LAWFARE: THE JUDICIALIZATION OF POLITICS OR THE POLITICIZATION OF JUSTICE

Lawfare and democracy. Law as a weapon of war

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President Donald Trump look on as Supreme Court Associate Justice Clarence Thomas swears in Judge Amy Coney Barrett as Supreme Court Associate Judge. Monday, Oct. 26, 2020, on the White House. Picture by Andrea Hanks

Since law is law, malicious individuals have made a crooked or twisted use of it in order to take advantage of it illegally. The issue at stake is not so much that some people take advantage of the law for their own benefit, which may be legitimate. But rather that there are people who use it for purposes other than those provided for by the legal system itself, and which may even be contrary to it, thus perverting existing institutions, or creating new ones that may conflict with the general principles of the system. Hence, this is not a new phenomenon.

Introduction: the birth of lawfare

The Roman lawyer Aulus Gellius explains in his work of the 2nd century *Attic Nights* one of the most beautiful logical paradoxes [1]. One fine day the Greek sophist Protagoras met a

potential student, Euatle, who wanted to take rhetoric lessons with him but had no money to pay. Protagoras reassured him by saying, “Don’t worry, Euatle. You learn from me, and when you win your first case in court, you will pay the price you owe me for all the lessons I have given you.” Euatle gladly accepted the proposal, and studied with Protagoras for years. After completion of the training, however, time passed and Euatle did not pay for the classes at Protagoras arguing that he had not yet won any case. One day, finally, Protagoras sued him. Before entering the trial, when he was at the door, Protagoras said to Euatle: “Whatever happens, you will pay me what you owe me. If I win the lawsuit, you will be sentenced to pay me. And if I lose, you will win your first case and will have pay me.” Euatle replied to this: “No, master. Whatever happens I will not pay you what I owe you. If I win, I will be exempted from paying. And if I lose, I won’t have won my first case.” Who uses law as a weapon in this story, Protagoras or Euatle? The paradox does not allow us to see it quite clearly. It may appear that Euatle is the abuser, as he did not pay Protagoras for the lessons he owes. However, we can also consider Euatle is right, because he has not yet been able to take advantage of the lessons for not having won a single case, that Protagoras was wrong to make that offer, and that in any case it appears that his lawsuit is a trap for Euatle. The strategic or even abusive use of law, the use of law as a weapon, also known as lawfare is as old as law itself [2].

Examples of this abound: false allegations and accusations, unfounded or excessive punishments, undue or fraudulent procedural delays, convictions for uncorroborated facts, the famous diabolical evidence that in the Middle Ages required defendants to prove their innocence in the face of an accusation, for example, of heresy or witchcraft. The intricate world of law and justice can turn, in bad hands, into an indecipherable dead-end trap, an immense nonsense that quickly turns into a nightmare of terrible consequences, as Franz Kafka described in his novel *The process*, published posthumously in 1925. Hence, why almost all studies on the topic agree that the idea of lawfare began in 2001?

> We have plenty of examples of false accusations, unfounded punishments, fraudulent procedural delays or convictions for uncorroborated facts. The intricate world of law and justice can turn, in bad hands, into an indecipherable trap, an immense nonsense that quickly turns into a nightmare of terrible consequences

On September 11, 2001, terrorists under the orders of Bin Laden crashed their planes in which they were flying crashed into the Twin Towers of New York and the Pentagon, killing more than 2,000 people. Some consider that day a turning point in the history of modern liberal, democratic and guarantee law, which until then had always followed a path of progress in the guaranteeing of rights. The reaction to the attacks by the United States, led by George W. Bush, was not long in coming. In just one month, Congress passed the Patriot Act by a very large majority, initiating the use of the so-called lawfare or “legal war”

against terrorism and giving “legal” coverage to actions that few internationalists would hesitate to call contrary to international law. Just think of the continuing human rights violations of hundreds of people at the Guantanamo Detention Centre (Cuba) for years, or the Bush administration’s own attempt to justify certain forms of torture, such as waterboarding, as is they were legal. Not to mention specific acts of torture such as those that were uncovered in Abu Ghraib prison in Iraq. However, and somewhat paradoxically, the Bush Administration itself accused human rights activists of protesting against these forms of culture and of filing allegations of human rights violations of illegally using the right to interfere in what Bush considered an armed conflict in which national security was at stake. Who exactly was using the law as a weapon, the Bush administration or human rights organizations?

