

1-1-1984

State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication

Frederick E. Snyder

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Frederick E. Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 U. Miami Inter-Am. L. Rev. 503 (1984)

Available at: <http://repository.law.miami.edu/umialr/vol15/iss3/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

STATE OF SIEGE AND RULE OF LAW IN ARGENTINA: THE POLITICS AND RHETORIC OF VINDICATION

FREDERICK E. SNYDER*

| | |
|----------------------------|-----|
| I. INTRODUCTION | 503 |
| II. THE LEGAL FRAMEWORK | 505 |
| III. THE JUDICIAL RESPONSE | 512 |
| IV. CONCLUSION | 519 |

I. INTRODUCTION

During the Colonial period of Latin American history the conduct of officials appointed by the Spanish crown to serve in the provinces was subject to a formal review at the end of their term of office. At the public hearing, or *residencia*, anyone in the jurisdiction could appear before the presiding officer to present charges or to testify either for or against the incumbent. When an unfavorable judgment was rendered, the office-holder had to make restitution to the persons he had mistreated, or perhaps undergo more severe punishment. No one could leave office without first submitting to the *residencia*.¹

Recently, the military junta in Argentina, nearing the end of its reign, engaged in a ritual that it presumably hoped would be accepted as an "accounting" for its rule over the past seven years. First, there was that inglorious little war over those islands. It seemed a simple enough adventure, sure to produce the sort of heroes whose past misconduct one finds easy to forgive. Unfortunately, the Brits fought back.²

© Copyright 1983 by Frederick E. Snyder. All rights reserved.

* Assistant Dean for International and Comparative Legal Studies and Lecturer on Latin American Law, Harvard Law School.

1. See generally, J.M. MARILUZ URQUIZO, *ENSAYO SOBRE LOS JUICIOS DE RESIDENCIA INDIANOS* (1952); C. GIBSON, *SPAIN IN AMERICA* 100 (1967); B. KEEN & M. WASSERMAN, *A SHORT HISTORY OF LATIN AMERICA* 92 (1980).

2. For a discussion of the 1982 Falkland/Malvinas Islands War, see B. DE CARRIL, *THE*

Its second ploy was an attempt to persuade the leaders of the political parties scheduled to compete in the national elections promised for October, 1983 to agree that the winning party would not investigate crimes committed by the military during the junta's reign. No one agreed.³ Ultimately, the junta issued a report in effect conceding, if only in part, its responsibility for adding a new word to the vocabulary of state terror, "*desaparecido*."⁴ Like Macbeth shrinking before the phantom of his past, however, the junta laced its confession with what appeared to be an almost petulant rhetoric of justification: all of the desperate measures that were taken against Leftists and others between 1976 and 1979, it said, were prompted by a very real need to restore the social fabric that had been torn by urban guerilla warfare in the mid-1970's—"they got what they deserved."⁵

Not everyone in Argentina, however, agreed, particularly parents of the disappeared. Shortly after the report was televised, the Mothers—*Las Madres de la Plaza de Mayo*—condemned the document as "nothing more than a new and vain attempt to elude justice and assure impunity for the cowards responsible for the Argentine horror and tragedy of this past decade."⁶ Human rights organizations, politicians gearing up for the elections and opinion leaders were quick to denigrate the report and to demand a "true" accounting.⁷

The easy way to avoid punishment under the old *residencia*, of course, was to pay a witness to either say the right thing about one's incumbency or to decline to testify at all. An official might have also avoided potential repercussions by purchasing a

MALVINAS/FALKLANDS CASE (1982). The author has compiled a collection of materials (newspaper clippings, speeches made before organs of the United Nations and the Organization of American States, and press releases) illustrating the arguments advanced by the Argentine authorities during the conflict on file at Harvard Law School.

3. Schumacher, *Argentina after the Falklands*, N.Y. Times, Dec. 26, 1982, § 6 (magazine), at 14.

4. For a description and partial [unofficial] translations of the April 28, 1983, televised report, see *Latin America Weekly Report*, May 6, 1983, at 5, col. 1.

5. *Id.*

6. The statement was reported by the Associated Press. See *Thousands who disappeared are dead, Argentina reports*, Boston Globe, April 29, 1983, at 10.

7. See generally, *Latin America Weekly Report*, April 29, 1983, at 5, col. 1; Hatch, *Argentine Democracy's Obstacles*, The Boston Globe, May 16, 1983, at 2. European reaction to the junta's report, particularly on the part of the Vatican, was especially severe; see Kamm, *Vatican Assails Argentine Junta Over Its Report on War on Leftists*, N.Y. Times, May 4, 1983, at A 10, col. 1.

favorable judgment outright from the hearing officer.⁸ For the junta, however, there are no such alternatives. The junta is accountable not to a mere king or his delegate, but to the Argentine people as a whole. Some say the junta is accountable to the world as well, for all of us have been "witnesses" of the regime's transgressions of so many fundamental human rights, in such great measure.⁹ How can one bribe an entire society, to say nothing of an international community, especially when annual inflation of 100% and more combined with a poorly conceived and managed network of economic programs have all but emptied the national treasury?¹⁰

Apparently, all the junta could do was to try to excuse *itself*—a dubious enterprise at best. In its final days, the junta began to test popular reaction to its plan to declare an amnesty for military and security officials who violated the law during the junta's rule.¹¹ At first blush, the junta's preoccupation with the need for a workable principle of legality to vindicate its notorious departures from lawfulness is somewhat baffling. Wouldn't it be simpler to grab the first plane out of Buenos Aires and seek refuge with another like-minded regime the day after the October 1983 elections, or whenever and howsoever it is that the transfer of power takes place? Isn't that what Latin American military dictators are supposed to do?

