Jus Cogens (2023) 5:229–253
https://doi.org/10.1007/s42439-023-00083-y

ORIGINAL ARTICLE

Was the Rule of Law the Only Casualty of Polity Design in the New Latin American Constitutionalism?

Franz Xavier Barrios-Suvelza[1]

Accepted: 17 October 2023 / Published online: 6 November 2023
© The Author(s) 2023

Abstract
The objective of this article is to introduce a new concept for grouping all countermajoritarian instruments which became the true casualties of polity design during the New Latin American Constitutionalism (NLAC). This theoretical endeavor, which has not been undertaken until now, will be discussed on the basis of the constitutional upheavals that occurred between 1999 and 2009 in Venezuela, Ecuador, and Bolivia. By addressing a specific theme of this experience, namely its implications for the relationship between democracy and countermajoritarian devices, this article shows why an aggregating concept such as state ataraxy is needed. This concept fills the gap that hinders understanding of what has been institutionally dismantled in the course of these reforms. The article then challenges the claim that with the collapse of countermajoritarian institutions, democracy necessarily collapses. It concludes with a new assessment of the novelty that the NLAC may have brought concerning the tension between democracy and countermajoritarian institutions. The findings contribute to understand one of the most enduring concerns of state theory in general, the tension between democracy and the rule of law.

Keywords New Latin American Constitutionalism · Democracy and rule of law · State reforms in the global South · Countermajoritarian difficulty

1 Introduction

To understand how Latin American statehood has changed over the past two decades, we must look at what has been called the New Latin American Constitutionalism (NLAC). The concept of NLAC is in itself still controversial, and there is no agreement on which countries this label should comprise (Salazar 2013, p. 54; Wolkmer and Machado 2011, p. 403). It is true that constitutional renewal has taken place

✉ Franz Xavier Barrios-Suvelza
franz.barrios_suvelza@uni-erfurt.de

[1] Faculty of Economics, Law & Social Sciences, University of Erfurt, Nordhäuser Str. 63, 99089 Erfurt, Germany

in many Latin American countries since the 1980s, and that the NLAC shares characteristics with the fourth wave of "human rights and multicultural" constitutionalism (Gargarella 2017, p. 215), which went beyond the third wave of social constitutionalism typical of the twentieth century (Curcó 2018, p. 217), which followed the second "foundational" and first "experimental" waves (Gargarella 2017, p. 214). Not surprisingly, some speak of a "general phenomenon" (Elkins 2021, p. 461; Curcó 2018) of constitutional transformation that began with Brazil in 1988, followed by Colombia in 1991, and that continued a few years later in Bolivia, Venezuela, and Ecuador. These last three countries, referred to as "Bolivarian" (King 2013; Elkins 2021), are then considered only a subset or "the militant fringe" (Elkins 2021, p. 461) of the general phenomenon. I disagree. Although the NLAC shares with other currents of constitutional transformation in the region an interest in the link between law and social change (Mc Manus 2021, p. 2), this common concern does not turn them all into a single clump. NLAC represents a pattern that is qualitatively different even from the pioneering Colombian reform of 1991 (Mc Manus 2021, p. 19). In this context, Viciano and Martínez (2011), p. 5) distinguish NLAC from "neoconstitutionalism," which emerged in the 1980s as a result of judicial activism in order to mitigate the impact of neoliberalism in Latin America (Rodriguez Garavito 2009). This doctrine relied on progressive-minded, morally evaluative judges who downplayed the role of the majority principle (Mc Manus 2021, p. 18), which diverges from NLAC's rationale. While Viciano and Martínez (2011) acknowledge that neo-constitutionalism has been a progressive step, they hasten to underline the new quality of NLAC. For instance, they underscore that NLAC challenged liberalism, and not just neoliberalism. To that extent, NLAC also barely fits into "transformative constitutionalism," which is associated with the "normative trinity of rule of law, democracy and human rights" (Mc Manus 2021, p. 2).

The NLAC forms a self-contained series of constitutional reforms that began in Venezuela in 1999 and were completed in Ecuador and Bolivia in 2008 and 2009, respectively (Mc Manus 2021, p. 19; King 2013; Couso 2013; Alterio 2019, p. 289). The peculiarity of the NLAC—even considering the differences in the respective constitutions (Curcó 2018, p. 213)—justifies considering it as a *fifth* wave[1] in its own right, if only because plurinationalism (Barrios-Suvelza 2012), which shines through in Bolivia and Ecuador, is qualitatively different from multiculturalism.

The NLAC cannot be equated with the constitutional text itself either, as this text may contain (Western liberal) remnants of the previous constitutional order that are alien to NLAC's spirit. NLAC also goes beyond the thesis that constitutions are more than a text (Palmer 2006) or that they should be understood as a "social institution" (Galligan and Versteeg 2013, p. 7), as this would still center around the constitution. Needles to say, NLAC is not about a methodological advice to study constitutions in their "social and political context" (Galligan and Versteeg 2013, p. 3). In fact, NLAC is a bundle of social, political, and ideational forces within which a constitution is only one element, whereby the choice of the constitution as a means of state transformation was not only central but genuine. NLAC represents thus

[1] Which is not to say that later major reforms, such as Mexico's in 2011, are also part of this fifth wave.

more of a social movement led by leaders who mobilized the non-elite social masses to transform the architecture of the state, which has translated into a cross-national, wave-like pattern of constitutional upheavals based on constitutions understood as higher law enshrining this rupture. NLAC appears as the strongest constitutional translation of a "movement of social inclusion" (Elkins 2021, p. 487).

The most comprehensive account of the NLAC is provided by Viciano and Martínez (2011), who characterize it by two fundamental traits. The first is the overcoming of the nominalism of the "old" Latin American constitutionalism; the second is the decisive role of the constituent power that should remain even after the end of the constitutional reform. For them, NLAC arose from grass-root movements, and any technical inconsistencies of the constitutional text were greeted as salutary features by simultaneously upstaging academic expertise. More importantly, Viciano and Martínez (2011), p. 13) see that NLAC radically improved the bill of rights, introduced many institutional "innovations" such as plurinationality, and addressed the symbiosis of liberal and indigenous values.

This article will focus on NLAC's impact on the tension between democracy and those phenomena that could provisionally be called countermajoritarian devices. Critics claim that NLAC has caused deinstitutionalization (Madrid et al. 2010), rule of law being one of its victims (Brewer-Carías 2020). To the NLAC proponents, NLAC has called into question the usefulness of inherited countermajoritarian mechanisms. Since both opponents and supporters agree, albeit pursuing different expectations, that these instruments of countervailing power have been damaged, one can assume that their dismantling is plausible. Moreover, while critics anticipated further damage, claiming that dismantling institutionality would *consequently* lead to the breakdown of democracy (Levitsky and Loxton 2013), NLAC proponents meant that these constitutional changes would rather bridge the gap between (popular) sovereignty and government by diversifying the modalities of democracy (Viciano and Martínez 2011, p. 21). In either way, the link between democracy and countermajoritarian mechanisms has been shaken.

The main purpose of this article is to address conceptual inconsistencies related to the tension between democracy and countermajoritarian devices in light of the NLAC. This concerns, first of all, the lack of a systematic conceptualization of *what* these countermajoritarian devices really encompass. Second, the article addresses the *conceptual* link between the dismantling of countermajoritarian devices and the breakdown of democracy. The article then offers a brief reevaluation of the novelty attributable to NLAC regarding the tension between democracy and countermajoritarian devices.

As for the first task, I will introduce a new concept to bundle phenomena such as rule of law, an independent regulator, or the division of powers into one single package. This concept is called *state ataraxy*, which broadly designates the domain within the state that responds to a logic that is structurally opposed to both democracy and the political in the strict sense. Later in the text, I explain why this term, inspired by Hellenistic skepticism, was chosen. To address the second question, the article draws on system theory to examine the conceptual interface between democracy and state ataraxy. Finally, the question of NLAC's novelty is assessed by redirecting attention away from state structures towards motivational spheres.

The following section recapitulates some premises of NLAC laid down by its main doctrinaires. The subsequent section identifies four shortcomings of the NLAC critics relevant to the democracy/countermajoritarian device dichotomy. An alternative conceptual framework is then outlined to better assess the tension between democracy and countermajoritarianism and to understand the novelty that NLAC might have brought.

2 Approaching a pro-NLAC self-description

For pro-NLAC doctrinaires, NLAC was the result of popular complaints (Viciano and Martínez 2011, p. 7) that led to the revival of "revolutionary constitutionalism" (Martínez 2010, p. 31). While these doctrinaires do not deny that constitutions should effectively regulate political and juridical relations (Viciano and Martínez 2011, p. 8), they insist that the thrust of this process was not the juridical dimension of the constitution, but its democratic legitimacy (Viciano and Martínez 2011, p. 7). They advance the following postulates about NLAC relevant to my analysis.