That same year 2001, Charles Dunlap, a senior U.S. Air Force officer published a military strategy article popularizing the term lawfare [3]. However, Qiao Liang and Wang Xiangsui already used it two years earlier in a book on military strategy called *Unrestricted Warfare* and, in fact, the first documented mention of the word lawfare was made by Australians John Carlson and Neville Yeomans in their article “Whither Goeth the Law. Humanity or Barbarity”, published in 1975, in which they lamented what they described as a growing trend in the legal systems of the time towards increasingly adversarial and confrontational forms.

Given this background, it is perhaps not surprising that in 1985 the German criminalist Günther Jakobs explained that criminal systems sometimes treated defendants not as citizens, subjects of fundamental rights, but as enemies of the social order. Based on Carl Schmitt’s idea of the state of emergency, which is the one where the dialectic between friend and foe is most strongly revealed, Jakobs developed one of the most influential and controversial criminal doctrines of recent years: the criminal law of the enemy (or *Feindstrafrecht*). The basic idea is simple. Rights and guarantees are to be respected only when it comes to our fellow citizens. If we speak instead of terrorists, of enemies of society who threaten our national security, we can start using law simply as an instrument of defence, that is, as a weapon of war [4]. The purpose of protecting the security of society would apparently justify the means of cancellation or restriction of fundamental rights for some people, as well as the indiscriminate use of forms of legal coercion such as arbitrary detention; the extension of pre-trial custody; the initiation of lawsuits without a truly solid basis; the forced or extensive application of criminal types that do not quite fit the facts; and even legislative reforms to toughen the penalties for certain “enemy crimes” and the drafting and execution of forceful and exemplary sentences that defend society from the threat posed by the enemy. Jakobs himself gave the best synthesis: “the enemy has fewer rights” [5].

At first it seemed that Jakobs was just describing a pattern or process of transformation of Western legal systems. After 2001, however, he began to consider his idea of enemy’s criminal law as an understandable and justifiable defence mechanism. Why was Jakobs able to anticipate by 15 years the attack on the Twin Towers and the reaction it generated? Because he had identified a latent drive in our democratic legal systems that is indeed prior to 2001, a very clear and obvious drive. For example, in the criminal law of the 80s and 90s

in the midst of the rise of punitivism and of the Anglo-Saxon policies of “tough on crime”, “three strikes and you are out”, and others, especially in the context of the war on drugs.

Seven years after the 9/11 attacks, and once the two presidential terms of Georg W. Bush were over, Barack Obama was contesting a very close election with John McCain. His speech was strongly based on the hope of building a better world, of a new international order based on peace, human rights and ecology, and above all with the promise to turn the page on Bush’s legacy. In one of the election debates between Obama and McCain, at a time of questions from the audience, a woman threw a poisoned dart at Obama that would eventually prove prophetic. She asked the Democratic candidate what he would do if, once elected President of the United States, the intelligence services told him that they had located Osama Bin Laden in Pakistan. Obama did not hesitate. “We will kill Bin Laden. We will crush Al Qaeda. That has to be our biggest national security priority” [6]. That terrible statement perfectly summed up what is perverse about the idea of lawfare. Everything is allowed when it comes to defending the national security from our enemies. If Bin Laden is a terrorist who “attacks” the United States, the United States has the right to defend itself and kill him, even without a fair trial. Such is the war. The purest example of the enemy’s criminal law, the lawfare raised to full power. Moreover, worst of all, Obama’s response did not cause any discomfort or scandal among the American public. On the contrary, he gave the answer everyone expected.

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We may never know, but it is hard not to think that this is exactly what Obama ordered in 2011 when elite American forces actually killed Bin Laden. Obama, who had won with the promise of ending George W. Bush’s revenge international policy, based on the childish division between “good and bad,” between civilized countries and the so-called “axis of evil”, that is, between friends and enemies. He was not able to close Guantanamo or bring Bin Laden to court so that he could have a fair trial with full criminal guarantees.

Recent developments of the lawfare: law, politics and democracy

During the last decades, the idea of lawfare has evolved fundamentally linked to the international law, and especially the law of war and the armed operations and the human rights international law [7]. International lawfare undoubtedly refers to the abuse of international legal instruments, to a twisting or betrayal of their principles, but also, paradoxically, to lawsuits between countries in the context of conflicts that might otherwise have been resolved by armed form. Seen this way, lawfare could even have a positive side, as long as it is a real alternative to war or armed confrontation. However, I will not dwell on international lawfare. I want to focus instead on three phenomena that occur at the national

level, which although not new, have accelerated in the last 20 years. These phenomena today are a serious danger to the health and the consolidation of our democracies:

- The increasing use of lawfare as an everyday political weapon an alternative to ordinary democratic processes.
- The judicialization of politics, complemented by the politicization of justice.
- The growing repression of protest movements and the general abuse of criminal law to restrict fundamental rights, especially those of a more political nature.

