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Year 2007

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Constitutional Changes, Transitional  
Justice, and Legitimacy: The Life and  
Death of Argentina's "Amnesty" Laws.

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**Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina’s “Amnesty” Laws.**

*Jose Sebastian Elias\**

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\* I am indebted to Bruce Ackerman for his insightful criticisms and comments on an earlier version of this paper. I have also benefited from long conversations on the topic with Leonardo Filippini, Marcelo Alegre, and Samuel Ferguson. Julio Rivera (h) read a previous draft and made useful comments. To all of them I am truly grateful.

## ABSTRACT

The article analyzes in-depth the legal and political process through which Argentina came, first, to amnesty former military officers who took part in the repression during the last dictatorship (1976-1983) and, then, to nullify those “amnesties” and indict the officers again eighteen years later. The thematic core is the legitimacy (or lack of it) of constitutional changes carried out by unconventional means, which are the unavoidable spin-offs of the very difficult process of transitional justice that has taken place in Argentina.

Section I gives an overview of the most salient legal and political facts of the last twenty-five years and poses the central questions to be tackled in the rest of the article. Section II covers the restoration of democracy in 1983 and the early attempts to bring the perpetrators of heinous crimes to justice. I analyze the position of some scholars who have suggested that Alfonsín should have chosen the path of constitutional lawmaking, instead of the rocky road of transitional justice. I argue that such position was untenable, in light of both Alfonsín’s political commitments and of the redemptive character of the 1983 election. However, I contend that Alfonsín intended to pursue both military trials and constitutional reform, and give reasons why the trials achieved a logical and temporal priority. The failure of the enterprise is also analyzed in-depth, with particular emphasis in the process that ended up in the enactment of the so-called “amnesty laws”. This Section also scrutinizes the role of the Supreme Court in the post-1983 period, the political incentives at play when the Court decided the constitutionality of the “amnesty laws”, and what alternatives –if any- the justices had at hand. The Section closes with an examination of the political process that led to the 1994 Constitutional Convention and the grant of constitutional standing to a number of international human rights treaties which were later deemed fundamental by the Supreme Court to nullify both Alfonsín’s “amnesties” and Menem’s pardons. Section III, finally,

discusses the legitimacy of the *Simon* ruling by the Supreme Court, declaring the death of the “amnesty laws”, as well as the political and constitutional implications of such a decision. Contrarily to a majority of Argentine commentators, I argue that the process that ended up in *Simon*, although wrapped up in the attractive rhetoric of human rights, can be seen as little more than the imposition of political power by the victors. I offer an alternative view that tries to fit the decision in a broader picture of political legitimacy. However, I give reasons why, though the outcomes may be deemed legitimate from a certain perspective, the means used to achieve such results are of dubious legitimacy.

## I.INTRODUCTION.

Argentina has, most unfortunately, a long story of authoritarian governments and, during a good portion of the twentieth century, military dictatorships. Such an institutional environment has hindered the development of a liberal constitutional practice.<sup>1</sup> The most serious interruption of constitutional order took place between 1976 and 1983, when a military government ruled the country with an ‘iron hand’, under the pretext of fighting the ‘communist guerrilla’. In the process, commonly known as ‘dirty war’, the dictatorship engaged in the systematic commission of countless crimes, establishing a parallel criminal - yet state-run- organization aimed at annihilating the subversion at any cost. The most heinous crimes were committed. Many people ‘disappeared’, without their family having any notice about their destiny ever again. A few lucky people saved their lives and regained freedom after abduction and torture. Many others died in bombings and terrorist attacks. Such a dark phase left deep wounds in the social tissue, and we are still trying to heal them.

Predictably, our society has had serious troubles trying to reestablish constitutional democracy in a liberal fashion. One of the most important obstacles Argentina has faced is transitional justice. During the last 23 years we have been struggling with the issue without having been able to give it a definitive solution, much less one that would content ample sectors of the population. As I shall argue, the topic of corrective justice after the democratic restoration has had a profound influence in the legitimacy of our constitutional process, and it continues to influence it today.

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<sup>1</sup> See CARLOS S. NINO, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL*, (Astrea, Buenos Aires, 1992) at 106-157.

Not unlike the United States, Argentina has a written constitution, whose original text was drafted in 1853 and then revised in 1860. There have been some minor reforms over time, for which the document provides a special procedure, but until 1994 the constitutional text remained essentially the same since its nineteenth-century enactment. Its observance, however, has suffered from a variety of institutional illnesses ranging from instability to plain factual derogation. Nonetheless, the original Constitution has remained in force, even if only symbolically, for most of the time since its establishment.<sup>2</sup> It has worked as symbol of unity and identity for the People. So much that even the worst violators of the Constitution claimed that they were trying to ‘defend’ it and preserve it, and none of them dared to abrogate it formally.

In 1983, after the restoration of civil government, the Constitution was not replaced by a new Higher Law, nor was it amended following the established procedures. Instead, it was reestablished as the ‘supreme law of the land’.<sup>3</sup> In 1985, the Government of President Alfonsín brought the main military leaders to justice. Several former members of the Military Juntas were convicted, and the Supreme Court affirmed their convictions. In 1987, the Congress passed two bills that were functionally equivalent to an amnesty for all intermediate rank officers. In 1990, President Menem pardoned a number of military officers as well as guerrilla people. Some of them had been already convicted, while others were being tried. In 1994, a Constitutional Convention was called, and the document went through some important reforms, in an attempt to modernize our constitutional framework. Individual guarantees were explicitly reinforced, while the classic ‘dogmatic’ part or the

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<sup>2</sup> Except for a brief period between 1949 and 1955, when it was replaced by the 1949 Peronist Constitution, later abrogated by the so-called ‘Revolucion Libertadora’ in 1955.

<sup>3</sup> Between 1976 and 1983, the historic Constitution was subordinated to the “basic goals” and the “revolutionary statute” enacted by the Military Junta. But it was not formally repealed. A new legality, topped by the “revolutionary” rules, was established.

Constitutional remained untouched.<sup>4</sup> In 2004-2005, the Supreme Court handed down two very important decisions touching the transitional justice issue. While their concrete substantive results, in terms who the individuals involved in the cases were, were received warmly, their constitutional foundations have proved highly controversial. The rulings in *Arancibia Clavel*<sup>5</sup> and *Simon*,<sup>6</sup> at least apparently, clashed with some of the most sacred, so to speak, principles of modern liberal criminal law; principles which, in turn, had long been secured in the constitutional level. I am talking, basically, about the prohibition of *ex post facto* criminal laws. In *Simon*, the Supreme Court declared unconstitutional the 1987 ‘amnesty-laws’. Not only did these decisions seemingly contradict foundational principles of Argentina’s legal order, but they also collided frontally with the precedent *Camps*<sup>7</sup> where the Court had settled the matter –in the opposite way- some 18 years before.

Is there any substantial relation between the somewhat disordered sequence of facts I have depicted? Did Alfonsín fail to ‘constitutionalize’ the civic euphoria that followed democratic restoration? What role, if any, did the military trials play in legitimatizing the reconstruction of constitutional democracy in Argentina? Is it possible to give an alternate narrative of today’s Supreme Court decisions that helps understand the larger frame of constitutional legitimacy? Or is the common assertion that the Supreme Court business, in developing constitutional cultures such as Argentina’s, is ‘just politics’, all we are left with? Are we facing a revolution led by the Court? These are the kind of questions I will attempt to answer in the following pages.

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<sup>4</sup> The ‘dogmatic’ part contains the declarations and fundamental principles of the regime, as well as the individual rights and guarantees. It could be characterized as the functional equivalent of the ‘Bill of Rights’ of the U.S. Constitution.

<sup>5</sup> 327 *Fallos* 3294 (2004).

<sup>6</sup> *Simon, Julio Hector y otros*, 328 *Fallos* 2056 (2005).

<sup>7</sup> 310 *Fallos* 1192 (1987).

## II. LOOKING BACKWARDS

In order to better understand the current constitutional situation in Argentina, it is necessary, at least, to take a glance at how the country got to where it is today, and how we built the scenario in which the Supreme Court is starting a constitutional revolution. Let us, then, go back to 1983 for a brief moment.

### *A-1983: A True 'New Beginning' or Just a Simple Restoration?*

By the time Raul Alfonsín was elected President by democratic means, the country was exhausted. It had spent much of its moral reserve in going through seven years of harsh military dictatorship, characterized by the systematic violation of human rights. But the violence and institutional decline had begun much earlier. Even the democratic government of '73-'76 had not been much of a break to a society shaken by political instability and recurrent authoritarianism. For the last 53 years, the country had endured repetitive cycles of weak and short civil governments,<sup>8</sup> followed by strong military rule. Argentina needed some institutional rest.

How it would get it was not very clear until the moment of counting the ballots. The dominant force in the political scene had been, for almost forty years, the Peronist party. It had gone undefeated in every election in which it had not been proscribed. Even when forbidden, the Peronist party had had an enormous influence in electoral results and had been a major player in Argentina's politics. It was only natural, then, that many believed Italo Luder, the Peronist candidate, would become the next president.<sup>9</sup>

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<sup>8</sup> With the exception of Peron's presidency from 1946 to –maybe- 1953-54.

<sup>9</sup> The military dictatorship was among those who were confident in a Peronist victory in the October election. Not only did they have reasons to think so, but they also had motives for hoping so. I will elaborate further below.

There was much more at stake than just holding the main political office of the country for the next six years. The future shape of Argentina's return to democracy and constitutional life would depend heavily on who won the election. Whether we would try to build a liberal constitutional practice that reflected the aspirations of a mobilized society, or we would just try to 'bridge the gap' between 1976 and 1983, and pretend that nothing had happened in between, depended on the name of the winner. Alfonsín and Luder chose to face the electorate with proposals that were radically different in one essential point: what would be the scope of the change in our institutional life. While Alfonsín represented a new generation of politicians, associated with the possibility of deep changes, Luder had strong links to the violent past<sup>10</sup> and offered the prospective of continuity with the past. The 1983 presidential election was, then, crucial.

The military dictatorship had begun with strong civil support. Many people were just tired of the increasing violence that affected society during the mid 1970's, and thought the generals could fill the growing vacuum of power and reestablish peace and order. They were right about the former, but wrong about the latter. Instead of peace, terror came, and with it the fracture and division of society that still haunt us today. As the time passed, support for the regime faded away. The disappearances of people, the abhorrent methods used by the Armed Forces in the 'war on communist guerrilla', and the lack of a coherent and efficient management of the economy were a cocktail that most people were not willing to sip from anymore. Moreover, the changing international environment was no longer tolerant with human rights violations. Criticism abounded, both from internal and external sources, and the military regime was ill equipped to respond to them. The Junta was rapidly losing the

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<sup>10</sup> Even when he himself had not participated in violent actions, he had signed –during his tenure in Isabel Perón's constitutional government- the decrees ordering the "annihilation of the subversive guerrilla" that the military used as legal justification at the beginning of the so-called 'dirty war'.

moral battle.<sup>11</sup> The dictatorship was entering its decadence phase, although in a somewhat disguised fashion, in the beginning of the 1980's.

Then the Malvinas war came. There was a short return of the people's support, when the Military Junta –the supreme organ of government- decided to regain by force the possession of Islas Malvinas from the British usurpation. The legitimacy of the cause made people forget about the illegitimacy of their rulers and, worse, about the futility and the ill-timing of the enterprise. Despite the huge costs that the war had for Argentina, in both human and political terms, it did have one positive spin-off for the country: it contributed decisively to the collapse of the military regime.<sup>12</sup> The generals, blaming one another for the disastrous results of their midnight-conceived military adventure, only had time to call for general elections and try to negotiate protection from criminal prosecutions. They were not successful in the latter task, probably due to their very weak position after the defeat in the war.

But let us get back for a moment to Alfonsín and Luder. A wide range of opportunities for democratizing actors was opened after the military collapse and the non-pacted transition. Possibilities for building a fuller democracy were at hand.<sup>13</sup> It was up to

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<sup>11</sup> The repression had reached unbeknown levels, and the charges –sustained both by western governments and different internal groups- of state terrorism were undeniable. The regime lacked the possibility of neutralizing the criticism in the world of moral power, where ideology, justification and utopias meet, and play a significant role. Obviously, it was a world in which the dictatorship was frankly vulnerable. See CARLOS FLORIA and CESAR GARCIA BELSUNCE, *LA ARGENTINA POLITICA*, (El Ateneo, Buenos Aires, 2005), at 254.

<sup>12</sup> See ELIN SKAAR, *HUMAN RIGHTS VIOLATIONS AND THE PARADOX OF DEMOCRATIC TRANSITION*, (Chr. Michelsen Institute, Bergen, 1994), at 71. Also see CARLOS S. NINO, *RADICAL EVIL ON TRIAL*, (Yale University Press, New Haven and London, 1996), at 43. But see J. PATRICE MCSHERRY, *INCOMPLETE TRANSITION: MILITARY POWER AND DEMOCRACY IN ARGENTINA*, (Saint Martin's Press, New York, 1997), at 9 (arguing that Argentina's transition does not fit well in the "collapse" category, and that it is, perhaps, better explained as somewhere in the middle between "transitions by extrication" and "transitions by reform").

<sup>13</sup> See J. PATRICE MCSHERRY, above n 12, at 7. Also see MARCOS NOVARO and VICENTE PALERMO, *LA DICTADURA MILITAR (1976-1983)*, (Paidós, Buenos Aires, 2003), at 547 (emphasizing the factors that hindered taking full advantage of the opportunities).

them to decide whether to take the opportunities and how to fill the spaces that the retreat of the military from power would create.

Alfonsín won the election, with almost 52 percent of the total votes and his own majority in the Electoral College.<sup>14</sup> Was the 1983 Election the mark of a true ‘new beginning’<sup>15</sup> or was it just a democratic restoration? The question is, I think, legitimate since one of the options in the national debate was, precisely, “institutional and political continuity” (Luder). Also, the failure to enact a new Constitution immediately after the fall of the dictatorship implied, at least apparently, a certain degree of “legal continuity”. After all, constitutional lawmaking is frequently a potent symbolic marker of break with the past.<sup>16</sup> Why consider as a ‘new beginning’ a political enterprise that started by restoring a 130-year old constitutional text that had been violated more frequently than observed during the previous 53 years?

The year 1983 was, indeed, a ‘new beginning’ for Argentina. There was no new constitutional text, but there was a clear cut with a devilish model of state that had been developed by the Military Junta: the National Security State.<sup>17</sup>

The elections were the marking signal of discontinuity between hegemonic authoritarian rule and constitutional democracy, of course. But they were more than that. They were the frontier dividing an old way of conceiving politics and a new perspective on

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<sup>14</sup> Argentina’s presidential election system was indirect and used an electoral college until the 1994 Constitutional Reform. See Article 94, Constitution of Argentina –hereinafter, Constitution-.

<sup>15</sup> See Bruce Ackerman, “The Rise of World Constitutionalism”, 83 *Va. L. Rev.* 771, 778 (1997).

<sup>16</sup> *Idem.*

<sup>17</sup> See J. PATRICE MCSHERRY, above n. 12, at 1, 59-83. She argues, convincingly, that the military *coups* of 1966 and 1976 were qualitatively different from the previous dictatorships. From 1966 on, the military rulers took complete control of the state machine, and establish a totalitarian model of state based on the ‘National Security Doctrine’.

how the Argentinean people wanted to run their *Res Publicae*. The electoral returns marked the epilogue of an epoch and the probable prologue to a different one.<sup>18</sup>

Writing in 1983, Alain Rouquie emphasized that

“Perhaps never before has Argentina society reached such a level of entropy or come so close to disintegration and loss of its identity...The barely tolerated appearance of an *antimilitarism* which is as *new* as it is *uncontrollable* leads one to think that, according to the traditional phrase, *nothing will ever be the same again*”<sup>19</sup>

Novaro and Palermo have described the situation prior to 1983, in a powerful fashion:<sup>20</sup>

“...the dismantling of the military power would encourage the most perspicacious political actors, and through them, ample sectors of society, to aspire to *a new democratic founding* that were *not a mere repetition of previous transitions* and exits, but a definitive cut with long decades of institutional instability and military ‘pretorianism’...”

