

The shadow of disobedience

First draft

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(...)

II.-

The creation of a constitutional order was always linked to the idea of limits, of power constrained. In that sense Argentina's political system, as defined in its first Constitution enacted in 1853, can only loosely be linked to constitutionalism. In effect, the political project created by the founding fathers was aimed not at limiting power but at creating it almost unbound.

The diagnosis of Argentina's weaknesses identified a long history of confrontation (a war of independence from Spain since 1810 until 1820, a civil war from 1820 until 1835 and dictatorship from 1835 until 1852) that led the elites to believe that a pervasive anarchy and a perennial state of poverty were the two main causes the country's lamentable situation. On the one hand anarchy was blamed on the refusal of the provincial warlords to accept a formal, written political Constitution, thus creating an unstable system of atomized power without processes to deal with conflicts other than war and assassinations. On the other, poverty was blamed on the deserted *pampas* and on the few people that lived scattered on them, the *gauchos* (the peasants-

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soldiers-cowboys) who were characterized as a people impossible to turn into civilized citizens.

The political project of the founding generation, aspiring to achieve order and growth, proposed two main policies: concentration of powers to curb anarchy (after all, the recent dictatorship had shown its efficacy monopolizing force -and exercising it ruthlessly- in the hands of a single person) and immigration (from Northern Europe) and education, in order to end poverty. This project was written into a Constitution and borrowed ideas from both the Continental and the USA traditions to create a quasi unitarian monarchy, a hyper presidential system within the restrictions (under the guise) of a federal republic.

From USA the Argentine Constitution borrowed the role of the President (but endowed it with more discretionary powers), a symmetric bicameral Congress (which favored the Senate, the Chamber representing the elite), a Supreme Court with judicial review powers and a federal system. From the Continental tradition it borrowed the federal Codes (which took most of the legislative power away from the provinces), a formalist dogmatic legal culture and legal education, the lack of *stare decisis* and the ways of Continental legal science: French (when not straight fascist Spanish or Italian) administrative law, German criminal law, Italian commercial law. Thus, an almost unconstrained President, with a handful of members of the Senate and three justices (nominated by the President and confirmed by the Senate in secret deliberations) were able to rule Argentina. The political culture was not contradictory with this scheme: fraudulent elections and political assassinations were the rule in most of the second half of the XIX century.

The project, though, was successful: Argentina grew very fast. By the turn of the century it was among the top ten economic world powers and half of their population,

some two million people, were immigrants. Most of them did not speak Spanish. Their children, thanks to an impressive educational public policy, were able to become lawyers and physicians, and illiteracy rates were the lowest in the world.

But these were not the Northern European hard working, obedient of authority peasants, they were not the immigrants the project expected,. Most of them came from Southern Europe and some of them were political dissidents. Anarchist, socialists, unionists, communists who were running from persecution established many of the first labor unions, led violent strikes and uprisings and performed some of the most spectacular bombings and shootings against the officials of the repressive state forces. But their struggle was no foreign to Argentine culture. Before their arrival those who were left out of the political system fought back and were able to create a political party which, eventually, after many revolutionary attempts to through the government, forced a piece of legislation to put an end to fraudulent elections.

Thus was built the Argentine tragedy: an illegitimate authority resisted by illegitimate disobedience. This cultural struggle was also played out in literature. Sarmiento's *Facundo* was a justification of the need of a functioning State and an accusation: the gauchos were the ones to blame on Argentina's barbarism. Hernandez's poem *Martin Fierro* was the plight for the defense: the gaucho turns an outlaw because the authority is illegitimate. Both were right, Argentina needed authority and inclusiveness; and both were wrong, legitimate authority cannot be stable and exclusionary, and disobedience cannot be outright criminal. It was an ontological tragedy: two understandings of being, the elitist and the populist, were at war with each other. The creation of the shadow of hierarchy was an outright failure.

As soon as there were clean elections the majority party, the *radicals*, took over this institutional system in 1916. And they won the elections from then on using every

bit of concentrated power the system offered. The conservatives, having lost the Presidency three times, could not take it anymore and in the midst of the 1930 depression orchestrated the first military coup, the first of many that would come: 1943, 1955, 1962, 1966 and 1976. The Supreme Court obliged and in an infamous decision created the *de facto* doctrine. It respected any authority since that first coup as legitimate as long as it could provide social order.

