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

By JOSE SEBASTIAN ELIAS *

I. Introduction

Argentina has a long history of authoritarian government, with a good portion of the twentieth century characterized by military dictatorships. This environment has hindered the development of a liberal constitutional practice of government, one that is consistent with the rule of law and that places a high value on individual rights and on the value of autonomy.¹ The most serious interruption of constitutional order took place between 1976 and 1983, when a military government ruled the country with an iron fist under the pretext of fighting the communist guerrilla. In this process,

* I am indebted to Bruce Ackerman for his insightful criticisms and comments on an earlier version of this paper. Another version of this piece was presented at the Latin American Human Rights and Legal Theory Workshop at the Leitner Center for International Law and Justice, at Fordham Law School, where I received useful comments and criticisms from Jorge Contesse, Juan Gonzalez Bertomeu, Ruti Teitel, and other assistants. I have also benefited from long conversations on the topic with Leonardo Filippini, Marcelo Alegre, and Samuel Ferguson. Julio Rivera read a previous draft and made useful comments, and Santiago Gascon gave me more than a helping hand with bibliography at a distance. Last, but not least, Elizabeth Klebaner, Erica Yen, Alicia Miller and the editorial team at the *Hastings International and Comparative Law Review* did a great job on this piece, helping make it more accurate and readable. To all of them I am truly grateful. Obviously, unanswered criticisms and any other shortcomings remain my responsibility.

1. See CARLOS S. NINO, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL: ANALISIS FILOSOFICO, JURIDICO Y POLITOLOGICO DE LA PRACTICA CONSTITUCIONAL* 106-57 (1992).

commonly known as the “Dirty War,” the dictatorship engaged in the systematic commission of countless crimes, establishing a parallel criminal, yet state-run, organization aimed at annihilating the subversive element at any cost. Heinous crimes were committed, and many people disappeared, leaving their families forever ignorant of their fate. A few lucky people regained freedom after abduction and torture, but many more died in bombings and terrorist attacks. This dark phase in Argentina’s history left deep wounds in the social fabric of the country, and we are still trying to heal them.

Predictably, our society has had serious troubles in its attempts to re-establish a liberal constitutional democracy. One of the most important obstacles Argentina has faced is attaining transitional justice. We have struggled with this issue throughout the last twenty-three years, unable to reach a definitive solution, much less one that would satisfy a sufficient portion of the population. After the democratic restoration, the topic of corrective justice has had a profound influence on the legitimacy of our constitutional process, and continues to influence it today.

Not unlike the United States, Argentina has a written Constitution. Its original text was drafted in 1853, and then revised in 1860. There have been some minor reforms over time, but until 1994 the text remained essentially the same since its enactment. The Constitution’s observance, however, has suffered from a variety of institutional illnesses ranging from instability to plain derogation. Nonetheless, the original Constitution has remained in force, even if only symbolically, for the majority of its existence.² In this way, the Constitution has functioned as a symbol of unity and identity for the People. So much so that even the worst violators of the Constitution claimed that they were trying to ‘defend’ it and preserve it, and none dared to formally abrogate it.

In 1983, after the restoration of civil government, the Constitution was not replaced by a new higher law, nor was it amended. Instead, it was re-established as the “supreme law of the land.”³ Subsequently in 1985, under the authority of the original

2. 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. U.S. Dep’t of State Background Note: Arg. (2008), <<http://www.state.gov/r/pa/ei/bgn/26516.htm#history>>.

3. 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

Constitution, 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. Then in 1987, the Congress passed two bills that were functionally equivalent to amnesty for all intermediate rank officers. As an independent political maneuver, President Menem pardoned a number of military officers and guerrillas in 1990. Those officers and guerrillas that were pardoned had already been convicted, while others were standing trial.

Four years later the Constitution went through some important reforms. In 1994, a Constitutional Convention was called in an attempt to modernize our constitutional framework. Individual guarantees were explicitly reinforced, while the classic dogmatic part of the Constitutional text remained untouched.⁴ In 2004 and 2005, the Supreme Court handed down two very important decisions touching on the issue of transitional justice. While the Court's decisions on the merits of the two cases were received warmly, the doctrinal foundations of these decisions have proved highly controversial. The decisions in these two cases, *Arancibia Clavel*⁵ and *Simon*,⁶ at least on their face, clashed with some of the most time-honored principles of modern liberal criminal law. Principles that had long been secured by the Constitution. Specifically, the decisions were in derogation of the prohibition on *ex post facto* criminal laws. In *Arancibia Clavel*, the Supreme Court declared that crimes against humanity were not covered by statutes of limitations of any kind, because international customary law and conventional obligations had displaced the applicable domestic rules.⁷ In *Simon*, the Supreme Court expanded

established. Felipe Aguero, *Legacies of Transitions: Institutionalization, the Military, and Democracy in South America*, 42 MERSHON INT'L STUDIES REV. 383, 383-388 (1998).

4. 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. EMILIO J. CARDENAS & MARIANO GARCIA RUBIO, NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY, (Vera Gowlland-Debbas & Djacoba Tehindrazanarivelo eds., 2005).

5. Corte Suprema de Justicia [CSJN], 24/8/2004, "Arancibia Clavel, Enrique Lautaro y otros" Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2004-327-3294) (Arg.).

6. Corte Suprema de Justicia [CSJN], 14/6/2005, "Julio Héctor Simón y otros," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2056) (Arg.) (translated by author).

7. See "Arancibia Clavel," *supra* note 5, at § 38 (Zaffaroni, J., and Highton de

upon the principles set forth in *Arancibia Clavel*, declaring unconstitutional the 1987 Congressional "amnesty" bills. Not only did these decisions seemingly contradict foundational principles of Argentina's legal order, but standing together they also overruled the precedent set by *Camps*⁸ where the Court had seemingly settled the matter with a contradictory ruling some eighteen years earlier.

Is there any substantial relationship between the sequence of facts I have depicted and the outcome of these two cases? Did President 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 framework of their constitutional legitimacy? Or is the Supreme Court, in developing Argentina's constitutional culture, merely a political actor: is "just politics," all we are left with? Are we facing a revolution led by the Court? These are questions I will attempt to answer in the pages that follow.

II. Looking Backward

In order to better understand the current constitutional order in Argentina, it is necessary to take a glance at how the country got to where it is today, and how this history has contributed to the constitutional revolution led by the Supreme Court. Let us then go back to 1983.

A. 1983: A True 'New Beginning' or Just a Simple Restoration?

By the time Raul Alfonsín was elected President by democratic means in 1983 the country was exhausted. It had expended much of its moral reserve on seven years of harsh military dictatorship, characterized by systematic violations of human rights. But the violence and institutional decline had begun much earlier. Even the democratic governments of 1973 and 1976 had not been much of a break for a society shaken by political instability and recurrent

Nolasco, J., concurring), § 24 (Petracchi, J., concurring), §§ 30, 35 (Boggiano, J., concurring), §§ 74, 77 (Maqueda, J., concurring) (translated by author).

8. Corte Suprema de Justicia [CSJN], 22/06/1987, "Camps, Ramón Juan Alberto y otros / Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1987-310-1162) (Arg.).

authoritarianism. For the last fifty-three years, the country had endured repetitive cycles of weak and brief civil governments,⁹ followed by military rule. Argentina needed respite.

Whether it would get it was not very clear until the ballots were in. The Peronist party had been the dominant force on the political scene for almost forty years. It had never been defeated in any election it had been permitted to enter. Even when forbidden, the Peronist party continued to have an enormous influence on electoral results. It was only natural that many erroneously believed that the Peronist candidate, Italo Luder, would become the next president.¹⁰ But he did not, of course, and Raul Alfonsin was chosen to run the country in 1983.

Much more than partisanship was at stake; the method by which Argentina would resume its democracy and constitutional life would depend heavily on who won the election. The difference lay in whether Argentina would try to build a liberal constitutional practice that reflected the aspirations of a mobilized society, or whether it would simply bridge the gap between 1976 and 1983, and pretend that nothing had happened in between. Alfonsin and Luder chose to face the electorate with proposals that were radically different in one essential point: the scope of the change in our institutional structure. While Alfonsin represented a new generation of politicians, associated with the possibility of deep changes, Luder had strong links to Argentina's violent past¹¹ and offered the prospective of continuity. The 1983 presidential election was crucial to Argentina's new political order.

The military dictatorship had begun with strong civilian support. Many people were tired of the increasing violence of the mid-1970s,

9. With the exception of Peron's presidency from 1946 to maybe 1953-54. U.S. Dep't of State Background Note: Arg. (2008), <<http://www.state.gov/r/pa/ei/bgn/26516.htm#history>> (visited April 7, 2008).

10. 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.

11. Even when he himself had not participated in violent actions, he had signed, during his tenure in Isabel Peron'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." IRENE MUNSTER, FROM NORWICH TO THE PAMPAS AND BACK: THE ARCHIVE OF RABBI MARSHALL T. MEYER AT DUKE UNIVERSITY, (2005), available at <<http://www.jewishlibraries.org/ajlweb/publications/proceedings/proceedings2005/munster.pdf>>.

and believed that the generals could fill the growing power vacuum, and re-establish peace and order. They were right about the former, but wrong about the latter. Instead of peace, there was terror and with it came the societal fractures that still haunt us today. As time passed, support for the regime faded away. The disappearances, the abhorrent methods used by the Armed Forces in the “war against the communist guerrilla,” and the lack of a coherent and efficient economic management was a noxious political cocktail that most people were not willing to sip any longer. Moreover, the international community ceased to be tolerant of human rights violations. Criticism of the regime flowed from both internal and external sources, and the military regime was ill equipped to respond to them. The Junta rapidly lost its ground in the moral battle for national security.¹²

The Malvinas war brought a brief return of popular support to the Military Junta, which decided to regain by force the Islas Malvinas from the British. The ostensible legitimacy of the cause made people forget about the illegitimacy of their rulers, and worse, about the futility and the ill-timing of this military campaign. Despite the huge costs that the war had for Argentina, in both human and political terms, it did have one positive effect for the country, namely, contributing to the decisive collapse of the military regime.¹³ The generals, blaming one another for the disastrous results of their ill-conceived military escapade, had time only to call for general elections and attempt to negotiate protection from criminal prosecution.¹⁴ They were not successful in the latter task, probably

12. 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 & CESAR GARCIA BELSUNCE, *LA ARGENTINA POLITICA* 254 (El Ateneo, Buenos Aires 2005).

13. *See* ELIN SKAAR, *HUMAN RIGHTS VIOLATIONS AND THE PARADOX OF DEMOCRATIC TRANSITION* 71 (Chr. Michelsen Institute 1994). *See also* CARLOS S. NINO, *RADICAL EVIL ON TRIAL* 43 (Yale Univ. Press, New Haven and London 1996). *But see* J. PATRICE MCSHERRY, *INCOMPLETE TRANSITION: MILITARY POWER AND DEMOCRACY IN ARGENTINA* 9 (St. Martin's Press 1997) (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”).

14. *See* MARCOS NOVARO & VICENTE PALERMO, *LA DICTADURA MILITAR [THE MILITARY DICTATORSHIP]* 477-78, 501-07 (2003) (translated by author).

due to their lack of political leverage following Argentina's defeat.¹⁵

The collapse of military rule opened a wide range of opportunities for democratization. Many possibilities for building a fuller democracy were at hand.¹⁶ And it was now up to Alfonsín and Luder to decide whether and how to take the available opportunities and fill the remnant power vacuum.

Alfonsín won the election with almost 52 percent of the total votes and a majority in the Electoral College.¹⁷ Was the 1983 election the mark of a true "new beginning"¹⁸ or was it just a democratic restoration? The question is legitimate since one of the options in the national debate was precisely the "institutional and political continuity" offered by Luder. Failure to enact a new Constitution immediately after the fall of the military dictatorship implied a certain degree of legal continuity. After all, constitutional lawmaking is frequently a potent symbolic marker of break with the past.¹⁹ Yet can a political regime that began by restoring a 130 year-old constitutional text – violated more frequently than observed during the previous fifty-three years – be described as a "new beginning?"

However, the year 1983 was, indeed, a new beginning for Argentina. There was no new constitutional text, but there was a clear break with the devilish National Security State model that had been developed by the Military Junta.²⁰

The election signaled the break between authoritarian rule and constitutional democracy. Moreover, it marked the divide between traditional politics and a new perspective on the Argentine *Res Publicae*. The electoral results marked the epilogue of an era and the probable prologue to a new order.²¹ Writing in 1983, Alain Rouquie

15. *Id.* at 509.

16. See MCSHERRY, *supra* note 13, at 7; see also NOVARO & PALERMO, *supra* note 14, at 547 (emphasizing the factors that hindered taking full advantage of the opportunities).

17. Argentina's presidential election system was indirect and used an electoral college until the 1994 Constitutional Reform. See CONST. ARG. ART. 94.

18. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 778 (1997).