Subsequent historical developments would give the chance to prove that a fundamental change had occurred. Although there were more than a few opportunities in which different poor conditions (economic as well as political) shook Alfonsín’s government –and, in fewer occasions, Menem’s as well,<sup>21</sup> the People never again entertained the possibility of asking for ‘military help’, as they had done so frequently in the past. On the

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<sup>18</sup> See CARLOS FLORIA and CESAR GARCIA BELSUNCE, above n 11, at 268.

<sup>19</sup> See Alain Rouquie, “The Departure of the Military-End of the Political Cycle or Just Another Episode”, 59 *International Affairs* 575, 576 (1983). The italics are mine.

<sup>20</sup> See MARCOS NOVARO and VICENTE PALERMO, above n 13, at 468. The italics are my own.

<sup>21</sup> Even in the deep crisis of 2001-2002, when people demonstrated massively against the government, there was no support at all for an eventual intervention for the Army in politics.

contrary, when democracy was endangered, the People mobilized in strong support of it.<sup>22</sup> *Coup D'Etats* were definitely rejected as political solutions to all-too-frequent frustrations.

The 1983 election was no usual election.<sup>23</sup> The choice was not about who was the candidate one disliked the least, as it happens sometimes in ordinary, regular-scheduled elections. Casting a vote had a powerful meaning, and most people came to realize it. Political apathy was at an extraordinary low level. Society was mobilized, following closely the electoral campaigns, and highly receptive to any signals sent by the political parties.

The period of mobilization had begun around 1981, when the erosion of the military regime was becoming evident, and the changing conditions started to hinder the possibility of military continuity. On July, 14<sup>th</sup>, following an initiative of the Union Civica Radical (Alfonsín's party), a number of political parties founded the *Multipartidaria Nacional* (National Multi-Party Organization), to which later almost all political formations adhered. The whole range of political visions was represented in the *Multipartidaria*, and all of the involved political movements were mobilized as a consequence.

In June, '82, the political pool known as the *Multipartidaria* released a "Program for the National Reconstruction", that was completely silent about the human rights violations, but emphasized the necessity of the put the 1853 Constitution in full force again. However, the issue of human rights would become central in the electoral campaign previous to the

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<sup>22</sup> During the dangerous *carapintada* rebellion of Easter 1987, approximately 50,000 people –responding to the call of the government- surrounded the Campo de Mayo garrison –where the rebellion was taking place- in support of democracy. Many other places around the city of Buenos Aires were filled with demonstrators against the rebellion. See J. PATRICE MCSHERRY, above n 12, at 214. The General Confederacy of Labor announced a general strike in support of democracy. See CARLOS S. NINO, above n 12, at 97. And the rest of the country followed the development of the events with anxiety and similar manifestations of rejection to military threats against democracy.

<sup>23</sup> Of course, elections could hardly be considered 'usual' in those times in Argentina.

1983 election, as the military defeat in Malvinas changed the relationships between military leaders and civil power.<sup>24</sup>

The political demonstrations multiplied. By the end of 1982, the *Multipartidaria* gathered 80,000 people in Plaza de Mayo, in support of democratic restoration.<sup>25</sup> The civil society was flourishing. Political parties' affiliation reactivated with unprecedented force.<sup>26</sup> Many people affiliated to some party. The sense of 'belonging' and 'participating' became truly important, and affiliation was a symbol of such sense.

Progressively, the question of the crimes committed by the dictatorship and how to handle the issues of transitional justice reached the center of the political debate. In August, 19<sup>th</sup>, 1983 –barely two months before the general elections–, 40,000 people marched to Plaza de Mayo, in opposition to a possibly self-amnesty by the military government,<sup>27</sup> as rumor had it.

Alfonsín and Luder took significantly different stances regarding human rights. While the former explicitly rejected the possibility announced by the soon-to-be outgoing military government that crimes committed during the illegal repression should be judged by history alone and not by civilian courts,<sup>28</sup> the latter held publicly that, according to the prohibition of *ex post facto* criminal laws, any self-amnesty that were issued by the Junta would

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<sup>24</sup> See MARCOS NOVARO and VICENTE PALERMO, above n. 13 at 476.

<sup>25</sup> See MARCOS NOVARO and VICENTE PALERMO, above n. 13, at 501. But see, J. PATRICE MCSHERRY, above n. 12, at 108, who refers 100,000 as the number of people in the same demonstration.

<sup>26</sup> See, i.e., “La Elección Presidencial: Los Padrones como Instrumento de Poder”, *Diario Clarín*, 01/18/2003, available at <http://www.clarin.com/diario/2003/01/18/p-01101.htm> (last visited 11/08/2006).

<sup>27</sup> See CARLOS S. NINO, above n 12, at 64.

<sup>28</sup> See “It Is Not the Final Word”, May, 2<sup>nd</sup>, 1983, response of presidential candidate Raul Ricardo Alfonsín to the “Final Report on the War against Subversion and Terrorism” issued by the Military Junta. Alfonsín stated clearly that it would be by civilian Justice and not history that would judge crimes committed between 1976 and 1983, and that no personal privileges *contrary to the 1853 Constitution* would be allowed.

have permanent effects.<sup>29</sup> While Alfonsín rejected off-hand the possibility of a “pacted” transition, Luder favored such possibility.<sup>30</sup>

There were further indicators that a Peronist electoral victory would likely turn out in military impunity: a then-recent military amnesty granted to right-wing military leaders; the return to trade unions –the bases of Peronist party’s electoral force- of their property, as well as the possibility for them to manage welfare activities –which implied the availability enormous amounts of financial resources-; the connection between the right-wing Peronism and its para-police forces with the violent past; the role Luder had played in issuing the civil government executive orders that authorized the military to suppress guerrilla activities –a fact that the Military Junta had taken well care of reminding the population in their “Final Report”-; the shared beliefs in authoritarianism, nationalism and anti-communism; among many others. All of them virtually guaranteed that no legal action would have been taken against the military, had the Peronist party won the 1983 electoral contest.<sup>31</sup>

Alfonsín, as opposed to Peronist leaders, saw clearly from the very beginning of the collapse process the opportunities offered by the fall of the regime, and tried to take distance from the ideas and symbols that were on demise. Immediately after the military defeat in Malvinas, Alfonsín stated that “the Armed Forces do not deserve this destiny, and the country do not deserve this government, which must go now; the usurpation must cease and

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<sup>29</sup> See JOAQUIN MORALES SOLA, *ASALTO A LA ILUSION*, (Planeta, Buenos Aires, 1991), at 131. Morales Sola argues, however, that Luder’s stance was more precise legally than politically. Such assertion is, frankly, quite disputable. It seems to me that the constitutional invalidity of such de facto self-amnesty law was a plausible legal position, and so it might have been considered, on the political realm, the grant of an amnesty –which would not have been more than following a long-established tradition. If anything, one could argue that there was more *political* accuracy than *legal* accuracy in Luder’s position.

<sup>30</sup> See J. PATRICE MCSHERRY, above n. 12, at 108. But see JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE*, (Cambridge University Press, Cambridge/New York, 2004), at 191/192, who holds that deals were struck secretly and that Alfonsín promised that “only a limited number of officers would have to be tried, and that even these would be granted an amnesty at the end of his term”. However, Elster offers no support for his assertion and the bibliography, if anything, seems to point in the opposite direction.

<sup>31</sup> See Alain Rouquie, above n. 19, at 585.

a process of civil transition towards democracy must begin today”.<sup>32</sup> One of the main Peronist leaders, Deolindo Felipe Bittel chose a different path. In a discourse pronounced in front of Peron’s tomb, he said:

“When the Armed Forces decided to attempt the recovery of the Islands...we acted as you taught us. The Nation comes first. We postponed our legitimate claims and...we stood by the combatants...and denounced to the world the enemy of the Peoples, the imperialism and colonialism that you fought all through your life. Latin America and the Third World understood us and supported us, and all the visionary grandeur of the ‘Third Position’ policy that you held four decades earlier was revealed. Even your most persistent enemies had to walk the path that you pointed...”

Even in the middle of the military defeat, the invasion of the islands and the war seemed to be a victory of the Peronist ideology.<sup>33</sup> The Peronist leaders did not seem to grasp the way in which Argentina was changing. There would be no room for authoritarian rhetoric and ill-understood nationalist positions. Bittel, Luder, and the old-guard union leaders were trapped in a past that, suddenly, seemed to be long gone.

Alfonsín, instead, was the only candidate that could be labeled as “new”, in more than one sense. He had not been part of the military government, nor was affiliated with violence and intolerance. On the contrary, he had been an active participant in human rights movements, and arrived at the crucial electoral movement as the alternative for renovation. He offered the possibility of a cultural world open to pluralist constitutional democracy, while at the same time very critic to the authoritarian thought. He presented himself as the most democratic candidate, focusing his campaign in the rejection of the authoritarian past,

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<sup>32</sup> *La Nación*, June 15, 1982, quoted by MARCOS NOVARO and VICENTE PALERMO, above n 13, at 465, fn. 5.

<sup>33</sup> See MARCOS NOVARO and VICENTE PALERMO, above n 13, at 465, fn. 5.

and making a strong claim to rescue the vision of the political activity as something of intrinsic value.

The 1853 Constitution was a central theme of Alfonsín's campaign.<sup>34</sup> The search for a democratic institutional frame was pressed to the center of the political debate, as it had not been in many years. Alfonsín offered an attractive political prospect to large sectors of the population. His discourse, while displaying some anti-oligarchy and populist leanings, also played with constitutional themes. He was drinking not only from Yrigoyen –the great Radical caudillo of the early twentieth century-, but also partially from Peron and, ultimately, he was elaborating a very accurate synthesis of the transitional moment.

“Reciting the Preamble of the Constitution, invoking the preeminence of the law over the sheer force, counter-pointing the civil and political rights of the citizens to the military –but also to the unions’, the economic and the cultural- authoritarianism, would be the central topics of a strategy that essentially aimed at giving an *epic extent to the change of regime*”<sup>35</sup>

That was the main point in the whole process: Alfonsín understood the foundational possibility that was open at the moment,<sup>36</sup> and worked hard to make sure that his proposal conveyed precisely the idea of a fundamental change, a break from the past.

His position as the only credible candidate who would bring the worst perpetrators of heinous crimes to justice has been widely regarded as a main cause of his electoral

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<sup>34</sup> See CARLOS FLORIA and CESAR GARCIA BELSUNCE, above n 11, at 267.

<sup>35</sup> See MARCOS NOVARO and VICENTE PALERMO, above n 13, at 518. The italics are mine.

<sup>36</sup> See Juan Carlos Portantiero, “Prologo”, in RAUL ALFONSIN, *MEMORIA POLITICA –TRANSICION A LA DEMOCRACIA Y DERECHOS HUMANOS-*, (Fondo de Cultura Economica, Buenos Aires, 2004), at 14 (arguing that Alfonsín would later try to carry out an institutional re-founding, through a wide array of measures, encompassing the corrective justice effort as well as his initiative to reform the Constitution and the proposal –turned into law but never implemented- of moving the Federal Capital out of Buenos Aires –to Viedma-).

victory.<sup>37</sup> We cannot know for sure to what extent it was so. But we can be reasonably certain that Alfonsín's attitude toward human right violations and transitional justice did play a role in the landslide victory he achieved in October.

Alfonsín won the elections, against all odds, because he synthesized adequately what values and commitments from the past the People wanted to retain and what –a whole lot– they wanted to reject and substitute. He won because, unlike Luder, he embodied a concrete proposal to the People to make 1983 a turning point in Argentina's history.<sup>38</sup> Whether the transformation process ultimately lived up to the expectations it had generated is a completely different question.

The day Raul Alfonsín was inaugurated as President, Argentine People signed a new social contract.<sup>39</sup>

#### *B.-The Military Trials and the Lack of a New Constitution.*

But it was signed over an old, venerable, pre-determined model, without any chances to add or suppress anything. The 1853 Constitution served as the model for the “new beginning” the country was trying to establish. Why was it so? Are not constitutional texts, when backed up by the legitimacy of popular consent, powerful symbols of a “new beginning”? More importantly, are not they the very possibilities of projecting the salient features of the “new beginning” into the future, unifying the People behind it and helping

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<sup>37</sup> See J. PATRICE MCSHERRY, above n 12, at 110; also see ELIN SKAAR, above n 12 at 73; and Kathryn Lee Crawford, “Due Obedience and the Rights of Victims: Argentina's Transition to Democracy”, 12:1 *Human Rights Quarterly* 17, 20 (1990), who emphasizes that Alfonsín's Party (UCR) had a human rights platform in the 1983 election, and that Alfonsín was elected on such electoral promises.

<sup>38</sup> See JORGE VANOSSI, *LA REFORMA DE LA CONSTITUCION*, (Emece, Buenos Aires, 1988), at 125.

<sup>39</sup> See Dardo Pérez Guilhou, “El Constitucionalismo”, in ACADEMIA NACIONAL DE LA HISTORIA, *NUEVA HISTORIA DE LA NACIÓN ARGENTINA*, (Planeta, Buenos Aires, 2001, Volume 7), at 506.

them go through turbulent times<sup>40</sup> without relapsing into old practices? Does not new constitutional lawmaking provide a great opportunity to get the political elites' support and commit them to "play by the rules they made themselves"?<sup>41</sup> Why did not Alfonsín try to embed his vision of the "new beginning" into a new constitutional text? Why did Argentines decide to sign their brand-new social contract on an old sheet of paper instead of using a new one?

There might have been various reasons why things turned out as they did. It was not the case that Alfonsín did not want a new constitution. He sure did.<sup>42</sup> And it may be true that he enjoyed an extraordinary level of political support and moral legitimacy during the first two years of his administration.<sup>43</sup> It may be, as Ackerman argues, that Alfonsín just squandered his moral capital in criminal trials, hence,<sup>44</sup> missing the chance of enacting a new constitution while the window of the "constitutional moment" rapidly closed. But there might be a slightly different story to tell as well.

Although many times disobeyed –especially after 1930–, the 1853 Constitution was a document that had taken much sacrifice to reach. Since, at least the Federal Pact of 1832, the different Argentinean provinces had been trying to attain their constitutional charter, in a

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<sup>40</sup> See BRUCE ACKERMAN, *THE FUTURE OF THE LIBERAL REVOLUTION*, (Yale University Press, New Haven/London, 1992), at 2.

<sup>41</sup> *Id.*, at 62.

<sup>42</sup> In conversation, Marcelo Alegre –a constitutional scholar and legal philosopher who worked close to Alfonsín's team in the elaboration of a proposal of constitutional reform around 1986– suggested that Alfonsín may have not entertained the idea of a constitutional reform before 1985-1986. However, soon after the Military Government invaded the Islas Malvinas, Alfonsín –taking the lead for the post-war period– proposed that the *Multipartidaria* designed a transitional president, whose main tasks would be to pave the way for a constitutional reform in the short-term and to call to free elections. His candidate for the position was former president Arturo Illia (from Alfonsín's own party). The proposal was rejected by Illia himself –and by the *Multipartidaria*–, but its existence shows that the idea of constitutional reform was present in Alfonsín's mind before the 1983 election. See, i.e., MARCOS NOVARO and VICENTE PALERMO, above n 13, at 470; also see JOAQUÍN MORALES SOLA, above n 29, at 114 (arguing that in the 1983-1985 period the idea of a constitutional reform was entertained only by the most extreme sectors of *alfonsinism*, and that it was only after 1985 that the topic became a concern for the administration.).

<sup>43</sup> See JOAQUÍN MORALES SOLA, above n 29, at 33.

<sup>44</sup> See BRUCE ACKERMAN, above n 40, at 80.

highly convulsed political environment. In spite of the serious obstacles that the provinces had to overcome, and after long years of on and off civil war, they could finally enact a Constitution.<sup>45</sup> It was enacted as a result of a long process of popular mobilization, and thus, a dualist theory of democracy would give it the highest degree of legitimacy.<sup>46</sup> So the 1853 Constitution was not a bad starting point at all. Or so Alfonsín may have thought.

Much in the way pre-determined, standard, commercial contracts are used to make transactions easier –basically, by reducing transaction costs–, the 1853 Constitution helped make the transition from dictatorship to democracy simpler. We just had to sign the “new social” contract, but not negotiate what we would write in it. The venerable historic constitution provided an acceptable framework that people could subscribe without much of a discussion. For better or worse, it had been the symbol to which we had resorted many times in the past while in the middle of institutional disruptions. Every time that there was strong discontent about the political and institutional situation –mainly, because the power was held by dictators–, the People appealed to the 1853 Constitution, and asked for a return to its full observance. When the 1949 Constitution was repealed by the 1955 *coup d'état*, the 1853 Constitution was immediately put back in force. The original Constitution has been the “political safety net” that we have used when our democracy has stumbled and fallen.

