International Institute for the Sociology of Law / Euskal Herriko Unibertsitatea

Master's Thesis:

"The coloniality of international law: The Agreement between Argentina and the IMF as a case study to critically rethink the relationship between law, power and politics"

Thesis submitted in partial fulfillment of the

requirements for the degree of Master of Arts in Sociology of Law

Master's candidate: Juan Martín Liotta

Supervisor: Nahuel Maisley

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Abstract:

In this dissertation, I seek to contribute to the critical legal studies on international law and colonialism. I will focus my analysis on the Agreement signed between Argentina and the IMF in July 2018. This Agreement has been strongly criticized for being contrary to the institution's regulations, and for supporting a political party's presidential electoral chances in 2019.

I will use this Agreement as a case study to argue that international law legitimizes and reproduces neocolonial relations between Global North and Global South states. Thus, this dissertation is guided by the following questions: What role does international law play in regulating relations between states in the Global North and Global South? And how do transnational actors manage to impose their private interests and reflect them into public policies?

From a postcolonial and poststructuralist understanding of law and power, I will refer to Enrique Mari's body of work, especially to his concept of law as a part of a *dispositif* that legitimizes and reproduces power relations. I will further highlight the "colonial legacies" of modern law. That is, during the last centuries, law has evolved pierced by a political and social context of colonial expansion, and it has adopted the strategic function of legitimizing these relations. The legal discourses reflect an ideology that aims to perpetuate dynamics of power and dominance that favor Global North states, transnational private actors, and local elites. In this context, the International Monetary Fund played a key role since the 1970s in imposing neoliberal policies to Global South states, promoting transnational governance, and reducing local sovereignty. The rulemakers' role was then adopted by private actors, according to their own interests. The consequence of this process was the privatization of democracy.

The case study will be helpful to observe how this process takes place in the Argentinian context of the 21st century. I aim to reveal how international law adapts itself to legitimize neocolonial domination.

Keywords: international law, TWAILS, coloniality, IMF, Global South.

I would like to start thanking to my friends during these months, and the people in Oñati.

Special mention for my partners Deo, Itzi, Male and Debbie for our adventures.

Thanks to my family and friends for your kindness. Thanks to my mom.

Thanks, Mili for your support and patience.

I wouldn´t have made it here without the privileges I have had.

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Glossary:

AoA: Articles of Agreement

BCRA: Argentinian Central Bank (*Banco Central de la República Argentina*)

CELAC: Latinamerican and Caribbean States Community

EAC: Extraordinary Access Criteria

EPE: Ex Post Evaluation

GAO: Government Accountability Office

ICSID: International Center for Settlement of Investment Disputes

IFI: International Financial Institutions

IMF: International Monetary Fund

SBA: Stand By Agreement

TWAIL: Third World Approaches to International Law

UNASUR: Union of South American States

US: United States of America

1. Introduction

1 I decided to write my dissertation about the International Monetary Fund (IMF) in a European university as a way of telling the story of what is happening far away, in Latin America. The Argentinian society is perhaps one of the most aware of the existence of the IMF. Our history during the second half of the 20th century has been strongly crossed by arrangements with the institution. In fact, Argentina has signed more than thirty agreements with the Fund to date (July, 2022), and most of them are associated with the hardest times of our history, i.e., attacks on democracy, military dictatorships, enforced disappearance of people, hyperinflation, increase in poverty, etc.

2 Moreover, I consider that my background is quite important. I studied in the University of Buenos Aires (UBA), a public university of academic excellence. UBA is characterized by being a place where people from all social classes are seated next to each other, studying side by side. A place like that is an endangered species in today's society. The University also has a quite strong Critical Legal Studies tradition which is maintained and reproduced by many academics to the present, such as Enrique Mari, Alicia Ruiz, Carlos Carcova, Ricardo Entelman, Marina Gorali, Emiliano Buis, among many other academics.

3 This dissertation might not sound innovative; certainly, many authors have already discussed the IMF's policies. However, I consider that, given the current context, it's worth revisiting this issue. In the Argentinian case, the institution has regained the prominence that it seemed to had lost at some point. As I will further explain, starting in the 1970s, the Fund had an essential role in the states' policies (vid. infra §29). However, from 2006 onwards, things changed. That year, Argentina and other Latin American states fully paid their debts, and the IMF lost its relevance. In the public arena, the institution was only mentioned and discussed during history classes. The following years, the policies taken by the government were quite different from those taken during the last two decades of the 20th century. The Fund became a secondary actor in the region.

4 However, a new stage of the institution's history has been recently inaugurated. March 8th, 2018 is a special date in Argentinian history. The then president appeared on television announcing he had decided to initiate negotiations with the IMF. The next years were characterized by an acceleration in the processes of inflation, multiplication of poverty, depreciation of wages, migration of friends and family, among many other social consequences. Things are not much better while I write this introduction.

5 While writing this dissertation, I learned that the original design of the Fund had completely different objectives than those adopted since the 1970s (vid. infra §29). That is, in the beginning, the Fund did not promote "austerity" policies. The institution adopted the role of promoter of neoliberal policies and watchdog of economics after the Bretton Woods period. Ugarteche (2016) claims that, in the period from 1944 to 1971, the organism adopted Keynesian policies that sought the development of the state. During this period, the agreements were mainly addressed to European states. In the years that followed this stage, the Fund's loans were exclusively addressed to Global South states, and the role of the IMF was radicalized.

6 This period matches the years next to the decade of independence of African states. The global context in which this process took place makes us wonder if the original development objective of "expansionary developing policies" was directed only to European states with the aim of creating the developed Global North in opposition to the Global South. Once African and Asian states achieved their independence, the "control role" was not abandoned, but delegated to international financial institutions (IFIs).

7 In any case, in this dissertation I will consider that the Fund effectively adopted the role of promoter and safeguard of the neoliberal interests. These interests, defended since the 1970s, are in line with those of the financial sectors. Jule Goikoetxea calls them "transnational private regulations system of governance." From this stage on, an offensive against the sovereignty of the states of the Global South was inaugurated. International organizations such as the IMF, the World Bank, the Inter-American Development Bank, and the World Trade Organization played a key role in disempowering the states. This implied removing their ability to translate the local communities' demands into public policies, and weakening the state. Rules had to be made by private actors or, at best, following their interests. Popular sovereignty[1] was corroded, and private sovereignty flourished. In this global context, I wonder what role does international law play in regulating

[1] I will not refer to the term "sovereignty" in a "legal approach" (Koskenniemi 2005), but in a political mode. I understand the term "sovereign" in the terms postulated by Goikoetxea Mentzaka (2018). This is, the relationship between State, community and democracy; the political legitimacy and authority derived only from the *demos* — the political community. As Goikoetxea explains (Bilbo Barcelona Critical Theory 2020), the term has been reappropriated by political subjects in different states to refer to the capacity of a community to self-govern and decide on substantial issues (environmental, food, health, education, sexuality, etc.), and not limit its participation to the election of representatives. In this line, Goikoetxea (2018) states that any kind of legal system that lacks the idea and application of popular sovereignty, falls into private hands (lobbies, bureaucracy, "experts," etc.) and reproduces private interest.

relationships between states in the Global North and South? How do transnational actors manage to impose their private interest and reflect them into public policies?

8 First of all, I have to make some specifications. I will not set off from a liberal conception of law. I will understand it in the same terms as Enrique Marí. The author offers an understanding of law as part of a *dispositif* of legitimation of power relationships. I will further develop this issue in the "Theoretical Framework" section (vid. infra §53). Moreover, I will take some concepts of Third World approaches to international law (TWAIL) authors that suggest that international law has roots in the colonialist stage, and reproduces neocolonial relationships. My hypothesis, then, is that international law is part of a *dispositif* of legitimation of neocolonial relations between Global North and Global South states (vid. infra §55). In other words, this *dispositif* has the strategic function of legitimizing and reproducing those relations, thus "naturalizing" the hegemonic position of certain states.

9 In order to prove this hypothesis, I will use a case study methodology. The case study is a methodology proposed by Robert Yin. The author understands that a qualitative analysis based on a unique selected case could be used to understand and examine "how" or "why" a decision or a process took place. This methodology enables me to understand a complex situation with multiple actors and ridges, by deeply focusing on a rich case (Yin 2009; Baharein & Noor 2008). In this instance, the case study under review will be the Agreement signed between Argentina and the Fund in 2018 (from now on, "the Agreement").

10 On the other hand, I will use critique as a methodology. Marina Gorali claims that criticism is "an operation of interrogation on a concept, practice and theory that aims to make visible aspects that have been omitted, silenced; understanding that this very act of making something visible produces changes, effects, transformations" (Gorali 2022).

11 Finally, in this line, I consider that it is also relevant to refer to Alicia Ruiz's understanding on law:

> "Law is presented as a social discourse, which is more than a norm. A discourse that, while legitimizing existing power relations, serves to transform those relations. A discourse loaded with historicity and ideology, but which does not mechanically reproduce the organization of society. A discourse whose most hidden and denied portion is played out in the collective imaginary, where beliefs, myths and fictions form a symbolic network that gives meaning to real acts of individuals and groups" (Ruiz 2001: 30).

