinking: *Estado de Derecho* is *imperio de la ley*, and the latter means *principio de legalidad*.


Paradoxically, all of them can be translated into English as « rule of law » [?]. However, despite the diverse rhetorical employments, the dogmatic reduction of the semantic field, and the complexities of translating the concept, some historical experiences present limits to the pragmatic use of the concept. For example, recently — May 3rd, 2017 — the Supreme Court approved a reduction of Luis Muiña’s sentence, who had been found guilty of crimes against humanity during the last dictatorship (1976-1983). In the judgment, several judges referred to the defense of the Estado de Derecho as a key argument to support their decision. However, this use of the concept to justify that measure was considered controversial. Not only did jurists publish critical articles in a variety of journals, but several popular demonstrations took place throughout the country, most prominently in the historical Plaza de Mayo. In this context, only a few individuals approved of the use of Estado de Derecho to benefit a man convicted of perpetrating crimes against humanity.

This episode shows that the dogmatic reduction of the concept’s meaning runs up against some limits when it is used within the context of particular political experiences. It also proves that in contemporary Argentina the link between Estado de Derecho and human rights is very strong, and therefore, it would be contradictory to appeal to one to more or less deny the other. Finally, as we can observe from the aforementioned case, some symbols and emotions are intrinsically connected with the history of this concept.

Against the background of this tension between trivial dogmatic reduction and the emotiveness evoked by Estado de Derecho, several questions arise: When was the concept first used in the Argentinean legal language? To which legal tradition is the concept connected? Is it connected with the German concept of Rechtsstaat,

(2) CSJ 1574/2014/RHL. Bignone, Reynaldo Benito Antonio y otro s/ recurso extraordinario.
(3) The traditional newspaper La Nación, however, published an editorial entitled El Estado de derecho, which tried to justify the Supreme Court’s decision. See: http://www.lanacion.com.ar/2021842-el-estado-de-derecho.
with the Anglo-Saxon « rule of law », or is it a combination of diverse legal traditions? And last but not least: What kinds of historical meanings, emotive figures, and symbols were attached to this concept in the various Argentinean contexts?

To answer these questions adequately, and given the wide range of uses of the concept, the focus of this contribution will be on the field of constitutional law since, as Mohnhaupt has stated, we are confronted with « ein schwieriges Verfassungsprinzip » (6). To this end, the sources used to analyze this complex concept include juridical discourses founded in the diverse constitutional manuals, treaties, and legal journals. Moreover, a selection of Supreme Court judgments will be analyzed in order to assess the impact of this « dogmatic » concept in the pragmatic world of judicial decisions.

If the current research is able to uncover the diverse meanings, changes, and ways of dealing with the topic of Estado de Derecho throughout Argentinean legal history, a radical question about the socio-historical conditions regarding the possibility of appealing to this concept in the present day and age will naturally come into view. Therefore, by means of a historical analysis, the traditional dogmatic definition could be suspended or even challenged.

2. *From Traditional Dogmatic History to the Conceptual History of* Estado de Derecho.

Before beginning with the history of the concept of *Estado de Derecho* in Argentina, it is important to remark that legal historians are mainly interested in the thematization and historicization of legal traditions (7). This specific question distinguishes their work from the narrative of constitutional jurists. From the perspective of legal history, the uses of the past in constitutional history are seen as ways of legitimizing the present and, therefore, a reconstruction generated


(7) In this case, the historicization of a tradition supposes the historical description of a social process of selection of those discourses that are apprehensible as sources of authority in the field of law. The premises of Leclerc are followed. See: G. LECLERC, *Histoire de la vérité et généalogie de l’autorité*, in « Cahiers internationaux de sociologie », 111 (2001), 2, pp. 205-231.
from the very core of the tradition. In contrast, legal historians are interested in describing how this legal tradition was constructed and its effects on the way the law is conceived and applied. As such, I claim that the historical reconstructions provided in constitutional textbooks are not trustworthy.

In fact, in the dogmatic history written by jurists, the concept of Estado de Derecho constitutes a blind spot of sorts, which more or less represents an indefinite ideal. These authors understand the category in terms of an atemporal idea. The consequence of this presupposition within the discourse is that the diverse historical meanings are effectively erased. Therefore, a unique meaning, defined abstractly in the present, is used to suggest a common « inspiration » shared by jurists at different times and in different spaces (8). This means that the concept is often used as a meta-category to carry out an anachronistic judgment of the past experience. Beyond the flattening of historical experience, the side effect of this operation is a mystification of the present from which the « evolution » of constitutional thought in society can be — teleologically — narrated and justified.

This way of proceeding, devoid any historical-conceptual awareness, also permits the exclusion of diverse traditions from the historical narrative. Some past experiences are neglected (sometimes intentionally) by authors who construct a history of constitutional thought as a form of retrospective dogmatism. Hence, against the evolutionary linearity, it is necessary to look for the different logics that guided how public law was conceived in different historical periods.

With this in mind, it becomes important to engage in a history of the formation of the languages — and prejudices — of constitutionalism. Only by analyzing the genealogy and the internal logic of constitutional language is it possible to observe the diversity of meanings subsumed under the concept (9).


(9) The critique of « the history of ideas », as it is exercised in the juridical field, admits a dislocation when one observes the conceptual problems in the field of language.
2.1. *From the American to the Argentinean Tradition: Republic and Liberalism.*

One way of suspending the mythological narrative of the temporal ubiquity of the idea of *Estado de Derecho* is simply by asking when this term first appeared in the language of Argentine constitutionalism. Now, if we analyze the language of constitutionalism of the 19th and the early 20th centuries, paying special attention to the word-concept *Estado de Derecho*, we come up empty. In this sense, if *Rechtsstaat* was one of the keywords of the liberal tradition in Germany during the 19th century, in Argentina the central concept, which also served as a *Leitbegriff* within the illustrated conceptuality of that period, was « republic » (10). This difference would not only form and structure the language but it also influenced the creation of a particular tradition of how the relationship between law and politics should be understood (11).

In this sense, a debt is expressed here with the work of Elias Palti. See: E. PALT, *The 'Theoretical Revolution' in intellectual history: from the history of political ideas to the history of political languages*, in « History and Theory », 53 (2014), pp. 387-405.

(10) *Rechtsstaat* is a creation of the German legal theory which afterwards was spread all over Europe during the first half of 20th century (M. FIORAVANTI, *Los derechos fundamentales*, Madrid, Trotta, 2007, p. 112). The formation of the concept had diverse manifestations through its development in Germany, nevertheless in its origins in the German *Aufklärung*, worked as a counter-concept of the *Polizeistaat*, and thus as a limitation against the intervention of the Administration in the private sphere of the citizens. Under this dynamic it developed a series of requirements which were formalized in the limitation of the governmental power by the *Herrschaft of Gesetzt*, « administrative justice », « division of powers », « independence of the judge », « judicial form ». Despite all these characteristics were developed through diverse authors during the 19th century, just for the sake of the argument, and recognizing its critical approach, it is quite interest to read the summary made by the Carl Schmitt in his *Verfassungslehre* of 1928. See: R. KOSELLECK, *Liberales Geschichtdenken*, in Id., *Vom Sinn und Unsinn der Geschichte*, Frankfurt am Main, Suhrkamp, 2014; E.W. BOCKENFORDE, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in Id., *Recht, Staat, Freiheit*, Frankfurt am Main, Suhrkamp, 1991; *Figures de l’État de droit. Le Rechtsstaat dans l’histoire intellectuelle et constitutionnelle de l’Allemagne*, O. Jouanjan (dir.), Strasbourg, Presses Universitaires de Strasbourg, 2001; M. STOLLEIS, *La idea de Estado de Derecho*, in *La metamorfosis del Estado y del Derecho*, M.A. Presno Linera (ed.), Oviedo, Junta General del Principado de Asturias, 2014.

(11) The rejection of German culture in the formative scheme of the Argentine constitutional language had linguistic reasons but also negative views on the logic of the
When the language of Argentinean constitutionalism was first established (1866-1875), many authors conceived the Constitution as a replica of the American model (12). During this early period, the authors understood the balance of powers as well as the republican and representative government as a response against the arbitrariness of despotic rulers. Examples of this contradiction can be found throughout history, from ancient Rome up to more recent North America; however, this historical reconstruction was not a particular historiographical exercise Argentinean jurists engaged in. To the contrary, the incorporation of historical records to justify the « republic » as the goal of constitutionalism was primarily carried out along the lines of the narration of American publicists (13). Within the context of this appropriation of the past, the aim of the Constitution was in fact to establish a complete network of liberal premises and control devises to protect the rights of the individual against arbitrary treatment.