The phenomenon of charisma, usually associated with the personality of a leader, took place in the very text of the original Constitution that thus became a charismatic value in itself.<sup>47</sup> There was no charismatic leader to follow. The last one had been Perón. Alfonsín

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<sup>45</sup> Almost 37 years had to pass since independence for Argentina’s People to unite as one nation (1816-1853). There had been previous attempts, in 1819 and 1826, to establish a constitution. They were not successful, mainly, because they did not reflect the shared aspirations of majoritarian sectors of the social structure. See, i.e., ALBERTO GARCIA LEMA, *LA REFORMA POR DENTRO: LA DIFÍCIL CONSTRUCCIÓN DEL CONSENSO CONSTITUCIONAL*, (Planeta, Buenos Aires, 1994), at 24.

<sup>46</sup> See Bruce Ackerman and Carlos Rosenkrantz, “Tres Concepciones de la Democracia Constitucional”, 29 *Cuadernos y Debates* 15, 16 (1991).

<sup>47</sup> See JORGE VANOSSI, above n 38, at 43.

was not that kind of leader.<sup>48</sup> Instead, much of the attention was centered in a compound of rules that acquired a particular magnetism, since many people saw it as the path to the national reencounter. The 1982 *Multipartidaria* agreement is a sign of this peculiar reification of charisma. All political parties in the agreement –even those that had criticized the 1853 Constitution- agreed that the historic text should be the rule to recover institutional normality.<sup>49</sup>

Although quite an old text, which many sectors would be happy to see amended, the historic Constitution contained more than a significant portion of shared values. The basic tenets could be accepted by most relevant political sectors in 1983. One should add that the 1853 Constitution was sort of a ‘tried-and-true’ political tool: it might not be perfect, but during the periods in which the charter had been fully observed, the nation had made significant progresses in many respects.<sup>50</sup> It was only after the long series of institutional disruptions that started in 1930 that the country had entered into a phase of steady decline, especially when compared with the evolution of other comparable countries in the international scene.

This leads us to another factor that might have played a role in Alfonsín’s calculation about the possibilities –and desirability- of embedding the ‘new beginning’ in a new political text immediately. Many people in Argentina had the idea that the problem was not the

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<sup>48</sup> But see JOAQUIN MORALES SOLA, above n 29, at 344 (arguing that Alfonsín did possess charismatic resources in a significant degree).

<sup>49</sup> See ALBERTO D. LEIVA and EZEQUIEL ABASOLO, *CONSTITUCIONALISMO ARGENTINO EN EL SIGLO XX*, (Ediciones Dunken, Buenos Aires, 1998), at 171.

<sup>50</sup> Of course, the argument could be turned around: the Constitution was observed because the economic situation and the general context were favorable. As soon as the world economy collapsed and the context changed, the institutional disruptions began. However accurate this explanation may be, it does not alter the value of my assertions in the main text. It may be a technical explanation –whose accuracy I doubt- but, definitely, it is not the way general public would naturally perceive the situation. Thus, my contention that the 1853 Constitution was regarded as a ‘tried-and-true’ political device is not affected. It is a matter of how people *conceived* the role of the Constitution in shaping reality, not a matter of to what extent, if any, it actually did so.

constitutional rules themselves but the lack of compliance with them.<sup>51</sup> Such idea was taken up and turned into some sort of ‘official doctrine’ by some political sectors that trivialize the belief in the rule of law.<sup>52</sup> “It is not necessary to reform the Constitution, but to abide by it” was the motto. This extended belief may have contributed to generate a climate of resistance to any proposed change of the constitutional rules. Even in 1988, Jorge Vanossi –who besides being a renowned constitutional scholar was a member of the Radical Party and a Representative in House of Deputies- could describe this ‘conservative’, so to speak, popular approach to constitutional reform in the following terms:

“...[our] society does not want to move to a completely different model of state. Such ambition does not correspond to the degree of aspirations and vital experiences of the current Argentine society. Our society wants changes; it wants *aggiornamento*;... it wants opportunities: yes; but it does not want to make a radical cut with the great rules of the game...above all, in regard to the underlying values that ...are perceived here and now as duly adapted and in force...”<sup>53</sup>

There were also additional constraints. During the 1970’s talk of constitutional reform had been rich in references to the “social function of property”<sup>54</sup> –surely inspired by the 1949 Constitution and, more broadly, by the so-called ‘social constitutionalism’ movement-, that engendered the resistance of powerful sectors of the population.<sup>55</sup> The

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<sup>51</sup> The idea is not without foundations, at least partially. Our lack of a serious culture of abiding by the law hinders the development of any institutional scheme, however well-designed it may be. Of course, this does not mean that rules do not play a role in the shaping of society, nor that we should give up all hope and be skeptics about the ultimate value of the rule of law. For an account of the problem of ‘anomie’ and ‘lawlessness’ that affect Argentina and the relationship with the lack of development in potential terms, see generally CARLOS NINO, *UN PAIS AL MARGEN DE LA LEY*, (Ariel, Barcelona, 2005).

<sup>52</sup> See Humberto Quiroga Lavie, “Estudio Introductorio”, en JORGE VANOSI, above n 38., at 10.

<sup>53</sup> See JORGE VANOSI, above n 38, at 47-48.

<sup>54</sup> See, i.e., ALBERTO D. LEIVA and EZEQUIEL ABASOLO, above n 49, at 149-153.

<sup>55</sup> This seems to be a common constraint in nascent democracies. See GUILLERMO O’DONNELL and PHILIPPE SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE*

prospective of any modification to the already-bad-treated property rights of bourgeoisie was feared like the plague. The main concern of this sector was expressed best by the so-called “Article 17-constitutional scholars”.<sup>56</sup>

One of the main themes in Alfonsín’s electoral campaign had been the return to the 1853 Constitution. He had used the powerful attraction that it exerted upon ample sectors of the population to pour constitutional legitimacy on his proposal and to make it a distinctive feature of the Argentina he had in mind and was proposing to the People. He recited the Preamble when closing the campaign, and even described it as a “secular prayer” that he “offered to the great Argentina of the future”.<sup>57</sup> Alfonsín had won the confidence of many people, precisely, by promising that Argentina would start all over again but within the framework of the 1853 Constitution. Paradoxical as it may be, it was fidelity to historical constitutional foundations that gave Alfonsín popular support to re-found the country.

As Nino has argued, if at the very beginning of his term Alfonsín had called for an early constitutional reform, major political, economic and social groups would have seen the maneuver as a highly self-serving to change the political and economic rules.<sup>58</sup> It is very likely

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*CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES*, (John Hopkins University Press, Baltimore, 1986), at 69, citation by J. PATRICE MCSHERRY, above n 12, at 17, 18.

<sup>56</sup> See JORGE VANOSI, above n 38, at 46. Article 17 of the 1853 Constitution –unreformed in 1994– provides that “Property may not be violated, and no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated. Only Congress levies the taxes mentioned in Article 4. No personal service can be requested except by virtue of law or sentence based on law. Every author or inventor is the exclusive owner of his work, invention, or discovery for the term granted by law. The confiscation of property is hereby abolished forever from the Argentine Criminal Code. No armed body may make requisitions nor demand assistance of any kind”. Vanossi uses the graphic expression ‘Article 17 constitutional scholars’ to describe a particular sector of Argentina legal academia that seems to be preoccupied only about the fate of the inviolability of property as a constitutional guarantee, and that share a primal aversion to “social function of property”, as if it implied necessarily the collectivization of property.

<sup>57</sup> See Inaugural Speech to Legislative Assembly, President Raul R. Alfonsín, December, 10, 1983, pp. 75, available at <http://lanic.utexas.edu/larrp/pm/sample2/argentin/alfonsin/830075.html> (last visited 11/08/2006).

<sup>58</sup> See CARLOS S. NINO, above n 12, at 129. Also see ALBERTO GARCIA LEMA, above n 45, at 40 (holding that even in 1985, when Alfonsín made the first moves pushing constitutional reform to the center of debate, public opinion saw the attempt as pursuing a hidden motive –probably associated with allowing Alfonsín’s reelection, something the 1853 Constitution did not provide for-).

that, in such event, they would have withdrawn their support, thus frustrating the attempt and, maybe, jeopardizing the whole process.

An attempt at constitutional reform would have opened the discussion for a series of different, but similarly disturbing, possibilities: some Peronists<sup>59</sup> wanted to re-establish the 1949 Peronist Constitution –that had been repealed illegally, though the legality of its very enactment was very disputable-,<sup>60</sup> while others –such as the previously pro-reform Luder-<sup>61</sup> simply opposed to the idea because of their unwillingness to let another Party leave its mark on the constitutional realm.<sup>62</sup> Moreover, some civilian sectors with military sympathies might have decided to pursue an authoritarian constitutional path, had they been given the chance. One should not forget that the Military had started its political adventure with high ambitions: to reorganize the Nation, to change its economic structures, to *restructure its basic institutions*, and to *reformulate the basic values contained in the Preamble to the Constitution*.<sup>63</sup> The dictatorship had envisioned itself as the great transformer of Argentina.<sup>64</sup> The generals’ plan was not unlike a political party’s plan: the military party’s plan. A military constitution was only the natural culmination of such a political scheme.

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<sup>59</sup> Particularly, a sector of the party, led by his president Vicente L. Saadi, who would even present a bill to the effect in 1986. See ALBERTO GARCIA LEMA, above n 45, at 46. Also see ALBERTO D. LEIVA and EZEQUIEL ABASOLO, above n 49, at 173.

<sup>60</sup> Peronists failed to secure the necessary majority of two-thirds of the total members of both Cameras for the legality of the bill authorizing the reform and the election of delegates to the Constitutional Convention. Instead, they counted two-thirds of the members *present* at the moment of voting, and went along with the reform. Radicals (UCR) protested, but then –inconsistently- took part in the election and took their seats in the Convention. See i.e., Lucretia Illsley, “The Argentine Constitutional Revision of 1949”, 14:2 *The Journal of Politics* 224, 227 (1952).

<sup>61</sup> See ITALO LUDER, *EL PROCESO ARGENTINO*, (Ediciones Corregidor, Buenos Aires, 1977), at 104-139 (arguing that the political crisis could not be solved by a mere reform of the Constitution; it was necessary to enact a new Constitution that embodied a new national project).

<sup>62</sup> See JOAQUIN MORALES SOLA, above n 29, at 80.

<sup>63</sup> See CARLOS FLORIA and CESAR GARCIA BELSUNCE, above n 11, at 240.

<sup>64</sup> See ELIN SKAAR, above n 12, at 67, fn. 4. Also see J. PATRICE MCSHERRY, above n 12, at 86; and ALBERTO D. LEIVA and EZEQUIEL ABASOLO, above n 49, at 165 (recalling that in 1977, the military drafted a “National Project” that expressed the wish of effectuating deep changes in the 1853 Constitution’s power scheme).

There were, it seems clear to me, too many conflicting aspirations regarding what should be done with a constitutional reform, had the opportunity presented itself. Thus, the return to the 1853 Constitution was a simple way to rule out the possibility of any disputes over the constitutional framework of the re-born democracy. In this sense, it lowered the transaction costs, allowing a reasonably consensus-based transition to constitutional life. Strategically, it allowed Alfonsín to throw off the disquieting possibility of a Peronist constitution or, even worse, an authoritarian-influenced text. Additionally, it must be born in mind that Alfonsín was keen on the idea of moving towards a semi-parliamentary system, idea that later would generate resistance in some sectors of his own Party,<sup>65</sup> but mainly in the Peronist Party, that held to the idea of presidentialism even if it admitted the possibility of including some mitigating elements.<sup>66</sup>

Due to all conflicting positions, as well as to the links that the military retained with sectors of the civilian population, it may have been the case that, in Argentina's case, new constitutional lawmaking, contrarily to Ackerman's general suggestion, would have been divisive, instead of a unifying factor.

Moreover, old Constitutions, as they are detached from current political fights, often have a halo of political purity that makes them more attractive for people in general. As long as the text reasonably reflects society's basic commitments of today –even if it does not encompass all of them–, it may well be that a traditional constitution plays a reassuring role in some transitions. The older they get, the farther from today's "impure" political scenario they seem to be. The fading of lived experience makes an older constitution appear as a concentrate of higher principles, purified of any negative input from self-interested politicians. Much in the same way it accounts for the movement from particularized

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<sup>65</sup> See Ricardo Gil Lavedra, "Prologo", in ALBERTO GARCIA LEMA, above n 45, at 12.

<sup>66</sup> See ALBERTO GARCIA LEMA, above n 45, at 57.

synthesis to comprehensive synthesis in judicial interpretation,<sup>67</sup> the slow but inevitable passing of time induces the People to think of their historical Constitution in more charitable terms. Take, for instance, the case of pre-existing constitutional pacts that led to the formation of the Argentina Republic. Our Preamble expressly refers to them.<sup>68</sup> Nowadays, nobody thinks about them in terms of dubious political bargains between *caudillos* whose commitment to legality was hard to ascertain. Such pacts are usually regarded as more-or-less aseptic fundamental steps in the constitutional construction of the country. However, the *Pacto de Olivos* between then-President Carlos Menem and his predecessor Raul Alfonsin, that paved the way for the 1994 Constitutional Convention, is commonly thought-of as a rather spurious exchange of presidential reelection for a couple of seats in the Supreme Court and a few more smaller political prizes. As time passes by, the concrete details of the bargain as well as the motivations of the protagonists will slowly fade away from the collective memory, and the sounder principles of the pact will remain. Then, the *Pacto de Olivos* will probably be considered in its own right as one of the pre-existing pacts that gave life (in this case, simply a partially new form) to the Argentine Republic.

So, *prima facie*, it might have made some sense to use the historic Constitution as the legal and political base for the ‘new beginning’, even if the ultimate intention was to reform it in the not-so-distant future.

There is yet another factor to be analyzed, that had some serious weight in Alfonsin’s decision to offer the People the historic Constitution as the predetermined model to sign the new ‘social contract’: the long-promised military trials.

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<sup>67</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, (Belknap/Harvard, Cambridge/London, 1991), at 96-99.

<sup>68</sup> “We, the representatives of the people of the Argentine Nation, gathered in General Constituent Assembly, by will and election of the Provinces which compose it, *in fulfillment of pre-existing pacts...*”, Constitution of the Argentine Republic, Preamble. The italics are mine.

Before winning the election, Alfonsín had decided to embark the country in an ambitious enterprise of corrective justice. The violators of human rights –from both sides of the story, subversive guerrilla and military repressors alike- would not go unpunished.

As Ackerman points out, both constitutional lawmaking and corrective justice are attempts to draw a sharp legal line between the old order and the new regime.<sup>69</sup> However, they have important differences: corrective justice looks back, striving to right the wrongs from the past, while constitutionalism looks forward, seeking to shape the future so that the past cannot be repeated; corrective justice focuses on particular individuals, while constitutionalism involves institutions and general principles; corrective justice tend to generate divisions among the population, while constitutional lawmaking attempts to unite the People in defining a new order.<sup>70</sup>

There seems to be some degree of incompatibility between both approaches, and it would seem that the forward-looking task of constitutional building is more promising for countries facing situations of a ‘new beginning’ type, that involve grave violations of human rights. This tension may help explain why Alfonsín could not achieve constitutional reform: he made the wrong decision. But is it really so? Could he have gone the other way, and tried to ‘constitutionalize’ the spirit of renascent democracy without pursuing any degree of corrective justice? Could Alfonsín have followed both paths –constitutional reform plus some military trials-? Did he just blunder in what was probably the most important decision of his term?

Not necessarily. Contrarily to what Ackerman seems to argue, I believe Alfonsín did not have the option of taking the constitutional lawmaking path and abandoning the corrective justice enterprise.

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<sup>69</sup> See BRUCE ACKERMAN, above n 40, at 70.

<sup>70</sup> *Id.*, at 70-71.