2. Research contextualization

12 Global South economies have been conditioned by many factors since their independence from their former masters. These constraints have adopted different ways of enforcing the economic interests of the Global North, always legitimized by international law. Namely, in the last centuries, capital has managed to protect and reproduce itself in different states (Pistor 2019). As I will argue throughout this dissertation, law plays a key role in the legitimation of these global relations of dominance.

13 When thinking of how capital has conditioned the Global South states, and has imposed its interests in them, perhaps one of the most relevant issues is debt. According to Eric Toussaint, foreign debt has played a key role in imperialist policies from the 19th century to the present (Toussaint 2018). In Toussaint's view, debt has been used as a weapon for domination, and as a means to accumulate wealth for the benefit of dominant groups and states.

14 Debt has been used as a tool to impose control of Global South economies since their independence. This is the case of Argentina, but also of many other Latin American states that found themselves seriously indebted a few years after their independence. The "debt issue" has been in the public debate of these states for many years, from the first decades of the 19th century onwards. In the Argentinian case, the economic history has been marked by arrangements with European bankers since the 1820s. These arrangements imposed conditions that were severely detrimental for the state's economy, while being very beneficial for the European bankers (Toussaint 2018).

15 During the 20th century, after World War II, a new player entered the scene: The International Monetary Fund. The IMF was devised as an institution meant to give loans to states going through economic recessions in the post-war period. Stiglitz (2002) narrates that the institution originally had the mission of preventing a new global economic depression. This would be achieved by injecting liquidity into the economy, and promoting increased public spending. However, since the 1980s, the IMF changed its target, and all of its agreements were, from then on, signed with Global South states. In this new era, the organism imposed much more severe "austerity" conditions to the states. Not surprisingly, critiques of these operations flourished (Brenta 2013: 74, Stiglitz 2002).

16 In this section, I will briefly introduce the history of the debt issue in Latin America. I will present some events which reflect the operation of debt since the times of the independence in the newly-established states. I will argue that, at the beginning of the 19th century, the independent states acquired legal and political sovereignty, but not economic sovereignty. Those decades inaugurated the neocolonial stage, in which the European states and private actors were able to condition Latin America without establishing formal colonies (vid. infra §22).

17 Then, I will argue that the IMF has acted as a political tool for states from the Global North (especially, the United States of America), so that they could impose certain policies and have control over the economies of states from the Global South. I will argue that, even when the IMF's objectives were thought to be in line with the development of the states, the design of the institutional architecture ensured that the United States could establish itself as the hegemonic power, capable of driving policy and imposing its economic interests. The institutional design allowed U.S. Congress and the United States Department of the Treasury to redirect the policies of the institution. Since the 1970s, the original objectives changed, and the policies were oriented to condition and impose state policies in the Global South. I will further develop this issue.

18 Lastly, I will refer to the relationship of Argentina and the IMF. I will start narrating some events of the Argentinian history of the 20th century. I will then introduce the 2018 Argentinian Agreement with the IMF, and I will mention the criticism that arose regarding irregularities in the criteria for the credit approval. I will argue that the loan was approved with the political aim of supporting a political party, and certain maneuvers were carried out in order to distort the hard law. I will present the main characteristics, legal points, and criticism of the Agreement.

2.1 Debt issue: the influence in Argentinian history

19 Since the 1820s, the economies of almost all recently independent Latin American states have been conditioned and limited by debt (Marichal 1992). The operations were carried out mainly by five English banks that controlled the Latin American market, with complicity of local elites (Toussaint 2018). Latin American states required financing to fight the wars of independence, to build cities, and to modernize infrastructure. These loans were distinguished by the exorbitant profits of debt holders, while debtors had enormous difficulties paying them back. This financial architecture allowed England to position itself as the main hegemonic power, and to find new markets for its

industrial production. It did it by pressuring foreign states to adopt free trade policies, while adopting protectionist measures inside its market (Chang 2004: 62, Toussaint 2018: 33).

20 Argentina's relationship with the Baring Brothers serves as a paradigmatic example, but this same picture could be easily appreciated in almost all Latin American states (Marichal 1992, Toussaint 2018: 23).[2] The agreement with the Baring Brothers marked the beginning of Argentina's history with foreign debt.[3] On July 1st, 1824, the Argentinian agents signed an agreement that pawned all state-owned assets, rents, and soil for the amount of 1 million pounds plus interests (Rapoport 2014). However, not all the money arrived to Argentina. Between the Baring Brothers and the Argentinian agents in London, many rates and personal fees were deducted, and only 552,700 pounds were left to the Argentinian State. According to the story, this money was not even sent (Amaral 1984). The Baring Brother sent only 57,400 pounds to Buenos Aires (deducting 1.5% for insurance expenses), and the rest of the money was shipped at the company's discretion, not in gold, but in bills of exchange. During the next decades, Argentina's economy was conditioned by foreign debt, and it took eighty years to cancel the loan. In the end, Argentina paid 44 pounds for each pound received (Rapoport 2014).

21 This same story is repeated across Latin America. From 1822 to 1826, ten loans were signed between English companies and Latin American states. Toussaint (2018) emphasizes that, in this period, forty-six companies dedicated to finance and investments in Latin America were created in England, and almost two-thirds of the funds destined for financing went in this direction.

22 In sum, foreign debt has always been a public issue for Latin American states. New mechanisms were adopted to gain control over the new states and to reproduce the hegemonic position of European states. Even though these states were politically independent, they remained economically dependent on Global North states, while local elites made sure that the policies applied satisfied their economic interests (Young 2001). In other words, these states were legally but not politically and economically sovereign. The first decades of the 19th century inaugurated the "neocolonial" stage. Nkrumah explains that neocolonialism is a new stage of colonialism, in which there are "empires without colonies," but with effective control on the politics (Young

[2] In Mexico, in 1824, a very similar process took place with B. A. Goldschmidt and Barclay's Bank (Bazant 1995, Toussaint 2018: 43).
[3] I will use the term "Argentina" just to simplify the explanation. In fact, it is not possible to affirm that the Argentina National State existed back then. It would be much more appropriate to talk about the "Provincias Unidas del Río de la Plata."

2001). Even though the author refers to the African independence during the 20th century, I consider that it could be easily applied to the situation in the Latin American context. A key element that the author points out is the additional component of a Western-educated, neocolonial elite who identified itself with Europe, and who facilitated the exploitation of the country's resources and people.

23 In the Latin American case, Obregón (2006) affirms that the *criollos* represented this social group. The *criollos'* "will to civilization" was intended to complete the civilization process with a view of European societies (vid. infra §64). The aim was to eliminate barbarism, and to justify certain economic, religious, educational and racist practices (Obregón 2006).

24 In sum, the debt issue was not circumstantial, but a situation which repeated itself all over the continent, and which was functional for the economic interests of foreign actors in concordance with the local elites' ideology. The English bankers and merchants were able to take advantage of the economic needs, and to consolidate a hegemonic position through the next decades. This would not have been possible without a local class willing to consolidate a European society in America, and reluctant to defend local interests.

2.2 International Monetary Fund: main characteristics, origins and functioning

25 The IMF (2021b) presents itself as a global organization of 190 states with noble objectives (such as the protection of the world economy's "health," the promotion of high employment and sustainable economic growth, the reduction of poverty, among others), and certain discourses assume that the IMF represents the "trust of the world". However, the architecture of the organization and its daily work highlight another reality. The IMF has been a leading actor in the world economy of the 20th century, particularly since the 1980s. During that century, new technologies of neocolonialism emerged as soon as African and Asian colonies got their independence. The "control role" was carried out by other institutions, such as the IMF and the World Bank. Anghie (2004: 264) states that the Fund is the evolution of a system of control and science of management, which relies on new models of legitimation. In the same way it used to be under the Mandate System,[4] those sovereign states which are administered by IFIs cannot

[4] "The Mandate System was an international regime created for the purpose of governing the territories — stretching from the Middle East and Africa to the Pacific — that had been annexed or colonized by Germany and the Ottoman

effectively decide their own policies (vid. supra §22). If they deviate from what was suggested, they are disciplined by the international financial system.

26 As I will further expand, international law has developed as a necessary *dispositif* in the legitimation and reproduction of colonial relationships between Global North and Global South states (vid. supra §19-24; infra §55, 63-66). When thinking of public debt, international law also has a legitimizing role. In this section, I will present the main characteristics of the IMF and I will show that it is not a "global organization" with noble objectives; on the contrary, it represents the interests of a few states and private actors, and it has been used as a tool to reproduce neocolonial relations of domination between states. This dominance is exercised by the Global North states in general, but mainly by the United States.

27 In consequence, as noted above, Global South states are legally independent, but not sovereign: they are not able to self-govern nor to take decisions by themselves, since they depend on what a bureaucrat in an office in Washington D.C. defines. Furthermore, I will briefly review Argentina's history with the institution, and I will show what ideology and interests were reproduced.

