LEGAL DISCOURSE AND ADMINISTRATIVE LAW IN ARGENTINA: *DE FACTO* DOCTRINE AND ECONOMIC EMERGENCY

By NICOLÁS DIANA

1. Introduction

"Life is a story told by an idiot, full of noise
and emotional disturbance but devoid of meaning."
Shakespeare, William, Macbeth

The first approach to this subject aimed at resuming the discussion concerning the application of the *de facto* doctrine by the Supreme Court of Justice of the Argentine Republic, tolerated by Argentina's Authoritative Opinions.[1] The second analysis related to this matter involved the rationale of the Argentine edition of *La deconstrucción del derecho administrativo argentino* (Deconstruction of Argentine Administrative Law.)[2]

In Argentina, as from the return of democracy and after 1983, the discussion related to the *de facto* doctrine was largely abandoned as a topic of practical and academic interest.

From an institutional point of view, the problem is as relevant nowadays as it was eighty years ago, particularly due to the expansive nature that the vernacular interpretation of the *de facto doctrine* has against other institutions related to the *state of necessity* or emergency.

Just like a ten thousand mile road starts with the first step,[3] the destination of subsequent steps "may be scrutinized from the latest steps of 20th Century, and the first steps observed from the next Millennium. Thus, we are not talking about the future, but of the disturbing present. The real question is not where we will be in one hundred years, but in which direction we are now and what steps are we taking.[4]

Nothing affirmed herein is new or original —nothing is—, we are merely trying to think of the power of discourse within the scope of Argentina's legal and political reality, but mainly about questioning (ourselves) the function of language in connection with the framework that once protected what is legal from what is illegitimate.[5]

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[1] See Diana, Nicolás, "*La fuerza de las palabras (o las palabras de la fuerza)*" [Force of Words (or Words of Force)] at RPA, 2007-1, p. 93 *et seq*.

[2] Bonina, Nicolás and Diana, Nicolás, *La deconstrucción del derecho administrativo*, Buenos Aires (Deconstruction of Argentine Administrative Law), Lajouane, 2009. The development included herein mostly reproduces, though with some changes, the thesis entitled *Discurso Jurídico y Derecho (administrativo)* [Legal Discourse and (Administrative) Law], with Dr. Mario Rejtman Farah as Director, submitted for the completion of the Course of Studies on Specialization in Administrative Law and Public Administration at the University of Buenos Aires, School of Law.
We thank him for his tutelary role and advise, and we would like to thank Agustín A. Gordillo, Laura Monti and Maria Rosa Cilurzo who, in their capacity as members of the panel in charge of analyzing the work, took the lead to a deepening of concepts and ideas unnoticed by the author by the time he wrote the work. Such an ambitious purpose aims at describing the general features related to the role of the legal discourse—academic and related to case law—in particular, from the point of view of public-administrative law, compared to political power and Argentine history.

[3] As remembered by GORDILLO, AGUSTIN, *Introducción al derecho administrativo* (Introduction to Administrative Law), Buenos Aires, FDA, 2000, chapter III -37.

[4] GORDILLO, AGUSTÍN, *Tratado de derecho administrativo* (Administrative Law Manual) book. 1, "*Parte general*" (Overview) 10th Edition, Buenos Aires, FDA, 2009, chapter IV -17.

[5] Jorge Luis Borges used to say: "I have done my best -I don't know with what success- to write straightforward stories. I do not dare state they are simple; there isn't anywhere on earth, nor a single page or a single word that is so, since each thing implies the universe, the most obvious trait

The permanent confusion of politics, legality, and the value conferred to discourse (legal and academic) are issues that shall be treated tangentially and will be included in the national-historical process lived along most of the 20th Century, which formally commenced in 1930.

In the 20th Century, Latin America seemed to be dictatorship doomed. In 1978, only Colombia, Venezuela, and Costa Rica were able to escape from dictatorships or *de facto* regimes; even when these are, by nature, ephemeral, [6] like every result of force, not derived from agreement.[7]

The authoritarianism-dictatorship phenomenon is copied and has been copied in the continent South of Rio Bravo River from common experiences caused by shared historical roots. The dream of any dictatorship involves institutionalization to ensure their survival and that of the responsible parties. The *de facto* doctrine guarantees such goal. In order to escape from the temporariness of an exceptional status, it is required to acquire acceptable legitimacy. However, in most cases, it must only be exercised, and rest on economic success, military victory or international prestige.[8]

This exercise of legitimacy or legality does not supersede the original vice inherent to any intruding government.

Since 1930, Argentina has been the Latin American example of a Praetorian Republic.

Here, "public life is characterized by the permanence of a disguised martial hegemony. Military interventions are not the last resort in exceptional circumstances, but they appear as «normalized» alternative procedures for dispute resolution. Far from provoking a sacred union to defend democratic institutions, every military uprising receives public support from the parties opposed to the government. Moreover, most of the times, these opposing parties knock on the quarters' doors. Therefore, military intervention is, if not legitimate, legitimated by wide sectors of opinion especially, for the most influential ones."[9]

At the end of the 50s and the beginning of the 60s, the doctrine of hemispheric security changed into the national security doctrine all along the continent. However, Argentina "presents an extreme feature since it had a dictatorship regime not only incapable of being institutionalized, but also deprived of the means required to impose some conditions upon the restitution of the constitutional order. In Uruguay, outgoing dictatorship will also try to establish a pseudo-democracy under protection."[10]

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of which is complexity." ("Brodie's Report" Prologue, Complete Works, Book 2, 14th ed., Buenos Aires, Emece, 2004, page 399.)

[6] Rouquie, Alain (Víctor Goldstein translation), *A la sombra de las dictaduras. La democracia en América Latina* (In the Shadow of Dictatorships. Democracy in Latin America), Buenos Aires, Fondo de Cultura Económica (Economic Culture Fund), 2011, p. 113.

[7] A balance on the achievements and failures of Latin American democracies and the current phenomenon of political power concentration in Presidential regimes implemented as a challenge to overcome during the post-transition stage of dictatorships in the 70s may be seen in OEA -PNUD Report, Nuestra Democracia (Our Democracy), Mexico, Fondo de Cultura Económica (Economic Culture Fund), 2010 (particularly, p. 57 *et seq.*) The democratic development still continues, while its dilemmas and questions are transformed. Our democracy is gradually less disturbed by the past, but more disturbed by the future rather. (Electronic version available at: http://www.undp.org.ar/publi_coop_reg.htm.)

[8] Rouquié, A., quote, pages 119-120.

[9] Rouquie, A., quote, p. 102.

[10] 11 Rouquie, A., quote, pp. 123-124.

In Latin America, the *de facto doctrine* has a historical, legal and also political value.

In the early last century, Argentina was an example of the way in which the *legality-legitimacy* relationship was taken to the limit. On one hand, there is the majority legal origin of power, pursuant to constitutional rules. Secondly, there is the existence of an elite group which neither accepts nor recognizes the principle of majorities, except where it satisfies its own interests. On the other hand, "illegitimacy of *de facto* governments, undeniable dictatorships, is rarely a consensus object. In view of what dominant groups present as an «authority crisis» or an evident «power vacuum», given the alleged «dangers» planned on the society, how can we think that a coup, a judgment, will "«repeal legality to reestablish legitimacy»? To the legitimacy of the new power origin, based on «fair cause», the legitimacy of exercise providing «restoration of the natural order» and «search of common good» are added; these being a synonym for «country modernization» or «economic growth». Naturally, this legitimacy is eminently provisional. It is granted under benefit of inventory by dominant groups. Trust shall vanish and the expected «revolution» will become a simple «dictatorship», the days of which will be numbered."[11]

The institutionalization of dictatorship and sacralization of *de facto* power (intruder) is a heritage of the Latin American nation, supported by our classist and authoritarian past dating back to colonial times, internal battles, the presence of commanders and deliberate breach of rules, matters related to the past; all of these in common, defining our contemporary democracies.

Sadly, the establishment of a dictatorship, a *coup d'état*, seems to be "a simple art of utter execution. It only implies following a «too human» inclination of power. However, pluralist constitutional regimes are the result of permanent tension, proactive self-correction and a long-lasting and tough learning of virtues.

Democracy is not engraved in nature. It is a complex cultural construction, at random, of trial and error progress. It is often gray and dim. It generates less fervor than the absolute power of autocracies."[12]

Our work seeks to think about the distance between the ideal system outlined by our constituents —expressed in Fundamental Law— and the reality of the institutional system as it worked and as it works, as part of a fiction where the law of the strongest party dominates over institutions as a constant of Argentina's society cultural roots.

The historic and dogmatic relationship of the *de facto doctrine and state of economic emergency* —both behind the veil of power— comprise our work hypothesis. This relationship was strengthened after 2002, with an emergency extended *sine die*, stronger and based on factual grounds during the first years, in view of the worst social, economic and political crisis suffered by Argentina in the 20th Century.

As affirmed by the Supreme Court, quoting IHERING,[13] "the function of law, in general, is to perform itself; what cannot be performed cannot be law."[14] Reality

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[11] Rouquie, A., quote, p. 107.

[12] Rouquié, A., quote, p. 345.

[13] CSJN [Argentine Supreme Court], Pérez de Smith *et al*, judgment entered on 21-XII -78, Decisions, 300: 1282.

[14] CSJN, García Méndez, Emilio and Musa, Laura, judgment entered on 2-XII -08, cons. 8°; Decisions, 331: 2691.

has proved that Argentine law has assumed theories and practices, sometimes of foreign origin which were misrepresented and forcefully applied to *de facto* situations for which these were not developed. This construction —or vernacular strain— has academic autonomy, turning it into an interesting and attractive phenomenon from the theoretical point of view; especially from both the historical and the practical viewpoints.

The legal phenomenon does not *per se* derive from a regulation or system of rules, but it derives from facts acting as grounds and aiming at being caught in a unique discourse where legislation and practice are expressed as representation of (political and economic) power, not men's. We question the scope that many times the legal discourse assigns to itself through the work of leading authorities and judges, who, from the formal point of view intend to get reality, as if it was an object within our reach, as if time and space were cognizable and measurable parameters, as if men and their environment were questions defined by law, instead of law being a consequence thereof.

We are fond of the definition of administrative law considered as "the branch of public law that studies the exercise of the administrative function and judicial protection against it."[15] Thus, the conceptions of this branch as a science are left aside, as if they were part of an authoritative model or derived from the political theory of sacralization of the State.[16]

Regardless of the definition adopted, administrative law is directly related to power, like every branch of law. Fictions created from and by discourse have been designed to form and distort administrative law, from a simple function of organization of the State and Administration itself, until assuming and questioning its own validity in the case of the Argentina Constitution.

This is where the direct relationship between *de facto* and economic emergency doctrines lays, from the point of view of the abstraction and misrepresentation of its sources, which at certain historical periods have largely taken the Supreme Court of Justice, to accept just the force of words to legitimate what is illegal, by way of an apparent consensus, always justified in the life of Nation and State, their existence and institutions.

Here lies the challenge of our work.

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[15] GORDILLO, AGUSTÍN, *Tratado de derecho administrativo* (Administrative Law Manual) book 1, "Overview," 8th ed. Buenos Aires, FDA , 2003, chapter V-19.

[16] Quoting Garcia de Enterría and Fernández, "The simplest and most traditional definition of administrative law deems it as public administrative law; a political reality radically exempt from private administrations, at least from the legal point of view. However, from the neutral perspective of organizational techniques or work methods, both types of administration may be considered under the same unitary prism (never totally abstract and interchangeable) by the so- called Science of Administration." (García de Enterría, Eduardo y Fernández, Tomás-Ramón, Curso de derecho administrativo (Administrative Law Course), book I, with notes of Agustín Gordillo, Buenos Aires, Thomson-Civitas-La Ley, 2006, 1st ed. Argentina, page 29.)

2. *The Illusion of Language. Reality of Facts*

"There is nothing either good or bad, but thinking makes it so."
Shakespeare, William, Hamlet

Since the man has been able to control and dominate nature, beasts and then other men, from the origin of the first organized communities, and used up the resources provided solely by physical force, the power of word and discourse (religious, political and legal) have fulfilled a duty of supplement to and seduction of body, men and citizen.

From the philosophical point of view, it has been pointed out that in every historic succession mind follows life, since life did not exist in our planet until after the inorganic matter had adopted very complex shapes, "just as life did not occur on our planet until inorganic matter had reached a still further degree of complexity, so mind did not arise until organic matter had reached a still further degree of complexity, involving sense organs, nerves and brains."[17] Discourse pretends to trace domination of inorganic over organic matter: Not to be over reality.

There is a logical error connected "with the narrow analogy existing between meaning of words, terms or concepts, and the truth of sentences or propositions. It may easily be proved that the meaning of words is somehow connected with its history and origin. From a logical consideration, a word is a conventional sign, from the psychological point of view; it is a sign with a meaning established by use, custom or association. From the logical viewpoint, its meaning is, in fact, established by an initial decision, similar to a primary definition or convention, to a kind of original social contract. Psychologically speaking, its meaning was established when we learned to use it, when our habits and linguistic associations were formed." This way, a "familiar and logically arguable sense arises where the «true» or «adequate» meaning of a term is the original meaning, so that if we understand it, it is because we have correctly learned that meaning, a real authority from someone who is familiar with language. This shows that the problem of the meaning of a word is in fact related to the problem of the authorized source, or the origin, of how we use it."[18]

The force of words is nothing but the weight conferred to it by each of us and the society as a whole. Truth does not have more value than that granted by authority (political, academic, etc.), and accepted or tolerated by the community.

The Dictionary of the Royal Spanish Academy of Language defines truth as: a) being in accordance with the concept formed in the mind; b) being in accordance with what it is said, felt or thought; c) property of a thing of being in the same, unchanged status; and d) judgment or proposition that cannot be rationally denied.[19]

None of these definitions apply to science or law, as a technique.

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[17] Hospers, John, Introduction to Philosophical Analysis, book II , Buenos Aires, Macchi, 1961, page 317.

[18] Popper, Karl R. (translated by Néstor Míguez- Rafael Grasa), *Conjeturas y refutaciones: El desarrollo del conocimiento científico*, (Conjectures and Refutations: The Growth of Scientific Knowledge) reviewed and enlarged edition, Barcelona, Paidós, 2008, page 41.

[19] http://www.rae.es.

Nothing is true or certain in law. Facts model rules and cases define their scope. Truth and certainty only take place in connection with fiction and individuals. It is men, and their own power, which shape and mold discourse and make use of the legal means according to what power requires for (or the group controlling it).

FOUCAULT has clearly explained that there are always two sides of *truth*. "The first is a kind of internal history of *truth* that he corrects from his own principles of regulation: it is the history of *truth* as it is made up into or from history of science. On the other hand, I think that in society, or at least in our societies, there are other sites where *truth* is formed, where a certain number of game rules are defined, from which we see certain ways of subjectivity, object domains, kinds of knowledge and, therefore, we can make out of it an external history, external from *truth*."[20]

The single idea that it is not only *truth* what does not exist. It is impossible to learn or have access to facts, but for interpretations thereof, what puts us in a situation of crisis, fear, impotence and uncertainty. As a consequence, we "immediately feel lost, without ground under our feet. And we generally react neurotically, as affected by an attack of agoraphobia, afraid of the open and uncertain space opening to us. It is a fear that is even more intense if we leave the field of pure philosophy (in essence, philosophers have said many things and the world has not changed in consequence...) and we step into the field of politics. It is true that, once we understand that there are no absolute truths, but only interpretations, many cases of authoritarianism are unveiled for what they are; that is, the intention to impose behaviors that we do not share, in the name of some law of nature, man's essence, untouchable tradition, or divine relation."[21]

Therefore, philosophy relieves us from idols and law but, mostly, it takes us back to them.

Within the increased speed at which life is developed, we need to know what to expect, "and it is vital to make the method of truth out of this urgency... The truth is what it is true now, and not what is to be discovered in an indefinite future."[22]

There are as many signifiers as meanings, but what we conventionally accept —particularly in law— takes us to the field of fiction.

This is where reality aims at being caught within the intrinsic value conferred to words (or by the illusion alleging its existence.)

The history of these two Faulcatian *truths* is not the *truth* of history, but the degree of deformation and adaptation of *truths* that are implicitly and explicitly included in the words used, and therefore, in scientific language, and also the technical, legal language of our courts and opinions of authority. "Even though at first these may seem merely theoretical or abstract speculations, it is important to remember that language is innocuous and there is no single term evoking, at the same time, the whole system of ideas, concepts, representations and images comprised in it.

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[20] Foucault, Michel, Truth and Legal Forms, Barcelona, Gedisa, 1996, 4th reprint, page 17.

[21] Vattimo, Gianni (translated into Spanish by María Teresa D'Meza), *Adiós a la verdad* (Goodbye to Truth), Barcelona, Gedisa, 2010, page 27.

[22] Ortega y Gasset, José, *Historia como sistema* (History as a System), Madrid, Biblioteca Nueva, 2001, page 75.

Therefore, every time we speak, we are also adhering to and confirming the whole ideological universe where that word belongs to."[23]

We would like to refer to language related to knowledge of law: The language of law and the application of legal remedies to social and political disease.[24]

Who defines legitimacy and legality of these remedies? Under which consensus or authority?

Extreme situations require prompt and effective solutions; however, it does not justify nor authorize the violation of institutions or the principle of legality.

The most terrible legal aberrations are committed in times of institutional emergency. For the national case, it is not necessary that these be immersed in the monopoly of *usurping governments*.

In law, there are terms and constructions called principles or institutes, theories or doctrines. However, their power of conviction is that especially granted by Courts —and also by doctrine— at the time of exercising, applying, criticizing and justifying them (for instance, presumption of legitimacy, allowing the case to be heard in an administrative law court, institutional acts, non-actionable political matters, national interest, area reserved for administration, police power, etc.)

In administrative law —maybe more often than in other branches of law— a complex set of principles has been built, which has intended to keep a procedural and adversarial system which would answer to certain logic directly related to organization of (political) power and weighing of institutional guarantees against abuses. This system remains at a fictional level and has the appearance of mere legality, in which man's realization in society —for the collective imaginary— cannot be imagined without the intervention of justice given the lack of other Governmental powers.

It is evident that anyone having the highest number of economical resources will have access to the best lawyer, judge and authoritative opinions supporting their interests. In summary, it is all related to having access to power, withholding power, and developing the rules of the game supporting and defining such power, at a definite time and place.

Society as a whole is responsible for its acceptance or rejection. We Attorneys —a common kind at the different powers of State— do not write scripts and act within a scenario by chance, with a wide range of interesting words, where legitimate to illegitimate is paired, and where men and their vices are idealized: [25]

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[23] Yacovino, Cecilia, "*Discurso y realidad: Otra mirada sobre el debate Gordillo-Campolieti*" (Discourse and Reality: Another Look on Gordillo-Campolieti debate) RPA, 2007-1, Buenos Aires, Ediciones Rap, page 35.

[24] Cilurzo has stated that "[L]aw is not a mere legal dogmatism and decisions of the Supreme Court of Justice cannot be literal interpretation of rules, unrelated to reality; however, in order to temporize with reality, they cannot forget their supreme responsibility as governing entity and final interpreter of the National Constitution." (Cilurzo, María Rosa, "*La Corte Suprema de Justicia de la Nación en la interpretación de variables (mutables)*" (The Supreme Court of Justice in the Interpretation of Variables (Mutable), LL, *Suplemento Constitucional*, 22-VIII-06, page 17.)

[25] "The essential thing in ecstasy of [will] is the feeling of increased power and profusion. Out of this feeling we impart to things, we constrain them to accept something from us, we force them by violence; this proceeding is called idealizing. Let us here free ourselves from a prejudice: idealizing does not consist, as is commonly believed, in an abstraction or deduction of the insignificant or the contingent; forcing out of principal traits, in a formidable way, is, rather, the decisive characteristic, so that the others thereby disappear." (Nietzsche, Friedrich, "A psychology of the artist" in Twilight of the Idols, translation into Spanish: Buenos Aires, Letras Universales, 2005, page 885.)

The Big Constitutional Theater. According to JAURETCHE, public law is a trick like theater curtains. It is a decoration while the play is being shown. The play lasts until the presence of effective democracy —people's—, makes its representation inconvenient for the «company» that has mounted it.[26]

We usually define and explain concepts related to our competence, although in this case we omit that our proximity to the sovereign is much closer compared to other professionals. It also applies to human misery.[27]

Law is conceivable as a management and social control technique of particular cases[28] including the human phenomena as a social, economic and political gender of its kind.

Law shares its subject of study with different social sciences —men and institutions— but its function as a technique relates to social control and organization, as an evolution of primitive social bonds whereby institutions and rules derive from religion and custom. Even when we can think of an international system of human rights, it is difficult to accept that law is a "set of knowledge gathered through systematical structured observation and reasoning."[29]

History proves that no "general law and principles are derived" from it, but every legal system has their own, which vary from time to time and from man to man. Perhaps, certain principles may be shared, but each political organization takes them in the most convincing manner for the benefit of the interests of the Nation or those who control it.

In principle, historical conscience (conscience of the history as a whole, history of science and of law, and everything in between) seems neutral, "deprived from all passion, solely focused on the truth. But if it examines itself and if, more generally, it interrogates the various forms of scientific consciousness in its history, it finds that all these forms and transformations are aspects of the eagerness to know: instinct, passion, the inquisitor's devotion, cruel subtlety, and malice. It discovers the violence of a position that sides against those who are happy in their ignorance, against the vigorous illusions with which humanity protects itself, prejudices against everything connected with the dangers inherent to doing research and the disturbance in discoveries."[30]

So as to set a conventional starting point,[31] legal knowledge may be summed up or simplified in a set of regulations and systems, case law and opinions

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[26] Jauretche, Arturo, "*Manual de zonceras argentinas*" (Manual of Argentine Nonsense) Complete Works, v. 2, Buenos Aires, Corregidor, 2010, 1st edition, 11th reprint, page 151.