First of all, because he had promised time and time again that criminals would have to face civilian justice. It had been a central theme of the electoral process, and one of the sharpest differences with his opponents in the presidential race.<sup>71</sup> Of course, it would not be the first time that a politician disappointed its constituency and fell short of his electoral promises. But this was different. This was a very central part of what the ‘new beginning’ was all about. The People had put him in the *Casa Rosada* with a mandate to reestablish the rule of law as a substantial reality.<sup>72</sup> Such a task, almost logically, required that at least the central actors of the criminal enterprise of the ‘70s were held accountable.<sup>73</sup>

Second, and consequently, a blanket amnesty was not an option.<sup>74</sup> Not only because it could be argued, as Malamud Goti, Nino and others have done,<sup>75</sup> that the ideal of democracy would suffer if the military criminals were not prosecuted, but also because it would be very difficult to gain credibility for the rule of law without the trials. Why should people believe that “this time would be different” and that the Constitution –old or new– would be respected if the Alfonsín administration did not even attempt to bring to justice the ultimate violations of the rule of law? Why should the Constitution be regarded as anything more than the sheet of paper Lasalle thought it to be? Why should Argentines have reasons to believe that the hypothetical new Constitutional text would be the

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<sup>71</sup> The surprising victory of Alfonsín, along with his heavy campaigning on uncompromising retribution, is credited by Aguero as the decisive factor why Argentina was a case of “no-compromise transition”. See Felipe Aguero, “Legacies of Transitions: Institutionalization, The Military, and Democracy in South America”, 42:2 *Mershon International Studies Review* 383, 390 (1998).

<sup>72</sup> In the same train of thought, see Kathryn Lee Crawford, above n 37, at 20, fn 14 (arguing that the mandate to reestablish the rule of law implied that the fate of “desaparecidos” –disappeared people– had to be faced).

<sup>73</sup> But see Emilio Mignone, Cynthia Estlund and Samuel Issacharoff, “Dictatorship On Trial: Prosecution of Human Rights Violations in Argentina”, 10 *Yale J. Int’l L.* 118, 149 (1984), arguing that the three-levels scheme devised by Alfonsín would fail to reinforce the rule of law. Only complete punishment would, in their view, achieve such goal.

<sup>74</sup> See Alejandro Garro, “Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?”, 31 *Colum. J. Trans’l L.* 3, 12 (1993-1994).

<sup>75</sup> See Jaime Malamud-Goti, “Transitional Governments in the Breach: Why Punish State Criminals?”, 12 *Hum. Rts. Q.* 1, 3 (1990). Also see CARLOS S. NINO, above n 12., at x.; and J. PATRICE MCSHERRY, above n 12, at 8.

embodiment of their collective achievement as a free People and not merely “that little notebook”, as former dictator Juan Manuel de Rosas scornfully referred to constitutions?<sup>76</sup>

This point is of the utmost importance in the context of this article, and I believe it may help to improve the common understanding of Alfonsín’s fateful decision of pursuing corrective justice instead of a new constitution.

As I have pointed out before, Alfonsín did want a new Constitution. Alfonsín believed in the possibility of shaping politics through institutions and, above all, he believed in the foundational character of his administration.<sup>77</sup> But he was aware of both the political and legal necessity of the trials. Any attempt to establish a new constitutional order without making the effort credible by fulfilling electoral promises and holding the dictators responsible would probably have been deemed less legitimate.

So the military trials acquired a two-tier priority order: political *and* legal. In Alfonsín’s plan, bringing the ‘Dirty War’ criminals to justice became, then, a logical priority. Once the issue had been dealt with, if successful, Alfonsín would have even more support from the masses, as the democratic hero that effectively achieved justice in a very difficult context. At the same time, the promises of the strict compliance with the rule of law would be perceived, if not lived, as a reality. The scenario would be ready for the triumphal entrance of the new, parliamentary-oriented Constitution.

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<sup>76</sup> Letter from Juan Manuel de Rosas to Estanislao Lopez, in *PAPELES DE ROSAS* (Ed. by Felix Barreto), citation by Jose Maria Rosa, “Las Diez Noches Historicas”, 1 *Revista del Instituto Juan Manuel de Rosas* (July/September, 1944); available online at [http://www.pensamientonacional.com.ar/biblioteca\\_josemariarosa/Articulos/diez\\_noches\\_historicas.htm](http://www.pensamientonacional.com.ar/biblioteca_josemariarosa/Articulos/diez_noches_historicas.htm) (last visited 12/07/2006). Also see Jorge Vanossi, “Suplemento (1) al Orden del Dia Nro 929”, *Camara de Diputados de la Nacion, Sesiones Ordinarias*, available at <http://www.diputados.gov.ar/dependencias/dcomisiones/periodo-124/124-929-s.pdf> (last visited 12/07/2006); Sandra Olaza Pallero, “Respeto Rosas los Derechos Existenciales?”, available at <http://www.revistapersona.com.ar/olaza.htm> (last visited 12/07/2006).

<sup>77</sup> In his Inaugural Speech to the Legislative Assembly, on December 10, 1983, Alfonsín explicitly acknowledged that it was the notion of being protagonists of this “new beginning”, which would be definitive, inspired in the People a feeling of responsibility, equal to the effort that would be undertaken. See <http://lanic.utexas.edu/larrp/pm/sample2/argentin/alfonsin/830009.html> (last visited, 11/14/2006).

It was a risky gamble. Eventually, it failed. Alfonsín could barely manage the issue of constant military demands, and he definitely failed in the economic arena. But his bet could have had big payoffs, had the whole process not been hampered by a number of factors (military pressures, lapse of time,<sup>78</sup> unmanageable economic crisis). Alfonsín may have miscalculated the importance of the obstacles he would have to face if the corrective justice enterprise were to succeed. But he was not completely wrong in his assessment of how to establish a credible and enduring new Constitution, in the context of the time.

Moreover, one should not underestimate the value of the trials as expressions of the “new beginning”. Alfonsín’s previous decision to postpone the drafting of a new constitutional text put even more pressure in the direction of corrective justice. The symbol of the foundational stage in the republic would have to be played, temporarily at least, by the Courts.

The return of democracy in 1983 had implied the restoration of constitutional legality. Legitimacy, however, was a different question and, at all events, something to be built by the new democratic government. This uphill task required a central focus in a critical vision of the authoritarian –civilian and military- past, reclaiming the idea of the rule of law in a pluralist constitutional democracy,<sup>79</sup> if it were not to become a Sisyphean enterprise. In this regard, I believe that the military trials played also an important role. They became powerful symbols of the rejection of any authoritarianism and of the supremacy of law above all individuals, however powerful they were. Bringing the most conspicuous criminals of the recent past to *civilian* justice meant a sharp break with the authoritarian past, in two different ways. As McSherry argues, it channeled society’s explicit rejection of the “national

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<sup>78</sup> As Malamud Goti has stated, time was crucial to the task of bringing the military dictators, as well as some of the most notorious perpetrators, to justice. See Jaime Malamud Goti, above n 75, at 4.

<sup>79</sup> See CARLOS FLORIA and CESAR GARCIA BELSUNCE, above n 11, at 267.

security state” built by the military.<sup>80</sup> On a more concrete, procedural level, it meant a clear break with past practices of on-the-spot, summary, and informal “justice” that had been deployed by the dictatorship and the guerrilla. The fact that guerrilla leaders would also be brought to justice must not be overlooked: Argentina had had more than its fair share of violence, and it was ready to reject the concept altogether.

Perhaps the most remarkable expression of the deep meaning the trials had in the context of the “new beginning” was Prosecutor Strassera final plead to the Federal Court of Appeals:

“We, Argentines, have tried to achieve peace based on forgetting, and we failed: I have already spoken about past and unsuccessful amnesties. We have attempted to search peace through violence and extermination of the adversary...From this trial on...we have the responsibility to look for a peace based not on forgetting but on memory; not on violence, but on justice. This is our opportunity: it may be the last one...I want to renounce to any claim of originality...I want to use a phrase that does not belong to me, because it belongs to the entire Argentine People...NEVER AGAIN.”<sup>81</sup>

That “Never Again” summarized in two words, worth the meaning of a thousand, the clear break from the past Argentine People longed for. Until September 18, 1985 –at least-, Alfonsín’s strategy was relatively successful.

*C-The Failure of Alfonsín’s Strategy for Human Rights and Its Effects on the Legitimacy of the Constitutional Process*

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<sup>80</sup> See J. PATRICE MCSHERRY, above n 12, at 126.

<sup>81</sup> See Julio Cesar Strassera, “Fundar Una Paz Basada en la Memoria y en la Justicia”, in LUCIANO DE PRIVITELLIO and LUIS ALBERTO ROMERO, *GRANDES DISCURSOS DE LA HISTORIA ARGENTINA*, (Aguilar, Buenos Aires, 2000), at 409.

But the relative success would not last long. I cannot elaborate here in full detail the complex sequence of facts that eventually led to such failure.<sup>82</sup> Suffice to say that Alfonsín's original strategy contemplated limited punishment, since he was aware of the constraints imposed both by time and military resistance, and established three different categories of responsibility: a) those who organized the state apparatus of terror and gave the orders; b) those who, following orders or not, committed atrocious acts; and, c) those who, in a general climate of confusion and oppression, followed orders and committed offenses which did not constitute atrocities.<sup>83</sup> He had announced publicly this policy long before the 1983 election,<sup>84</sup> and in October, 26 –a few days before the election- he spoke before near one million people, emphasizing the need for justice and his plan of three categories.<sup>85</sup> Shortly after, he won by a landslide.

One could speculate that Alfonsín received a popular mandate to rebuild democracy, carrying on the proposed strategy to deal with human rights violations. Seemingly, the support continued during the trials phase, given that in the 1985 legislative election the UCR –Alfonsín's party- roughly maintained the proportion of votes of 1983.<sup>86</sup> At any rate, it was clear that the People did not see any significant problem in the government's human rights plan.<sup>87</sup>

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<sup>82</sup> For more detailed explanations, see especially CARLOS S. NINO, above n 12, at 41-134; also see, Jaime Malamud Goti, above n 75 at 4-5; J. PATRICE MCSHERRY, above n 12, at 120-235.

<sup>83</sup> See Carlos S. Nino, "The Human Rights Policy of the Argentine Constitutional Government: A Reply", 11 *Yale J. Int'l. L.* 217, 222 (1985-1986).

<sup>84</sup> *Id.*

<sup>85</sup> See CARLOS S. NINO, above n 12 at 66.

<sup>86</sup> In 1985, the UCR obtained 42% of the total votes for the Lower House, against 34% of the Peronist party – the main opposition at the time-, while for the Senate the UCR got 17 seats and the Peronists, 22; in 1983, the UCR had collected 46% (Lower House) against 37% of the Peronist Party, while in the Senate, the UCR had won 18 seats, versus 22 of the Peronists rivals. The proportions show little variance. See Base de Datos Políticos de las Américas, (1999) Argentina: Elecciones Legislativas de 1983, available online at <http://pdba.georgetown.edu/Elecdata/Arg/cong83.html> (last visited 11/13/2006).

<sup>87</sup> Of course, this does not mean –and it could not mean- that nobody had any objections to the plan. Instead, it means that a significant majority of the public supported Alfonsín's attempt at transitional justice, limited and imperfect as it was from the beginning.

However, the plan had some obvious problems. How to tell apart those who had committed atrocities from those who had simply followed orders that did not amount to the commission of atrocious acts, in a context of generalized attacks against human dignity? All crimes committed in exercise of illegal repression amounted to violations of human rights that could be considered “atrocious”. So what seemed to be clear in the paper, might turn out quite differently in its practical application.

Despite the efforts of the government to deploy its initial strategy and bring a relative degree of tranquility to both the lower-rank officials and the general public, military discomfort began to surface. Initially, the Alfonsín had proposed a bill that created a presumption of having acting under coercion and, thus, being justified by due obedience, in favor of all lower-rank officials who lacked decision-making power. However, Congress substituted a word –“it *may* be presumed” for “it *will* be presumed”- hence making the presumption rebuttable –which, under the circumstances, it would not be hard to do-. This was but one of the problems that Alfonsín would have to move forward with his original plan. The military pressures mounted over time, and there were fears of institutional disruption.

After the successful conviction of the main military leaders –perhaps the most momentous episode in Alfonsín’s term-, the situation started deteriorating. Before the 1985 legislative elections, there were rumors of an amnesty, which were denied by Interior Minister Antonio Troccoli.<sup>88</sup>

Tension kept mounting, and the administration’s tactic of making concessions to every military demand was counterproductive.<sup>89</sup> Instead of calming the mood among military personnel, Alfonsín’s position encouraged additional claims. With every concession, his

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<sup>88</sup> See J. PATRICE MCSHERRY, above n 12, at 207.

<sup>89</sup> *Id.*, at 227.

position was weaker. At the same time, this fruitless tactic alienated large sectors of his constituency, and Alfonsín's power entered a slow-paced, but nonetheless firm, downward spiral. The administration began to entertain the idea that the military trials should be stopped, in the hope of regaining full control of the situation. The dilemma was which method would be more effective.

Some people in the administration hoped that Judiciary would solve the problem by delimiting the concept of "due obedience" and, thus, taking tranquility to the large mass of lower-rank officials that constituted Alfonsín's problem. But the judges were reluctant to do so. The Supreme Court was expected to deal with the issue,<sup>90</sup> but it refused to do so, because the justices rightly considered that the topic bore no substantial relationship with the cases to be decided –that involved high-hierarchy military leaders, who could not claim to have obeyed any orders-. Apparently, the Court thought that it was a task for the elective branches to find a political solution to the problem, and the justices were not willing to take the issue on their shoulders.<sup>91</sup> There were no reasons for them to do otherwise.

By the end of 1986, the Government had successfully passed through Congress the #23.492 Law (commonly known as "Punto Final" –"Full Stop"), which basically set a time limit -60 days- for the indictment of all military officials, for crimes committed during the dictatorship. Instead of functioning as an extremely short-timed statute of limitations –which had probably been the idea in the first place-, that would preclude most of the prosecutions, the law sparked a frenzy judicial activity. Hundreds of officers received citations. The courts

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<sup>90</sup> It seems to me an irony that elective branches often complain when judges, by means of exercising judicial review of legislation, intervene in economic matters. Those are deemed 'political', no matter how encroaching of individual rights the economic measures may be. However, when faced with a properly 'political question' – i.e., grant an amnesty to repressors-, politicians frequently prefer to shift the burden to the Judiciary.

<sup>91</sup> See CARLOS S. NINO, above n 12, at 100.

suspended their summer holidays to be able to process all the files before the period set by the law expired. Again, the administration's plan had misfired.

In Easter 1987, the newly-born democracy was at high risk again. Following the resistance of a Colonel Barreiro to appear before the Federal Court of Appeals in Cordoba, Lieutenant Colonel Aldo Rico rebelled in Campo de Mayo. The loyal forces were in a difficult position, due to the reluctance of various squadrons to repress Rico. The level of tension was incredibly high. People mobilized in defense of democracy, surrounding the garrison where Rico and the rebels were, and later demonstrating in Plaza de Mayo and all over the country. Finally, Alfonsín flew to Campo de Mayo and negotiated the surrender of the rebels. It was more than obvious that the military issue needed an urgent solution.

Alfonsín and his closest legal and political advisors analyzed a few options.<sup>92</sup> Both an amnesty and presidential pardons presented serious constitutional and political problems. Amnesties required that all subjects responsible for a crime benefited from the measure. According to Article 18 of the Constitution, which prohibits the application of *ex post facto* criminal laws, such requirement –established in the Military Code- could not be abrogated for the occasion. Hence, any amnesty would free all military personnel, even the commanders who had been already convicted. Pardons were not a feasible option since, under the light of the best constitutional interpretation,<sup>93</sup> could not be granted to persons not yet convicted –precisely, those whose situation needed to be handled in some way-.

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<sup>92</sup> See CARLOS S. NINO, above n 12, at 100.

<sup>93</sup> Which was not followed by president Menem later. Of course, Menem was no legalist and had not much appreciation for the rule of law. He believed in *caudillo* style of leadership.