2.2.1 The International Monetary Fund: main characteristics

28 The IMF was created after the Second World War through the Bretton Woods Agreement. Ugarteche (2016) recounts that the infrastructure of the institution was discussed by England and the United States during the war, since both states aimed to secure their hegemony. In the end, the economic and social context of the post-war period allowed the United States to consolidate its hegemony as the main economy (able to finance other states) and the dollar as the replacement of gold. Both Keynes and White shared the will to create an institution that promoted economic expansion, full employment and stable exchange rates, and that facilitated access to resources, especially in states going through an economic recession.

29 According to Stiglitz (2002), since its creation the IMF has changed its objectives. While in its origins the IMF had Keynesian ideas that aimed to produce global collective actions to mend market failures through expansionary policies, these objectives changed, and the institution was coopted by the financial interests. In the original Articles of Agreement (AoA), the IMF had the

Empire, two of the great powers defeated in the First World War. Rather than distribute these territories among the victorious powers as the spoils of war, the international community resolved to place them under a system of international tutelage" (Anghie 2004: 116).

goal of promoting global stability and guaranteeing finance for states experiencing economic recessions. However, the organism informally changed these objectives, and it now promotes the interests of the financial community, which, in many cases, are contradictory to the original ones. The IMF never changed the writing of the original Agreement, but in practice, Stiglitz claims that they reflect the interests of Wall Street, which leads to intellectual inconsistencies. Thus, the author suggests analyzing the IMF "as if it is defending the interest of the financial community" to better understand its actions (Stiglitz 2002: 289). Tabb also agrees with this view, and states that the IMF and the World Bank "have moved further from the financial regime that was the framework for the Bretton Woods System. This change of direction corresponds to the desire of the most transnationalized sector of finance economy" (Tabb 2004: 219). The evolution of the operations of the Fund raises the question of whether this "development model" was designed exclusively for the European states and to ensure the creation of a developed Global North in opposition to a Global South.

30 Regarding this "informal shift" , many authors have referred to the process of neoliberalization of the global economy since the 1970s. A strong shift characterized the policies applied in the decades following the Second World War and the ones applied after the 1970s. The IMF was, along with the World Bank and other institutions that emerged later, one of the main promoters of these changes. Goikoetxea (2018: 35) explains that, after the Bretton Woods period (1944-1973), a system of governance consisting of private transnational regulations was established with the aim of dismantling the welfare state, an analysis shared by Gargarella (2014). Sassen (2010) also refers to this process. She points that period following the Second World War was characterized by controlled exchange rates and international capital flows. The states were powerful and important, and had a major impact in the economy; there was a financial market that was regulated and had low activity; and, finally, the financial system was protected from international competition and exchange rates (Sassen 2010).

31 During the 1970s, this logic changed, and neoliberal policies arrived. In the first place, there was much less regulation of the financial system. Moreover, the legislative power yielded its capacities to private agents and to other public administration sections, i.e., the executive and judicial powers. Then, bureaucratic administration proliferated, and the government of technocrats expanded. The author refers to this process as the "disassembling" of state power and the re-assembling under a new logic. In other words, these authors suggest that during these years there was a redefinition of

the "separation of powers doctrine." The new functioning does not answer to a notion of popular sovereignty, but to one of private sovereignty. In this line, from the 1970s onwards, the IMF aligned itself to the neoliberal agenda, and imposed it on Global South states.

32 I will delve into a brief analysis of the institutional functioning of the IMF. Firstly, the states' capacities to affect IMF's decisions rely on a very complex voting system. The more quotas a state has, the more votes it has. The US has the most votes and the highest quota. This implies that in certain important decisions, which need 85 or 70% of the votes, it has veto power. Thus, a first characteristic to point out is that the institution does not have a democratic decision-making system. On the contrary, while the peripheric states have been the main "users" of the programs of the Fund since 1970, they have almost no voice in the organization (Brenta 2013).

33 Moreover, even though the Articles of Agreement of the Fund established that "each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of these functions,"[5] the influence that the United States exercises over the IMF is far from informal, but rather institutional. Brenta (2013) explains that the US Congress sends mandates to the US representative in the Fund with the objectives that need to be achieved by the institution. Also, the Government Accountability Office (GAO) is the body in charge of verifying if the representative has accomplished or not the instructions given. In addition, the United States Department of the Treasury must identify opportunities to influence the Fund's decisions and must report them to Congress. In sum, there is a quite complex regulatory and bureaucratic architecture destined to ensure that the US' interests are represented in the Fund.

34 In a "non-public" document of the 1980s, the IMF (International Monetary Fund 1984: 7) recognized that in certain opportunities, nongovernmental creditors contacted the institution's staff requesting for assistance for unpaid financial claims.[6] The document states that the Fund usually does not provide assistance, except in those cases in which a member state decides to espouse the claim of the nongovernmental actor. In these cases, the Fund informally takes the claim. That is, in the same line as Stiglitz maintains, the institution acknowledges its role in informally defending private actors' interests.

35 Furthermore, the issue of conditioning is a key element when analyzing the Fund's behavior. As soon as a state intends to use IMF resources, the organization demands certain conditions. These

[5]Articles of Agreement, article XII, section 4 (c).
[6] Reference kindly provided by Dr. Matthias Goldmann.

might be both formal and informal, or hidden, conditions (Brenta 2021), and may include the privatization of public institutions (such as banks, the social security system, or any other kind of public company), the modification of law (i.e., deregulation of labor rights), and also certain macroeconomic targets (monetary and budgetary). If these conditions are not properly met, the IMF might suspend the program and the following payments. This could mean a severe economic crisis in the debtor state, since access to private funding is also usually related to the success of the program (Brenta 2021).

36 In short, the sum of these conditions tends to create what is known as "austerity" policies in an economy that is already shrinking. The effect produced by austerity measures creates an environment that deteriorates the material living conditions of peoples, and deepens the economic crises specially for the working classes (Bohoslavsky 2021, Brenta 2021). Moreover, after taking these measures, in most cases, the economies do not grow, but on the contrary, the crisis deepens (Stiglitz 2002).

37 Bohoslavsky (2021) indicates that those objectives related to poverty reduction are not considered to be binding, so International Financial Institutions do not answer for the results of their actions. This is to say, if as a consequence of their recommendations, there is a violation of human rights, they are not responsible. Even though there are legal arguments to bind the IFIs to human rights obligations (Bohoslavsky 2021), in practice, when the institutions recommend certain actions, they do not even carry out studies on the possible impacts they could have on people´s lives. And, in the case that a state would argue that the IMF has violated the AoA, there is no jurisdiction to attend to. All disputes must be solved within the institution, since there is no "independent" body. The controversy must be addressed to the same two bodies which took the questioned decisions: the Executive Board and the Board of Governors (Brenta 2013).

38 In essence, even though the original purposes of the Fund were influenced by Keynes and sought an active role of the states in regulating and generating expansionary measures, the design of the institution architecture allowed the United States to modify those original objectives, and to impose its transnational financial interests. The IMF then aligned and imposed neoliberal interests in Global South economies (vid. supra §30).

2.2.2 Argentina's history with the IMF and the 2018 Agreement.

39 An Agreement with the Fund was not something new for Argentina. On the contrary, the state is perhaps the one with the strongest relationship with the Fund in its history. This history has some chapters that deserve to be briefly described.

40 In the first place, regarding the US Congress mandates, Noemi Brenta (2013) states that during the 1990s, at least two legislative mandates directly affected Argentina's politics. On the one hand, in 1998 the US Congress instructed the US representative in the Fund to stimulate "adequate" banking practices. This issue became a key mission in the Fund, and was incorporated into the conditions. In sum, in the agreement between Argentina and the IMF in 1998, the Fund demanded a draft bill on the privatization of the National Bank of Argentina. Similar situations took place in the same decade regarding labor rights. In a report called "Efforts to Advance U.S. Policies at the Fund," the GAO acknowledges having influenced through the Treasury to implement a flexibilization of labor rights in Argentina (United States General Accounting Office 2001). In both cases, the US Congress sanctioned a bill that ordered certain mandates to the IMF, which was later made effective in Argentina's legal system.

41 Moreover, it is worth mentioning that Argentinian relationship with the IMF during the 20th century has been characterized by the financing of non-democratic governments on several occasions. Brenta (2013) narrates that, in the months previous to the *coup d'état* that took place in Argentina in 1976, the democratically elected government sent four memorandums to the IMF negotiating a loan without getting a single dollar. During the negotiations, on February 21st, Jack D. Guenther, IMF representative, wrote in a memorandum that "there are rumors that the military will act soon." One month later, on March 24th, 1976, a *coup d'état* took place, leaving thirty thousand forcibly "disappeared" people, strong neoliberal economic policies, and many other dramatic consequences. On March, 26th, 1976, that is, two days after the military had taken power, the IMF authorized a loan to the antidemocratic government. Some months later, in August, the IMF approved the biggest loan in the history of the institution to a Latin American country. During the administration of James Carter, in 1977, the IMF changed its policy, and did not approve loans to Argentina as a sanction for human rights violations. Once Reagan was in the presidency, in 1981, the prohibition to finance Argentina was removed (Brenta 2013).