2.1 Towards a legitimate constraint on state power

NLAC doctrinaires contend that NLAC overcomes the notion that a constitution is merely a means of limiting power, or what scholars have termed negative constitutionalism (Barber 2018, p. 1), and see the constitution as a formula through which the constituent power expresses its will (Viciano and Martínez 2011, p. 4). Since this will is a unity, it is more appropriate for them to speak of an allocation of functions rather than of a division of powers (Martínez 2010, p. 26). It was therefore foreseeable that they would belittle the role of checks and balances. However, as Wolff (2008, p. 177) points out, this downplaying is far from denying power control per se. The goal is to replace non-elected technical agencies with mechanisms of popular control of power (Martínez 2010, p. 24). That the people become the first controller (Martínez 2010, p. 27) ostensibly appears in the "function of transparency and social control" introduced in the Ecuadorian Constitution of 2008 (Martínez 2010, p. 27), which is praised as the "most important innovation." NLAC abandoned the conventional model of technical control in favor of a philosophy of a "controlling citizenship" (Wolff 2008, p. 176).

2.2 From the "estado de derecho" (state of law) towards the "estado de derechos" (state with rights)

This is not the first time that the decline of the (liberal) rule of law[2] is welcomed especially by "radical left theorists" (Tamanaha 2004, p. 73). The NLAC

[2] I will leave aside the differences between the terms "estado de derecho" and "rule of law." See Barber (2004, p. 485).

doctrinaires' dismissive attitude toward the conventional rule of law or *estado de derecho* has several sources of inspiration. A first source is offered by the comprehensive critique of the modern state and its legal system put forward by some theorists in this context (Belloso 2015, p. 29). If both are radically questioned (Vidotte and Sousa 2017, p. 99), then it is consequential that the conventional *estado de derecho* loses its footing. This becomes clear at the latest when, as NLAC assumes, the notion of the state as *the* correlate of law, as represented by Western constitutionalism, is challenged by the coexistence of indigenous law and state law (Flores 2015, p. 65). A second source can be seen in NLAC's attempt to free popular sovereignty from the corset of the conventional *estado de derecho*, as this is understood as a kind of cage in which democracy vegetates (Belloso 2015, p. 35; Vidotte and Sousa 2017, p. 102). Thus, the constitution is understood as political will rather than (higher) law, in order to channel even irrational transformation (Gonzalez-Jacome 2017, p. 457). Finally, there is the classical Marxian perspective that sees law as an instrument of domination by the bourgeoisie, since it hides the real intentions of the elites behind a supposed neutrality. Thus, while populism may be discontent with *liberal* legality but not with law as such (Blokker 2020, p. 1449), NLAC is more radical and remains discontent even with law as such, including the devaluation of parliament as the main source of law (Flores 2015, p. 63).

In light of these sources of inspiration, it becomes clear that NLAC's dismissive attitude towards the rule of law cannot be captured by the distinction between formal and substantive rule of law (Lauth and Sehring 2009, p. 176), since the substantive variant meant here wants to respect liberal fundamental rights, but does not want to take into account the social justice achieved by the law. Hence, Tamanaha's (2004), p. 91) scheme linking formal/substantive with thin/thick theories of rule of law seems more appropriate, with NLAC approximating the thicker *and* substantive quadrant seeking "substantive equality, welfare" and the "preservation of community." Yet, it should be noted that NLAC's *estado de derechos* is more than the constitutional entrenchment of the welfare state in postwar Europe, and also more radical than opening up a legalistic view of rule of law to social and economic claims (Barber 2004, p. 475). To that extend, NLAC's *estado de derechos* coincides with the view that sees NLAC as *postliberal* constitutionalism (Farinacci-Fernós 2018, p. 35; Mc Manus 2021, p. 19), since here too the mere transition to substantive rights is not sufficient. NLAC, understood as postliberal, seeks to improve "the quality of life itself" (Farinacci-Fernós 2018, p. 33) through both "substantive policy provisions" and social rights, whereby civil and political rights are not understood as being more fundamental than social rights (Noguera 2009, p. 125). All these views undergird the concept of *estado de derechos*, understood as overcoming the conventional *estado de derecho* (Belloso 2015, p. 43), which, according to the radical left, became subservient to liberalism and capitalism (Tamanaha 2004, p. 73). The rule of law is questioned because of the impact of socioeconomic inequalities on its impartiality (Vilhena 2007, p. 27).

2.3 Regeneration of democracy

For pro-NLAC authors, the constitution is an indispensable means to regulate political life (Viciano and Martínez 2011, p. 10), belying those critics who believe that NLAC would steer everything towards plebiscitism. Accordingly, NLAC seems more aligned with formal institutionality and thus to "plebeian democracy" *à la* Mulvad and Stahl (2019, p. 593), which explicitly adheres to "constitutional rules of the game and to individual civil rights," than to a theory of "plebeian experience" *à la* Breaugh (2019, p. 585). What may be new is that the NLAC has superelevated direct citizen expression (Wolff 2008, p. 174; Vidotte and Sousa 2017, p. 112) by constitutionalizing it and rediscovering the *pouvoir constituant* (Gonzalez-Jacome 2017, p. 467). Pro-NLAC authors do not pretend that the new forms of participation should abolish representative democracy (Viciano and Martínez 2011, p. 1). Yet, for them, respect for representative democracy is not an obstacle to challenging the roots of the current political system. The NLAC aims to "regenerate" democracy (Viciano and Martínez 2010, p. 23), in part by locating social participation in high government offices (Belloso 2015, p. 40) and by incorporating democratic legitimacy even into the constitutional court dynamics (Martínez 2010, p. 29), arguing that even a judge may be democratic insofar as he allows equal participation in the elaboration of the reasons behind his adjudication (Grijalva 2017, p. 124). Not surprisingly, and misled by NLAC's strong claim to recover the people, some scholars were too swift in linking NLAC to populism (Mc Manus 2021, p. 19; but see critical Alterio 2019). Even the term "left-wing populism" may be misplaced to describe NLAC, as left-wing populism fails to overcome the "unclear distinction between elite and people" and continues to resist accounting for a "rich minority" that consistently thwarts political and socioeconomic justice (Mulvad and Stahl 2019, p. 593).

Overall, it might be too hasty to dismiss the NLAC on the grounds that, despite some promises, it still adheres to a narrow conception of democracy, as does Gargarella (2017, p. 211). NLAC actually moves beyond the short list of "constitutional obligations to ensure democratic self-determination" so typical of liberals (Farinacci-Fernós 2018, p. 32).

2.4 Clues about the conceptual pair democracy vs. institutionality

Pro-NLAC authors remind us that popular sovereignty does not operate only within the domain of the legal order (Viciano and Martínez 2011, p. 2) and welcome majoritarian decisionism outside it, thereby disconnecting democracy from rule of law. In this context, NLAC envisions an "institutional redressing" and lauds the overcoming of the classical tripartite separation of state powers. This triad is declared to be alien to democracy and one of the ossifications of traditional constitutionalism that does not deserve immutability, as democracy does (Martínez 2010, p. 19). Looking at the way US and British constitutional theory has viewed the relationship between democracy and constitutionalism, it has been argued that the NLAC has qualitatively changed the understanding of this relationship (Colón-Ríos 2017,

p. 158). For instance, NLAC constitutions provide for their own destruction through the invocation of an "original" constituent power, if foundations of the polity are to be addressed (Colón-Ríos 2017, p. 166).

3 Criticism of the NLAC critique

The NLAC was held responsible for the destruction of the state's institutionality, which then allegedly led to the breakdown of democracy. There are scholars who express more caution on this issue (Cameron 2014; Wolff 2013), although they may both overstate the real impact of more participation and underestimate the severe erosion of democracy that NLAC provoked. Others, such as Gargarella (2017, p. 216), criticize that despite all the promises of NLAC, the concentration of power that has persisted since the nineteenth century is still present and has ultimately thwarted the benefits of the increase in social participation proclaimed by NLAC designers and practitioners. Hence, the organic part of the constitution (imbalance in favor of the executive) still clashes with its dogmatic part (more rights). Gargarella's skepticism, however, has been challenged. For example, it has been argued that the toxicity of strong presidentialism should be assessed in a more nuanced way (Elkins 2021, p. 482). In what follows, I will focus on the more radical criticisms of NLAC rather than the moderate and skeptical views just mentioned, because they point out the conceptual flaws in a more direct way. I shall highlight four shortcomings of this radical critique.

3.1 What is being dismantled in institutional terms?

One problem critics face is the lack of agreement on how to conceptualize *what* has been dismantled. Some authors proclaim that NLAC has assaulted "liberal institutions" (Salazar 2013, p. 60), whereas others underscore it was "horizontal accountability" (Madrid et al. 2010, p. 142), the "division of powers" (Couso 2013, p. 10), "judicial independence" (Couso 2013, p. 1), and "fundamental freedoms" (Salazar 2013, p. 81) that have suffered the most. Despite the diversity of terms, all seem to pivot around the dismantling of countermajoritarian devices. Still, this common concern does not translate into an overarching concept.