19. *Id.*

20. See MCSHERRY, *supra* note 13, 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.

21. See FLORIA & GARCIA BELSUNCE, *supra* note 12, at 268.

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. . . [t]he 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*.²²

Novaro and Palermo²³ have described the situation prior to 1983 as,

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'.²⁴

Subsequent historical developments would prove that a fundamental change had occurred. Although there were more than a few opportunities in which different conditions (economic as well as political) shook Alfonsin's government – and, on fewer occasions Menem's as well²⁵ – the people never again entertained the possibility of asking for military help, as they had done so frequently in the past. On the contrary, when democracy was endangered, the people mobilized in strong support of it.²⁶ *Coup d'états* were definitively rejected as a political solution to frequent frustrations.

The 1983 election was an usual election in that casting a vote had a powerful meaning for many.²⁷ Political apathy was at an

22. See Alain Rouquie, *The Departure of the Military-End of the Political Cycle or Just Another Episode*, 59 INT'L AFF. 575, 576 (1983) (emphasis added).

23. See NOVARO & PALERMO, *supra* note 14, at 468 (emphasis added).

24. *Id.* (emphasis added).

25. 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.

26. 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 MCSHERRY, *supra* note 13, at 214. The General Confederacy of Labor announced a general strike in support of democracy. See NINO, *supra* note 13, at 97. The rest of the country followed the development of the events with anxiety and similar manifestations of rejection to military threats against democracy.

27. Of course, elections could hardly be considered "usual" in those times in

extraordinary low level.²⁸ The people had been mobilized: many closely followed the progression of the campaigns, and were 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 14th, following an initiative of Alfonsín's Party, the Union Cívica Radical (Radical Civil Union or "UCR"), a number of political parties founded the *Multipartidaria* (National Multi-Party Organization), which was later joined by almost all political parties. *Multipartidaria* represented the whole range of political thought and disparate movements were mobilized as a consequence of their involvement.²⁹

In June of 1982, the *Multipartidaria* released the "Program for the National Reconstruction." This document was completely silent about the human rights violations that had occurred, but emphasized the necessity of reinstating the 1853 Constitution. However, the issue of human rights would become central to the electoral campaign after the military defeat in Malvinas changed the relationships between military leaders and civil society.³⁰ By the end of 1982, the *Multipartidaria* gathered 80,000 people in Plaza de Mayo, in support of democratic restoration.³¹ Civil society was flourishing and political party membership was renewed with unprecedented force.³² The need to feel a sense of belonging and civil participation became truly important, and many joined the political party of their choice as the manifestation of this need.

Argentina.

28. See, e.g., NOVARO & PALERMO, *supra* note 14, at 502 (arguing that, by the time the military regime collapsed, public opinion had long abandoned the anti-political inclinations that were dominant during the beginnings of the dictatorship, and that Argentine society was "massively democratic and mobilized").

29. *Id.* at 375-78, 396-97, 406-07, 512 (describing the formation of the *Multipartidaria*, the different positions within the coalition, and the difficulties it had every time a new political sector tried to be included in the coalition, as well as its aspirations of representing a wide range of political positions as a means to gain legitimacy).

30. *Id.* at 476.

31. *Id.* at 501. *But see* MCSHERRY, *supra* note 13, at 108 (stating 100,000 as the number of people in the same demonstration).

32. See, e.g., "La Elección Presidencial: Los Padrones como Instrumento de Poder," DIARIO CLARIN, Jan. 18, 2003, available at <<http://www.clarin.com/diario/2003/01/18/p-01101.htm>> (visited Nov. 8, 2006).

The issue of the crimes committed by the dictatorship, and transitional justice, gradually reached the center of the political debate. On August 19, 1983, barely two months before the general elections, 40,000 people marched to Plaza de Mayo in opposition to rumored self-amnesty for the military.³³

The two competing presidential candidates, Alfonsín and Luder, took significantly different stances on human rights. Alfonsín explicitly rejected the amnesty proposal announced by the outgoing military government, which advocated that the crimes committed during political repression should be judged by history alone and not by the civilian courts.³⁴ On the other hand, Luder's position was that, according to the prohibition of *ex post facto* criminal laws, any self-amnesty that was issued by the Junta would have a permanent effect due to the constitutional prohibition of *ex post facto* criminal laws.³⁵ While Alfonsín rejected off-hand the possibility of a "pacted" transition, Luder favored such a possibility.³⁶

There were further indicators that a Peronist victory would likely result in military impunity: the grant of amnesty to right-wing military leaders,³⁷ the return of trade union property and the possible

33. See NINO, *supra* note 13, at 64.

34. See "It Is Not the Final Word," May 2, 1983, Response of Presidential Candidate Raul Ricardo Alfonsín to the "Final Report on the War against Subversion and Terrorism" issued by the Military Junta (on file with author). Alfonsín stated clearly that it would be 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. See, e.g., *Diario Los Andes*, Mendoza, Argentina, May 3, 1983, at 1, 4. The argument is explained in fuller detail in RAUL ALFONSÍN, *AHORA: MI PROPUESTA POLITICA* 141-49 (Sudamericana-Planeta, Buenos Aires 1983).

35. See JOAQUÍN MORALES SOLA, *ASALTO A LA ILUSIÓN* 131 (Planeta, Buenos Aires 1991). 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.

36. See MCSHERRY, *supra* note 13, at 108. *But see* JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* 191-92 (Cambridge Univ. Press 2004) (holding 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.

37. See FLORIA & GARCIA BELSUNCE, *supra* note 12, at 283.

resumption of the unions' (the base of the Peronist party's support)³⁸ management of welfare activities; the connection between right-wing Peronism and para-military force;³⁹ the role Luder had played in executive orders authorizing the military to suppress guerrilla activities;⁴⁰ the Peronist party's support for authoritarianism, nationalism and anti-communism;⁴¹ and many others.⁴² The confluence of these factors virtually guaranteed that no legal action would be taken against the military if the Peronist party were to win the 1983 election.⁴³

In contrast to Peronist leaders, Alfonsín saw clearly, from the very beginning of the military's decline, the opportunities that would be offered by its collapse and tried to distance himself from the ideas and the symbols associated with the old regime. Immediately after the Malvinas defeat, Alfonsín made his political position clear by stating that, "the Armed Forces do not deserve this destiny, and the country does not deserve that government, which must go now; the usurpation must cease and a process of civil transition towards democracy must begin today."⁴⁴ Deolindo Felipe Bittel, a popular Peronist politician

38. See Alberto J. Pla, *El justicialismo en el poder en Argentina*, in *HOMBRES Y MOMENTOS DE LA ARGENTINA*: ROCA, YRIGROYEN, PALACIOS, PERON, FRONDIZI 149 (1975) (translated by author).

39. The connection between Isabel Peron's close advisor, Jose Lopez Rega, and the infamous "Triple A" right-wing para-military force is well known. See, e.g., *Argentina's 'Triple A' death squads*, BBC NEWS, Dec. 29, 2006, available at <<http://news.bbc.co.uk/1/hi/world/americas/6216431.stm>> (visited Mar. 30, 2008).

40. The military junta, in its document "Final Report," had taken care to remind the population about Luder's role in the executive orders authorizing the military to suppress guerrilla activities.

41. Peronism covered a wide range of political positions, and Peronist politicians have embraced widely different political programs throughout time. However, it is at least arguable that there are important authoritarian components in its history. One should not forget that Peron himself was a prominent member of the 1943 *de facto* government. The nationalistic elements have also been present in the Party's themes, and they appear intertwined with anti-communist topics. See, e.g., Pla, *supra* note 38, at 146-48 (arguing that Peronism can be included, without any difficulties, in the nationalistic positions that arose in post-WWII Latin America, and that Peron's stances represented a second kind of nationalism, defined by anti-imperialism and, at the same time, extreme anti-communism).

42. In general, the military officers were well-aware of all these signals, and that's why they generally preferred that Luder won the elections and not Alfonsín. They saw a Peronist victory as a lesser evil. See, e.g., Rosendo M. Fraga, *Las Fuerzas Armadas (1973-1983)*, in *8 NUEVA HISTORIA DE LA NACIÓN ARGENTINA* 261 (2001) (translated by author).

43. See Rouquie, *supra* note 22, at 585.

44. NOVARO & PALERMO, *supra* note 14, at 465, n.5 (quoting *La Nación*, June

chose a different political strategy. In his speech 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 combatant . . . 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 led

Even in the face of the military's defeat and the failed invasion of the Mavinas, the war seemed to be a victory under Peronist ideology and rhetoric.⁴⁵ Peronist leaders did not seem to grasp the way in which Argentina was changing. There would be no room for authoritarian rhetoric and extreme nationalist positions. Bittel, Luder, and the old-guard union leaders were trapped in the past that, suddenly, seemed long gone to the people of Argentina.

Alfonsin was the only candidate that could be called "new" in more than one sense of the word. He had not been part of the military government, nor had he been affiliated with violence and political intolerance, as was the case with the Peronist party. On the contrary, he had been an active participant in the human rights movement, and arrived at the crucial electoral moment as the alternative for true political change. He offered the possibility of a culture open to pluralist constitutional democracy, while at the same time was very critical of authoritarian ideology. He presented himself as the most democratic candidate, focusing his campaign on the rejection of the authoritarian past, and making a strong claim to revive political participation as an intrinsic value of the new political order.

The 1853 Constitution was the central theme of Alfonsin's campaign.⁴⁶ The search for a democratic institutional framework was on. Alfonsin offered a political prospect that was attractive to a large sector of the population. His rhetoric, while displaying some anti-oligarchy, populist leanings, also relied on constitutional themes. He

15, 1982).

45. See NOVARO & PALERMO, *supra* note 14, at 465, n.5.

46. See FLORIA & GARCIA BELSUNCE, *supra* note 12, at 267.

was drinking not only from Yrigoyen, the great Radical caudillo of the early twentieth century, but also partially from Peron⁴⁷ and, ultimately, he embodied the accurate synthesis of the transitional moment.⁴⁸

“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 against the military and the authoritarian management style of the trade unions, would be the central topics of a strategy that essentially aimed at giving an *epic extent to the change of regime*.”⁴⁹ Alfonsín understood the foundational possibility that was open at that historical moment,⁵⁰ and worked hard to make sure that his proposal conveyed precisely the idea of a fundamental change and 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 the main cause of his electoral victory.⁵¹ We cannot know

47. Alfonsín's reliance of populist and anti-oligarchy themes was inspired by both Yrigoyen and Peron, while his emphasis on the Constitution was something born out of his own appreciation of the historical circumstance. Neither Peron, nor Yrigoyen had been champions of constitutional discourse.

48. Hipólito Yrigoyen embodied the early twentieth century fight for popular sovereignty and universal vote. His party defined itself as a cause against the “oligarchic regime,” and its rhetoric focused on political participation, within the limits of the Constitution. Yrigoyen reached power after the enactment of the “universal and mandatory voting law.” See Marta H. Cavillotti, *La causa contra el régimen en la Argentina*, in *HOMBRES Y MOMENTOS DE LA HISTORIA ARGENTINA: ROCA, YRIGOYEN, PLACIOS, PERON, FRONDIZI* 62-65 (1975). See also FELIX LUNA, 1 HIPOLITO YRIGOYEN: PUEBLO Y GOBIERNO 234-35 (1956) (translated by author). Later, Peron would build his political project based upon the idea of social justice, which would occupy the center of his thought. See, e.g., RICARDO M. ZUCCHERINO, *HISTORIA CONSTITUCIONAL ARGENTINA* 483-84 (2007) (translated by author). Thus, the populist themes Alfonsín was using in his campaign recognize as antecedents both Yrigoyen and Peron. The constitutional themes, although also used in the past, were something more characteristic of the historical moment Alfonsín was facing.

49. See NOVARO & PALERMO, *supra* note 14, at 518 (emphasis added).

50. See Juan Carlos Portantiero, *Prologo*, in RAUL ALFONSIN, *MEMORIA POLITICA - TRANSICION A LA DEMOCRACIA Y DERECHOS HUMANOS* 14 (Fondo de Cultura Economica, Buenos Aires 2004) (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).

51. See MCSHERRY, *supra* note 13, at 110; see also SKAAR, *supra* note 13 at 73; Kathryn Lee Crawford, *Due Obedience and the Rights of Victims: Argentina's Transition to Democracy*, 12:1 HUM. RTS. Q. 17, 20 (1990), who emphasizes that Alfonsín's Party (UCR) had a human rights platform in the 1983 election, and that

for sure to what extent this was so. However, we can be reasonably certain that Alfonsin's attitude toward human right violations and transitional justice did play a role in the landslide victory he achieved.

Alfonsin won the elections, against all odds, because he was able to synthesize the values and loyalties the People wanted to retain and those they wanted to replace. Unlike Luder, he embodied a concrete proposal to make 1983 a turning point in Argentina's history.⁵² However, whether the transformation process ultimately lived up to the expectations it had generated is a different question altogether.