In this new textual space, the term « republic » would no longer be used as a concept of political identity to fight against the monarchy, as it appeared in the documents of the first half of the 19th century (14). Instead, it primarily functioned as a desirable « form of government » to prevent « tyranny » (15). The progressive state. For a general study see: V. Tau Anzoátegui, La influencia alemana en el derecho argentino: Un programa para su estudio histórico, in «Jahrbuch für Geschichte Lateinamerikas», 25 (1988), p. 611. The vision of the State as an anti-liberal machine that nullifies personality can be found in: F. González, Lecciones de derecho constitucional, México, Librería de la Vda. De Ch. Bouret, 1909 [1866], p. 346.


(15) This can be found especially in González, Lecciones..., cit., pp. 280-281.


(15) For this new meaning, the debate between Alberdi and Sarmiento is foundational. This topic was reconstructed in the classic book by N. Botana, La
change in meaning of the term republic also represented an inversion in the performativity of the concept. It not longer served as a Kampfbegriff but rather as an objective and normative concept (16). In the language of constitutionalism, the semantic field of « republic » was renewed and fulfilled with several juridical institutions, which at the same time, were immediately legitimized by the concept’s positive emotivity. Among these new political institutions were the division of power, representation, fundamental rights, judicial control, etc.

Now, in order to grasp the rapid spread of this new concept among scholars, the role played by university lectures and manuals should not be overestimated (17). In those texts, the argument in favor of desiring the limitation of governmental power was the release of the productive forces of individuals. However, in order to achieve this, individuals required not only the recognition of fundamental rights but also needed instruments for their protection. This argument was consistent with the paradigm of political economy, which conceived of the society as a depoliticized group of indivi-

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16 Both tendencies would generate a progressive de-politicization of the concept. On this process, see: K. PALONEN, Politik als Handlungs begriff. Horizont wandel des Politikbegriﬀs in Deutschland 1890-1933, Helsinki, Societas Scientiarum Fennica, 1985.

17 This literary genre would act as a vehicle for the formation and incorporation of the language of constitutionalism among lawyers. In those texts, the thin line that divided the waters of law, politics, and historiography was rather inexistent. Probably, this was also an effect of the conditions of production of this new discursivity, especially owing to the orality which characterized the early development of this particular language. In fact, most of these « Manuales » were adaptations approved by the authors of the notes taken by students who attended their classes. For a theoretical contribution to the topic see: C. PETIT, Discurso sobre el discurso. Oralidad y escritura en la cultura jurídica de la España liberal, Madrid, Universidad Carlos III de Madrid, 2014, esp. pp. 59 and 65. For a history of the teaching of constitutional law in Argentina: H. TANZI, La enseñanza del Derecho Constitucional en la Facultad de Derecho de Buenos Aires, in « Academia. Revista sobre enseñanza del Derecho », 9 (2011), 17, pp. 85-112.
duals acting in a self-regulative market without interference by the «government» (18).

Nonetheless, the normative role of the concept and the parallel de-politicization of subjects would require a strategy to integrate the individuals in a common political space. The idea of a nation made its entrance as a cohesive concept; one employed to reunify the lost sense of community and collective identity — sentiments which had been a part of the concept of republic until the 1850. Nonetheless, the incorporation of the nation as a central concept not only provided a mythical unification of citizens but, as a side effect, it also changed the narrative about the origins of the Argentinean Constitution (19). Starting in 1875, and primarily thanks to the work of the liberal Catholic José Manuel Estrada, the idea of drafting a Constitution of their own — one no longer assimilated to the American one — was very prevalent amongst scholars. From this period onward, the Constitution was no longer grasped in terms of an adaptation of a foreign experience, but rather as a product of the history of their own nation’s freedom (20).

The aspiration to have one’s own Constitution was forced to deal with the problematic lack of a solid Argentinean constitutional doctrine. In order to fill this void, history was regarded as a means for interpreting the constitution. And from that time on, the interpretation of constitutional law was provided by constitutional his-

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(20) The nation was also conceived as the actor of the constitutional movement. As Joaquín V. González stated speaking of the constitutional history: «Hemos visto en el capítulo anterior cómo nació, se desarrolló y formó su Constitución la Nación a que pertenecemos los argentinos». The nation would be the actor of the history and the individuals suddenly would be determined as «Argentinos» (J.V. González, Manual de la constitución Argentina, Buenos Aires, Ángel Estrada y C., 1897, p. 78). The culmination of this process of nationalization of the constitutional language can be seen in the declaration of the «Argentinidad of the Constitution», on this topic: M.R. Polotto, La Argentinidad de la constitución. Nuevos enfoques para el estudio de nuestra carta magna a principios del siglo XX (1901-1930), in «Revista de Historia del Derecho», 37 (2004).
tory (21). In this second stage, albeit still linguistically linked to American conceptuality, scholars thought that constitutional controversies could be better explained and solved by looking to Argentinean history and, in particular, national characteristics (22). One consequence of this operationalization of history, belonging to legal interpretation, was that the language of historiography would be also influenced by constitutional grammar. Thus, the concepts of liberal constitutionalism were anachronistically presented as somehow belonging to the intentions of the forefathers of the Argentinean nation. In other words, the naturalization of this new conceptuality was achieved by means of a legitimization process made at the intersection of constitutionalism and historiography.

In this renewed “historical-national” narrative of constitutionalism, the concept of republic found a counter-model in the Caudillo (described as a popular figure who led a large mob and who represented the Argentinean ideal-type of personal “tyranny-dictatorship”) (23). Certainly, for Argentinean jurists of the early 20th century, to speak about the Constitution was akin to speaking about a project designed to limit the natural impulses of the native spirit in order to protect against the historical tendency of men to fall into the despotism of a Caudillo or a leader. As a consequence of this narrative, a strong mistrust against the “multitude” developed and led to the eventual rejection of universal democracy. So, during the late 19th and in the first decades of the 20th century, the concept of republic served as a way of not only protecting individuals against


(22) For example, J.V. González stated that: « Para no extraviarnos en teorías y ambiguas interpretaciones, es necesario, en primer lugar, entrar en su estudio [el de la constitución] con amor y respeto, porque es la obra de muchos sacrificios de nuestros antepasados, y es la ley suprema de la Nación [...] recúrrase, entonces, a las fuentes más directas, a las doctrinas más relacionadas con sus principios, a los orígenes históricos y jurídicos... », GONZÁLEZ, Manual..., cit., pp. 17-18.

dictators but also individuals from the masses (24). This limitation went on to become a fundamental feature of the dark side of the republic.

This new pragmatic use of the concept can be seen in the legal interpretation of the « form of government » provided by the historical explanation within the text of the constitution. To accomplish this, the concept of republic underwent a transformation in the way in which « people » were represented (25). On the one hand, the limitation of practicing politics outside the institutional apparatus was key to fulfilling the idea of a moderated government (26). On the other hand, constitutionalists reclaim a political patronage of the masses. As they see it, the government of educated men would avoid the intromission of masses inside the « machinery of the State », which would lead to « despotism » (27). According to the constitutionalist narrative, the brutality of the so-called Rosas’s tyranny will remain a threat to the ideal of the republic (República verdadera), which — in accordance with the 19th century paradigm of progress — can only be accomplished in the future (28).

(24) The figure of the « mass » formed a key topic of Argentine positivism, which was intersected in the constitutional narrative. There would be a long history of the Argentinean crowd inspired by Ramos Mejía, reading Le Bon, which synthesized the leader’s formula — « meneur » — that would be followed by an ignorant crowd easy to manipulate. O. Terán, Positivismo y nación en la Argentina, Buenos Aires, Puntosur, 1987, pp. 21-26.

(25) See, especially: Montes de Oca, Lecciones, cit., p. 81 ff.

(26) For González Calderón, the representation could only be understood by analyzing the art. 22º which stated, « el pueblo no delibera ni gobierna sino por medio de sus representantes »; after this principle, the republic meant the way of organizing those authorities created by the Constitution (González Calderón, Derecho..., cit., p. 429 ff.).