II. THE LEGAL FRAMEWORK

The Argentine case stands as an intriguing example of the indeterminacy of the language of law and justice, of the magical properties attributed to legal terminology, and of the inevitable vulnerability of apparently autonomous legal institutions and

8. See MARILUZ URQUIZO, *supra*, note 1.

9. There have been numerous reports documenting official violations, on a large scale, of human rights generally recognized under international law. See e.g., Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OEA/ser.L/V/11.49, doc. 19 corr. 1, Washington, D.C., April 11, 1980 [hereinafter cited as IACHR Report]; Amnesty International, *Report of An Amnesty International Mission to Argentina 6-15 November 1976* (1976) [hereinafter cited as Amnesty International Report].

10. For descriptions of Argentina's current economic situation, see INTER-AMERICAN DEVELOPMENT BANK 1982 REPORT, ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA, 183-88 (1982); F. GÈZE, Y. LOCOSTE, A VALLADÃO, *WORLD VIEW* 1983, 160-62 (P. Ayrton trans. and ed. 1982); Barbieri, *From Speculation to Economic Disaster*, Latin America Press, March 10, 1983, at 3; Schumacher, *Argentina's 200% Inflation*, N.Y. Times, Feb. 2, 1983, at D1, col. 1.

11. See Latin America Weekly Report, April 29, 1983, at 5, col. 1; Hatch, *supra* note, 7.

processes to manipulation by the forces in a society in actual control of real political power. There is, for example, a constitution—one of Latin America's oldest and most durable.¹² Like the documents of the liberal democracies of the North, the Argentine constitution purports to serve as a map of the country's political and social pathways. It tells us how government power is divided—among executive, legislative and judicial departments.¹³ It tells us who the citizens are, who the "people" are, and how their individual liberties are immune from state violence.¹⁴ It tells us that the Constitution is itself an emblem of "national union" dedicated to the goals of "ensuring justice, preserving domestic peace, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to ourselves, to our property, and to all men in the world who wish to dwell on Argentine soil."¹⁵

The Constitution also contains a clause that essentially amounts to a curious declaration of the very futility of constitution-making *a la manera yanqui*, given the volatility of political life in Argentina. Article 23 provides that in the event of "internal disorder" or "foreign invasion" placing in jeopardy "the operation of this Constitution and of the authorities created thereby," the area in which the disturbance occurs "shall be declared in a state of siege" and the constitutional guarantees "shall be suspended" in that area.¹⁶

Tinkering with constitutional safeguards during periods of domestic upheaval is not unknown in liberal democracies: Recall, for example, Abraham Lincoln's suspension of the writ of *habeas corpus* during the Civil War in North America, with the later approval of the United States Supreme Court.¹⁷ Such measures are, however, taken with great caution or reluctance, or at last surreptitiously—and always with considerable embarrassment. The Argentine Constitution treats its own suspension of protections as somehow predictable, albeit regrettable nonetheless. Article 23 emerges

12. CONSTITUCIÓN DE LA NACIÓN ARGENTINA (1853). Citations are to the 1968 Pan American Union Translation, reprinted in 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD. (A Bloustein & G. Flanz, eds. 1971) [hereinafter cited as CONSTITUCIÓN].

13. *Id.*, arts. 36-103.

14. *Id.*, arts. 14-20.

15. *Id.*, Preamble.

16. *Id.*, art. 23.

17. *Ex parte Milligan*, 4 Wall. 2, 125 (1866) held the suppression of the writ of *habeas corpus* permissible in areas where armed violence makes the enforcement of the civil law impossible. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 179, n. 39 (1978).

from its text as an almost surrealistic tribute to the violence born of Argentina's arrested development as a Nation, and perhaps a strangely defiant salute to the malformation of the political economy of Latin America as a whole.

The clause does not end here, however. It tries next to identify the boundaries within which executive action may proceed during a state of siege. Thus, "during such suspension the President of the Republic shall not convict or apply punishment upon his authority. His power shall be limited, in such a case, with respect to persons, to arresting them or transferring them from one point of the Nation to another, if they do not prefer to leave Argentine territory."¹⁸ The voice of the Constitution may be muted during the crisis, but an echo, however faint, will continue to resonate through the palace of the President. "Constitutional law" may hibernate, but "law" will remain alive and well albeit to a lesser degree. The government may exercise extraordinary powers during the state of siege, but its performance must be tidy. In other words, revolt and reaction may be permanent characteristics of the political life of the nation, but we are not barbarians. This appears to be the message and meaning, the hope and fear of this ambivalent constitutional text.