[27] Whatever the field of law we work in, every day we are witnesses of human miseries in full splendor; in many cases, as an expression of our failure as a society.

[28] It has been affirmed that law is a science of particular cases (Gordillo, A,. Introduction, chapter III -3; with quote of García de Enterría, Eduardo, in his preface Viehweq, Theodor, Tópica y jurisprudencia (Topic and Case Law) Madrid, Cívitas, 1964, page 12: "Law Science has always been, is and cannot cease being, a Science of singular problems.") We accept singularity of law as a technique, but not as a science.

[29] http://www.rae.es.

[30] Foucault, Michel, Nietzsche: Genealogy of History, Valencia, Pre-texts, 2004, 5th ed., pages 69-70.

[31] In Nietzsche's words, "In some remote corner of the universe, poured out and glittering in innumerable solar systems, there once was a star on which clever animals invented knowledge. That was the highest and most mendacious minute of "world history"—yet only a minute. After nature had drawn a few breaths the star grew cold, and the clever animals had to die." (Nietzsche, Friedrich, "On Truth and Lie in an Extra-Moral Sense," in *Sobre verdad y mentira* (On Truth and Lie) Buenos Aires, 2009, 1st reprint, page 25.)

of authority, dating back from Roman times and related to social, political and economic organization of human society at different times and spaces.

This unique knowledge does not gather scientific knowledge typicity, even though it may share methods with other social sciences and it may seek to include it as an independent branch.

Legal knowledge may not limit the social function of law as a technique of organization, order or realization of men in democracy.

What does democracy represent for Argentine Law? What value does democracy have for the Argentine citizen? Who do actually bear the cost and responsibility of living in democracy?

Democracy, as such, is a new concept for us and our legal experts who have lived, suffered and struggled for law within a scenario filled with political, economic and social breakdown, where the value of our institutions and particularly that of the Constitution itself has been of secondary importance, under usurping and *de jure* administrations that have easily destroyed the supremacy of fundamental law for the sake of supremacy of particular interests.

The formal or fictional agreement of every nation in the Argentine Republic has not been present for many years; as occurs in most governments with access to power —whether by institutional means or in violation thereof— have chosen to disregard national union and consolidate justice; instead, they have devoted themselves to ephemeral indulgences of culture leading to an institutional and political vacuum. The success of a true democracy, whether from the political, economic and social point of view, is only conceivable in a consensual space with as large a majority as possible.[32]

Latin American democracies, restored in the 80s and 90s, are heirs — or prisoners — of past dictatorships. Coercion games at the political and cultural levels, implemented by authoritarianism, do not affect them less than institutional arrangements established by such regime.[33] Even the repudiation to such inheritance carries the repudiated regime around.[34]

Latin America must face democratic imperfection, permanence of authoritarian spaces, public power deficit and institutional precariousness as recurring characteristics "often, also the source of general discomfort and an evident political disappointment."[35] In South America, two hundred years ago, "theoretically representative regimes were deviated, lost, mutilated. They faced fraud and tricks, false appearances and simulations. However, the fire of democracy was never extinguished. Deceptions were customized to perseverance, which in some occasions seemed pathetic or desperate. However, for more than twenty five years, States of the continent had to deal with the heritance of dictatorships, *coup d'état* attempts, institutional turmoil, intense social confrontation, economic collapse, dramatized alternation and truncated presidencies within a framework of representative systems considered vulnerable and unsteady. [Latin American] democracy withstood it very firmly, as time works for democracy, even in the shade of dictatorships. Its permanence, by itself, is a

[32] Gabetta, Carlos, "Argentina Cromagnon," Le Monde diplomatique, Year X, number 114, December 2008, page 3.
[33] Rouquié, A., quote, p. 15.
[34] Rouquié, A., quote, p. 115.
[35] Rouquié, A., quote, p. 16.

source for citizenship. Undoubtedly, that's the other side of the democratic mystery."[36]

Democracy has been associated to our release from the prison of ignorance, dependency, tradition and divine law, thanks to the combination of reason, economic growth and popular sovereignty.[37]

In our capacity as citizens and lawyers, *deconstruction* of law requires rethinking the material definition we long for out of democracy, and a right we expect to assume, a guaranteeing function in this formal *iter* we are engaged in, towards materialization thereof.[38]

Democracy can be defined as a set of guarantees against upraise or continuation in power of governing leaders opposing the will of the majority. Nevertheless, in this globalized world where political interests of society are discussed in the market and travel at the speed of information, democracy may seem to subsume into it, where the citizen is a customer or consumer.

There are two distinct issues in political modernity: the rule of law and the idea of popular sovereignty. In both cases, from the application of the *de facto* doctrine (or that of the usurping government), these have been evidently dishonored.

French Revolution introduced two base principles in Occidental political thought: first, the principle of legality of action of public power and, secondly, the principle of freedom; both interrelated in Section 4 of the Declaration of the Rights of Men and Citizen of 1789.[39] They both play an essential role in democracy and presumption of act of government constitutionality.

Therefore, the simple definition of representative government as government by discussion is profoundly inadequate. "It conceals the fact that, in this type of government, persuasive discussion has a specific function that has not to do with making decisions, nor does it necessarily have to do with offering suggestions for making decisions, but it is only related to obtaining consent in a situation where no individual will prevail over that of others. Once again, we see here the critical role of entering judgment: making suggestions is not necessarily an initiative of the debating body, since no suggestion is adopted unless where it has been submitted for approval before the relevant authority."[40]

The analysis, practices, and specific institutional provisions outlining the basis of representative government proves that in opposition to common sense and democratic ideology statements, representative democracy is not an indirect or mediatized form of government by the people. This analysis having been made,

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[36] Rouquié, A., quote, p. 351.

[37] Most sense and scope granted to the concept of democracy is derived from Alain Touraine, What's democracy? (*Qu´est-ce que la démocratie?*), Buenos Aires, Fondo de Cultura Económica (Economic Culture Fund) 1995.

[38] Regarding this subject, see: Cohen Salama, Claudio, "*Bases epistemológicas y metodológicas para una teoría interpretativa del Derecho Administrativo*" (Epistemological and methodological basis for an interpretative theory of Administrative Law) JA, 2003-I-1375.

[39] (García de Enterría, Eduardo and Fernández, Tomás-Ramón, *Curso de Derecho Administrativo* (Administrative Law Course), book II, Madrid, Thomson-Cívitas, 2005, 9th edition page 571.

[40] Manin, Bernard, "Modern Democracy, The principles of representative government" an article developed with slight modifications in the book titled Principes du governement représentatif, Calmann Levy, Paris, 1995. (Published in: http://www.politica.com.ar/Filosofia_politica/Nuevos%20Filopol/manin_democ_mod.html.)

it is the representative democracy positive feature that comes out: the main role hereof is played by collective judgment.

This is the main issue of the debate: Everything related to community government may be controlled by people, and it is also their responsibility to run out of control or judgment, or incur in excess and abuse.

Law is part of those issues that may be controlled by people. Therefore, not only should we analyze and split theories comprising the law, but it is also a duty of judges by the time they enter judgment, and also that of attorneys where they perform functions and, in both cases, they share legal knowledge, whether at academies, in legal magazines, or in books and classrooms. Even though it may appear a dogmatic analysis of the legal phenomena, it is an analysis required in order to split the basis of knowledge and legal discourse.

The challenge of administrative law "does not only imply creating absent mechanisms or improving existing mechanisms, and even going back in time to cure all setbacks suffered, but it implies integrating a contingent, harmonic and interrelated system; to eliminate contradictions, unnecessary overlapping situations, conflicts and superfluous jealousy, controversies related to interpretations and control interstice, «no man's land» where arbitrary behavior or cases of abuse of power may -and actually do- happen."[41]

We should avoid getting intoxicated with theories of power, and what can be done in detriment of freedom; we should follow the initial premise: what is the purpose of administrative law and what it is for, refraining from putting administrative law at the service of authority and power.[42]

[41] Gordillo, *Tratado de derecho administrativo* (Administrative Law Manual), book 1, quote, chapter II -35.

[42] Gordillo, *Tratado de derecho administrativo* (Administrative Law Manual), book 2*, La defensa del usuario y del administrado* (Defense of Users and Administrated People), 9th ed., Buenos Aires, FDA, 2009, chapter V-4.

3. *Functions of Law: Political Power Organization, Legitimization and Limitation*

Reality is shown confused, vast and infinite, with the observer (in this case, the legal operator) deciding what and how reality is observed and analyzed. There are as many laws—or legal systems, to be technically correct— as organized human communities there are, have these been more or less developed in history. In summary, they all have the same purpose: to guarantee social peace. At different periods of time, law may be confused with moral, ethics and religion. However, law is not more than a cooption and community control technique, with a special cooption system established for compliance purposes.

That control, according to DUVERGER, [43]grants law a triple function against power: it organizes, legitimates and limits power. And law acquires an indisputable prominence in this field of legitimacy: it justifies power exercised over the social system, from the formal course of politics.

In the beginning, everything was chaos and mayhem —the state of nature fiction—until men organized and created a civil society (State), by entering into a contract —another legal fiction now taken to the political field.

In order to "understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty."[44]

When did it happen? Its chronology is not very accurate; however, we may affirm that the modern State appears after signing the Treaty of Westphalia in 1648. But if the abovementioned state of nature was a state of freedom, not of license or licentiousness, the civil state (Rule of Law) could not be like that, particularly for the third state created in that process: the State itself.

When talking about a formal and material Constitution, the increase of normality due to the increase of authoritative regulations as planned in modern Constitutions is closely related to the need to produce, according to plan and with a conscious drafting of rules, a normality and predictability increasingly greater in social relationships.

This is it because "cultural development is always conditioned by an increased division of labor and, therefore, an increase in reciprocal dependency of

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[43] Duverger, Maurice, *Instituciones Políticas y Derecho Constitucional* (Constitutional Law and Political Institutions), Barcelona, Ariel, 1970, 5th Spanish Edition, page 40 and ss., where the author states: "[l]aw is an element of power, a means of power action, a type of power. It organizes power, institutionalizes power, and contributes to legitimacy. However, it also includes elements of guarantee against power."

[44] Locke, John (1931 translation into Spanish on the French version of alfereces de caballería C.C. y L. C.), "Of the State of Nature" in *Tratado del gobierno civil* (Treatises of Government), Buenos Aires, Claridad, 2005, 2nd ed., page 11.

especially separated social groups forced to establish close relationships with one another. Intensification of division of labor and interchange requires additional legal system safety, called "legal security" by legal experts. Legal system safety and legal security are mostly claimed on the basis of a plan and the predictability of social relationships. In order to reach this intense and deep rationalization, where the geographically limited traditional facts are insufficient, social relationships, particularly political, economic and military relationships, must be increasingly subjected (whether in its subject matter or territory) to a single order, i.e. these must be governed from the center, in a scheduled manner, and regulated; thus, normalized.

For the time being, the final result of this formal process of social rationalization is the current State, that has organized on its own the administration of justice and coercive execution thanks to its body of officers. Additionally, it has centralized legislation particularly by means of written Constitutions, and important codes as from 17th to 19th Centuries" [45].

Under what grounds did men partially give in some of their rights and confer them to an unbiased and capable individual?

There are and there have always been both of fact or law (*de facto* or *de jure*) as many political and legal systems as we can imagine and while this is important, it is not the most relevant issue.

What really matters, in our humble thought plenty of subjectivities, is taking into consideration the model chosen by each society to accept that the power granted is legitimate, which is not a part of human nature, but the artificial construction of theories of power for each society in particular.

Men —and society by logic inference— do not have *nature, but they have… history.* "Or, expressed differently: what nature is to things, history —as *res gestae*— is to men. Once more, we find the possible application of teleological concepts to human reality. *Deus qui hoc est natura quod fecerit*…, in the words of San Agustín. Man finds no other «nature» than what he has himself done."[46] We are, then, the reflection and representation of facts of the past and ghosts of our present. They trace and delimit our future.

Legal discourse addresses the need of a group of power adapting to circumstances of time and space of that group of power. *De facto* and emergency (or necessity) doctrines responds to that overcoming need of an extreme situation with a dominant group (direct or indirect holder of power) as the main affected party, under the argument of public interest or existence of Nation itself.

In the strength of discourse and in the face of such assumptions, private interest —the interest of each citizen in particular— gives way to the defense of public interest. If political power of the community protects a social interest with legislation, that interest is "public." However, individual interest is called "private."

Public interests are social interests protected by "the State", as expression of politically organized bodies of power in the community.[47]

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[45] Heller, Hermann, *Teoría del Estado* (Theroy of State) Mexico, Fondo de Cultura Económica (Economic Culture Fund), 1968, 6th edition, page 272. Emphasis added.

[46] Ortega y Gasset, J., Historia… (History...), quote page 93.

[47] Ross, Alf, *Sobre el Derecho y la Justicia* (On Right and Justice), Buenos Aires, EUDEBA, 1994, 5th ed., page 351.

The validity criteria of these concessions from public to private (or the precedence of the second group of interests over the first group) are only valid if they are created *legally* from the political power chosen according to constitutional rules of organization set forth in a definite community; i.e.: if this power is *legitimate*.

In every state of exception, suspension or deferral of rights (whether civil, political or economic) shall be valid from the formal perspective if they are consistent with preestablished procedures thereof. From the material point of view, this occurs upon compliance with reasonableness and proportionality principles.

Again, we find the legality-legitimacy dilemma, and the autonomy which, from the legal discourse and case law enacted by the Argentine Supreme Court of Justice, has been intended to give to each of them despite of the fact that, in the Rule of Law both must be verified, as described, at both formal and material levels, simultaneously.

4. *Legality and Legitimacy*

It is necessary to make a distinction between *legality* and *legitimacy* of power for clarification purposes.

Legality of power means "conformity with the current positive law. Legitimacy of power involves conformity with theories of power accepted at a certain time. For citizens, legality is a sign of legitimacy. Therefore, legality of power involves legitimization. Only in the case where such legalization is impossible, the usurping party turns to theories of legitimacy."[48]

The importance of concepts *legality and legitimacy* of power (and political system) is directly related to the stability of any democracy, together with the idea of *efficiency*, understood as the *true* action at the level where the system satisfies basic functions of government as considered by the majority of the population and including powerful groups such as finance and Armed Forces.

Legitimacy implies capacity of the system to generate and maintain the belief that current political institutions are the most adequate to society. The degree of legitimacy of current democratic political systems largely depends on how key events that historically divided society were solved. **While effectiveness is primarily instrumental, legitimacy is evaluative.**[49]

Discrepancy between *legality and legitimacy* originated in monarchist France by the time of Restoration Age, where a surprising antagonism was established between historical legitimacy of a restored dynasty and Napoleonic Code legality, which was effective.[50]

In the Argentine case, in our recent existence as State, we should ask:

What values served as the basis for the installation of usurping governments in our country? Were these the same that formed the basis to create the 1853-60 Constitution?[51]

Who, but the authority elected by constitutional procedures represents—in fictional theory of political representation— the interests of society?

Where is the ideal image of constituted power expressed? Anywhere except for the Constitution of each country. However, in the Argentine dogmatic-legal construction, the theory of legitimacy set aside the Constitution, with the *de facto* doctrine, including new values or giving priority to other interests, under penalty of the health of the Nation.

NICOLÁS MAQUIAVELO said "there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things; because the innovator has for enemies

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[48] Duverger, quote, p. 41, adding that the usurping party affirms that "like the author of the French Coup d'état on December 2nd, 1851: «I have only come out of legality to get into law», taking this last voice in the sense of «natural law» […] and «legitimacy»."

[49] Lipset, Seymour Martin, *El hombre político. Las bases sociales de la política* (Political Man. The Social Bases of Politics), Buenos Aires, EUDE BA, 1963, page 57.

[50] Schmitt, Carl, "*Introducción," Legalidad y legitimidad* (Introduction: Legality and Legitimacy), Buenos Aires, Struhart, 2002, page 17.

[51] In another work, we highlighted the fact that maybe the moral dilemma mainly involves "assuming our constitutional reality and values with which we seek to live that reality. It is time to mature. It is time to decide without superficial moral, prejudice or pride, time to decide, in any case, our destiny..." (Bonina, Nicolás and Diana, Nicolás, "*Los superpoderes al jefe de gabinete*" (Superpowers to the Chief of Cabinet) LL, Actualidad Supplement, 27-VII -06, page 1.)

all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new." [52]

The reason of the State[53] was applied in pure terms in our country for the purposes of avoiding national disintegration and loss of values of Occidental and Christian society, assuming a leader role of armed forces in cases of political immaturity of citizenship, paving the way towards democracy and any authoritative argument we might imagine, since justification of the use of force in some cases, as that of the *Coup d'état* in 1955 was based on the principle of right to resist pressure (*jus resistendi*.)

However, citizens with voting rights had not elected them to play such an important role, but the deficiency of origin was cured by the Supreme Court of Justice case law,[54] which was subsequently criticized, followed and developed by National authors of opinion.[55]

BIDART CAMPOS —surprisingly and paradoxically— affirmed on forced movements that, "at the end of the last Century and the beginning of this Century, these movements were carried out invoking purity of vote and vices of «system» and «power monopoly», between 1930 and nowadays, characterized by those who, with additional skills and strategies, reached the loot of victory, displacing constitutional governments.

But we should provide an explanation: leaving aside the opinion on the intention of each *coup d'état* and its participants — because history criticism must be cautious when entering the environment of subjective motivations and claims as to the success derived from those who take advantage of the situation — and making as objective as possible the narrative on dishonest or viced politics against which armed forces have reacted against, the parable of military riots records a fully justified revolution in the exercise of the right of resistance to oppression. In September 16, 1955 the Liberating Revolution overthrew Peron and changed democracy for a totalitarian regime.

Besides the discrepancies concerning the management of this revolution's government, the movement itself put an end to a stage that boosted the ego of the highly individualistic Creole individuals characterized by the leadership of power,

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[52] El príncipe (The Prince), Buenos Aires, Distal, 2003, chapter VI , pages. 42-43

[53] "For that reason, let a prince have the credit of conquering and holding his state, the means will always be considered honest, and he will be praised by everybody because the vulgar are always taken by what a thing seems to be and by what comes of it; and in the world there are only the vulgar, for the few find a place there only when the many have no ground to rest on." (Maquiavelo, N., quote, chapter XVIII, page 97.)

[54] One example will suffice to prove it: so we shall note that the Supreme Court of Justice has also held that "[p]rovided it is critical for the operation of State and taking derogation of representative principles to the minimum, de facto government is empowered to adopt legislative provisions which, except for Congress ratification, are not effective for the future once the country has come back to normal, without detriment of the attribution of Courts of Justice to reestablish constitutional principles governing legal certainty and fundamental rights system of civil life if they were unknown by such provisions. However, such government is not empowered to validly create sanctions or increase existing penalties." (CSJN , Anders, Carlos et al, Decisions, 204: 345, 1946.)

[55] In this work, we have tried to quote some national authors, critical or not so critical, to de facto doctrine, beyond reproach or responsibilities, aiming to highlight legal discourse notes and its construction in different fields. (Political, case law and academic.)

and ended with the system that a large sector of political thought has called the «second tyranny».”[56]

Far from intending to start a debate or anachronistic judgment on opinions and past thoughts, we highlight that we cannot affirm at the same time the legitimacy of certain *coups d'état* and the *illegitimacy* of others. Neither Gods nor demons: the single support and *pseudoscientific* justification authorizes both actions and justification of others, within the same terms.

It is a trip of ideas towards collapse, not only in institutional but in social terms, given that if the first and most important rule of access to the power through consensus of the majority may be violated, the remaining legal framework supporting validity and efficacy of the legal system is weakened, until it disappears as recognized practices.

As a consequence of the combination of what both ideology and feeling that the history lived causes, the legal expert loses its alleged objective character and returns to its simple condition of man and citizen.

Argentine institutional history has proved it in the 20th Century. Such affirmation is not an accusation, it is far from that. It is the expression of the reality of facts and the role the legal expert assumes in modern society. As Ross said, “[t]he role of the legal expert as legal politician involves serving as a rational technician to the extent practicable. In this role, he is not conservative, nor progressive. Like many other technicians, the legal expert merely puts its knowledge and ability at the disposal of others; in this case, at the disposal of those who are exercising control of political power.”[57]

The problem involves setting a limit on the technical function of the legal expert when we aim at keeping the legal system the main source of which -the Constitution-, has been violated by those governing with the sole support of force as legitimating element.

Even though it may look obvious, it is necessary to study a country in order to know about it.

“However, if we see the everyday experience, we must agree that most co-citizens think exactly the opposite. And if we add that it is necessary to go back to the origins, follow the internal evolution closely, and make a conscious opinion on the contemporary phenomenon, it is not impossible that a discreet smile is the only answer […] **the book of life remains closed for those who do not intend to decipher it.**”[58]

Law is a part of history and the social phenomenon, and maybe it is the best representation of pathologies of legal systems in general; Latin American, in particular.

Unfortunately, all along history, the role of law was overcome by misrepresentation and it was applied with different purposes, which under the pretext of scientific knowledge have balanced the political scale for one side or the other. This scale is affected not only by our political-institutional-economic crisis,

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[56] “*Diagrama histórico-constitucional de las fuerzas armadas en Argentina*” (Historical-constitutional Chart of Armed Forces in Argentina) ED, 47-843. We should ask ourselves, with the respect and admiration of who was one of the greatest constitutionalist and legal expert of the 20th Century: How can we justify a coup d'état without justifying all of them at the same time? How can we defend the Rule of Law if we accept institutional breakdown as normal? When is it lawful to knock on the doors of quarters and when is it not? Where is it established?

[57] Ross, A., quote, page 364.

[58] García, Juan Agustín, *La ciudad indiana* (Indian City), Buenos Aires, Emecé, 1954, page 11.

but for our recurrence and persistence to fail as social network, in a basic minimum consensus which for men of law should be included in our National Constitution. Although in this context, in borderline situations, it is intended to be found in quarters or in the street, in the work of some legal expert or opinion maker, seeking to misrepresent reality and popular election with the power of discourse or words of strength (economic and political power).