3.2 A biased concept of democracy

To the critics of NLAC, democracy tends to coincide with the representative variant, making plebiscites or referenda seem disruptive (Mayorga 2017, p. 43). Moreover, they consider "negotiation and coalition building" (Levitsky and Loxton 2013, p. 110) to be a more crucial feature of democracy. By doing so, however, these critics strangle the nuclear attribute of democracy, which is that the majority's will, provided minority chances to become a majority are given, imposes itself upon a transitory minority. Based on their assumptions, radical critics concluded that NLAC countries have left the democratic domain. Mayorga (2017, pp. 60, 61, 66) discounts

that the outcome is a delegate democracy, semi-democracy, deficient democracy, or even competitive authoritarianism, and concludes that we are facing dictatorial or "full-scale authoritarianism."

3.3 Democracy and countermajoritarianism as inseparable elements

NLAC critics point to the loss of what in the 1990s became a general consensus: democracy is unthinkable without constitutional constraints or an independent judiciary (Couso 2013). Many critics believe that NLAC led to democracy's collapse due to "plebiscitary attacks on institutions of horizontal accountability" (Levitsky and Loxton 2013, p. 107). Thus, if one element (institutions) founders the other (democracy) inevitably collapses with it. However, it might be that this interface is far more complex than assumed and that conventional interpretations suffer from a liberal bias.

3.4 Evaporation of the state as the casing of democracy and countermajoritarianism

Regarding the question of the entity in which the relationship between democracy and rule of law is housed, some NLAC critics adhere to the idea that countermajoritarian devices are components of democracy (Merkel 2013). Hence, the first casualty of this conceptual twist is the state, which is eliminated as a contender for the role of the enveloping instance. To be sure, scholars who have chosen democracy as the casing leave some room for the state, but reduce it to a coercive machine or background condition that ensures some degree of rule enforcement and peace in society (Merkel 2013, p. 293).

4 Potential solutions to the conceptual shortcomings

4.1 Alternative venues for aggregating countermajoritarian devices

I agree with both proponents and critics that NLAC has compromised countermajoritarian devices. My contention is that critics have been unable to synthesize *what* has been institutionally dismantled, although scholarship has developed concepts sufficiently neutral and broad that could serve to aggregate these devices, avoiding thus biased (e.g., "liberal institutions") and too narrow concepts (e.g., rule of law). For making my case, I have selected two:[3] (a) horizontal accountability (O'Donnell 2003) and (b) non-majoritarian institutions (Bovens and Schillemans 2020; Koop 2015). Regrettably, these alternatives show shortcomings when it comes

[3] Other alternatives are Schmitt's (1996), p. 111) "state neutrality," Ackerman's (2000) "functional specialization," Vibert's (2007) "rise of the unelected," and Rosanvallon's (2008) "legitimacy through impartiality."

to aggregating rule of law and its cognates. As for horizontal accountability (HA), we must remember that the "balance" variant includes checks among the legislative and executive branches (O'Donnell 2003, p. 44), which will apply political control parameters that do not ensure the required impartiality (Carolan 2020, p. 24), even if the legality remains the yardstick of control. O'Donnell (2003, p. 45) himself was skeptical of this variant and therefore complemented it with the "mandated" HA, which focuses on *independent* state agencies, such as a Court of Auditors or an ombudsperson, that sanction illicit acts of other state agencies. However, the mandated HA fails when the independent state agency is a central bank whose actual concern is not illegal action. Nor would mandated HA cover civil service, which is not a typical "agency."

Another option is the concept of non-majoritarian institutions (NMIs), which can cover a central bank from the onset and is suitable for dealing with sectoral regulators and public risk assessment bodies (Bovens and Schillemans 2020, p. 514). This option also fails, however, when it must deal with rule of law or the civil service, which are not public offices. Moreover, theory on NMI (Koop 2015, p. 228) maintains that NMI suffer from a "democratic deficit," but this seems not quite logical for, say, an Auditor General, whose *raison d'être* is precisely to disconnect from democracy (Pettit 2013, p. 151). In other words, the idea of a democratic deficit may not make sense for some NMI, and if democratic legitimacy were desirable for others, such a deficit may be justified in the interest of the common good.

The choice of HA and NMI for the analysis has another implication given the great importance that majoritarianism has for the NLAC tenet. From the perspective of NLAC proponents, the dismantling of HA or NMI was tantamount to overcoming the countermajoritarian difficulty (CMD). Therefore, it is helpful to take a brief look at the CMD theory (Bickel 1986) to further contextualize NLAC's claims (Mc Manus 2021, p. 20). The problem is that the very idea of CMD is not clear. For example, some confuse CMD with constraints that apply only to the legislature or with those that emanate from the (elected) executive (see Colón-Ríos 2012, p. 53). Further, it is not clear, for example, whether the representatives should be considered part of the victims of the CMD, which would only make sense if one assumes, perhaps too optimistically, that these representatives necessarily implement the mandate of the electorate (critical Colón-Ríos 2012, p. 57; but see Koop 2015, p. 231). Moreover, the idea of CMD stands or falls with the elective origin of the controlled organs (Waldron 2021, p. 102). However, elections must be relativized, because it could be that it is the unelected constitutional judge who, by declaring a law unconstitutional, rescues the original will of the people, thus exercising "legitimate *majoritarian*" judicial review (Farinacci-Fernós 2021, p. 380, my italics). Conversely, constitutional judges can decide against the will of the people, even if they are elected. This was the case in Bolivia where the NLAC-Constitution of 2009 mandates the direct election of constitutional judges. No one less than those democratically elected judges decided in 2017 against the people's will expressed in a referendum that rejected Morales' attempt to be reelected indefinitely.[4] Finally,

[4] Decision 0084/2017.

the CMD concept is better tailored for analyzing the judiciary, but provides little guidance for the treatment of other state domains such as the civil service. There is, however, one issue that justifies taking up CMD-theory at this stage. It forces us to reflect more carefully on who is really being controlled. The term "countermajoritarian" disguises, for instance, the fact that agencies such as state auditors or regulatory agencies may constrain public authorities not necessarily connected to majoritarianism. What a constitutional court, an Auditor General, or similar independent agencies actually oppose is a dual structure that can no longer be satisfactorily captured by the idea of contra-majoritarianism. On the one hand, in certain circumstances, they may oppose democracy, understood as a state regime based on decisions by a part—a certain kind of majority—of the demos, whose will is expressed through elections that decide either on policy or on appointments to posts in the state. On the other hand, they may oppose the political in the narrower sense, i.e., the struggle of political elites for commandeering the decisive posts in the state responsible for formulating policy, a process which is not necessarily subjected to the will of the majority of the demos. Therefore, it seems conceptually more appropriate to consider not majoritarianism as the potential opponent of these independent instances of the state, but a dual opponent (democracy and politics, as just defined). My distinction of this dual addressee is similar to Koop's (2015), p. 231, italics added) claim that NMI mean "instances isolated from politics *and* elections," the latter alluding to democracy, the former to the political in the narrower sense.

4.2 State ataraxy as the aggregative concept

The challenge here is to bring together diverse "principles" such rule of law, division of powers, and constitutionalism with bodies such as "meritocratic authorities" of a "contestatory" (e.g., an Auditor General), "adjudicative" (e.g., judges), and "executive" (e.g., statisticians) kind (Pettit 2013, p. 147), all of which share a common axis. I argue that all these state devices share the purpose of limiting state power when it takes the form of democracy and politics (i.e., the dual addressee mentioned above) and share a common logic for accomplishing this task. To choose a catchy term that quickly conveys the spirit behind these devices, I will call them *ataraxic*. This choice is not entirely fortunate, not only because such a term has no links to earlier state theory, but also because its original meaning was narrowly associated with mental tranquility. Moreover, contemporary political philosophy might offer other alternatives, such as "epistemic authority" (Zürn 2018, p. 52) or "apathy" (Elster 1984, p. 89). Nevertheless, the notion of *ataraxia*, which Hellenistic Skepticism understood as a counterweight to "emotional turmoil" (Bett 2020, p. 12), seems best suited at this stage. It suffices to say for the moment that ataraxia is a better choice than *epoché* as the latter meant a stage that focuses on "suspension of judgment" (Ziemińska 2020, p. 38), which does not necessarily lead to a subsequent stage called ataraxia or "freedom of disturbance" (Massie 2018, p. 258). Ataraxia is also more appropriate than the Stoic alternative *apatheia* (Massie 2018, p. 251), which became too much associated with a lethargic person, which admittedly was not the original Stoic intention either (Massie 2018, p. 252). Thus, I interpret ataraxia more in the Skeptic's sense,

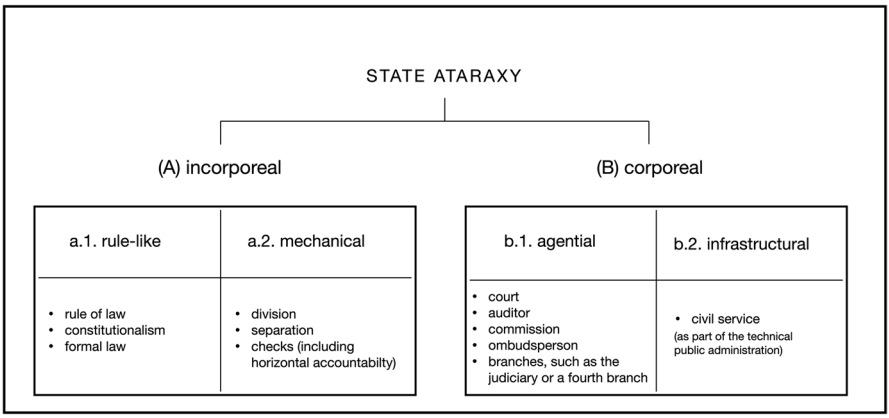

Fig. 1 The basic structure of state ataraxy

i.e., as "moderation of feelings in inescapable matters" after a "suspension of judgment in moral matters" has set in (Massie 2018, p. 256).