This ambiguity, which lies at the heart of Argentina's political charter, provides a rich opportunity for the production of an apparatus of legality on behalf of regimes the legitimacy of whose actions would otherwise appear very fragile indeed. Article 23 makes it possible for a regime exercising "emergency" powers to create a legal image for itself, or rather, an image of the power it is exercising as 'legal,' i.e. as grounded in law. The military junta took full advantage of this opportunity in 1976 when it seized control of the state from the exhausted government of Maria Estela [Isabel] Martínez de Perón, which had declared the country to be in a state of siege since later 1974.¹⁹

Within hours after the *golpe*, the junta's office became the fountainhead of a steady stream of public addresses, institutional acts, statutes, decrees, and resolutions describing the goals of the new government and prescribing and proscribing various forms of social and political behavior. In his first major public speech as

18. CONSTITUCIÓN, *supra* note 12, art. 23.

19. Decreto 1.368, Nov. 6, 1974 [1974] *Anales de Legislación Argentina* 3525 [hereinafter cited as C *Anales*].

President on April 5, 1976, General Jorge Rafael Videla explained the junta's motivation as safeguarding the "highest interests" of the nation, a mission generally entrusted to the military under the Constitution:

Profoundly respectful of constitutional powers, the natural underpinning of democratic institutions, the armed forces on repeated occasions, sent clear warnings to [Isabel Perón's] government about the dangers that existed and also about the shortcomings of their senseless acts. Its voice went unheard, and as a consequence not one single measure was adopted. Therefore, every hope of institutional change was completely dashed. In the face of this dramatic situation, the armed forces assumed control of the government.²⁰

The junta's mission now, he continued, was to bring the promises of Argentina's constitution to life by making its government work:

[I]t is precisely to ensure the just protection of the natural rights of man that we assume the full exercise of authority; not to infringe upon liberty but to reaffirm it; not to twist justice but to impose it. After reestablishing an effective authority, which will be revitalized at all levels, we will turn to the organization of the state, whose performance will be based on the permanence and stability of juridical norms which will guarantee the primacy of law and the observance of it by the governors and governed alike.²¹

Summarizing, he said that all the measures the junta proposed to take were aimed "both at achieving general well-being through productive labor and at developing a genuine spirit of social justice" with the goal of forming "a vigorous, organized, and unified society that is spiritually and culturally prepared to forge a better future."²²

The junta had articulated the general content of this revitalized society in its Act Determining the Purpose and Basic Objectives for the Process of National Reorganization, of March 24, 1976.²³ The emphasis was to be on the maintenance of state secur-

20. A Time for Fundamental Reorganization of the Nation, speech by General Jorge Rafael Videla, in *THE POLITICS OF ANTI-POLITICS: THE MILITARY IN LATIN AMERICA* 179 (trans. and ed. from *La Nación* [Buenos Aires], April 5, 1976) (B. Loveman & T.M. Davies, Jr. ed. 1978).

21. *Id.*, at 180.

22. *Id.*

23. Acta Fijando el Proposito y los Objetivos Basicos para el Proceso de Reorganización Nacional arts. 1, 2, March 24, 1976 [1976] C Anales 1020.

ity, the preservation of the national heritage, the promotion of private enterprise, and the development of a close relationship between the state, capital and labor. To reinforce these declarations, on the next day, the junta effectively proclaimed itself the real and exclusive source of law through the "Statute for the Process of National Reorganization,"²⁴ whereby it dissolved the federal and provincial legislative bodies, fired all the key federal and provincial government officials, and prohibited all political party and union activity throughout the country. The junta declared that the constitution was to remain in force only "to the extent that it does not oppose the main objectives set forth by the military junta or the provisions" of the law.²⁵

These acts and statutes coupled with similar laws were designed to serve as the basis for a series of statutes and decrees that severely restricted the individual rights and liberties of Argentine citizens. The most draconian of these was undoubtedly the "Act to Consider the Conduct of Those Persons Who Prejudice the Higher Interests of the Nation," in which the junta assumed "the power and responsibility to review the actions of those individuals who have injured the national interest."²⁶ The Act specified a number of grounds that would justifiably trigger the government's concern: serious negligence in the exercise of a public, political or social interest; acts or omissions that facilitate subversion; and tolerance of administrative corruption or negligence leading to corruption. The Act also endorsed government action where there was a "failure to observe basic moral principles in the exercise of public, political or union offices or activities that involve the public interest."²⁷

Article 23 of the Constitution barred the junta from convicting or punishing any person upon its own authority. The Institutional Act skirted this problem by authorizing the junta to apply a variety of intermediate sanctions, short of "punishment" to persons caught in the net. Such milder sanctions included: loss of political or union rights; loss of citizenship for naturalized Argentini-ans; disqualification from public office; and confinement, during which

24. Estatuto para el Proceso de Reorganización Nacional, March 25, 1976 [1976] C Anales 1021.

25. Ley 21.258, art. 5, March 24, 1976 [1976] C Anales 1032.

26. Acta para Considerar la Conducta de Aquellas personas Responsables de Ocasionar Perjuicios a los Superiores Intereses de la Nación, art. 1 June 18, 1976 [1976] C Anales 1975.