5. *Mythology*[59] *of Our Words*

Whether myth or reality, the Constitution limits the primitive situation of (Argentine) society in which the Nation was politically disrupted, establishing a single system (electoral) guaranteeing that what we consider power is exercised by those meeting the qualifications required to be seated where they should, with the consensus apparently provided by vote, by the majority rule, where majority governs and the -**non elected-** minority exercises control.[60]

At least, this is valid for most current representative democracies, these being the predominant form of government in the contemporary era.

Legal discourse has been built around a mythical and unclear past, with fictions based on our institutional origins to make up a collective moral and a future of prosperity.[61]

In order for the (social) pact "may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key to the working of the political machine; this alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical, and liable to the most frightful abuses."[62]

It shall only be required that the constitutional and legally established method has been chosen in order to get to public positions (offices) according to the appropriate procedures. This is so simple that maybe it is too complex to be understood by we Argentines as a society.

For almost two hundred years, we have been questioning and re-questioning at ourselves what is the best system available, but we do not care about the price of freedom and the value of respect and tolerance in the social coexistence or development of democracy.[63]

From the dawn of our country, Argentines not only learned about absence of respect for own institutions and regulations, but also about the adoration of false idols who allowed themselves to avoid an initial vice connected with the way they took office, becoming truly feet of clay giants.[64]

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[59] In its first meaning, it is defined as a set of myths of a town or culture, particularly Greek and Roman. (http://www.rae.es.)

[60] ROUSSEAU, JEAN-JACQUES, El contrato social (Social Contract) Barcelona, Altaya, 1997.

[61] The National Constitutional preamble is a precise reflection thereof.

[62] ROUSSEAU, J.J., The Social Contract, quote from pages 18-19.

[63] ALAIN TOURAINE has developed this idea in great detail, together with other ideas related to democracy and its relationship with development and restoration of freedom, equality and fellowship values, in What's Democracy? (original title (*Qu'est-ce que la démocratie*?), Buenos Aires, Fondo de Cultura Económica (Economic Culture Fund) 1995.

[64] Agustín Gordillo has accurately stated that our constitutional system has a dual fragility: "the fragility of a violated Constitution with mechanisms of the State unable to react on time in order to make corrections, and much less prevent infringement to constitutional values, and the fragility of the system created in violation of higher regulations. **Thus, the society perceives that this system violating the Constitution is worthless and, therefore, does not feel the same respect or observance towards it, which are the foundations of the legal system operation**." (*La administración paralela. El parasistema jurídico administrativo* (Parallel Administration. The Legal-Administrative Parasystem), Madrid, Cívitas, 2001, 3ª reprint, pages 27-28. The highlighted section is not included in the original text.)

In 1861 the military force led by Bartolomé Mitre overthrew President Derqui government and established Mitre as the *usurping authority* of the political power, with all the consequences derived therefrom.[65]

Through an executive order dated April 12, 1862, "General Mitre, in his capacity of *leader of the Executive Branch*, set forth the conditions under which he would carry out functions, stating that «it is required and convenient to regularize the exercise of these powers determining means, manner, object and extension under which the interim executive branch powers must be exercised, while the above mentioned national Congress decides as appropriate». Therefore, «making use of authorizations spontaneously delegated by peoples», it resolved that «regarding the internal system, the duties of the leader of the executive branch shall be limited to maintaining public order, providing for respect and complying with the National Constitution as the provinces see fit, taking care of safety of such provinces borders using military forces under their order, and the organization of which has been expressly authorized by such leader, under the loyal and regular collection of national profits the leader shall comply with, taking care of equitable investments, with the obligation to submit a detailed account to Congress where appropriate, as well as oversee other urgent issues as required» Once Congress was established on May 25, 1862, by virtue of the provisions of the law on June 3 same year, it decided that General Mitre would exercise «powers related to the Executive Branch, until the legislative Congress of the Republic adopted the appropriate decisions. » Congress scrutinized the presidential election on October 5th and shortly afterwards; General Mitre assumed the constitutional executive branch, closing the reconstruction stage derived from the Battle of Pavon."[66]

Mitre's vision of the Argentine history has minimized this fact but, unfortunately, it represents the kickoff of a certain possibility of gaining access to power without respecting established procedures therefore.

History and, in general, "historical disciplines have ceased to be the cornerstone of continuations other than apparent successions; now these systematically compromise discontinuation. The great mutation that marked them in our times is not the extension of our domination to economic mechanisms known for some time. It is not the integration of ideological phenomena either, or ways of thought, or a mindset: 19th Century has already analyzed them. It refers to the formation of discontinuation: the step from obstacle to practice; this discourse analysis of the historian who ceased to see this as the external fatality which required to be reduced but the operative concept used; the inversion of signs whereby the historical reading is no longer negative (its reverse, its failure, the limit of power), but the positive element defining its object and validating the analysis. What history has become should be understood as from the real work of historians: a regulated use of discontinuation for the analysis of temporal series." [67]

In the analysis of internalization of law and history, interpretation originates *historization of rules* where it adapts sources to new circumstances, discovering unprecedented possibilities and setting aside what is overdue or

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[65] See González Calderón, Juan A., *Curso de Derecho Constitucional* (Constitutional Law Course), Buenos Aires, Ed. Guillermo Kraft, 1943, page 119 and ss.

[66] Linares Quintana, Segundo V., *Derecho Constitucional e Instituciones Políticas* (Constitutional Law and Political Institutions), book II , Buenos Aires, Abeledo-Perrot, 1970, pages 520-521.

[67] Foucault, Michel, Discourse of Power, México, Folios, 1983, pages 90-91.

expired. Given the extraordinary elasticity of texts, even in the case of complete indetermination or ambiguity, the hermeneutical operation of declaration has considerable freedom.[68]

What's the elastic limit of our Constitutions and their institutions when the basis or support defining the existence of a Rule of Law; i.e., when consensus of the majority is broken by force and it becomes a common practice? This phenomenon was repeated all over Latin America for most of the 20th Century and at least deserves consideration on the civic responsibility and theory of power.

In the Argentine case, the first action of civic-military violence[69] would later on be repeated in 1930, 1943, 1955, 1962, 1966 and 1976, with different characteristics and modalities, but always with the common note that the power exercised was conferred in each case, only based on the force sought.

When a government —not an officer, I state— initiates through force and not by vote, a legal and media engineering is required to legitimate the original vice and, therefore, provide legality to the set of institutions, officers and actions derived from the exercise of power.

Therefore, everything that IS "must have a nature which is essential and peculiar to it, by virtue of which it is what it is, which is proven in all of its actions, and the manifestations of which are provoked by external causes; while on the other hand nature itself is by no means the effect of those causes, nor can it be modified by them. But all this is just as true of man and his will as of all other beings in nature,"[70] and also applicable to the institutions they created.

We Argentines should not take pride, among other things, on the creation of false knowledge and theories to justify ourselves of everything and to everybody, but most importantly, to ourselves. There is nothing worse than believing our own lies. The intellect, as a means for the preservation of the individual, unfolds its chief powers in simulation; for this is the means by which the weaker, less robust individuals and societies preserve themselves, since they are denied the chance of waging the struggle for existence with horns or the fangs of beasts of prey.[71]

We are prisoners of our own lies and failures, and the legal, political and social parasystem currently existing which, nowadays without *coup d'état* or dictatorship regimes, assumes the position of domination of the new system—a paradigm—, leaving aside the system embodied in the Constitution and laws of our country. Therefore, to recognize "the importance of the imaginary does not imply abandoning the whole field of analysis. Focusing the attention on the mythical phenomena is, in the movement itself, a reductionist provocation that would be erroneous to omit. Verification serves as warning." The irrational, the intelligible,

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[68] Bourdieu, Pierre, "*Elementos para una sociología del campo jurídico*" (Elements for Sociology in the Legal Field) in Bourdieu, Pierre and Teubner, Gunther, La fuerza del derecho (The Strength of Law) Bogotá, Siglo del Hombre Editores, School of Law of the University of Buenos Aires, Ediciones Uniandes, Instituto Pensar, 2000, page 178. And adds that "[i]n hermeneutical terms, our interpretation is conditioned by pre-understanding or preconceptions of the world, our prejudices in the sense of previous ideas to the world we know."

[69] We say civic-military because in each military insurrection action there were civil, academic and partisan sectors which collaborated with at some degree, whether by action or omission.

[70] Schopenhauer, Arthur, *Ensayo sobre el libre albedrío* (Essay on the Freedom of Will). La libertad, Buenos Aires, Gradifco, 2005, page 73.

[71] Nietzsche, F., "Sobre verdad…" (On Truth...) quote, page 27.

as members of a mythical reality will always escape the most original and strictest analysis.[72]

This is not original. Many voices have been raised and are raised at present to claim a crisis of values in society and a generalized non-compliance with the legal system. "This is not new, it has always been present, and in fact the magnitude of the phenomena has not been sufficiently perceived, and deepest reasons are not recognized either; diagnosis are circumstantial and superficial, and at the most they suggest a stricter application of Constitution and legislation, which does not seem to occur integrally."[73]

This work does not aim to impose values on society. It involves vindicating issues related to discourse in our reality, being honest with ourselves.

[72] Girardet, Raoul, Mitos y mitologías políticas, (Political myths and mythologies) Buenos Aires, Nueva Visión, 1999, page 23.
[73] Gordillo, A., *La administración paralela*.., (Parallel Administration) quote page 13.

6. *Coup d'état (Fiction of Revolution)*

"If chance will have me king, why, chance may crown me."
SHAKESPEARE, William, *Macbeth*, First Act, Scene III

A part of the Argentine institutional decadence is born and lies, to the best of our knowledge, on the so-called *de facto* doctrine used by the Supreme Court of Justice from 1930,[74] but developed by important argentine legal experts and defended by the press in each occasion the institutional break so required.[75]

In this case, legal discourse is, as such, relevant.

Under absence of respect to constitutional means and procedures for legitimate access to power, opinions of authority and case law have tried to fill the institutional gap, with pseudo-institutional patches, as we may call them, for instance, the "Agreements" of the Highest Federal Court.

SÁNCHEZ VIAMONTE stated that "there are no *de facto* governments. Government is an institution, and every institution is *de jure* in nature. A *coup d'état* does not change government, but governors or officers, and if a legitimate and true revolution is sought, it may be obtained through the paths Constitution has marked for its reform, because true and legitimate revolutions arise when they derive from true popular will of the majority. Even if a decision, mutiny or military riot has the consent of the majority of the people or is in accordance with the fundamental legal system, it is bound to respect the Constitution and applicable laws. Given that it is impossible to disregard Law, actions must be adjusted to the existing law in institutional organization." [76]

SÁNCHEZ SORONDO, explained that "we talk about *de facto* governments as from authoritative opinions based on the old English «common law», developed at the administrative level by American case law and systematized in France with similar scope by Gaston Jeze […] it is about the overthrow of governments allegedly transgressing guarantees and usurping institutions set forth by Constitution. The authors of the *coup d'état* usually do not intend to provide an ideological basis other than the constitutional order. Although they actually violate

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[74] In the famous Agreement dated September 10, 1930, Decisions, 158: 290 (1930) and repetition of the Agreement dated June 6, 1943, Decisions, 196: 5. (1943.)

[75] Institutional breaks have not been an exclusive Argentine asset, like the construction of legal and political theories to support and legally include the unlawful notion, without consensus of the majority. In particular, "1923 in Spain, 1924 in Chile and 1930 in Brazil, an armed uprising dissolved Congress and put an end to a long period of normal operation of Parliament. Thus, a constitutional State crisis arises in all these countries which, among other manifestations, affect the Parliament in both main functions: legislative and supervisory. With respect to the Parliamentary law, stated in the Constitution, other types of legislation falling on law subjects are developed, but they are enacted without intervention of the Parliament, which has been repeatedly dissolved. This may be called extra-parliamentary law […] At this point the Argentine case is highly illustrative. Between 1930 and 1983, the Congress was six times dissolved and many others restored. Therefore, there is an alternation between constitutional and extra-constitutional governments and in this subject, a continuous boom of executive orders versus laws." (Bravo Lira, Bernardino, "La ley extraparlamentaria en Argentina 1930-1983; leyes y decretos-leyes" (Extra-parliamentary Legislation in Argentina: 1930-1983; laws and executive orders) LL, 1990-C, 1193.)

[76] SÁNCHEZ VIAMONTE, CARLOS, *Doctrina de la revolución y doctrina de facto* (Revolution and De Facto Doctrine), Buenos Aires, Claridad, 1943, page 169. Beyond the problem of words, the truth is that no usurping government derived from different *coup d'états* occurred in 20th Century in Argentina managed to generate a true revolution, whether in greater or lesser degree. However, they always kept a partial validity of the Constitution.

the system, they do not intend to destroy it. On the contrary, the justification involves assigning misconduct, ineptitude or despotism to holders of legality, who according to the words of victors, are solely responsible for the grievance to Constitution, in whose defense it was an unpleasant necessity, required to take power by force, temporarily."[77]

From the constitutional law point of view, the difference between *de jure* or in law government, and in fact or *de facto* government lies in the original title. The first refers to the government that has obtained power as of right, pursuant to the procedure set forth in the Constitution. However, the second case refers to the pacific action of public service, it is not a power as of right, but a power derived from a fact not contemplated by Constitution, with the agreement —at least tacit— of people.

A *de facto* government must not be confused with the usurping government, "one that has taken power with violence, used to keep power, without title or right and violating constitutional regulations."[78]

It has been said that this confusion is not casual at all. However, it is absolutely casual. Within the *power of discourse* — and of the speaker— the meaning of words is often misunderstood by those uttering them. Strength —*the holder of power*—defines discourse and appropriates it, always surrounded by ideology irretrievably related to words, but as we may see, not related to Constitution.

It has been emphasized for a reason that "every *de facto* government that overthrows a *de jure* government needs to overcome its obvious and evident illegality covering itself with the veil of legitimacy provided by the formal adherence to the system. Since the occupation of power by violence is a scandalous fact deeply affecting the social coexistence built upon prestige of the judiciary and non-violated rules, *de facto* governments withstand a «*capitis diminutio*» subjected to a restrictive treatment, a kind of quarantine lacking authority. It is isolation under jurisdictional observation filling the factual interval until the course of altered legality has been restored. And if despite its legal bastardy the insurgent authority is accepted, it is only because it has not intended to break legitimacy. Far

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[77] Sánchez Sorondo, Marcelo, "*Gobiernos de facto y sistemas de supralegalidad*" (De facto Governments and Supra-legality Systems) LL, 1982-B, 775.

[78] Linares Quintana, quote, page 517.

As clearly stated by Gordillo, "An usurper assumes the function without regular or irregular title, and is characterized because he lacks the appearance of legitimacy we find in a *de facto* officer. Its actions are, in principle, inexistent; however, in this case, there is a full range of factual varieties that may correlatively change the legal system applicable to its actions. Social perception and regulatory prevision of the phenomena may also change, as in the first aspect of the last decade of the 20th Century, and in the second aspect with Section 36 of 1994 Constitution, as well as the rules of the Code of Ethics of at least the members of the Buenos Aires Bar Association. For many decades and until recently, if it was a successful revolution affirmed in facts and exercising functions of the overthrown government, its investiture was accepted and therefore, government or officers were deemed *de facto*, and their actions were considered valid. Even more, the legitimating force of facts has been so strong in those times that neither those who question the semantics of subjective or objective vices, which we have just explained, nor the Judicial Branch itself may shake the intellectual burden of and, even today, they keep calling Law to Executive Orders of the latest *de facto* governments." (Gordillo, Agustín, *Tratado de derecho administrativo* (Administrative Law Manual),book 3, *El acto administrativo* (Administrative Action), Buenos Aires, FDA, 2007, 9th Edition, Chapter IX-4/5.)

from that, a trauma of the power occurs on its name and in order to defend it against alleged despotic holders."[79]

More than twenty years ago, EKMEKDJIAN pointed out that argentines were in unprecedented constitutional paths, the course of which required an effort of imagination of the participants and interpreters,[80] a path which apparently had no return and that Section 36 of National Constitution amended in 1994 has delimited even more.[81]

These were the words used for the prologue of the recently enacted Act No. 23,062 in those days, the first section of which stated: "[i]n defense of the Republican Constitutional order, based on the popular sovereign principle, it is hereby established that regulations and administrative actions, issued by *de facto* authorities derived from a rebellion action, as well as judicial processes and decisions, aimed to judge or impose sanctions on the members of constitutional powers, even when they claim to be supported by the intended revolutionary powers, shall be null and void.

It is under this law that the legislative branch exercises a constitutional controlling power concerning rules and actions of the described above type, *de facto* power, which may and must be reviewed by *de «jure»* powers and includes the current declaration of constitutional validity of the institutional actions decided by the previous government."

The constitutionalist stated that the regulation had been and would probably be questioned, "Because it incorporated conflictive and innovative focus on classic authors of opinion and case law related to *de facto* governments." [82]

In the lines below we will expose different assumptions of institutional breaks, the first being the enactment of the National Constitution of 1853, with the action of political and military forces of the Province of Buenos Aires against the national Government from around 1861 and until the *Coup d'état* in 1976.

6.1. *General Mitre Inauguration*

The first *coup d'état* and probably the most unremembered, is a necessary consequence of the Battle of Pavon, when Derqui, elected President pursuant to

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[79] Sánchez Sorondo, M., quote.

[80] Ekmekdjian, Miguel Ángel, "*Nuevos enfoques de un viejo tema: La doctrina de facto*" (New Focus on an Old Subject: De Facto Doctrine) ADLA XLIV -B, 2513.

[81] It states the following: "This Constitution shall keep its full force and effect even when its observance was interrupted by acts of force against institutional order and the democratic system. These acts shall be completely void. Its authors shall be subject to the penalties set forth in Section 29, declared unfit to hold public positions for life, and excluded from the benefits of pardon and commutation of criminal punishments. The same penalties shall apply to those who, as a consequence of such acts, unlawfully take positions intended to be taken by authorities under this Constitution or the Constitutions of the provinces, who shall be held personally liable for their actions both under civil and criminal law. Actions shall not fall under statutes of limitation. All citizens are empowered to resist against those who execute force actions described herein. An attack of the democratic system shall also arise whenever an individual commits a felony against the state deriving in personal financial gain, who shall be disqualified for the period set forth by legislation, unable to hold public jobs or positions. Congress shall enact a law on public ethics for the exercise of such position."

[82] Ekmekdjian, Miguel Angel, "*Nuevos enfoques de un viejo tema: La doctrina de facto*" (New Focus on an Old Subject: De Facto Doctrine) ADLA XLIV -B, 2513.

National Constitution of 1853, was defeated by Mitre[83] and was made to resign on November 5, 1861, when Vice-president Pedernera took office and, finally, on December 12 that year he declared the Executive Branch on recess by way of an executive order.

Not much later, the Supreme Court of Justice admitted that, as a result of that insurrection action, Mitre had enough power to assume the important function of governing a country.

In the words of NINO, the armed action had more impact on the institutionalization of the country, with "a legal consequence which would be the root cause of a crucial weakness in our legal practices: recognition of *de facto* governments, the highest expression of anti-legality of our public life. In fact, as a consequence of an absolute trivial issue on the payment of a bill of exchange that had been cancelled by Mitre, the Supreme Court of Justice held in the case «Martinez, Baldomero y otro» (Case 2:127) in 1865 that «the governor of Buenos Aires and Commander in Chief of his Army, was a competent authority to make a decision on this type of issues, as he was the provisional holder of all national powers after the Battle of Pavon, **empowered by the successful revolution and agreed by the people, and by virtue of the serious duties derived from his victory.**».

This raw recognition of rights derived from force would have terrible consequences that would be evident many decades later, for the conformation of our [deficient] constitutional practice."[84] Emphasis added.

The mere invocation of successful revolution, supported by the people, served as a basis to break the young National Constitution.

6.2. *Saturday, September 06, 1930 Coup d'état*

In 1930, after the September 6th civic-military *coup d'état*, our Supreme Court retakes the path it had taken in 1862, but now it was determined to legally hold the usurping government of José Félix Uriburu through a superintendency action, the Agreement —it was not even a judgment imposed— whereby it granted a frame of legality to the exercise of public power to those who had taken office through forceful means.

That was the sorrowful turning point of our institutional life which would give way to "a second period of more than fifty years of riots, anarchy and dictatorship which, like the period after the independence, was marked by absolute disregard to legality and rule of law."

Like the first half century of independent life, "between 1930 and 1983, a considerable containment of the process of economic and social development was

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[83] Regarding Mitre resemblance, it has been stated that "Argentine youth followed the spirited «Colonel» (the young degree persisted after the generalship degree), much more than to Moreno or Rivadavia, other Argentine idols. Its romantic flaccidity dressed in gabardine, with long hair and beard blowing in the wind, gained the devotion of University students, big boys from family homes, traders from Florida Street. It is a purely downtown prestige, exclusively decent, which did not transpose Arts Street and did not get to slaughterhouse workers or coastline farmers, and much less to campaign *gauchos*." (Rosa, José Maria, *Historia Argentina* (Argentine History) Book 6, "*El cisma*" (The Disagreement) Buenos Aires, 1974, page 315.)

[84] Nino, Carlos, Un país al margen de la ley (A Country on the Margin of the Law), Buenos Aires, Ariel, 2005, 3rd edition, page 60.

attained along seventy years of imperfect institutionalization, in contrast with countries enjoying legal continuity."[85]

In 1930, after the Agreement had been signed, we understand that it gave rise to *seizure* of Judicial Branch by the *de facto* Executive Branch, through violent cooptation of its members, but not as a result of the successful *pseudo-revolution holding the illegitimate monopoly of use of force*. According to the recent opposing opinion of DI IORIO, "in the period under analysis, we cannot talk about «seizure» of Judicial Branch by the Executive Branch, as the social, political and ideological uniformity of the first had been formed next to the evolution of majority social forces unlawfully holding power from the time of institutional consolidation of the country, which in general terms was kept constant and homogeneous almost half of the century."[86] It is a phenomenon which the aforementioned legal expert employs as a starting point in the impeachment of the Supreme Court of Justice in 1947.