The virulence of the idea of ataraxia in the context of public authority becomes clear when one realizes that in every state, measures are taken that aim to steer society in the direction of a transformation guided by passions, visions, and material values. These actions are located in the democratic and political spheres and are carried out mainly by the heads of legislative and executive branches. The term ataraxia conveys well the idea of a logic opposed to this kind of transformative actions. I name the parts of the state endowed with such a logic, which is opposed to actions aimed at directing society in terms of transformation according to a particular worldview, ataraxic state devices, and I will call the aggregation of them all *state ataraxy*. State ataraxy offers a particular perspective. For instance, while we conventionally distinguish between the the legislative and executive branches, they are indistinguishable from the perspective of state ataraxy, since both branches belong equally to the structural counterpart of state ataraxy formed by democracy and politics.

State ataraxy forms a state subsystem, and to understand it, one must decompose it into its peculiar logic and into its operative configuration. As for the peculiar ataraxic logic, state ataraxy is based on rational formalism, as defined by Weber (2005, p. 507) and Carolan (2009), and on "political-moral indifference" (Kramer 2007, p. 143). In order to speak of state ataraxy this logic has to command some state decisions or actions. Even if one accepts that the judiciary creates law, this creating follows a different logic than that of the legislative branch (Kavanagh 2016, p. 232). Regarding its operative configuration, state ataraxy is versatile. We saw that when alternative approaches focus on state organizations, rule of law is overlooked; conversely, when focusing on principles such as rule of law, civil service is overlooked. One could also assume that the civil service undergirds the executive branch (see Möllers 2019, p. 254), while in reality, it may infuse all branches. Likewise, the executive branch may be regarded as a technical branch (Barber 2018, p. 75), although this preferably applies only to its part that carries a civil service. To address

these subtleties, I will break down state ataraxy into two main dimensions: incorporeal and corporeal. These, in turn, will each be divided into two sub-dimensions: rule-like and mechanical; and agential and infrastructural, respectively (see Fig. 1).

Since a principle such as the separation of powers is no more an office or agency of public law than is the rule of law, I consider both to be incorporeal. The sense of the corporeal is thus given by the existence of a clearly delimited single organization (it may be an agency, office, or commission) or an organizational complex (e.g., a nonpolitical branch such as the judiciary or a fourth branch)[5], on the one hand, or the existence of a network of public administration arrangements including civil service employees, on the other hand, all sharing the ataraxic logic with the incorporeal entities. The distinction between rule-like and mechanical within the incorporeal dimension results from comparing their different purposes. In the case of the mechanical subtype (division, separation, or checks and balances) a technical configuration of how steady public law authorities may channel their power and get interconnected is implied. In contrast, rule-like devices such as rule of law or constitutionalism constrain power not because the flow of state power is mechanically disturbed, but because public law authorities must adhere to legal principles of a formal kind.

- Incorporeal devices are, *inter alia*, either:

a.1) Rule-like, such as rule of law, constitutionalism, and formal law. Rule of law here must be distinguished from the state legal system in its capacity to provide public coercion (Waldron 2013, p. 457), and constitutionalism is here understood as a constraint (Waldron 2009, p. 271) upon state power based on higher law.

a.2) Mechanical, covering those devices designed to disturb the steady flow of state power, such as division of powers, separation of powers, and checks and balances (Waldron 2013, p. 442). By separation, I mean more than the "matching of tasks to those bodies best suited to execute them," which Kavanagh (2016, p. 223) views more related to efficiency. Separation understood ataraxically means, e.g., that the one who legislates does not execute law, since there is a danger of self-exoneration (Waldron 2013, p. 445). Division is different from separation (Waldron 2013, pp. 433, 438), since a legislative, once distinguished through separation, can further be *divided* into two chambers. Finally, the principle of checks and balances signifies either making some decisions of one branch necessarily dependent on the decision of the other branch, with an optional mutual veto if necessary as in the Loewenstein (1965), p. 44), or subjecting state actors to oversight and possible sanctions by independent agencies if illegality occurs as in the O'Donnell-model of "mandated" HA.

- The corporeal dimension, on the one hand, relates to:

b.1) State agencies such as courts, auditors, budget offices, or the bureau of public statistics. This corporeal-agential subdimension includes only agencies that are independent, so that branches such as the legislative or the executive,

[5] See the "fourth branch" proposed by Tushnet (2021), which, however, contains only some ataraxic devices.

insofar as their core political nature is concerned, would not belong here. Naturally, these agencies are one thing, the functions they perform another. The physical dimension that embodies an organization always includes a "software" like dimension in addition to the hardware dimension. Thus, a court's function is adjudication, but it is possible to decouple adjudication from courts if administrative offices are allowed to adjudicate (Kavanagh 2016, p. 222). Needless to say: if a court were to formally adjudicate, while following partisan orders from the executive, no state ataraxy would be given, since the court and adjudication would be severed from the logic of state ataraxy. Similarly, politicians may isolate state agencies from the demos, but not from the politicians themselves. These agencies could still be counted as NMI by some, but would not be ataraxic.

On the other hand, the corporeal dimension covers:

b.2) The infrastructural perspective which correlates with the technical public administration including the classical professional civil service dispersed across the whole state edifice. Civil service personnel are formally subordinated to the chain of command of the political principal, but are not politically subjugated in their routine operations which must follow technical criteria. Its ubiquitous existence—civil servants may work within the legislature (as technical budget officers) or within a municipality (as a local auditor)—confirms that state ataraxy overcomes the traditional geometric picture of the horizontal or vertical division of state powers. Hence, as important as it is to question the tripartite separation of powers, expanding branches alone would miss the point (Carolan 2020, p. 18).

To round off this proposal, I would like to preempt some reasonable doubts about my model. First, not all accountability exchanges between state organs imply state ataraxy, because for this, controlling agencies must be independent—even if they are formally located within a political branch. Besides, ataraxic state devices such as an independent statistical bureau do not "check" other agencies. Still, such devices also imply a curtailment of democratic and political legitimacy within the state if a statistical office is expected to operate impartially.

Second, although ataraxic state devices are directed against state agencies subjected to a democratic and political logic, it may of course be that some of these devices, while remaining within the state, target actors outside the state (Barber 2018, p. 53), as in the case of sectorial regulation (Koop 2015, p. 230). But even then, the effect of curtailing the democratic and political sphere of decision-making remains, because the state could also have chosen to have providers monitored by politicized state agencies.

Third, strong state ataraxy may pose accountability risks, as is the case with NMI (Koop 2015, p. 231). However, the independent character of ataraxic state devices does not exempt them from informing the political bodies on a regular basis.

Fourth, while the nature of state ataraxy clashes not only with the electoral selection of their authorities (Pettit 2013, p. 150), but also with political nomination, many directors of the ataraxic agencies—such as constitutional judges—can be chosen within the political branches without necessarily abrogating their ataraxic nature.