Law was not a bystander. Its function was reduced to supply order to civil society and stability to market transactions. In this sense, law was depoliticized, deconstitutionalized,² kept away from political deliberations and from its role in limiting the power of the political branches. The Code and the culture of codification provided the necessary arrangements creating a self sufficient set of rules written by a single person, enacted without congressional discussion, taught word by word, learned by heart, and dogmatically enforced.

The disentanglement of law and politics was also possible by the Supreme Court's application of the *de facto* and the political questions doctrines. Federal homogeneity was enforced by the Court's creation of the arbitrary decision doctrine which enabled it to intervene in Provincial cases under the rationale of defending the right to a fair trial while exercising federal discipline against Provincial courts. Later on, when the Codes were not sufficient, the professors provided treatises and when the treatises were not enough scaffolding, the Code was reformed (substantially and by a military government in 1968).

² I use the term "depoliticized" differently from Paul Kahn. In this context it amounts to deconstitutionalization, thus stressing the continental law view on this issue. Politics, in this tradition, is the jurisdiction of majoritarian powers. Law, on the other hand, is the formal application of rules to cases. Constitutionalism is an aberration in this context in the sense that it assumes the possibility of inconsistencies in the legal system which have to be dealt with by the judges exercising some degree of discretion. This dialogue among branches of government is what a Continental lawyer may understand by the politicalization of law.

III.-

Politics unrestricted by law and irrespective of constitutional rights, a violent, terrorist, subversive attempt to oppose illegitimate authority, coupled with the international context of the cold war prompted the 1976 military coup. As usual the coup attempted justification was that it was necessary to curb chaos and to destroy the communist threat of the armed groups. But this time the violation of human rights that generally accompanied coups in the past would change qualitatively: the State not only closed Congress and banned electoral politics and freedom of expression; it became terrorist itself and launched a systematic plan of kidnappings, torture and murder. Thousands of people still remain disappeared and hundreds of children stolen and raised by their parents' murderers are still being searched by their grandparents.

But in the midst of all the horror, an unprecedented event occurred. A group of women, searching for the disappeared children, asked for information, and when they received none, when the habeas corpus presented to the judges were not responded, they insisted. They convened in front of the Presidential building and the police told them it was forbidden to gather in public spaces. Instead of leaving the square, they started to walk around the historic monument of the historic Plaza de Mayo. They did this every Thursday, and did not stop when they were threatened, when some of them were kidnapped and became themselves *desaparecidas*. They still march today and they are known as the Mothers of Plaza de Mayo.

This event could have gone unnoticed. After all, there were always those who resisted. But this time the rebels were not seeking vengeance, or started killing innocents with the excuse of the illegitimacy of the authority. This time the Mothers started asking for information, and when the news of concentration camps and massive killings started to pile up, their demand was also for "trials and punishment".

What happened then can be laid out in the terms of what Hubert Dreyfus calls cultural reconfiguration.³ In fact, through the action of the Mothers, other human rights groups and eventually the political parties, what was in the margins of our political and legal culture became central: the idea of rights, and what was in the center, the idea of the common good as defined by whoever hold power, became marginal. Thus, a certain way of understanding human rights reconfigured for the decades to come the conception of law, the role of social actors and the processes through which those actors are called upon to articulate the new paradigm. Constitutionalism emerged from the redefinition of crimes into the language of human rights violations, the appeal to international law as well as the demand for due process and eventually for due punishment.