The day Raul Alfonsin was inaugurated as President, Argentine People signed a new social contract.⁵³

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

The new social contract was signed over an old, venerable, pre-determined model without any chance to add or subtract from this model. The 1853 Constitution served as the model for the "new beginning" the country was trying to establish. Why was this so? Are not constitutional texts, when backed up by the legitimacy of popular consent, powerful symbols of a "new beginning?" More importantly, are they not the very possibility of projecting the salient features of the "new beginning" into the future: unifying the People and helping the Nation to go through turbulent times⁵⁴ without relapsing into old practices. New constitutional lawmaking provides an opportunity to gain the support of the political elite and also to commit them to "play by the rules they made themselves."⁵⁵ Why then, did Alfonsin not try to embed his vision of the "new beginning" into a new constitutional text; and why did Argentineans decide to sign their brand-new social contract on an old sheet of paper instead of using a new one?

There may be various reasons why things turned out as they did. It surely was not the case that Alfonsin did not want a new

Alfonsin was elected on such electoral promises.

52. See JORGE VANOSI, *LA REFORMA DE LA CONSTITUCION* 125 (Emece, Buenos Aires 1988).

53. See Dardo Perez Guilhou, *El Constitucionalismo*, in *7 NUEVA HISTORIA DE LA NACION ARGENTINA*-506 (Academia Nacional De La Historia, Planeta, Buenos Aires 2001).

54. See BRUCE ACKERMAN, *THE FUTURE OF THE LIBERAL REVOLUTION* 2 (Yale Univ. Press 1992).

55. *Id.* at 62.

Constitution.⁵⁶ 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.⁵⁷ It may be, as Ackerman argues, that Alfonsín just squandered his moral capital on criminal trials,⁵⁸ missing the chance to enact a new Constitution before the “constitutional moment” rapidly passed. But there may still be a slightly different story to tell.

Although many times disobeyed, especially after 1930, the 1853 Constitution was a document that required much sacrifice to conclude. Since at least the Federal Pact of 1832, the various Argentinean provinces had been trying to attain their constitutional charter in a 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 finally enacted the Constitution.⁵⁹ It was enacted as a result of a long process of popular mobilization, and thus, the dualist conception of democracy would give it the highest degree of legitimacy.⁶⁰ So the 1853 Constitution was not a bad starting point at all. Or so Alfonsín may have thought.

Much in the way standard commercial contracts are used to make transactions easier by reducing transaction costs, the 1853

56. 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, e.g., NOVARO & PALERMO, *supra* note 14, at 470; see also MORALES SOLA, *supra* note 35, 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.).

57. See MORALES SOLA, *supra* note 35, at 33.

58. See ACKERMAN, *supra* note 54, at 80.

59. Almost thirty-seven 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, e.g., ALBERTO GARCIA LEMA, *LA REFORMA POR DENTRO: LA DIFÍCIL CONSTRUCCIÓN DEL CONSENSO CONSTITUCIONAL* 24 (Planeta, Buenos Aires 1994).

60. See Bruce Ackerman & Carlos Rosenkrantz, *Tres Concepciones de la Democracia Constitucional*, 29 CUADERNOS Y DEBATES 15, 16 (1991).

Constitution helped make the transition from dictatorship to democracy simpler. We just had to sign the “new social contract,” without having to negotiate what it would contain. The venerable historic Constitution provided an acceptable framework that people could subscribe to without much of a discussion. For better or worse, it had been the symbol to which Argentines had resorted many times in the past even in the midst of institutional disruption. Every time there was discontent with the pending political and institutional situation, mainly because the power was held by the 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. In this way, the original Constitution has been the “political safety net” that we relied on when our democracy stumbled and fell.

The phenomenon of charisma, usually associated with the personality of a leader, existed in the very text of the original Constitution and, thus became a charismatic value in and of itself.⁶¹ There was no charismatic leader to follow: the last one had been Peron. Alfonsín was not that kind of leader either.⁶² Instead, much of the attention was centered on a collection of rules that acquired a particular magnetism, since many people saw them 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 normalcy.⁶³

Although quite an old text, which many constituencies would be happy to see amended, the historic Constitution contained more than a significant portion of shared values. Its 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 those periods in which the charter had been fully observed, the Nation made significant progress.⁶⁴ It

61. See VANOSI, *supra* note 52, at 43.

62. *But see* MORALES SOLA, *supra* note 35, at 344 (arguing that Alfonsín did possess charismatic resources in a significant degree).

63. See ALBERTO D. LEIVA & EZEQUIEL ABASOLO, *CONSTITUCIONALISMO ARGENTINO EN EL SIGLO XX* 171 (1998).

64. 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

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 development of other comparable countries on the international scene.

This leads to another factor that might have played a role in Alfonsín's calculation about the possibilities, and the desirability, of rushing to embed the "new beginning" in a new constitutional text. Many people in Argentina had the idea that the problem was not the constitutional rules themselves but the lack of compliance with them.⁶⁵ This idea was taken up and turned into some sort of "official doctrine" by some political sectors which trivialized the rule of law.⁶⁶ Their motto was: "It is not necessary to reform the Constitution, but only to abide by it." The residual consequences of that ideology may have contributed to a general climate of resistance to any proposed change to the constitutional rules. Even in 1988, Jorge Vanossi—who, besides being a renowned constitutional scholar, was also a member of the Radical Party and a Representative in House of Deputies—could describe this "conservative" 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 *aggiornamenta*, . . . 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

disruptions begun. 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.

65. 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* (2005).

66. See Humberto Quiroga Lavie, *Estudio Introductorio*, in VANOSI, *supra* note 52, at 10.

force. . . .⁶⁷

There were also additional constraints: during the 1970s, talk of constitutional reform was rich in references to the “social function of property,”⁶⁸ which was surely inspired by the 1949 Constitution and, more broadly, by the so-called ‘social constitutionalism’ movement and which engendered the resistance of powerful sectors of society.⁶⁹ The prospect of any modification to the already maltreated property rights of the bourgeoisie was feared like the plague. This concern was expressed best by the so-called “Article 17-constitutional scholars.”⁷⁰

As Nino has argued, if at the very beginning of his term Alfonsín had called for constitutional reform, major political, economic and social groups would have interpreted the maneuver as highly self-serving, geared to change the political and economic rules.⁷¹ It is very likely that, in such event, they would have withdrawn their support, thus frustrating Alfonsín’s attempts and, maybe, jeopardizing the entire process.

An attempt at constitutional reform would have opened the discussion for a series of different, but similarly disturbing,

67. See VANOSI, *supra* note 52, at 47-48.

68. See, e.g., LEIVA & ABASOLO, *supra* note 63, at 149-53.

69. This seems to be a common constraint in nascent democracies. See GUILLERMO O'DONNELL & PHILIPPE SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 69 (1986), cited by MCSHERRY, *supra* note 13, at 17, 18.

70. See VANOSI, *supra* note 52, 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.

71. See NINO, *supra* note 13, at 129. See also GARCIA LEMA, *supra* note 59, 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).

possibilities: some Peronists⁷² wanted to re-establish the 1949 Peronist Constitution – that had been repealed illegally, though the legality of its very enactment is itself disputable⁷³ – while others, such as the previously pro-reform Luder,⁷⁴ simply opposed the idea because of their unwillingness to let another party leave its mark on the constitutional realm.⁷⁵ Moreover, military sympathizers 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*.⁷⁶ The dictatorship had envisioned itself as the great transformer of Argentina.⁷⁷ The generals' plan was not unlike a political party's plan; it was the military party's plan. A "military Constitution" was only the natural culmination of such a political scheme.

There were, it seems clear, too many conflicting aspirations about what should be accomplished through constitutional reform, had the chance to reform the Constitution actually been taken. 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 newly reinstated democracy. Strategically, it allowed Alfonsín to

72. 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 GARCIA LEMA, *supra* note 59, at 46. See also LEIVA & ABASOLO, *supra* note 63, at 173.

73. 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, e.g., Lucretia Illsley, *The Argentine Constitutional Revision of 1949*, 14:2 THE JOURNAL OF POLITICS 224, 227 (1952).

74. See ITALO LUDER, EL PROCESO ARGENTINO 104-39 (Ediciones Corregidor, Buenos Aires 1977) (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).

75. See MORALES SOLA, *supra* note 35, at 80.

76. See FLORIA & GARCIA BELSUNCE, *supra* note 12, at 240.

77. See SKAAR, *supra* note 13, at 67, n.4. See also MCSHERRY, *supra* note 13, at 86; LEIVA & ABASOLO, *supra* note 63, 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).

eschew the disquieting possibility of a Peronist Constitution or, even worse, an authoritarian influenced text that could be ushered in under the auspices of the Peronist party's military constituency. Additionally, it must be borne in mind that Alfonsín was keen on the idea of moving towards a semi-parliamentary system, an idea that would later generate resistance in some sectors of his own party,⁷⁸ but mainly in the Peronist Party, which prescribed to the idea of "presidentialism," even if admitting for the possibility of some mitigating elements, such as the figure of a Chief of Cabinet of Ministers with responsibilities over the administration of the country.⁷⁹

Due to all these conflicting positions, as well as to links the military retained in certain sectors of the civilian population, it may have been that, for Argentina, new constitutional lawmaking, contrary to Ackerman's theory, would have been a divisive instead of unifying factor.

Moreover, old constitutions, because 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 the day, even if the text does not encompass all of them, it may well be that a traditional Constitution plays a reassuring role in time of transition.

Much in the same way, this "political purity" accounts for the movement from particularized synthesis to comprehensive synthesis in judicial interpretation;⁸⁰ 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. The Preamble expressly refers to them.⁸¹ Nowadays,

78. See Ricardo Gil Lavedra, *Prologo*, in GARCIA LEMA, *supra* note 59, at 12.

79. See GARCIA LEMA, *supra* note 59, at 57. This tendency, although in a much watered-down version, would find its way into the Constitutional text in 1994.

80. See BRUCE ACKERMAN, *WE THE PEOPLE FOUNDATIONS* 96-99 (1991). Particularized synthesis treats constitutional principles at a very low level of abstraction, paying close attention to the historical circumstances that surrounded the enactment of the texts to be interpreted and, perhaps even to the concrete intentions of the legislators in regard to the issue at hand. Contrarily, comprehensive synthesis heightens the level of abstraction and generality at which the principles are interpreted. The concrete intentions of the lawgiver tend to go out of the center of the stage, displaced by a focus on the more abstract principles that can be plausibly read into the texts.

81. "We, the representatives of the people of the Argentine Nation, gathered in

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* executed by President Carlos Menem and his predecessor Raul Alfonsin, which paved the way for the 1994 Constitutional Convention, is commonly thought of as a rather spurious exchange of presidential nominations for two seats on the Supreme Court.⁸² As time passes, the concrete details of the bargain as well as the motivations of the actors will slowly fade from the collective memory, but the sounder principles of the pact will remain. In the future, 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. Consequently, *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 that heavily influenced Alfonsin's decision to offer the people the historic Constitution: the long-promised military trials. Before winning the election, Alfonsin had decided to embark on an ambitious plan of corrective justice. Violators of human rights were to be held accountable and neither the subversive guerrilla nor the military would 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.⁸³ Perhaps this was Alfonsin's method of drawing that line.

However, corrective justice and constitutional reform are not interchangeable as they do 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

General Constituent Assembly, by will and election of the Provinces which compose it, *in fulfillment of pre-existing pacts . . .*" CONST. ARG. PREAMBLE (emphasis added).

82. Although Alfonsin would only get one, eventually, since Menem did not fully comply with their "gentlemen's agreement" regarding the Court seats, and the UCR only got the appointment of Justice Bossert.

83. See ACKERMAN, *supra* note 54, at 70.

principles; corrective justice tend to generate divisions among the population, while constitutional lawmaking attempts to unite the People in defining a new order.⁸⁴ There seems to be some degree of incompatibility between the approaches, and it would seem that the forward-looking task of constitutional building is more promising for countries facing “new beginning” type situations and a past of grave human rights violations.

This tension may help explain why Alfonsín could not achieve constitutional reform: he made the wrong decision. But is this really so? Had the circumstances been different, 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 and military trials, or did he just blunder in what was probably the most important decision of his term?

Not necessarily. Alfonsín in fact did not have the option to abandon the promise of corrective justice. 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 his main differences from his opponents in the election.⁸⁵ Of course, this would not be the first time that a politician disappointed his constituency. But this was different; this promise was central to the “new beginning.” The people had put him in the *Casa Rosada* with a mandate to reestablish the rule of law⁸⁶ and this task, almost logically, required that at least the main actors of the terror of the 1970s were held accountable.⁸⁷

Second, and for the same reasons, the option of blanket amnesty

84. *Id.* at 70-71.

85. 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 MERSHON INT’L STUDIES REV. 383, 390 (1998).

86. In the same train of thought, see Crawford, *supra* note 51, at 20, n.14 (arguing that the mandate to re-establish the rule of law implied that the fate of “desaparecidos” – disappeared people – had to be faced).