6.3. *June 4, 1943 Coup d'état*

On June 4th, 1943, with the military insurrection of the Group of United Officers (*Grupo de Oficiales Unidos, GOU*),[87] the usurping government takes an action similar to that of 1930 and, again, the Supreme Court issues a decision similar in terms to the Agreement—in EKMEKDJIAN words— legitimacy to *de facto* governments derived from military movements, with the original vice of the use of force as a mean to gain access to power.

Besides the written analysis on the subject, one of the main issues involves the analysis of validity (legal, of course) of actions derived from governments erroneously called "de facto".[88]

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[85] Nino, quote, page 63.

[86] Di Iorio, Alfredo J., "Apuntes para el estudio del "apoderamiento" del Poder Judicial por parte del Poder Ejecutivo (Notes for the study of 'seizure' of Judicial Branch by Executive Branch)," SJA 5-VIII-2009.

[87] The lodge was related to the nationalism, had been formed in 1942 and was made up by "Lieutenant Colonel Gonzalez, Juan D. Peron, Mittelbach and others, who had taken part in one or more of the previous plots. The purpose of the group was to prevent the political interference in military affairs and prevent communist danger but, particularly, aimed to prevent the election of Robustiano Patron Costas and achieve a change towards allies of foreign politics.
[…] On June 3, 1943, the President asked the Ministry of the Navy to organize Ramírez removal (future candidate for President for the Radical political party). Revolution was decided that day in a meeting where Peron did not attend for precautionary reasons. The next day, 10,000 men marched to the Pink House in order to establish a military government. The conservative regime had come to an end. Deprived from popular support and with the military opinion established, it had provoked its political suicide. For the second time in fourteen years, Republican tradition had given way to Nationalist tradition." (Floria, Carlos A. and García Belsunce, César A., *Historia política de la Argentina contemporánea* 1880-1983 (Political History of Contemporary Argentina), Buenos Aires, Alianza Universidad, 1988, page 131.)

[88] The Court has held that state of siege involves the authorization to arrest a person without ordinary legal cause or authorization by the competent judge, thus the Constitution has suspended those guarantees, powers and rights enjoyed by people and things in a state different than that of siege. However, they were empowered to arrest or take people if they do not wish to leave the country and do not authorize the President to enter judgment or impose sanctions. Such situation is not changed by the fact that the state of siege executive order and measures derived thereof come from the *de facto* government of the *PEN*, by virtue of grounds and reasons set forth in the Agreement of the Supreme Court dated September 10, 1930 (Supreme Court, Hipólito Yrigoyen on remedy, Cases 158: 391, 1930.)

6.4. *Derived Actions*

In 1868, the Supreme Court of Justice, in a case remembered by GORDILLO, declared that: "when the legitimate government has not been able to resist usurpation and citizens are «therefore subjected to the power of enemies», and not related by their obligations to the usurped government; therefore, the actions of the usurper shall be valid while the usurping government remains in power. Then, the *de jure* government may not consider them ineffective actions in the future."[89]

In 1933, the Court held that "the *de facto* officer has the same powers and attributions than the legal officer; and his actions, performed within the scope of the official authority exercised, whether in the public interest or in the interest of third parties and not for his personal benefit, are not unconstitutional, but valid and mandatory as if they derived from *de jure* officers. Thus a tax imposed or increased by a *de facto* Government binds the taxpayer and the subsequent law establishing it retroactively is not unconstitutional either. Therefore, such tax must be paid without penalty, as the retroactive application of tax law must have a civil effect, but not turning a fraudster those who were not fraudsters under the previous law."[90]

A year later it would go much further, indicating that the revolutionary government had removed members of the Executive and Legislative branches, all of them immovable during the period of office except for impeachment or withdrawal of immunity, thus it could also remove magistrates from the Judiciary, whether appointed by the Constitution or a special law as in that case, being the judgment at the discretion of and with efficiency employed by the *de facto* government in each case on the margin of rights of justice.[91]

In 1947, after the change of composition of the Supreme Court as a result of impeachment of its members,[92] the new Court modified the criteria that held that *de facto* governments have broad powers to legislate, being the extension and opportunity of subject matter outside the scope of judicial control.[93] Moreover, it establishes that decree-laws are still valid, even after the new *de jure* government, unless it expressly states otherwise.[94]

6.5. *1955 and 1966 Coups d'état*

1955 and 1966 *coups d'état* were induced by their denomination of *revolutions* (liberating and Argentine), even when they defined themselves as violent changes of politics, economic or social institutions of a country; restlessness, commotion,

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[89] CSJN , El Fisco Nacional vs. Varios comerciantes de San Juan, Cases, 5: 155 (1868); quoted in Gordillo, Agustín, *Tratado de derecho administrativo* (Administrative Law Manual), book 3, *El acto administrativo* (Administrative Action), 9th edition, Buenos Aires, FDA , 2007, chapter IX-5.

[90] CSJN, Impuestos Internos vs. Malmonge Nebrera, Martiniano, Case 169: 309 (1933.)

[91] CSJN, Avellaneda Huergo, Alfredo vs. Nación, Case 172: 344 (1934); followed in Baeza González, Heriberto vs. Nación, Case 210: 1095. (1948.)

[92] See La Nación Newspaper, May 2, 1947: "Fueron destituidos los ministros de la Corte y el Procurador General" (Removal of Justices and Attorney General) pages 1 and 7; May 4, 1947: "Repercusión de un fallo" (Outcomes of a judicial decision) Editorial.

[93] Supreme Court, Arlandini, Enrique, Cases 208: 184. (1947.)

[94] Supreme Court, Ziella, Egidio vs. Smiriglio Hnos., Cases 209: 25. (1947.)

sedition or rapid and profound change in anything;[95] and in each case in particular, institutions were kept with more or less regularity, seeking a climate of normality, but not normativity.

According to PABLO A. RAMELLA, "Insurrection aims at overthrowing governing authorities in order to establish a legal system already existing and, in that sense, it may be said that it is basically conservative. Rebels claim to the government that it does not follow the Constitution and applicable law, while using weapons to uphold it. […] However, revolution tends to establish a new legal order, whereby the people's legitimate rights are limited, precisely by the applicable legal system. According to Burdeau, a revolution involves the substitution of a *de iure* idea for another idea; in that manner, it is not pure fact, but a legal phenomenon." [96]

Although we may affirm that the revolution doctrine undoubtedly belongs to political law and also to constitutional law, and that *de facto* doctrine in fact belongs to administrative law, and conclusions do not apply to usurpers," we should highlight that the legal discourse confusion inverted concepts over and over and accepted the idea that *coups d'état* in our country were true revolutions. However, usurpation was not tolerated as a constitutional breakdown, but as the exercise of the right to reject oppression. [97]

From the philosophical point of view, COSSIO summarized the idea of *revolution* matching it to a factual matter: logical breakdown of background information.[98] In the case of constitution (formal and material), the breakdown of procedures and legal system itself. *Revolutions* involve breakdown of *axiological consistency*.[99]In the case of a *coup d'état*, only the superior distributors of power change.[100]

As another feature of past *coup d'états*, it should be mentioned that "different civil sections participated in the process that ended with the collapse of the elected government. Some civilians had an active participation in the development of ideas for military conspirators in order to reorganize the structure of government or specific proposals of internal and external politics […] There were others, the overwhelming majority, who played a passive role, observing the process with indifference, and doing nothing to discourage so."[101]

6.6. *1962 Coup d'état*

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[95] http://www.rae.es.

[96] Ramella, Pablo A., *Derecho Constitucional* (Constitutional Law), Buenos Aires, Depalma, 1982, 2nd edition, page 18.

[97] Sanchez Viamonte, C. quote, page 170.

[98] Cossio, Carlos, *El concepto puro de revolución* (Pure Concept of Revolution), Barcelona, Bosch, 1936.

[99] Ciuro Caldani, Miguel Ángel, "*El cambio de era histórica desde la teoría de las respuestas jurídicas*" (Change of Historical Era from the Theory of the Legal Answers) Magazine of the Centro de Investigaciones de Filosofía Jurídica y Filosofía Social (Center of Investigation of Legal Philosophy and Social Philosophy), Rosario National University, 2000, vol. 24, page 79.

[100] Ciuro Caldani, Miguel Ángel, *Comprensión trialista de la revolución* (Trialist Comprehension of the Revolution), Notes of Course I of Introduction to Law, School of Law, National University of Rosario.

[101] Potash, Robert, *El ejército y la política en la Argentina* (The Army and Politics in Argentina) (1962-1973). First part, 1962-1966, Buenos Aires, Sudamericana, 1994, page 229. He also observes the role of the press in this process, for example, with publications such as *Confirmado and Primera Plana*.

Although in high school history books the renounce of Dr. Arturo Frondizi and the subsequent inauguration of Dr. Jose Maria Guido owed to institutional continuation in order to comply with the Law of Presidential Succession (No. 252),[102] as a matter of fact those events were the result of a successful military *coup d'état* against democratic order.

POTASH recalls that when "the Argentine people read the newspapers on March 29 1962; it was discovered that the country did not have a constitutional President. At 4 a.m., the Commanders in Chief of the three Armed Forces had formally deposed President Arturo Frondizi and a few hours later, he was taken to Martin Garcia Island, the naval base that had been used as a detention site for famous political prisoners in other critical events of the Argentine history [Hipolito Yrigoyen and Juan Domingo Peron].

The political crisis that had broken out ten days before when the first results of January 18th election had been revealed; it had finally come to an end."[103]

National Constitution in Section 75 (current Section 88), set forth as follows: "In case of illness, absence from the Capital city, death, resignation or destitution of the President, the Executive Branch shall be presided over by the Vice President.

In case of destitution, death, waiver or incapacity of the President or Vice President, Congress shall decide which public officer shall fill such vacancy until the reason of incapacity ended or until a new President is elected." Congress had to appoint a new President in case of *forced resignation* —destitution— of Frondizi and in the absence of a Vice President in office.

Notwithstanding the conditions related to Dr. Guido inauguration after an institutional breakdown, his secret oath before the Supreme Court of Justice, once again, proved that the power to decide whether Argentina was governed by a Military *Junta* or a civil President was in the hands of the head of the Judicial Branch.[104]

6.7. *Decree-laws. Effectiveness, Validity and Efficacy*

In 1973, the Treasury Department General Counsel, in a communication addressed to President Hector J. Campora, dated June 13, affirmed "decree-laws are an anomalous way to legislate through Executive Branch actions on issues reserved to

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[102] Act no. 252 (1868) stated the following:
"Section 1 - In case of leaderless of the Republic due to absence of President and Vicepresident, the Executive Branch shall be represented in the following order: first, by the President of the Senate; second, by the Interim President of the House of Representatives; and, in absence of the former, by the President of the Supreme Court."
"Section 2 - Thirty days after the end of the period of regular sessions, the Senate and the House of Representatives shall appoint a President for the purposes of this Act."
"Section 3° - The officer called to hold office at the Executive Branch within the cases described in Section 1 shall call on a new election of President and Vice President within thirty days after holding office, provided it is a case of perpetual incompetence."
"Section 4° - When the officer who shall preside over the Executive Branch within the cases described in Section 1 herein is to hold office, he shall take the oath before Congress or, otherwise, he shall do so before the Supreme Court of Justice as provided in Section 8 of the Constitution."
[103] Potash, R., quote, page 21.
[104] Potash, R., quote page 34 and ss.

Legislative Branch under the Constitution, employed as a consequence of the installation of a *de facto* government [...]. In all cases, the [judicial] recognition of value to decree-laws issued by the Executive Branch on matters reserved to Legislative Branch is based on necessity. Therefore, the limits for the functions of *de facto* governments have also been set." [105]

Later, it affirmed that: "Undoubtedly, the argument of necessity is insufficient to provide a valid argument for decree-laws in as far as it may only legitimate an action when those in need are unrelated to the cause of such state." Such assumption was not verified by any *de facto* government, as the usurping authorities closed the Congress and therefore, the necessity was an internal fact of the sedition process.

Nevertheless, "the application of legislation of a *de facto* government, and precisely decree-laws by the subsequent *de jure* government is not legitimated in the previous order, but in the need of the new *de jure* government to keep peace and social organization pursuant to the principles of the Rule of Law. It is only because of such necessity that a *de iure* government may apply a legislation which was originally corrupted." [106]

6.8. *Legal Security and National Legislative Branch. Confusion of Discourse*

In every opportunity, the Congress ratified legislative actions of previous *de facto* governments, except for 1973 and the current period. We understand that this confirmation —unnecessary from 1947 due to the case "*Ziella vs. Smiriglio*"— is aimed at proving disagreement with such precedents, thus vindicating the monopoly of legislative function of Congress.

Actions derived from a source different from the bodies provided for in the Constitution, or a different procedure, are null and void (Section 27 of Alberdi Constitution project), even when such action has been efficient —not to do with its validity— due to the force granted by weapons. Matching efficiency (*de facto* concept) with validity (*de jure* concept) would be like expecting that contradictory positions be contemplated in the legal system, at the same time.

Notwithstanding the foregoing, it is not forgotten that "undoubtedly, legal doctrine of the strongest individuals seeks to serve as moral justification of the State when stating that, according to a metaphysical plan of the world —even not certainly Christian— it has been ensured that the moral supremacy status may also apply to political cases. This childish belief that current world is the best world, evidently lacking historical support, does not include any other meaning than unqualified capitulation of our legal conscience upon momentary political success. As such belief is at odds with real history, it is commonly completed with a historicism whose main feature is confusion between political action and moral value, ideal validity and political validity. By demonstrating that, historically, the rights of the strongest have always prevailed, it is believed to have been proved that it has always to be like that."[107]

6.9. *The Value of Words*

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[105] PTN , *Dictámenes* (Opinions), 125: 370
[106] PTN , *Dictámenes* (Opinions), 125: 370
[107] Heller, quote pages 238-239.

At the end of 19th Century, "lots of studies of language philosophy are published, which in fact would subsequently prove the fallacy of a legal dogmatism based on words: a *contradictio in terminis*. Dogmatism cannot be based on words, one of the least accurate instruments used by humanity."[108]

In our view, this is the mistake of our Supreme Court and part of the authoritative opinions as for these the right ***only*** granted by force and weapons prevailed over the provisions of the Constitution.

The value of discourse in every *Coup d'état*, granted by Supreme Court in 1930 and 1943, did not even require to be subsequently affirmed; silence alone was sufficient to legitimate the original lack of consensus of usurping governments.[109]

In this case, consistency and logic "of paranoiac delirium match cohesion and logic of mythological discourse. Sociological analysis and psychiatric observation tend to confuse. And it is not important to reason which of both methods of interpretation would be more convenient to follow in particular. Regarding history, they both agree on the inclusion of a discloser in order to reveal the myth.

Maybe with the analysis of those dreams, a society reveals with more certainty some of their disorders and suffering."[110]

In the Argentine case, silence is part of the myth, as acquiescence to to a sadly omnipresent phenomenon.

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[108] Gordillo, Agustín, Introducción al derecho administrativo (Introduction to Administrative Law), Buenos Aires, FDA, 2000, chapter X-4, §5; available free of charge in http://www.gordillo.com.

[109] In these cases, a debate should be carried out, particularly for the ideology of discourse and words. (See: Gordillo, Agustín and Campolieti, Federico, "¿Ley 19.549 o decreto-ley 19.549/72? Un debate epistolar y generacional," (Act No. 19,549 or Decree-law 19,549/72? A Generational and Epistolary Debate) LL, Suplemento Administrativo 2006 (October), page 69; and Miljiker, María Eva, "¿Ley 19.549 o Decreto-Ley 19.549/72? Un debate lingüístico y filosófico," (Act No. 19,549 or Decree-law 19,549/72? A Linguistic and Philosophical Debate) in LL, Suplemento Administrativo 2006 (December), who summarizes both positions and, particularly, that of Gordillo.)

[110] Girardet, R., quote page 55.

7. *De Facto Doctrine: Pseudo-Institutional Guarantee*

In this section we will try to demystify the so-called *de facto* doctrine, whereby the following issues were analyzed from theoretical and factual points of view: *Usurping government doctrine*. The assimilation of that denomination from legal discourse has led to the above mentioned confusion between *legality-legitimacy*.

CONSTANTINEAU has affirmed that the general rule is that the existence of a *de jure* office is a condition precedent to the existence of a *de facto* officer, and that without such an office the pretended officer can never be afforded any legal recognition.[111]

Argentine history tells the story of political and economical instability and disregard of institutions as a base for groups having access to power, whether by constitutional means (or through the only method, the vote) or with violence (Usurpers.)

It should be mentioned that no *Coup d'état* institutionally identified with Armed Forces is entitled to seek protection and legally turn into another regime. It would be even more illegitimate whenever it invokes revolutionary powers and makes unpredictable alterations in the content of Constitution.[112]

The above is valid for *Coup d'états* intended to develop a supraconstitutional system, as an issue related to "dialectical development of supralegality process. It does not involve admission of a *de facto* government in the above legality based on Supreme Court recognition. After 1955 and particularly as from 1966 and 1976, instead of a *de facto* government, it is implemented a supralegal system enacting its own constitutional statutes, which far from obtaining recognition from the Judicial Branch, binds its members to swear upon the new rules the political priorities of which bypass the Constitution. With its revolutionary appeal and invocation of the constitutional power, the de facto supralegal system acquires a discretionary structure prepared to ensure its continuation."[113]

7.1. *Non-related Grounds*[114]

From the beginning, the special role assigned to the Supreme Court of Justice and the Judicial Branch as a whole, in the *legitimation* of usurping authorities cannot be disregarded by the reader, as under the Agreement, the first action in support of

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[111] Constantineau, Albert, A treatise on the de facto doctrine, Book I, Buenos Aires, Depalma, 1945, page 49.

[112] Sánchez Sorondo, M., quote.

[113] Sánchez Sorondo, M., quote.

[114] Now we will analyze some details of the Agreement of the Supreme Court of Justice of September 10, 1930; however, we will not explain the nature of this superintendent action to the reader, nor its administrative essence and the existence or absence of vices in the issuing procedure. Therefore "Republican principles and the Rule of law are based on legality; it is a precondition of the interested party defense and judicial control; a groundless action is, for us and in the Rule of Law, irretrievably null and void. Based on the above, the illegitimacy of an action regarding this issue may be shown in four different ways: a) lack of factual support, b) lack of legal support, c) lack of sufficient explanation of factual support, d) lack of sufficient explanation of legal support." (Gordillo, Agustín, Tratado de derecho administrativo (Administrative Law Manual),book 3, El acto administrativo (Administrative Action) 9th edition, Buenos Aires, FDA, 2007, chapter IX-42.)

the democratic rupture gave way to all subsequent legal aberrations, under the pretext of CONSTANTINEAU *de facto doctrine*.

As mentioned above, such theory was, in due time, implemented in other countries and legal systems; in the introduction of this book, thus the author explains that this book has not been written for any jurisdiction in particular, but for all communities whose legal subjects are based on English *common law*.

7.2. De facto Doctrine (according to CONSTANTINEAU)

***First issue*.** In the Argentine Republic, regardless of the driving force of jurisprudence at our courts, this system is not applicable.

The *de facto doctrine* may be understood as "a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, it recognizes the existence of, and protects from collateral attack, public or private corporate bodies, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and, thirdly, it imparts validity to the official act of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage."[115]

There are, at least, three situations for the application of *de facto* doctrine:
- Usurping authorities of power or government, through force and arms;
- Irregular or illegitimate officers (or bodies) holding a legally created position, apparently lawfully;
- Officers holding position within the cases described above.

***Second issue*.** *De facto* doctrine may not assign legitimacy whatsoever for the first case of usurping authority "because the offices they hold are tainted with the same illegality as the power which gave them birth, or under which they are held. But, nevertheless, were a person is to take charge of such an office, without at least color of authority, he would be regarded as a mere usurper, and his acts could not be upheld on the basis of any consideration."[116]

De facto doctrine is based on *considerations related to public order, justice and necessity*, and its purpose involves protecting and safeguarding the community that recognizes or invokes the authority held in fact.

***Third issue*.** *De facto* doctrine is not invoked by the illegitimate authority but by those who, as a result of exercising such *de facto* power, have acquired rights under their office or as from the existence of a legal relationship originated under their office.

***Fourth issue*.** It should be mentioned that a usurper is "one who assumes the right of government by force, contrary to and in violation of the constitution of the country."[117]

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[115] Constantineau, quote page 9.
[116] Ibidem, page 10
[117] Ibidem, pages 42-43.

Here we appreciate the inconsistency of applying this doctrine to statutory governments as a consequence of institutional breaks, because as power was taken in violation of our Fundamental Law, it could not possibly cure the legitimation it lacked or somehow purge the original vice.

Despite of the fact that "principles of the *de facto* doctrine are applicable to all classes of public officers, [...] The condition or rank of the officer is also immaterial, and it is of no consequence whether it be the highest or the lowest in land [...] There may be [...] a *de facto* President."[118] But we repeat that the original vice in the latter of the cases, when power is taken in violation of the Constitution of a country (usurper), may not be amended.

7.3. *10 September 1930 Agreement* [119]

As expressed above, the Supreme Court of Justice, by the Agreement signed on September 10, 1930, recognized José Félix Uriburu and the new authorities appointed by him as a *de facto* government, and granted validity to his actions "regardless of the vice or deficiency of appointments or election." This attitude would be repeated in 1943.[120]

After military movement of September 6, 1930, the Agreement of the Court recognized the *de facto* government and the visit made by judges to Uriburu, Leader of the movement, on September 12th, created an adequate and sufficient relationship with the usurping executive branch. On September 16th, a note was sent explaining that he considered that the appointment of the Chief Justice of the Court was included in the first part of the so then Section 99 of the Constitution and, therefore, it was not necessary to make such appointment.