Some have suggested that there was yet another option available: to grant prosecutors discretion.<sup>94</sup> Thus, they could drop charges in most cases, and focus on the most conspicuous perpetrators. Military unrest should cease, while the most important and symbolic prosecutions could still be carried out without serious risks for democracy. Carlos Nino actually suggested the idea, and Alfonsin seemed very enthusiastic about it. But he faced opposition from Attorney General Juan Gauna and others, who thought the proposed solution would look too *ad hoc*.<sup>95</sup>

Finally, Alfonsin decided to send to Congress the Due Obedience bill. The core of its provisions was an irrebuttable presumption that lower-rank officials had acted following orders and, hence, were not punishable. Such presumption covered some superior officers as long as they had not acted as chief of zones, sub zones, or of armed, security, and prison forces, unless it was decided that they had had decision-making power or had helped formulate the orders. Basically, the law suppressed the exception that Congress had introduced in the Executive bill –later turned law- that modified the Military Code in the issue of due obedience. Nonetheless, there was a loophole that permitted some prosecutions: rape, kidnapping and concealment of children, and appropriation of real property were excluded of the presumption. But, undoubtedly, the law aimed at cutting off most prosecutions and, ultimately, limiting the effort at corrective justice to the top-level of the military. In that regard, the law was successful. Finally, Alfonsin had achieved the political feat that had inhabited his sleep for long time.

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<sup>94</sup> See Andrew S. Brown, “Adios Amnesty: Prosecutorial Discretion and Military Trials in Argentina”, 37 *Tex. Int’l. L. J.* 203, 217 (2002). The author suggested that such method could be adequate in Argentina’s current situation, after the judicial nullification of the “amnesty laws” (Full Stop Law and Due Obedience Law)

<sup>95</sup> See CARLOS S. NINO, above n 12, at 100. The argument –which Nino finds somewhat persuasive- does not hold: *any* solution at that point would look *ad hoc*. Perhaps, the opposition of the Attorney General Juan Gauna and the prosecutors was based in different concerns: why should they appear before society as the ones who decided who would be prosecuted and who would not? It would have been a very undesirable situation for Gauna and his staff. Just as the justices thought so, the Attorney General may have thought that if it was a political issue, he should not be the one charged with making the hard decisions.

However, many people were not so happy about the trade-off between justice and stability that, probably, saved democracy.<sup>96</sup> Enacted only a month after the Easter rebellious episode, the Law was seen as a concession of the democratic government to the military extortion. Bitter criticism and indignation were expressed by large sectors of society. There was opposition and outrage.<sup>97</sup> The legislative election of 1987, held only months after the enactment of the Due Obedience Law, punished Alfonsín and the UCR, with big losses – and corresponding Peronist winnings.<sup>98</sup>

Even if Alfonsín had tried to accomplish something similar to the Due Obedience Law with the bill he sent to Congress a couple of years before, this was something different. The feeling of the military pressure was hinting the emergence of a “guardian democracy” that people did not want to see. Thus, the rejection and opposition to the laws was more intense than it would have been, had the process not involved a rebellion. It could also be argued that Alfonsín failed to fulfill his electoral promise –almost foundational in character– that those who committed atrocious crimes would be punished. That had been the deal between Alfonsín and his constituency. Maybe people felt that he had not lived up to his promise. Maybe it was just the feeling of the democratic impotency that pervaded the souls in 1987. Anyhow, something was lost in 1987 in terms of the general legitimacy of the enterprise. There were hints that, if not handled carefully, the situation could start to look

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<sup>96</sup> Former President Raul Alfonsín does not hesitate to say that his much-criticized measures saved democracy. See, i.e., Entrevista a Raul Alfonsín, Diario La Capital, 04/30/2006, available online at [http://www.lacapital.com.ar/2006/04/30/politica/noticia\\_289977.shtml](http://www.lacapital.com.ar/2006/04/30/politica/noticia_289977.shtml) (last visited 11/18/2006).

<sup>97</sup> See, i.e., J. PATRICE MCSHERRY, above n 12, at 217; CARLOS S. NINO, above n 12, at 101; ELIN SKAAR, above n 12, at 115-116.

<sup>98</sup> It is difficult to tell, however, how much influence in the legislative electoral losses should be attributed to the handling of the military situation and how much to the economic crisis. Also, it must be taken into account that the variation in percentage, of UCR votes, while significant, it is by no means absolutely conclusive: in 1985, the UCR carried 42% of the votes for Deputies, and Peronism, 34%; in 1987, Peronism totaled 40%, while UCR reached 37%. See <http://pdba.georgetown.edu/Elecdata/Arg/cong85.html> (last visited November, 21, 2006). The real magnitude of the loss becomes apparent when the provinces' election for governors is computed: 17 out of 22 provinces went to the Peronist Party, with 3 being taken by provincial parties, and only 2 (plus the federal district) going to the Radical Party.

like the “doubtful combats” Aron talked about: no victories either over the military resentment or over the militant disillusion; the former, had not been neutralized; the latter, could not be discouraged.<sup>99</sup> But not all was lost; there was still hope.

Menem took up the task of destroying whatever positive effects the Alfonsín experiment had had, and he did it quite well. Between October, 1989 and December, 1990, Menem pardoned both the *Montoneros* guerrilla people and the military officers that were either convicted or awaiting trial. The first set of pardons reached four hundred people that were under trial. Its very dubious that such measures were constitutional, as Nino has argued.<sup>100</sup> They did not work as a “pardon” of people already convicted, but instead the presidential decrees interfered with the judicial function, in open violation of the separation of powers established by our Constitution.<sup>101</sup> In 1990, Menem completed the dismantling of the corrective justice enterprise in which Argentine People had invested almost a decade: he pardoned the commanders that had been convicted in the “big” trial. The largest symbol of Argentina’s effort to break with its troublesome past was gone, and with it, much of the legitimacy of the “new beginning”. In some ways, Menem’s actions implied a shift towards a scenario of continuity. Of course, there were achievements in political culture that went much deeper than what the pardons could reach. Those could not be uprooted. The rejection of military authoritarianism was definitive –although, paradoxically, we got used rather easily to civilian leaders of authoritarian tendencies-.

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<sup>99</sup> See CARLOS FLORIA and CESAR GARCIA BELSUNCE, above n 11, at 282.

<sup>100</sup> See CARLOS S. NINO, above n 12, at 103. Also see MIGUEL A. EKMEKDJIAN, *TRATADO DE DERECHO CONSTITUCIONAL*, (Depalma, Buenos Aires, 1999), Vol. 5, at 114. But the Supreme Court, enlarged in 1990 –from five to nine seats- by Menem, decided otherwise in *Aquino -315 Fallos 2422 (1992)-* by a five-to-two (only seven justices took part in the consideration of the case). It must be noticed that, contrarily to what one might guess, two of the justices appointed by Alfonsín voted to uphold the presidential power to pardon persons under trial and one dissented. Of course, it is impossible to know what would have happened had the Court not been enlarged in 1990.

<sup>101</sup> Article 109 of the Constitution provides that “In no case, the President of the Nation shall exercise judicial functions, assume jurisdiction over pending cases, or reopen those already adjudged”.

The failure of the attempt at corrective justice, while not complete, was certainly substantial. After 1990, the symbolic system that had embodied the “new beginning” in 1983 had been dismantled. An important degree of legitimacy –not of the entire democratic enterprise, but of one of the methods Alfonsín had chosen to signal the new founding- had been lost.

*D-The Role of the Supreme Court After 1983 and the Camps Case.*

The behavior of the Supreme Court during the 1983-1990 period confirms that the 1983 Election, with the put in force of the historic 1853 Constitution, was clearly a “new beginning” scenario. Throughout the period, the Court acted consistently with Ackerman’s prediction that this type of scenarios promote a “redemptive” style of judicial review.<sup>102</sup>

Although there was, actually, no “new” constitutional text, in the full sense of the word, the 1853 legal structure was somehow new. Its great principles had not been observed for a long time. So the full force of Alfonsín’s promise of a re-founding was an open invitation for the Court to redeem the old-but-renewed commitments.

In *Sejean*, for instance,<sup>103</sup> the Supreme Court ruled unconstitutional the 1893 civil law provision that forbade divorced people from reacquiring nuptial ability. It did so, by adopting a dynamic approach to constitutional interpretation, on the grounds of the principle of individual autonomy –which the Court found in Article 19 of the Constitution-, among other arguments. In *Portillo*,<sup>104</sup> again by the same three-to-two bare majority of *Sejean*, the Court acknowledged the right of a conscience-objector to comply with conscription

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<sup>102</sup> See Bruce Ackerman, above n 15, at 795.

<sup>103</sup> 308 *Fallos* 2268 (1986). The case was decided by a three-to-two majority formed by Justices Fayt, Petracchi and Bacque.

<sup>104</sup> 312 *Fallos* 496 (1989).

without the use of weapons. In *Bazterrica*,<sup>105</sup> it ruled unconstitutional the criminalization of possession of drugs only for personal consumption and in quantities not adequate for purposes of commercialization. Again, the constitutional ground was the principle of privacy and autonomy established by Article 19. In the *Repetto* case,<sup>106</sup> the justices considered that the requisite of argentine nationality for the exercise of the teaching profession was unconstitutional, since it deprived foreigners of the equal exercise of civil rights acknowledged by Article 20 of the Constitution. In *Arenzon*,<sup>107</sup> the Court declared the an administrative resolution that required a minimum height of 160 centimeters in order to be able to be a teacher was openly arbitrary and encroaching of the individual rights. The concurring opinion by Justices Belluscio and Petracchi is particularly descriptive of the function the Court was willing to assume. They said

“13) That it is also true that the State has a compelling interest in education. Therefore, it is valid to wonder whether the exigency of an oath of loyalty to the Constitution –instead of the one meter and sixty centimeters requirement- that included *the explicit compromise to repudiate*, from the teacher position, the promotion ...of *any idea or act leading to the inobservance of its [the Constitution’s] fundamental principles and guarantees*, is not more compatible with the *State’s democratic structure*. In the end, nobody is taller than the Constitution itself...15) That it is not necessary to possess an elaborate understanding of the issue to notice *the principles of an elitist, perfectionist, and authoritarian ethic* that give ideological support to the impeached rule...17) That neither may this Court prescind of *the fact that the obstacle has been established by de facto authorities, which demands a deep and punctilious judicial scrutiny...*”

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<sup>105</sup> 308 *Fallos* 1392 (1986).

<sup>106</sup> 311 *Fallos* 2272 (1988).

<sup>107</sup> 306 *Fallos* 400 (1984). The Court was unanimous in this case. I have italicized the parts that are more relevant to my argument.

The rejection of the authoritarian past, in all its possible forms –from culture to legal rules- is present in the concurrence. With regard to the validity of *de facto* rules, the Court took a clear stand in *Aramayo*<sup>108</sup> and *Dufourcq*,<sup>109</sup> declaring that they are valid only if the constitutional government acknowledges such validity, explicitly or implicitly.

Of course, these are but a few of the many important cases the Supreme Court decided in the 1983-1989 period. But I think they suffice as a small example of the general tendency of Court during those years.<sup>110</sup> The justices were taking seriously the job of stating “broad constitutional principles and to vindicate them in ways that ordinary men and women will appreciate”.<sup>111</sup>

The constitutional validity of the Due Obedience and Full-Stop Laws received a different, more cautious approach. Redemptive courts sometimes do appreciate the virtues of prudence.<sup>112</sup> The *Camps*<sup>113</sup> case was, precisely, one of those opportunities.

In a divided opinion,<sup>114</sup> the Supreme Court upheld the Due Obedience Law –as it would do later with the Full-Stop Law-, resorting to different arguments. Justices Fayt and Petracchi considered that, despite the name of the law and –in the case of Justice Petracchi-

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<sup>108</sup> 306 *Fallos* 72 (1984).

<sup>109</sup> 306 *Fallos* 174 (1984). Later, the Supreme Court, packed by Menem’s political allies, would return to a doctrine much more benevolent towards *de facto* rules.

<sup>110</sup> See, i.e., Roberto Gargarella, “In Search of Democratic Justice –What Courts Should Not Do: Argentina, 1983-2002”, in SIRI GLOPPEN, ROBERTO GARGARELLA and ELIN SKAAR (Editors), *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES*, (Frank Cass, London/Portland, Or, 2004), at 190; also see, ARTURO PELLET LASTRA, *HISTORIA POLITICA DE LA CORTE (1930-1990)*, (Ad-Hoc, Buenos Aires, 2001), at 412-413; and Christopher Larkins, “The Judiciary and Delegative Democracy in Argentina”, 30:4 *Comparative Politics* 423, 427 (Jul, 1998), (arguing that during that period the Judiciary enjoyed notable degrees of impartiality and insularity and possessed fairly broad authority to regulate the legality of official acts).

<sup>111</sup> See Bruce Ackerman, above n 15, at 795.

<sup>112</sup> *Id.*

<sup>113</sup> 310 *Fallos* 1162 (1987).

<sup>114</sup> The decision was four-to-one. Though, given the arguments advanced by Justice Petracchi –that turn his reluctant concurrence in almost a dissenting opinion- the decision could well be regarded as three-and-a-half-to-one-and-a-half. According to Pellet Lastra, the deliberation among the Justices was intense, and the decision was delayed due to the lack of a majority. See ARTURO PELLET LASTRA, above n 110, at 433. Unfortunately, there are no personal papers of the justices that hint what happened inside the Court, what was their disagreement about, and who was the justice that, ultimately, decided to go along with the majority.

its formal deficiencies, it was an amnesty law that Congress was competent to enact.<sup>115</sup> Petracchi, whose opinion is for the most part dissenting, held that the country was going through a very particular historical and political circumstance, in which the branches charged with producing norms and those charged with their interpretation were all aiming at reestablishing and reaffirming for the future the democratic and republican government. Such goal, in his view, should guide constitutional hermeneutics.

There was no doubt that the underlying thread in all opinions –except for Justice Bacque’s- was precisely that kind of “prudential” interpretive approach favored by Justice Petracchi. The Supreme Court treated the issue as political in essence. Although the majority did not use the doctrine of the “political questions”, it considered that the decision to cease prosecutions was an essentially political decision, for which the Congress was responsible. From the juridical standpoint, the justices did not find constitutional objections to such exercise of power. Justice Bacque, instead, filed a powerful dissent whose arguments surely appealed to the human rights organizations.

The decision is a reflection of what happened in the larger frame of society: there was no consensus about the measure, and even those who supported it as a means to stop military unrest, were badly sore. It is worth noting that all five justices had been appointed by Alfonsín. However, the decision showed how contested the issue was, even among the justices.

We can indulge in a brief thought experiment. What would have happened if the Supreme Court had ruled the Due Obedience Law unconstitutional? Given the situation, it would have forced Alfonsín to take the initiative once again. His options, basically, would have depended on the arguments used by the justices. If the only complaints of the

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<sup>115</sup> Strictly speaking, the law did not provide for an amnesty, with its typical effects. Instead, it created an irrebuttable presumption of facts, for certain categories of officers who did not enjoy decision-making powers.

hypothetical majority had stood on the alleged interference with judicial function –because the law established an irrebuttable presumption on factual aspects whose judgment belong to the Judiciary- or other similar grounds, then Alfonsín would have had the alternative of trying to get Congress to pass an open blanket amnesty. Definitely, the worst scenario from Alfonsín’s perspective. Any amnesty would have had to be general, according to the best constitutional interpretation,<sup>116</sup> which would have probably implied the immediate release of the commanders that had been already convicted. The only clearly successful move of Alfonsín so far, and the most powerful symbol of the break with the past and of the reestablishment of the rule of law would have been scratched in one move. The whole enterprise would lose sense. That was not a feasible option.

Another alternative were presidential pardons. It, too, posed some troublesome questions. The individual nature of pardons would allow the convictions of the commanders to stand. But the alternative presented, at least, three problems. Legally, it was doubtful that the president could pardon people under trial but not-yet-convicted, who were the majority of the officials.<sup>117</sup> Politically, it was neither attractive nor completely effective, since, on the one hand, it put all the political costs of the highly unpopular decision on Alfonsín’s shoulders; while on the other hand it may have not brought complete tranquility to the

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<sup>116</sup> Article 75, Section 20 of the Constitution explicitly refers to the congressional power to “grant general amnesties”, and scholars have interpreted the requirement of generality as inherent to amnesties. See, i.e., GERMAN BIDART CAMPOS, *MANUAL DE LA CONSTITUCION REFORMADA*, (Ediar, Buenos Aires, 1997), Vol. 3, at 126-127;

<sup>117</sup> But see above n 101. However, in our hypothetical case, it cannot be assumed that the Justices that later voted for upholding the presidential power of pardoning people not-yet-convicted (Justices Petracchi and Fayt) would have voted in the same way, given the fact that in the example they had been willing to rule unconstitutional such an important measure as the Due Obedience Law. Nor can it be assumed that in the five-seat Court of 1987, they would have commanded a majority, since Justice Belluscio later voted against recognizing such constitutional power, and Justice Bacque was clearly against the possibility that such offenders could go unpunished, as he made clear in his dissenting opinion in *Camps*. The decisive vote would have been Justice Caballero.

military, precisely because of the individual character of the solution and its dubious constitutionality.<sup>118</sup>

An extremely principled judicial position –crimes of such nature cannot be either amnestied or pardoned-<sup>119</sup> would have forced an all-out confrontation with the rebel officers whose outcome would have depended, ultimately, on the distribution of forces –and it was unclear whether Alfonsin had under his command enough loyal forces to crush a large rebellion-.