2.3 Case Study: The 2018 Agreement between Argentina and the IMF. Characteristics and main criticism

42 In 2018, Argentina signed its twenty-third agreement with the IMF. This agreement will be used as a case study to argue that international law reproduces and legitimizes asymmetric power relations, which maintain colonial dominance between states. That is, the basic and most influential areas and doctrines of international law, i.e., IFIs regulations, investments regulations, the ICSID, the fragmentation of international law, among others, have been designed to perpetuate this logic (Eslava, Obregón, and Urueña 2016). In other words, the IMF is a political organization that plays a key role in endorsing policies in Global South states which reproduce colonialist practices. The Global North and the private actors use international organizations as a means to protect their economic interests in peripheric states. In this process, the role of the law must be questioned. As I will explain, I understand law is part of a *dispositif* for the legitimation of power relationships. The economic, political, and social interests behind these dominance relationships must be protected and, in certain cases, law must adapt itself to do so. With this in mind, I will analyze the normativity of the IMF that regulates the access to financing outside the ordinary framework, suspecting that maneuvers were performed to support a political party, and that the AoA were distorted.

43 On the one hand, the IMF establishes that, in normal conditions, a state's access to funding is limited to 145% of its quota for twelve months, and cumulatively to 435% of the quota throughout the program (International Monetary Fund 2021a). However, in extraordinary cases, the state's capacity could be extended if they fulfill the requirements established by the "Exceptional Access Criteria" (EAC) (IMF Communications Department 2015). The soft law norm establishes that, in order to extend the access over 435%, states must satisfy the following arrangements (International Monetary Fund 2015):

44 > "The member is experiencing or has the potential to experience an exceptional balance of payments pressures on the current account or capital account resulting in a need for Fund financing that cannot be met within the normal limits. […] A rigorous and systematic analysis indicates that there is a high probability that the member's public debt is sustainable in the medium term. Where the member's debt is assessed to be unsustainable ex-ante, exceptional access will only be made available where the financing is provided from sources other than the

> Fund restoring debt sustainability with a high probability. **Where the debt is considered sustainable but not with a high probability**, **exceptional access is justified if financing is provided from sources other than the Fund**, although it may not restore sustainability with a high probability, improves debt sustainability and sufficiently enhances the safeguards for Fund resources. […] The member **has prospects of gaining or regaining access to private capital markets within a timeframe and on a scale that would enable the member to meet its obligations** falling due to the Fund. […] The policy program of the member **provides a reasonably strong prospect of success, including not only the member's adjustment plans but also its institutional and political capacity to deliver that adjustment**."[7]

45 In 2018, the Stand-By Agreement[8] (SBA) signed with Argentina considered that the state did not satisfy the "high probability" sustainability criteria, but it was only "sustainable." So, to approve extra financing, the Fund needed to argue that Argentina had access to other sources of finance that improved debt sustainability and enhanced safeguards. The Fund argued that: i) "The long maturity of Argentina's privately-held foreign currency-denominated debt improves the prospects of adequate private creditor exposure being maintained throughout the program;" and ii) "Argentina has access to both domestic and foreign financial markets" (International Monetary Fund 2018: 31).

46 After this, referring to the third criteria, the Fund stated that Argentina had access to private capital "on a scale that would enable the member to meet its obligations," and argued in favor in just three sentences, in which it referred to a previous successful bond placement in the previous months. However, it recognized that global and local actors had tightened external financing conditions, but it "expected" Argentina's politics program to be successful, to restore trust and to reduce budgetary finances (International Monetary Fund 2018). In sum, with these considerations, the Fund approved the extension to funding nearly three times the original limit, which represented the largest agreement in the history of the IMF (Brenta 2021).

47 Moreover, it is quite important to analyze the issue of the IMF norm. Here, soft law plays a key political role. When analyzing the hard law, the Articles of Agreement, we notice that states ratified certain general principles which should rule IMF actions and decisions. However, in practice, the

[7] Emphasis mine.
[8] Stand-By Agreements are the most frequent programs, and they are applied to short-term balance of payment problems. They allowed a state to obtain money in periods of twelve to eighteen months and they must be reimbursed in two or four years. The disbursements are usually made every three months (Brenta 2013).

Fund self-governs through soft law rules and deviates from what was originally agreed. This is how the institution was able to abandon the original principles, as Stiglitz points out (vid. supra §29). In this case, the Fund established certain criteria through soft law norms, which allowed the international organization to act with much more discretion and, thus, more chances to pursue their political interests. Consequently, at the time of analyzing whether the loan was feasible or not, they did not consider the AoA at all, but only referred to the soft law framework. I will further argue that this "soft law governance," together with other strategies, is an attempt against the sovereignty of the ratifying states (vid. infra §88).

48 This had both theoretical and practical effects. If the IMF would have referred to the AoA standards, it would have had to conduct studies to verify, for example, if the Agreement was contrary to the principles established in articles 1 (v) and (vi), and article 6 section 1 (a) (Ferreira Lima 2021).[9] This is, provide finance without resorting to measures destructive of national or international prosperity; shorten the duration and lessen the degree of disequilibrium in the international balances of payments; and make sure that Fund's resources are not used to sustain large outflows of capital.

49 On the other hand, a key element to take into consideration when analyzing the soft law, is its indeterminate character (Kennedy 1997), or its sharp vagueness. In the first place, the norm states that a "rigorous" analysis must reveal a "high probability that the member's public debt is sustainable in the medium term," though it does not clarify what is a "high probability" nor denies technical studies considering the AoA principles.

50 In the case the loan is categorized as sustainable but not highly probable, the State must have financing other than the Fund to improve the sustainability and have access to extra funding. The mere fact that Argentina could access credit in the previous months was enough proof to argue that it had access to other means of finance. But, as Patricio Lima (2021) points out, this access was an exceptional and unsustainable action carried out by the Central Bank of Argentina (BCRA), as the

[9]Article I: Purposes. The purposes of the International Monetary Fund are: (…) v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. (vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members. Article IV: Section 1 (a): A member may not use the Fund's general resources to meet a large or sustained outflow of capital except as provided in Section 2 of this Article, and the Fund may request a member to exercise controls to prevent such use of the general resources of the Fund. If, after receiving such a request, a member fails to exercise appropriate controls, the Fund may declare the member ineligible to use the general resources of the Fund.

institution itself acknowledged during the same administration (Banco Central de la República Argentina 2018). If the IMF would have conducted a holistic analysis, it would have noticed that the access to funding was much more fragile than it appeared.

51 Certain authors have already expressed their view on this Agreement and have pointed out strong criticism of its legitimacy (Bohoslavsky & Cantamutto 2021, Rua 2021). However, I will mainly refer to Patricio Ferreira Lima (2021), who argues that the IMF acted manifestly contrarily to the AoA and thus, the act is *ultra vires*. She argues that the IMF: i) negligently failed to provide adequate safeguards for the external adjustment; and ii) irrationally assumed substantial private financial inflows (vid. infra §78-82). The consequence was the overestimation of the debt sustainability, and a "black hole" or an inconsistency of merely 20 billion U.S. dollars.

52 In this dissertation, as I have been mentioning, my aim here is not to make a strictly legal, but to critically approach to the IMF's work focusing on the role of international law as legitimizer and reproducer of colonial relations and the way in which it is manipulated.

3 Theoretical Framework

53 In the lecture given at the Collège de France, on January 14th, 1976, Foucault (2001) stated that one of the most important creations of bourgeois society was disciplinary power. Disciplinary power does not exercise domination through law, but through a set of discourses, myths, symbols, practices, knowledge, and institutions that impose certain rules and produce the subjects. These rules are not just legal rules, but norms that aim for "normalization."

54 In other words, Foucault understands that, in modern societies, power is not exercised by law, but through disciplinary mechanisms. Law would have the role of legitimizer of mechanisms that remain concealed, namely, law plays a strategic role in dominance (Foucault 2001). If we understand law as a *dispositif* (Foucault 1977)[10], we shall understand that it produces reality and subjects in a particular direction that is functional to power (Agamben 2011). This is, legal discourse should not be thought of as the result of the previous subject who freely agrees to form a community, but on the contrary, it should be thought of as a producer of subjects that it will later

[10]Agamben (2011) explains that a *dispositif,* in Foucault's terms, is a machine which produces subjectivations through discourses, practices, knowledges, and institutions. Every *dispositif* implies a strategic process of subjectivations. In this sense, Foucault understands that **power produces the subjects**. So, a *dispositif* is a technology designed by power to produce subjects and self-legitimate.

regulate (Lerussi & Sckmunck 2016: 75). As Foucault (2001) poses: subjects are constructed by power.

55 In this same line, Mari (1986) shows the intimate relationship between law and power. The author offers an analysis of the power legitimizing *dispositif*¸ which has two aspects. On the one hand, there is a "discourse of order," which makes the effect of certain power relationships appear to be "necessary" or "natural," even though it is an order imposed for the benefit of a certain privileged class or group of people. This discourse of order is where reason is located. It is the place for academica religion, moral, and political philosophy. It is also the site of law. Power finds its most rational mode of social communication in law through the mechanisms of obedience and social control. The relationship between law and reason is twofold: in the first place, law uses reason in the formal logical structures; and secondly, through reason, ideological operations that legitimize power are produced and reproduced.