As for the two *de facto* governments it had to acknowledge (1930 and 1943), in the first case for ideological identity reasons; in the second case, to keep the previous doctrine, the Supreme Court came up with this legal infidelity contravening constitutional principles, which was impossible to harmonize.

Respect towards institutions was not a virtue of Argentine governments, but at least until 1930 an apparent constitutional compliance had been kept. Once this appearance disappeared as from the ruptures of September 1930 and June 1943, the adaptation of institutions to political reality was not a simple task and somehow this situation characterized the political role of the Court for over fifty years.

From the jusphilosophical point of view, judges had overcome the legal positivism and performed a dynamic interpretation of Constitution and laws. From the political point of view, they did not feel the need to make changes. Therefore, they gladly accepted the radical (personalist) movement of 1930, supported from the radicalism itself (anti-personalist) and adhered to the conservatism that followed.

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[118] Ibidem, pages 29-30.

[119] See Cayuso, Susana G.; Gelli, María Angélica y Miller, Jonathan M., Constitución y poder político (Constitution and Political Power), Book 2, Buenos Aires, Astrea, 1987, p. 827 and ss.

[120] For a deeper analysis, see: Cayuso, Susana G. and Gelli, María Angélica, *La Acordada de la Corte Suprema de 1930. Legitimación del gobierno "de facto"* (1930 Supreme Court of Justice Agreement. Legitimation of "De Facto" Government", Instituto de Investigaciones Jurídicas y Sociales Ambrosio L. Rioja, School of Law of the University of Buenos Aires, 1988; Ciri, Rodolfo Luis, 1930, *Proceso a la Corte Suprema* (Process to the Supreme Court of Justice), Buenos Aires, Plus Ultra, 1984.

7.4. *Strength Over Law: Sincerity of Our Institutions?*

Yrigoyen overthrow in military *coup d'état* on September 6, 1930 raised an unprecedented institutional fact at the Supreme Court.

Until then, attempts of sedition or rebellion had been solved within the constitutional order, without affecting political powers. But in this case, the President was overthrown, Congress was dissolved and almost all provinces were taken over; only the stability of Supreme Court judges was respected, and the same applied to the rest of the Judicial Branch, with some exceptions.

In the 1930 Agreement, members of the Highest Court accepted that the government derived from the successful revolution, and being in possession of military and police forces, it would ensure peace and order and would protect freedom, life and property, which coincided with the acknowledgement of the head of the Army to maintain the supremacy of the Constitution.

It was a *de facto* government, and officers could perform any actions to meet their goals for enforcement and necessity purposes in order to keep society protected, since it could not argue about its *legality*. But should individual guarantees not be recognized, judges would be the ones in charge of restoring them, as if they were acting before a *de jure* Executive Branch.

Arguments are political, not legal. Neither Constantineau's quote (*Public officers and the facto doctrine*), whose doctrine had been developed before, nor the judgment entered in *Judicial Decisions 148:303*,[121]are grounds to legally justify a military government. In 1910, CONSTANTINEAU had compiled and published case law of Great Britain, Canada and United States on *de facto* officers, and the Court had quoted him a few times, but he referred to officers with an observable or viced title, not to usurpers of the national power. Regarding the aforementioned case, it analyzed the validity of a judgment entered by a judge in San Juan, after the intervention order in that province, which was considered valid by the Court as the judge kept its jurisdiction until the Controller decided upon its permanence. Thus, quotes were inaccurate.

In summary, the *Agreement* legalized a government in violation of the Constitution which, on the contrary, it affirmed to defend, and it would be difficult for the Court to combine constitutional principles with an illegitimate power, exceeding of the provision of the Constitution.

7.5. *Judicial Support to Institutional Decadence*

The first *de facto* government of the 20th Century legislated as per decree-laws, a legislative activity which was not scarce at all, as more than 1200 laws were enacted in a year and a half of government.

After restoration of constitutional government in February 1932, Act No. 11,582 was enacted to confirm this irregular substantial legislation, with *ex post facto* validity. Therefore, the military government legislation was ratified by Congress, giving way to subsequent authoritative opinions and jurisprudence development on the validity and efficiency of laws enacted after institutional *normality* was restored.

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[121] CSJN , Cristóbal Moreno Postigo s/ remoción de tutela, Case 148: 303. (1927.)

Court jurisprudence ratified such *de facto* legislation. A tobacco trader, Martiniano Malmonge Nebreda,[122]judicially repealed a fine imposed by the administration of internal taxes on grounds of an offense related to goods, a fine imposed according to decree of March 31, 1931 of the *de facto* government, confirmed by Act No. 11,582, thus repealed for that reason. When the case was heard at the Court, it was held that **they have the same rights of a legal government, a principle based on the necessity of facts and acknowledged by the Court in its *Agreement*.**

Here, the case of Baldomero Martinez was noted, decided in 1865[123] (not mentioned in the 1930 Agreement) and CONSTANTINEAU's quote was repeated, adding the work of HENRICH HERRFAHRDT, *Revolución y ciencia del derecho (investigación acerca del alcance jurídico de los procesos revolucionarios y su significación práctica para la teoría general del derecho)* [Revolution and Law Science (Investigation on the legal scope of revolutionary processes and its practical meaning for general theory of law)—1932 Spanish version.

When *de facto* legislation was not confirmed by Congress, once a *de jure* government had been established, application thereof had to be rejected in theory. This was the decision adopted in "*Mattaldi, Simón S.A.*" case, where taxes imposed by the *de facto* government which had not been ratified were repealed.[124]

The provisional government was limited under the alleged regulatory powers, taking as example the case of Law No. 4363 regulating genuine wine, and a decree of March 12, 1930, regulating such law; but later, on March 16, 1931, it was amended by the *de facto* government in order to defend public health and prevent diseases derived from the use of unacceptable raw material. Businessmen such as Emilio Cahiza, Esteban Costa, Francisco Granata, Aurelio Podestá and Juan Andrés Toso, challenged the latter of these laws on unconstitutionality grounds, and when the Court intervened, despite recognizing the power of *de facto* governments to regulate laws, it decided that the repealed decree had amended and violated the law.[125]

This analysis of *de facto* governmental powers did not prevent the existence of arbitrary actions, unconstitutionality, and, in some cases, decisions against the Judicial Branch. The famous claim of judge Alfredo Avellaneda Huergo, who had excused himself from intervening in a cause of action brought against the overthrown President Yrigoyen, was the reason why he was dismissed with a decree-law of the usurping government on March 16, 1931. Once the constitutional government had been restored, he filed an unsuccessful claim against the Senate and later sued the National Government for lost wages. The case was admitted in first instance, as it was understood that the *de facto* government was not entitled to dismiss the judge. It was the appropriate interpretation according to the Court's *Agreement*, although the Appellate Court revoked that judgment as it considered that it had to be reviewed at the political, not judicial, level; later, the Supreme Court confirmed it: It explained that the *Agreement* of September 10, 1930 had recognized the validity of political and administrative actions of *de facto*

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[122] CSJN, Impuestos Internos vs. Malmonge Nebrera, Martiniano, Case 169: 309. (1933.)
[123] CSJN, Cases, 2: 127.
[124] CSJN, Mattaldi Simón Ltda. S.A. vs. La Nación, Cases 183: 151 (1939); see also H. Bertone y Cía. vs. Nación Argentina, Cases 185: 36 (1938) and Antonio Sassone vs. Nación Argentina, Cases 195: 539. (1942.)
[125] CSJN, Cases, 177: 237. (1934.)

government for the development of the program, such as dismissal of members of Executive and Legislative Branches as a whole, as well as that of some magistrates, officers, or provincial governments.

If it could overthrow them, it could not disqualify a judge's dismissal. On the other hand, the "discretion and efficiency employed by the *de facto* government in both cases fall outside the scope of the powers of justice."[126]

Had it followed the doctrine of previous cases, the Court should have decided on the legitimacy of the decision and whether it was within the purposes of the *de facto* government, but it failed to do so.

Any interpretation will turn even more complex with the usurping government derived from the military movement which in June 4, 1943 overthrew President Ramon S. Castillo.

The head of the Army was General Arturo Rawson, later replaced by a government under the leadership of Pedro P. Ramirez. The Court was informed the formation of the new provisional government and on June 7th an Agreement was prepared including the terms of the 1930 Agreement.[127]

The situation was similar to that of 1930, but the new government would go further in terms of legislative and administrative matters. Then, it would be evident the ideological separation between new *de facto* governors and Judges of the Supreme Court, which would end in judicial and political confrontation.

The new version of the military government lasted twice as long as the period before (three years), it divided leaders not only in internal political issues, but in foreign politics, confronting rupturists and neutralists, as this period covered a good part of the Second World War. Tensions were observed from the beginning, with the separation of General Rawson and his replacement by Ramirez and reached the highest point of tension in September and October 1945, when sectors opposing the military government claimed that power be handed over to the Supreme Court. Moreover, on October 13, the Attorney General Álvarez was asked to form a government. The names proposed by Álvarez proved how far he was from political reality. However, when on October 17 Perón was brought back to hold office, he replaced the Attorney General slow and inefficient management.

On April 2nd of that year, the Supreme Court issued a decision and signed two Agreements aimed to prevent legislative attempts of the *de facto* government.

In the case *Municipalidad de la Ciudad de Buenos Aires versus Carlos M. Mayer*, it was discussed whether the *de facto* government was empowered to amend the expropriation law 189 —enacted by Congress in 1866— by a decree-law, and whether that law restricted the right of defense when denying the expert evidence in order to determine the value of the real property to be expropriated.[128] Three opinions were filed: majority opinion of Sagarna, Nazar Anchorena and Ramos Mejia, Repetto's and Casares´.

The majority developed the arguments presented by the Court on the limits of the legislative powers of *de facto* governments, but it explained in more detail the scope of such restrictions. The Constitution was in full force and effect and it had been declared valid by the *usurping* military executive branch. Allegedly, the Judicial Branch, that had retained powers to define these issues, had been respected. While Constitutional powers granted to the Executive Branch were

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[126] CSJN, Cases, 172: 344. (1935.)
[127] CSJN, Cases, 196: 5. (1943.)
[128] CSJN, Cases, 201: 249. (1944.)

recognized to *de facto* governments, it did not enjoy judicial functions. However, the issue related to the exercise of legislative powers was complex; and the necessity of facts made exercise of said powers unavoidable and limited to keep the operation of the State and comply with the purposes of revolution, because recognizing wide legislative powers to a man or group would be incompatible with the validity of the Constitution. Once normality was restored along the country, *de facto* provisions would not be applicable for the future, unless otherwise ratified by Congress and, in that case, validity would take back to facts as established.

The majority concluded that the Executive Branch could issue the decree the unconstitutionality of which was at stake —decree-law 17290/44— as its purpose was within the possibility to make use of the legislative branch; however, they found that the exclusion of expert evidence was unconstitutional because it affected the right of defense.

As per this judgment, three tendencies will be defined in the Court:

a) That trying to adequate legislative powers of the usurping government pointing out its limitations,

b) That recognizing the presence of legislative powers in the usurping government exclusively for the purposes of the movement, revolution or process, and

c) That granting wide legislative powers to the usurping power, notwithstanding judicial review.

By way of example, regarding the scope of validity and efficiency of pseudo *de facto* laws, it should be noted that Act 14467 in 1958 set forth as follows:

"It is hereby declared that decree-laws enacted by the provisional government between September 23, 1955 and April 30, 1958 not repealed by the Honorable Congress shall remain valid." Moreover, in 1964, Act No. 16478 set forth as follows: "Decree-laws enacted with force of law by *de facto* government between March 29, 962 and October 12, 1963, which have not been expressly repealed, declared ineffective, nor suspended, shall remain valid. Those suspended shall continue in the same condition provided no subsequent decision provides otherwise."

Different regulatory and theoretical opinions as well as jurisprudence have been summarized and explained, among others, by CARLOS NINO,[129] indicating five possible strategies on the treatment for *de facto* laws, once the *de jure* regime is restored:

a) Full validity, as if enacted by constitutional bodies in charge of the regulation of the relevant issue;

b) Full validity, excluding criminal laws;

c) Invalidity of *de facto* laws, but acceptance of its validity as mere orders of the Executive Branch;

d) Repeal of laws not expressly ratified by Congress, or recognition of non-expressly repealed laws (non automatic expiration), with no possibility for judges to decide on the validity or invalidity of *de facto* laws; and

e) Absolute invalidity (automatic expiration) of all *de facto* laws, with judges empowered to disregard those laws in their decisions.

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[129] Nino, Carlos, "*Una nueva estrategia para el tratamiento de las normas «de facto»*" (A new Strategy to Treat "de facto" laws) LL, 1983-D, 935.

The distinctive features of each period of institutional normalization contributed to the development of each variable, and Congress was under the duty to define scope, validity and effectiveness of *de facto* laws.[130]

A similar problem may arise from the view of the validity of jurisdictional actions of judges appointed by usurping governments during institutional breakdown, particularly between 1976-1983.

This issue has been addressed by the Supreme Court, which stated that "elementary reasons of legal continuation and safety, the implicit ratification provided by constitutional authorities for actions of judges in office between 1976 and 1983 and the preservation of regularity of transition to normal operation of republican institutions", lead to the rejection of illegitimacy cases for such actions.[131]

7.6. *De facto laws*

As explained above, it cannot be denied regardless of the opinions of authority followed, the problem presented upon restoration of the Constitution validity, beyond the name it has been sought to hide, on the original vice of laws derived from usurping governments.

These may be called laws or decree-laws, but they are nothing but mere examples of *persuasive* definitions, irrational techniques to convince[132] the social collective, under the protection of legal experts that have held them as such. This is because "*de facto* supralegality is a hybrid regime, mistreated by its internal inconsistency the framework of which cannot find a definite point of balance. As in fact it has not been designed for civil order, it does not answer to any known way of government because it has not provided for communication channels or much less representative participation. There are no more citizens, but only inhabitants. Paradoxically, it is an apolitical structure placing the military leadership on the top of organization of power. Deprived from every connection with politics and spontaneous relationship with the universe of citizenship, the government turns into pure command. Order does not derive from consensus of citizens, which does not exist but from passive obedience of inhabitants. External order achieved simply registers political opacity of the military State. Without representation or consensus, without political shape, *de facto* supralegality only translates the organization of command overthrowing institutions and occupying governmental functions. Legality has disappeared and legitimacy has become inaccessible."[133]

The original vice of legitimacy in the usurping government cannot be purged, nor can the oblivion of our legal experts, lawyers and judges as to the fact

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[130] For a deeper analysis of the subject, see: Bravo Lira, Bernardino, "*La ley extraparlamentaria en Argentina 1930-1983; leyes y decretos-leyes*", (Extra-parliamentary Legislation in Argentina: 1930-1983; laws and decree-laws) LL, 1990-C, 1193; and quotes. It is also valid for the control of actions executed in budgetary issues, in times of usurping governments. (Cfr. Rosatti, Horacio Daniel, "El control de la hacienda pública por los tribunales de cuentas durante los gobiernos «de facto»" (Control of Public Treasury by the Audit Courts during de facto governments) ED, 29-XII-82, page 1 and ss.).

[131] CSJN , González Bellini, Guido Vicente vs. Río Negro, provincia de s/ daños y perjuicios, 17-III - 09, Cases 332: 552; with cases quoted, 311: 175; 312: 2352; 316: 2325.

[132] Nino, C., Una nueva estrategia…, (A New Strategy…) quote, citing Stevenson, Ch., *Ethics in Language*, New Haven, 1973, page 206 and following.

[133] Sánchez Sorondo, M., quote.

that the only formal laws are those enacted by a collegiate body under the constitutional procedure established for enactment thereof.

Particularly interesting, it is the manner in which we have permitted that, in the case of usurping processes of years 1930-1932, 1943-1946, 1955-1958 and 1962-1963, substantially legislative actions be qualified as *decree-laws* and, then, as a result of the set of fictions and supra-constitutional instruments, such actions have been called *laws* without any formality whatsoever.

We still hesitate as to whether "it is possible to correct, in the language of lawyers, some authoritarian habits typical of *de facto* governments: the official terminology employed to call «Law» what was no other thing but decree-laws. Once democracy had been restored and the theory of *de facto* governments had been condemned by Section 36 of the Constitution, it is not legally nor politically admissible to call «laws» what was merely called that way. Now that we are talking about Law, it is indispensable to appropriately call decree-laws to the so-called laws enacted during the periods 1966-1973 and 1976-1983.

As it may be observed, it is a long way until getting to a democratic, liberal, and constitutional administrative law. The idea of force and authority without limits permeates all linguistic layers, all conceptual strata."[134]

Even when we can accept the formal argument exhibited by CAMPOLIETTI,[135]as decree-law 976/73 set forth that "the actions of the Executive Branch enacted as laws from June 28, 1966 to May 25, 1973 would be called decree-laws, with the addition of the year they were enacted to the number assigned thereto. Decree-law 1319/76 was subsequently issued, repealing the prior regulation and established that «legislative actions enacted by the Executive Branch from June 28, 1966 to May 25, 1973 under numbers 16892 to 20507 shall be registered and quoted as laws.» In the recitals of the aforementioned regulation it is clarified that at that time it was appropriate to standardize the form of quotations, as these actions were quoted under the denomination of decrees-laws and also laws."

From the merely formal aspect, we are not satisfied either with the explanation that, once the institutional normality was restored after 1983, the Highest Court named and accepted de facto regulations within the category of laws.[136] However, in an attempt to revert such situation, the Supreme Court in a sentence dated December 15, 2009, has expressly referred to law 19549 as decree-law 19549/72, which is not a minor issue, when referring to the value of words.[137]

Extra-parliamentary influence of usurping governments have caused the following in the period between 1930 and 1983:

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[134] GORDILLO, AGUSTÍN, *Tratado de derecho administrativo* (Administrative Law Manual) book 1, "Parte general" (Overview) 10th Edition, Buenos Aires, FDA, 2009, chapter I-13, §5.2.

[135] Gordillo, Agustín y Campolieti, Federico, "*¿Ley 19.549 o decreto-ley 19.549/72? Un debate epistolar y generacional,*"(Act No. 19,549 or Decree-law 19,549/72? A Generational and Epistolary Debate) LL, 2006-F, 892.

[136] Campolieti quotes, by way of example, that "since 1983, the Federal Court also calls Act 19,549 to the Administrative Procedure Act in every opportunity it has referred to the regulations therein. Some examples of classic cases of our subject matter and different years are: 1985 Mevopal (recitals 3° and 4°), 1989 Mackentor (recitals 3°, 5° and 6°), 1991 Universidad de Buenos Aires (recitals 8° and 10), 1993 Serra (recitals 2°, 6°, 7°, 12 and 15), 1995 Gypobras (recitals 6°, 7° and 10), 1999 Tajes (recitals 5°, 6°, 9° and 10) and 2005 El Jacarandá (recitals 6° and 7°)."

[137] CSJN , Micheli, Julieta Ethel c/ EN - M1 Justicia y DD.HH. - Resol 313/00 - s/ empleo público, Cases 332: 2741. (2009.)

- We have had a little more than 29 years of democracy.
- 9396 *de facto* regulations were enacted (substantial laws enacted by the usurped Executive Branch), and
- 6049 laws were enacted by the national Congress.[138]

Still in legal discourse (the force of oral and written words), there are habits related to words of force. It is impossible to see the degree of influence and insertion in the relative weight of standards enacted during institutional breakdown periods.

As explained below, we understand that it has given way to a development, perhaps exacerbated, of the *economic doctrine emergency (state of necessity)*, not only from the Argentine public law point of view, but mainly from that of the State.

The political myth of *emergency*, not the factual question determining and justifying its legislative statement, "appears as mainly polymorphic: we have to understand that the same series of oneiric images may be taken by apparently diverse myths; and also it must be understood that the same myth may offer multiple resonance and no less numerous connotations. Connotations are not only supplementary, but also opposed. Not a single explorer of the imaginary stops insisting on that dialectic of the opposed which seems to constitute another specification: polymorph, the myth is likewise ambivalent."[139]

More than ambivalent, the *de facto doctrine* plus *the economic emergency doctrine (economic state of siege)* has meant polyvalence of the myth derived into implementation and legal reception, denaturalizing legal constructions, true fictions, in detriment of the Rule of Law and the institutions composing it, giving sense and imposing limits to the political power.

[138] See Bravo Lira, Bernardino, quote
[139] Girardet, R., quote page 16.

8. *State of Emergency (Or Emergency of the State?)*[140]

"They who lay the foundations of a State and furnish it with laws
must, as is shown by all who have treated of civil government, and
by examples of which history is full, assume that 'all men are bad,
and will always, when they have free field, give loose to their evil inclinations; and that if these for a while remain hidden,
it is owing to some secret cause, which, from our having no contrary experience, we do not recognize at once,
but which is afterwards revealed by Time, of whom we speak as the father of all truth."
Nicolás Maquiavelo, Discourses on the First Decade of Titus Livy, Chapter III I.

8.1. *Introduction*

From 1930, Argentine history involved not only construction and application of the theory of *de facto* governments (usurpers), but also the birth, development, growth and mutation of the *economic emergency doctrine*. We can establish ties and feedback concerning political crisis in Argentina, and social, financial and economical crisis.

Nevertheless, we are not making a descriptive task on whether crisis were causes, consequences or factors coadjuvant to its formation, but as an irrefutable note of our past, present and future. Instability has always been the rule, and stability, mainly economic, its exception.

The Inter-American Commission on Human Rights of the Organization of American States, has affirmed that "as from 1930, we are living a long stage of social and political instability that has given rise to deep institutional crisis, the onset of irregular or *de facto* governments, the implementation of internal state of war, state of siege and martial law, attempts of totalitarian or corporate regimes, alterations in the procedures of organization of the powers of State, enactment of repressive legislation and, particularly in the last ten years, the growing onset of terrorist violence and extreme left and right, with armed fight methods; all in detriment of duration of the Rule of Law."[141]

During the validity of economic emergency, the Rule of Law is also affected, restricted and threatened in its system of rights and guarantees[142]; therefore, the

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[140] This chapter is integrated with some modifications with the statements of Diana, Nicolás in "*El estado de sitio económico: Estado de emergencia (¿o emergencia del Estado?)*" (The Economic Coup d'état: State of Emergency (or emergency of the State?) LL, 2009-D, 781

[141] Inter-American Commission on Human Rights (OAS), Informe sobre la situación de los derechos humanos en Argentina (Report on the Situation of Human Rights in Argentina), April 11, 1980, http://cidh.oas.org/countryrep/Argentina80sp/Cap.1.htm.