(27) The defense of republican individualism was exercised not only with the caudillismo but also against « the State », characterized as a machine, according to the classical metaphor of the XVII century. This also explains the rejection of the German public law discourse, which was structured under the figure of the State. See: J.B. Alberdi, La omnipotencia del Estado es la negación de la libertad individual (1880), in Id., Obras Selectas, Buenos Aires, La Facultad, 1920; J.M. Estrada, Curso de derecho constitucional, Tomo I, in Id., Obras Completas de José Manuel Estrada, T. VI, Buenos Aires, ed. Científica y Literaria Argentina, 1927, p. 124 ff.

(28) Hence, the Janus face of the constitution, which was presented as learning from the past and as a limit to the repeatability of that undesirable experience. For
The characteristic of the republic, shifted by the concept of representation, meant a restriction of the universal vote \(^{29}\). Only once economic prosperity reached the shores of Argentina (for the liberalism of Alberdi), or once the evolution of the society reached a certain point of development (Spencerian positivism), would the people be capable of participating in politics. Until one of these conditions is fulfilled, only a selected group of people can guide the project of a contemporary and unfinished republic (República Possible). In short, the dark side of the republic was the denial of democracy and the consolidation of a conservative order \(^{30}\). Thus, the connection between republic and representation served as a means of exclusion, leaving the reformation of the nation in the hands of the elite \(^{31}\).

Both the liberal-republican discourse and the nation’s paradigm — with its regimes of temporality, methodologies, and political presuppositions — were eventually consolidated into the Argentine constitutional tradition, which remains latent in the legal field of nascent public law.

The success of the naturalization of tradition influences the possibility/impossibility of receiving concepts not already produced by this language. This effect of meaning configures the translation process of a concept belonging to another semiotic space in the language created by « tradition ». With an autopoiesis that presupposes the closing off of the juridical language in the name of

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\(^{29}\) Despite several jurists stated that Republic was the government for the people and by the people, it seems to the that it was better to recognize that the government would only work when the citizenship « confía su ejercicio a un número proporcional y libremente designado de los mismos, que deben reunir cualidades especiales calculadas para hacer posible la dirección, régimen, seguridad y prosperidad de los negocios comunes (res publica) ». GONZÁLEZ, Manual..., cit., p. 285 ff.

\(^{30}\) N. BOTANA, El orden conservador. La política argentina entre 1880 y 1916, Buenos Aires, Edhasa, 2012.

security for the user, the possibility of opening the semiotic system of an established tradition requires a process of internal crisis that, in the case of the constitutional language, became manifest towards the end of the 1920s. At that time, adaptation or radical critique of the liberal tradition was one of the jurists’ possibilities for opening the door to the process of receiving a new conceptuality. This new field of knowledge was further developed through a radical debate on what jurists themselves would call the «crisis of law».

2.2. *The Catholic Staat and the Critical Reception of the Estado de Derecho.*

The historical determination of the nation and the devices created to control and regenerate the society, in order to achieve an «ideal Republic», proved to be insufficient in dealing with new social movements, which radically demanded their participation in politics. This situation was later aggravated by the immigration process, which doubled the country’s population in just a few years. This influx brought with it European experiences and impulses, both in terms of culture and political demands. The limits of liberalism and positivism, linked with the prejudice of conservatism against politics, became evident when intellectuals had to deal with mass democracy, especially once the male universal vote was declared in 1912. The growing influence of political leadership, political parties, and politics in the streets started to erode the liberal-positivist system. All these problems were an expression of the inability of the vernacular constitutional republicanist language to grapple with the conflicts and paradoxes of mass democracy. The critical point was involved the ambivalence of the concept of republic versus the concept of democracy \(^{(12)}\).

In fact, the internal tensions within the political model of Argentinean secular positivist liberalism quickly provoked a reaction that manifested itself in a complex nationalist movement with strong anti-liberal and anti-individualist characters. This movement pro-

\(^{(12)}\) This can be found in the conceptual discussions that the anti-liberal nationalist Catholics would carry out from the magazine «La nueva República». See: M. I. Barbero, F. Devoto, *Los nacionalistas*, Buenos Aires, CEAL, 1983, pp. 79, 80, 99-103.
posed a hierarchical model of order — if not also corporatist — that eventually came to being in the 1930 coup d’état (33). Both this political movement and historical event are factors that influenced during that time the formation of legal thought and above all of constitutional thought.

Yet, in order to understand the indispensable relationship between constitutional discourse and political events, one must look at the legal method adopted at each historical moment, which is also a condition for the possibility of observing the connection between the historical-political context and legal language. Indeed, the crisis of liberalism, which in Argentina began to weigh heavily on intellectuals towards the end of the nineteenth century, gave rise to a radical criticism of the episteme of constitutional law, which had been shielded by the historical resource of the liberal and positivist paradigm. The decadent perception of the idea of liberal progress served here as the fertile grounds for the development of a debate within the legal field, which in connection with nationalism — particularly Catholic — revitalized the political dimension of law (34). In this particular field, the methodological debate functioned as a wedge for radical change in constitutional discursiveness, and in turn, it motivated the intention of political intervention through the reform of the electoral law or a constitutional reform (35).

After the perceived « crisis of law » (36) in Argentina in the 1930s, a true Methodenstreit occurred between Kelsen’s nomological

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(36) M.R. Pugliese, La denominada ‘crisis del derecho’ desde la perspectiva argentina durante el periodo de entre guerras mundiales (1920-1940); A. Aragoneses, Crisis del derecho privado y legislación especial en Francia y en Argentina, both in Derecho privado y modernización. América Latina y Europa en la primera mitad del siglo XX, María Rosario Polotto, Thorsten Keiser, Thomas Duve (eds.), Frankfurt am Main, Max Planck Institut, 2015.
positivism, which asked about the logical condition of the sollen, and neo-Thomism, which postulated the need for considering the « common good » as a presupposition for interpreting law in modern society (37). This debate highlighted the methodological crisis of the evolutionary-historical point of view and its inability to deal with the moral and ethical problem posed by the political crisis unleashed after the First World War (38). This perception subverted the temporal regime of constitutional thought. On the one hand, it suspended any recourse to the past (constitutional history) as a sufficient explanans in resolving political-constitutional problems. On the other hand, it turned its gaze to the present and, in comparative terms, reflected on the new trends within constitutional law (especially in Europe) (39).

One of the consequences of the opening up to Europe, and the perception that the acceleration of social changes resulted in a legal crisis, was reflected in the conditions of textual production responding to the social demand for justice. At this time, legal journals became the privileged space for the inscription of the methodolo-

(37) TAU ANZOÁTEGUI, La influencia, cit., p. 626; Id., El Derecho: cruce de miradas y tendencias, in Antología del pensamiento jurídico argentino (1901-1945), Id. (Coord.), Buenos Aires, Instituto de Investigaciones de Historia del Derecho, 2007, pp. 33, 43. The greatest representative of neo-Thomism was Tomás D. Casares, who influenced an entire generation of Catholic intellectuals in the legal field.


(39) In constitutional terms, two clear trends developed at this time: A traditional side still anchored in the logic described in the previous section (See D. PÉREZ GHIOU, La constitución: enfoques académicos, in Antología..., Tau Anzoátegui (Coord.), cit., pp. 345-347), and a newer perspective, which looked toward the events in Europe and which heavily influenced the new constitutionalism. These late works were responding to the ideas of the time, which are summarized in the contributions by B. MIRKINE-GUETZVITCH, Les nouvelles tendances du Droit Constitutionnel, Paris, Librairie Générale de Droit et Jurisprudence, 1934; and M. MANOLESCO, Le siécle du Corporatisme. Doctrine du Corporatisme Intégral et Pur, Paris, Librairie Félix Alcan, 1934. Mirkine-Guetzvitch’s work is very important for this essay and presents the state of the art survey regarding the État du Droit as a rationalization of the power in the face of « new forms of absolutism » (Le soviétisme et le fascisme) — see, MIRKINE-GUETZVITCH, Les Nouvelles, cit., pp. 46, 214-215.
gical debate and reception by the authors (40). The doctrinal article and the critical review influenced, therefore, a rapid process of debate that exhibited the intensity in the appropriation of new knowledge.