56 On the other hand, this *dispositif* is integrated by discourses, myths, and non-discursive practices such as ceremonies, flags, anthems, rituals, ranks, symbols, etc. This second element is called by Mari (1986) "social imaginary." He states that the function of the social imaginary is to operate in the universe of symbols by selecting the most effective and appropriate to power's aims. The social imaginary is reflected directly in the emotions and wishes of the people. Its function is to provide rigid and repetitive behavioral schemes, and to create frameworks that connect regularities of behaviors with the goals of power. Mari (1986) understands that force is the third element which integrates the legitimation *dispositif*. However, force would not be effective without the articulation of the order discourse and the social imaginary. These two elements constitute the conditions for the reproduction of power.

57 Mari (1993) also indicates that the legal discourse has a constitutive process in which discourses of different origins and functions intertwine and dispute a space of power, while in the final product there is a "rupture" or a "discontinuity." So, legal creations cannot be interpreted as an individual decision, but they should be thought of as a collective struggle process. During the process of construction of the legal discourse, different discourses with different ideologies and interests are involved, while in the final product they all disappear. Mari notes that it is not possible to understand the final result by observing only what the final product shows, but rather we should look at what is missing to correctly understand which struggles were fought.

58 In this line, legal discourse deserves special attention, since language is also a *dispositif* in Agamben's (2011) terms. Signs (and, thus, words) should be understood as socially constructed and imbued with ideology and interests. Words represent *par excellence* the most genuine means of social communication (Cárcova & Gorali 2021); they are previous to the subjects and they produce them. They represent a field for social struggle. So, in the same line as Mari, Bajtin states that, although legal discourse presents itself as neutral and conceals power relations which affect its creation and application, it is also charged with ideology (Cárcova & Gorali 2021: 193 - 204).

59 Lastly, I must remark that when referring to legal discourse, I do not refer only to the norm. I understand, in the same line as Ruiz (2001), that legal discourse is constituted by different levels. The first level — and the more visible — is the final product of those institutions legitimized to "say the law" and create a norm, i.e., laws, resolutions, decrees, etc. The second level is integrated by doctrine, theories, and opinions which affect and guide the legal practice, and facilitate the manipulation of the first level. The everyday work of law operators and the academic production are included here (lawyers, judges, professors, academics, etc.). Finally, a third level consists of the beliefs and myths which are reflected in the social imaginary. These myths have great importance, because without them the legal discourse would not have efficiency. Kennedy (1987: 405) would also add to these three levels the "reasoning processes," by which the law is created and applied.

60 Now, the legal discourse has colonial roots (Lerussi and Sckmunck 2016). Namely, behind the neutral image that the legal discourse presents, a colonial logic remains. I will refer to the term "colonial legacies" (Mohanty and Alexander 1997), which indicates the imaginary of a legacy and aims to map the continuities of inherited practices.

61 The modern legal discourse has been part of a legitimation *dispositif* that has established colonial practices and instruments in the Global South, and it has produced the basic premises of the Western world. That is to say, the legal discourse, at the same point in history, has evolved in a way that has legitimated and reproduced colonial relationships between Europe and the rest of the world. If we consider, as mentioned above, that subjects are produced by power (vid. supra §54), then Latin American states and subjects might be thought as the product of the colonial legal discourse of the last centuries. It does not arise from the history of these states that at some point in the last centuries there has been a rupture in which the legal discourse has lost or abandoned

these colonial legacies. On the contrary, it is quite simple to observe the colonial roots in our legal system (Lerussi and Sckmunck 2016, Liotta and Szpiga 2022).

3.1 The coloniality of International Law

62 Now, when analyzing international law, a "legal approach" (Koskenniemi 2005: 228) that does not problematize the epistemological basis of the legal discourse might reproduce a history of international law devoid of power and dominance relations. So, it might claim that "since its independence, Latin American states were sovereign and equal and chose freely to interact with European actors," or that "Argentina was a sovereign and equal state, which had a democratically elected president, which freely chose to bind with the IMF." This is, at least, a very biased view of the history of international law.

63 In the opposite direction, many authors have already referred to the colonial character of international law. The TWAIL movement understands that imperialism and colonialism have constituted international law; that is, that the legal discourse has not developed in a previous or parallel way to imperialism, but that it has been pierced by its historical and social reality, and that its basic premises have arisen to legitimate and reproduce dominance relations (Eslava et. al. 2016: 42-44). In this line, Anghie claims that there are a set of structures that repeat themselves at different stages in history, and finds in the IMF the continuity of the Mandate System (Anghie 2004: 263 - 268).

64 The author also claims that the colonial project has also been ideologically supported by a "civilizing mission" as a means of "redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe" (Anghie, 2004: 3). In the same line as Obregón (2006), the colonial project divided the world between "civilized" vs. "uncivilized" or "barbaric" people, and the international lawyers adopted this logic as their own, and reproduced it in the construction of a legal order. European culture, society, political organization, institutions, etc., are self-proclaimed as superior and universal.

65 Anghie also refers to the sovereignty issue for Global South, and he demonstrates that the evolution of the doctrines and institutions were related to colonial problems. In this path, in an earlier stage, Francisco de Vitoria was in charge of elaborating a new doctrine for the justification of the

conquest. To solve the legal obstacles, he turned to the universalization of *jus gentium.* Then, he was able to argue that Indians were in violation of the universal law, and that Spaniards were justified to invade, massacre and enslave. In a later stage, this role was occupied by the positivist lawyers who created the sovereignty doctrine, and established certain formal criteria to define who was and who was not a sovereign state. With this argument, they were able to colonize the African and Asian continents during the 19th century (Anghie, 2004: 101).

66 Other authors such as Pahuja (2011) and Koskenniemi (2004, 2020) have also critically approached the colonial roots of international law. I will briefly refer to Scarfi's (2014) work regarding the construction of international law's discourse in America. The author refers to the construction of the US hegemony through legal imperialism in America. In this path, James Brown Scott, a US diplomat, played a key role in establishing the leadership. Scott admired Francisco de Vitoria's doctrine, particularly the universalist view. He used a variety of instruments to expand and "educate" international law throughout the continent. Among these, the American Institute for International Law (AAIL) was an organism whose aim was to popularize international law in American states. The idea was to create an American code to regulate the behavior of all states without appealing to the use of force, that is, by exporting American values; or, in other words, through the "civilization mission" (Scarfi 2014: 136-141). Thus, Latin American lawyers incorporated US legal values as their own. Scarfi (2014: 185) shows that Scott was able to create a disciplinary system that served to form knowledge/power relations, institutions, and discourses, in turn imposing a norm. The US was then able to renounce the use of constant direct force in America and secure its interests.[11]

4. Critical analysis of the Agreement and the colonialism of International Law

67 The complexity and relevance of the debt issue for the Global South, and the role of the IMF during the last decades of the 20th century have already been discussed in this dissertation. I have also referred to my understanding of law as a part of a *dispositif* of legitimation of power relations, and

[11] This is not to say that there was no use of force at all, e.g., in Nicaragua. On the other hand, there are many examples of the United States using indirect force in Latin America. For example, during the 1970s and 1980s, there was an open support and financing of military dictatorships.

the colonial traces in international law. However, it is not clear yet how international law is operationalized as a *dispositif*. So, my goal is to prove that the Agreement is a perfect case study to show that International Law is part of an imperial *dispositif* that legitimates and reproduces neocolonial relations between the Global North and Global South.

68 I will further develop the analysis of the Agreement signed in 2018 between Argentina and the IMF in the second section. On the basis of what has already been explained, I will focus on those points of the Agreement that I consider to be key to understand that it was a political act to defend a political party and, thus, certain economic policies, a particular model of state, and regulations. In other words, I will look for the colonial roots in the Agreement. I will point out that, in those cases in which the legal norm establishes barriers to the colonial project, it is manipulated. In this case, the manipulation was made using soft law rules, leaving aside the principles of hard law, and allowing the organization to act with greater discretion.

69 In this line, I will start by briefly explaining the historical context of Latin America during the early years of the 21st century. I will present the counterhegemonic political movements that questioned the neoliberal logic and which democratically governed the region. This, together with the dispute between the US and China over global hegemony, might have encouraged a bigger intervention of the United States over Latin American states.

70 In the final subsection, I will focus on the consequences of signing an Agreement with the IMF over popular sovereignty and democracy. I will argue that, in these cases, sovereignty is diminished by the International Organization, and democracy gets privatized. I will maintain that neocolonialism does not attack the existence of the Global South states, but on sovereignty. In those cases, in which a state deviates from the global financial norm, there is a disciplinary system which acts looking for normalization and is much more powerful than the formal law.