87. *But see* Emilio Mignone, Cyntia 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).

was not feasible.⁸⁸ This is so not only because it could be argued, as Malamud Goti, Nino and others have done,⁸⁹ 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 Alfonsin administration failed to bring to justice these undisputed violations of the rule of law? The Constitution would be nothing more than a sheet of paper. Why should Argentineans have reasons to believe that the hypothetical new Constitutional text would be the 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?⁹⁰

This point is of the utmost importance, and may assist the understanding of Alfonsin’s fateful decision to pursue corrective justice instead of a new Constitution. As previously noted, Alfonsin did want a new Constitution. Alfonsin believed in the possibility of shaping politics through institutions and above all, he believed in the foundational character of his administration.⁹¹ But he was aware of both the political and legal necessity of the trials. Any attempt to

88. 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).

89. See Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 3 (1990). See generally NINO, *supra* note 13; and MCSHERRY, *supra* note 13, at 8.

90. 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/Sept. 1944); available at <http://www.pensamientonacional.com.ar/biblioteca_josemariarosa/Articulos/diez_noches_historicas.htm> (visited Dec. 7, 2006). See also Jorge Vanossi, *Suplemento (1) al Orden del Dia Nro 929*, Cámara de Diputados de la Nación: Sesiones Ordinarias, available at <<http://www.diputados.gov.ar/dependencias/dcomisiones/periodo-124/124-929-s.pdf>> (visited Dec. 7, 2006); Sandra Olaza Pallero, *Respeto Rosas los Derechos Existenciales?*, REVISTA ELECTRÓNICA DE DERECHOS EXISTENCIALES, available at <<http://www.revistapersona.com.ar/olaza.htm>> (visited Dec. 7, 2006).

91. In his Inaugural Speech to the Legislative Assembly, on Dec. 10, 1983, Alfonsin 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 Mensaje Presidencial de Raul Alfonsin al la Honorable Asamblea Legislativa, available at <<http://lanic.utexas.edu/larrp/pm/sample2/argentin/alfonsin/830009.html>> (visited Nov. 14, 2006).

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: political *and* legal. In Alfonsín's plan, bringing the "Dirty War" criminals to justice became 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 time. At the same time, the promise of strict compliance with the rule of law would appear manifest. Thus, the scene would be ready for the triumphant entrance of a new, parliamentary-oriented Constitution.

It was a risky gamble; and eventually, it failed. Alfonsín could barely manage the constant military demands, and he failed in the economic arena as well. But the risk he took could have had big payoffs had the process not been hampered by a number of factors (e.g., military pressures, lapse of time⁹² and an unmanageable economic crisis). Alfonsín may have underestimated the obstacles he would have to face in order for corrective justice to succeed as he had envisioned. But he was not completely wrong in his assessment of how to establish a credible and enduring new constitutional order. The trials had value 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 out, at least temporarily, by the Courts.

The return of democracy in 1983 had implied the restoration of constitutional legality. Legitimacy, however, was something that had to be built by the new democratic government. This uphill task required the complete rejection of the civilian and military authoritarian past, as well as the reclamation of the rule of law in a pluralist constitutional democracy.⁹³ The military trials also played an important role as a symbol of this ideological commitment. The act of bringing the most conspicuous criminals of the recent past to *civilian* justice was a sharp break with the authoritarian past in two

92. 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 Malamud-Goti, *supra* note 89, at 4.

93. See FLORIA & GARCIA BELSUNCE, *supra* note 12, at 267.

different ways. First, as McSherry argues, it channeled society's explicit rejection of the military's National Security State.⁹⁴ On a more concrete, procedural level, it also signaled 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 plea before 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.⁹⁵

That "NEVER AGAIN" summarized in two words, the meaning of a thousand: the clear break from the violent past Argentine people had longed for.

C. The Failure of Alfonsín's Strategy for Human Rights and Its Effects on the Legitimacy of the Constitutional Process

Alfonsín's strategy was relatively successful until September 18, 1985. I cannot elaborate here in full detail the complex sequence of facts that eventually led to this failure.⁹⁶ Suffice it to say that Alfonsín's original strategy contemplated limited punishment, since he was aware of the constraints imposed both by time and military resistance. He established three different categories of responsibility: 1) those who organized the state apparatus of terror and gave the

94. See MCSHERRY, *supra* note 13, at 126.

95. See Julio Cesar Strassera, *Fundar Una Paz Basada en la Memoria y en la Justicia*, in LUCIANO DE PRIVTELLIO & LUIS ALBERTO ROMERO, GRANDES DISCURSOS DE LA HISTORIA ARGENTINA 409 (2000).

96. For more detailed explanations, see NINO, *supra* note 13, at 41-134; see also Malamud-Goti, *supra* note 89, at 4-5; MCSHERRY, *supra* note 13, at 120-235.

orders; 2) those who, following orders or not, committed atrocious acts; and 3) those who, in a general climate of confusion and oppression, followed orders and committed offenses which did not constitute atrocities.⁹⁷ He had announced this policy long before the 1983 election,⁹⁸ and on October 26, a few days before the election, he spoke before nearly one million people, emphasizing the need for justice and his plan for these three categories of criminal liability.⁹⁹ Shortly thereafter, he won by a landslide.

One could speculate that Alfonsín received the popular mandate to rebuild democracy and to carry on the proposed strategy to deal with human rights violators. Seemingly, the support continued during the trials, given that in the 1985 legislative election the UCR (Alfonsín's party) roughly maintained the same proportion of the votes as in 1983.¹⁰⁰ At any rate, it was clear that the people did not see any significant problem in the government's human rights plan.¹⁰¹

However, the plan did have some flaws: For instance, although theoretically it did differentiate between those who had committed atrocities and those who had simply followed orders, as a practical matter it was very difficult to delineate the two categories. All of the crimes committed to further illegal repression amounted to violations of human rights that could be considered "atrocious."

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, Alfonsín proposed a bill that created a presumption of coerced action and, thus, provided a due obedience justification in

97. 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).

98. See *id.*

99. See NINO, *supra* note 13, at 66.

100. In 1985, the UCR obtained 42 percent of the total votes for the Lower House, against 34 percent of the Peronist party, the main opposition at the time, while for the Senate the UCR got seventeen seats whereas the Peronists got twenty-two; in 1983, the UCR had collected 46 percent (Lower House) against 37 percent of the Peronist Party, while in the Senate, the UCR had won eighteen seats, versus twenty-two of the Peronists rivals. The proportions show little variance. See Base de Datos Políticos de las Américas (1999), Argentina: Elecciones Legislativas de 1983, Georgetown University y Organización de Estados Americanos, available at <<http://pdba.georgetown.edu/Elecdata/Arg/cong83.html>> (visited Nov. 13, 2006).

101. 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.

favor of all lower-rank officials who lacked decision-making power.¹⁰² However, Congress substituted the words “it *may* be presumed” for “it *will* be presumed,” making the presumption rebuttable.¹⁰³ Conceivably, the presumption could be rebutted in many circumstances. As pressure from the military mounted, there were fears of institutional disruption.¹⁰⁴ This was just one problem that Alfonsin would face in moving forward with his original plan.

After the successful conviction of the main military leaders, perhaps the most momentous episode in Alfonsin’s term, the stability of Alfonsin’s vision deteriorated. Before the 1985 legislative elections, there were rumors of amnesty; however, these rumors were denied by the Interior Minister Antonio Troccoli.¹⁰⁵

Nonetheless, tension between Alfonsin’s cabinet and his constituents mounted. The administration’s tactic of making concessions to every military demand was counterproductive as they merely encouraged additional requests for favorable treatment.¹⁰⁶ Finally, the administration began to entertain the idea that the military trials should be stopped in the hope of regaining full control.¹⁰⁷

Some people in the administration hoped that the Courts would solve the problem by defining *Due Obedience* in terms that would be helpful to the large mass of lower-rank officials that constituted Alfonsin’s problem. Lower court judges were reluctant to do so. The Supreme Court was also expected to deal with the issue,¹⁰⁸ but it similarly declined because the Justices rightly considered that the topic bore no substantial relationship with the cases to be decided

102. NINO, *supra* note 13, at 71, 75.

103. *Id.* at 75.

104. *Id.* at 77, 84, 86, 93, 111 (describing the process by which military unrest and pressures mounted throughout the period 1984-1987, and the generalized fear among politicians that the situation could degenerate, if not into a direct coup d’etat, at least into pressures for a participation of the military in the conduction of the country).

105. See MCSHERRY, *supra* note 13, at 207.

106. *Id.* at 227.

107. See NINO, *supra* note 13, at 90 (giving his personal impression, as a close advisor to President Alfonsin and an attendee of secret meetings at very high level, that the idea of stopping the trials was gaining ground by March 1986).

108. 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.

(these involved high-ranked military leaders, who could not claim to have obeyed any orders).¹⁰⁹ Additionally, the Court thought that it was the task of the elected branches of government to find a political solution to the problem.¹¹⁰

By the end of 1986, Congress had successfully passed Law No. 23.492 (commonly known as Punto Final ["Full Stop"]), which set a time limit of sixty days for the indictment of all military officials who had committed crimes during the dictatorship.¹¹¹ Instead of functioning as an extremely short statute of limitations, designed to preclude prosecution, the law sparked a frenzy of judicial activity. Hundreds of officers received citations. The courts 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.

By the spring of 1987, the new democracy was at risk again. Following the resistance of Colonel Barreiro to appear before the Federal Court of Appeals in Cordoba, Lieutenant Colonel Aldo Rico rebelled in Campo de Mayo.¹¹² The loyal forces were in a difficult position due to the reluctance of various squadrons to repress Rico. The level of tension was high. The 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 problem of the military's resistance needed an urgent solution.

Alfonsín and his closest legal and political advisors analyzed a few different options.¹¹³ Both an amnesty and presidential pardons presented serious constitutional and political problems. Amnesty would result in a benefit to all those responsible for a crime. According to Article 18 of the Constitution, which prohibits the application of *ex post facto* criminal laws, such requirement, established in the Military Code, article 478, could not be abrogated for the occasion.¹¹⁴ Hence, any amnesty would free all military

109. See NINO, *supra* note 13, at 100.

110. See *id.*

111. Law No. 23493 art. 1, Dec. 24, 1986, available at <<http://infoleg.mecon.gov.ar/infolegInternet/anexos/20000-24999/21864/norma.htm>> (visited Mar. 23, 2008).

112. For a full account of the rebellion, see NINO, *supra* note 13, at 95-100.

113. See *id.*

114. Article 18 of the Constitution, in its relevant part, prescribes: "No inhabitant of the Nation may be punished without previous trial based on a law enacted before

personnel, even the commanders who had been already convicted. Pardons were not a feasible option either since pardons could not be granted to persons not yet convicted.¹¹⁵

Some have suggested that there was yet another option available: to grant prosecutors discretion to choose whom to put on trial.¹¹⁶ It was hoped that they would drop charges in most cases, focusing only on the most conspicuous perpetrators. In this way, military unrest would cease, while the most important and symbolic prosecutions could still be carried out consistent with the democratic process. Carlos Nino was a proponent of this idea and Alfonsín seemed enthusiastic about it as well.¹¹⁷ However, Alfonsín faced opposition from the Attorney General, Juan Gauna, and others who thought the proposal would appear to be an *ad hoc* solution.¹¹⁸

Finally, Alfonsín decided to send to Congress the “*Due Obedience* Bill.” The core of its provisions was the irrebuttable presumptions that lower-ranked officials [had] acted following orders and, thus, were not punishable. The presumption also covered superior officers if they did not act as chiefs of zones, sub-zones, or of armed, security, and prison forces.¹¹⁹ This presumption could be rebutted if shown that they had had decision-making power, or had helped to formulate orders. The *Due Obedience* Bill suppressed the

the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried.” On top of that, the best constitutional interpretation also requires an amnesty to be general and, thus, to reach those already convicted. Article 75, incise 20, establishes as a power of Congress “to grant *general* amnesties” (emphasis added) (translated by the author).

115. Such was, arguably, the best constitutional interpretation, but clearly not the only possible one. Menem, for instance, didn't follow it. Of course, Menem was no legalist and had not much appreciation for the rule of law. He believed in *caudillo* style of leadership.

116. See Andrew S. Brown, *Adios Amnesty: Prosecutorial Discretion and Military Trials in Argentina*, 37 TEX. INT'L. L. J. 203, 217 (2002) (suggesting that such method could be adequate in Argentina's current situation, after the judicial nullification of the “amnesty laws” of Full Stop Law and Due Obedience Law).

117. See NINO, *supra* note 13, at 100.

118. See *id.* 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, 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.

119. Law No. 23521, June 8 1987, [XLIV-A] A.L.J.A. 260.

exception that Congress had introduced to the Executive bill, modifying the Military Code on the issue of *Due Obedience*. Nonetheless, this bill had a loophole that permitted prosecution for specific crimes namely, rape, kidnapping and concealment of children, and appropriation of real property. Ultimately, the law was aimed at limiting corrective justice to the upper military echelon. In that regard, the law was successful; finally, Alfonsín had achieved the political feat that he long desired.