[142] It has been stated that: "In theory, the true regulatory force of the constitutional order centrally depends on planning their «own» guarantees; sometimes these operate efficiently, sometimes these do not. Constitution guarantees; i.e. the constitutional order, have been designed to protect the legal system it organizes; these are guarantees that the Constitution confers itself to ensure hierarchy —logical and axiological— within the state legal system, even in cases of emergency. These guarantees, analyzed broadly, bring back the idea that politics must be adapted to the Constitution. In such orientation, the following institutional mechanisms should be noted: (i) the strict separation/division, reasonable distribution and prudent balance of functions of powers of State; (ii) constitutional rigidity as to the process of amendment (iii) basic emergency plan of the constitutional law of power: declaration of state of siege, central government interventions in the management of powers constituted in federated entities, including the regulatory formula regulating imperativeness and effectiveness of the constitutional order against every act of force

Executive Branch concentrates the power even more in our presidentialism, true deliberative democracy.

CARLOS NINO has affirmed that the state of siege has plain and simply been the cemetery of our freedom, going back from the national order to the individual safety decree of 1811.[143]

Maybe the strictest attempt to develop a theory on the state of exception (every exceptional state of emergency itself is an state of exception), has been attributed to CARL SCHMITT for his works *Dictadura* [Dictatorship] (1921)[144]and *Teología política* [Political Theology] (1922),[145] precisely due to the special relationship he built between the former and legal order, since in the legal sense and beyond suspensions and restrictions of certain rights and guarantees, such order still exists as such.[146]

Political emergency has been an express reason of constitutional consideration, in Section 23, providing that: "In the event of domestic disorder or foreign attack endangering the full enforcement of this Constitution and that of the authorities hereby established, the province or territory which is in a turmoil shall be declared in state of siege and the constitutional guarantees shall be suspended therein. But during such suspensions the President of the Republic shall not enter judgment or impose penalties on his own. In such case, his powers shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave the Argentine territory." "The Argentine experience as to «political emergencies» and «state of siege » is very important, and these supplements other constitutional mechanisms such as «federal intervention in the territory of provinces» or «*de facto* doctrine»; the latter developed by the Supreme Court, acquiring an emblematic and infamous value from the agreement dated September 10, 1930."[147]

A lot it has been written on the state of emergency in Argentina, and for brevity and intellectual honesty purposes, we refer to specialized books and articles dealing with this subject.[148]

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trying to interrupt validity, as well as the right of resistance of citizens against tyranny or oppression; (iv) principles stipulating a rational exercise of the power of the State, requiring a minimum standard of reasonableness in acts or omissions of officers holding office in powers of State." (Ferreyra, Raúl Gustavo, "Estado Argentino modelo 2002: ¿Involución hacia la emergencia infinita?" (2002 Model of the Argentine State: Involution towards infinite emergency?) ordered text, includes the lecture given on April 19, 2002 at the study seminar entitled "*Radici e caratteristiche della crisi argentina: profili constituzionali ed economici*," performed at *Centro di Ricerca e Formazioni sul Diritto Costituzionale Comparato, Universita Degli Studi di Siena*, Italy. (http://www.unisi.it.)

143 Carlos Nino, *Fundamentos de derecho constitucional. Análisis filosófico, jurídico y politológico de la práctica constitucional* (Grounds of the Constitutional Law. Phylosophical, Legal and Political Analysis of the Constitutional Practice) Buenos Aires, Astrea, 2005, 3rd reprint, p. 489.

144 Schmitt, Carl, Die Diktatur, Munich-Leipzig, Duncker & Humblot, 1921.

145 Schmitt, Carl, Politische Theologie, Munich-Leipzig, Duncker & Humblot, 1922.

146 Agamben, Giorgio, State of exception (translated by Kevin Attell), The University of Chicago Press, 2005, pp. 32-33. This is so because the state of exception goes beyond the situation created in case of war or domestic disorder.

147 Casás, José O., "*La emergencia infinita en el ámbito del derecho tributario argentino (o el contribuyente bajo perpetuo estado de sitio fiscal*)" (Infinite Emergency in the Argentine Tax Law (or the taxpayer under continuous official coup d'état) RDA, 2002-499

148 Barcesat, Eduardo S., "*El precedente «Massa». Tributo al dios Kronos*" (Massa Precedent, Tribute to God Kronos), *La Ley Sup. Esp. Pesificación de los dépósitos bancarios 2006* (December) (Pesification of Banking Deposits), page 5, LL, 2007-A, 1103; *Bianchi, Alberto B., "Una calma*

VANOSSI has affirmed that within the institutional framework, there is a **golden rule** in the contemporary constitutional State: "for every growth of power, there must be a consequent improvement or strengthening of control mechanisms, as something absolutely necessary to achieve an efficient limitation of power, as an

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perfecta" (Perfect Calm*), La Ley Sup. Esp. Pesificación de los dépósitos bancarios 2006* (December) (Pesification of Banking Deposits), page 7, LL, 2007-A, 1105; Carnota, Walter F., "*La pesificación hoy ("Cronoterapia" y realismo)*" (Pesification Today (Chronotherapy and Reality) *La Ley Sup. Esp. Pesificación de los dépósitos bancarios 2006* (December) (Pesification of Banking Deposits), page 13, DJ 2007-1, 53; LL, 2007-A, 1110; Gil Domínguez, Andrés, "*El acto final de la pesificación: ¿el porvenir de una ilusión?*" (Final Act of Pesification: the future of an illusion?) *La Ley Sup. Esp. Pesificación de los dépósitos bancarios 2006* (December) (Pesification of Banking Deposits), page 15, DJ 2007-1, 49, LL 2007-A, 1112; Gelli, María Angélica, "*El caso «Massa»: fin de un capítulo en la pesificación de los depósitos bancarios*" (Massa Case: the end of the chapter on pesification of banking deposits*) La Ley Sup. Esp. Pesificación de los depósitos bancarios 2006* (December) (Pesification of Banking Deposits), page 23, LL, 2007-A, 1120; Manili, Pablo L. "*La propiedad privada es inviolable (art. 17 de la Constitución Nacional)*" (Property may not be violated [Section 17 of the Constitution]) *La Ley Sup. Esp. Pesificación de los depósitos bancarios 2006* (December)(Pesification of Banking Deposits), page 35, LL, 2007-A, 1130; Cilurzo, María Rosa, "*Breves consideraciones referidas al fallo «Massa»*" (Brief considerations related to Massa case), LL, 2007-D, 143; Kaminker, Mario E., "*Aspectos prácticos de la aplicación del fallo «Massa»*" (Practical issues on the application of Massa case) *La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case), page 80; Hernández, Antonio María, "*El caso «Massa» y el regreso a la jurisprudencia convalidatoria de la emergencia económica*" (Massa case and the return to confirming case law of economical emergency) *La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case), page 70; Sola, Juan Vicente, "*El fin del nudo gordiano constitucional*" (The End of the Constitutional Gordian Knot) *La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case), page 101; Ciuro Calda, Miguel Angel, "*El fin judicial de la emergencia desde el punto de vista jusfilosófico trialista. Posibilidades de debate que aclaran el sentido del derecho*" (Judicial End of Emergency from the Trialist Legal Philosophy View) *La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case), page 35; Morello, Augusto M., "La Corte Suprema, piloto de tormentas" (Supreme Court, Storm Pilot*) La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case) page 91; Dalla Via, Alberto Ricardo, "*La doctrina constitucional de la emergencia y el derecho de propiedad*" (Constitutional Doctrine of Emergency and Property Rights), *La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case), page 48; Alterini, Atilio Aníbal, *"¿Hay dos derechos, uno de la normalidad y otro de la emergencia?*" (Are there two rights, one of normality, and another of emergency?) *La Ley Sup. Esp. La emergencia y el caso Massa 2007* (February) (Emergency and Massa Case), page 3; Kielmanovich, Jorge L., "*Aspectos procesales del caso «Bustos, Alberto Roque y otros c. Estado Nacional y otros s/amparo»*" (Procedural issues of the case «Bustos, Alberto Roque y otros c. Estado Nacional y otros s/amparo») LL, 09-XI-2004, p. 4; Badeni, Gregorio, "*Reflexiones sobre el caso «Bustos»*" (Reflections on «Bustos» Case) LL, 09-XI-2004, page 1; Alanis, Sebastián D., "*Lo previsible. Las consecuencias*" (The Foreseeable. Consequences) La Ley Sup. Adm. 2004 (November), p. 9; Miljiker María E. (coord.), *El derecho administrativo de la emergencia* (Administrative Law on Emergency), I, Buenos Aires, FDA , 2002; Ahe Dafne S. (coord.), *El derecho administrativo de la emergencia* (Administrative Law on Emergency) II, Buenos Aires, FDA , 2002; Alanis Sebastián D. (coord.), *El derecho administrativo de la emergencia*, (Administrative Law on Emergency) III, Buenos Aires, FDA , 2003; Scheibler Guillermo (coord.), *El derecho administrativo de la emergencia* (Administrative Law on Emergency) IV, Buenos Aires, FDA , 2005; Zayat, Valeria E. (coord.), *El derecho administrativo de la emergencia* (Administrative Law on Emergency) V, Buenos Aires, FDA , 2006; Barraguirre, Jorge, "*Derecho y Emergencia*" (Law and Emergency) *Revista de Derecho Público*, Rubinzal-Culzoni, 2002, p. 17; Hutchinson, Tomás, "*La emergencia y el Estado de Derecho*" (Emergency in the Rule of Law) *Revista de Derecho Público*, Rubinzal-Culzoni, 2002, p. 27, Botassi, Carlos, "*Emergencia y derechos adquiridos*" (Emergency and Vested Rights) *Revista de Derecho Público*, Rubinzal-Culzoni, 2002, page 61; Cassagne, Juan Carlos, "*Los contratos públicos y la ley de emergencia pública y reforma del régimen cambiario*" (Public Contracts, Public Emergency Law and Exchange System Reform) *Revista de Derecho Público*, Rubinzal-Culzoni, 2002, page 113; among others.

inexcusable prior step so that the responsibility instance may also be achieved. This means that, without an effective control, there is no real limitation of power; and without real control, it is not possible to make the responsibilities of leaders effective. Therefore, it means that in an ostensible case of growth of State in all its phases, whether in the social State phase (with State new functions and powers), as the traditionally political side (due to the necessity in cases of violence and subversion hitting contemporary societies, answering with the arm of law to end this situation), it is imperative that this rule be effective and enforced.

The abandonment of such principle would mean a fatal and irretrievably dictatorship enthronement, although it were a constitutional dictatorship. Therefore, the true quadrature of the circle, posing the problem before the new dimensions of the State, as well as before the new proportions of social turmoil, requires a new point of balance (a difficult point of balance) between the need to ensure the permanence of the State and, at the same time, the need to ensure permanence of freedom. In other words, it is about how to answer to emergency situations without incurring in a double risk; on the one hand, that of disarming the State and, on the other, the risk of transforming the State in a dictatorial body."[149]

The observance for that **golden rule**, in the search of balance between individual freedom and existence of State (and the Nation itself) should be the turning point in economic emergency. The sole invocation of such balance, even when it is materialized in laws, cannot mean or justify the permanent life under the umbrella of emergency.

In mid-2001, GORDILLO anticipated that the emergency was and is perpetual because "from now on, we see and will continue to see reality. **The fantasy of Argentinean entered into the final emergency. Reality is as bad as usual. But now it is evident that there is no immediate escape, as laws today confirm some of their classic parameters as locked-in.**

In our environment, it is usual to criticize the duration of the aforementioned emergency, it having been so long and now seeming almost perpetual or at least stable for almost a decade. It is another way of saying long term. It seems obvious that nobody will be happy with that state of things. But reality does not change because we do not look at or see it, or because we do not agree on its etiology or scope or because we do not agree on the reasonable and proportionate means to face it."[150]Emphasis added.

Reasonability and proportion of remedies chosen by the State to solve and/or reduce the effects of our recurrent crisis must necessarily be analyzed in the light of determinant facts of each emergency in particular and the state of necessity justifying it. Those states of emergency and necessity are recurrent even since 1853, from the down of our process of institutionalization, characterized by the rising cost of access to credit and funding of the federal State. In 1890, it came with the economic crisis affecting Argentina directly, in a world which was [151]globalized then. For the argentine case, the state of exception transformed the ordinary and normal course of our political, economic and social reality.

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[149] Vanossi, Jorge Reinaldo, "*Reflexiones en torno al estado de sitio: A propósito del caso Solari Yrigoyen*" (Reflections on the state of siege: Solari Yrigoyen Case) LL, 1983-B, 1104.

[150] Gordillo, Agustín, "*El Estado de Derecho en estado de emergencia*" (The Rule of Law under Emergency) LL, 2001-F, 1050.

[151] See Casás, J. O., quote.

When we refer to the state of exception, we should make a difference of the different meanings of this expression. "Broadly speaking, it refers to total and absolute violation of the Rule of Law, usually by *de facto* governments.

Strictly speaking, these are the modifications of specific mechanisms of the Rule of Law for defense in abnormal situations."[152]

There are two opinions of authority used to define state of exception:

a) One including in these terms every situation in which some mechanisms of the Rule of Law are modified; and

b) Another restricting the definition to suspension of rights o suspension of guarantees in case of emergency affecting social or political order.

The first position is exclusive of constitutional law, and the second is common in constitutional and international human rights law, where protection and respect for humans is stricter. States of exception may be classified into those involving suspension or vulnerability of fundamental rights, and those who do not involve so.[153]

The disastrous nature of a *coup d'état* for the argentine constitutional practice has been highlighted by Vitolo, who explained that the in the last 50 years until 1983, the country lived under a *coup d'état* regime 43% of the time; from 1963 to 1983, 65% of the time, and from 1973 to 1983, 80% of such period.[154]

Regarding the Argentine history, "from the point of view of insecurity and public instability, it has not been easy, but it has not constantly been under a disorderly and dangerous institutional atmosphere which, according to old books, justified such extraordinary and fatal remedy. The simple conclusion is that there has been a huge abuse of this institution, where Judicial Power undoubtedly was responsible for its extreme complaisance with arbitrariness and lightness whereby political power, whether *de iure* or *de facto*, treated public freedom."[155]

A protectionist solution is that holding that the creation of states of exception different from the state of siege may only be created by Constitutional Power. It is a change in constitutional powers of the State, directly affecting rights and guarantees of inhabitants.[156]

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[152] Vallenas Gaona, Jesús Rafael, "*Los estados de excepción a la luz de los derechos humanos en el sistema americano*" (States of exception in light of human rights in the American System) in *Revista Internauta de Práctica Jurídica*, Universitat de València, Nº 4 (January-April, 2000), http://www.uv.es/~ripj/4raf.htm. For a more thorough analysis, see Agamben, G., op. cit., chapter 1, "The State of Exception as a Paradigm of Government."

[153] Ibidem.

[154] Nino, C., *Fundamentos*…, (Grounds...), quote, page 490, with words of Vítolo, Alfredo, Estado de sitio, Consejo para la Consolidación de la Democracia (State of siege, Council for the Consolidation of Democracy), "*Reforma Constitucional. Dictamen preliminar*" (Constitutional Reform. Preliminary Opinion) page 305.

[155] Nino, C., *Fundamentos*… (Grounds…) quote, page 491, who takes cases such as Alvear (1933), Bertotto (1931), Sofía (1959), among others as examples of the case law deterioration.

[156] Vanossi, J. R., quote, who adds: "An innovation of this type was introduced by the Constitution in Section 34, in 1949, when the following emergency situation was added to the old text (Section 23): "Moreover, the state of prevention and alarm may also be declared in case of public disorder endangering normal life or vital activities of individuals. A law shall determine the legal consequences of such decision, but it shall not suspend, but provisionally limit the constitutional guarantees provided it is critical. In such case, state power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, for a period not exceeding thirty days." As a consequence of Section 83, Subsection 19 (2nd paragraph), the President was empowered to declare such "state of prevention and alarm", but he shall notify such situation to Congress. Once that constitutional amendment was abolished, it should be mentioned that no

Another non-exclusive solution with a more pragmatic vision is that "during emergency, the Rule of Law is preserved with appropriate judicial intervention. This judicial activism is the response of the Rule of Law to emergency, if Legislative and Executive Branches do not apply the tax balance principle in the most rational manner, when deciding who is paid and who is not. Naturally, judicial activism shall respect the legal and international framework imposing observance of the fiscal balance."[157]That is not enough. "Judicial Branch on its own cannot fix the country. Executive and Legislative branches must have other restrictions to abuse of power, and learn not to commit excess, not to compromise too much our collective fate. This is the biggest challenge of our time. It used to be like that, but crisis has magnified it."[158]

Change goes beyond institutions; our problem lies in men, Argentine citizens, and the place that, as builders of reality, they take in this Nation.

8.2. *Economic State of Siege*

Before 1994 amendment to the constitution, BIANCHI, in a work entitled *El estado de sitio económico* (Economic State of Siege)[159], analyzed in particular the powers of the State in the exercise of the emergency police power, in particular reference to the enactment of Acts No. 23696 and 23697, which —in his view— had taken us to an "economic state of siege" that, for emergency reasons, had limited the economic rights like in the case of political state of siege, described in Section 23 of the Constitution, quoted above, for personal rights.

He concluded that "classic judicial decisions such as Ercolano c. Lanteri de Renshaw, Avico c. De la Pesa, Angel Russo c. Delle Donne, Cine Callao or Fernandez Orquin c. Ripoll, all derive from American case law, such as Munn vs. Illinois, Noble State Bank vs. Hankell, Block vs. Hirsh, Home Building and Loan Association vs. Blaisdell, Nebbia vs. New York y West Coast Hotel vs. Parrish, the political creed of which has never been at stake —in more than fifty years—, even the «Conservative Revolution» that seems to go back to the period of the individualistic liberalism which has been so widely criticized, these decisions are those which provide sufficient grounds to current Supreme Court to justify restrictions on the economic state of siege."[160]

Nothing is more descriptive to identify *de iure* and *de facto* situations in our recurring crisis than calling it economic state of siege, a situation in which economic freedom of citizens is suspended or limited.

The analogy between both exceptional situations is very exciting and interesting for study and analysis purposes, not particularly on the basis of its success, but rather to distill the alcohol that intoxicated —and still does nowadays— the spirit and heart of people used to living in an unreal past and,

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similar or analogous "status" of exception may be established without turning back to constitutional exercise."

[157] Gordillo, Agustín, "*El Estado de Derecho en estado de emergencia*" (The Rule of Law under Emergency) LL, 2001-F, 1050.

[158] Gordillo, Agustín, "*Una celebración sin gloria*" (A Celebration without Glory) La Ley Sup. Const. Esp. 2003 (April), 13; LL, 2003-C, 1091.

[159] Bianchi, Alberto B., "*El estado de sitio económico*" (Economic State of Siege) Publication of Argentina Bar Association, number 50, Buenos Aires, may 1990, pages 13-44.

[160] Bianchi, Alberto B., "" (The Supreme Court has established its official thesis on economic emergency), LL, 1991-C, 141

especially, in a present signed by memory of what we were and what we are not today.

BIANCHI's last comments as quoted above, referred to the judicial decision entered in *Peralta, Luis A. and others versus Estado Nacional*,[161] and the evolution of the jurisprudential construction of Argentina's Highest Court, in line with that of its American peer on economic emergency matters and those matters concerning legislative power delegation. The years went by and the emergency legislation of the 90's was transformed into a new and deepest crisis, first recognized by law 25,344 (2000),[162]and later by Act No. 25561, still in full force and effect due to the extensions thereof, until 31/12/11.[163] Men and government changed, but emergency has always been and will remain with us.[164]

If there's something we inherited from our young institutional experience as a State, it's that the failures and the lack of policies cannot be replaced by theories or by the reception of foreign concepts, created for different realities.

When the 1930 crisis took place,[165] constitutional history of the United States was not the same as in Argentina and, therefore, settling down principles was also different in both countries.

By that time, United States had undergone three consecutive constitutional stages: foundation stage (1776-1800); institutional stage, and federal State strengthening stage (1800-1870), as well as "the stage of constitutional containment of emerging capitalism during the second industrial revolution (1870-1920); a stage with many ups and downs but, however, the Americans made huge efforts to moderate and contain the advance of capitalism and that helped them prepare to explore in depth, from 1930 onwards, what slowly and moderately, and among comings and goings have been implemented since 1870 […] By 1930, Argentina had already showed an emerging tolerance to change when, in 1922, it made a decision in favor of the constitutionality of the act of

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[161] *CSJN*, Decisions, 313:1513, 27-XII -1990.

[162] Extended for an additional year by Executive Order No. 1602/2001.

[163] Law No. 26563 extended the emergency until 31 December 2011. Previous extensions:
Laws 26339, 26204, 26077, 25972, 25820 and 26456

[164] About analogy between the doctrine of economic emergency in the United States and that of Argentina, as from judicial decisions in *Blaisdell* and *Avico,* and the acknowledgement of three stages concerning local transformation and adaptation of such precedents; especially, those in cases *Peralta* and *Bustos-Massa*, recommended *Spector, Horacio*, Constitutional transplants and the transformation effect, 83 Chi.-Kent L. Rev. 129.)