4.1 Latin American turn to the left: Historical context of the region in the first decade of the 21st century

71 During the first decade of the 21st century, there were new left-wing parties in power in almost every Latin American country. In most cases, these governments were democratically elected, and they were able to end their mandates, which was a novelty compared to previous decades. This new trend of left-wing governments was a reaction of societies against the policies that were placed

all across the continent during the previous decades following the Washington Consensus mandates (Tabb 2004: 186). In this section, I will refer to the political context in Latin America. I consider that what was happening in the region, added to the global struggle for the hegemony between the US and China, might be the reason for the strong intervention that ensued. It is important to consider this, since this dissertation is focused on the political character of the Agreement.

72 The beginning of the 21st century was strongly marked by social policies and a political alliance of different countries which shared the same visions of the economy and the state. As many authors pointed out, even though the decade was marked by left-wing politics, the measures and policies taken were different (Stoessel 2014, Zanatta 2012). For example, in Bolivia, Evo Morales (2006 - 2019) was the first indigenous president, and he radically modified the political and social context of the country, with new actors coming into the political realm (Noguera 2022). Mignolo (2006) highlights that the Bolivian case was not a "turn to the left," but a "decolonial shift". In Argentina, things were different. Nestor Kirchner and Cristina Fernández (2003-2015) redesigned and revindicated the state role; they reactivated the industrial model, in opposition to the model of the previous decades. In this line, Lula da Silva was president of Brazil from 2003 to 2011; and his presidency was marked by strong economic growth and poverty reduction. A similar process took place in Uruguay and Chile, where government adopted reformist agendas, in contrast to more nationalist visions in Ecuador and Venezuela (Stoessel 2014). As a general rule, in almost all Latin America states, measures for the protection of national interests were adopted, and the neoliberal ideal, or the deregulation model, was put into question (vid. supra §39;41).

73 The neoliberal ideal is not just a model of free economy, with few regulations, where capital freely rules (vid. supra §30-31). It also has cultural and sociological implications that refer to the individualization of the subjects; the abandonment of the collective struggle; the privatization of democracy and decision-making mechanisms (Goikoetxea Mentzaka 2018); the deterioration of social rights (especially labor rights); the modification of the relationship between the subject and politics; and the naturalization of a relation between the subject and the market (Sader 2008, Stoessel 2014).

74 Now, during this decade, Latin American states questioned this logic, and developed an innovative regional alliance. This consisted in a regional group that questioned the neoliberal premises, and established a common foreign policy that was not aligned with the US interests. Many authors

claimed that this process was intended to achieve "post-neoliberalism," a stage in which the regional dependence on the US ended and the logic of neoliberalism was defeated (Sader 2008). This stage was characterized by an approach to the economy which focused on the importance of the domestic market, and of the role of the state as a wealth distributor and a strategic participant in certain areas of the economy (García Linera 2021: 194). An example of this regional post-neoliberal alliance was the creation of the UNASUR (Union of South American States), and the CELAC (Latin-American and Caribbean States Community). Both organizations aimed to define common strategies in regional and global policies, and were characterized by the absence of the US.

75 In the case of Argentina, the IMF influenced the economy until 2006. In this year, the then president Kirchner decided to entirely pay out the debt in advance and thus sever all links with the Fund. This was an action taken jointly with Brazil, but also, similar measures were taken by Uruguay and Venezuela. As a consequence, during the next decade, the IMF became a secondary actor in the economic politics of the region, and its influence was diminished (Ugarteche 2016). This is not to say that the influence of the Global North over the Latin American states disappeared, but it was exercised by different mechanisms, i.e., diplomacy, lobby, the ICSID, private companies and chambers, international institutions, the financial system, US judges, etc.

76 In the years following the payout, the Argentinian government and most Latin American states took measures that were the opposite of what was recommended by the Fund. They increased social spending and applied protectionist policies and, as a consequence, the economic growth was one of the highest in Argentine history (Brenta 2013, 2022; Kulfas 2016). On the other hand, regarding the global context, Brenta (2022) points out that, in 2013, China announced the Silk Road, and as a response, the IFIs and the G20 recommended that emerging states get into debt to invest in infrastructure and reduce the barriers to trade and capital.

4.2 The analysis of the case: the colonial traces in the Agreement

77 In the Agreement signed in June 2018, the IMF (2018) repeated several times that the "debt is sustainable but not with high probability," almost as if foreshadowing what was to come. In Annex I of the Agreement, there is a "Debt Sustainability Analysis" in which the Fund pronounced itself regarding the hazards of the Agreement and noted "high gross financing needs, a high share of

foreign currency debt, high external financing needs, and potential contingent liabilities pose important risks." However, none of these insights were an obstacle to the approval of the largest loan in the history of the institution, which tripled the normal access to funds (International Monetary Fund 2021a: 97). With this "sustainable but not with high probability" forecast, the soft law norm established that the state needed to have access to private finance in order to qualify for extraordinary credit or EAC. Then, the IMF affirmed that Argentina effectively had access to domestic and foreign financial markets on a scale that would enable the state to fulfill its obligations (International Monetary Fund 2018: 32). This assumption is a key element to understanding the problem, since the larger the loan is, the longer the state will be conditioned.

78 As I explained in the introduction, the Agreement signed in 2018 has two major aspects which affect its legal legitimacy and let us suspect that it was contrary to the Articles of Agreement: the unrealistic expectations on private credit, and the lack of measures to secure the external deficit.

79 In relation with the first point, Patricia Ferreira Lima (2021: 9) underlines that "key assumptions on external financial flows are confused — riddled with internal inconsistencies between different presentations on the same information — and appear cooked to meet the favorable projections of gross international reserves" (2021: 13). She notes that an important part of the expected funding depended on "other flow," which might refer to projections on spontaneous repatriation of the external portfolio by residents (Ferreira Lima, 2021: 14). In opposition to what the IMF stated, the BCRA itself acknowledged in July 2018 that it was having serious difficulties with finding private financing (Banco Central de la República Argentina 2018: 41).

80 Moreover, in the Ex-Post Evaluation (EPE) that the IMF conducted in 2021, the institution recognized that "Argentina was not able to raise significant funds externally during the program period" (International Monetary Fund 2021a). That is, after approving the Agreement, Argentina did not place bonds externally, only domestically and in a short term. The foreign holders started to exit the market by June 2019 and, by August 2019, the domestic market came to an end (International Monetary Fund, 2021a: 51). Both the preconditions and the final result of the Agreement let us suspect that there were, in the best scenario, unrealistic projections regarding the access to private credit; in the worst scenario, there might have been manipulation of information to justify access to the EAC.

Another problematic point of the Agreement was the lack of measures to secure the external adjudgment. The classic recipe of the IMF includes a strong fiscal adjudgment, which is supposed to create the conditions for the growth of the economy. However, the lack of measures in the external account supposes a severe bias, especially in cases in which a large part of debt holders are non-residents. In this sense, Ferreira Lima highlights that the lack of external measures made it impossible to consider the Agreement "sustainable." Similar considerations were made by the Fund in the EPE recognizing that "Despite the clear understanding of previous experiences, and in the absence of policy alternatives (debt reprofiling and CFMs), the program ended up with a pro cyclical policy stance, arguably worsening capital flight rather than boosting confidence." (International Monetary Fund 2021a: 62).

81 This weakness that I am pointing in the Agreement is not neutral. While at the local level there was a strong control and reduction of state expenditures, at the international level the interests of foreign holders and private actors that took profit out of the state were guaranteed (vid. supra §34).

82 In the end, the Agreement was a failure. I will briefly present some macroeconomic statistics which reflect the fragility of the program. In the period from 2018 to 2019, in which the Fund policies were applied, the poverty increased by 8%; the inflation duplicated from 24.3% in 2017 to 46.1% in 2019; the GDP decreased by 2.3% (Brenta 2021: 339 - 344); and the unemployment rate was 9.6%. Besides, a substantial percentage of money disappeared through capital flight. The Argentinean authorities specified that, between May 2018 and October 2019, capital outflow reached the sum of US$ 45,1 billion, which is even more than the money received by the Fund (International Monetary Fund 2021a: 112).

83 On the other hand, (International Monetary Fund 2021a: 101) Argentina passed all the four reviews that the institution made during the next year after signing the Agreement, meeting all the established objectives. So, the failure of the program, and the social and economic consequences were not the result of "not following the advice of the institution" as it might be argued; on the contrary, it was the result of doing exactly what was previously established in the Agreement.

84 In sum, these both actions allow us to consider, in the same lime as Patricio Lima, that the agreement constituted a breach to the Articles of Agreement (vid. supra §48). This is, in order to impose an economic model and subjugate the sovereignty of a state, the Fund acted at the very least negligently, and in the worst scenario with the aim of supporting and financing a political party.

85 Now, the operation of supporting certain economic policies through loans requires that the organization does not take into account the barriers that the AoA imposes. The hard law could imply serious limitations to the capacity of the IMF to act (vid. supra §48). A way of solving this is not to be governed by hard law but by soft law. The government of soft law norms allows the institution to act with much more discretion and to reduce the sovereignty of the states' parties in the organization. That is, the rules for functioning that the states originally arranged are informally modified. Then it is more functional to the Fund´s political interest to act according to previous established rules by the organization itself. In this case, the IMF observed the soft law that established the criteria to EAC (International Monetary Fund 2015) and failed to note that the structure of the Agreement could deepen the crisis and allow the capital flight, as the AoA expressly forbids. This operation was not only carried on in the negotiation, but during quarterly reviews in which the IMF checked the implementation of the Agreement and approved it.