In this context, the concept of Estado de Derecho entered the Argentinean legal debate through Sampay’s Noción de Estado de Derecho, published in the legal journal La Ley in 1939 (41). In this article, the title of which indicates the defining interest in an unusual word (notion), the difficulties associated with the concept are structured in the context of the interwar debates in Europe, mainly in Germany and Italy. In this way, the theoretical novelty and its contemporaneity were privileged over the historical weight of the German tradition (42).

In this first essay, Sampay made an effort to insert the German concept into the Argentinean constitutional tradition. In order to achieve this, he filled the signifier Rechtsstaat with the traditional elements of « republic »: the guarantee of individual freedoms (fun-
damental rights), equality before the law, and last but not least, the
division of powers (as a mechanism to safeguard rights). Never-
theless, appropriating the concept represented only the first part of
the task. He also dedicated an entire section of this introductory
essay to treating the true sense of « democracy » and « constitution »
in mass society, a topic relatively new to Argentinian constitutiona-
ism.

Given his work on the concept of democracy, Sampay was
unable to avoid attributing to the figure of the « people » a radical
characterization as a constituent power. The people, for Sampay,
were not to be considered the sum of isolated individuals at the time
of the election, but « the effective homogeneity of the nation,
engendered by a solid, common foundation of interests and convictions » (43). Having observed the European political regimes, he
warned that large democracies impose a kind homogeneity — one
that suppresses the individual — in favor of the State, race or the
proletariat. On the other hand, he thought it possible to realize a
personalist form of democracy that seeks to recognize the enactment
of personal freedom. For him, only this latter formulation could be
considered Estado de Derecho. In so doing, the concept became
dissociated from liberalism, given that another political system
might also be able to realize man’s freedom.

The question underlying this theoretical construction is: What
was the « solid, common ground » connecting the Argentinian
people and that was meant to serve as the basis of the democratic
constitution? The answer was provided by the radical character of
constituent power, that is, the people establishing their own political
order. For Sampay, the will of the people is the origin of all
legitimacy. However, and here he departs from Schmitt, this is a
condition provided by « natural law » (44). This interpretation
shielded itself from the radical political nature of the Schmittian
proposal and redirected legitimacy to the meta-positive principle of
law, which for Sampay was none other than human dignity — one

(43) Sampay, Noción..., cit., p. 67.
(44) Dotti, Carl Schmitt..., cit., pp. 135-166.
of the key aspects of his thought (45). The people’s will was then limited by natural law. To prove that this respect for human dignity was the common basis of the Argentinean « interest and conviction », the theological approach to politics and the history of Argentina as a « Catholic nation » appeared as a legitimate device.

Sampay’s article quickly provoked a response from Renato Treves, who was living in Tucumán after being exiled from Italy (46). In both Italy and Germany, Treves thought that the use of the concept was only an attempt to legitimize the national socialist and fascist regimes. If we wish to understand the debate, he states, then we need try to grasp the authors’ state of mind at that time rather than searching for some specific content belonging to the concept. For those trained in the liberal classical tradition, the concept had to be used because of the legitimacy it already possessed, while for younger people, the need to suppress or overcome it — due to its association with the previous, decadent phase of social development — was evident. In this way, Treves indirectly warned Sampay to be aware of the concept’s symbolic effectiveness in legitimizing all forms of authoritarianism. It was within this initial debate that the concept of Estado de Derecho was first introduced in Argentina.

A few years later, in 1942, in the midst of a strong debate among Catholic jurists about the form of the state and the system of representation (corporatism) (47), Sampay published La crisis del Estado de Derecho Liberal-Burgués (48). As the title indicates, the

(45) I use Carl Schmitt in this essay because he offers a radical criticism of the positivist-legal perspective. In fact, using Schmitt allows us to introduce the question concerning the legitimacy of confronting the positivist thinking matrix. This would enable Sampay to overcome the formal logic of constitutionalism and, at the same time, to consider the right for a radical reform of the Constitution by addressing the theory of the Pouvoir Constituant.


(48) A. Sampay, La crisis del Estado de Derecho Liberal-burgués, Buenos Aires, 1942. The reception of this work merited a critical reading by Ricardo Smith, who not
Rechtsstaat meant with a critical reception; in fact, this concept was seen as a historical phase that had already come to an end (49). However, this controversial side of the thesis — which will be discussed below — must not overshadow the radical change that the reception of the German Staatslehre and Schmitt’s Verfassungslehre produced in the constitutional grammar, as it was known until then. These new influences would politicize the constitutional language through the key concept of State.

According to this new perspective, the State was no longer to be understood as a concept of international law, which defined internal sovereignty (50), or as an administrative machine equivalent to the colonial apparatus (51). Instead, the State would be defined as a way of living, historically determined by the action of real and free men. These men, drawing upon the families and smaller corporative institutions as their basis, would go on to define a political status of unity and ordination of the people — destined to achieve a goal (52). Since Sampay considered the State a political being, it was subject to only attacked favoritism by a « corporate state » to the Portuguese — a question that Francisco Ayala had already highlighted in the prologue to the book — but also destroyed the desire for an anti-liberal « Catholic democracy » founded on the reading of Carl (Karl, for Smith) Schmitt. See: R. SMITH, La crisis del Estado de Derecho Liberal-burgués, por Arturo Sampay, in « La Ley », 28 (1942), pp. 1139-1148.

(49) The title of the work itself announces the critical turn against the « liberal state ». This change in the perspective can be seen on two levels. The choice of the liberal-bourgeois adjective is a synthesis of the criticism developed by anti-liberal German jurists and especially by Carl Schmitt (See: Ch. HILGER, Rechtsstaatsbegriffe im Dritten Reich, Tübingen, Mohr Siebeck, 2000, pp. 12-20). Secondly, a new form of temporality is used. Sampay no longer speaks of the concept in the abstract but rather in terms of a « state » in crisis. Overcoming this crisis implies a change to a new form of « State ». This critical radicalization is probably due to his contact with Carl Schmitt’s essay Was bedeutet der Streit um den „Rechtsstaat“ (1935), which was quoted by Treves and later appeared in Sampay’s work. In both Carl Schmitt’s essay and in Sampay’s book, the past-future temporal structure of the argument plays a central role. See: SAMPAY, La crisis..., cit., p. 62, f. 1.

(50) GONZÁLEZ, Manual..., cit., p. 83.

(51) ALBERDI, La omnipotencia..., cit.

(52) SAMPAY, La crisis..., cit., p. 27, 37 and 48. This condensation of the State-political was decisive since it implied the appropriation of all political phenomena by the State. Faced with this totality, the theory of Catholic subsidiarity in the Encyclical Quadragesimo Anno played the role of limiting the State in the face of the individual. The
modification (53). Having observed this modifiability, Sampay stated that confronted with what was referred to as a historical-critical moment, new political and social objectives demanded a political decision be made. Hence, the fundamental role of the constitution — in the sense of Schmitt’s Verfassungslehre — was to establish a new political-juridical order; one structured by the people’s cosmovision and used as a means for structuring a common life, which for Catholics was synthesized in the search for the Bene Commune (54).

This appropriation of the concept of the Staat also provoked a redefinition of the semantic core of terms republic and nation. The conception of the State as a political unit meant that the unifying role of the nation was no longer fundamental. On the other hand, as the State also represented a concept of order established by political decision, it displaced the normative demand of the republic — which became one historical modus for representing the order and desires of a political community (55). However, this was not meant to imply that the questions of the nation should be erased. For, as previously mentioned (and despite the tension with regard to the concept of « the people »), the history of the nation — this time written in terms of Catholic tradition — served as a device for

Catholic character of this proposal was especially written against the background of Jellinek’s traditional theory of the Selbstbeschränkung des Staates. (53) Sampay warned that political being is « State, in the modern lexicon ». The influence of Schmitt’s Verfassungslehre is obvious here. It allows for an assimilation of the concepts of state and politics that operate differently in Der Begriff des Politischen. In other words, the latter serves as the foundation of the former. On the Schmittian reading of the political and its relationship with the State that influences this whole reading, see: L. STRAUSS, Anmerkungen zu Carl Schmitt, Der Begriff des Politischen, in Id., Gesammelte Schriften. Hobbes’ Politische Wissenschaft und zugehörige Schriften- Briefe, Stuttgart, Metzlersche-Poeschel, 2001, p. 217.