Many were the areas in which this reconfiguration resulted in staggering modifications of everyday life of those who had been working in the previous paradigm. The conception of criminal law, the interpretation of constitutional rights or what due process entailed were some of the political questions strained by the demands for “trial and punishment” to those who had massively and systematically violated human rights.⁴ But no less spectacular was the change with respect to the relation with rules emanated from non-national actors, whose legitimacy reached peaks unheard of in our previous

³ Dreyfus, Hubert L., “Could anything be more Intelligible than Everyday Intelligibility? Reinterpreting Division I of Being and Time in the light of Division II”, in <http://socrates.berkeley.edu/~hdreyfus/html/papers.html>, January 2009. “Dasein can then act in such a way as to take over or repeat the marginal practices in a new way and thus show a form of life in which that marginal practices has become central and the central practices have become marginal. Such an innovator is so radical that he transforms his generation’s understanding of the issue facing the culture and produces a new authentic “we.” He thus goes beyond not only the banal general understanding of his peers, but even beyond the Situational understanding of the *phronemos*. We could call such a fully authentic history-making Dasein a cultural master.”(...) “As a cultural master he can take up marginal possibilities in his culture’s past in way that enables him to change the style of a whole generation and thereby disclose a new world.”

⁴ Schor, M., Constitutionalism Through the Looking Glass of Latin America, Suffolk University Law School Faculty Publications, 19, (2005), 1, 34-35. “The end of the Cold War transformed Latin American politics as conservative elements gave up their iron grip on power and the left moved from revolution to political and grassroots organization. The end of revolutionary struggle also led the United States to abandon its support for dictatorship in the region. The combination of poverty and inequality has led to the triumph of the political left throughout most of the region. The social construction of constitutionalism in the region is now possible as the political system has become responsive to societal pressure. Grassroots movements in the region have led to a transformation of the public sphere as new linkages are being created between informal democratic practices and the institutions of governance.

culture; or the transformation of the relation between civil society and the State through the emergence of new social actors, the myriad of NGOs created after the example of the Mothers; or the way these social actors now engage in procedures that allow them to claim their rights in public policy spaces previously forbidden to them.

IV.-

In the three decades of democratic rule since 1983 many important things happened to Argentine politics. I will just focus on some events that led to the creation and strengthening of social groups (countermajoritarian politics) and some of the traumatic events of government failure (majoritarian politics). They are the antecedents of the emergence of the shadow of disobedience.

The first democratic government took office on December 1983 and was a surprise. No one anticipated that Alfonsín would win, but when he did (with a discourse based on the Constitution and the rule of law) he developed the human rights policies he had promised in his campaign: prosecutions and trials against those who had planned the system of massive violations and those who had committed abhorrent acts. He turned the claim of the human rights organization into public policy (creating new statutes, signing international treaties, incorporating international jurisdiction). The historic event of a country bringing to domestic trial and punishing their recent dictators became a model for the rest of civil society. A lot of NGOs were founded to advance different agendas. And once the trials were in their way even the traditional human rights NGOs had to diversify their portfolio. The Supreme Court obliged and started a line of very liberal cases in areas such as divorce, drugs for self consumption, mandatory military draft, etc. The Court explicitly offered a forum of deliberation on public policies and pledged to respect *stare decisis*.

But the old game of presidentialist politics was not over, and the military were not powerless. In the midst of military uprisings and unrest, of endless labor strikes, hyperinflation and economic turmoil, Alfonsín had to step down before the end of its term, in 1989. The new government curbed inflation with the Washington consensus recipe, and it was successful in privatizing many areas and bringing foreign investments. It also pardoned the military under trials and packed the Court. Its success led it to reform the Constitution in 1994 to enable President Menem to be reelected, which he was in 1995.

The government had to negotiate a few issues at the Constitutional Assembly and Alfonsín's party was able to introduce some reforms to curb the President's power. But not only traditional politics were present in the constitutional deliberation. The NGOs were there demanding and getting some of the most important issues of their agendas such as land for the indigenous peoples, right to clean air and water, consumer rights, rights for the people with disabilities, affirmative action's policies, and the most dramatic constitutional move: the incorporation, within the constitutional text of the dozen main international human rights treaties, including the international jurisdiction they provide. But besides rights, the Assembly added procedures to enforce them, both individual and collective as well as collective standing, not only for the Ombudsman but also for the NGOs.

With such a constitutional text the setting was ready for the creation of legal NGOs and legal clinics to provide free lawyers and start testing the new constitutional text. The first tentative cases were public successes and what started with individual claims are now instances of classic and quite ambitious structural litigation. The judges obliged and not only domestic ones, but international tribunals wrote decisions that

changed Argentine public policies dramatically in the health, prison, social security, labor and political systems, to name a few.