Apparently, the justices had a menu of alternatives to choose from, ranging from upholding the laws, to ruling them unconstitutional on narrow grounds, thus allowing Alfonsin to insist with a corrected version of his measure, to the extreme, principled position –Justice Bacque’s- according to which such heinous crimes could not be object of amnesties. But, actually, there were only two alternatives. Either support Alfonsin, helping him to keep the military situation under control, or strike down whatever measures could free the perpetrators of the worst crimes. There was no middle ground available for the Court. What would have been the point in handing down a minimalist declaration of unconstitutionality? It would have just escalated the tension, pushing the situation closer to the brink, without any clear benefit: Congress and the President could have still released the officers from responsibility, adjusting their measures to the Court’s demands, which they would have probably done. For the Court, it would have been something close to political suicide, with

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<sup>118</sup> The individual nature of the measure implied that for the officers it was harder to ascertain whether any hypothetical promise would be kept –they were demanding “a general solution”-, and even if Alfonsin complied with the pardoning scheme, it was not a closed legal question. If Alfonsin decreed pardons immediately, they would encompass people not-yet-convicted. There was always the possibility of the Judiciary ruling such pardons unconstitutional, even after Alfonsin was out of office. Of course, Alfonsin could have promised to pardon them after conviction, but...would the rebellious officers have accepted such a deal?

<sup>119</sup> Of course, since there were no pardons at stake in the *Camps* case, the Court did not need to discuss whether such crimes were susceptible of pardon. However, some argumentative lines might have suggested the unconstitutionality of both amnesties and pardons. Especially, lines based of international law arguments, as those used by the current Supreme Court in the *Simon* case –which will be analyzed below-.

its authority plummeting down in the moment the decision was signed. Alfonsín and Congress would have taken the measure as undue obstructionism, and the public opinion would have seen the decision having no real effect, due to the likely amnesty or pardons. High risks, and low returns. The only other option was, if the justices believed that the democratic government could control the rebels, to go all the way and issue a broad decision putting the crimes in question beyond the reach of amnesties or pardons. But it was dubious that the situation could be controlled. It would have been a risky gamble, and most of the justices were not ready to play judicial brinkmanship with democracy at stake.

Clearly, there were strong political incentives for the Supreme Court to rule as it did.

*E-1994: A New Constitution and...The End of a Cycle?*

Let us fast-forward to a few years later. The process by which Argentina finally had a thorough reshaping of its constitutional charter still had Raul Alfonsín as one its main protagonists. After nearly a decade pursuing the project, he would get to embed some of his favored ideas in the new text. The other –very central- character was then-president Carlos Menem, who was desperately seeking to reform the Constitution in order to enable his reelection and take advantage of the high popularity he enjoyed at the time, due to the relative success of his economic plan.

The idea of a new constitution, that ameliorated some of the defects of Argentina's hyper-presidentialist system,<sup>120</sup> had seduced Alfonsín for long years. Since the mid '80s, he had entertained the idea of pushing the political system towards something closer to parliamentarism. The reformulation of the "supreme law of the land" would be the perfect tool for his longings. He had tried to bring the idea of a constitutional reform to the center

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<sup>120</sup> For an elaboration of Argentina's hyper-presidential system, see CARLOS S. NINO, above n 1, at 497-653.

of the political stage, as early as 1985. He created the Council for the Consolidation of Democracy (Consejo para la Consolidación de la Democracia),<sup>121</sup> a presidential commission integrated by personalities representative of different political forces that was charged with generating preliminary ideas for the search of a broad consensus. Carlos S. Nino –a renowned scholar and close advisor to the president- was designated as coordinator. The Council produced two important briefs, establishing general lines for a reform project. Although the political circumstances of the times prevented such work from fructifying in a constitutional reform, the failure of the Council was more apparent than real. Many of its proposals resurfaced as important starting points for the work of the Framers of 1994.<sup>122</sup>

On the Peronist side, Menem was going full-steam ahead, pursuing the possibility of his re-election. When his Party seemed to run into trouble to get the necessary votes in the House of Deputies, he ordered a referendum to consult the people about the possibility of a constitutional reform. Alfonsín, convinced that a consensus reform was much better than an imposed one and that he still could get some of his ideas on the Constitution, steered his Party towards supporting the reform.<sup>123</sup> Alfonsín and Menem signed the *Pacto de Olivos*,<sup>124</sup> which opened the doors for the 1994 Constitutional Convention.

The pact worked the following way: there were a number of issues that formed an untouchable core, the so-called “Basic Coincidences Core”, and the rest of the topics, generically referred to as “authorized themes”. The former could not be revised or altered in any way by the Convention –which could only approve them or reject them as a whole-, and

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<sup>121</sup> Executive Decree #2246/85.

<sup>122</sup> See ALBERTO D. LEIVA and EZEQUIEL ABASOLO, above n 49, at 176.

<sup>123</sup> Recently, Alfonsín has held that Menem would have achieved the constitutional reform even if the Radicals (UCR) opposed to it and that the content of such reform would have been clearly regressive for the Nation, debilitating the legitimacy of the process and the institutional legality. See RAUL ALFONSÍN, above n 36, at 156.

<sup>124</sup> It was signed on December, 14<sup>th</sup>, 1993. The name “Olivos” is due to the name of the place where the Presidential Residency is located, and where the agreement was reached.

the latter could be discussed, modified, accepted, or rejected by the delegates. The content of the agreement were poured into the Law #24309, which called a Constitutional Convention. To secure that the Convention could not go beyond the limits of the political consensus that allowed its existence, the Law provided expressly that any deviation from the authorized topics would be null and void (articles 6 and 7, Law #24309).<sup>125</sup>

Whatever the imperfections of the process that ended up in the reform, it is true that there was widespread agreement to carry out the modifications and that the people were aware of what was to be modified. The debate was ample and citizens had, in general, a good understanding of the big changes that were being discussed.<sup>126</sup>

Menem had what he wished. Alfonsín, in a somewhat diminished manner, also had some of his institutional ideas reflected in the constitutional document.<sup>127</sup> Many positive additions were made, and some of the old, anachronistic parts of the Constitution were revised. The People finally had a new Constitutional text, modernized, and that reflected some old longed-for ideas.<sup>128</sup> Had legitimacy been definitely restored? Was 1994 the end of a constitutional cycle? At least, it seemed to be so. We will put off the tentative answer for a while.

In what is pertinent to my argument, the Convention made one fundamental reform: following up on Alfonsín's efforts to promote a solid human rights policy, the 1994 Framers decided to grant "constitutional hierarchy" -or "constitutional standing"- to a number of

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<sup>125</sup> Later, the Supreme Court would enforce the limits of the Convention's reforming powers in the *Fayt* case - 322 *Fallos* 1616 (1999)-.

<sup>126</sup> See Mark P. Jones, "Assessing the Public's Understanding of Constitutional Reform: Evidence from Argentina", 18:1 *Political Behavior* 25, 42 (Mar, 1996).

<sup>127</sup> The purported intention of the reform was to attenuate the presidentialist features of the system. Many of the ideas that had been discussed in the briefs of the Council for Consolidation of Democracy were used -if, many times, in a watered-down version- in the Convention. Compare *REFORMA CONSTITUCIONAL: SEGUNDO DICTAMEN DEL CONSEJO PARA LA CONSOLIDACION DE LA DEMOCRACIA*, (Eudeba, Buenos Aires, 1987) to the enacted version of the 1994 Constitution.

<sup>128</sup> See ALBERTO D. LEIVA and EZEQUIEL ABASOLO, above n 49, at 189.

human rights' treaties. Article 75, Section 22, provides that the treaties there enumerated, plus those which Congress decides at any time by a special procedure stipulated in the same section, "have constitutional hierarchy, do not repeal any Section of the First Part of this Constitution, and are to be understood as complementing the rights and guarantees recognized herein".

What does such a phrase mean? In what position are treaties with regard to the Constitution itself? Let us see, briefly, what the Framers thought about the question.

The delegate Barra expressly said that

"There is no contradiction, then, between these rights –that we can call 'new'- and the ones already ...in the dogmatic part of the Constitution...if such a contradiction arises...there will not exist the complementariness required...therefore, such rights will not be perfected, and thus, it will not be possible to enforce them. These new rights...are the culmination of the first 35 articles, and not their abrogation...if the legal operator, ultimately the judge, cannot reach an integrative meaning of the norms in question, the one mentioned in the dogmatic part of our Constitution will have primacy...in accordance with article 7, Law #24309..."<sup>129</sup>

This was the position of the majority, and Barra was acting as informant member. In general, the dominant position was that treaties were to preempt laws, but the Constitution should trump all the legal order.<sup>130</sup> We should add, to have a complete picture, that one of the main conditions under which the Convention was called was, precisely, that it could not modify the principles, rights, and guarantees contained in the first 35 articles of the 1853

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<sup>129</sup> Third Ordinary Session, National Constitutional Convention, August, 2<sup>nd</sup>, 1994.

<sup>130</sup> See, generally, Gregorio Badeni, "El Caso 'Simon' y la Supremacia Constitucional", 2005-D *La Ley* 639 (2005), who makes a detailed analysis of the debates in the National Convention, arguing that several delegates made the express point that the Constitution should reign over all other normative sources, even international treaties with "constitutional standing". The delegates were clearly aware of the fact that the Convention was not allowed to modify in any way the first 35 articles of the Constitution.

Constitution. Law #24309 explicitly forbade the Convention to modify in any way such provisions (Article 7), and provided that any *ultra vires* action be null and void (Article 6). Among those articles was Article 27, providing that any treaties celebrated must be in accordance with “the principles of public law laid down by this Constitution”. The Supreme Court had interpreted, repeatedly –and has not formally overruled such line of precedents–, that the Constitution trumps a treaty, whenever they might conflict with one another.<sup>131</sup>

What does all this legalistic analysis have to do with the larger questions posed in the beginning of this paper? Much, as we will see.

### III.-A LOOK AT TODAY

#### *A.-The Supreme Court at the Bar of Politics: The Simon Case.*

In 2005, the Supreme Court entered the fray of human rights *politics*, handing down a much-anticipated, but nonetheless controversial, decision in the *Simon* case. There, by a seven-to-one vote,<sup>132</sup> the Court reversed itself and overruled the *Camps* decision. Now, some eighteen years later, the Due Obedience Law and Full-Stop Law had become unconstitutional.<sup>133</sup>

What had happened in those eighteen years? Well, a lot and not much, depending on where the attention is focused. Politically, a lot of water had run under the bridge. The army had lost a lot of resources and almost all possibilities of influencing politics –this last point

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<sup>131</sup> In *Fibraca*, for instance, the Court held that, according to Article 27 of the Vienna Convention on the Law of Treaties, treaties should be accorded supremacy over internal laws *once the principles of public law laid down by the Constitution have been secured*; 316 *Fallos* 1669 (1993).

<sup>132</sup> Of the nine justices that sat in the Court at the time of decision, three of them –Justices Petracchi, Fayt and Belluscio– has taken part in the 1987 decision –all of them concurring, at least, in the judgment–. In 2005, however, only Petracchi and Fayt voted. Belluscio, whose retirement was imminent, excused himself and took no part in the decision.

<sup>133</sup> Not that many people did not think so back in 1987, Justice Bacque being the most visible example. It is debatable whether the laws were constitutional in their time, but now I refer to the concrete issue of the opinion of the Court as an institution and not of the individuals –even those who might happen to sit in the Court–.

being highly positive-. Human Rights NGOs had grown a lot, doing important work in many areas, and gaining political lobby. Sectors sympathetic to the 1970's fight of guerrilla had become closer to power. Legally, we had had a constitutional reform, with a turn towards internationalization of human rights protection, but without altering in any way rights entrenched in the first part of the Constitution. The Supreme Court had continued to uphold Due Obedience and Full-Stop Laws, even after the Constitutional Reform.<sup>134</sup> The Inter-American Court of Human Rights had ruled that *self-amnesty* laws covering crimes against humanity were against the Inter-American Convention of Human Rights.<sup>135</sup> Congress had used the mechanism provided by Article 75, Section 22 of the Constitution to grant constitutional hierarchy or constitutional standing to some treaties, particularly, to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.<sup>136</sup> Last, but not least, Congress had declared null and void the Due Obedience Law and the Full-Stop Law.<sup>137</sup> So, apparently, a lot had happened in the legal field as well.

But, looking carefully, not much had occurred in regard to the *constitutional* situation of the so-called impunity laws. Article 18 of the Argentina Constitution provides that “no inhabitant of the Nations may be punished without previous trial based on a law enacted before the act that gives rise to the process...”. Thus, whatever the impact of the political and legal development on the *current* constitutional status of the laws, those who had

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<sup>134</sup> See, i.e., 321 *Fallos* 2031 (1998).

<sup>135</sup> IACHR, case *Barrios Altos (Chumbipuma Aguirre at al. v. Republic of Peru)*, available online at <http://www.corteidh.or.cr/casos.cfm?&CFID=100373&CFTOKEN=71856675> or (direct link) [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf), (last visited 11/30/2006).

<sup>136</sup> By Law #25778 (2003).

<sup>137</sup> By Law #25779, following immediately the grant of “constitutional hierarchy” or “constitutional standing” to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. It should be noticed that both laws had been repealed by Congress in 1998, by Law #24952, with clear conscience on the part of the representatives that such repeal could only have effects towards the future but in no way it could alter the effects both laws had already produced.

benefited from them seemed to be guarded against retroactive application. Even more so, when many of the beneficiaries had been expressly released from responsibility, and the corresponding criminal right to prosecute had been declared extinguished, by Supreme Court decisions that were final.

But the Supreme Court, with five sitting justices appointed by, or close politically to, the current government –whose sympathies towards the guerrilla movement have not been hidden-,<sup>138</sup> decided to jump in the constitutional politics fray and amend the “mistake” that their predecessors had made in 1987. The most redemptive style of adjudication was just about to be displayed. So redemptive it was, that it clearly exceeded what the Constitution provided for. Was it, finally, the end of an era and a very late confirmation of the ‘new beginning’? If so, what should we make of traditional criminal guarantees that seemed to be affected by the decision?

*1-A Pro-Majoritarian Effort to Restore the Lost Legitimacy or a Constitutional Revolution by the  
Judiciary?*

Both. On a more cynical approach –which, I think, anyone would have good reasons to take-, the decision is simply the result of a very long political battle in which winners are imposing their law upon the defeated, whatever the institutional cost. I believe such assertion, regrettably, holds true to a certain extent. In this case, the cost is a constitutional revolution, led by the majority of the Supreme Court. However, it is always possible to

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<sup>138</sup> See, i.e., Juan Gasparini, “El Nuevo Presidente Argentino y El Pasado Reciente: □ Kirchner y la Tercera Batalla de los Montoneros”, available at [http://www.lafogata.org/003arg/arg6/ar\\_tercera.htm](http://www.lafogata.org/003arg/arg6/ar_tercera.htm) (last visited, 12/06/2006); also see Joaquin Morales Sola, “Menem, Montoneros y el Error de Comparar el Hoy con el Ayer”, published in *La Nacion*, 04/15/2004, available at [http://www.clubdelprogreso.com/index.php?sec=04\\_05&sid=24&id=1838](http://www.clubdelprogreso.com/index.php?sec=04_05&sid=24&id=1838) (last visited 12/06/2006); James Nielson, “El Regreso de los Montoneros”, published in *Rio Negro Online*, 12/16/2005, available at <http://www.rionegro.com.ar/arch200512/16/o16f02.php> (last visited 12/06/2006); “Argentina: The Slow Battle for Justice”, published in *The Economist*, 09/14/2006, available at [http://www.economist.com/displayStory.cfm?story\\_id=7912930](http://www.economist.com/displayStory.cfm?story_id=7912930) (last visited 12/06/2006).

attempt a more sympathetic reading of the decision. One that goes beyond the particular interest of the parties –in a broad sense- and try to see the ruling under the light of the process that I have described roughly in the precedent paragraphs. Maybe from such standpoint, one can find another understanding –though not a justification- of the decision.