27. *Id.*, art. 1(a).

time restrictions might be imposed against practicing a profession and the disposition of personal property.²⁸

The junta took its state-of-siege power under article 23 quite seriously and also used it to suspend other constitutional guarantees as well. Laws promulgated by the junta reached almost all forms of social life capable of generating discussion or activity offensive to the government. A flurry of statutes and decrees, instructions, special provisions and resolutions criminalized participation in either political parties,²⁹ or labor strikes;³⁰ publication of all news items concerning terrorist activity, subversion, abductions or the discovery of bodies, unless officially announced;³¹ various modes of criticism of official policies in university classrooms;³² and all "political acts" that relate to a political party, regardless of whether such acts resulted in concrete action.³³

In addition, penalties for a wide range of activities already proscribed under the Penal Code were made dramatically more severe: a breach of the peace punishable by a fine or 30 days' confinement became a federal offense punishable by imprisonment for up to ten years.³⁴ The sentence for the old crime of "illicit association" rose from 3-8 years to 5-12 years.³⁵ The death penalty, abolished in 1972, was revived, and would now be carried out within 48 hours of the sentence, leaving little time to file an appeal.³⁶ The age of majority for criminal responsibility was reduced from 18 to 16 years for certain crimes.³⁷

In 1976, the junta saw itself as the guardian of the national heritage, the exponent of the noblest values of Argentine society and the true defenders of its constitution. As such, it claimed to exercise state power legitimately. One problem it faced in its effort

28. *Id.* art. 2.

29. Acta para el Proceso de Reorganización Nacional, art. 7, March 26, 1976 [1976] C Anales 1019.

30. *Id.*, art. 8; Ley 21.400, Sept. 3, 1976, [1976] C Anales 2116.

31. Communiqué 19, Delito de Prensa, March 24, 1976.

32. Ley 21.276, March 29, 1976, [1976] C Anales 1041.

33. Ley 21.322, June 2, 1976, [1976] C Anales 1102; Ley 21.325, June 2, 1976, [1976] C Anales 1104.

34. Ley de Represión del Sabotaje, Decreto 21.264, art. 1, March 24, 1976, [1976] C Anales 1034.

35. Ley 21.338, June 25, 1976, [1976] C Anales 1125 (amending art. 210 bis, Código Penal de la Nación).

36. Ley 21.338, June 25, 1976, [1976] C Anales 1113 (amending art. 5, 5 bis, Código Penal de la Nación).

37. Ley 21.272, March 26, 1976, [1976] C Anales 1038.

to remake an Argentine society in its own image was to identify and declare a panoply of behaviors as criminal which were formerly viewed under the law as inoffensive, or relatively inoffensive—and to do so in a manner that would not do violence to the cautionary language of article 23. The open-textured penal program that it wove through the acts, statutes, decrees and resolutions of its first few months in office neatly served that purpose. Subsequently, an even greater challenge arose as the junta attempted to create a mechanism to enforce these stern, repressive measures in the face of the clear warning of article 23 that the executive “shall not convict or apply punishment upon [its] own authority.”³⁸ It was here that the junta made its peculiarly macabre contribution to the law of the state of siege. One law authorized the armed forces, security forces and the ordinary police to investigate crimes of subversion and to interrogate, detain, and gather evidence for summary proceedings.³⁹ Another authorized the same personnel, when investigating subversive activity, to arrest anyone on suspicion alone wherever there were strong indications or “half-conclusive proofs” of guilt.⁴⁰ One law authorized the security forces to use firearms when a person apprehended for a mere breach of the peace *in flagrante delicto* “does not cease upon the first warning.”⁴¹ Suspects could be detained indefinitely pending the accumulation of incriminating or exculpatory evidence,⁴² or they could be dealt with through summary proceedings before special military tribunals.⁴³ Conversely, the enforcers were themselves virtually immune from challenge: one early statute assigned severe penalties for committing “any violent act” against military personnel, security forces or police officers.⁴⁴ Another provided that all such officials would be subject only to military jurisdiction with respect to “infringements which they may commit during or in occasion of the execution of the missions imposed by the particular military command.”⁴⁵

This legislation made it possible for a wholly unofficial law to develop within the finely wrought edifice of the junta's law. Mili-

38. CONSTITUCIÓN, *supra* note 12, art. 23.

39. Ley 21.461, Nov. 19, 1976, [1976] C Anales 2895.

40. Ley 21.460, arts. 1, 9, Nov. 18, 1976, [1976] C Anales 2894.

41. Ley 21.264, art. 5, March 24, 1976, [1976] C Anales 1035.

42. Ley 21.461, *supra* note 39.

43. *Id.*

44. Ley 21.272, art. 1, *supra* note 37.

45. Ley 21.267, art. 1, Mar. 24, 1976, [1976] C Anales 1036.

tary personnel, security forces and the police were now able to roam city streets at will, veritable sovereignties in competition only with each other. The military did not act by "convicting" or "punishing" the enemies of the state they might identify, or proceeding in a manner beyond the authority committed to the junta by article 23 and delegated in turn to them by the junta's volley of proclamations. Instead, they proceeded by "detaining" those enemies for days, weeks, months, and sometimes years on end;⁴⁶ torturing them;⁴⁷ and finally, perhaps more mercifully, "disappearing" them.⁴⁸ Thus, there was a law within a law, for a state within a state. Or, more accurately, a sphere of utter lawlessness beneath the facade of an official lawfulness bankrupt of any real content. The one a mask to disguise the other,⁴⁹ grinning its ghoulish grin at all those who still held dear some hope and faith in the virtue and power of mere legality.