Fifth, it could be argued that if state ataraxy has the democratic and political as its main structural target, this would contradict the application of the ataraxic procedure

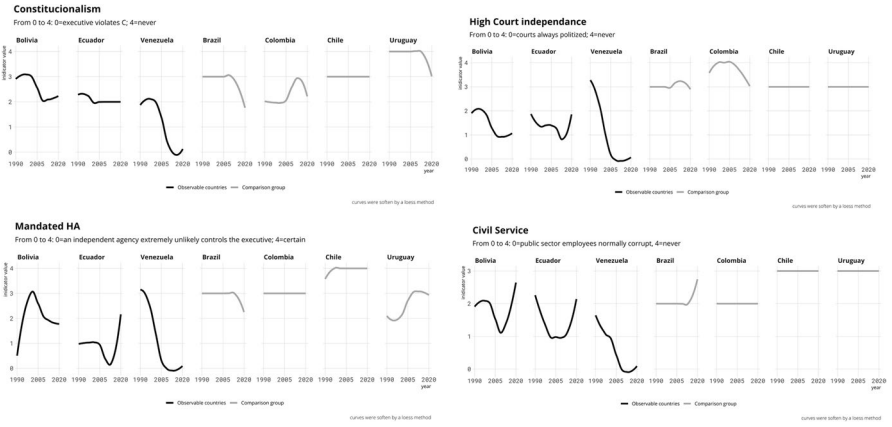

Fig. 2 Historical trends of state ataraxy damage in NLAC countries

to unlawful misconduct within the ataraxic domain itself. Moreover, possible misconduct by independent state agencies need not necessarily indicate politicization or democratization, but damage to the *res publica* out of sheer personal greed on the part of ataraxic personnel. The logic of state ataraxy would also apply in this case because it must protect the *res publica*, even if the threat comes from within the domain of state ataraxy and emanates from sheer greed rather than from politics or democracy. However, while corruption may play a role within state ataraxy, state ataraxy's handling of its own malaise does not change the fact that the *structural* counterpart to state ataraxy remains the democratic and political spheres, as they play the crucial role in transforming society and well-established state ataraxy devices are less susceptible to corruption.

Sixth, in contrast to the alleged failures of negative constitutionalism (Barber 2018, p. 5), state ataraxy does not aim to advocate a "minimal state liberalism," nor to thwart any attempt by the state to alleviate poverty. The latter effect should be possible even under full state ataraxy.

Finally, one might object that the philosophy behind state ataraxy seems to fantasize about exemplary, disinterested judges, fully disciplined Weberian bureaucracies, and impeccable regulatory agencies. This would be missing reality. State ataraxy is not about such angelic entities, but about a critical mass of state neutrality that, for all its flaws, produces a mixed state structure by effectively balancing the political/democratic realm with the a-political/democratic realm.

It is now safe to say that the "institutionality" affected by NLAC was not just the *estado de derecho* or the division of powers, but the entire state ataraxy. At this point, one might object that this dismantling has so far only been asserted, not proven. Whereas the aim of this article is more conceptual, some remarks about the risk of simply assuming something seem appropriate. First, the fact that my premise of the dismantling of the ataraxic devices is shared by both, endorsers and opponents, conveys an initial plausibility of the claimed dismantling. Second, it is not only in empirical field research that clues to the how (constitutional design)

and the why (the clash of different logics) of this dismantling are to be looked for, since they can already be found at the conceptual level, so that empirical validation confirms to a certain extent what is conceptually predictable. Third, my claim also draws on what scholars have already found in studies of how NLAC has *concretely* damaged the judiciary in Bolivia (Castagnola and Pérez-Liñán 2011), checks and balances in Ecuador (Balderacchi 2017), and electoral cleanliness in Venezuela (Corrales 2020). To be even more explicit, I calculated V-DEM data for NLAC countries for the last 30 years, which show that selected state ataraxy parameters have tended to deteriorate over the NLAC period between 1999 and about 2012–2015 (see Fig. 2), especially in comparison to non-NLAC countries. And here, too, a certain correlation seems to confirm empirically what was worked out conceptually.

It becomes clear that the main problem NLAC caused is not so much, or not only, the perpetuation of the historical imbalance in favor of the executive, as Gargarella (2017, p. 218) maintains. What NLAC actually accomplished was the *coup de grâce* for state ataraxy, which was historically and systemically already underdeveloped in Latin America if compared to the democratic and the political subsystems. This seems to me to be the crucial imbalance. One might argue that several alleged "independent" institutions were kept or even created by NLAC constitutions. However, these remnants are not only mere shells, devoid of any ataraxic logic despite the honorable designations (court, auditor, etc.), but at best artifacts carried over from previous constitutions *despite* the NLAC. In fact, only those articles of the constitutional text that reflect NLAC's *Weltanschaaung* can be attributed to NLAC, not those that have survived but are foreign to its spirit. It is important to keep in mind that while NLAC would never have produced or protected what it abhors, neither was it able to erase all traces of the old liberal heritage during the constituent process for pragmatic, symbolic, or strategic reasons (Galligan and Versteeg 2013, p. 26).

Having outlined state ataraxy as one pole, it is time to clarify the interface between state ataraxy on the one hand and democracy on the other, because the second major claim addressed in this article is the allegedly fateful and structural link between democracy and the rule of law. To this end, it is now necessary to address democracy and the systemic embeddedness of both subsystems.

5 Towards a reappraisal of democracy as a state subsystem

Contrary to the tendency of NLAC critics who declare democracy to be *the* overarching structure, I view democracy as a subsystem on the same level as the ataraxic subsystem. Both belong to a superordinate system composed *inter alia* of democratic as well as "technocratic elements" (Koop 2015, p. 237). Democracy is concerned with the question of *who* governs, representing only one possible answer by declaring the *demos* as the *who* that institutionally and decisively influences governmental policies.

My understanding of democracy follows a rather plain procedural albeit "more-than-minimalist"[6] way of defining democracy. The emphasis on the procedural, however, should not obscure the fact that the core of democracy is "rule by the people" and not something procedural. Procedural means that material elements such as social justice are excluded from the definition, and covers more than filling political posts through elections, since the demos can also exert influence through referendums and plebiscites in the period between elections. I define democracy based on a *limited* majority, though I do not believe this quality is an offspring of liberalism. Here I follow Sartori (1987, p. 57), for whom respect for minorities does not stem from a liberal conviction (but see Mainwaring et al. 2007, p. 127), but from the purely arithmetical consideration that the demos must contain both the majority and the minority. Admittedly, the core of democracy is not sufficient to fully account for democracy. To this we should add what O'Donnell (2001, p. 16) calls "surrounding conditions" of the electoral process. While I agree that democracy needs political rights and liberties to exist, I argue that only those freedoms and rights are meant that are truly relevant to democracy, while acknowledging that this distinction is difficult to make (Diamond 2002, p. 28).

Such a definition of democracy departs from the mainstream only insofar as it emphasizes the core of democracy (popular rule) and avoids conflating democracy with ideologies (i.e., liberalism) and methods (i.e., elections). Concurrently, it is important to remember what the definition of democracy *does not* encompass (Mainwaring et al. 2007, p. 128). Democracy does not ask, for instance, whether the exercise of government is corrupt or efficient, nor does democracy include ataraxic devices.

5.1 Rescuing the state as the enveloping entity

Defined in this way, democracy forms a subsystem within the state, which appears as the entity that houses other subsystems besides democracy, such as state ataraxy. The enveloping entity is the state—not democracy, as Pettit (2013, p. 151) insinuates. To consider the state as the enveloping entity is not obvious considering that its demise was announced (Deitelhoff and Steffek 2009). For those who do not adhere to this prophecy and insist on regarding the state as the still decisive candidate for the role of the entity that harbors democracy and the rule of law, the question naturally arises as to the relationship between this overarching entity and these subsystems. Democracy and state ataraxy, understood as subsystems within the state, enter into a peculiar kind of hierarchy vis-à-vis the state based on what system theory theoreticians have called "nesting systems" within systems (Easton 1990, p. 297; Mingers 2014, p. 31), whereby the upper level (the state) does not become the principal of the lower (Easton 1990, p. 270). This concerns the vertical linkage between

[6] By detaching rule of law from the definition of democracy, Mainwaring et al. (2007) remain minimalist, and thus avoid the kind of maximalism endorsed by authors such as Merkel (2013). Yet, by neglecting elements such as direct democracy, Mainwaring et al. conceptually deplete their democracy definition, as direct democracy belongs to what they themselves call elements "inherent" to democracy. The explicit consideration of direct democracy is a feature of a "more-than-minimalist" definition.

system and subsystems, but equally interesting from a systems theory perspective is the horizontal relationships between the subsystems themselves. One translation of this perspective was the assertion that the two are fatefully intertwined.

5.2 The thesis of an inescapable concatenation between democracy and ataraxy

In contrast to the thesis of a fateful intertwining of democracy and state ataraxy, I consider both as self-regulating subsystems, as loosely coupled entities, whose interactions are less decisive than their self-reproduction (Bühl 1990, p. 45). Rejecting a simplistic assumption such as "no ataraxy, then no democracy" does not absolve us from recognizing the complex interface between the two subsystems (Koop 2015, p. 237). These connections, however, are punctual and do not affect the fact that each subsystem is built by a "network…closed upon itself" (Maturana 2002, p. 7).

Although punctual, these interconnections exhibit several patterns. Consider a constitutional court intruding into the domain of the democratic and the political when reversing a decision of the legislature or consider when politicians agree to cede some functions, such as monetary policy, to an independent central bank. Still, both democracy and state ataraxy retain their own logic of self-reproduction (Maturana 2002, p. 9), and if one fails, this does not necessarily mean that the other subsystem necessarily crumbles or merits to be marked as damaged because of the failure or absence of the other subsystem.