However, many people were not so pleased with this trade-off between justice and stability, which Alfonsín claimed saved Argentina's fledgling democracy.¹²⁰ Enacted only a month after the Easter rebellion, the new law was seen as a concession in favor of the military and a detriment to the democratic government.¹²¹ Bitter criticism and indignation were expressed by large sectors of society and there was much opposition and outrage.¹²² 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 resulted in corresponding Peronist victories.¹²³

Even if Alfonsín had tried to accomplish something similar to the *Due Obedience* Law with the bill he sent to Congress a couple of

120. Former President Raul Alfonsín does not hesitate to say that his much-criticized measures saved democracy. See, e.g., *Entrevista a Raul Alfonsín*, Diario La Capital, (Apr. 30, 2006), available at <<http://www.asteriscos.tv/noticia-155.html>> (visited Feb. 17, 2008) and "*Yo salvé la democracia con la ley de punto final*," dijo Alfonsín, DIARIO HOY, available at <<http://www.diariohoy.net/notas/verNoticia.phtml/html/227319/?1024>> (visited Feb. 17, 2008).

121. See NINO, *supra* note 13, at 101; see also Corte Suprema de Justicia [CSJN], 14/06/2005, "Simon, Julio Hector y otros," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2056) (Zaffaroni, J., concurring) (acknowledging that the Executive and Congress were faced with a delicate situation when the *Due Obedience* and Full Stop laws were passed).

122. See, e.g., MCSHERRY, *supra* note 13, at 217; NINO, *supra* note 13, at 101; SKAAR, *supra* note 13, at 115-16.

123. 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 percent of the votes for Deputies, and Peronism, 34 percent; in 1987, Peronism totaled 40 percent, while UCR reached 37 percent. See Base de Datos Políticos de las Américas, *supra* note 100. The real magnitude of the loss becomes apparent when the provinces' election for governors is computed: seventeen out of twenty-two provinces went to the Peronist Party, with 3 being taken by provincial parties, and only two (plus the federal district) going to the Radical Party.

years before, the new law was something different. The persistent military pressure hinted at the emergence of a “guardian democracy.” Thus, popular rejection and opposition to the law 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 – foundational in character – that those who committed atrocious crimes would be punished. That was the deal between Alfonsín and his constituency. Something was lost in 1987 in terms of the general legitimacy of the transitional justice.

Shortly after being inaugurated as President, Carlos Saul Menem took up the task of destroying whatever positive effects the Alfonsín experiment had had. Between October 1989 and December 1990, Menem pardoned both the *Montoneros* guerrilla people and the military officers that were either convicted or awaiting trial.¹²⁴ The first set of pardons reached 400 people that were on trial. It is doubtful that such measures were constitutional.¹²⁵ They were not the functional equivalent of pardons, and these presidential decrees interfered with the judiciary, in open violation of the separation of powers established by our Constitution.¹²⁶ 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 return to the pre-1983 state of affairs. Of

124. See NINO, *supra* note 13, at 104; see also Corte Suprema de Justicia [CSJN], 19/8/1999, “Fayt, Carlos Santiago v. Estado Nacional,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1999-322-1408) (Arg.) (Fayt, J., dissenting).

125. See NINO, *supra* note 13, at 103. See also MIGUEL A. EKMEKDJIAN, 5 TRATADO DE DERECHO CONSTITUCIONAL 114 (Depalma, Buenos Aires 1999). But the Supreme Court, which had been increased from five to nine seats in 1990 by Menem, decided otherwise in “Aquino,” by a five-to-two vote (only seven justices took part in the consideration of the case). Corte Suprema de Justicia [CSJN], 14/10/1992, “Aquino,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1992-315-2421)[0] (Arg.). It must be noted that, contrary 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 number of seats on the Court not been increased in 1990.

126. 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.” CONST. ARG. ART. 109.

course, certain achievements in the political culture went much deeper and could not be uprooted by the executive pardons; the rejection of military authoritarianism was definitive. However, paradoxically, Argentina quickly accustomed itself to civilian leaders with authoritarian tendencies.

The failure of 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 process, but of one of the methods Alfonsín had chosen to signal the new foundation of Argentina's democracy – 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 term confirms that the 1983 election, and the reestablishment of the 1853 Constitution, were in fact a "new beginning." Throughout this period, the Court acted consistently with Ackerman's prediction of "redemptive" judicial review.¹²⁷ Although there was actually no "new" constitutional text in the full sense of the word, the 1853 legal structure was renewed: The Constitution's great principles had not been observed for a long time and so the force of Alfonsín's promise was an open invitation for the Court to redeem these commitments.

In *Sejean*,¹²⁸ for instance, the Supreme Court held unconstitutional the 1893 civil law provision that forbade divorced people from reacquiring nuptial ability.¹²⁹ It did so, by adopting a dynamic approach to constitutional interpretation, ruling on the ground of the principle of individual autonomy, which the Court extracted from Article 19 of the Constitution. In *Portillo*,¹³⁰ again by the same three-to-two bare majority of *Sejean*, the Court acknowledged the right of a conscientious objector to comply with

127. See Ackerman, *supra* note 18, at 795.

128. Corte Suprema de Justicia [CSJN], 27/12/1986, "Sejean, Juan Bautista v. Ana Maria Zaks de Sejean," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1986-308-2268) (Arg.) (The case was decided by a three-to-two majority formed by Justices Fayt, Petracchi and Bacque).

129. *Id.*

130. Corte Suprema de Justicia [CSJN], 18/4/1989, "Portillo, Alfredo," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1989-312-496) (Arg.).

conscriptio without the use of weapons. In *Bazterrica*,¹³¹ it ruled unconstitutional the criminalization of the possession of drugs for personal consumption in quantities inadequate for the purposes of sale and distribution. Again, the constitutional ground was the principle of privacy and autonomy established by Article 19. In the *Repetto* case,¹³² the Justices held unconstitutional the requirement of nationality for a career in pedagogy because it deprived foreigners of the equal exercise to civil rights acknowledged by Article 20 of the Constitution. In *Arenzon*,¹³³ the Court declared an administrative resolution that required teachers to be of a minimum height of 160 centimeters clearly arbitrary and an encroachment on individual rights. The concurring opinion of Justices Belluscio and Petracchi is particularly descriptive of the function the Court was willing to assume:

... [t]hat 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* False”¹³⁴

The rejection of the authoritarian past, in all its possible forms – from culture to legal rules – is present in this concurrence. With

131. Corte Suprema de Justicia [CSJN], 29/8/1986, “Bazterrica, Gustavo Mario y Capalbo, Alejandro Carlos” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1986-308-1392) (Arg.).

132. Corte Suprema de Justicia [CSJN], 08/11/1988, “Repetto, Maria Ines v. Provincia de Buenos Aires,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1988-311-2272) (Arg.).

133. Corte Suprema de Justicia [CSJN], 15/5/1985, “Arenzon, Gabriel Dario v. Estado Nacional Argentino,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1984-306-400) (Arg.) (emphasis added). The Court was unanimous in this case.

134. *Id.* (emphasis added).

regard to the validity of *de facto* rules, the Court took a clear stance in *Aramayo*¹³⁵ and *Dufourq*,¹³⁶ 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 they suffice as a small example of the general tendency of the Court during those years.¹³⁷ The justices were taking seriously the job of stating "broad constitutional principles [] to vindicate them in ways that ordinary men and women will appreciate."¹³⁸

The constitutional validity of the *Due Obedience* and Full-Stop Laws received a different, more cautious approach from the Court. Redemptive courts sometimes do appreciate the virtues of prudence.¹³⁹ The *Camps*¹⁴⁰ case was, precisely, one of those opportunities. In a divided opinion,¹⁴¹ the Supreme Court upheld the Due Obedience Law – as it would do later with the Full-Stop Law –,

135. Corte Suprema de Justicia [CSJN], 14/2/1984, "Aramayo, Domingo Raul," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1984-306-72) (Arg.).[0]

136. Corte Suprema de Justicia [CSJN], 27/3/1984, "Dufourq, Felix Esteban," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1984-306-174) (Arg.). Later, the Supreme Court, packed by Menem's political allies, would return to a doctrine much more benevolent towards *de facto* rules.

137. See, e.g., Roberto Gargarella, *In Search of Democratic Justice – What Courts Should Not Do: Argentina, 1983-2002*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 190 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., Frank Cass 2004); see also PELLET LASTRA, HISTORIA POLITICA DE LA CORTE (1930-1990) 412-13 (Ad-Hoc) (2001); Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30:4 COMP. POLITICS 423, 427 (July 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).

138. See Ackerman, *supra* note 18, at 795.

139. *Id.*

140. Corte Suprema de Justicia [CSJN], 22/6/1987 "Camps, Ramón Juan Alberto y otros / Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional" Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1987-310-1162) (Arg.).

141. The *Camps* 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 PELLET LASTRA, *supra* note 137, 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.

resorting to different arguments. Justices Fayt and Petracchi considered that, despite the name of the law and – in the case of Justice Petracchi – its formal deficiencies, it was an amnesty law that Congress was competent to enact.¹⁴² Petracchi, whose opinion is for the most part dissenting,¹⁴³ held that the country was experiencing very particular historical and political circumstances, in which the branches charged with producing norms and those charged with their interpretation, were all aiming at reestablishing and reaffirming the democratic and republican government.¹⁴⁴ These goals, in his view, should guide constitutional hermeneutics.

There was no doubt that the underlying thread in the Court's opinions – with the sole exception of Justice Bacque's opinions – was precisely the kind of "prudential-interpretive approach" favored by Justice Petracchi. The Supreme Court treated the issue as political in essence. Although the majority did not rely on the "political question doctrine," it considered that the decision to cease prosecutions was a legitimate exercise of Congressional authority. Justice Bacque wrote a powerful dissent to this judgment, and its reasoning must have had a wide appeal for human rights organizations. The Court's opinion was a reflection of Argentine society at large: There was no consensus about the measure, and even those who supported it as a means to stop military unrest were dissatisfied with it. It is worth noting that all five Justices had been appointed by Alfonsín; the decision showed how contested the issue was, even among Alfonsín's constituents.

We can indulge in a brief thought experiment here. 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 complaints of the hypothetical majority were limited to the interference with Judiciary (the law left judgments of fact to judicial discretion) or other similar grounds, then Alfonsín would be left with the alternative of trying to get Congress to pass an open blanket amnesty (the worst case scenario from Alfonsín's perspective). Any

142. "Camps," *supra* note 140, at § 9 (Fayt, J., concurring), § 35 (Petracchi, J., concurring in part and dissenting in part). 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.

143. *See id.* at §§ 25-33 (Petracchi, J., concurring in part and dissenting in part).

144. *See id.* at §§ 34-35, 37-39.

amnesty would have had to be general, consistent with the accepted interpretation of the Constitution,¹⁴⁵ which would have probably implied the immediate release of the commanders that had already been convicted. In the event of general amnesty, Alfonsin's only clearly successful move, and also 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 go.

Another alternative for Alfonsin would have been the presidential pardon. This too would have posed some troublesome questions. The individualized nature of pardons would allow the convictions of the commanders to stand. But this alternative presented, at least, three problems: one legal and two political. Legally, it was doubtful that the president could pardon people on trial but not yet convicted, as were the majority of the officials.¹⁴⁶ 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 Alfonsin's shoulders; while on the other hand it may have not brought complete tranquility to the military precisely because of the individualized character of this solution and its dubious constitutionality.¹⁴⁷

In the hypothetical of an extremely principled judicial position –

145. Article 75, § 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, e.g.*, GERMAN BIDART CAMPOS, 3 MANUAL DE LA CONSTITUCION REFORMADA 126-27 (Ediar, Buenos Aires 1997).

146. *But see supra* note 123. 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.

147. 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?

that crimes of such nature cannot be either amnestied or pardoned¹⁴⁸ — would have forced an all-out confrontation with the rebel officers. The outcome of this confrontation would have depended, ultimately, on the distribution of forces, and it was unclear whether Alfonsín had under his command enough loyal forces to crush a large rebellion.¹⁴⁹

The Justices had a menu of alternatives to choose from, ranging from upholding the laws, ruling them unconstitutional on narrow grounds and thus allowing Alfonsín to proceed with a corrected version of his measure, to the extremely principled position taken by Justice Bacque's that such heinous crimes could not be subject to amnesty. In actuality, the political realities of the time permitted only two alternatives: the Court could have either supported Alfonsín, helping him to keep the military under control, or struck down whatever measures would free the perpetrators of the worst crimes. There was no severability, or middle ground, available to 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; its authority would plummet the moment the decision was signed. Additionally, Alfonsín and Congress would have taken the measure as undue obstructionism, and the public would have witnessed the decision take no real effect, due to the likelihood of executive amnesty or pardons.