86 The soft law arranged in 2015 established certain criteria for the access to EAC through the use of vague, imprecise, or "indeterminate" language (Koskenniemi 2005, Kennedy 1997). In this sense, the rule says that, in cases in which the debt is only considered "sustainable," the state must have other means of financing that improve sustainability. However, it does not mention, for example, the amount of finance or the technical analysis that must ensure that the extra access to funding might not affect the general principles that rule the institutions. The IMF must then be able to act with higher flexibility and discretion and less barriers to support its interests.

4.3 The quest for the privatization of democracy and the international disciplinary system

87 In the face of an agreement with the IMF, a state finds itself in a difficult situation in which its policies are conditioned and controlled by an external agent. I have already made some references to the kind of policies imposed by the IMF, and their consequences in people's material conditions. As I expressed above, I understand international law to be part of a *dispositif* of legitimation of neocolonial relations between Global North and Global South states (vid. supra §55). In this way, during the last centuries, international law has created, as Scarfi claims, a "legal imperialism" through a quite complex set of institutions that produce and reproduce these relations in different stages (vid. supra §33; 66). Sovereignty is one of the main targets attacked by international law in this process. That is, in order to secure dominance over Global South states, they should not be

able to freely self-rule. In this section, I will develop the IMF's attack on sovereignty. I will argue that the main target of imperialism — and neoliberal policies — is not the legal existence of the state, but the popular sovereignty, namely, the ability and power of a political community that inhabits a territory to self-govern. The main consequence of this process is the privatization of democracy (Goikoetxea Mentzaka 2018) or the Denationalized State Agenda (Sassen 2010).

88 The liberal doctrine understands that the modern state has unique and centralized legal sovereignty over a territory, and thus, the exclusive authority to make decisions (Noguera 2019). This is based on a fiction that establishes that people created the State and transfer the sovereignty to it through a social contract. So, sovereignty arises originally from the people and is delegated in the State through a constitutional constituent process. As a result, the State has then an indirect sovereignty that arises from the people and subjects have individual rights. Noguera (2019: 21) underlines that sovereignty is then a mode of social organization based on two ideas: the existence of a single nucleus of power (mainly the State), and the connection between this nucleus and law. The State is the only source able to organize society through law.

89 I consider this to be a fiction mainly for two reasons. On the one hand, there was not a process of empowering of the people, but an empowerment of the bourgeois class. On the other hand, this idea implies that modern subjects create the State. Conversely, it is the power the one in charge of creating subjects and imprint on their bodies the necessary myths and fictions for the reproduction of modern societies.

90 I will not refer to this concept, but I will consider a redefinition of the term "sovereignty" that it is not exclusively legal, but it is also a political reappropriation. Many political actors in different states have been using the term ´sovereignty´ as a mode of claiming a substantial and active participation of the population in communitarian issues (Bilbo Barcelona Critical Theory 2020). Goikoetxea (2018) points out two sides of sovereignty: on the one hand, we can find the formal element which refers to the institutional authority; and, on the other hand, there is a material sovereignty that refers to the effective political capacity of a political community. An agreement with the IMF affects both sides.

91 Regarding the first side, the formal one, since the 1980s, many specialized mechanisms bloomed with the aim of privatizing the decision-making processes, and rising global projects. This was not a new process for the Global South; it was a modification — in some cases a deepening — of the mechanisms and architectures of global governance.

92 Sassen (2010) indicates that the participation of the state in its disempowering process is necessary, but not all states have the same participation. Global North states, especially the US, were in charge of thinking and creating the necessary conditions for this process to take place. In some cases, this happened with complicity of local actors, or "global classes" (Sassen 2007), and in other cases, through imposition or violence.

93 As a consequence, in the last decades, governments have become less and less competent. States have lost the exclusivity of making decisions in certain fields. Examples of these strategies are visible when talking about supranational organizations, like the World Trade Organization, private dispute resolution mechanisms (i.e., ICSID), or just private actors lobbying, producing norms and public policies. In other words, there is a process of displacement of authority from public to private hands that is global and oriented to the private production of norms (vid. supra §22). Goikoetxea (2018) explains that global governance removes ways of channeling public decision making, public authority and accountability, diminishing public institutional capacity. She notes that the political capacity of the communities gets privatized. In this same line, Koskenniemi (2010: 63) expresses that "the pattern of influence and decision making that rules the world has an increasingly marginal connection with sovereignty."

94 Also, Noguera (2010) describes this process, and points out that contemporary power field is constituted by two different kinds of power. On the one hand, the state power, and on the other hand, what he calls a "supranational sovereign private power." This last one is characterized by global private companies with enough power to impose their own interests in policies independently from the state — through private *lex mercatoria* —, to build barriers to states' decisions, and even to threaten and punish (Sassen 2010). Albert Noguera notes that their interests become formal law through international institutions, in which they have great power, such as the IMF, the World Bank or the G7.

95 Now, in the case of a state that signs an agreement, this process is deepened to an extreme. The IMF and other actors play a strategic role in non-state market governance (Sassen 2010: 329). The state will maintain its formal sovereignty, but it will be disputed. This is, sovereignty is not exclusive, but there are two spheres of authority (Goikoetxea Mentzaka 2018)[12]: one is the

[12]Jule Goikoetxea uses this expression to refer to the process of transferring sovereignty to the European Union in the European context. I consider that this could be a good analytical tool to understand the authority that the IMF exercises with Global South states.

traditional state with diminished capacities; the other is the IMF, which will not have an *ethos* but it will have voice, public accounts, and the ability to review policies, to lobby and to demand certain objectives on public policies. They will both compete with each other to define who is able to impose their interests, or eventually they will agree. That is, the liberal idea of a sovereign National State with exclusive authority over a territory is brought down.

96 > The formation of a global capital market represents a concentration of power capable of systemically influencing national government economic policy and, by extension, other policies. The key concern here is the fact that the global financial markets are not only capable of deploying raw power but also have produced a logic that now is seen as setting the criteria for 'proper' economic policy. IMF conditionality has some of these features. In a way these markets can now exercise the accountability functions formally associated with citizenship in liberal democracies: they can vote governments' economic policies out or in; they can force governments to take certain measures and not others (Sassen 2010: 312).

97 As I mentioned before, the material character of sovereignty refers to the real capacity of a community to develop policies. A state which has formal sovereignty but is substantially constrained so that it is not able to impose its policies, is not fully sovereign. Namely, the state has no ability to translate the political community's needs in public policies since it is conditioned by private actors.

98 Popular sovereignty is achieved when the political community that inhabits a specific territory is able to self-govern without outside restrictions (Bilbo Barcelona Critical Theory 2020). In this sense, Goikoetxea (2018) maintains that neoliberalism and the defenders of globalization do not pursue the destruction of the state, but the destruction of popular sovereignty and the welfare state. So, the state will only be accountable to the economic power.

99 The process of appropriation of sovereignty leads to the privatization of democracy (Goikoetxea Mentzaka 2018, Sassen 2010). Goikoetxea notes that this process has place when the state transfers its public and political powers to private hands, i.e., lobbies, experts, corporations, or any other private actor. In this process, laws are produced, applied, and modified by these agents (Goikoetxea Mentzaka 2018: 34).

100 An important element to consider is that privatization of democracy can take place in a formal democratic government, that is, one elected by the people. This process entails the weakening of public responsibility, an issue that does not have place only in practice, but one that it is also formalized (Sassen 2010: 312). This is the public delegation of power and capacities to private actors. Sassen (2010) emphasizes that the financial market has a logic that requires certain goals in the economic public policies, and they were able to create a common sense that suggests that their demands are "adequate."

101 On the other hand, in those cases in which the state formally maintains the capacity to rule, this activity is also done pursuing private interests. Who has the political capacities and whose interests are being defended must be considered. This is a material dimension of democracy, not merely formal. In other words, it is not enough to think of the minimum liberal notion of democracy which refers to political representative institutions, but the democracy must be rethought in a substantial way (García Linera 2021). The pursuit for democratization is the process by which a political community intends to expand the public sphere. The opposite process of privatization implies the elimination of the means for channeling the public conflict and popular demands a political community might have (Goikoetxea Mentzaka 2018: 37).

102 So, the privatization of democracy refers to the interest of certain actors to limit popular sovereignty and thus, to be able to rule according to their own interest. It also answers to an ideology that considers the European universal values (which must be imposed) more evolved and superior than the non-European ones.

103 International law legitimizes the intervention in the decision-making processes and the reduction of Global South states' capacities. This is perhaps the clearest sign of colonial legacy in international law: the constant search for the reduction of popular sovereign capacity and the appropriation of democracies in Global South states (vid. supra §60-61). This is why Antony Anghie (2004) claims that the IMF is the evolution of the Mandates System. A much more sophisticated mechanism that uses technologies to control, dominate and reproduce the power relations in Global South states, which functions with the legitimation and masking of international law.