(54) The concept of « State » appeared in this context as a simile of polis, which implied not only the politicization of the concept, since this term was meant to represent the total political community, but also a critique of individualism from the moment in which, as Sampay recalls reading Schmitt, « the individual could not be emancipated from that totality ».

(55) The decision is also limited by natural law. Sampay’s friendship with O. Derisi was significant in helping to forge his political-Thomist thought. See: SAMPAY, La critic... cit., p. 107, f. 2. The political decisionism of the time was very strong in Sampay’s thinking, due to the relationship between theology and politics: miracle and decision.
legitimizing the political decision and the internal characteristics of the Argentinean State (56).

This new language (57), which spread rapidly among Catholic intellectuals (58), allowed Sampay to formulate a radical critique of the 1853 constitution, yet without getting caught up in the language of republicanism. In fact, at this point, the concept of Estado de Derecho played a central role. Sampay identified the Alberdian constitutional model with the «Estado de Derecho liberal-burgués», thus shifting the characterization of the traditional constitutional language and breaking the internal logic of normative-constitutional knowledge (59). In establishing this connection, Sampay re-politicized the Alberdian constitutional moment through its historicization and declared its terminal crisis (60).

For him, as well as for later jurists, the neutral role of the State in society, associated with the depoliticization of individuals, needed to be reformed (61). The most important thing, however, was the

(56) In this way, from a history of juridical-political languages, the title of Loris Zanatta’s work, «From the Liberal State to the Catholic Nation» can be inverted, since in terms of the employment of the concepts, the nation served as the basis for the unity of liberalism, while the State served as the basis for the Catholic proposal. See: L. ZANATTA, Del Estado Liberal a la Nación Católica. Iglesia y Ejército en los orígenes del peronismo. 1930-1943, Bernal, Universidad Nacional de Quilmes, 2005.

(57) In addition to the reception of the concept of the State, various theories and institutions, such as the Catholic theory of subsidiarity, the concept of the constitution in a material sense, etc., entered into the juridical language of public law, thus broadening the theoretical basis of the constitutional debate. This dislocation had an impact on the knowledge of constitutional law — one that could hardly be traced back to the logic of the nineteenth-century forms of restricted democracy of republicanism.

(58) The reception of this work can be seen above all in the Teorías del Estado, which was published between 1945 and 1951 by Pablo Ramella, Ernesto Palacio, and Arturo Sampay. On the Catholic nationalist jurists, see: J. F. SEGOVIA, Peronismo, Estado y Reforma constitucional. Ernesto Palacio, Pablo Ramella y Arturo Sampay, in «Revista de Historia del Derecho», 32 (2004), pp. 347-441.

(59) SAMPAY, La crisis…, cit., p. 70.

(60) The use of the voice moment is not narrative license. Here it is used in the sense that Sampay attributes it, following Hermann Heller, as a «Phase that can be designated in a movement» (SAMPAY, La crisis…, cit., p. 53, f. 1).

(61) It is worth noting the influence of Carl Schmitt’s Legalität und Legitimität (1932) as a basis for criticism of Kelsenian positivism, which was associated with the liberal state. The legal theory was incorporated into, and served as a basis for, the
formation of a new anthropological perspective. This time, against
the background of the « homo economicus », the integrality of
human existence entered into the discourse, and the ethos of the
State was redefined to provide « dignity » instead of liberty and
economic prosperity. Thus, the proposal called for the dissolution of
the « liberal State » (also referred to as « abstentionist ») and the
subsequent creation of an interventionist State.

However, the crisis of the liberal state required a « decision »
in order to consolidate the new political being of Argentina, espe-
cially in the face of the threat of totalitarianism. Moreover, the
liberal crisis required a national solution for Argentina. To this end,
nationalism was seen as a way of limiting the transplantation of new
constitutional models. Sampay’s Janus-faced proposal should be
understood within the context of the historical critique of Alberdi’s
model and his reserved stance towards the contemporary organiza-
tion of the State under fascism, national socialism, and the U.S.S.R.
Thus, following Salazar’s corporatism, yet inquiring about the es-
sence of the Argentinean people, Sampay proposed a « welfare
state ». This theory was materialized in the Peronist Constitution of
1949. In fact, in the parliamentary debates, Sampay again began to
criticize the liberalism of Alberdi’s Constitution and called for a
« protectionist state », sometimes referred to as the « prosperity and
welfare (previsional) State » (62). For the first time, the State was not
seen as a threat to individuals but as the creator and protector of
constitutional rights.

The obvious consequence was the dissolution of the constitu-
tional tension between society and State, which served as a
premise for liberal constitutionalism and, consequently, led to a

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(62) Diario de sesiones de la Convención Nacional Constituyente 1949, Buenos
Aires, Imprenta del Congreso de la Nación, 1949, p. 271. In the political debate, Sampay
stopped using the expression « Estado de Derecho Liberal-Burgués » to refer to the
« liberal state », which was more common at that time. See: F. Ayala, El Estado Liberal,
in « La Ley », 20 (1940), pp. 63-69. This variation in conceptual uses shows the thin line
separating the political-constitutional and constitutional discourses.
radical politicization of the population (63). This process of politicization intensified once Peron broke with the Catholic Church and unveiled a political model that moved away from the theory of *subsidiarity*. The results were not just theoretical, for the political manifestations included the persecution of opponents, single trade unionism, government interventions in different autonomous spaces, etc. (64).

For the jurists educated in traditional constitutional law, the reform and its principles were seen as exceptions, if not deviations. In this way, despite the validity of the constitution, the contrast between traditions generated a negative perception of its legitimacy, which weakened the very foundations of the 1949 constitutional process and generated an association of the language of the State with *Peronism*.


The main problem of the anti-liberal conception of Peronist constitutionalism was the blurry (if not inexistente) separation between State and society, a consequence of which was the extreme politicization of the later. The anti-Peronist reaction was also implicated in this logic, and in 1955, a military coup d’état removed Peron from power. The political and juridical fields underwent extreme changes. Just to name a few: The Constitution of 1949 was abrogated; Peronist supporters were excluded from playing any role in the new regime, and the constitutional literature written during this period disappeared from the universities. The Constitution of 1853 was re-established by decree, and the part of the 1949 Consti-

(63) It was not clear whether politics was to be considered as equivalent to or as the basis of the state, and this was linked to the criticism of the separation between state and society. This was a direct criticism directed at the basis of liberalism. For Sampay, this principle had been artificially created by Lorenz von Stein, and consequently, he asked for a reconsideration of the separation between State and society (A. Sampay, *Introducción a la Teoría del Estado*, Buenos Aires, Politeia, 1951, p. 375, f. 1).

(64) This would also exclude Sampay from the Peronist universe.
tution that was retained was the recognition of social rights — which were, paradoxically, protected by the State (65).

Due to the prohibition of the dominant popular party, the constitutional discourse suffered from a lack of legitimacy. Aware of the precarity of this situation, the formal and positivist approach to law proved to be successful. On the one hand, it obscured the problem of legitimacy, because the Kelsenian model worked on the base of deductive-logical interpretation. On the other hand, legal positivism was not based on history, which had been the traditional modus operandi of legitimatization in constitutionalism.

However, as previously stated, the new political languages that had emerged over the course of the past few decades weren’t easily erased. Despite the fact that some of the earlier, traditional constitutional law manuals were reprinted, the new constitutionalism, nevertheless, was forced to confront the problem of incorporating the conceptuality of the State into the traditional language of the restored Constitution of 1853. This tension between two diverse and contradicting traditions (liberal and anti-liberal) was resolved by re-writing the tradition by means of a theoretical approach. In other words, juridical positivism was able to incorporate a more abstract political theory (66).

The new political-constitutional order influenced the structuring of legal matters. While constitutional law had rejected the Schmittian matrix, the Staatslehre gradually moved in the direction of political sociology. The latter established its own space for reflection in the 1980s with the formation of the subject « Theory of the State » at the University of Buenos Aires. For its part, constitutional law, instead of returning to the pre-Peronist tradition, incor-

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(66) An interesting piece of news on the intellectual climate of Argentine positivism can be seen at the conference of Alf Ross held in Buenos Aires in 1961 (see: A. Ross, Validity and the Conflict between Legal Positivism and Natural Law, in Normativity and Norms. Critical Perspectives on Kelsenian Themes, S. Paulson (ed.), Oxford, Clarendon Press, 1998, pp. 147-163). With the fall of Peronism, the Thomism would be weakened, turning the scale of academic reflection in the National Universities towards Kelsenian positivism. The influence of Carlos Cossio stands out here.
porated some elements of American political science as its theoretical framework for working on the *material* aspects of the constitutional theory (a question opened by the radicalization of the political role of the people in the constituent moment) (67). This latter selection of a new narrative and tradition was in tune with the formation of a new theoretical perspective in Argentina, which opened itself up to American structural-functionalist sociology. This eventually went on to impact the field of law but also general sociology and political history starting in the mid-1950s (68).