The other option was, if the Justices believed that the democratic

148. Of course, since there were no pardons at stake in the *Camps* case, the Court did not need to discuss whether such crimes were pardonable. However, some argumentative lines might have suggested the unconstitutionality of both amnesties and pardons. This especially includes lines based of international law arguments, as those used by the current Supreme Court in the *Simon* case, which will be analyzed below.

149. See NINO, *supra* note 13, at 97. Nino explains that Aldo Rico, the leader of the rebellion in Buenos Aires, had proclaimed that he enjoyed the support of the commanders of the armed forces in different provinces, and that the loyalist General Alais had great difficulty in gathering troops to march against Rico's rebellion. Apparently, the loyalist commander in Campo de Mayo — where Rico was leading the rebellion — did not have enough troops at his disposal to crush Rico's forces. Similarly, in Cordoba the Third Army Corps could not force Colonel Barreiro to submit.

government could control the rebels, to issue a broad decision exempting the crimes in question from amnesty and pardon. This would have been a gamble, and most of the Justices were not ready to play judicial brinkmanship with democracy at stake.¹⁵⁰ 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 a few years later and focus on the actors that were instrumental in the push for a new constitutional text. Raul Alfonsín's support for a "pacted" reform assisted in the process by which Argentina finally underwent a thorough reshaping of its constitutional charter. After nearly a decade of building up to this goal, Alfonsín hoped to embed some of his favored ideas in the new text.¹⁵¹ The other important character was the acting president, Carlos Menem, who was seeking to reform the Constitution in order to enable his reelection on this crest of his popularity due to the relative success of his economic plan.¹⁵²

150. See Corte Suprema de Justicia [CSJN], 22/6/1987 "Camps, Ramón Juan Alberto y otros / Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional" Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1987-310-1162) (Arg.), at § 34 (Petracchi, J.) (arguing that despite the grave constitutional deficiencies of the Due Obedience Law, the Court could not overlook the fact it demonstrated the will of Congress and the President to quiet social unrest and, stating that the interpretation of the law cannot disregard either the particular political circumstances that gave rise to it or the potential consequences of its invalidation).

151. Many of the institutions suggested by the Alfonsín appointed Council for the Consolidation of Democracy were in fact incorporated into the 1994 constitutional text. See generally CONST. ARG. arts. 36 (the right of resistance against de facto governments), 39-40 (direct and semi-direct means of participatory democracy), 94 (presidential election by direct vote of the citizens), 100 (the Chief Cabinet of Ministers); cf. Law No. 24309, Dec. 31, 1993, [1994-A] A.D.L.A. at 1 (incorporating the *Pacto de Olivos*).

152. Menem came to power in 1989, during one of the worst economic crises in Argentina's history. The state of the economy was central in the political debate. Menem's 1991 "Convertibility Plan" stabilized the economy and controlled inflation. This brought him support from sectors of the population that had previously opposed his administration. As a measure of this success, one can point to his reelection in 1995, with 51 percent of the votes. See CARLOS A. FLORIA & CESAR A. GARCIA BELSUNCE, *HISTORIA DE LOS ARGENTINOS* 287-88, 291 (Larrouse, Buenos Aires, 2001). For an explanation of the "Convertibility Plan" and its initial success in controlling inflationary expectations see William C. Smith, *State, Market, and Neoliberalism in Post-Transition Argentina: The Menem Experiment*, 33 J. INTERAMERICAN STUD. & WORLD AFF. 45, 63-64 (1991); Pamela

A new constitution that would ameliorate the defects of Argentina's executive-oriented system,¹⁵³ had seduced Alfonsín for many years. Since the mid 1980s, he had entertained the idea of pushing the political system towards something closer to parliamentarism.¹⁵⁴ The reformulation of the "supreme law of the land" would be the perfect tool for this end. Alfonsín had tried to bring the idea of a constitutional reform to the center of the political discourse as early as 1985. He created the Council for the Consolidation of Democracy (Consejo para la Consolidación de la Democracia), a presidential commission, consisting of representatives of different political forces, that was charged with generating preliminary ideas for the search of a broad consensus on constitutional reform.¹⁵⁵ Carlos S. Nino, a renowned scholar and close advisor to the president, was designated as the Council's coordinator. The Council produced two important briefs, establishing general lines for a reform project. Although the political circumstances of the times prevented the fruition of constitutional reform, many of the Council's proposals resurfaced as starting points for the Framers of 1994.¹⁵⁶

After the initial success of his economic stabilization plan (referred to as the "Convertibility Plan"), Menem started to push the idea of allowing presidential re-election. When the Peronist Party failed to get the necessary votes in the House of Deputies, Menem ordered a referendum to consult the people about the possibility of a constitutional reform. Alfonsín, convinced that consensus-based reform was the better alternative, successfully steered his Party towards supporting reform.¹⁵⁷ The *Pacto de Olivos*, signed by Alfonsín and Menem in 1993 opened the doors for the 1994 Constitutional

K. Starr, *Government Coalitions and the Viability of Currency Boards: Argentina Under the Cavallo Plan*, 39 J. INTERAMERICAN STUD. & WORLD AFF. 83, 85 (1997) (arguing that the stabilization program had had important political effects, leading to Menem's reelection in 1995, even in the middle of a recession).

153. For an elaboration of Argentina's hyper-presidential system, see NINO, *supra* note 13, at 497-653.

154. See *infra* note 162, at 49-53.

155. Executive Decree No. 2246/85, B.O. 31/12/1985, p. 1-2.

156. See LEIVA & ABASOLO, *supra* note 63, at 176.

157. Recently, Alfonsín has held that Menem would have achieved the constitutional reform even if the Radicals (UCR) opposed 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 ALFONSÍN, *supra* note 50, at 156.

Convention.¹⁵⁸

The Pacto de Olivos worked the following way: there were a number of issues that formed the core of the proposed revisions, the so-called “Basic Coincidences Core,” and then there were the rest of the proposals, 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 the latter could be discussed, modified, accepted, or rejected by the delegates. The content of the agreement was enacted under Law No. 24309, which also called for a Constitutional Convention.¹⁵⁹ To ensure that the Convention would not go beyond the limits of the political consensus that gave rise to its existence, Law No. 24309 expressly provided that any deviation from the authorized topics would be null and void (articles 6 and 7, Law No. 24309).¹⁶⁰

Whatever imperfections may have existed in the chosen process for reform, there was widespread agreement to carry out the modifications. Likewise, there was ample debate at the popular level and the people, in general, had a good understanding of the big changes that were being discussed.¹⁶¹

In the end, Menem got the revisions he wanted; Alfonsín, in a somewhat diminished capacity, also had some of his institutional ideas reflected in the new constitutional text.¹⁶² 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 that reflected their long-desired revisions.¹⁶³ At

158. It was signed on December, 14th, 1993. The name “Olivos” is due to the name of the place where the Presidential Residency is located, and where the agreement was reached. See CARLOS A. FLORIA & CESAR A. GARCIA BELSUNCE, *HISTORIA DE LOS ARGENTINOS* (Larrouse, Buenos Aires, 2001) at 1051.

159. Law No. 24309, Dec. 31, 1993, [1994-A] A.D.L.A. at 1.

160. Later, the Supreme Court would enforce the limits of the Convention’s reforming powers in Corte Suprema de Justicia [CSJN], 19/8/1999, “Carlos Santiago Fayt v. Estado Nacional,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1999-322-1408) (Arg.).

161. See Mark P. Jones, *Assessing the Public’s Understanding of Constitutional Reform: Evidence from Argentina*, 18:1 POLITICAL BEHAVIOR 25, 42 (Mar. 1996).

162. 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 (1987), to the enacted version of the 1994 Constitution.

163. See LEIVA & ABASOLO, *supra* note 63, at 189.

least it seemed that legitimacy had been definitely restored and the 1994 revisions would be the end of the constitutional cycle.

What is pertinent to my argument is that the Convention did succeed in enacting one fundamental reform: Following up on Alfonsín's efforts to promote a solid human rights policy, the 1994 Framers decided to elevate a number of human rights treaties to constitutional standing. Article 75, Section 22, of the 1994 Constitution 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 this phrase mean and in what position are treaties in respect to the Constitution itself? Let us see, briefly, what the Framers thought about the question:

The delegate Barra stated 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 No. 24309 . . ." ¹⁶⁴

This was also the position of the majority, and Barra was acting as the majority speaker.

In general, the dominant position was that treaties were to preempt federal laws, but that the Constitution would trump treaties.¹⁶⁵ It was also the case that one of the main conditions under

164. Third Ordinary Session, National Constitutional Convention, Aug. 2, 1994; full text of debate available at <http://www1.hcdn.gov.ar/dependencias/dip/Debate%20Constituyente/ago_02-.zip> (visited Feb. 17, 2008).

165. See generally Gregorio Badeni, *El Caso 'Simon' y la Supremacia Constitucional*, reprinted in *La Ley* [L.L.] (2005-D-639), for a detailed analysis of the debates in the National Convention, and the argument 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

which the Convention was called was that it could not modify the principles, rights, and guarantees contained in the first 35 articles of the 1853 Constitution.¹⁶⁶ Law No. 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 the relevant constitutional provisions was Article 27, providing that any honored treaties must be in accordance with “the principles of public law laid down by this Constitution.” The Supreme Court has consistently held, that the Constitution trumps treaties, whenever they might conflict with one another.¹⁶⁷

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, the Court reversed itself and overruled the *Camps* decision.¹⁶⁸ Now, some eighteen years later, the *Due Obedience* Law and Full-Stop Law had become unconstitutional.¹⁶⁹

What had happened in those eighteen years? Politically, a lot of

aware of the fact that the Convention was not allowed to modify in any way the first 35 articles of the Constitution.

166. Law No. 24309, *supra* note 159.

167. 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*. Corte Suprema de Justicia [CSJN], 7/7/1993, “Fibraca Constructora SCA. v. Comisión Técnica Mixta de Salto Grande,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1993-316-1669) (Arg.).

168. Of the nine justices that sat in the Court at the time of decision, three of them – Justices Petracchi, Fayt and Belluscio – took part in the 1987 decision, all of them concurring 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.

169. 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.

water had run under the bridge: The army had lost a lot of resources and almost all possibilities of influencing politics, this last point being highly positive; human rights NGOs expanded their presence through grass-roots activism and political lobby. Sectors sympathetic to the 1970s guerrilla had come closer to power. In terms of rule of law, there was 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 the *Due Obedience* and Full-Stop Laws, even after constitutional reform.¹⁷⁰ 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.¹⁷¹ Congress had used the mechanism provided by Article 75, section 22 of the Constitution to grant constitutional hierarchy or constitutional standing to some treaties, and particularly, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.¹⁷² Last, but not least, Congress had declared null and void the *Due Obedience* Law and the Full-Stop Law.¹⁷³

Taking a closer look, not much had occurred in regard to the *constitutional* status 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 benefited from them seemed to be guarded against retroactive application. Moreover, when many of the beneficiaries were released from responsibility, the corresponding

170. See, e.g., Corte Suprema de Justicia [CSJN], <13/8/1998>, “Suárez Mason, Carlos Guillermo,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1998-321-2031) (Arg.).

171. Barrios Altos v. Peru, Inter-Am. C.H.R., Mar. 14, 2001, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf> (visited Mar. 31, 2008).

172. By Law No. 25778 (2003).

173. By Law No. 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 No. 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.

criminal right to prosecute had already been extinguished by the Supreme Court.

But then the Supreme Court, with five sitting justices appointed by, or politically aligned with, the current government – whose sympathies towards the guerrilla movement had not been hidden¹⁷⁴ — decided to jump into the political fray to undo the “mistake” that their predecessors had made in 1987. The most redemptive style of adjudication was just about to be displayed. So redemptive that it clearly exceeded the Constitution itself. 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 were affected by the Court’s decision?

i. Pro-Majoritarian Effort to Restore the Lost Legitimacy or a Constitutional Revolution by the Judiciary?

A cynic would conclude that the Court’s decision in the *Simon* case is simply the result of a very long political battle ending in victor’s justice at the price of institutional integrity. Regrettably, this assertion holds true to a certain degree. The price paid was a constitutional revolution, led by the majority of the Supreme Court. However, it is always possible to attempt a more sympathetic reading of the Court’s decision in this case, one that goes beyond the particular interest of the parties — in a broad sense — and presents the decision in light of the historical and political processes that are described in the preceding paragraphs. Maybe in retrospect one can gain a deeper understanding, though not a justification, of the Court’s decision.

This article does not present in detail the *Simon* decision, composed of eight different opinions (seven concurrent and one dissenting, including in addition two advisory opinions by the

174. See, e.g., 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> (visited Dec. 6, 2006); see also Joaquin Morales Sola, *Menem, Montoneros y el Error de Comparar el Hoy con el Ayer*, available at <http://www.clubdelprogreso.com/index.php?sec=04_05&sid=24&id=1838> (visited Dec. 6, 2006); James Nielson, *El Regreso de los Montoneros*, available at <<http://www.rionegro.com.ar/arch200512/16/o16f02.php>> (visited Dec. 6, 2006); *Argentina: The Slow Battle for Justice*, THE ECONOMIST, Sept. 14, 2006, available at <http://www.economist.com/displayStory.cfm?story_id=7912930> (visited Dec. 6, 2006).