The use of lawfare as a tool of internal political struggle

First, in the last two decades we have witnessed an expansion of the use of lawfare as a tool of internal political struggle, that is, as a weapon that some political actors use to achieve, often illegitimately, goals they have not been able to reach politically, by the force of the ballot box. This includes many of the examples already mentioned in the first part of the article: false allegations, unjustified police or prejudicial actions, fake news with legal content or outcomes, parties' outlaws, invalidation of political lists, etc. This use of political lawfare has been especially intense in the Latin America. As is often the case, it is difficult to discern here which uses of law would be legitimate and which would be illegitimate. Cases such as the legal prosecution of Lula or Dilma Rousseff in Brazil, Fernando Lugo in Paraguay, Rafael Correa in Ecuador, Evo Morales in Bolivia, or Cristina Fernández de Kirchner in Argentina, have been considered as examples of lawfare [8]. Perhaps the case of Lula and Rousseff is, of all of them, the clearest example of illegitimate lawfare.

It happens, however, that some of the legal battles against these political leaders may have a solid legal basis, that is, be motivated by actual criminal or illegal conduct misconducts. Here we find the paradoxical story of Protagoras and Euatle with which we began this article. Who is trying to take advantage of who using the right? Any politician facing criminal charges will immediately defend himself by saying that he or she is being the victim of illegitimate law enforcement. The problem, as we have seen in the previous examples, is that only a court can really separate the wheat from the chaff. How do we know if Cristina Kirchner has been or not the victim of illegitimate lawfare in the many legal cases brought against her? The only way to know it is to rely on an independent court to look into the case. However, this implies hopelessly judicializing the conflict.

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In fact, this could have, as with the examples of international law, a positive dimension, if recourse to justice is as an alternative to other more aggressive and even violent forms of political confrontation. After all, in a legal system effectively governed by minimum principles of rule of law and judicial independence, some basic rules must be observed (such as the presumption of innocence or the right to defence) to enable the victim of lawfare to defend himself better. It is clear that this alleged advantage vanishes in those cases where these basic principles are not met, when law is twisted by the police, prosecutors and judges themselves, with the aim of serving a particular political cause. After all, as Thomas Jefferson warned in a famous statement, law can become a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. What happens then, as Orde Kittrie perfectly explains, is that an "alternative law" is born, aimed only at deliberately attacking someone for strictly political reasons, a right that distorts and subtly betrays the basic principles of the rule of law itself, even though you say you are serving the principle of legality [9].

The judicialization of politics and the politicization of justice

This brings us to the second phenomenon I want to analyse, that of the judicialization of politics and the politicization of justice. That justice is politicized is nothing new. In the United States, for example, the composition of the Supreme Court has been analysed for decades, identifying which of the nine magistrates have a conservative ideology, which have a progressive one, and which can vote with one block or another depending on the case, the so-called swinging judges. Perhaps the judicial control exercised by the Supreme Court, or in Spain the Constitutional Court, over the laws can be justified, as Hamilton, Marshall, or Kelsen thought, as well as much of modern constitutional theory do. However, what is clear is that judges' decisions are not politically neutral. If they were, we would not be able to predict, with a small margin of error, what the majority of judges of the highest courts will vote on in many of the rulings, especially those with a more clearly political and ideological component. Judges are human beings, and as such, they cannot fully transcend their own ideology or their subjective personal bias. Moreover, it is even more difficult if the method of appointment has an eminent political nature, as is precisely the case of these high courts in many countries of the world. In addition to that, this problem, which has existed since the very beginnings of modern legal and judicial systems, seems to some jurists and observers to have worsened over time. We all know of examples of deteriorating conditions of judicial independence in Europe and the United States, not to mention Latin America. This is why the first phenomenon I have described, that of political lawfare, is aggravated by the politicisation of justice.

Moreover, to the politicization of justice we must add another new dimension: the judicialization of politics, no longer understood as the illegitimate use of lawfare against a candidate or an opponent, but as the judicialization of major political decisions. In the last three decades, we have witnessed an increase in the tendency for major issues of political discussion to be finally decided by the highest courts, or at least for them to be able to exercise a certain veto power. The U.S. Supreme Court deciding the President of the United States in the case of Bush v. Gore, in the year 2000, with the consequences that we all

know and that I referred to at the beginning. The German Constitutional Court deciding last year on whether the 2006 Lisbon Treaty or the Eurobond policy were acceptable. All the high courts of our democracies that have had the last word on basic issues of territorial balance, monetary, financial and fiscal policy, redistribution of wealth, cultural and language policy, electoral legislation and political rights. In addition, of course all those issues that may affect civil and social rights, from abortion to death penalty, to euthanasia, same sex marriage or freedom of speech.