III. THE JUDICIAL RESPONSE

Indeed, the Argentine judiciary has grown increasingly assertive on behalf of constitutional values in the years since the *golpe*. The Supreme Court has traditionally insisted that the Constitution, as at least a legal form, survives the declaration of a state of siege in even the direst of emergencies. Although the court has noted that article 23 may provide for the suspension of constitutional safeguards in the area under siege, it concluded that it does not justify the suspension of the Constitution itself in its entirety.⁵⁰

Measures adopted under a state of siege, for example, that would fundamentally and permanently restructure the political authority of the nation would contravene the very essence of the Constitution and would thus fall beyond the contemplation of arti-

46. See generally, IACHR Report, *supra* note 9, at 139-177; Amnesty International Report, *supra* note 9, at 17-26.

47. See generally, IACHR Report, *supra* note 9, at 199-215; Amnesty International Report, *supra* note 9, at 36-39; Amnesty International, *Testimony on Secret Detention Camps in Argentina* (1980).

48. See generally, IACHR Report, *supra* note 9, at 53-138; Amnesty International Report, *supra* note 9, at 27-35; Amnesty International, *Political Killings by Governments* 50-55 (1983); see also A. GRAHAM-YOOLL, *A MATTER OF FEAR: PORTRAIT OF AN ARGENTINE EXILE* 81-89 (1982).

49. I am indebted for the imagery to Corradi, *The Mode of Destruction: Terror in Argentina*, 16 *TELOS* 61, 70 (1982-83).

50. Causa CCCLIII, Leandro N. Alem y Mariano N. Candiotti, 54 Fallos de la Corte Suprema de Justicia de la Nación 432 (1893) [hereinafter cited as Fallos].

cle 23.⁵¹ Furthermore, an emergency does not authorize the executive to create new powers *sua sponte*: "it only justifies the exercise of those powers that are expressly or implicitly authorized in the Constitution [including, of course, article 23]."⁵² Most juridical statements addressing the propriety of executive action taken during states of siege in Argentine history have amounted to little more than verbal pinball of this sort. Opinions on such matters often read like the poetry of the Tudor courtiers: pleasant, polite, reassuring and harmless.

More recently, states of siege have become less exceptional and more a commonplace of Argentine political life.⁵³ As a result, the Court has entertained an increasing number of *habeas corpus* petitions⁵⁴ pleading for interpretations of the Constitution that would presume to regulate the conduct of the powerful more closely.

Until 1959, the Court customarily and unanimously read article 23 as authorizing the suspension of all individual rights and freedoms.⁵⁵ Since then, it has begun to forge a version of the instrumental rationalism of North American constitutional jurisprudence⁵⁶ to fashion a "means-end" test of the "reasonableness" of such restrictions. The dissenting opinion of Justice Alfredo Orgaz in the case of *Antonio Sofia* heralded this development. Orgaz suggested that only individual rights whose exercise contributed to the onset of an emergency should be subject to the extraordinary powers of the executive during the state of siege and should not be subject to judicial review. He felt that otherwise, the Court should

51. *Id.*

52. Oscar Agustín Avico v. Saul G. de la Pesa, 172 Fallos 21 (1935).

53. From 1930 through 1976 there have been 10 successful *coups d'état* or *glopes d'estado* in Argentina, usually preceded or accompanied by a declaration of a state of siege (*estado de sitio*). See K. KARST & K.S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 185 (1975); R.A. POTASH, *THE ARMY AND POLITICS IN ARGENTINA, 1928-1945* (1969); R.A. POTASH, *THE ARMY AND POLITICS IN ARGENTINA, 1945-1962: PERÓN TO FRONDISI* (1980).

54. The *habeas corpus* procedure is described in arts. 617-644 of the Código de Procedimientos en lo Criminal pars la Justicia Federal, (I.F. Dova de Zavalía ed. 1979). Official action may also be challenged in *amparo* proceedings under Ley 16.986, Oct. 18, 1966, [1966] *Leyes Nacionales* 175. For a description of *amparo* proceedings in Latin America, see generally, H. Fix-Zamudio, *The Writ of Amparo in Latin America*, 13 *LAW. AM.* 361 (1981).

55. José Guillermo Bertotto, 160 Fallos 104 (1931); *Herrero v. Consejo de Reconstrucción de San Juan*, 266 Fallos 34, 41 (1966).

56. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

apply ordinary tests of reasonableness in reviewing official actions not directly related to the restoration of order.⁵⁷ Since then, a majority of the Court has held that only a limited number of rights and freedoms may reasonably be suspended during a state of siege—those which are “incompatible in each case with . . . threats to order.”⁵⁸

This constituted the analytical framework within which the Court has approached allegations of human rights violations in *habeas corpus* petitions since the junta assumed control of the Argentine government. Among the more significant of its decisions are the *Carlos Mariano Zamorano*,⁵⁹ *Cesar Ollero*⁶⁰ and *Jacobo Timerman*⁶¹ cases. Each is instructive of the character of the role that judicial review can play during a state of siege.