It is now possible to take up the thesis of the NLAC critics that the breakdown of democracy in these countries followed the dismantling of countermajoritarian devices. To be clear, I do not doubt that democracy in NLAC countries may have disintegrated a few years after their constitutional upheavals, as was the case in Bolivia (Barrios-Suvelza 2022). Rather, my point is to question the simplistic conceptual causality expressed in the claim: "No rule of law, then no democracy." I draw on system theory to discard the conceptual plausibility of this fatalistic link. Instead, the following interface patterns between the two subsystems are proposed: (a) state ataraxy is not a criterion whose absence would produce some kind of diminished democracy; (b) state ataraxy is not essential in its entirety for democracy to exist; (c) state ataraxy's presence cannot guarantee democracy's unbreakability; and (d) if democracy were to break, state ataraxy could still function.

The first point is easy to understand once one accepts that democracy cannot include elements alien to its essence, as, for instance, the ataraxic elements are. Many scholars take the incorporation of HA as a component of democracy for granted (Cameron 2014, p. 8). In fact, democracy is averse to constraints of almost any kind, especially those emanating from mandated HA or from NMI (Koop 2015, p. 236; but see otherwise Bovens and Schillemans 2020, p. 522). This is quite logical, since HA is about sanctioning actions of state agencies involved in transgressions of an illicit nature (O'Donnell 2003, p. 45), not about giving the people a voice. Hence, democracy is opposed to anything that comes from state ataraxy. A country bereft of state ataraxy will probably be more corrupt. However, this alone does not mean that this country is not a democracy (Huntington 1991, p. 10), not even that the country's democracy is severely damaged.

The second point, claiming state ataraxy is not needed in is entirety for democracy to exist, requires a caveat. The validity of this thesis does not preclude certain institutions, such as an independent electoral court, from being indispensable to democracy. In fact, considering the above definition of democracy, an independent electoral court is not merely an environmental factor for democracy. The particular case of an independent electoral court shows us that some ataraxic institutions, although belonging to the ataraxic realm by virtue of their inherent logic, serve a purpose only in conjunction with the functioning of another subsystem, thus making the existence of these ataraxic institutions justifiable only as they serve the reproduction of another system. For instance, democracy needs some "services" (Luhmann 1995, p. 156) of the ataraxic subsystem. However, not state ataraxy in its entirety but only one specific element of it is permanently connected to another subsystem. This means that not the *entire* ataraxic subsystem must be intact for democracy to exist. For bodies such as a sectoral regulator or the Court of Audit, this reasoning seems straightforward, but in the case of the electoral authority, whose existence is a constant necessity for democracy, this is less so. The caveat proposed may be reinforced by the following arguments. First, as important as an independent electoral authority is for democracy, its impact concerns the surrounding conditions, and only indirectly the core structure of democracy. Second, it is possible for authoritarian political forces to be careful to temporarily defend not only the political rights necessary for democracy, but even the workings of a still-credible electoral court, while allowing all the rest of state ataraxic institutions to crumble, because they are not immediately essential to democracy. NCAL leaders, for example, were able to decide opportunistically when, where, and to what extent to dismantle state ataraxy, and they respected, to some degree and for many years, the procedural rules required for a democratic subsystem in the state, if only as long as they secured their victory. Third, the proposed caveat is also reflected in a similar issue concerning the role of human rights and civil rights in general for democracy. Again, it has been argued that there are rights and freedoms that do not directly affect democracy (Ackerman 1991, pp. 12, 325), no matter how much they are needed or defended for other reasons. One could argue also that the fact that democracy requires many technical organizational measures to be effective is evidence that state ataraxy is somehow implied in democracy in more pervasive terms, as I propose. However, all of these necessary organizational measures are primarily intended to enable democracy, not to limit it. State ataraxy is by definition a subsystem designed to limit democracy when warranted, not to enable it.[7] This duality of limiting and enabling is similar to the distinction between the separation of powers as a means of limiting power and the technique of separation of powers to make state power more effective (Waldron 2013, p. 445). The former is clearly an ataraxic dispositive, the latter is not.

As to point three, the mere existence of state ataraxy cannot warrant the indestructibility of democracy, since elites in power may severely distort the playing field of political competition until democracy founders by using means that are not justiciable (Levitsky and Way 2010, p. 6). Finally, regarding point four, the source of legitimacy of state ataraxy is different from that of democracy. This difference

[7] When I speak of the electoral body in an ataraxic sense, I mean, of course, only the activities that constrain, and not those that enable, which this organ also normally performs.

can be illustrated by one of the most paradigmatic accounts of state ataraxy, judicial review. It is often argued that judicial review derives its special legitimacy from expertise (Bassok 2013, p. 154). From the point of view of state ataraxy, however, the reason lies rather in the fact that there are issues in society whose assessment is naturally better left to actors who observe, analyze, and decide predominantly free of passions and of commitments to material justice, and who are able to remain strongly immunized from political and democratic constraints. It is based on a very high match between the nature of an object (e.g., the question of the conformity of law and the constitution; the technical relationship between the quantity of money and the development of prices) and the ability of some subjects to approach that object with those methods of thinking, acting, and deciding that correspond to the nature of that object. The point is that these specific objects and subjects remain regardless of whether democracy is the prevailing regime or not.

6 The alleged novelty of NLAC

It remains to be asked whether NLAC has brought anything new with regards to the tension between democracy and state ataraxy. Some scientists are skeptical that NLAC is a novelty at all. Salazar (2013, pp. 69-70) notes a convergence between some NLAC axioms with either Jacobinism or popular constitutionalism from the beginnings of US constitutionalism. Mayorga (2017, p. 45) goes to the extreme, arguing that NLAC traced patterns based on the fascist trilogy of leader, people and state. In contrast, other authors see NLAC as "original and disruptive" (see Elkins 2021, p. 464) or representing a rupture (Curcó 2018, p. 213). Furthermore, one may argue that it is not fair to attribute the novelty of dismantling state ataraxy to NLAC, since rule of law or an independent judiciary were historically undeveloped well before NLAC started (Rosenn 1990). However, a functioning, albeit deficient, state ataraxy may still mean that, contrary to NLAC's philosophy, state ataraxy is not completely uprooted from constitutional aspirations.

Others might argue the novelty lies in how the NLAC countries have achieved a balance between liberalism and representative democracy,[8] on the one hand, and elements of postliberal democracy (Wolff 2010, p. 407), on the other hand. Thus, one could argue that elements such as the rule of law were not forgotten by retaining the liberal component. However, this is also questionable because, while liberalism may promote or at least facilitate the functioning of state ataraxy, historically and

[8] In fact, Mota (2017, p. 91) considers that what has taken place is not a symmetrical symbiosis between liberalism and the NLAC values, but rather (only) an attenuation of the liberal. The mechanisms of postliberal democracy that might have been constitutionally enshrined with the NLAC, are in reality either negligible or tantamount to participation without binding effect. The few areas of novelty concerning democracy would then be satellites orbiting a liberal core. The most credible non-liberal traits that appeared in the Bolivian and in the Ecuadorian case, are evident in the phenomena of indigenous autonomies, in the mandatory presence of indigenous people in some crucial state entities, and in recognizing an indigenous adjudication system (Barrios-Suvelza 2012). All these examples, however, seem to indicate a plurinational state rather than a completely non-liberal or postliberal state.

logically state ataraxy did not emerge from liberalism, not to mention that liberalism may be maintained to an extent that is insufficient to protect state ataraxy.

Whether NLAC brought novelty will remain a controversial issue. Yet, one point can already be made: Unlike to the past, the dismantling of ataraxic structures during the NLAC was not so much the result of a weak state or the enthronement of a *caudillo* who seeks to stifle state ataraxy in order to secure situational advantages to maintain his power. Instead, the dismantling of state ataraxy was carried out for the first time in a principled way, embodying a kind of Oakeshottean "politics of faith." "Principled" means that it is against the very nature of NLAC to accept any constraint of an ataraxic kind. Whilst state ataraxy expresses a mode of legitimizing state authority that is not based on the people's will and reflects a kind of "politics of skepticism," for NLAC, it is the people who must not only guide policy making, but also assume all controls on the exercise of power. In other words, even if the existence of independent judges did not jeopardize the elite's hold on power, state ataraxy would nevertheless be dismantled out of sheer conviction of a specific *Weltanschauung*.

It could be argued that it is one thing if state ataraxy were imposed from the outside (i.e., by international organizations) or the inside (i.e., a dictatorship), another if it is wanted by the people and consequently, by their vote, a constitution emerges that contains strong ataraxic structures. In the latter case, how could state ataraxy ever collide with democracy? Yet, even in the latter case, NLAC would still reject it. Not because the demos as a constituent power were to endorse state ataraxy, would state ataraxy cease to contradict both democracy and politics. On the contrary, it will mean that no one less than the people, as the constituent power, have deliberately chosen to limit democracy in the future. If state ataraxy is intended to be an effective part of the constitution, it will limit "normal politics," no matter how determinant the demos was in entrenching state ataraxy in the moment of "constitutional politics."