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This is what Canadian constitutionalist Ran Hirschl has described as “the judicialization of mega-politics.” Not only isolated actions are prosecuted, such as a particular protest, but also any political decision of a certain importance ends up being taken to court so that the judges will exercise ultimate control. Always justifying their decision by the preservation of constitutional values. This implies a de facto power draining from the most purely political institutions, such as Parliament or the Government itself. This is how our democracies, Hirschl tells us, are becoming more and more “juristocracies” [10]. At best, a juristocracy will have independent, competent, and responsible judges making good decisions. At worst, unscrupulous judges will create the “alternative law” we talked about earlier only to pursue certain political ends for their own benefit and against much of society. In any case, for better or worse, a juristocracy is not a democracy.

The use of lawfare to persecute social movements or protest actions

Finally, we come to the third recent phenomenon linked to lawfare, which is the increasing use of lawfare to persecute social movements, or protest actions which should be protected by the fundamental political rights of assembly, demonstration and protest. Let us start with some data. Helen Poulos and Mary Alice Haddad, for example, have thoroughly studied 175 movements or actions of peaceful environmental protest that took place in the world between 1965 and 2003. Their study reveals that a third of them have been repressed by the police and that the vast majority of these repressions –but not all– have taken place in countries with low per capita incomes, mainly in Latin America and Asia, and against groups of protesters who are part of vulnerable or marginalized sectors [11]. The same pattern of repression and criminalization of social and protest movements is identified by the anthropologist Carolijn Terwindt, but no longer concentrated in poorer countries, but extended to all liberal democracies [12]. As Rob Watts tells us in a magnificent book published this year, *Criminalizing Dissent*, cases of repression of protest movements are not limited to authoritarian countries or countries with a weaker democratic history, but also

reaches, in a very worrying way, supposedly consolidated liberal democracies [13]. There is a growing tendency to pursue dissent, protest, and criticism. It is certainly an anti-democratic trend, but it is not limited to non-democratic countries.

Violent police repression, police charges, for example, are just one of the many faces of the state's dirty legal war against these protest movements. Other mechanisms of alleged criminal prevention are well known, usually designed to fight terrorism, but which end up being applied to virtually any citizen perceived as an annoying protester [14]. We only need to think of closer examples such as the so-called Gag Law passed by the Popular Party in Spain. Or the legislative and judicial restrictions imposed on freedom of speech, often using tools such as the hate speech that were designed to protect vulnerable social groups having historically suffered severe domination by dominant groups. However, now, in a typical law-twisting and lawfare move, they can end up protecting precisely the powerful, like a head of the state, the army or the police. Alternatively, consider the prototypical case of Tamara Carrasco, arrested on charges of terrorism and finally acquitted [15].

Although the specific repression of environmental movements dates back to the 1960s, as Poulos and Haddad show, much of the literature on the subject agrees in considering 1999 –again!– as the year of a certain turning point. It was the crackdown on protests in Seattle against the World Trade Organization summit, followed by those in Genoa, where one of the protesters died. It cannot be a coincidence that scholars studying the social movements and the police repression and criminalization identify a point of worsening just as military strategy analysts enumerate the beginnings of contemporary lawfare. As I tried to show in the first part of the article, what we are seeing developing in multiple areas and at different levels must necessarily be different dimensions of the same more complex and deeper phenomenon. We do not yet fully understand the reasons for this phenomenon. Nevertheless, we can say that it is dangerous for democracy, human rights and the rule of law, even more when accompanied by the growing social and political polarization that characterize our societies.