Zamorano was a lawyer who had been arrested shortly after the Isabel Perón regime declared Argentina to be under a state of siege in late 1974. His was the first *habeas corpus* petition the Court allowed to challenge arrests executed during a state of siege. Previously, such arrests were reviewable only if they violated article 23, by forestalling the prisoner's right to exercise the option to leave the country.⁶² *Zamorano* held that it was proper for the judiciary to review the “reasonableness” of these arrests.⁶³ This meant that the government had to be able to offer “particular facts” linking the detention to the causes of the state of siege; otherwise, the Court would not be able to conduct a fruitful review. “The executive is bound to provide a clear basis in each case so that a competent judge may accurately determine the proper extent to which exceptional powers should apply.”⁶⁴ The opinion concluded with a message to the President to provide the specific facts requested by the Court of Criminal Appeals bearing on the reasonableness of Zamorano's detention.

Cesar Ollero brought a *habeas corpus* petition in an effort to unearth facts that might lead him to the discovery of the whereabouts of his daughter, Inés Ollero, who had disappeared from Bue-

57. Antonio Sofia, 243 Fallos 504, 529 (1959) (Orgaz. J., dissenting).

58. Daniel Mallo, 282 Fallos 392, 397 (1972).

59. Carlos Mariano Zamorano, 298 Fallos 441 (1977).

60. Inés Ollero, 300 Fallos 457 (1978).

61. Jacobo Timerman, 300 Fallos 816 (1978), 301 Fallos 771 (1979).

62. G.J. BIDART CAMPOS, *THE ARGENTINE SUPREME COURT: THE COURT OF CONSTITUTIONAL GUARANTEES* 104 (W.J. Brisk trans. 1982).

63. Zamorano, *supra* note 59, at 445.

64. *Id.*

nos Aires in 1976.⁶⁵ Typically, a *habeas corpus* petition is proper only where it is levelled against an identifiable official alleged to be responsible for a person's detention.⁶⁶ It is not possible, of course, to establish with any real certainty the official responsible for the "detention" of a person who has [been] "disappeared." Thus, it is not possible, then, in theory, to use *habeas corpus* to penetrate the wall of secrecy obscuring the fate of the thousands of victims of the enforcers of the law of the "state within the state." Such, in essence, was the argument of the Attorney General in *Ollero*.⁶⁷ The Court agreed that the file lacked evidence that Inés Ollero was presently in the custody of security forces. It pointed out, however, that there *was* evidence that she had been among a group of bus passengers who had all last been seen when they were being taken to a particular police station in Buenos Aires; therefore, the matter could not end here. *Habeas corpus*, the Court said, was created "to immediately restore freedom to persons deprived of it," and to do so "requires the exhaustion of judicial procedures."⁶⁸ The judge of the court of origin, then, "should have broadened the investigation" and taken the "necessary measures" to "duly clarify" the woman's "status and personal situation," as well as the "truth of the events."⁶⁹ The Court concluded by remanding the case to the lower court with instruction to conduct such an investigation into the *desaparecida's* whereabouts.

Jacobo Timerman was arrested April 21, 1977, under a special executive decree, at the request of the Commander-in-Chief of the Army.⁷⁰ He was detained because of his association with David Graiver, the publisher of *La Opinión*, the Buenos Aires newspaper Timerman edited. Graiver was suspected of having provided substantial sums of money to the Montoneros, one of the largest of the left-wing political groups that had engaged in terrorist activities in the 1970's. Graiver was killed in an airplane accident while out of the country in early April, 1977. Decree 1093/77 ordered Timerman's arrest on grounds that he had a "direct and close relationship with the causes that motivated the declaration of a state of siege."⁷¹ Five months later, after a period of interrogation and tor-

65. Ollero, *supra* note 60, at 457.

66. Código de Procedimientos en lo Criminal, *supra* note 54, arts. 617, 622.

67. Ollero, *supra* note 60, at 458-59.

68. *Id.*, at 461.

69. *Id.*

70. Timerman, *supra* note 61, at 818-19.

71. *Id.*, at 819.

ture in the army's custody,⁷² he was tried and acquitted by a Special War Council, under The Code of Military Justice.⁷³ The junta then ordered that he be placed under house arrest and deprived him of both his political rights and his right to employment under the Act to Consider the Conduct of Those Persons Who Prejudice the Higher Interests of the Nation.⁷⁴

On *habeas corpus*, the Supreme Court held Timerman's house arrest unconstitutional. His acquittal by the Special War Council, it said, vitiated any connection between Timerman's association with Graiver and the "causes that motivated the declaration of a state of siege." Thus, the decree under which he was first arrested could no longer serve as the basis for continued detention.⁷⁵ Furthermore, the junta's resolution ordering his house arrest after the acquittal was not based upon any evidence of a direct relationship between Timerman and the causes of the state of siege; it thus amounted to the issuance of a "punishment" not authorized by article 23 of the Constitution.⁷⁶ The Court therefore ordered his release.

These cases are often cited as evidence of the continuing vitality of the rule of law in Argentina and of the real, albeit limited, achievements of the country's historically independent judiciary, all in a period when conventional legal processes and institutions were subject to extraordinary pressure.⁷⁷ Such a conclusion would follow, only upon an over-reading of these cases. An even stronger argument can be made that the outcome of these proceedings illustrates, as graphically as ever, the incapacity of formal legal process to restrain in any significant way the exercise of executive power during states of siege.