[165] We highlighted that "from 1860-1930, a period of seventy years, Argentina had an astonishing record of economic and demographic growth. This shows that constitutional transplantation can carry the day. Of course, one could argue that constitutional transplantation was responsible for the long period of military interventions and political instability that lasted from 1943 to 1983.
But scientific rigor does not allow us to make this claim by pointing to military intervention and political instability when there have already been transplanted constitutional texts and precedents.
There are too many other relevant factors that stand on the way of this interference. The ceteris paribus clauses involved in historical causal propositions make it very difficult to isolate a single factor as the cause of stability or instability. For instance, what was the role of the Law of Universal Suffrage, passed in 1912, in threatening powerful interests groups? What was the role of the Great Depression? What ideological influence did European totalitarian movements have in Argentina?
All these factors could have been relevant even in the presence of a wholly autochthonous constitution" (Spector, ob. cit.)

urban rent freeze, a measure that -by that time- was extraordinary for a country not used to that kind of measures." [166]

Ever since, that allowed for making assumptions as to Argentina's possibilities to face the crisis with a similar spirit, but all of them were wrong. The economic crisis "found us submerged in another political phenomenon we had already experienced with particular hostility during the first part of our history; what probes the recurrence of historical cycles. I am referring to the incapacity to find solutions for crisis within the established constitutional system. Just as occurred between 1810 and 1827, good constitutional intentions were knocked down, one by one, by political intolerance; the same intolerance that took control of us, now under the form of a *coup d'état*, or under a policy of systemic exclusion of all regimes opposing the existing regime. This variable turned into a constant of our history for the following fifty years and it marked deeply, since it was inevitable, constitutional law addressing the politics sage and aiming at covering it with legality." [167]

This national precedent of acceptance and institutional consensus reflected in the 1930 Agreement, offered the possibility for *usurping governments* to violate the Constitution invoking it, paradoxically. However, also strikingly, it guaranteed impunity and arbitrariness as to the performance of *de jure* governments which, under the excuse of national emergency were legitimated to do and undo property law in order to protect the life of Argentine people and the existence of the nation itself.

There were, and there are at present, special circumstances when "dedication to private property of objects subject to public interest and exploitation conditions justify and make Sate price intervention necessary, for the purposes of protecting vital interests of the community. When, due to the nature of the business, the physical conditions where it is developed or any other circumstances of the like, the efficient action of the common regulatory is not possible; that is, competence, the owner would be in the position to impose to the society true charges under the name of prices. The biggest the public interest for that constituting the purpose of monopoly, the stronger the economic oppression may be, and the more sensitive and pernicious its effects, since these could lead to the case where prosperity and essential welfare of a country or a region are at the mercy of greed or the whim of those unlawfully holding the factors of a service of vital necessity.

Getting to this extreme, protection of economic interests constitutes for the State an obligation of such a primary nature, as inevitable as is the defense of a community menaced by the abusive exploitation of an exceptional situation.

These conclusions have been incorporated to public law. It is no longer in question the power of State to exercise effective control over prices of services highly relevant for the society and which, for their nature, or because of the conditions present, necessarily constitute monopolized businesses."[168][169]

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[166] Bianchi, Alberto B., "*El Derecho Constitucional argentino en la década de 1930 (A propósito del nacimiento de la Revista La Ley*), [Argentine Constitutional Law in the 30´s (About the birth of the Law Journal L.L.)]" LL, 2005-F, 1302

[167] Bianchi, Alberto B., *El Derecho Constitucional argentino*… [Argentine Constitutional Law…], quote.

[168] Bianchi, Alberto B., "*El Derecho Constitucional argentino en la década de 1930 (A propósito del nacimiento de la Revista La Ley*)," [Argentine Constitutional Law in the 30´s (About the birth of the Law Journal L.L.)] LL, 2005-F, 1302

8.3. *No answers…*

The questions that the legal operator should ask himself in the case of economic state of siege —and its constitutionality— are:

Who, when and up to what extent the existence of categories of *laws and guarantees* that can be *sine die* suspended are defined?

What goods comprise this category of rights, the exercise of which is susceptible of being *temporarily* affected?

How does the time factor impact on the postponement of the exercise of such rights?

What is the role of the Judicial Branch in the restoration of the *postponed, suspended, or virtually confiscated* rights and, eventually, in the deepening crisis called on to be extinguished?

Is legal certainty a value susceptible of being temporarily confiscated?

There is no univocal answer to the questions set out, nor an answer following a scientific or logic criterion, since these seem to adapt to the occurrence of our times and our political, social and economic miseries.

There may be some basic parameters (minimum standards) but there is no probabilistic or logic assessment when the rule, in terms of Argentine practices, is the *pseudo discretional* exercise of exceptional powers.

As dangerous as the permanent emergency is the abuse of remedies created hereunder, for the sole invocation of undefined legal concepts, such as *public interest, general welfare, common good, etc.*

In the well-known case of Munn v. Illinois (94 U.S. 113), after reminding the monopolist situation of the companies owning grain lifters in the city of Chicago, and the large interest of the public in such business, the U.S. Supreme Court of Justice held that the regulation of its fees was justified, establishing as a general principle that "everyone offering their property for use must be subject to control thereof for public welfare purposes, to the extent of the interest creating it" (Granger Cases, 94 U.S. 155 *et sec*), for water supply firms. (Spring Valley Water Works vs. Schottler, 110, U.S., 347.)

Is the scope of the private interest created in regulated or monopolist services or activities similar to that of individuals depositing their savings in the financial and banking system? Evidently, it is not.

Section 30 of the American Convention on Human Rights sets forth that "permitted restrictions to exercise and enjoyment of rights and freedoms recognized therein cannot be applied except as laws enacted for general interest reasons and for the purposes these have been established. In comparison to this dialectics, a restriction can only be understood to be permitted to the extent that it is expressly authorized under this Convention and provided that it is limited by the conditions special set forth therein. In this sense, its prevision turns out to be a logical consequence of the principle expressly stated in Section 32, as it provides that rights are not absolute, since the rights of a person are limited by the rights of

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[169] Quoted: CSJN, Ercolano, Agustín c. Lanteri de Renshaw, Julieta, Fallos (Case), 136:161. (1922.)

others, for the safety of all citizens and according to common welfare requirements within a democratic society."[170]

The rights granted by international treaties and local legal systems are not absolute, accepting its limitations in order to harmonize exercise thereof with the rights of others, as well as in line with the general interest of the community.

Section 14 of the Argentine Constitution stipulates "an open classification of rights —completed by the implicit rights referred to in Section 33—, which are recognized in accordance with laws regulating exercise thereof [...] Not every regulation is constitutionally acceptable, but only those which entail a reasonable limitation that does not destroy its substance. The essential standard to determine the degree of legal regulation is given by Section 28, stating that regulations to laws must not altering the principles, rights and guarantees recognized in the Constitution.

At the same time, Section 99 paragraph 2, lists the powers of the Executive Branch, authorizing it to issue regulations as these may be necessary for the enforcement of laws, making sure not to alter their spirit with statutory exceptions." This is so, since "the question lays, then, in the degree of right violation involved: if it is reduced (altered) in its substance, stops being a restriction (reasonable) to become suppression (unconstitutional)."[171]

At the international level of human rights, laws limiting the rights of individuals "cannot impose restrictions other than those expressly authorized in pacts and for the purposes expressly stipulated therein. International courts of justice make efforts to adequate their judgments to real governmental goals, on the basis of necessity and proportionality as to the standards of the democratic society."[172]

The key of the answers to the questions herein lays in the realization of men and citizens within the scope of a democratic society.[173]

Our society bad health is reflected in the illness caused not only by crisis, but also by worst remedies. There is no point in providing formal arguments concerning control, and checks and balances of the political power as prescribed in the national Constitution, if in practice both lawyers and judges[174],and also legislators, have supported *de jure* State violations as from the beginning.

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[170] Alonso Regueira, Enrique M., "*El principio de legalidad y las facultades legislativas del presidente a la luz de la CADH*," (The rule of law and the legislative powers of the President in the light of the IACHR) LL, 2008-C, 803.

[171] González Campaña, Germán, "*Restricciones a los derechos humanos*," ("Restrictions on human rights,") in AA.VV. Gordillo, Agustin (dir.), *Derechos Humanos*, (Human Rights) 5th editorial, Buenos Aires, FDA, 1999, chapter VI-1/2.

[172] González Campaña, G., quote., chapter VI-20.

[173] Cfr. Bonina, Nicolás y Diana, Nicolás, "*La senda del Derecho Administrativo en la jurisprudencia de la CSJN*" (The path of Administrative Law in case law of the Supreme Court) *La Ley Sup. Adm. 2010* (August), page 40 *et sec*.

[174] As regards this, with certainty, it has been stated that "The power of judges is not measured as from the writing of their judgments, but from the true possibility of such judgments to be enforced within the scope of the law and he Constitution, expressing, in the particular case, values that are to be safeguarded. Otherwise, the notion that justice aims at communicating is at stake and, with it, the perception of effectiveness and credibility of the system." (Garcia Sanz, Agustín A. M., "*Los costos de la imprudencia en el sistema republicano*," (The costs of recklessness in the republican system) LL, 2005-E, 1504.)

Consecration of the *de facto* doctrine is a source of violation of the national Constitution, clearly followed by consecration of the economic emergency doctrine; gods and demons of an Argentine society lacking any reasonand justice

This is the Argentine reality that the law attempts to follow and reflect in a world of fictions that only we believe. These fictions are not useful, favoring social peace, it is just the opposite. These fictions lead to a permanent conflict among social groups, supposedly antagonist: those who have been deprived of their property rights and those who had nothing and continue not having anything. Thus, all is in this case much more than the sum of the parties.

This is so, in particular, since the whole (the Argentine society) is not only one but many, with multiple interests that do not even coincide in a basic minimum consensus (another fiction of the *de jure* government) that, in Argentina, does not exist since the 80's generation and that is included among the principles stated in the Preamble of the national Constitution.

8.4. *Conclusion*

Apparently, we have always lived under an absolute *state of siege* until 1983 (in terms of Section 23 of the national Constitution); and since 1989, with some interruptions, under an *economic state of siege* "the commencement date of which we are aware [but] we don't know the limits thereof."[175] We have all contributed, to a greater or lesser extent as part of the society, its existence, as from the criticism or acquiescence of its eternal validity.

As happens with *de facto* doctrine, abuses in its declaration and implementation have led to the collective awareness of its injustice due to, in some cases, the media management of the crisis and, in some others, the *sine die* extension thereof, there being no political reason supporting, in certain cases, the suspension of certain guarantees concerning property.

Public justification of emergency measures addresses those opposing them.

The justification, by Government[176] —notice we do not refer to the "State"— of the adopted political decisions "means to convince [citizens] by way of the use of public reason; that is, by way of reasoning and appropriately inferring fundamental political issues, and making use of belief, reasons and political value reasonably expected to be recognized by others. Public justification begins with some form of previous consensus; this is, statements that all disagreeing parties, supposed to be free and equal, and of full capacity, may reasonably share and freely subscribe. Thus, public justification is not to be confused with mere reasoning, valid as from statements (although this may also be so, of course). Valid reasoning is instructive for establishing relationships with statements: it links

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[175] Bianchi, Alberto B., "*La Corte Suprema ha establecido su tesis oficial sobre la emergencia económica*," (The Supreme Court has established its official thesis on the economic emergency) LL, 1991-C, 141.

[176] In terms of legal protection of the State, a great professor and excellent lawyer, whose name we keep confidential, has pointed out that the lawyer for the State does not counsel the government, but he counsels the State, since this is what we all are. And as per such task, no moral dilemma may appear. The dilemma starts when the interests that are said to be counselled are not public but private of the political officers.

essential ideas and general declarations, and these are linked to other judgments, more peculiar. It exhibits the general structure of any type of conception."[177]

Is any reasoning valid to back any emergency measure which is not supported by facts, reality, or the Constitution?

The answer is limited to a comment made by GORDILLO, whereby he stated with his usual pragmatism the Argentina's Supreme Court of Justice "cannot, without paying a high political price or social estimation at the international and national level, perpetuate the state of total lack of faith in the law that chokes the citizenship by stating that all that existed then or magically exists now, perfectly in accordance with the Constitution. Additionally, since it cannot –politically- declare on the contrary, only one option was left: silence. It did not know how to use it; *Bustos* probed that. Changes have not been minor and it was not time to affirm the advances on property rights of common citizens, who lack all kinds of powers to influence on the decisions of governmental bodies but expect to be protected by an independent Judicial Branch, be it that of first instance or —less and less— that of Argentina Supreme Court of Justice. If the Highest Court of Justice, in this fateful legal time, cannot politically confirm a decision of a lower court in order to restore the legal order, it should refrain at least from saying so, thus reopening the wound that the first instance court was trying to stop from bleeding. Leave the first instance decision unchanged, dismiss the appeal. Exercise ordinary judicial function; let the extraordinary powers rest until faith in the law is restored, as MAIRAL, plenty of hope, stated."[178]

It should not be confused the validity of the possible reasoning with its adaptation to constitutional reflection and reality. If such standard cannot be overcome, the decision (emergency measure) is not valid and, therefore, unable of any public justification; nor by discourse or the media, or by words imposed by force or by monopoly thereof.

Another additional problem is the consequences arising from the economic emergencies at the statutory level, since these have served and continue to serve to amend laws under the excuse of the state of necessity giving raise to them. In particular, from the administrative law point of view, the eventual constitutionality[179] of the amendments introduced in administrative procedural law matters is pragmatic, in the revision or renegotiation of administrative contracts, in Acts No. 23696, 23697, 25344 and 25561,[180] and the temporary validity thereof, after the emergency is overcome.

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[177] Rawls, John, *La justicia como equidad*. *Una reformulación*, (Justice as fairness. a reformulation) Buenos Aires, Paidós, 2004, p. 53.

[178] Gordillo, Agustín, "*¿Puede la Corte Suprema de Justicia de la Nación restituir la seguridad jurídica al país*?," (Can the Supreme Court of Justice of the Nation restore legal certainty to the country?) LL, 2005-A, 905-921. Reproduced in David Cienfuegos Salgad o / Miguel Alejandro Lopez Olvera (coords.), Studies in honor to Jorge Fernández Ruiz. *Derecho constitucional y política (Constitutional Law and Politics), México, D.F., Universidad Nacional Autónoma de México, 2005*, pages 269-296.

[179] See: Rejtman Farah, Mario, "*La consagración legal de la habilitación de instancia de oficio: su inconstitucionalidad*," *en Derecho Procesal Administrativo*, (The legal consecration of instance enabling business: its unconstitutionality, in Administrative Litigation), t. 1, Cassagne, Juan Carlos (dir.), Buenos Aires, Hammurabi, 2004, page 917 *et sec*.

[180] See: Mab romata, Enrique, "*Sacrificio compartido*: *¿Nuevo estándar jurídico o emergente de la emergencia?*," *La Ley Sup. Esp. El Contrato Administrativo en la Actualidad 2004 (mayo),* (Shared Sacrifice: New legal standard or emerging from emergency?" Contract Administrative Law for Today) page 136 *et sec*.

It is understood, for example, that the desperate situation in which we have been submerged by the recurring crisis suffered along most of the 20th century cannot authorize despair from the State itself or governments using procedural gimmicks resulting in gross abuses not only to property rights but also to the minimum guarantees of the right of defense.

While analyzing the validity of Section 12 of Executive Order No. 214/02, which suspended the enforcement of injunctions issued or to be issued in relation to the restrictive regime that started with Executive Order No. 1570/01, case law stated that such rule aimed at "interfering in the right of defense conferred by law, without which persons face the risk of having a judgment entered in the future in accordance with their actions but sterile as to its material meaning, since such sentence was passed when it was impossible to operate in reality due to the fact that the interest it attempted to preserve upon commencing a judicial action had expired by that time." It was not a matter of "modulation of a process which both the State and the individuals must observe for litigation purposes (modification of terms, defenses, exceptions or specific standing standards, for example) [but] of abrogation of a procedural defensive tool of substantial type, for the purposes of protecting a right in its nature."

In conclusion "the right of defense can only be abolished in two cases: a) within the scope of the state of siege, since statutory provisions are set aside the institutional responsibilities of the *de jure* State —except for guarantees that even in this case are to be preserved in accordance with Section 27 paragraph 2 of the Pact of San José de Costa Rica—, and b) within the *de jure* State, the only emergency I can imagine as a justification of that limitation, is the judicial one, objectively verified."[181]

The **golden rule**, outlined by Vanossi, had been flagrantly violated by Section 12 of decree-law 214/02, and it was the Judicial Branch that had the duty to restore it, turning the situation back to an equitable position, adapted to reality and emergency, but which does not set aside the *de jure* State.

This is not a case, nor are those hundreds of cases of similar effect, of charging with the generic unconstitutionality of all laws and to fall in the demonization of everything arising from the branches of the State during the emergency state, a solution adopted at many courts and most of the authors of opinion and was translated —as is translated today— as a minor commitment against reality.

Democratic tolerance must collaborate for larger understanding and acceptance of the reality we have to face—or suffer—, within and outside the State that, strictly speaking, we will always be part of.

To learn to live and cohabitate with our differences, to build a society that is more and more open each time, but which possesses the highest diversity possible as possible paths there are in connection with understanding in front of the social controversy envisaged in connection with any judicial case.

Such diversity cannot be ignored at the political-legal-economic level.

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[181] *Juzgado Nacional de 1a Instancia en lo Contencioso Administrativo Federal N° 4, Florido*, María C. c. P.E.N.; Date: 19-IV -02; LL, 2002-D, 306 - IM P 2002-15, 151; with comments from Rejtman Farah, Mario, "*Emergencia: Conforme las circunstancias (Emergency: Under the circumstances)*;" Sup. Adm. 2002 (June); LL, 2002-D, 306.

Reality always overcomes any theoretical statement we may make, compared to the current global economic situation, in a crisis commencing in 2008 and which seems not to have a final solution in the short term.

9. *Shared but not assumed* r*esponsibilities*

At the down of Argentine constitutional law, taking the American democracy as the focus of analysis, Florentino Gonzalez stated that when men's freedom is subject to a certain order, the founders of the United States "have adopted the most efficient measure to form a society according to the representative democratic government type, since this makes it easier for men to educate themselves individually as per *self-government,* thus making it qualified to take a useful and intelligent part in social *self-government*. The feeling of freedom that is taught to individuals in this way is, is extended all over the community, making it fit to keep the quality of skillful and free people, so as to obtain their happiness under a government inspired by opinions and supported by responsibility."[182]

As for the *de facto* doctrine, it would be very innocent to believe that each government (military), with greater or lower support of civil groups, had no control over media and academic sectors and, in any case, should these not exist, the first thing it would do would be to intervene and control them; especially, their content.[183]

The same occurs with the *economic emergency doctrine*. Its enforcement seems justified under certain situations of fact, but who is the one to establish its temporary limits, above all, just as we saw during almost twelve years in emergency. As a Nation we have two hundred years of experience —almost one hundred and seventy as a State— so making use of such arguments would make us sink in a formal fallacy.

From the point of view of common citizens, the decisions entered by Argentina's Highest Court of Justice are relevant and carry an emotional burden in their words of authority or in the authority of words.[184]Who, but the Highest Court of Justice of the Nation, is the suitable means to guarantee social acceptance of a government that proclaimed itself victorious during the revolution, with the only power been granted by the monopoly of force.

In 1955, 1962, 1966 and 1976 *coup d'état*s, although the system of the Agreement was not used to cure the original vice in order to gain Access to power, other tools and/ or legal institutions were adopted, such as: Proclaim (dated May 1, 1956); Leaderless Law (with Guido going into office in 1962); By-Laws (of the

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[182] Gonzalez, Florentino, *Lecciones de Derecho Constitucional (Lessons of Constitutional Law), París, Librería de Ch. Bouret*, 1889, p. 21. One of the A7rgentine causes of our permeability to accept as normal the violations to the Constitution and our laws, with basis on the fact that the Argentine citizen was not educated in freedom, but under tolerance and disregard for institutions. Thus, no one is to ever assume responsibility for anything.

[183] At present, the power probed by massive communication media concerning formation and deformation of opinions cannot be ignored (v. Carpizo, Jorge, "*Los medios masivos de comunicación y el estado de derecho, la democracia, la política y la ética*," (The media and the rule of law, democracy, politics and ethics) AA.VV. *Defensa de la Constitución. Garantismo y Controles* (Víctor Bazán, coord.), Buenos Aires, EDIAR, 2003, p. 441 *et sec*.).

[184] In the dissenting opinion of the Chief Justice of the Supreme Court, Mr. Roberto Repetto, in re: "*Municipalidad vs. Mayer*", Decisions 201:249 (1944), it was expressly stated that: "the definition or enumeration of the powers of the different branches of government and strict enforcement thereof, especially in the presence of a revolutionary movement, has more significance for the fate of democratic institutions than the possible temporary misfortunes derived from accepting the conclusion that it is the *de facto* government that, in fact, lacks legislative powers to amend or enact general codes or rules of public law within basic laws [...] the *de facto* government cannot have more powers than the *de jure* government, a limit sealed with the strength of an oath."

Argentine Revolution, in 1966; Fundamental, in 1972 and for the National Reorganization Process, in 1976; with supranational validity) and law-decrees.[185]

Same optimistic criterion had an effect on its interpretation of the *economic emergency doctrine*.

Simply think of the years 2002 and 2003, with endless lines at courts, permanent demonstrations in front of the Courthouse of the City of Buenos Aires, requests for impeachment of judges as per "automatic majority", federal judges saying hello to "people" from balconies facing Tucuman Street in the same city, banks exfoliated by savers affected by the seizure of sums of money deposited in the financial system, legislative members escaping, hidden, for fear of being hit by the out of control mob, judicial corruption scandals at some federal jurisdiction courts in the interior of the country as a consequence of the frozen bank deposits measure, etc. Hanger then got to the streets only when the "argentine society" decided to look at it and accept it. Neighbor assemblies were created to solve —by self-management? — the great problems of humanity, but not those of neighborhoods, people, or the streets. The supposed crisis found the light of political representation that would end up with the corrupted class and cause-effect of all our endemic, pathetic, and incurable misfortunes. Crisis concerning political representation that seemed to have been extinguished and was forgotten as was the economic emergency creating it, which until the time this work was written, still seemed permanent, immutable, and perennial.

