



**Book review: Zaffaroni, E.R., Caamaño, C., Vegh Weis, V. (2020),  
¡Bienvenidos al lawfare! Manual de pasos básicos para demoler  
el derecho penal. Capital Intelectual.**

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In recent decades, western countries have witnessed an unprecedented empowerment of the courts as key political actors (Ginsburg, 2003; Hirschl, 2007; Tate & Vallinder, 1995). The widespread use of judicial review, and a constitutional rhetoric that locates legitimacy in expert knowledge rather than in democratic decision making, have allowed elites to use the judiciary as a stronghold to retain power at a time when the legislative and executive branches are more and more under popular control (Hirschl, 2007). These phenomena have been studied worldwide in relation to the expanding role of constitutional and supreme courts in the political arena, which has led to what Hirschl has defined as “the judicialization of mega-politics” (Hirschl, 2008). However, at least in Latin America, the growth of the judiciary has not stopped there. As if the courts’ interventions in striking down legislation that has passed through parliament were not enough to preserve the interests of local and transnational plutocracies, the realm of the political in recent years has increasingly come under the watch of the criminal courts. More precisely, denouncing politicians, mainly those belonging to progressive and popular governments, has become daily practice in this part of the world. With the invaluable help of a malleable judiciary, this has allowed neoliberal economic groups to use their political swords to take their opponents out of the political arena, and to label as crimes purely political decisions that are contrary to their interests. In contrast to the consolidation of judicial review, the criminalization of politics has received scarce attention from academia. Therefore, *¡Bienvenidos al lawfare! Manual de pasos básicos para demoler el derecho penal* is a contribution of the utmost importance for the comprehension of what is probably currently the most important juridical and criminological phenomenon of Latin America. This book provides a clear and deep insight into the use of criminal law as a tool to attack political leaders of the left and centre-left and to consolidate neoliberal politics. The authors

call this practice “lawfare”, a term that originated in US military law to characterize the use of law as a weapon to fulfil the objectives of warfare and that is used here to show how power groups have shifted from physical violence to judicial manipulation in order to reach their goals (Dunlap, 2009). *¡Bienvenidos al Lawfare!* is directed at the general public, so it uses plain language and an attractive narrative to present its case. The work focuses on Argentina, but it has many references to the situation in other Latin American countries.

The book is divided into three chapters, each of which is written by one of the authors; three effects of the use of lawfare are studied. In the first section, Raul Zaffaroni, a renowned criminal law scholar, former Justice of the Argentinian Supreme Court and current Justice of the Inter-American Court of Human Rights, explains how lawfare erodes substantive criminal law. In the second chapter, Cristina Caamaño, who has long experience as a prosecutor in the criminal justice system and is the current head of the Federal Bureau of Intelligence of Argentina (Agencia Federal de Inteligencia), studies the damage inflicted by lawfare on procedural law. In the last chapter, Valeria Vegh Weis, a criminologist who focuses much of her work on Latin America, portrays lawfare from a criminological perspective and delves into how it takes hold of the most perverse tools to fulfil its purposes. Finally, the authors present five cases in which the practices described are manifested.

To begin with, Zaffaroni locates his perspective on lawfare within his broader theory, developed in his previous work, of the constant tension between the rule of law and the police state. In the criminal law domain, the former is represented by the classical liberal view of criminal law, originating in the writings of Cesare Beccaria and polished during the nineteenth and twentieth centuries. From the liberal perspective, the role of the criminal law is to constrain punitive power so as to allow the imposition of punishment only when all the substantive and procedural safeguards of a constitutional polity are respected. By contrast, the police state is embodied in what Zaffaroni identifies as “the shameful Criminal Law”, in which judges forget their role as protectors of the people against the arbitrary use of force by the state and start to become a tool to legitimize and facilitate the prosecution of certain people. According to Zaffaroni, the shameful criminal law is always accompanied by a broader political discourse that considers some groups as dangerous to society, or points to them as morally unworthy. That was what happened to the Jews in Nazi Germany or to anyone who opposed the proletariat revolution in the USSR of Stalin. In the 1970s in Latin America, the enemy was anyone who opposed those values deemed to be western and Christian. For Zaffaroni, the market is nowadays looked up to as a contemporary god, whereas distributive politics is the demon that we need to expel. In this context, the shameful criminal law is manifested in two ways that complement each other, in order to support the interests of powerful financial elites.

On the one hand, the criminal law is enforced against those who have not achieved the local version of the American Dream. Given that the neoliberal rhetoric holds that private gains trickle through to society as a whole, and that making a living depends on one’s own will and effort, all those who live below the poverty line or who do not comply with capitalist standards are signalled to be social pariahs and are excluded through criminalization. This stigmatization provides a justification for marginalization, placing the burden on the individual and not on social inequality. From Zaffaroni’s point of view, the crusade against the poor has the collaboration of a passive judiciary, which operates as a mechanical bureaucracy that sees people and their lives as scraps of paper. (Argentina has an inquisitorial procedural system, which mainly takes place on paper, especially in the investigation stage.) Thus, the situations that lead the marginalized to commit minor crimes or offences are never considered, and the jails are full of burglars, while white-collar crimes are never targeted by the criminal justice system.