> Democracy cannot exist outside the rule of law, just as politics cannot transform the world without the use of law. The problem, therefore, is not law interfering with democratic politics; the problem is when law becomes a weapon of war, when used fraudulently or illegitimately

Law is the essential instrument of politics and the undeniable foundation of all democracy. Democracy cannot exist outside the rule of law, just as politics cannot transform the world without the use of law. The problem, therefore, is not law interfering with democratic politics. The problem is when law becomes a weapon of war, when used fraudulently or illegitimately, when abused against both its own general and basic principles and its own essential democratic values. Democracy requires absolute and scrupulous respect for

pluralism and the difference of opinion, which must be arbitrated in the headquarters and the spaces of political nature designed for it, like the parliaments. Democracy also requires an active and watchful society, ready to take to the streets to defend its rights and liberties. The vast majority of the civil, political and social rights we enjoy today were conquered thanks to political struggle and plural public deliberation that transformed and moved society in a certain direction. Political lawfare and the criminalization of protest, let alone the use of enemy's criminal law, are therefore purely anti-democratic phenomena that should make us all concerned, and for which we need effective and urgent solutions. If necessary, we must take to the streets to defend democracy as well.

REFERENCES

1 — Aulus Gel·li, *Les nits àtiques*, Barcelona, Bernat Metge, 2018.

2 — This is, actually, the most widespread definition of lawfare, and also the title of one of the best works on the topic: Orde Kittrie, *Lawfare: Law as a Weapon of War*, Oxford, Oxford University Press, 2006.

3 — Charles J. Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Cambridge, Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001. See also Charles J. Dunlap, 'Lawfare Today: A Perspective', *Yale Journal of International Affairs*, Winter, 2008, pp. 146–54. For further information, see also Dunlap's basic lawfare manual: Charles Dunlap, "Lawfare 101. A Primer", *Military Review*, May-June 2017, available online.

4 — See Günther Jakobs & Manuel Cancio Melià, *El derecho penal del enemigo*, Madrid, Civitas, 2006. See also Jesús-María Silva Sánchez, *La expansión del derecho penal: aspectos de la política criminal en las sociedades postindustriales*, Madrid, Civitas, 1999; E. Raúl Zaffaroni, *El derecho penal del enemigo*, Madrid, Dyckinson, 2006; and Manuel Cancio Melià & Carlos Gómez-Jara Díez, *Derecho penal del enemigo*, 2 vols., Madrid, Edisofer, 2006.

5 — See "Los intelectuales del mundo y La Nación. 'El enemigo tiene menos derechos', dice Gúnther Jakobs", *La Nación*, July 26, 2006. Available online.

6 — The question and the answer are available here.

7 — See the works of one of the leading experts in the field of international lawfare: David Kennedy, *Of War and Law*, Princeton, Princeton University Press, 2006; and David Kennedy, "Lawfare and Warfare", in James Crawford & Martti Koskenniemi (eds), *The Cambridge Companion to International Law*, Cambridge, Cambridge University Press, 2012.

8 — In this video you can find Harvard Professor John Comaroff's explanation about how the persecution that Lula and Dilma Rousseff received was a political lawfare paradigmatic case. Comaroff is one of the leading scholars focused on the idea of lawfare. For a complementary point of view that includes other non-strictly political actors as promoters of lawfare, see also Juan M. Padilla, *Lawfare. The Columbian Case, Biblioscholar*, 2012.

9 — Orde Kittrie, *Lawfare: Law as a Weapon of War*, Oxford, Oxford University Press, 2006.
10 — See R. Hirschl, “The judicialization of politics”, in R. Goodin (ed), *The Oxford Handbook of Political Science*, Oxford: Oxford University Press, 2011; see also his previous book *Towards Juristocracy*, Cambridge: Harvard University Press, 2007.
11 — See H. Poulos & M.A. Haddad, 2016: “Violent Repression of Environmental Protests”, *SpringerPlus*, 5, 230.
12 — See C. Terwindt, *When Protest Becomes Crime*. *Politics and Law and Liberal Democracies*, London: Pluto Press, 2019. See also *Oñati Socio-Legal Series* volume 14, number 1, 2014, edited by Terwindt and Gustavo Rojas-Páez. Available online.
13 — R. Watts, *Criminalizing Dissent. The Liberal State and the Problem of Legitimacy*, New York, Routledge, 2020.
14 — See, for example, M. Welch, *Flag Burning. Moral Panic and the Criminalization of Protest*, New York: Aldine de Gruyter, 2000. E.R. Zaffaroni, “Derecho penal y protesta social», included in “¿Es legítima la criminalización de la protesta social?” from the book *Derecho penal y libertad de expresión en América Latina*, Buenos Aires: Universidad de Palermo, 2010, pp. 1–15; and R. Gargarella, “Law and Social Protests”, *Criminal Law and Philosophy*, 6(2), 2012, pp. 131-148.
15 — Montse Riart & Xavi Tedó. “Court acquits Tamara Carrasco two years after being arrested on terror charges”. Article published at Diari ARA on October 7, 2020. Available online.



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