I cannot not elaborate in detail a decision that is composed of eight different opinions –seven concurrent and one dissenting opinion, all different and very long- and extends to a total of 353 pages –including two advisory opinions by the *Procurador General de la Nacion*-. Necessarily, there will be many very important issues that I will have to skip. I hope not much is lost the process since the focus of this paper is not the ruling itself, but how it fits into the larger constitutional picture.

Some of the justices attempted to prove that, at the time the laws were enacted, Argentina’s Congress was forbidden to pass any laws of that kind. The non-retroactive approach, so to speak. It is remarkable, however, that most of the justices that pursued this line of argument, did not rely in Argentina’s constitutional rules as Justice Bacque had tried to do in his dissenting opinion in *Camps*.<sup>139</sup> Instead, they preferred to rely on international conventional and customary obligations.

As far as conventional obligations are concerned, the majority has a hard time trying to find proper grounds for its assertion that Article 18’s prohibition of *ex post facto* criminal laws is not violated. No treaty that establishes the prohibition to amnesty crimes against

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<sup>139</sup> In such a long decision, it is striking that there are so few references to rules contained in the national Constitution. All the concurring opinions of the plurality amount to 247 different sections in the decision. Of those, only 7 sections (less than 3%) make very brief and secondary references to arguments of internal constitutional law that, in the justices’ opinion, lent support to their finding of unconstitutionality (section 13, Justice Petracchi’s opinion –in some very restricted sense-; sections 25, 26 and 28, Justice Maqueda’s opinion; section 19, Justice Highton de Nolasco’s opinion; sections 23 and 24, Justice Lorenzetti’s opinion). Justice Zaffaroni uses sections 23 and 24 of his opinion to *discard* arguments based on constitutional provisions that had been invoked to support the unconstitutionality of the Due Obedience and Full-Stop Law; and Justice Argibay devotes section 16 of her opinion to show that Article 18 of the Constitution is *not* violated by the solution favored by the plurality. That is as much as it is said about the Constitution in the plurality’s opinions.

humanity was binding for Argentina at the time. Article 15.2 of the International Covenant of Civil and Political Rights might have done the trick, had it not been object of an express reserve by Argentina –subjecting its application to the limit of Article 18 of the Constitution. Of course, it could be argued that the Inter American Convention on Human Rights, as interpreted by the Inter American Court in the *Barrios Altos* case, was binding at the time. But, as it happens, the document has no provision forbidding amnesties. On the contrary, it provides for the prohibition of the application of *ex post facto* criminal laws –Article 9. And the interpretation in *Barrios Altos* refers to *self*-amnesty laws, not to amnesties decided by duly elected democratic governments that, moreover, do not imply the complete impunity of the crimes nor do they impede the investigation and the discovery of truth, as Justice Fayt pointed out in his dissent.<sup>140</sup> The vague terms of section 41 of the Inter American Court Judgment were used by the Supreme Court to ground its assertion that Congress, in 1987, could not have constitutionally enacted Due Obedience and Full-Stop Laws. The section goes as follows

“41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”

Taken out of context, the fragment may seem to support the Court’s conclusion in *Simon*. But the paragraph refers to all amnesty provision *under decision in the instant case*.

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<sup>140</sup> Fayt, J. (dissenting), sections 75 to 85.

References to the “self-amnesty” character of the laws are found elsewhere in the ruling,<sup>141</sup> and, in any case, section 41 is nothing more than an *obiter dictum* that, as such, does not control the very different case of Argentina’s laws.

The decision fares no better when it comes to customary obligations. First, one cannot help but wonder how the justices that in 1987 passed on the constitutionality of the laws may have overlooked something so important as the alleged *ius cogens* rules. It seems rather incredible that, suddenly, the new justices found out something that their colleagues had completely ignored. Again, as Justice Fayt remarks,<sup>142</sup> Justice Petracchi expressly analyzed the international obligations of Argentina in his concurring –in the judgment– opinion in *Camps* and found no incompatibility whatsoever. Second, as Legarre has pointed out, the justices assumed that such a customary obligation existed, instead of carefully proving it.<sup>143</sup> If anything, evidence points in to opposite direction, with the existence of a countervailing practice of resorting to amnesties in the recent years.<sup>144</sup> Finally, it is dubious that a liberal system of criminal law, such as the one established by Argentina’s Constitution should accommodate sources of law that are diffuse in nature, such as custom. Criminal law has to be *certa* and *scripta*. Customary international law is, arguably, neither. At least, to the extent necessary to assure certainty in criminal prosecutions. Thus, it is hard to accept that it can be regarded as a normative source on which the punishment of individual depends, however despicable the crimes attributed to such persons may be.

But let us have the justices show us the true nature of the decision.

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<sup>141</sup> See, i.e., sections 42, 43 and 44 of the majority’s opinion.

<sup>142</sup> Fayt, J. (dissenting), section 76.

<sup>143</sup> See Santiago Legarre, “Crimes Against Humanity, Reasonableness and The Law: The Simon Case in the Supreme Court of Argentina”, 5:3 *Chinese J.I.L.* 723, 731 (2006).

<sup>144</sup> Among others, the cases of Spain, South Africa, and Uruguay can be brought to attention. *Id.*, at 731-732. Also see, Alfonso Santiago (h), “La Dimension Temporal del Derecho y el Conciente y Deliberado Apartamiento de los Principios de Legalidad e Irretroactividad en Materia Penal por Parte de la Corte Suprema Argentina en el Caso Simon”, 205 *El Derecho* 719 (2005).

Justice Boggiano said that the reference to the international treaties made by the Constitution would be useless, if the application of such treaties were blocked or modified by interpretations based on one or another national legal system. For instance, if the application of the principle forbidding statutes of limitations were to depend on its conformity with the principle of legality contained in Article 18 of Argentina's Constitution.<sup>145</sup> The recovery of damages, goes on the justice, is insufficient to comply with *current* requirements of international law,<sup>146</sup> and the imperativeness of such international norms renders them applicable *even retroactively*.<sup>147</sup>

Justice Argibay, using articles 26 and 28 of the Vienna Convention on the Law of Treaties, points out that the Argentine State could not excuse itself for not applying retroactively an international convention intended to be applied, precisely, in that way.<sup>148</sup> There is no point in arguing that the prohibition of the application of *ex post facto* criminal laws is not violated by the Court, if one believes that, no matter what, the State had to apply the treaty *retroactively*. Unfortunately, she provides no explanation why the articles of the Vienna Convention must be applied against the Constitutional provision. Especially, when

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<sup>145</sup> Boggiano, J. (concurring), section 14. The reasoning is fallacious. Since the reference to the treaties is made by the Constitution itself, the application of such treaties would not be frustrated by "interpretations based on one or another national legal system" –as Justice Boggiano would have us believe-, but by the Constitution's own provisions. It is the Constitution that provides for the constitutional standing of some treaties, and it can perfectly establish –as it does, in my opinion- that in case of collision, the Constitution would trump the treaties. From the fact that the Constitution grants constitutional hierarchy –with the caveats already referred in the main text- to some treaties, it does not follow that the Constitution has resigned its position as "the supreme law of the land" or that it is impossible to displace an international norm when it contradicts the Constitution. The same argument used by Justice Boggiano can be formulated, more persuasively, in exactly the opposite way: "The Constitution's declaration as the 'supreme law of the land', as well as the provision that mandates that all treaties must conform to the principles of public law laid down by the Constitution and the express prohibition that the treaties abrogate rights and principles declared in the first part of the Constitution –among which the two previous assertions are contained- would all be useless if their application were frustrated by interpretations based in one or another international norm. For instance, if the prohibition of the retroactive application of criminal laws (article 18), were to be trumped by the principle that mandates retroactive punishment".

<sup>146</sup> Boggiano, J. (concurring), section 25.

<sup>147</sup> Id. at section 45.

<sup>148</sup> Argibay, J. (concurring), section 17.

article 46 of the same international treaty provides some relevant exceptions to the rule Justice Argibay based her reasoning on.

Justices Zaffaroni and Lorenzetti resorted to the idea of the “principle of universal jurisdiction” as a new, supervenient fact that should influence decisively the outcome of the case.<sup>149</sup> Since, according to such principle, the persons suspected of having committed crimes against humanity could be prosecuted and judged by any Nation, the dignity of the Argentine Republic demands that they are prosecuted in our own country. Or so goes the argument.

Additionally, Justice Lorenzetti emphasized that the level of evolution of humanitarian international law, *appraised today*, did not allow to keep the constitutionality of the amnesty laws in question.<sup>150</sup>

Another device used by some of the justices,<sup>151</sup> when confronting the undeniable reality that provisions of the human rights treated –as interpreted by international organs- collided with fundamental rights and principles of our constitutional organization, was to interpret the constitutional limitation of Section 22 of Article 75 (that the human rights treaties “do not repeal any Section of the First Part of this Constitution, and are to be understood as complementing the rights and guarantees recognized herein”) in a rather peculiar way. They held that such phrase means that the constitutional delegates of 1994 *actually did check for incompatibilities between the human rights treaties in question and the Constitution, and found that there was none*. Such factual judgment would be of a special *constitutional* nature – as emanation of the people’s power through the delegates- and could not be contradicted by the Supreme Court, whose role would consist in integrating all norms in a way that all had

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<sup>149</sup> Zaffaroni, J. (concurring), section 32; Lorenzetti, J. (concurring), section 29.

<sup>150</sup> Lorenzetti, J. (concurring), section 23.

<sup>151</sup> Boggiano, J. (concurring), sections 10 and 12; Lorenzetti, J. (concurring), section 17.

effects. By means of such a fictional device, the justices tried to save the supremacy of the Constitution. According to this narrative, the Constitution would not be defeated by treaties because the Framers checked for inconsistencies and found none. End of the story. Call this the *theory of the Framers' compatibility check*.

But things are not so easy, because –as *Simon* shows clearly- there are a number of cases in which inconsistencies can –and will- arise. The 1994 delegates could not possibly check the potentially infinite cases in which collisions can occur. It is only in the frame of an actual case that such interpretive problems may arise and be resolved. The Court cannot resign its power to test the constitutionality of human rights treaties to which “constitutional standing” has been accorded, simply because there is no other opportunity to test it.

Moreover, this position takes an erroneous stand towards constitutional language. The Constitution does not inform; it prescribes. Its language is neither descriptive nor informative; it is normative. To illustrate my point, I will borrow an example from the National Academy of Law in Argentina. When Article 15 of our 1853 Constitution states “In the Argentine Nation there are no slaves”, it is not informing us of the factual inexistence of persons subject to such servitude; it is abolishing slavery.<sup>152</sup> Similarly, Section 22, Article 75, is not informing of an intellectual activity of the Framers; it is preserving the supremacy of the Constitution in the eventuality of a collision with a treaty with “constitutional hierarchy” or “standing”.<sup>153</sup> So, as a matter of legal theory, the *theory of the Framers' compatibility check* is faulted.

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<sup>152</sup> Dictamen Academia Nacional de Derecho y Ciencias Sociales, Caso *Arancibia Clavel*, point 8; available online at <http://www.academiadederecho.org.ar/memoria.htm> (last visited 12/06/2006); also available at [http://www.revistacriterio.com.ar/art\\_web.php?cuerpo=1&artweb\\_id=30](http://www.revistacriterio.com.ar/art_web.php?cuerpo=1&artweb_id=30) (last visited 12/06/2006).

<sup>153</sup> Id.

Needless to say, it is also mistaken as a matter of legal history. As debates in the Constitutional Convention show,<sup>154</sup> the delegates did not worry about such compatibility tests, and instead intended that the Constitution should trump the treaties in case of collision.

The consequences of such a doctrine are revolutionary. Every time a constitutional provision comes in touch with a provision of a human rights treaty with “constitutional standing”, the judges should assume that there are no incompatibilities –no matter how blatant they might be- and try to make both rules equally applicable and effective. This opens a space in the first 35 –today 43- articles of our Constitution, in spite of the express prohibitions of 1994, that now can be filled by current or future treaties with “constitutional standing”, or –as in *Simon*- by alleged international customs. This is especially problematic in the case of provisions that prescribe in the form of rules,<sup>155</sup> such as Article 18.<sup>156</sup> In such cases, there is no possibility of interpretive integration. Rules are all or nothing. Of course, there can be exceptions to rules. This is, precisely, the point at stake. Since the justices cannot admit the plain derogation –or invalidity- of a constitutional provision that collides with an international norm, they are required –by the described theory- to introduce exceptions to constitutional rules. But, as it happens, the Constitutional Convention was forbidden to make this kind of deep reforms, and the delegates did not think they were

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<sup>154</sup> See below, footnotes 157 and 158, and accompanying text.

<sup>155</sup> See Ronald Dworkin, “The Model of Rules”, 35:1 *U. Chi. L. Rev.* 14, 25 (1967); also see ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS*, (Oxford University Press, New York, 2002), at 48.

<sup>156</sup> Let us remember that Article 18 provides that “no inhabitant of the Nations may be punished without previous trial based on a law enacted before the act that gives rise to the process”. Since the law can only be, temporally, prior or posterior to the act that gives rise to the process, the previous trial mandated by the provision, can be conducted in only two different ways in this respect: it is either based on a law that is prior to the facts –thus complying with Article 18-, or it is based in a law that is subsequent –and, thus, Article 18 is violated-. The guarantee against *ex post facto* criminal laws does not admit degrees of compliance (in the way principles do; see, i.e. ROBERT ALEXY, above n 155, at 47-48): it is either observed or violated, but it does not seem plausible to think that the guarantee can be respected to a certain extent. It does sound strange to say that an individual has been convicted after a trial that respected “a little” or “a lot, but not completely” his guarantee against *ex post facto* criminal laws. This is, in my view, an all-or-nothing kind of issue.

doing so. Are the justices authorized to take the stand and do what the Framers could not do –and did not want to do-? The analyzed theory opens a big gap in the constitution, forming an empty “bubble” that can be filled with different interpretive elements –jurisprudence, whether or not applicable to the case; *obiter dicta*; opinions issued by political bodies; among other resources- taken from the international arena. We can call this the *constitutional bubbles effect*.

Justice Petracchi, quite understandably since he had voted for the constitutionality of the laws in 1987, did not bother himself to attempt a non-retroactive justification or to use the *theory of the Framers’ compatibility check*. Instead, he chose to follow a different path. For him, the 1994 Constitutional Reform signaled the starting point of a process of fundamental change in Argentina’s constitutional law. The reader should notice that Petracchi does not say that the 1994 reform itself was the change, but that it started an evolutionary process that, based on the evolution of international human rights law, *no longer* authorizes the State to make decisions whose outcome is the renunciation of right to prosecute the perpetrators of crimes against humanity.<sup>157</sup> Domestic law is *now* clearly limited to grant amnesties or pardons in such kind of crimes and, therefore, those who were benefited by Due Obedience and Full-Stop cannot invoke either the prohibition of retroactive application of criminal laws or ‘*res iudicata*’.<sup>158</sup>

Justice Petracchi did openly what other justices tried to hide: to apply retroactively criminal rules against the indicted person, in clear violation of Article 18. He tried to justify his move on an alleged “fundamental change” in Argentina’s constitutional law. There is an “ackermanian” flavor to his argumentation. The idea of a “constitutional moment” is present throughout the opinion. Basically, his opinion holds that the formal amendment of 1994

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<sup>157</sup> Petracchi, J., sections 14 and 15.

<sup>158</sup> Id., at sections 15 and 31.

opened the way for introducing evolving notions of international law in our Constitution. Then, the politics of human rights would fill the interpretive gap.<sup>159</sup> In similar vein, the brief filed by the Procurador General Becerra, contains a specific citation of Ackerman's *Foundations*,<sup>160</sup> in support of the idea that a change in the interpretive paradigm of the Constitution had occurred and that such "constitutional moment" had been explicitly recognized and embedded in the Constitution in 1994.<sup>161</sup>

The problem is that both *Procurador* Becerra and Justice Petracchi beg the question. They just invoke the idea of constitutional moments, but –even accepting, *ex hypothesi*, that the theory is applicable to Argentina's constitutional history- they fail to show how the alleged change has taken place and,<sup>162</sup> then, that its content is the one which they invoke.