It could also be argued that by democratizing independent agencies, NLAC has indeed contributed to overcoming of the old dilemma in political thought and practice that keeps cropping up in various dichotomies such as politics vs. law, democracy vs. constitutionalism, or popular sovereignty vs. human rights. However, this tension would not truly be overcome, since democratizing independent agencies does not make state ataraxy democracy-friendly; the result is that state ataraxy simply disappears. When this point is reached, at the latest when societies ask themselves whether it is reasonable to let democracy and politics permeate the entire state dynamic, this tension will be back. Unless one rejects that there might be some issues in society, whose regulation could be better addressed by some method other than the democratic method. There are, however, as Schumpeter (1975, p. 292) thought, instances that should be removed from political decision because not every enlargement of the "sphere of public authority" must be accompanied by a symmetrical and parallel enlargement of the sphere of political decision. The fact that the reaches of the two spheres are not aligned can ensure the stability of the polity in the long term.

7 Conclusions

As this article has pointed out, the rule of law was not the only casualty of NLAC's transformation of the polity. To think so would not only underestimate the actual extent of what was truly damaged institutionally during this stunning upheaval. It would also leave us with implausible causalities, like the one prophesied for democracy when the rule of law collapses. Moreover, it would prevent us from understanding the precise nature of the novelty or even innovation of this huge constitutional wave of change, and continue to leave misunderstood the complexity and structural affinity of all those mechanisms and practices, such as independent authorities, checks and balances, the rule of law, and rational state administration, that scholars have not yet systematically integrated into a single package.

We identified that NLAC has affected an array of cognate mechanisms, such as the division of powers or an independent judiciary. However, it has been shown that their dismantling was diagnosed without a clear conceptual framework of what has been dismantled. I therefore proposed to pool all the instances dismantled by NLAC into a new concept called state ataraxy. I have also suggested that state ataraxy is a subsystem alongside democracy. Both democracy and state ataraxy are equal-ranking and equally self-contained subsystems within the state, meaning that they produce almost all conditions for their own reproduction as subsystems. Consequently, the breakdown of the ataraxic dimension of the state must not necessarily lead to the breakdown of democracy. Even if state ataraxy were to collapse, democracy could survive if some specific "services" provided by state ataraxy remain effective. On the other hand, a polity with state ataraxy does not need democracy. Neither deficiencies nor the absence of state ataraxy are reasons that automatically indicate a lower quality of democracy.

Finally, it might be that for the first time in Latin American history, state ataraxy has been dismantled out of a principled conviction to do so. Novelty could lie not only in the fact that NLAC introduced some previously unknown organizational features of the state apparatus itself, but also in the fact that this time motives deeply rooted in the actor's *Weltanschauung* justified the systematic dismantling of state ataraxy.

Acknowledgements Special thanks to Rafael López for his assistance with the statistical work and to André Brodocz for helping me rediscover Luhmann. Thanks also for the helpful comments of the anonymous reviewer. Some ideas on the ataraxic state were presented at the Mai 2023 colloquium at the University of Erfurt, coordinated by André Brodocz and Andreas Anter. I thank my colleagues at the colloquium for their feedback on this topic.

Funding Open Access funding enabled and organized by Projekt DEAL.

Data Availability Figure 2 dataset was generated and analyzed on the basis of V-DEM 2021.

Declarations

Ethics approval Not applicable.

Informed consent Not applicable.

Research Involving Human Participants and/or Animals Not applicable.

Conflict of interest The authors declare no competing interests.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

References

Ackerman B (1991) We the people. Harvard University Press, Cambridge
Ackerman B (2000) The new separation of powers. Harv Law Rev 113:633–729
Alterio A (2019) Reactive vs structural approach: a public law response to populism. Global Constitutionalism 8:270–296
Balderacchi C (2017) Participatory mechanisms in Bolivia, Ecuador and Venezuela: deepening or undermining democracy? Gov Oppos 52:131–161
Barber N (2004) Must legalistic conceptions of the rule of law have a social dimension? Ratio Juris 17:474–488
Barber N (2018) The principles of constitutionalism. Oxford University Press, Oxford
Barrios-Suvelza FX (2012) The Bolivian invention: plurinationality and indigenous people within an unusual composite state structure. In: Requejo F, Caminal M (eds) Federalism, plurinationality and democratic constitutionalism. Routledge, New York, pp 266–294
Barrios-Suvelza FX (2022) The concept of coup d'état under stifling stress: Legal theory's political-science–based response. Int J Const Law 20:1982–2007
Bassok O (2013) The supreme court's new source of legitimacy. J Constitutional Law 16:153–198
Belloso N (2015) El neoconstitucionalismo y el nuevo constitucionalismo latinoamericano: ¿Dos corrientes llamadas a entenderse? Cuadernos Electrónicos De Filosofía Del Derecho 32:21–53
Bett R (2020) What is *ataraxia* like, and why do some schools, but not others, aim for it? Sképsis: Revista De. Filosofia 11:1–19
Bickel AM (1986) The least dangerous branch: the supreme court at the bar of politics. Yale University Press, New Haven
Blokker P (2020) Populist understandings of the law: a conservative backlash? Partecipazione e Conflitto 13:1433–1452
Bovens M, Schillemans T (2020) Non-majoritarian institutions and representation. In: Rohrschneider R, Thomassen J (eds) The Oxford handbook of political representation in liberal democracies. Oxford University Press, Oxford, pp 511–525
Breaugh M (2019) The plebeian experience and the logic of (radical) democracy. Constellations 26:581–590
Brewer-Carías AR (2020) The collapse of the rule of law and the struggle for democracy in Venezuela. Editorial Jurídica Venezolana, Caracas
Bühl W (1990) Sozialer Wandel im Ungleichgewicht: Zyklen, Fluktuationen. Katastrophen. F, Enke, Stuttgart
Cameron MA (2014) The myth of competitive authoritarianism in the Andes. Unpublished paper, University of British Columbia
Carolan E (2009) *The New Separation of Powers: A Theory for the Modern State*. Oxford University Press, New York
Carolan E (2020) Revitalizing the social foundations of the separation of power? In: Fasone C, Vanoni L (eds) Baraggia A. New challenges to the separation of powers, Dividing power. Elgaronline, pp 11–30

Castagnola A, Pérez-Liñán A (2011) Bolivia. The rise (and fall) of judicial review. In: Helmke G, Ríos-Figueroa J (eds) Courts in Latin America. Cambridge University Press, Cambridge, pp 278–305
Colón-Ríos J (2012) The counter-majoritarian difficulty and the road not taken: democratizing amendment rules. Canad J Law & Jurisprudence 25:53–78
Colón-Ríos J (2017) Constitutionalism and Democracy in Latin America. Victoria Univ Wellington Legal Res Papers 118:155–167
Corrales J (2020) Democratic backsliding through electoral irregularities: the case of Venezuela. Eur Rev Latin Am Caribbean Stud 109:41–65
Couso J (2013) Las democracias radicales y el nuevo constitucionalismo latinoamericano. https://law.yale.edu/sites/default/files/documents/pdf/sela/SELA13_Couso_CV_Sp_20130420.pdf. Accessed 26/10/2023
Curcó F (2018) The new Latin American constitutionalism: a critical review in the context of neo-constitutionalism. Canad J Latin Am Caribbean Stud 43:212–230
Deitelhoff N, Steffek J (2009) Einleitung: Staatlichkeit ohne Staat? In: Was bleibt vom Staat?: Demokratie. Recht und Verfassung im globalen Zeitalter. Campus-Verlag, Frankfurt, pp 7–34
Diamond L (2002) Thinking about hybrid regimes. J Democr 13:21–35
Easton D (1990) The analysis of political structure. Routledge, New York
Elkins Z (2021) Strong citizens, strong presidents. In: Kapiszewski D, Levitsky S, Yashar D (eds) The constitutional architecture of the inclusionary turn in Latin America. Cambridge University Press, Cambridge, pp 461–490
Elster J (1984) Ulysses and the sirens. Cambridge University Press, Cambridge
Farinacci-Fernós J (2018) Post-Liberal constitutionalism. Tulsa Law Rev 54:1–48
Farinacci-Fernós J (2021) Constitutional courts as majoritarian instruments. ICL J 14:379–397
Flores C (2015) Questioning democracy in the name of the people: the so-called new Latin American constitutionalism. SD Security Dialogues 1-2:55–70
Galligan DJ, Versteeg M (2013) Theoretical perspectives on the social and political foundations of constitutions. In: Galligan DJ, Versteeg M (eds) Social and political foundations of constitutions. Cambridge University Press, Cambridge, pp 3–48
Gargarella R (2017) The "new" Latin American constitutionalism—old wine in new skins. In: Bogdandy AV, Mac-Gregor EF, Morales Antoniazzi M, Piovesan F (eds) Transformative constitutionalism in Latin America The emergence of a new ius commune. Oxford University Press, Oxford, pp 211–234
Gonzalez-Jacome J (2017) From abusive constitutionalism to a multilayered understanding of constitutionalism: lessons from Latin America. Int J Constitutional Law 15:447–468
Grijalva A (2017) Novo constitucionalismo, ativismo e independência judicial. In: Avritzer L, Bernardo Gomes LC, Corrêa Marona M, Carvalho Dantas FA (eds) O constitucionalismo democrático latino-americano em debate: Soberania, separação de poderes e sistema de direitos. Autêntica Editora, Belo Horizonte, pp 119–134
Huntington SP (1991) The third wave: democratization in the late twentieth century. University of Oklahoma Press, Norman
Kavanagh A (2016) The constitutional separation of powers. In: Dyzenhaus D, Thorburn M (eds) Philosophical foundations of constitutional law. Oxford University Press, Oxford, pp 221–239
King P (2013) Neo-Boliviarian constitutional design. In: Galligan D, Versteeg M (eds) Social and political foundations of constitutions. Cambridge University Press, New York, pp 366–397
Koop C (2015) Non-majoritarian institutions: a challenge for liberal democracy? In: Müller-Rommel F, Casal F (eds) Party politics and democracy in Europe. Taylor and Francis, eBook, pp 227–241
Kramer MH (2007) Objectivity and the rule of law. Cambridge University Press, New York
Lauth HJ, Sehring J (2009) Putting deficient on the research agenda: reflections on diminished subtypes. Comp Sociol 8:165–201
Levitsky S, Way L (2010) Competitive authoritarianism: hybrid regimes after the cold war. Cambridge University Press, New York
Levitsky S, Loxton J (2013) Populism and competitive authoritarianism in the Andes. Democratization 20:107–136
Loewenstein K (1965) Political power and the governmental process. The University of Chicago Press, Chicago
Luhmann N (1995) Das Recht der Gesellschaft. Suhrkamp, Frankfurt A.M
Madrid R, Hunter W, Weyland KG (2010) The policies and performance of the contestatory and moderate left. In: Weyland KG, Madrid RL, Hunter W (eds) Leftist governments in Latin America: Successes and shortcomings. Cambridge University Press, Cambridge; New York, pp 140–199