The methodological change in the hermeneutics of the constitutional text — between American political science and juridical positivism — redefined the conditions of bibliographic production. Here, we see a new literary role of constitutionalists, who, on the one hand, wrote treaties on doctrinal interpretation for lawyers and magistrates and, on the other hand, worked at the university by producing manuals — which constituted a more theoretical sector that was closely related to the constitutional phenomenon in general.

One example of this new constitutionalism can be found in the monumental work of Francisco S. V. Linares Quintana, who — after a long self-exile during Peronism — had returned to Argentina from America. During this time, he worked as a teacher and researcher at the University of North Carolina, where he was steeped in recent American political science theories and also developed a strong bond with Karl Loewenstein (69). Both in his nine volume *Tratado de la Ciencia del derecho constitucional* (1953-1963) and in his two volume *Derecho constitucional e instituciones políticas* (1970), a work that can be seen as both an epochal synthesis and source of conceptual meaning among jurists, Linares dealt with the concept of *Estado de Derecho*. However, in order to understand the meaning

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(68) E. Adamovsky, *Historia de la clase media argentina. Apogeo y decadencia de una ilusión, 1919-2003*, Buenos Aires, ed. Planeta, 2009. Parsonian sociological assumptions would also impact the historical narrative that would see Peronism as an exception in the history of a « middle class », considered by the apologist of this representation of the past as « the true representative of the Argentinean nationality ».
given to the concept, it is necessary to analyze the epistemological turn that occurred in constitutional law starting in the 1960s.

The first problem that the new constitutionalism was faced with was the excessive politicization of constitutional theory that had taken place during the 1930s and 1940s. To deal with this problem, the new jurists needed to « de-statistize the political » (Entstaatlichung des Politischen) by reducing the meaning of the concept of the State. This was achieved through an epistemological criticism against the Teoría del Estado, warning that modern « political science » should not only be concerned with the « State » but also with the governance of societies. For Linares, understanding « the political » as the exclusive study of the State corresponded to a traditional, restrictive, and limited approach. From this perspective, he postulated that the analysis of « the political » needed to be extended to « the science of society’s government ». In so doing, he wanted to overcome what he labeled the « limited » scope of the state phenomenon. Behind this naïve definition of the scientific scope, he implicitly reduced the concept of the State in contrast to a variety of other social institutions, which this way of thinking considered superfluous (70). While Linares was very hesitant to forge his own conception of the State, his approach is similar to traditional positivism in that it presented the State as a juridical person distinct from the subjects (Carré de Malberg), to which he added the Kelsenian element identifying it as « the personification of the juridical order » (71). With the limitation of the State sphere, one space was opened up where it was possible to think about politics: society.

What was the principal theme of political science? In line with American contemporary studies, Linares did not hesitate to define

(70) Here, the German tradition was read through an Anglo-Saxon lens. Thus, while in Germany the state had been traditionally viewed as a « republic » — according to the traditional characterization — or a « whole political society », from this moment onwards, the term was used as a more technical concept that designated the administration. Thus, the concept of the State would progressively turn into a « governmental machine », which later more closely approximated « governmental institutions », « administrative cadre », or « governing body ».

the object of study as the problem of power in society (72). This re-redefinition of the object would have two major consequences for the constitutional theory. On the one hand, instead of the question of sovereignty as a constituent power, for the new constitutional law, based on political science, sovereignty became the « legal rationalization of the power ». The radical problem of the material constitution was thus given over to the dynamics of political analysis carried out by lobbyists, interest groups, etc. (73). On the other hand, and as had already been anticipated, the study of power in society presupposed the irreducible separation of the latter from the State, and this is where the Constitution came in.

From this point of view, the Constitution would have two distinct roles. Theoretically, from the perspective of political science, the Constitution was nothing more than the crystallization of political tensions between individuals in society. However, from a political perspective, the Constitution was seen as a controlling device to prevent the state from taking control of social power. This latter role was the condition for the possibility of displaying a societal analysis of the power. In fact, Linares’s immersion of « social life » into the State meant falling into « totalitarianism »; meanwhile, maintaining the distinction between « society/State — the social and the juridical — » was the main task of the constitutionalized State and democratic politics (74). It was under the auspices of this last

(72) Ibid., p. 43. Among the North American authors who guide this narrative, we have: David Easton, Charles Merriam, Harold D. Lasswell, T.V. Smith, and George Catlin.

(73) The inscription of the political in the society made the State superfluous. Nevertheless, Article 22° of the Constitution of 1853-60 only allowed for politics to be carried out within the framework set forth by the State — the implications of which implied a contradiction within the praxis of constitutionalism. Hence, the need for a systematic study of lobbyists and interest groups arises. Thus, paradoxically, politics could only manifest itself within the State, and civil society was configured in terms of a purely economic model of exchange. On the concept of civil society, see: S. CIGNOLA, Fragile cristallo. Per la storia del concetto di società, Napoli, Editoriale scientifica, 2004.

(74) LINARES QUINTANA, Derecho constitucional..., cit., p. 64; A similar critical operation was carried out for the German field by E.W. BÖCKENFÖRDE in his classic 1972 conference: Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit, Düsseldorf, VS Verlag für Sozialwissenschaften, 1973.
postulate that the concept of the *Estado de Derecho* found a place in
the constitutional discourse.

The re-signification of the traditional separation of State and
society first made it possible to recover the nineteenth-century
characteristic of the concept, that is, by presenting it as «the
subjection and accommodation of the State to the Law » in order to
protect subjects. Linares pointed out that the term was formulated
by Robert von Mohl in 1832, warning that the *Estado de Derecho* was
the counterposition to the *Estado de Policía* (proposed by Machia-
velli!?). After linking together generations of German jurists — from
Stahl to Schmitt and Kelsen — as champions of this principle, he
filtered it through the American tradition by stating that the *Estado
de Derecho* is the « rule of law » (*Gobierno de leyes*) and not « rule
of men » (75). Together with Legón, he pointed out that the aim here
was to limit the « mere fleeting and passionate arbitrariness ». Later
on, he brought it to the *Río de la Plata*, citing Supreme Court
Judgment Edelmiro Abal of 1960, which states that the *Estado de
Derecho* is the state limited by the Constitution, thereby guar-
anteeing « a calculable stability of relations between governors and
governed ». This stability was the very essence of constitutional
order, and to support this value, Linares quoted Bertrand de
Jouvenel, who thought that when « the fundamental rules and
notions are capable of being modified indefinitely, it creates the
most advantageous situation for the despot! » (76).

After having justified the concept, Linares needed to condense
the typology into a clear and positivistic group of characteristics. To
accomplish this, Linares drew upon the recent work of Elías Díaz,
from whom he drew four key characteristics of *Estado de Derecho*: 1)
« imperio de la ley »; 2) separation of powers; 3) legality of admi-

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(75) Linares Quintana, *Derecho constitucional...*, cit., p. 85; the double inscrip-
tion of the concept of *Estado de Derecho* in the tradition of 19th-century German
liberalism and as a word that synthesized the American constitutional desire, made the
debate that arose in the 1940s invisible.

(76) Ibid., pp. 85-86.
istration: legal regulation and judicial control; 4) fundamental rights and freedoms (77).

Using these characteristics, the concept finally had a formulation that was easy to learn, but above all, it received a legitimization that was difficult to transpose. It is worth mentioning that both the historical-emotional narrative, which inscribed the concept in the long universal constitutional struggle for freedom, and the analytical systematization were key to redefining the concept. This combination allowed readers to come up with an interesting condensation that assimilated the Estado de Derecho to the « republic » and the « Estado de Policía » as equivalent to « despotism » and « tyranny » (78). In so doing, Linares accomplished two things: First, he successfully redefined the guiding concepts of constitutional thought (79); second, it enabled jurists to work with the liberal Constitution of 1853-60 within a positivist context, thus helping them to deal with political and social conflicts without having to carry out a constitutional reform (80).