By the end of the nineties Menem's government was losing steam the economy was entering into a recession, public deficit was growing and the government's corruption was intolerable. The president's party lost and de la Rúa took over. The deficit and the stagnation got worse. The peso pegged to the dollar, a measure of the previous government that had curbed inflation was now an anchor impossible to lift that kept the country's economy entrapped. The measures the government tried found the resistance of the people and in the end of 2001 led to a social uprising that prompted the President to resign.

Overnight half of Argentina was poor, the peso was devalued three times and the country defaulted its foreign debt. After several attempts to nominate a President Congress decided on Duhalde. When the country was starting to move forward in one of several demonstrations social movements organized, the police killed two people. This event brought down Duhalde's presidency, elections were called and Kirchner became President with only twenty two percent of the votes (having lost to Menem but after the latter's refusal to confront a ballotage he knew he would lose). Kirchner tried to increase his legitimacy doing the opposite Menem had done. He sided with the human rights organizations and pushed to reestablish the trials against the military. He also accepted a proposal offered by a group of legal NGOs to limit his discretion to nominate justices and created a transparent deliberative system of nomination which was replicated later by the Senate. The new Court is generally praised and the institution has increased its legitimacy dramatically in the last years.

After the 2001 crisis, social movements took their grievances to the streets. The strategy got rid of two Presidents and it was used for a vast array causes, from the most

dramatic to some frivolous ones. Indigenous peoples would cut national highways, homeless people would stop trains, students would take their classes on city avenues, and an international bridge would be cut off for months to protest the installation of a pulp mill in Uruguay's opposite shore. But politics had learned a few lessons: Human rights should not be egregiously violated, hyperinflation is to be feared, corruption and budget deficit can make you lose elections and people cannot get killed in demonstrations by the police. Kirchner got inflation under control and piled up money in the Federal Reserve. He used the system to its limits and concentrated power in order to make it work. Crucially he decided never to repress any demonstration: he could not trust the capacity of the security forces, he knew the Argentine President cannot rely on the capacity of the State to create the shadow of hierarchy.

V.-

Thus, in the midst of the usual shortcomings of a system that tends towards concentrating power in order to function, people used non majoritarian ways to defend their rights and to push for public policies reform. I will develop three case studies: one on public land occupation (Parque Indoamericano, the occupation of a public park that eventually got dismantled), another on structural litigation (on prison system reform) and a third one that mixes both (the cleaning of a river that entails massive reallocation of industries and people). The idea is to explore the conditions of existence of such cases, what the actors think they accomplished, how the process developed and the shortcomings of the different strategies.

Every reconfiguration needs an articulation or, as Kahn puts it, "a revolution that fails to create a Constitution, fails as a revolution". I will try to help in that direction articulating part of the new dynamics of Argentine politics with an attitude of

hermeneutic generosity. The project, of course, can fail, both mine and Argentina's after all they are also acts of hope.

In the last part of the paper I will describe a stylized dynamics of the shadow of disobedience. It will be the blueprint of the cases I am planning to study.

VI.-

To describe the dynamics of the shadow of disobedience the starting point is to admit the existence of a situation in which authority is regarded as illegitimate and society as anomic (disobedient and involved in permanent coordination problems). Authoritarian governments are challenged by outlaws who violate the rights of others and their conduct is widespread to such a degree that everybody loses. In other context there are of course instances in which an unlawful situation is challenged by legitimate disobedience, as well as instances in which a legitimate authority enforces the law against illegitimate disobedience. Here I am proposing to think of an instance of both illegitimate authority and disobedience. This situation is different from an outright state of nature because in the former there are appearances of authority and some rules are followed as well as some level of obedience. But authority is generally perceived as illegitimate in the sense that its orders are, at most, suggestions; and obedience lacks the internal point of view Hart required to be somewhat spread over the people subject to the law.