Thus, the *Zamorano* mandate that the executive specify the particular facts that a court might assess in evaluating the "reasonableness" of an arrest has simply provided the government with a comparatively uncomplicated formula to follow to establish the legality of its actions. One experienced Court-watcher observed that simple statements to the effect that a prisoner has engaged in sub-

72. For Timerman's personal account of the ordeal, see J. TIMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER* 9-14, 47-50 (T. Talbot trans. 1982).

73. *Id.*, at 128, 129; Timerman, *supra* note 61, at 820.

74. Resolución 6 (Junta Militar), Nov. 10, 1977 [1978] C Anales 3.

75. Timerman, *supra* note 61, at 779-80.

76. *Id.*, at 782.

77. BIDART CAMPOS, *supra* note 62, at 99-110; IACHR Report, *supra* note 9, at 231, note 14.

versive activities "have been sufficient to warrant continued imprisonment."⁷⁸

Despite the pyrotechnics of the *Ollero* opinion and its support of independent trial judge investigations into the whereabouts of *desaparecidos* who are the subjects of *habeas corpus* proceedings, such inquiries have failed to yield any positive results. As Pedro Narvaiz suggested after resigning from his judgeship on the federal court of criminal appeals in Buenos Aires, *Ollero* has made one more opportunity available to the state to keep the promise of law to the ear, and break it to the hope: "no one actually obstructs the judges in their investigations, but still there are never any answers."⁷⁹ Inés Ollero herself, interestingly enough, is still missing.

Timerman, it is true, won his freedom. But not because of the Court's decision on his *habeas corpus* petition. This went ignored by the army generals responsible for his detention, who even went so far as to suggest that the judges ordering his release resign from their positions on the Supreme Court.⁸⁰ It was not until President Videla, after yielding to a forceful international campaign on Timerman's behalf, threatened to resign that the army capitulated—which even then they did not quite do. The generals' final solution to the *Timerman* case was not to release the man, as the Court had ordered, but to nullify his citizenship, confiscate his property and expel him from Argentina.⁸¹

The Court, moreover, has never directly addressed the core questions of the legality of the junta's overall performance in office. Standard bearer of procedural regularity though it is, it has never addressed the issue. It has, for example, refused to review the lawfulness of the state of siege itself. It consistently holds the junta's declarations thereon to be non-justiciable political questions,⁸² even though article 23 suggests the need for the existence of "internal disorder" or "foreign invasion" to justify a state of siege. In 1981, one appellate court judge declared the state of siege to be unconstitutional; revealingly, a few days after issuing the opinion, he left his post and fled the country.⁸³

78. Bidart Campos, *supra* note 62, at 105-106.

79. Quoted in R. Fernandez Taboada & J. Vidal, *Quién es Pedro Narvaiz*, Somos, Feb. 11, 1983, at 8.

80. *TIMERMAN*, *supra* note 72, at 129.

81. *Id.*

82. See, e.g., Zamorano, *supra* note 59, at 441; *Timerman*, *supra* note 61, at 816, 771.

83. Fernandez Taboada and Vidal, *supra* note 79, at 10.

The Court has never managed, moreover, even to scratch the surface of the problem of the *desaparecidos*, or to formally contemplate the magnitude of the power that paramilitary forces have wielded so effectively and so clandestinely since the junta took office. Neither statute nor rule of court has authorized anything like a class action, for example, that might formally bring to life the grievances of *Las Madres de la Plaza de Mayo*. The Court has never even expressly declared illegal the junta's singularly most overt and explicit violation of a specific provision of article 23, its suspension of a prisoner's option to leave the country.⁸⁴

It would be a mistake, however, to sing some wistful dirge for the Argentine judiciary's failures and omissions over the past several years, and to suggest that its "missed opportunities" are in any way the key to real insight into the problem of the state of law during a state of siege. The problem is not simply that conventional forms of legal process in Argentina—courts, judges, lawyers, *habeas corpus*, "the law"—have been ineffective as brakes on the junta's exercise of executive power. After all, what else might one have expected? The problem is that legal process, ostensibly available as a quasi-autonomous mechanism to challenge and check executive power, may ironically have functioned as an unsuspecting accomplice in the junta's very efforts to consolidate that power.

The convoluted process of human rights litigation, leading as it does in Argentina to the publication of judicial opinions in cases like *Zamorano*, *Ollero*, and *Timerman*, has had the effect of generating a discourse of rationality, a language of reasonableness, as a tool for the portrayal and analysis of government behavior during the state of siege. The junta, as a party to this litigation, has acquired a voice in this discourse. The formal outcome of these cases has turned on such issues as the "sufficiency" of the facts offered by the state as evidence "justifying" the detention of a prisoner, the "connection" between a particular prisoner, the "causes" of the emergency and the government's "conduct" in arresting the person. The implication here is that the behavior of the junta and its

84. Estado de sitio-suspension del derecho de opción para salir del país, Mar. 24, 1976, [1976] C Anales 1022-23; Acta Institucional, Sept. 21, 1977, [1977] C Anales 3664. The Supreme Court faced a challenge to the legality of that action in a recent *habeas corpus* petition; it held that the President might well be entitled to deny a prisoner's right to exercise the option of self-exile in exceptional cases where the sanction it orders is house arrest. Benito Alberto Moya, 303 Fallos 696 (1981). It has been suggested that this "compromise" between court, junta and Constitution "undoubtedly falls short of Article 23." BIDART CAMPOS, *supra* note 62, at 109.

subordinate officials is susceptible to a mode of description that includes such terms as "reasonableness" and "rational." A judicial declaration of official illegality in a case like *Zamorano* or *Ollero* or *Timerman* suggests at least the possibility that official action may be legal in some other case, and that except for this case, the junta may well be operating within a field of legality.