On the other hand, neoliberal aims are achieved through lawfare. Here, the persecuted are politicians

from the left or centre-left who are identified with welfare politics. The juridical war against popular leaders is masked by a narrative that treats corruption as the greatest evil, an enemy against which anything that will achieve the triumph of transparency is permitted. The next step is to equate redistributive politics with corruption. After that, all is set for the use of the criminal law as a tool to put down those who criticize the reign of the market. Zaffaroni specifies that, in the case of lawfare, what is needed is an active judiciary, sensible to the pressures of the mass media, the secret services and the main financial agents. Logically, this paves the way for the shameful criminal law to prevail over its liberal counterpart. Zaffaroni argues that, throughout history, politicians and jurists have tried to justify the use of the shameful criminal law with reference to different legal theories. However, for him, those in charge of the current onslaught on progressive politicians have not even made this effort. The result is that lawfare is put into practice with no regard for any constitutional or legal principle. Legal figures are deformed as necessary to subsume political measures within the definitions of crimes, so the *actus reus* and *mens rea* elements of crimes are forgotten and are painted as mere formalities that obstruct the supreme goal of fighting corruption. Liberal criminal law is thus destroyed. Interestingly, Zaffaroni ends this section with a warning. Underlining the fact that many of the judges and prosecutors who implemented lawfare were appointed by popular governments, he calls for progressive governments to be more careful and serious in the administration of justice.

The second chapter, written by Cristina Caamaño, explores how lawfare perverts procedural law. Caamaño begins by stating that cases against popular politicians always start in the same way: there is a denunciation that allows the mass media to use headlines that have an impact on public opinion. This brings about the instant labelling of certain people as “corrupt”. From there on, it does not matter whether or not the accusation is true, and even less important is respect for the defendants’ rights. All kinds of methods are used to bring cases against those who oppose neoliberal governance. The best case scenario for lawfare agents is to achieve a guilty sentence for their opponents. However, if this is not possible, damage would already have been done to the accused’s reputation, which is also enough. Between these two results, there are many possibilities, such as using the case to leak private conversations to the mass media or putting people in preventive detention on no grounds whatsoever.

;*Bienvenidos al lawfare!* is a book that is not directed to academic clusters but to the general public, and Caamaño’s work, before it dives into the way in which lawfare erodes procedural rights, has the merit of explaining the constitutional grounds for procedural rights and how a criminal process should lawfully proceed. It is in this way that she teaches us why every defendant should be tried by an impartial judge, and how the constitution and the national criminal procedural code establish the way in which the competence of a judge to intervene in a certain case is to be determined. She then goes on to explain how lawfare has broken all these rules, and she describes the mechanisms that have been designed to permit the same judges to hear all the cases against progressive politicians. Taking a step forward, we can mention that this subject is also discussed by Vegh Weis. With a touch of humour and a reference to a mathematical calculation, she states that there was a 0.000000001777% chance that nine out of ten cases were all assigned to one of twelve judges. However, that was actually what happened.

After this, Caamaño delves into the political use of the law against those who repent. This law rewards those who confess their crimes and provide relevant data for the investigation of a case with a reduction in their future penalties, if the data are revealed to be useful. This practice has practical and normative problems. Among the practical problems, the main issue is that defendants’ confessions are usually extracted in a coercive way, with no concern for the truthfulness of what is said. The only goal is to produce a new headline for the newspapers, or to find any kind of excuse to move against those who are considered by neoliberalism as the “big fishes”. The method usually consists of putting a person in preventive detention and telling them that they will only be released if they confess. At the nor-

mative level, this generates violations of the right not to incriminate oneself, of the legal principle of equality (because those who are given the chance to confess receive a lesser penalty than those who do not have that chance), and of the principle that a person should be punished according to their guilt and not according to other circumstances, such as having confessed.

Caamaño's last two points concern the illegal leaking of judicial hearings and the abuse of preventive detention. Regarding the former, she explains the shifts in the legal regulations on judicial intervention in private communications, and the way in which Mauricio Macri's government put the Office of Judicial Hearings under the control of the Supreme Court. This proved to be a disaster, since private conversations between defendants — which, in many cases, had nothing to do with the criminal investigation — were leaked to the mass media. In this way, lawfare achieved one of its goals: to humiliate its political opponents. Finally, there is the unconstitutional use of preventive detention. Because many of the denunciations of popular leaders did not have enough substance to achieve a conviction, a judicial strategy under the shameful criminal law was to put defendants into preventive detention. The argument used was that, because they once were public officers, it was likely that they would have contacts who could pervert the course of the investigation. Shockingly, these alleged ties were not specified, so the reasoning was merely abstract. Logically, this line of thought leads to absurdity. Every officer, because of the nature of their tasks, has contact with other officers. However, that does not mean that those contacts are criminal or would obstruct a criminal procedure. If it did, every public officer should be in prison for the mere reason of holding their post.