This could be a permanent situation and it is so in most of the regions of the world, with few exceptions. It usually turns into a Pareto efficient equilibrium of fragile entrenched interests and sporadic uprisings of those excluded from the game. But it could also be an opportunity for the creation of legitimacy both of the way of enforcing authority of the State and of the ways of challenging State decisions. In such a situation

a group believes its rights to be violated and the authority (the officials who are regarded as those in charge of the resolution of a conflict) acknowledges its legitimacy to be at stake: it cannot enforce public norms, it cannot keep the peace and it also cannot choose not to act.

Thus the group makes the first move. In the belief that majoritarian processes are worthless (having tried them, or knowing of their impotence, or of their lack of sensitivity to minority plights) it challenges the status quo using non majoritarian ones. In the cases I will examine these processes are, on the one hand, direct action such as the taking over of land or buildings or organizing disruptive picketing on the streets and, on the other, judicial litigation, in particular strategic public interest and structural litigation.

This move should not be regarded as a mere event of law breaking, or as a thoughtless challenge to power, to be dealt with through repressive action or not to be dealt with at all, just replied with a dismissive gesture of indifference. These actions should be regarded, I argue, as a way to restart deliberation, bringing to the public attention the fact that the particular place in which deliberation had stopped overlooks the situation of the group and thus violates its rights. They are also an act of hope in the sense famously used by White; they are efforts to engage others in a dialogue, to reach out to their capacity of empathy. They use disobedience as a threat to increase the perception of the illegitimacy of the authority. In this sense, the amount of leverage social movements have depends, among many other things, on the perception by the authority of the costs of being, or appearing to be, ineffective and thus illegitimate. In the Argentine case, following the steps of the Mothers, groups become formal organizations of civil society, define their claims as human rights violations and imply that the omission of the authorities to redress their grievances turn make them

authoritarian, heirs of the dictatorship. This threat is what I call the shadow of disobedience.

Close to my position, Holmes uses Machiavelli to affirm that

Governments tend to behave as if they were “bound” by law, rather than using law unpredictably as a stick to discipline subject populations, less because they fear rebellion than because they have specific goals (such as fending off attempts by foreign invaders to seize their territory) that require a high degree of voluntary cooperation from specific social groups possessing specific skills (soldiers) and assets (the tax base). 19-20⁵

Nevertheless, a subtle distinction should be made. Holmes assumes a standing ruler. I am thinking of a somewhat less mighty authority, one less capable of enforcement but aware of its need to increase its legitimacy. The shadow of disobedience, in Holmes’s terms is explained this way:

The threat to withdraw cooperation, in fact, provides a more enduring motivation for the regularization of governmental power than the threat to inflict physical harm noted by Machiavelli and stressed by Przeworski. 29

The second movement belongs with the authority. If it takes the group’s move as a suggestion to restart deliberation and accepts the offer, i.e., if it does not use force to impose its will or does not remain dismissively passive then it is ready to enter a dialogue in which, at least, it had been recognized as a legitimate interlocutor. As such, it has the opportunity to offer a benefit, to acknowledge the violation of a right, to hear a complaint, to propose a process to solve the conflict, or to make believable promises. That is, it is able to exercise ways of assuming authority as if its legitimacy were not at stake.

This reply is made with a tentative attitude, since it is a counter suggestion (a reply to the suggestion made by the group) not yet an order. But it is made under the

⁵ Holmes, Stephen, Lineages of the Rule of Law, in Maravall, José María and Adam Przeworski, eds., *Democracy and the Rule of Law*, Cambridge University Press, 2003.

condition of putting an end to the act of disobedience or at least to start a proceeding that will eventually put an end to the act of disobedience. This counter move acknowledges the alleged violation in the status quo and the group as worthy of attention. I argue that in the Argentine context this move (refraining from violence, listening and negotiating) arise from the feeling of shame of being identified as an authoritarian power, to be placed in the same position of the dictatorship.

If the disobedient group ends the act of disobedience or enters the proceeding to end it, it also acknowledges the other as an authority growing in legitimacy as deliberations develop. Then an order has been created in the sense that the suggestion has been accepted as such. The hope is that, with time the authority will be able to give legitimate orders and the people will introject legitimate orders and develop habits of coordination.