From the junta's perspective, it matters not whether the government "wins" or "loses" one case or another. It will always find a way to disregard or neutralize the effects of a really threatening decision like *Zamorano* or *Ollero*. What is important is that it appears to be an actual player in the game of legal rhetoric, a partner with court, petitioner, and legal analysis in the search for legality and justification. Legal process has thus been singularly important in the mobilization of state terror in that it has enabled the junta to address society not only through the amplifier at the rally, the proclamation in the newspaper, the rifle butt on the street, and the electrode in the torture chamber, but through a vocabulary of reason and right as well. It is for this reason that the junta in Argentina, like its counterpart in other Latin American states, preserves the courts intact during the administration of a state of siege.⁸⁵ Political factions it will exterminate, political parties it will suspend, and the legislature it will dissolve.⁸⁶ But the courts stay open for business, producing their discourse on right and wrong that indirectly but powerfully, by inference alone, draws the junta into the enviable world of formal rationality where it shares the benefits that only an apparatus of justification can confer.

IV. CONCLUSION

The Argentine case as described demonstrates something about one possible relationship between state, power and law in a society struggling to contain the violence that is the byproduct of widespread and conflicting pressures for revolutionary political and economic transformation.⁸⁷ It tells us something about the role of

85. General Augusto Pinochet Ugarte, on assuming the Presidency of Chile as leader of the military junta that overturned the government of Salvador Allende Gossens on Sept. 11, 1973, ordered the collapse of executive and legislative powers into one body, but allowed the judiciary to continue functioning as usual. Decreto Ley 27, Sept. 11, 1973, *Gaceta Oficial* 28, 653, Sept. 24, 1973; Decreto Ley 1, Sept. 11, 1973, *Gaceta Oficial* 28, 653, Sept. 18, 1973.

86. Acta Fijando el Proposito, *supra* note 23.

87. For descriptions of the events leading up to the junta's assumption of power in 1976 and of the Argentine political background generally, see J. Corradi, *Argentina: A Story Behind a War*, in *DEMOCRACY AND DICTATORSHIP IN LATIN AMERICA* 31 (I. Howe ed. 1982); B.

legal conventions as integral elements in the consolidation of authoritarian rule during a state of siege. It also indicates something about the subtle contribution of formal rationality to the construction of that edifice of justification that allows an "official" state apparatus to screen from view the terror exercised on its behalf by its homuncular state. As such, it may lend useful insight into the process of legitimation of authoritarian rule in many other "dependent" societies as well.⁸⁸

The Argentine people today, however, may be telling us an even more important story, a story of the crucial limitations of this process. The efforts of the junta to vindicate itself for the excesses of its past and the fate of the *desaparecidos* have met only rejection, pervasive and total rejection. The demand for a public accounting is vocal and continuous. Words having failed it, the junta, in its final hours, apparently began to dip into its other arsenal, subduing some of the opposition by dispatching its leaders to a state of permanent silence through the bullet in the night.⁸⁹ The marches continued nonetheless; the processions through the streets of Buenos Aires and the Plaza de Mayo,⁹⁰ in displays of defiance and hope, hope that the junta will appear at last before the people, naked of its power. The demonstrations called on the junta to stand for judgment, as if the requirement of *residencia*, that old nuisance for the viceroys, were reaching out of the Latin American past to try to catch the junta in its contradictions.

Perhaps the junta was wrong in its strategy all along. Perhaps the pretense to legality it has cultivated so assiduously all these years has somehow managed to create a demand that the truth of justice we all can understand peel away that false face and expose its lie of "law" for what it is.

KEEN & M. WASSERMAN, *supra* note 1 at 320-25; P. G. SNOW, *Argentina: Politics in a Conflict Society*, in *LATIN AMERICAN POLITICS AND DEVELOPMENT* 98 (H.J. Wiarda & H.F. Kline, eds. 1979).

88. The continuing tendency toward militarization of political life in Latin America and other Third World countries has been described by I.L. HOROWITZ, *BEYOND EMPIRE AND REVOLUTION: MILITARIZATION AND CONSOLIDATION IN THE THIRD WORLD* (1982) A. STEPAN, *THE MILITARY IN POLITICS: CHANGING PATTERNS IN BRAZIL* (1971); E.B. BURNS, *LATIN AMERICA: A CONCISE INTERPRETIVE HISTORY* (3d ed. 1982).

89. Schumacher, *Military in Argentina is Accused in Assassination of Two Peronists*, N.Y. Times, May 19, 1983, at A1.

90. *Argentines protest report by government on '70s war*, Boston Globe, May 21, 1983, at 3.