(77) Ibid., p. 87. The positivism and the historization of « ideas » allowed for a decontextualized appropriation of the work of Elías Díaz, who clearly sought to critique Franquism; a position that had sought to give legitimacy to the regime against the backdrop of foreign countries by using the concept of the Estado de Derecho. This dialogical and historical moment is not evident in Linares’s construction. See: S. MARTÍN, Del Fuero del Trabajo al Estado Social y Democrático. Los juristas españoles ante la socialización del derecho, in « Quaderni Fiorentini », 46 (2017), pp. 369-371.

(78) For example, in the series of lectures organized by the Colegio de abogados de Buenos Aires (Buenos Aires bar association) in 1980 on the Estado de Derecho in Argentina, Tomislavo Davinovich said that « in dark hours, Alberdi’s legacy [needed to be remembered]. That legacy was, for a century, the Estado de Derecho in Argentina (« en horas aciagas, al legado de Alberdi. Ese legado fue, durante un siglo, el Estado de Derecho en Argentina »). See « Revista del colegio de abogados de Buenos Aires », 1980, 1.

(79) In this way, a 19th century leitmotif was also proclaimed untouchable. The ‘completeness’ of the concept and the rejection of the state’s projection on the social resulted in a closure of the concept « Estado Social de Derecho ». On this topic, J.R. Vanossi published in 1982 a widely circulated book called El Estado de Derecho en el Constitucionalismo social. However, this work remained within the framework of political theory rather than in the constitutional field.

(80) Another example of this positivist perspective of Estado de Derecho can be seen in the essay from 1960 by Agustín Gordillo, the title of which is also explicit about the methodological trend of the time: « Estructuración dogmática del Estado de
The abstract formulation and the theoretical un-definition of the concept permitted an extremely broad range of uses. From the side of history written by jurists during this period, the normative concept served as a narrative motif by means of which to criticize the recent past, especially Peronism. At this point, anti-Peronism found in *Estado de Derecho* the framework from which to perform a political reproach. In other words, the emotional part of this concept was historically determined as a counter-position to Peronism (which had been labeled a « second tyranny » by the military forces) (81).

The influence was even greater in the jurisprudential field since the formula was used to legitimize the defense of individual guarantees by the magistracy, thereby giving rise to the praetorian construction of the figure of *Amparo*. This phenomenon is also interesting because it brought the dogmatic-ahistorical construction of the *Estado de Derecho* closer to the Anglo-Saxon « rule of law » system. Moreover, it produced a particular subjectivisation of citizenship. In fact, the protection granted by jurisdiction was fundamental to securing the constitutional rights of private individuals, which should be protected not only against the State but also against the action of social groups (82). Finally, the figure of *Amparo* serves as a guarantee for the defense of the rights of the individual, which did not possess an ethical value, since it was presented in terms of a contrast between a factual situation and a recognition of rights explicitly declared in the constitutional text.

The incorporation of the principle in the jurisprudence of the Supreme Court and its use to develop a historical narrative of law...
evidence the proliferation of the new concept among jurists of the time, but this time under the hermeneutic prism of a renewed tradition and not as a theoretical derivation of political doctrine.

The dogmatic formulation developed during this period persists to the present day in the classrooms of constitutional law. However, the country’s political history gave this concept a new plea of meaning, which would configure a special semantics for the Argentine case, which would be inscribed in the matrix of a democratic inspiration based on human rights.


Since 1983, the status quo of the dogmatic formulation of Estado de Derecho was disturbed by the process of recognition of the aberrant crimes against the humanity committed during the last dictatorship (1976-1983). The acknowledgment of the tortures and kidnappings by the people as well as the demand for justice for the Desaparecidos invaded the public sphere. Against the background of this undeniable horror, the abstract formulation of the concept and its usage to legitimate any State action according to law separated from the ethical question was no longer possible. The continuity of the dogmatic position was limited in the face of the demand for reparation that arose out of transitional justice. In 1983, when president Alfonsín started the long journey back to democracy, one of the key points was the reconstruction of a democratic culture that would encompass not only the political and social sphere but also the action of justice within the State.

Within this context, the 1985 trial of Juntas Militares represented a foundational milestone of the new democracy. This political decision was considered crucial in order to expose the risks connected with living outside of democracy, tolerance, and constitutional guarantees (83).

To achieve this goal, two parallel strategies were deployed. On

the political side, the demand for unveiling the underground actions of the military dictatorship was realized by a commission that described the atrocities committed by the regime. As the title indicated, the *Nunca Más* represented a barrier against « state terrorism » (84). The main point of this report was the introduction of Ernesto Sábato, who established a kind of endpoint for the wound opened by the radical violence of the dictatorship. Sábato’s analysis produced an explanation that was quickly labeled the « theory of the two demons ». This « theory » established a paradigmatic narrative in which Argentina had experienced a war between two demons: on the one hand, the « guerrilla », on the other, the military forces. According to this narrative, Argentinean society had been trapped between these two violent forces. The critique in the preface of *Nunca Más* simply claims that the military forces neither applied the military code nor conducted any legal process against the « subversive ». Instead, of conducting themselves according to their own codex and guidelines, they engaged in a dirty war. However, the fundamental role of the text was to expose the radical evil that the military dictatorship had displayed in Argentine society. Needless to say, this report was widely read (85).

On the juridical side, and based on this political and social consensus, there was a necessity for reinstalling the idea of a democratic order under the auspices of justice, so the crimes against humanity could be punished. The political and juridical orders were once again working together — this time, however, in order to reconcile society.

Within the field of constitutionalism, the mentalities of those involves underwent a substantial change. Against the extension of legal positivism among scholars, these authors interjected several

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(84) *Nunca Más*, Informe de la Comisión Nacional sobre la desaparición de personas, 1984. In this work, the concept of Estado de Derecho is mentioned in contrast to the concept of « Estado de Sitio ». It was noted in the report that the declaration of the « state of siege » was a strategy to « grant [...] legality to the political persecution unleashed by a dictatorship that devastated our republican institutions ». It is worth highlighting, however, the appearance of the concept of « state terrorism » as a formulation for cataloging the action deployed by the repressive civil-military apparatus.

ethical questions into the legal debate. Indeed, the constitutional language was shifted as a result of the inscription of the Argentine tragedy, not in the logic of an internal war but in the universal history of the «administrated massacres» of the 20th century (86). History and politics — which had determined the constitutional question — could never have sufficiently confronted the radical nature of the evil that had unfolded in Argentina. Hence, the constitutional question of the order was ultimately displaced by the introduction of ethics into law.

In order to achieve the restoration of democracy, a number of jurists educated in the analytical school of philosophy worked side by side with President Alfonsín in trying to establish a new paradigmatic discourse from which to judge the crimes against humanity committed by the dictatorship. They restored the concept of Estado de Derecho, but this time distancing themselves from the «dogmatic» definition and linking it to the ethical question of human rights, truth, and justice (87). The reception of Habermas, Elster, and Rawls, among others, started an accentuation of democratic presuppositions and of philosophical debate inside the language of constitutionalism (88). This new methodology criticized the idea of reducing constitutional thinking to political order and power (in a Schmittian way) but also against excluding the question of ethics as a central feature of the debate — as the legal positivism had done. In short, the main characteristic of this new constitutionalism was the reinstallation of the idea of values at the heart of the discourse,


(87) Carlos Alchourrón, Eugenio Bulygin, Eduardo Rabossi, Carlos S. Nino, Genaro Carrió, among other jurists, all worked to revitalize the democracy by establishing a new paradigm of justice.

(88) For example, the very same titles of Carlos S. Nino’s works offer the reader a clue as to the radical change in the way of thinking when it came to constitutionalism and ethics: El constructivismo ético (1989); La constitución de la democracia deliberativa (1996); Ética y Derechos humanos (1984); Fundamentos de Derecho Constitucional (1992). This ethical tendency in constitutionalism was described by Danilo Zolo: D. ZOLO, Teoria e critica dello Stato di diritto, in Lo Stato..., Costa & Zolo (eds.), cit., p. 18 f. 3.
which served as a reaction against legal positivism and the extreme-politicization of society.