Procurador General de la Nación) and extending 353 pages in length. Necessarily, many very important issues discussed by the Justices will be omitted in this discussion, and I hope not much is lost in the process since the focus of this paper is not on the decision itself, but on how it fits into the larger constitutional picture.¹⁷⁵

In summary, some of the Justices attempted to prove that, at the time the laws were enacted, Argentina's Congress was forbidden to pass laws of that kind. This interpretative approach was the "non-retroactive approach." It is remarkable, however, that most of the Justices that pursued this line of argument, did not rely on Argentina's constitutional rules, as Justice Bacque had tried to do in his dissenting opinion in *Camps*.¹⁷⁶ Instead, they based their arguments on international conventional¹⁷⁷ and customary obligations.¹⁷⁸

As far as conventional obligations were concerned, the majority had a hard time trying to find proper grounds for its assertion that Article 18's prohibition of *ex post facto* criminal laws had not been violated. No treaty establishing a prohibition against amnesty for crimes against humanity was binding on Argentina at the time of the

175. I will speak of "majority" here in a somewhat loose sense. While the opinions of the Justices diverged in numerous respects, it is clear that there was a "majority" holding for the unconstitutionality of the so-called "amnesty laws".

176. See Corte Suprema de Justicia [CSJN], 22/6/1987, "Camps, Ramón Juan Alberto y otros, / Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional" Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1987-310-1162) (Arg.). 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 seven sections (less than 3 percent) make very brief and secondary references to arguments of internal constitutional law that, in the justices' opinions, lent support to their finding of unconstitutionality. See *id.* at § 13 (Petracchi, J., in a very restricted sense); §§ 25, 26, 28 (Maqueda, J.); § 19 (Highton de Nolasco, J.); §§ 23-24 (Lorenzetti, J.). 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.

177. *Id.* at §§ 16-33 (Petracchi, J.); §§ 14, 16-27, 38, 40, 45-46 (Boggiano, J.); §§ 18-19, 32-34, 58-75, 77-78, 85-88, 95 (Maqueda, J.); §§ 12, 14-16, 26-27, 30, 32 (Zaffaroni J.); §§ 13-14, 18, 20-31 (Highton de Nolasco, J.); §§ 17-18, 21, 23, 29, 31-32 (Lorenzetti J.); §§ 14, 16-17 (Argibay J.).

178. *Id.* at §§ 28-29, 36, 38, 41, 45-46 (Boggiano, J.); §§ 36-50, 56-57, 62, 89, 91, 93-95 (Maqueda, J.); § 32 (Zaffaroni, J.); § 31 (Highton de Nolasco, J.); §§ 19, 32 (Lorenzetti, J.).

enactment of the *Due Obedience* Law. Article 15.2 of the International Covenant of Civil and Political Rights might have assisted the Court had Argentina not reserved the application of this provision, limiting its application to instances where Article 15.2 does not conflict with Article 18 of the Argentine Constitution. Of course, it could be argued that the Inter American Convention on Human Rights (“Convention”), as interpreted by the Inter American Court in the *Barrios Altos* case, was binding at the time.¹⁷⁹ But, as it happens, the Convention has no provision forbidding amnesty. On the contrary, Article 9 provides for the prohibition of the application of *ex post facto* criminal laws. And the Court’s interpretation of the Convention in *Barrios Altos* refers to *self-amnesty* laws, not to amnesties decided by duly elected democratic governments.¹⁸⁰

The vague terms of the Inter American Court’s 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 relevant portion of the Inter American Court’s opinions reads as follows,

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.¹⁸¹

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*. References to the “self-amnesty” character of the laws are found elsewhere in the ruling,¹⁸² and, in any case, this portion of the opinion is dictum that, as such, is not controlling.¹⁸³

179. See *Barrios Altos v. Peru*, *supra* note 171, at §§ 42, 43, 44.

180. *Id.* at §§ 75-85 (Fayt, J., dissenting).

181. See *id.* generally.

182. See Corte Suprema de Justicia [CSJN], 14/6/2005, “Simon, Julio Hector y otros,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-20456) (Arg.) §§ 42-44.

183. Later on the Inter American Court extended the dictum of *Barrios Altos* and has explicitly turned it into a general rule, applicable to all cases in which states attempt to grant amnesties for crimes against humanity, regardless of whether they

The Supreme Court's decision in *Simon* fares no better when it comes to customary obligations. First, one cannot help but wonder how the Justices, who in 1987 held the laws constitutional, may have overlooked something so important as the rules of *jus cogens*. Again, as Justice Fayt remarks,¹⁸⁴ Justice Petracchi expressly analyzed the international obligations of Argentina in his concurring opinion in *Camps* and found no incompatibility whatsoever. Second, as Legarre has pointed out, the Justices in *Simon* assumed that such customary obligation existed, instead of carefully proving this proposition.¹⁸⁵ If anything, evidence of customary international practice points in the opposite direction, with various legal systems resorting to the amnesty solution in the recent years.¹⁸⁶ Finally, it is dubious that a liberal system of criminal law, such as the one established by Argentina's Constitution, should accommodate different sources of law, inclusive of customary practice. Criminal law has to be *certa* and *scripta*.¹⁸⁷ Customary international law is neither, at least not to the extent necessary to assure certainty in criminal prosecutions. Thus, it is difficult to accept that customary international law can be regarded as a normative source on which the punishment of individual depends, however despicable the crimes attributed to such persons may be.

are self-amnesties or amnesties granted by posterior democratic governments. See IACHR, 09/26/2006, *Almonacid Arellano v. Chile*, sections 111-114 & 120, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf> (visited April 8, 2008).

Despite what the Court holds in Sections 119-120, the decision does not alter in any way the arguments I make in the text regarding the problems raised by the violation of national constitutional norms, which in the case of Argentina- conditions the validity of the alleged conventional international obligations.

184. See *id.* at §76 (Fayt, J., dissenting).

185. 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).

186. Among others, the cases of Spain, South Africa, and Uruguay can be brought to attention. *Id.* at 731-32. See also Alfonso Santiago, *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).

187. The principle of *nullum crimen sine praevia lege poenali*, as interpreted in Argentina, demands that criminal law be written (*scripta*), exhaustive in the description of the criminal conduct, as opposed to merely general (*certa*), and not based on analogy (*stricta*). For a brief elaboration of these ideas, see Corte Suprema de Justicia [CSJN], 14/6/2005, "Simon, Julio Hector y otros," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-20456) (Arg.), at §§ 62-63 (Fayt, J., dissenting).

Justice Boggiano wrote that the reference to the international treaties made in 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.¹⁸⁸ For instance, the reference would be useless 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.¹⁸⁹ The recovery of damages, Boggiano continues, is insufficient to comply with *current* requirements of international law,¹⁹⁰ and the imperativeness of such international norms renders them applicable *even retroactively*.¹⁹¹

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 from applying retroactively an international convention intended to be applied, precisely, in that way.¹⁹² 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, Argibay provides no explanation why the articles of the Vienna Convention must be applied against the

188. *Id.* at §14 (Boggiano, J.).

189. *Id.* 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."

190. *Id.* at § 25.

191. *Id.* at section 45.

192. *Id.* at section 17 (Argibay, J., concurring).

Constitutional provision.¹⁹³ Especially, when Article 46 of the same international treaty provides some relevant exceptions to the rule on which Justice Argibay based her reasoning.¹⁹⁴ Justices Zaffaroni and Lorenzetti resorted to the idea of the “principle of universal jurisdiction” as a new, supervenient development that should influence decisively the outcome of the case.¹⁹⁵ 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.

Additionally, Justice Lorenzetti emphasized that the level of evolution of humanitarian international law, *appraised today*, demands the resolution of the constitutionality of the amnesty laws.¹⁹⁶

Another device used by some of the Justices, when confronting the undeniable reality that provisions of the human rights treaties (as interpreted by international organs) collided with the fundamental rights and principles of Argentina’s constitutional structure, 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.¹⁹⁷ Specifically, that the Constitutional Convention of 1994 *actually checked for incompatibilities between human rights treaties in*

193. *Id.*

194. *See* Vienna Convention on the Law of Treaties, arts. 46(1) (“[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless that violation was manifest and concerned a rule of its internal law of fundamental importance*”), 46(2) (“[a] violation is manifest if it would be *objectively evident* to any State conducting itself in the matter in accordance with normal practice and in *good faith*.”) May 23, 1969, 1155 U.N.T.S. 331 (emphasis added). It seems to me that Article 27 of the Constitution of the Argentina Republic is, objectively, an internal law of fundamental importance. So is Article 18 and the prohibition of retroactive laws in criminal matters. Normal practice would have made evident, to any state conducting itself in good faith, that an international treaty that provided for the violation of these two principles of the Argentina Constitution would have triggered the exception to the prohibition of invoking internal laws to excuse the breaching of a conventional obligation.

195. *Id.* at § 32 (Zaffaroni, J., concurring); *id.* at § 29 (Lorenzetti, J., concurring).

196. *Id.* at § 23 (Lorenzetti, J., concurring).

197. *Id.* at §§ 10, 12 (Boggiano, J., concurring); *id.* at § 17 (Lorenzetti, J., concurring).

*question and the Constitution, and found that there were none.*¹⁹⁸ The Justices held further that this sort of determination would be of a special *constitutional* nature, emanating from the people through the delegates, and could not be contradicted by the Supreme Court.¹⁹⁹ According to this narrative, the Constitution would not be defeated by treaties because the Framers checked for inconsistencies and found none: end of story. Call this the “*theory of the Framers’ compatibility check.*”

But things are not so easy, because, as *Simon* clearly shows, there are a number of cases in which inconsistencies can, and will, arise. The 1994 delegates could not possibly check the infinite occurrences of potential conflicts. It is only in the frame of an actual case that such interpretive problems may arise and, subsequently, be resolved.

The Court should not surrender its power to gauge the interaction of the Constitution vis a vis international human rights treaties. Such a maneuver takes an erroneous stance in terms of 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 the 1853 Constitution states “In the Argentine Nation there are no slaves,” it is not informing us of the factual inexistence of persons subject to servitude; it is abolishing slavery.²⁰⁰ 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 conflict with a treaty of “constitutional hierarchy” or “standing.”²⁰¹ So, as a matter of legal theory, the *theory of the Framers’ compatibility check* is flawed.

This “*theory*” is also mistaken as a matter of legal history. As debates in the Constitutional Convention reflect, the delegates did not worry about compatibility, but rather, intended that the Constitution trump conflicting treaty language.²⁰²

198. *Id.*

199. *Id.*

200. Dictamen Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires, Caso *Arancibia Clavel*, point 8; available at <<http://www.academiadederecho.org.ar/memoria.htm>> (visited Dec. 6, 2006); also available at <http://www.revistacriterio.com.ar/art_web.php?cuerpo=1&artweb_id=30> (visited Dec. 6, 2006).

201. *Id.*

202. See *infra*, nn. 205 and 206, and accompanying text.

The consequences of the doctrine advocated by the Court in *Simon* are revolutionary. Every time a constitutional provision implicates a provision of a human rights treaty with “constitutional standing,” the judge should assume that there are no incompatibilities, no matter how blatant they might be, and then try to make both rules equally applicable and effective. This doctrine opens space in the forty-three articles of the Argentine 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,²⁰³ such as Article 18.²⁰⁴ 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 conflicts 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 from making these kinds of far-reaching reforms. Are the Justices of the Supreme Court authorized to take the stand and do what the Framers could not and did not want to do – given both that the Constitution was reformed so recently and the intention of the Framers was clear? The theory that is the subject of this analysis, 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

203. See Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967); see also ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 48 (Oxford Univ. Press 2002).

204. 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, e.g., ALEXY, *supra* note 202, 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.

case, dicta, opinions issued by political bodies, among other resources taken from the international jurisprudence. We can call this the “*constitutional bubble effect*.”

Justice Petracchi, quite understandably since he had voted for the constitutionality of the laws in 1987, did not bother 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* authorized the State to make decisions whose outcome is the renunciation of the right to prosecute the perpetrators of crimes against humanity.²⁰⁵ It was that the *domestic* law was *now* clearly limited, and cannot support the grant of amnesties or pardons for certain crimes and, therefore, those who were benefited by *Due Obedience* and Full-Stop cannot invoke either the prohibition on retroactive application of criminal laws or *res iudicata*.²⁰⁶

Justice Petracchi did openly what other Justices tried to hide: he applied retroactively criminal rules against indicted persons, in clear violation of Article 18. He tried to justify his move through a “fundamental change” in Argentina’s constitutional law. There is an Ackermanian flavor to his argument; the idea of a “constitutional moment” is present throughout his opinion. Basically, his opinion holds that the formal amendment of 1994 opened the way for the introduction of evolving notions of international law in constitutional interpretation. The politics of human rights would fill the interpretive gap.²⁰⁷ In similar vein, the brief filed by the Procurador General Becerra, contains a specific citation of Ackerman’s *Foundations*,²⁰⁸ in

205. *Id.* at §§ 14, 15 (Petracchi, J., concurring).