The final section, by Valeria Vegh Weis, explores lawfare from a criminological point of view. From my perspective, Vegh Weis's work has the merit of introducing an important caveat that does not appear earlier in the book. She explicitly recognizes that corruption is a real and deep problem in Latin America that has to be resolved. Nevertheless, after stating this, she lucidly describes how this phenomenon is used to lump all popular politicians together, with all of them being labelled as corrupt. Also, this paves the way for the hiding of another kind of corruption that is often on a much bigger scale: the corruption of transnational financial agents. Vegh Weis begins her exploration of lawfare by resorting to Simon's *Governing through crime* (2007). In the US in the 1970s, the rise in crime and in the number of victims were used to mask the dismantling of the welfare state, with a shift to securitization. In current Latin America, the destruction of public health, education and redistributive politics as a whole is being obscured by a move that shines all the lights on the war against corruption. Deeming politics to be intrinsically corrupt, neoliberalism can advance its goals without inconvenient interference.

Vegh Weis then moves to a brief explanation of criminological theories. This allows her to explain that the description of conduct as a crime is related not necessarily to its intrinsic wrongness but mainly to the social goals that can be achieved by criminalizing this conduct. In other words, behind the criminal law there is an intricate game of interests and power struggles. At this stage, the author depicts how work on political propaganda has given insights into how to build a case and convince the public of its importance, even when there is not much substance to it. The key is to create an enemy and convince society that the survival of society depends on defeating this enemy. This tactic, famously used by Goebbels in Nazi Germany, is currently very accessible. With the collaboration of the mass media, the task is easier than ever. In current Latin America, the enemies are the corrupt popular politicians. Vegh Weis explains that the mass media act, in Cohen's words, as moral entrepreneurs who create moral panic within society (Cohen, 2011). When the panic against corruption is widespread, the liberal criminal law, which is based on the action, is replaced by the shameful criminal law, which is based on the author. It does not matter what a politician has done: what matters is that he or she is corrupt and must be punished. Proofs are superfluous, given the politician's corrupt essence.

Vegh Weis then develops an ingenious and elaborate argument that ties together the works of Freud, Bourdieu and Sartori to portray the mechanics of lawfare. She relies on psychoanalysis to explain the ways in which our personalities are built through identifications with other people and situations. This process, often unconsciously developed and crossed through by idealization, guilt and self-flagellation, allows us to understand why people sometimes support other people or decisions that are in clear contrast to their own interests. This is helped by selective television broadcasters who, as Bourdieu taught, hide by showing. That is, the mass media, by presenting one version of reality, obscure other situations and interpretations of the world. The picture is complete if, as Sartori wrote, we are now not *Homo sapiens* but *Homo videns*: beings that are constituted not but what they think, but by what they see in their constant exposure to television (Sartori, 1998). Currently, what television shows is a Dantesque picture of popular politicians being detained as if they were the most dangerous terrorists, or being humiliated by their aspect or choices. The reach of social media and the presence of mechanisms such as trolls of bots hired for constant attacks on progressive politicians help this process. On the one hand, this whole set-up permits people to identify themselves with role models who defend interests that are in sharp contrast with their own. On the other hand, it serves to obscure a high level of white-collar corruption that never reaches the screens. Vegh Weis concludes with an interesting remark, asking whether lawfare is not what we have always wanted: a criminal law that targets the powerful and not only the poor. The answer is that this reasoning is misleading because, more often than not, the bringing of charges against popular politicians works in tandem with the criminalization of the marginalized. In both cases, what is at stake is an attack against those who oppose neoliberal governance.

The book ends with the presentation of five cases in which the practices described are manifested. Additionally, it includes a preface by the former president of Brazil, Lula Da Silva, and two postfaces. The first of these is by the Minister of Gender of Argentina and human rights activist Elizabeth Gómez Alcorta, and the second is by the renowned sociologist and political scientist Atilio Borón.

All in all, *¡Bienvenidos al Lawfare!* is a must-read that has two main merits. First, it provides an in-depth analysis of the criminalization of politics, a phenomenon that has not, so far, received consistent attention from academia. Secondly, it is a book that addresses the general public and allows non-specialist readers to gain an initial insight into a situation that, because of its impact on politics, affects every citizen's life. This is a book that could be many books. The main challenge for the years to come will be to take forward the exploration of how Latin America's judiciaries have become the new battleground for politics, displacing the executive and the legislative as the bodies in which the future of our countries is defined. *¡Bienvenidos al Lawfare!* takes a first step in this direction, and marks a path that, if we want to comprehend the realities of our region, we are obliged to follow.

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