In this context, the concept of *Estado de Derecho* entered a new phase of resemantization. In the first stage of the recovery of democracy, as recalled by a key witness, the concept expressed « the most common conciliatory argument [which] consisted in that the military could have achieved the same goals through summary trials and public death sentences according to laws authorizing such procedures » (89). This definition was nothing but a synthesis of the « theory of the two demons ». However, we must not forget the strategic use of the concept linked to the image of the two demons, which was back then deeply engrained in society. It is still possible to see that a very clever strategy for criticizing the military powers, which were still putting weak democracy at risk, is there. This initial moment lasted until the trial of « Juntas Militares ». This juridical act, with its subsequent symbolic overlay, radically modified the semantic structure of the concept.

The second moment can be only recaptured from an *image* that served as a re-foundational mythos of Argentina’s democracy. As Vezzetti stated, « certain scenes condense a historical plot. [...] These scenes have a mythological character and therefore sustain a weft of beliefs » (90). This historical plot was precisely condensed by the image of the legal prosecution of dictators by a court of law, which judged them according to the law and gave them all of the guarantees afforded by the constitution. The trial represented two historical experiences divided by a thin line of a then still fragile democracy. The obscure experience of crimes against humanity confronted the « universal moral » in the courtroom; one belonged to the recent past, and the other to a hopeful future (91).

This image was linguistically represented as the triumph of the *Estado de Derecho* over the *Terrorismo de Estado* (state terrorism). While neither of these concepts could be clearly formulated, they

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(89) C.S. NíNO, *Juicio al mal absoluto*, Buenos Aires, Ariel, 2006, p. 198. The concept was used by President Alfonsín in his speech at the reception of the CONADEP report (September 20th, 1984).

(90) VEZZETTI, *Pasado y presente...*, cit., p. 16.

(91) VEZZETTI, *El juicio...*, cit., p. 5.
served as a denial of their counter-pair synthesized in a powerful emotional image. In this way, the emotional significance of this experience — almost impossible to describe — was immediately linked to the concept, and a whole set of new signifiers was incorporated into it. *Estado de Derecho* became an emotional signifier encompassing a variety of positive concepts, such as « democracy », « constitutional legitimacy », « human rights », « political participation », etc. (92). The emotional meaning also expanded its power to contain a whole set of counter-concepts, such as « dictatorship », which became equivalent to « state terrorism ».

From that period onwards, the *Estado de Derecho* became a condensation of the new political language of the democratization process, and this can be observed by the Supreme Court’s use of the concept. In contrast to the experience of the past — when the Supreme Court utilized this concept in a positivist manner — since the 1980s, the concept has been increasingly used, almost exclusively in cases involving crimes against humanity. The emotional semantics tied to the concept helped further its expansion and consolidation within the legal field. A paradigmatic example synthesizing this new meaning can be seen in a work published by the *Federación Argentina de Colegios de Abogados* in 2007 entitled: *Los Abogados, el Estado de Derecho y los Derechos Humanos*. It is quite remarkable that this emotional concept was not introduced in the new Constitution of 1994 (93).

Now, since the sanctioning of the new Constitution, there has been a renewal of positivist interest in the constitutional interpretation. Constitutionallists have chosen to provide descriptive comments about every article, integrating above all the jurisprudence, the comparative perspective regarding the Constitution of 1853, comparative law, and so on. Meanwhile, the ethical problem of the Constitution has found a home in the specialized fields of human rights law, analytical philosophy, etc. To this day, the different

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(92) In this context, the expression « imperio de la ley » also appeared; however, it meant subjecting the « absolute power of the military » to constitutional-democratic legality. See: B. SARLO, *No retroceder*, in « Punto de Vista », 30 (1987), p. 4.

(93) However, this concept was incorporated into two provincial constitutions: in Santiago del Estero (2002) and in Tierra del Fuego (1991).
interpretative and methodological approaches within constitutional law have maintained a kind of respectful synchrony — perhaps owing to the potential risk of reducing some still very emotional and historical concepts — like Estado de Derecho — to mere abstract definitions.


In this article, the long history of the Estado de Derecho was recovered (from its early critical reception in the 1930s up to the emotional re-significance in the 1980s). That the variety of meanings entailed by the concept were closely tied to the political events that took place in Argentinean political history is easy to see. That should not come as a surprise given the characteristics of constitutionalism as a specific mixture of juridical and political languages. Nevertheless, in order to create a conscious approach to legal languages, it is not enough to only speak about contexts. Therefore, the material conditions for the production of those discourses permitted an understanding of the process of professionalization of the language of constitutionalism (from orality to legal reviews to the constitutional treaties). The variety of methodological approaches were also considered at every single stage along the process of consolidating the tradition. Above all since the formation of a determinate field requires a specific grammar and conceptuality that establishes a way of judging what belongs to the legal tradition and what is peripheral to it (94).

From the perspective of legal methodology, the connection between political experience and legal conceptuality becomes clearer. In fact, each methodological tendency responded to the role of law in a political context (outside the scientific field), and it also established the conditions for the possibility (and the limits) of constituting the various senses of the concepts inside the internal order of discourse. The changes in methodological perspectives determined how constitutional law should be thought about and

written, so it is not only connected with the internal analysis of concepts but also (and primarily) with the inclusion/exclusion criteria that allowed for the social construction of a determined scientific field as well as the establishment of a tradition. Going back to the concept of Estado de Derecho, the historicization of the concept, through the history of the language of constitutionalism, demonstrated the variations of its meaning, and therefore, this insight can help to understand the political role of the concept at different periods in time, which can only be accomplished by bracketing out the emotiveness that it currently harbors (Verfremdungseffekt). It is precisely this recognition of the varied layers of meaning incorporated into the concept that allow it to deal with historical analysis. In a radical sense, it can be asked: What did an Argentinean jurist in the 1940s understand the term Estado de Derecho to mean? Its meaning was not only quite different from our contemporary usage, it was also a word utterly foreign to his vocabulary. This conceptual consciousness would help to confront the traditional constitutional history that judges past experiences from the perspective of abstract models constructed in the present. By disrupting the security this concept offers to the narrative of constitutional history — written by constitutionalists — not only are the anachronisms exposed, but more important, the prejudices on which a tradition is built can be recognized.

The historical-conceptual approach is able to show more than just the « inner meaning of concepts » in history. Once it focuses on the treatment of temporalization (Verzeitlichkeit), it can open up new possibilities for criticizing contemporary uses. For example, in the 1940s, some jurists declared that the Estado de Derecho (assimilated to the liberal State) had come to an end. As such, the horizon of expectation was guided by other counter-concepts, such as the « welfare state ». In the 1980s, the very same concept defined another temporalization of social experience. Against the traumatic past experience of Terrorismo de Estado, the Estado de Derecho

gained a significant new role as a concept oriented toward the future. This temporalization found its way into the concept through the association with democracy, and therefore, the demand for more Estado de Derecho became a fight for having a more democratic and peaceful society.

Coming back to the present, there has been in Argentina recently a dangerous social prejudice against the politics of « human rights and memory ». Some political actors have claimed that the Estado de Derecho has already been achieved. Therefore, any criticism against the government is an attack on Estado de Derecho. This new tendency shows that the concept has been used as a way of sustaining the political status quo by recurring to an emotional concept. In fact, the new counter-concept that appears against the backdrop of this new pragmatic used is « destabilization ». In this new clime of ideas, the emotional bond between the concept and the democratization process of the 1980s has started to erode.

The new usage has also changed the internal temporalization of the concept, by inverting its previous role as a progressive concept to a more conservative one. In fact, this process opens the gates to an institutional semanticization describing the concept as a paradigm of protection of the new form of political order. Perhaps all of these modifications of the political language are symptoms of a changing era.

In the case of constitutionalism, the renewed positivist and ethical approaches have convived till now; however, as it is easy to see in the academic milieu, their languages are becoming more and more removed from one another.

The radical criticism of conceptual history is able to confront this problem by simply asking about the meaning of this concept in the present. As this analysis has shown, jurists usually just reproduce the meaning and the historical reconstruction provided by the tradition in which they dwell. The radical question would be: What are the conditions for the possibility (political, methodological, etc.) of a changing the meaning of this concept in the present day and age? Are there new concepts that contradict the Estado de Derecho? Are we facing a restructuration of political and juridical languages? If so, it would be important to take concepts a little more seriously.