206. *Id.* at §§ 15, 31.

207. 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, e.g., id.* at §§ 20, 21, 33 (Petracchi, J., concurring) (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 id.* at § 86 (Fayt, J., dissenting).

208. *See id.* at Point A, at 23 (first opinion of the *Procurador General de la Nacion*). The advisory opinion can be found along with the decision at the Supreme Court’s website (www.csjn.gov.ar).

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 1994.²⁰⁹

The problem is that both *Procurador Becerra* and Justice Petracchi invoke the idea of the constitutional moment but, even accepting, *ex hypothesis*, that the theory is applicable to Argentina’s constitutional history, they fail to show how this moment came about²¹⁰ or that its contents actually correspond to their narrative. The Delegates in 1994 were not authorized to introduce *any* changes to the first 35 articles of the Constitution. That limitation included the prohibition on retroactive application of criminal laws (Article 18), and the supremacy of the Constitution over all other normative sources of law, including treaties (Articles 27 and 31). The law calling for the Convention, enacted following the *Pacto de Olivos*, expressly forbade introducing the aforementioned reforms, and declared that any extra-limitation of the Convention would be null and void.²¹¹ The delegates were aware of this limitation in their mandate, and when one delegate proposed an amendment to Article 75, section 22 (the one on which the argumentation of the plurality of the Court relies heavily) forbidding pardons or amnesties for crimes against humanity, the proposal was rejected.²¹² In 1998, Congress recognized that no change that allowed the nullification of the existing law had occurred. Thus, Congress repealed the *Due Obedience* Law and Full-Stop Law, but it did not nullify them.²¹³ In 1999, the Supreme Court ruled

209. 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. *See id.*

210. 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 id.* (Fayt, J., dissenting).

211. Law No. 24309 art. 6-7, *supra* note 151.

212. *See* Badeni, *supra* note 165, at [X] 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).

213. In the debate in Congress, previous to the enactment of Law No.24952 (repealing the Due Obedience and Full-Stop Laws), the representatives admitted

unconstitutional a reform introduced in 1994, because it considered that the delegates had overstepped their mandate by modifying an article that was not among the “authorized themes” of Law No. 24309.²¹⁴

Until 2001, there was really no public movement around the eventual nullification of the *Due Obedience* and Full-Stop Laws, nor general debate about the topic. Judge Gabriel Cavallo’s decision, which held both laws unconstitutional mainly on grounds partially different from those relied on by the Simon decision²¹⁵ – was probably the first and lonely call of attention about this interpretative stance. Even after 2001, the issue of the validity of the 1994 revision did not arise in any electoral campaigns. If anything happened in 1994 and after, if any “constitutional moment” took place, it wasn’t of the kind assumed in the *Simon* decision. If anything, evidence seems to point in the opposite direction: the public wasn’t really concerned with this particular point, and the Framers did not intend to subordinate constitutional rights to international human rights treaties. Although there were a movement towards a greater recognition and protection of human rights, this movement did not encompass the obliteration of fundamental guarantees of the domestic criminal law. Likewise, this movement did not seek to alter in any way the existent hierarchy of norms.

It was not until 2003 that Congress assumed the role of “speaker

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, Mar. 24, 1998, at 882, and Sesion 5a, Mar. 25, 1998, at 1438, 1442; § 20 (citation by Fayt, J., dissenting). 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.

214. Corte Suprema de Justicia [CSJN], 19/8/1999, “Carlos Santiago Fayt v. Estado Nacional,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1999-322-1408) (Arg.).

215. See Juzgado Nacional en los Criminal y Correccional Federal N. 4, Mar. 6, 2001, [2001-C] LA LEY 510 (2001), available at <<http://www.espaciosjuridicos.com.ar/datos/JURISPRUDENCIA/Del%20Cerro%20y%20Simon-SUSTRACCION.zip>> (visited Mar. 31, 2008). Judge Gabriel Cavallo decided *Simon* at trial level. His resolution would be subsequently affirmed by the Federal Chamber of Appeals and by the Supreme Court. His decision relied heavily on Article 29 of the Constitution, which forbids and makes null and void any acts by which the Legislature concedes to the Executive tyrannical powers, or extraordinary powers, or the sum of all public power. His thesis was that not only that such acts of “tyrannical delegation” are forbidden and, thus, nullified, but also that the acts imply the concrete exercise of such tyrannical powers.

of the People.” Without much justification but for their own judgment about what was morally right concerning violations of human rights, Congress enacted Law No. 25779, declaring “null and void” the “amnesty laws.”

The main line of argumentation in the Congressional debates was the so-called “new paradigm” of international human rights law. The new law was codified on September 3, 2003. The Senate elections were held *after* that date and the deputy elections took place before and after the law’s enactment, some in April and August and most in September, October, and November. Presidential elections occurred in April, but neither Nestor Kirchner nor Carlos Menem, the two major contenders, included the issue in their respective electoral platforms.²¹⁶ Although there were numerous political opportunities to air this issue, the notion of the “new paradigm” had not been widely discussed until it was taken up by Congress. Clearly, Congress could not 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 its own form of revisionism.

No branch of government assumed the “preservationist” role.²¹⁷ Nobody called the public’s attention about what was being done to the Constitution. There was only one ruling of unconstitutionality, by the Federal Court of Appeals of San Martín in the *Bignone* case.²¹⁸

This latest maneuver by Congress was one in a long line of majoritarian decisions: in 1987 Congress passed the “amnesty laws”; in 1998 Congress repealed both laws; and in 2003, Congress nullified them. The Supreme Court always went along with the decisions. Of course, most people were happy to see the perpetrators of heinous crimes go to jail. So, the Law No. 25779 did not generate so much protest among the general public. But the public is not much aware of

216. 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 visited Dec. 7, 2006). There is not one mention in either platform to the issue of past violations of human rights.

217. See ACKERMAN, *supra* note 80, at 10.

218. FedSanMartín, Sala I, 11/22/2004, *Bignone*, Reynaldo B.A. et al., 03/02/2005 LA LEY 15 (2005).

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

I have described the revolutionary side of the *Simon* decision. The Justices took two different paths to reach the same solution. Some of them applied retroactively norms in blatant contradiction to the fundamental guarantee of Article 18, and thereby, reformulated the constitutional hierarchy of norms to subordinate the Constitution to certain international treaties. Others preferred to insert exceptions in the Constitution, through the tool of “*constitutional bubbles*,” which can be filled accordingly to the necessities of each case. Both approaches alter the Constitution. In this way, they sowed the seeds of doctrines that will permit the modification of the Constitution in unforeseeable ways.²¹⁹

Add now that the *Simon* ruling, in its retroactive aspects, is a completely *ad-hoc* decision that cannot be repeated in the future. Because 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, 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, could ever be applied again. The *Simon* decision is relevant only to its facts: it was handed down to send a number of specific individuals to prison for crimes committed during the last dictatorship.

This is a cynical reading of the case, and as explained above there is yet another explanation for the Court’s reasoning. The political process that resulted in the Supreme Court ruling can be viewed as a majoritarian effort, backed by the Justices, to restore the legitimacy that was lost when Alfonsín’s visions of corrective justice was dismantled. After all, Alfonsín’s initial proposal, the one that people voted for 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-ranked officials would be spared with the exception of those who had committed atrocious crimes or had gone

219. 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 declares them null and void with general effects.

beyond the orders.²²⁰ And *Simon* will, most likely, have this very same practical effect.

Simon has also paved the way for the nullification of some of Menem's pardons.²²¹ Ultimately, the result will be that those who gave the orders to perpetrate crimes against humanity and the perpetrators of these crimes will be sent to prison.²²² The symbolism of the victory of the rule of law over the most egregious violators will be restored for the "new beginning."

The fact that the Due Obedience Law was enacted under pressure really influenced the way it was perceived by the people, generating much protest. Had the measure been taken in the absence of a perceived threat, it may have gained more legitimacy in the eyes of the public. Even in that event, it is unclear whether the People would have accepted amnesty as a just solution. In the words of JusticeMaqueda,

[E]ven 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,*

220. See MCSHERRY, *supra* note 13, at 111. See also NINO, *supra* note 13, at 63.

221. Recently, the Supreme Court, by a 4-2 vote, ruled the pardons granted to military officers were 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 iudicata* has been seriously affected by the decision. See Corta Suprema de Justicia [CSJN], 7/13/2007, "Mazzeo, Julio Lilo y otros," available at <www.csjn.gov.ar> (this decision is not yet paginated in the official Fallos report). The previous decision in the same case, which has been overruled, is *Riveros*. See Corte Suprema de Justicia [CSJN], 11/12/1990, "Riveros, Santiago Omar y otros," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1990-313-1392) (Arg.). A serious analysis of the decision is far beyond the limits of this essay and deserves a separate study.

222. 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. The reasons that may lead to a limited prosecution include: 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; and 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, on the other hand, yield low-benefits.

postpone such obligation, which will have to be carried out when the danger is over . . ."²²³

The amnesty was not granted voluntarily, which means that *morally*, it was no amnesty at all. Of course, it does not follow necessarily that the amnesty was *legally* deficient. That is a different sort of argument. In any case, it seems clear that coerced forgiveness is a self-contradiction, and this feature of the amnesty laws played an important role in shaping the issue of amnesty in Argentina's recent history. Unfortunately, this form of justice required the sacrifice of the Constitution, in terms of the individual rights of the indicted and of the constitutionally legitimacy of official government acts.

IV. Conclusion: the Death of the Amnesty Laws and the Question of Legitimacy

Throughout this article, I have argued that Alfonsín did not have the option of renouncing the prosecution of the leaders of the military repression of the 1970s to, instead, go down the constitutional law-making path. I have also argued that he did want to enact a new Constitution. Indeed, he had plans for a somewhat radical departure from the political traditions of the country. The military trials acquired a legal and political priority. Later, the changing political situation as well as pressure from the military forced him to pass through Congress the Full-Stop Law and the *Due Obedience* Law. With the passage of these laws, the possibility of a new Constitution faded away. The symbolic power of Alfonsín's "new beginning," embodied in the rule of law, was erased by the grant of amnesty to certain military officials and by Menem's subsequent decision to pardon many others. I have also analyzed the Supreme Court's behavior in response to these political developments in two different instances, specifically in the *Camps* and *Simon* decisions.

I believe that Alfonsín's clear stance on human rights violations in 1983, and the epic character of that election, may have provided grounds to justify the Supreme Court's overruling *Camps*. The Court's decision in *Simon* may turn out to be consistent with the political realities of Argentina's history: Alfonsín had made clear in

223. See Corte Suprema de Justicia [CSJN], 14/6/2005, "Julio Héctor Simón y otros," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2056) (Arg.), at § 81 (Maqueda, J., concurring) (citing Geoffrey Robertson's *Crimes Against Humanity* in support of the assertion).

1983 that he did not expect to punish all the perpetrators, and that those who would have to face justice would be the commanders and the perpetrators of atrocious crimes. This may be the platform that 52 percent of the people voted for in 1983; and its abandonment under *force majeure* in 1987, may partially account for the massive withdrawal of political support for Alfonsin's party, nation-wide. The restoration of the structure that Alfonsin had chosen with the support of the people, symbolizes the "new beginning," as well as the ultimate reinstatement of the rule of law. Of course, the Court's decisions also brings high costs in terms of institutional integrity, and the constitutional guarantees of the indicted. Moreover, the general 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 originate, however bitterly, from the political community seeking to heal its wounds.²²⁴

But it does not follow that the Supreme Court had to overrule *Camps* precisely as it did. The Court went far beyond what was necessary and entered the terrain of illegitimate, judicial constitutional revisionism. The Court could have used the bulk of Justice Bacque's arguments, focused largely in Argentina's constitutional law. Instead, the Justices resorted to international law, taking pains to make the international norms fit the domestic constitutional order. In this process, they created doctrine that amounts to a true constitutional revolution.

Today, and in contradiction to the provisions of the 1994 Constitutional Convention, the Constitution has a strange relationship with some international norms. It is precisely when our Constitution conflicts with international norms that the it should serve as the ultimate stronghold of human rights. Instead, the Court decided to create *constitutional bubbles*, to be filled in by whoever turns out to be the 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 the less guarded value. In conclusion, the Court reached what might be deemed a morally legitimate outcome, but it did so by means

224. Once again, this is a moral argument that has an impact in the legal argument but cannot, in itself, exhaust the question.

whose institutional legitimacy is disputable. The issue of legitimacy takes on greater force when one considers legal restraints and procedural requirements to be the means toward political legitimacy. The legitimacy — or illegitimacy — of means and ends is rooted, as always, in a long story of a difficult past.