As I explained before, the Delegates in 1994 were not authorized to introduce *any* changes to the first 35 articles of the Constitution. That included the prohibition of retroactive application of criminal laws (Article 18) and the supremacy of the Constitution over all other normative sources, including treaties (Articles 27 and 31). The law calling for the Convention, enacted following the political pact known as *Pacto de Olivos*, expressly forbade introducing the afore mentioned reforms, and declared that any extra-limitation of the Convention would be null and void.<sup>163</sup> Delegates were perfectly aware of the limitation of their mandates, and when one delegate proposed an amendment to Article 75, Section 22

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<sup>159</sup> Notice that Justice Petracchi relies not only on jurisdictional opinions of international tribunals, but also on the mere recommendations and informs of *political* organs of the international system of human rights protection. See, i.e., Petracchi, J., sections 20, 21 and 33 (referring to the Inter American Commission of Human Rights and to the U.N. Committee for Human Rights). Justice Fayt criticized this usage of political opinions and recommendations. See Fayt, J. (dissenting), section 86.

<sup>160</sup> Point A, page 23, first opinion of the *Procurador General de la Nacion*.

<sup>161</sup> In this point, Procurador Becerra and Justice Petracchi part ways: while for Becerra the 1994 Constitutional Convention had been the culminant point of the "constitutional moment", in Petracchi's opinion the Convention was just the starting point of the process of change.

<sup>162</sup> In his dissent, Justice Fayt replies to the supposed "change of paradigm" that, according to Justice Petracchi and Procurador Becerra –and then Procurador Righi, in the second opinion-, had occurred since 1987. Point by point, Fayt shows how each and every relevant legal norm invoked by Petracchi was already in force in 1987, and that the 'new' paradigm is not new at all. See, generally, Fayt, J. (dissenting).

<sup>163</sup> Articles 6 and 7, Law #24309.

(the one in which the argumentation of the plurality of the Court relies heavily) forbidding pardons or amnesties for crimes against humanity, the proposal was rejected.<sup>164</sup> In 1998, Congress recognized that no change that allowed nullifying the laws had occurred. Thus, it decided to repeal Due Obedience Law and Full-Stop Law but not to nullify them.<sup>165</sup> In 1999, the Supreme Court ruled unconstitutional a reform introduced in 1994, because it considered that the delegates had overstepped by modifying an article that was not among the “authorized themes” of Law #24309.<sup>166</sup> No movement of any relevance took up the idea. Until 2001, when Judge Gabriel Cavallo ruled both laws unconstitutional on other grounds, there was not even much talk about the issue. Even after 2001, the topic was not central in any electoral campaign. If anything happened in 1994 and after, if any “constitutional moment” took place, it was of the opposite sign of the one invoked in the *Simon* decision. Yes, there was a movement towards a stronger recognition and protection of human rights. But the movement did not deal with getting rid of fundamental guarantees of criminal laws. Nor did it alter in any way the hierarchy of norms.

It was just in 2003 that Congress seems to have taken for itself the role of speaker of The People. Without much justification, but for their own judgment about what was morally right concerning violations of human rights, Congress enacted Law #25779, declaring “null and void” the “amnesty laws”. The main argumentative line in the debates was the “new”

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<sup>164</sup> See Gregorio Badeni, above n 130, point II (arguing that delegate Maria Lucero made the proposal mentioned in the main text, and that it was rejected; and recalling that, when some delegates criticized the proposed draft of Section 22, Article 75, delegates Maria Martino de Rubeo and Horacio Rosatti, expressly clarified that the proposed text put treaties over laws, but not over the Constitution).

<sup>165</sup> In the debate in Congress, previous to the enactment of Law #24952 (repealing the Due Obedience and Full-Stop Laws), the representatives admitted that, due to the principle of application of the most benign criminal law –or prohibition of *ex post facto* criminal laws that prejudice the indicted-, a new indictment of the perpetrators was not possible). See Diario de Sesiones de la Camara de Diputados, 7a reunion, 24/03/1998, p. 882 and Sesión 5a, 25/03/1998, p. 1438, 1442, citation by Fayt, J. (dissenting), section 20. Moreover, they decided to simply repeal the laws, and not to declare them null and void, despite the existence of international treaties now used to support the alleged nullity.

<sup>166</sup> *Fayt v. Estado Nacional*, 322 Fallos 1616 (1999).

paradigm in international human rights law. But there had been no crucial election before in which the topic had been widely discussed. The law was published in September, 3<sup>rd</sup>, 2003. Elections for Senators were held *after* that date –starting September, 7<sup>th</sup>, depending on the electoral district-. Elections for Deputies were split before and after the enactment –some in April, some in August, and many in September, October, and November-. Presidential election had been held in April, but neither Nestor Kirchner nor Carlos Menem –the two major contenders- included the issue in their respective electoral platforms,<sup>167</sup> nor campaigned on the topic. It is pretty clear that no branch could legitimately claim to have received a popular mandate to nullify the laws in question. But Congress, with the sympathy of the President, did just that, and went ahead with their new role of “congressional revision” of their own, duly-enacted laws.

No branch assumed the “preservationist” role.<sup>168</sup> Nobody called the public’s attention about what was being done, silently, to the Constitution. There was only one ruling of unconstitutionality that I am aware of, by the Federal Court of Appeals of San Martin, in the *Bignone* case.

Mind you, this is a story of purely majoritarian, in a technical sense, decisions. In 1987, Congress passed the “amnesty laws”. In 1998, Congress repealed both laws. In 2003, Congress nullified them. The Supreme Court always went along with the decisions.

Of course, most people –among whom I am- are happy to see the perpetrators of heinous crimes go to jail. So the decision itself has not generated so much contradiction among the general public. But the public is not much aware of the institutional

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<sup>167</sup> Electoral platforms of both candidates in the 2003 Presidential election are available, in Spanish, at <http://www.pjn.gov.ar/cne/download/Partidos%20Nacionales/Alianza%20Frente%20para%20la%20victoria/Alianza%20frente%20para%20la%20victoria.pdf> (President Kirchner’s platform) and <http://www.pjn.gov.ar/cne/download/Partidos%20Nacionales/Alianza%20frente%20por%20la%20lealtad/Alianza%20frente%20por%20la%20lealtad.pdf> (former President Menem’s platform) (both sites last visited 12/07/2006). There is not one mention in either platform to the issue of past violations of human rights.

<sup>168</sup> See BRUCE ACKERMAN, above n 67, at 10.

consequences of what the Court did, nor, thus, seems to have consented to its constitutional lawmaking.

So far, I have described the revolutionary side of the decision. The justices took two different paths to reach the same solution. Some of them applied –admittedly or in disguise– retroactively norms against the indicted person, in open contradiction with the fundamental guarantee of Article 18, and therefore, they reformulated the constitutional hierarchy of norms, subordinating the Constitution to certain international treaties. Others preferred to insert exceptions in the Constitution, by a theory that provides the tools to generate *constitutional bubbles* that can be filled accordingly to the necessities of the instant case. Either way, they changed the Constitution. Looking forwards, they sowed the seeds of doctrines that will permit to modify the Constitution in unforeseeable ways at any time.<sup>169</sup> *The revolutionary picture is on display.*

Add now that the *Simon* ruling, in its retroactive aspects, is a completely *ad-hoc* decision that cannot be repeated in the future. Since the Constitution only forbids retroactive application of provisions that eliminate statutes of limitations or prohibit certain amnesties or pardons, and such provision are already a part of Argentina’s Constitutional system –in accordance to the formal rules of amendment–, any acts that amount to crimes against humanity that can be committed in the future will have been committed *after* the existence of the mentioned provision and, hence, they will not raise any retroactivity issue. It is virtually impossible that the *Simon* doctrine, as far as the retroactive application of criminal laws is concerned, is ever again applied. The decision was handed down, and the doctrines were built, aiming exclusively to sent a number of concrete persons to prison, for crimes

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<sup>169</sup> The decision raises many other problematic constitutional law issues that I cannot analyze here. For instance, the possibility that Congress does not simply repeal laws, but declare them null and void, with general effects.

committed during the last dictatorship. The smell of the imposition of the political winner over the defeated is all around. *The cynical picture is now in place.*

Is there any alternative view that can account for the decision? As I said before, I think there is. The political process that ended up in the Supreme Court ruling can be sympathetically viewed as a majoritarian effort, backed up by the justices, to restore the legitimacy lost in the dismantling of the corrective justice enterprise attempted by the Alfonsín administration. After all, Alfonsín's initial proposal, the one that people voted in the crucial election of 1983, was that those in charge of the repression –the generals and high-rank officers- would be punished, and that lower-rank officials would be spared punishment, and given the opportunity to join the democratic system. The exception would be those who had committed atrocious crimes or had gone beyond the orders.<sup>170</sup> And *Simon* will, most likely, have such practical effect. It has also paved the way for the nullification of some of Menem's pardons.<sup>171</sup> Ultimately, the result will be that those who gave the orders, and the paradigmatic perpetrators of atrocious crimes will go –or return- to prison.<sup>172</sup> The symbolic effect of the imposition of the rule of law over the most emblematic violators of law will be restored and the 'new beginning' will be complete again.

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<sup>170</sup> See J. PATRICE MCSHERRY, above n 12, at 111. Also see CARLOS S. NINO, above n 12, at 63.

<sup>171</sup> Recently, the Supreme Court, by a 4-2 vote, ruled the pardons granted to military officers unconstitutional. The decision is very problematic, since it implies the overruling of a prior decision of the Court in the same case and concerning the same person. The authority of *res indicata* has been seriously affected by the decision. See CS, 07/13/2007, *Mazzeo, Julio Lilo y otros*, available at [www.csjn.gov.ar](http://www.csjn.gov.ar) -not yet paginated in the official report *Fallos-* (the previous decision in the same case, which was overruled now, is known as *Riveros*, 313 *Fallos* 1392). A serious analysis of the decision is far beyond the limits of this essay and deserves a separate study.

<sup>172</sup> Even if, arguably, most of the people that took part in the repression actually committed atrocious crimes, it is highly likely, for a number of reasons, that only the most egregious offenders will be prosecuted. Which was, incidentally, Alfonsín's idea in the first place. Among the reasons that may lead to a limited prosecution are: death, of both the perpetrators and those strongly interested in the prosecutions; lack of witnesses and evidence, as a result of the passing of time; lack of political will. In the case of the paradigmatic offenders, evidence is easier to obtain, and it is more likely that affected people are alive and actively pursuing the punishment. Another factor that may account for this result is the political incentive that the government has to prosecute prominent repressors: it may bring the administration some good publicity and some votes for the Party. Low-visibility cases, instead, yield low-benefits.

As I said before, the fact that the law was enacted under pressure really influenced the way it was perceived by the people, and generated strong rejection. It could have been different, had the measure not been taken under perceived threat. Of course, in that case, the story would have been different, not only as a matter of perceptions but also substantively. Justice Maqueda gives us a hint of the point when he says that:

“...even when amnesties have been associated with concepts such as peace and compassion, *perpetrators of grave crimes have taken advantage of amnesties* to achieve impunity. Hence...States...are still obliged to prosecute and punish such crimes, even if...it is necessary to nullify such amnesties. *In case the powers of the State are put in significant risk, the State may, in such an emergency, postpone such obligation, which will have to be carried out when the danger is over...*”<sup>173</sup>

The amnesty was not granted voluntarily, which means that *morally*, it was no amnesty at all. Of course, it does not follow necessarily that *legally* there was no amnesty. That is a different sort of argument. But, in any case, it seems clear that coerced forgiveness is a conceptual contradiction and this feature of the “amnesty” laws plays, I believe, an important role in the definition of the current political process around the whole issue. Sadly, the cost of unmasking the past is sacrificing fundamental constitutional guarantees and making our institutional commitments look really bad.

My point is just that, besides the “revenge approach” –cynical–, the *Simon* decision may be understood in a way that fits the larger constitutional process that started in 1983. Such approach may help understand whatever legitimacy the process, which is largely defective from the legal point of view, may have.

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<sup>173</sup> See Maqueda, J. (concurring), section 81 (citing Geoffrey Robertson’s “Crimes Against Humanity” in support of the assertion).

#### IV.- CONCLUSION: THE DEATH OF THE “AMNESTY” LAWS AND THE QUESTION OF LEGITIMACY.

Throughout the paper, I have held that Alfonsín did not have the option of renouncing to prosecute the leaders of the military repression of the 1970's and going, instead, down the constitutional law-making path. I have also said that he did want to enact a new Constitution. Indeed, he had plans for a somewhat radical departure from some political traditions of the country. But the trials to the *Juntas*, at least, acquired a legal and political priority. Later, the changed political situation, and military pressures forced him to pass through Congress the Full-Stop Law and the Due Obedience Law. The possibility of a new Constitution faded away. The symbolic power of the ‘new beginning’, embodied on the subjection of the offenders to punishment –the rule of law-, was erased by both laws and Menem’s subsequent decision to pardon those already convicted and many others. I have also analyzed the Supreme Court’s behavior in the two different moments.

Is there any relationship between what happened in the ‘80s and early ‘90s and the current situation? If so, how does it affect the legitimacy of the process that ended up recently with the Supreme Court upholding the nullifying Law #25779 and also striking down, on independent grounds, the Due Obedience and Full-Stop Laws? The answer to these questions is two-fold.

I believe that, due to Alfonsín’s clear stance on human rights violations in 1983 and the epic character of that election, there might be some grounds to justify overruling *Camps* as a *legitimate* decision. Since Alfonsín had made clear in 1983 that he did not expected to punish all the perpetrators, but among those who would have to face justice would be not only the commanders but also the perpetrators of atrocious crimes, *Simon* seems to take things back in that direction. The direction 52% of the people voted in 1983, and whose

abandonment in 1987 –under *force majeure*- may partially account for the massive withdrawal of political support to Alfonsín’s party, nation-wide. The restoration of the structure that Alfonsín, supported by The People, had chosen to symbolize the “new beginning”, as well as the ultimate subjection of the repressors to the rule of law may well fit into the old scheme of legitimacy, altered by the Due Obedience law and –specially- Menem’s pardons. Of course, there is a high cost in terms of institutional quality and, not a minor issue, in terms of respect for the individual guarantees of those indicted.

Moreover, the general –and accurate- perception that the “amnesty” laws did not really represent a moment of true reconciliation but were, instead, the result of intense pressures and military threats, may give additional weight to the idea that the “amnesty” laws could be legitimately removed from the legal order, exactly as if they had never existed. Forgiveness cannot be imposed. It has to come out, however bitterly, from the political community seeking to heal its wounds.<sup>174</sup>

But it does not follow that overruling *Camps* had to be done the way the Supreme Court did it. It went far beyond needed, and –in my opinion- it entered the muddy terrains of illegitimate judicial constitutional revolution. The Court could have used the bulk of Justice Bacque’s arguments, focused largely in Argentina’s constitutional law. Instead, the justices resorted to the fashionable world of international law. They took pains to make the international norms fit in the constitutional order. In the process, they created doctrine that amounts to a true constitutional revolution. Today, and despite the express opposite provisions in the 1994 Constitutional Convention, the Constitution has a strange “love/hate” relationship with some international norms. In many occasions, everything goes smoothly, and human rights announced in international treaties complement human rights

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<sup>174</sup> Once again, this is a moral argument that has an impact in the legal argument but cannot, in itself, exhaust the question.

recognized in our Constitution. In other situations, however, the relationship goes sour. There, precisely when our Constitution should serve as a stronghold of rights, the Court decides to open *constitutional bubbles*, to be filled by whoever turns out to be victor in the politics of human rights. After *Simon*, in Argentina there are *less* individual interests that are outside the reach of majoritarian decisions. Human rights, paradoxically, end up becoming their conceptual opposite.

So the conclusion is one of mixed *feelings*. The Court reached what might be deemed, from a certain perspective, as a morally legitimate outcome, resorting to means whose political legitimacy is very disputable. This is even more so if legal restraints to political disputes, in the way of procedural restrictions, are considered as devices to try to secure political legitimacy. The legitimacy –or illegitimacy- of means and ends is rooted, as always, in a long story about a very difficult past.