104 The fact that this operation is concealed by international law is a necessary point (vid. supra §54). It might be argued that Argentina's state has not lost its sovereignty and, in the end, that it is the

one in charge of making decisions. This is true, but it must be considered that there is a disciplinary system behind international law.

4.3.1 On the financial international disciplinary system

105 In the same line as expressed above, I understand that subjects and collective identities are produced by power (vid. supra 54§). That is, the category "citizen" is not natural: it is the effect of a series of *dispositifs* applied on a body that aims to produce subjects from the logic of legal language, establishing the state as an intermediary by rationalizing and individualizing conflict (Goikoetxea and Noguera 2021: 13). In other words, humans are born as mammals and constructed as men, women, Argentinians, lawyers, Asians, Catholics, etc. None of these categories are biological, they are all cultural and thus, political. As I explained, I understand law as a part of a *dispositif* that produces the subject that it later regulates (Lerussi and Sckmunck 2016). In this same line, Alicia Ruiz (1986) highlights that "without being apprehended by the juridical order we do not exist, and after being apprehended we only exist according to its mandates." On the other hand, I have also referred to TWAIL authors who understand that law is a European creation that has colonial roots. Namely, during the last centuries, law evolved and expanded regulating, legitimizing, and reproducing colonial relations.

106 In this section I will argue, in the same line as I explained in the theoretical framework, that in the disciplinary society power is not exercised by law, but through a set of discourses, knowledge, practices, mechanisms, and institutions that impose norms. In the international disciplinary financial system, law plays the strategic role of legitimizer of concealed mechanisms while producing the subjects that it later regulates. That is, behind international law, it is possible to find a disciplinary system that is not regulated by the legal discourse, but through the financial disciplinary system. In this section, I aim to briefly describe this disciplinary system.

107 During the 20th century, Latin American lawyers were educated to adopt certain principles as natural and their own in a process that was described as the "civilizing mission." Scarfi (2014) brilliantly described the process of construction of "US imperial legalism" through organizations, associations of international law, law schools, academics and meetings, among other mechanisms (vid. supra §33; 66). Humprey (2010) refers to the process and describes a set of devices that act with the purpose of normalizing and universalizing values, and modify people's behavior. This is

done by training whole sectors of society in the Rule of Law (Humphreys 2010: xx). The author refers to this process as the "Theatre of Rule of Law," and notes that there is a US project called USAID that spends millions of dollars to influence, train and educate legislators, politicians, judges, lawyers, journalist and civil society in the "appropriate" use of legal tools, and to pass new pro-market laws (Humphreys 2010: 125). Similar comments could be stated regarding the World Bank, and the promotion and finance of legal projects in many states. These are the colonial legacies of international law: the social legal consciousness is strongly crossed by neocolonial relations.

108 In sum, the creation of an international disciplinary system is quite a complex process that includes the expansion of an architecture based on a series of principles of international law designed for the purpose of maintaining a position of dominance. This process requires the construction of a "discourse of order" that implies, as I developed above, building a common sense based on referring to these principles as "natural" and legitimate (vid. supra §55). This result is achieved by the intersection of many *dispositifs*, each one with strategic objectives.

109 In the case there is an anomaly in a state's behavior, certain disciplinary reactions will seek to re-normalize the subject (in this case, the state). Disciplinary systems need the threat of punishment in case someone deviates from the norm. This extra-legal threat does not arise from a public actor, but from a private one. If a state decides not to comply with what the IMF demands, it will be threatened mainly by Wall Street, who emerges as the ultimate guardian of neoliberalism and financial interests. Its reaction might be equal to or even worse than a fiscal adjustment. The state will be sooner or later normalized by an invisible subject, impossible to track, who does not inhabit its territory.

110 This is perhaps the most distinctive feature of the international disciplinary system. Someone with a computer in Tokyo is capable of punishing the economy of a state on the other corner of the world. There is no single subject responsible of exercising the punishment to the state, as it could be a judge in a liberal criminal system. In contrast, there is an impersonal financial system consisting of multiple subjects impossible to trace, who belong to a "global class" (Sassen 2007), who ask for "trust" in certain policies, and who are able to impose punishment to a whole community, defining its future. In sum, the legal features of the operations are not really important because the punishment is not exercised through law.

Final Thoughts

111 The process that I have just described is perhaps the answer to the issue of the crisis of democracy that many authors have addressed in the last years. I believe that the lack of representation of communities in policies and political parties is a direct answer to the process of denationalization of the state agenda, or the privatization of democracy. As Noguera and Goikoetxea highlight, during a part of the 20th century, parliamentarism was able to represent a small portion of society (male workers), but it a was sector that, at least, was able to translate their demands into public policies (Goikoetxea and Noguera 2021). Today the crisis of representation in politics is much deeper. The interests of local communities are left aside when deciding public policies, and private sovereignty is the rule. This process is more remarkable in the Global South and particularly in states in debt with the IMF, but it is still a global process that affects also European societies. It seems necessary to reexamine the basic notions of political theory to analyze the situation. Under these conditions, saying that power arises from the people is more an expression of hope than a reality.

112 International law has a necessary mission in this process. Koskenniemi (2011) explains that international lawyers have persisted in questioning and demonizing the concept of sovereignty. The author develops that the idea of sovereignty was associated with tyrannical governments. Hegemonic discourses pointed out the impossibility of international cooperation in strategic issues. On the contrary, I understand that the last decades have proven that it is not possible to have effective global cooperation in important issues, such as environmental protection or poverty reduction, without local democracies and sovereignty.

113 As explained by Antony Anghie, international law has played a part in legitimizing colonial relations since the time of Francisco de Vitoria, in the 16th century. Since then, international law evolved adopting different doctrines that justified the European intervention in other continents.

114 In this dissertation I have argued that international law has a necessary role in the neocolonial stage. I have borrowed the suggestion of Enrique Mari, who understands law as part of a *dispositif* for the legitimation of these dominance relations, and I have used the Agreement between Argentina and the IMF as a case study to prove this point. The story of the Fund during the 20th century and the "shift" in its policies prove the role of the institution in promoting neoliberal policies and private transnational governance. The case study allowed me to notice how

international law is able to adapt itself — in this case, through the institutional design that allowed the US's interests to prevail, the lack of a third "impartial" part, and the use of soft law to deviate from the hard law and act more discretionarily — to fulfill the objective of dominating a state.

115 Sovereignty has constituted a key subject of dispute. Namely, the concept of sovereignty has been used according to political interests depending on the historical context. During the 19th century, the doctrine established that certain communities were sovereign and that others were not. So, European nations were legally able to invade Africa and Asia, and to establish colonies. The process known as the Conference of Berlin is perhaps the best example of how international law is used as a tool to legitimate colonial interventions in Global South states. In sum, international law proved to be quite a useful tool in that colonial context. In the colonies, local traditions and world views were repressed and replaced by European logic through a legal discourse. Since then, the legal discourse achieved the role of acting as a *dispositif* that produces subjects according to colonial logic and reproduces dominance relations.

116 During the 1960s, a process of decolonization took place in many African and Asian states, and many academics celebrated the role of international law in supporting the self-sovereignty of the people. This is definitely true. However, many of those claims were done through the discourse of human rights, an eminently European discourse that hierarchizes European values over local ones (Liotta and Szpiga 2022). Moreover, once those states were legally sovereign, the IFIs and other private actors occupied the role that previously had the master state.

117 The IMF was a main character in the process of disempowering states during the last decades of the 20th century. As I explained above, the role played by the institution in Europe in the postwar period was completely different from the one played in the Global South (vid. supra §29). Here, the Fund was in charge of dismantling the welfare state, imposing austerity economic measures, promoting the interests of the financial sector, removing labor laws, and in some cases, supporting military dictatorships. In essence, assaulting popular sovereignty, privatizing democracy, and creating the necessary conditions for a transnational private government (Goikoetxea Mentzaka 2018; Sassen 2010).

118 This process would not have been possible to achieve without the action of the state and the local elites that facilitated the disempowering process. In the same way that I described how the *criollos* played a necessary part in the recently independent states in the first decades of the 19th century, there are local actors today who promote a private governance. In the Argentinian case, it was not

possible to carry out neoliberal policies with a democratic government, so a highly repressive dictatorship did it in the period between 1976 and 1983. Then, a democratic government was legitimated to continue the process during the 1990s.

119 The international disciplinary system that rules international law also deserves special attention, since it's an essential actor. As I explained above, in those cases in which a state behavior deviates from the norm, the disciplinary system activates certain mechanisms of normalization (vid. supra §109-110). These mechanisms are depersonalized. There is not a single subject responsible for punishing a state. On the contrary, there is a "financial system" consisting of multiple subjects distributed throughout the world, and it is them who, from an office, exercise the punishment. That is, the political decisions and the future of a community depend on invisible actors who are impossible to track and who, for the most part, do not even live in the same territory.

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