Mainwaring S, Brinks D, Pérez-Liñán A (2007) Classifying political regimes in Latin America, 1945-2004. In: Munck G (ed) Regimes and democracy in Latin America: Theories and methods. Oxford University Press, Oxford, pp 123–160
Martínez R (2010) El nuevo diseño institucional ecuatoriano. Democracia, funciones y legitimidad en la constitución ecuatoriana de 2008. In: Cabezas JC, Parreño C (eds) Diseño democratico. Quito, IDEA International, pp 19–33
Massie P (2018) Ataraxia: tranquility at the end. In: Kirkland SD, Sanday E (eds) A companion to ancient philosophy. North Western University Press, Evanston, pp 383–408
Maturana H (2002) Autopoiesis, structural coupling and cognition: a history of these and other notions in the biology of cognition. Cybernetics Human Knowing 9:5–34
Mayorga RA (2017) Populismo autoritario y transición regresiva: La dictadura plebiscitaria en la región andina. Rev Latinoam De Política Comparada 12:39–69
Mc Manus AC (2021) A critical account of Ius Constitutionale Commune in Latin America: an intellectual map of contemporary Latin American constitutionalism. Global Constitutionalism Online Preprint:1–29
Merkel W (2013) Staatstheorie oder Demokratietheorie: Wie viel Staat braucht die Demokratietheorie? In: Voßkuhle A, Bumke C, Meinel F (eds) Der Staat. Verabschiedung und Wiederentdeckung des Staates im Spannungsfeld der Disziplin. Duncker & Humblot, Berlin, pp 285–306
Mingers J (2014) Systems thinking, critical realism, and philosophy: a confluence of ideas. Routledge, London
Möllers C (2019) Separation of powers. In: Masterman R, Schütze R (eds) The Cambridge companion to comparative constitutional law. Cambridge University Press, Cambridge, pp 230–257
Mota A (2017) O constitucionalismo democrático latino-americano em perspectiva histórica. In: Avritzer L, Bernardo Gomes LC, Corrêa Marona M, Carvalho Dantas FA (eds) O constitucionalismo democrático latino-americano em debate: Soberania, separação de poderes e sistema de direitos. Autêntica Editora, Belo Horizonte, pp 77–96
Mulvad A, Stahl R (2019) Civilizing left populism: towards a theory of plebeian democracy. Constellations 26:591–606
Noguera A (2009) Derechos fundamentales, fundamentalísimos o simplemente derechos? El principio de indivisibilidad en los derechos en el viejo y el nuevo constitucionalismo. Derechos Y Libertades 21:117–147
O'Donnell G (2001) Democracy, law, and comparative politics. Stud Comp Int Dev 36:7–36
O'Donnell G (2003) Horizontal accountability: the legal institutionalization of mistrust. In: Mainwaring S, Welna C (eds) Democratic accountability in Latin America. Oxford University Press, Oxford, pp 34–54
Palmer M (2006) Using constitutional realism to identify the complete constitution: lessons from an unwritten constitution. Am J Compar Law 54:587–636
Pettit P (2013) Meritocractic representation. In: Bell D, Li C (eds) The East Asian challenge for democracy: political meritocracy in comparative perspective. Cambridge University Press, Cambridge, pp 138–157
Rodriguez Garavito C (2009) La globalización del Estado de Derecho. Universidad de los Andes, Bogotá
Rosanvallon P (2008) La légitimité démocratique: Impartialité, réflexivité, proximité. Seuil, Paris
Rosenn KS (1990) The success of constitutionalism in the United States and its failure in Latin America: an explanation. Univ Miami Inter-Am Law Rev 22:1–39
Salazar P (2013) Política y derecho. Cinco ensayos latinoamericanos. Distribuciones Fontamara, Mexico D.F, Derechos y garantías
Sartori G (1987) The theory of democracy revisited. Chatham House Publishers, Chatham, N.J
Schmitt C (1996) Der Hüter der Verfassung. Duncker & Humblot, Berlin
Schumpeter JA (1975) Capitalism, socialism and democracy. Harper Perennial, New York
Tamanaha B (2004) On the rule of law: history, politics, theory. Cambridge University Press, Cambridge
Tushnet M (2021) The new fourth branch: institutions for protecting constitutional democracy. Cambridge University Press, Cambridge
Vibert F (2007) The rise of the unelected: democracy and the new separation of powers. Cambridge University Press, Cambridge
Viciano R, Martínez R (2010) Los procesos constituyentes latinoamericanos y el nuevo paradigma constitutional. Revista del Inst de Ciencias Jurídicas de Puebla 25:7–29
Viciano R, Martínez R (2011) Fundamentos teóricos y prácticos del nuevo constitucionalismo latinoamericano. Gaceta Constitucional 48:307–328

Vidotte MC, Sousa V (2017) Novo constitucionalismo democrático latino-americano: Paradigma jurídico emergente em tempos de crise paradigmática. In: Avritzer L, Bernardo Gomes LC, Corrêa Marona M, Carvalho Dantas FA (eds) O constitucionalismo democrático latino-americano em debate: Soberania, separação de poderes e sistema de direitos. Autêntica Editora, Belo Horizonte, pp 97–116

Vilhena O (2007) Inequality and the subversion of the rule of law. Int J Human Rights 6:27–47

Waldron J (2009) Constitutionalism—a skeptical view. In: Christiano T, Christman J (eds) Contemporary Debates in Political Philosophy. Wiley, pp 265–282

Waldron J (2013) Separation of powers in thought and practice. BCLR 54:433–468

Waldron J (2021) The rule of law and the role of courts. Global Constitutionalism 10:91–105

Weber M (2005) Wirtschaft und Gesellschaft. Zweitausendeins, Berlin

Wolff J (2008) Bolivien nach der constituyente: Auseinandersetzungen in und um Demokratie. Lateinamerika Analysen 7:165–180

Wolff J (2010) Postneoliberal verfasst? Ein vergleichender Blick auf die neuen Verfassungen in Bolivien und Ecuador. Kritische Justiz 43:407–415

Wolff J (2013) Towards a post-liberal democracy in Latin America? A conceptual framework applied to Bolivia. J Lat Am Stud 45:31–59

Wolkmer AC, Machado L (2011) Tendências contemporâneas do constitucionalismo latino-americano: estado plurinacional e pluralismo jurídico. Pensar Fortaleza 16:371–408

Ziemińska R (2020) Argumentative strategies of Pyrrhonian and academic Skeptics. In: Arenson K (ed) The Routledge handbook of hellenistic philosophy. Routledge, Abingdon, pp 38–48

Zürn M (2018) A theory of global governance: authority, legitimacy, and contestation. Oxford University Press, Oxford