All that is the summary of the expression of the aspects of a single political phenomenon: **power**.

The consequences of a wrongly applied doctrine (be it that of *de facto* governments or that of *economic emergency*) helped nothing but to smear the reputation of the head of the Judicial Branch and to authorize the use of force to overthrow governments legally established or simply the strength of demagogic discourse to *sine die* maintain the emergency.

But all this ideal and theoretical purity, where the abstraction of the Court acquired supreme interest as to, for example, the triumphant revolution, it was escorted by who cooperated in the p*atriotic* task to perfect what the court had just untidily dawned, with the weight—manly—conferred by power and monopoly of force. Strikingly, at present, little or nothing said in this regard.[186]

We should also highlight the role of those who criticized this pseudo doctrine before, during, and after each usurping government, vindicating the value of words and what is related to each denomination per se: the ideology hidden behind language;[187]an ideology inherent to human beings.

In the narration of Foucault, truth is linked to the legal ways and how, through history, we encapsulate our reality in very different corsets, using terminology that offers nothing but condemns us to fiction as offered by law —the backdrop that takes no responsibility in reality—appearing before us:

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[185] See also the development made by Ramella, quote, pages 52-55.

[186] We leave for the reader the investigation concerning this, since we do not have as a goal, at present, a witch hunt. Everyone knows what responsibilities they have and that the higher the position occupied (academic, doctrinaire, political or judicial), the higher the social reproach will be.

[187] Sometimes, it is not that hidden.

What will happen then in five, ten, fifteen years' time, when others or the same men examine, revoke, declare unconstitutional what is nowadays considered legitimate?

Who assumes the social, economic and political cost of the misfortunes of a country used to *the sole rule (material) being that there is no rule (formal), and all (formal) rules are subject to violations, since the fundamental rule (the Constitution) is susceptible of being misinterpreted, dishonored, spitted up, stepped on, ignored, forgotten, sidestepped, buried, wasted, crossed out, corrupted and distorted as per piecework, and the will of those assuming the high function of being their representatives?*

It shall be time what will probe us our social maturity, if any, in front of political and social phenomena exceeding us day after day because of their significance and also because of the impossibility of adopting changes that the same system expects as answers to claims, the dissatisfaction of which has originated the crisis and the adoption of extraordinary remedies.

The power of words continues to be fundamental for the discourse on power and the legal forms it adopts in reality in times of crisis, and also of institutional normality.

10. *Meta-Legal Discourse*

"The true guarantee of a good government is the enforcement of laws. Therefore, all transgressions must be prevented; no matter how little these may be;
Insensitive causes end up dully mining the State, as well as pocket expenses, multiple though, destroy powerful fortunes."
Aristotle, Politics[188]

Time has always showed us that history repeats itself, and we Argentines do not know walking without looking at the path, that citizens have not been educated and that, every time, it is more easy to make citizens uncritical of power, with less schemes: few words are enough for this, although the counterpart of discourse is nowadays more costly than fifty years before and financing thereof is also more onerous.

In the political harangue —and in the battlefield of law— we see on a daily basis that the strength of words is used as an escape towards the field of irrationality, seducing by means of discourse.

The study of reality gets lost in the confusion it offers to the observer: it results so complex that the simplest thing is to wrap it in discourse (political, legal and economic). In this way, we are "in a field where the only true knowledge would be that having to do with existence: only those who live the myth adhering to their faith, the impulse in their hearts, and the commitment of their sensitivity would be in the position to express their profound reality. From an external point of view, examining only with the eyes of objective observation, the myth runs the risk of not offering more than a fossilized image; a dried piece of anatomy deprived of all mysteries of life, cold ashes of an incandescent fireplace. Among the data concerning the previously lived experience and those of critical distancing persist the hiatus that might be possible to reduce but it is vain to dream with its total abolition. The myth can only be understood if lived intimately, but living it prohibits to objectively explaining it. Subject to study, it tends to coagulate in a succession of statistical data and, all the same, to empty its emotional content; that is to say, the essential thing about it."[189]

There is an interesting phenomenon in *de facto* and *economic emergency* doctrines, opposed to the current political discourse, integrated in the structure of power not only by the use of force and crisis, respectively, as the only legitimating elements, but also as the rising of the military sector as the mentor of the Nation, in relation to the first case, and that of patron and enlightened policies in the second case.

According to the *de facto* doctrine, there was "the conviction that, in the armed forces, there are communitarian values they control and preserve and that political power has a scope it cannot and should not exceed, originating a limit to political power and exercise thereof by legal holders of such power.

This means that rulers , even when they do not accept this tutelary role of the armed forces, must count on it while using and disposing of all resources of power […] Our armed forces, evidently, forms part of the so called «political class» in the broadest sense because, even when its trustees are not usually the true

[188] Aristotle, Politics, Madrid, Alba, 1987, p. 235.
[189] Girardet, R., quote, p. 23.

holders of political power, they remain in the periphery of power, forming part of the political process and making a permanent estimation of its value, if any."[190]

It can be recognized that the armed forced played an eminent political role during the entire 20th century in Argentina —I especially refer to the consequences of their tutelary role after the process of national reorganization[191]—. However, the exercise of a governmental function that the sovereign —the people— did not delegate through their vote cannot be legitimized.[192]

According to the *economic emergency doctrine*, insuperable facts, the limit of the existence of the Nation and the State have been arguments easy to identify since they address our recurring reality and the mistakes that nobody takes as their own and that every government blames on the former. There are no programs or politic continuity of policies, even less of *men*, so responsibilities are never allocated and, if there is room for any criminal or equitable reproach, statutes of limitations —that in these cases apply for being part of legal certainty—shall play against the realization of men and citizen in democracy.

It has been recognized that "the use of arguments hiding an evaluative analysis has put obstacles to and delayed the changes concerning institutional and social arrangements, which many times are considered inconvenient or unfair.

In other words, the formalist discourse, the argument holding that the defense of the legal, certainty is more worthy than discussing about the justice of positions is a dissuasive tool of critics that helps freeze the *status quo.* For this

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[190] Bidart Campos, "*Diagrama histórico-constitucional*...,"(Historical-Constitutional Chart) ED, 47-843.

[191] We have held, in this regard, that "it is not as from oblivion that a sincere society is built, and those matters that tear apart, heal better and fastest if they are laid on the table, discussed and resolved. This is how a society gets mature, how it takes responsibility about it and may adopt a sense of belonging. Positions favorable to oblivion are not appropriate of those who disregard the contribution to civil society. There can be no better future without turning and looking back. We can only turn the page when we have read and understood the previous page. It is only then that we will be able to speak about a democratically mature society developing into a *de jure* State." (Diana, Nicolas y Kodelia, Gonzalo S., "*Seguridad jurídica vs. Derechos humano*s (o, en la sombra de la justicia) [Legal certainty vs. Human rights (or, in the shadow of justice] ¸" LL, 2005-A, 824.) This is so since it is not about oblivion and impunity that societies are built up; and it is not about lobbing defense or that of body, irrational, meaningless and without questioning that the highest aspiration is made true in any society: Justice. (Diana, Nicolas y Kodelia, Gonzalo S., "*Sinceridad y justicia: 18 años después*." [Sincerity and Justice: 18 years later] LL, 2005-E, 320.)

[192] It was not in vain at the dawn of the republican regime of government that it has been stated that "it is the people who are the only lawful source of power and, out of it, the constitution is originated; out of which the powers of the different branches of government are derived. It seems strictly according to the republican theory to go back to the same original authority, not only when it is necessary to expand, reduce, or change the powers of government but also every time any of its offices invades constitutional rights of another [...] It is not being discussed that this reasoning is of great value and it must be granted that it probes the need to define a way and keep it open, the decision of the people being expressed at certain big and extraordinary occasions. However, there are inconveniencies impossible to overcome as they oppose to this resource of people as an ordinary mean to maintain the different branches of power within its constitutional limits" (Hamilton, Alexander / Madison, James / Jay, John, *El federalist (The Federalist Papers), México, Fondo de CulturaEconómica*, 2006, 2nd edition, p. 214.)

This practical obstacle to making ordinary an extraordinary consultation through people, evidently, does not justify minorities or elites (armed forces) within or outside the State self-proclaiming them, representing supposed interests of the Nation or people.

reason, a critic vision of law aims at obtaining a more transparent discussion, and probably more radical and controversial, about the underlying moral conflicts."[193]

Sincerity towards ourselves seems not to be a feature identifying us or rather common in the Argentine society, a consequence at some point of this political –constitutional parasystem. Sadly, we seem to live in the *Aisat-naf* tribe, in *Noisuli* islands, within the darkest superstition, not concerning "*Tû –Tû*" but concepts such as *de facto* doctrine and *emergency state*, which despite lacking meaning (or its nonrelated application to factual circumstances not included in these concepts) have a relevant function in the Argentine collective imagination and also in the selection of our recent memory.[194]

Paraphrasing ALBERT CAMUS, lawyers need to have some self-criticism, since law "consists in defining every day, to present, the requirements of common sense and the simple honesty of spirit," which always "entails certain risks."[195]

It is the strength of words (as weapons) that has served to support the force of facts, violence as a means toward access to and exercise of power.

If democracy was the path chosen by the Argentine society to "give room to men as a person in a fair and free cohabitation,"[196]we cannot accept that anyone would raise against constitutional authorities, under the excuse they do not address the supreme interests of the Nation or justice. That is not exercise of the right to resist oppression no matter what the justification of the authors of opinion or what case law consist in, it is what Section 22 of the Constitution states as a sedition crime,[197]and Section 214 *et sec* of the Criminal Code as treason to the Nation. [198]

The simple fact "that state power be lawful must lead, above all, to the abolition and negation, as Law, of any right of resistance. But the old problem of the «right of resistance against the tyrant»; that is, against unjust and abuse exercise of state power remains a current issue, and this lack of content, of formalist and functionalist nature, the parliamentary legislative State is unable to address. It only leads to a concept of legality indifferent to all contents, neutral even to its own validity, and in disregard of all substantial justice. Lack of content of the mere statistics of the majorities suppresses the legality of all conviction strength. Neutrality is, above all, neutrality from the fair and the unfair. The

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[193] Miljiker, M.E., op. cit.

[194] Cfr. Ross, Alf, "*Tû-Tû*," translation of Genaro Carrio, Buenos Aires, Abeledo-Perrot, p. 9 *et sec*. We confess that, as lawyers, most of the times but mainly as citizens, we feel close to the Swedish missionary of Ross, intending to unmask trivial ideas or concepts or, at least, lacking connection with the meaning that by force or because of its monopoly intents to hide reality, what it is.

[195] Camus, Albert, "*Autocrítica*," *Moral y política (Self-criticism, Moral and political)*, Buenos Aires, Losada, 1978, p. 28.

[196] Cfr. Bidart Campos, "*La Constitución y la libertad (Para una reivindicación de Urquiza y de la Constitución de 1853)*, [The Constitution and freedom (For a claim of Urquiza and the Constitution of 1853]" ED, 45-914.

[197] "People do not deliberate nor govern, except by way of its representatives and the authorities created under this Constitution. Any armed force or group of people, who claim the rights of people in the name of such people, shall be liable for sedition."

[198] "Any Argentine or any person who, having to obey to the Nation by virtue of its job or public function, who shall raise in arms against it, join enemies, or somehow help them in any way or provide them assistance, shall be punished with prison or jail from ten to twenty five years, or perpetual penalty and in either case, he shall be punished with absolute perpetual prohibition to assume public office provided that this has not been provided for in any other provision of this code."

possibility of what is unfair, what is «tyrant», is whisked away by way of formal pre-digitalization specifically consisting of making the unfair not to be called as such; or preventing that the tyrant be called the tyrant, just as war can be whisked away by the trick of calling it «measures of peace accompanied by battles of more or less magnitude» and making this look like a «purely legal definition of war». In this way, legal power, as simple «conceptual necessity», can no longer do an injustice."[199]

We must assume that the *meta legal* discourse invades and has invaded the reality, trying to turn metals into gold.

This is so since having been "proven that the sovereign power resides *natural and essentially* in the political community —in the people— and that government is simply the exercise of sovereign power, it is *natural* that this power be exercised by delegation or representation of its owner. **There is no reason for anyone to retain it in their hands, as if it belong to them by law, so as to make them sovereign, and dispose at discretion of the fate of other members of the society."[200]** Emphasis added.

Let's then not trust in those who, like Simon the Magician, expect or have expected to sell the power to impose, by the hands, the holy spirit, turning *usurping governments* into *lawful governments*, no matter which the theory used to justify the act of rebellion be[201], even less when the emergency and the crisis have transformed the extraordinary remedies into ordinary, and exceptional situations into normal and usual.

The underlying vice, as stated by BIANCHI, is to believe that "Executive Orders —and also laws— have a demiurgic value, creative, and that the president, just as King Midas, can turn into gold everything he touches […] Reality —one and true judge of the situation — is always imposed on those vain inventions aiming at simplifying it, but it leaves hints that, in terms of citizenship, are translated into mistrust towards rulers. If it is true that we live in democracy, and if it is true that those administering it have the intention of strengthening it, its duty as such is to obtain the maximum yield out of existing institutions, respect for which they have invoked to access to power. Under such circumstances, it lays the key to the solution of these problems. Of course, treatment shall be slower but, in the end, it

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[199] Schmitt, C., quoted, p. 47.

[200] González, quoted, p. 10; who continues to state that "the forms of government against this principles may, with a reason, be called artificial, since these are only the result of art, and do not have a basis on the natural form of the society. This is how the society fits the government, instead of government being adapted to it."

[201] As remembered by Rejtman Farah, undoubtedly the existence of administrative law seems to show, as it was once said, that "miracles are possible. If it is almost a miracle that administration is subject to the rules it has established, and to respect them. However, miracles don't usually happen too often. And our country may be a good example of it. In this sense, it is less strange that the State finds the grounds to exercise exceptional powers outside the legal scope it has agreed to comply with, in a factual situation that it has created and for which it is responsible. Additionally, it is far from being considered an exceptional situation. In the same way, under the excuse of emergency, existing laws are abandoned, modified or ignored. Although almost anyone questions the responsibility of the State as regards application of policies which led to an emergency state, what is even less usually remembered is that the emergency so-referred in our legislation is not an exceptional or temporary situation" (Rejtman Farah, Mario, "*Contrataciones públicas transparentes: un desafío en la emergencia*," (Transparent public contracts: a challenge in emergency) LL, *Suplemento Especial El Contrato Administrativo en la Actualidad*, 2004 (mayo), p. 103.)

will be much effective."[202]Disproportionate rush to legislate within a democratic republican system "is a false proof of efficiency. Democratic governments are slow, and these should be so, based on previous enquiries, discrete surveys as to public opinion."[203]

The strength of words, silence and discourse, have taken us to the oblivion of our own 20th century history, marked by tolerance to six *coup d'états* which self-proclaimed themselves as triumphant revolutions,[204] swearing to defend the Constitution that, blatantly and shamelessor shame, they had violated, ignored and dishonored as they broke by force into the established powers.[205]

Tolerance is transformed into a demagogic discourse of emergency without factual support, but also in the conception of State in line with the collective imaginary.

In the words of BORGES, "Argentines, compared to North American and almost all of the European, do not identify themselves with the State and this is an inconceivable abstraction; the truth is that Argentines are individuals, not citizens. Aphorisms just like that of Hegel «The State is the reality of the moral idea », seem to be sinister jokes."[206]

The Argentine society is a community of words in *silence*, which are written but not pronounced; where history, economics and social practices, language, mythology of our ancestors and the fables of our childhood, and which obey to rules not having been set forth in our conscience. We do not want, at all, to be disposed of this discourse whereby we want to immediately say what we think, believe or imagine,[207] when we do not even see ourselves reflected in the mirror.[208]

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[202] Bianchi, Alberto B., "*De las leyes «de facto» en los gobiernos «de iure*» (Reflections on decrees suspension of judicial proceedings against the State)," RDA, Year 2- No. 5, September-December 1990, pp. 662-663.

[203] Linares, Juan Francisco, *Fundamentos de Derecho Administrativo*, (Grounds of Administrative Law)"Prologue," Buenos Aires, Astrea, 1975.

[204] From the theoretical point of view, it has been said "when it is just a *coup d'état*, not a revolution, the continuity stage is maintained in connection with the constituent power. All these powers are "*de jure*", as created, organized and regulated by the Constitution that existed and remains in existence. Only the officers are *de facto*, on the condition of holding a degree, either by appointment or vote, according to constitutional prescriptions. Such degree must be originally lawful and look legitimizing for a *de facto* officer. On the contrary, this is the case of a usurper." (Sanchez Viamonte, quoted, p. 170.) Implementing this statement to constitutional practice can lead us to what is ridiculous to be unaware of as to the intervention of *de facto* officers, designated by a usurping governor, and is as void as theirs. That is to say, that the original vice of who takes control of the State and all of its powers, cannot be purged no matter how much they promise to comply with a Constitution that was violated from the day the executive branch was overthrown, and with the intervention of the other powers. (Legislative and judicial.)

[205] It is worth mentioning that "it is not that we have abandoned at all the 1853 Constitution; but we failed to comply with it too much, both in connection with its text and spirit. Although we should mention the fact that we keep it formally in existence, which means that we share its ideas in spite of not having the social strength or enough will to make our governors comply with it, enforcing it." (Gordillo, Agustín, "*Una celebración sin gloria*," LL, 2003-C, 1091.)

[206] Borges, Jorge Luis, "*Evaristo Carriego*," *en Obras Completas*, t. I, Buenos Aires, Emecé, 1996.

[207] Foucault, Michel, *La arqueología del saber (The Archaeology of Knowledge), Buenos Aires, Siglo XXI, 2005*, 2nd edition, p. 354.

[208] We cannot stop remembering that "all costs assumed by the government in front of the society and justice are debts it incurs and will inevitably have to pay as per other public issues. Its credit is not endless. Apart from cases in which the society puts limits to government there are cases in which individuals do so. Not only Bielsa can question his conscience. Others may follow his

The answer lays in not missing our constitutional memories, no matter how much strength is intended to be given to discourse, [209]"**it is in the seed that the woods exist.**"[210]

According to NIETZSCHE, memory "recalls previous status of the same species, together with casual interpretations related thereto, but *not* its related causes […] This is how we get used to a certain casual interpretation that, in fact puts obstacles to the investigation of the cause and it may even block it."[211]

In the legal discourse there is no coincidence; everything has a cause and a certain purpose. The role and responsibility of legal scholars lay in making such discourse not deterministic or static, but dynamic within a changing and expanding reality, just as the universe.

If we accept that history is a system —the system of human experiences, which form an inexorable and unique chain— all terms, concepts and institutions of law, to be precise, are required to be determined according to history, "no more, no less than Hegel's Logic, each concept is worthy *just* for the gap left by others."[212]

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example. But, we do not get used to depending on them. And let's not forget that they react, at the same time, according to what they receive and perceive from society. Let's not be pleasant with anyone with power. That is the key to living in freedom." (Gordillo, Agustín, "*Racionalidad, política, economía, derecho*," (Rationality, politics, economics, law) in LL, December 28, 2005, p. 1.)

[209] "De iure State (*rule of law*) probably cannot work —and certainly cannot work well— without a sense of the institutions of the society. It is even worse if it fails to do so, without the institutional becoming the most wide sense of the word. Law protects and Law teaches; institutions grant meaning, substance and continuity to its powers. With independence of the construction of institutions, Law needs to be developed in such a way as to make its enforcement productive for freedom." (Dalla Vía, Alberto Ricardo, "*Derechos políticos y garantías constitucionales," (Political rights and constitutional guarantees) in AA.VV. Derecho Constitucional, Buenos Aires, Universidad, 2004,*1st. Edition, p. 128, quoting Dahrendorf, Ralf, Ley y orden.)

[210] As stated by Mariscal, "Plants teach us the worse that can happen to a person who is not dying but living dead, without style, without their own perfume. They do not worry about what there was before, now. It is in the present instant that the past and the future exist. The future is inventible, not inevitable; it is built out of what we do today. Every second, it determines both the future and simultaneously expresses the past. It is in the seed that the woods exist." (Mariscal, Enrique, *Manual de jardinería humana*, Buenos Aires, Serendipidad, 2003, 10ª ed., pages 15-16.)

[211] "*Los cuatro grandes errores*" *en El ocaso de los ídolos ,* ("The four major errors" in The Twilight of the Idols) Buenos Aires, Letras Universales, 2005, p. 55.

[212] Ortega y Gasset, J., Historia…, (History…) quoted, p. 95.

11. *Law: Strength Continuation (from war to other means)*

"It cannot be repeated enough that there is nothing more fertile as to wonders as is the art of being free; but there is nothing harder than learning about freedom
[...] Freedom [...] comes out of the ordinary in the middle of storms,
It is laboriously established among civil discords and only when it is long term
Can its benefits be learned."
De Tocqueville, Alexis, Democracy in America[213]

We could sum up the conclusion of this work, quoiting ORTEGA Y GASSET: "The historical reason is, then, ratio, logos, strict concept. It is convenient that not even the least doubt be raised in this regard. As we oppose it to the mathematics-physics reason, it does not have to do with allowing for irrationalism permission. On the contrary, the historical reason is even more rational than physical; stricter, more demanding than that. Physics resigns to understand that of which it refers to. Moreover, this ascetic resignation is its formal method and, for the same reason, it gives the term understanding a paradoxical meaning about which Socrates would have claimed when, at the Fedon, he refers us to his intellectual education; and, after Socrates, all philosophers until the late 18th century […]

The historical reason, instead, does not accept anything as a mere fact, but it flows with any fact related to the *fieri* where it comes from: it watches how facts take place. It does not think it makes human phenomena clearer, reducing it to a repertoire of instincts and «powers» —that would, in fact, be rude facts, just like crush an attraction—, but it rather shows what men do with instincts and powers, and even declares how those «facts»—instincts and powers—have been, since these are not, as it is clear, more than ideas —interpretations— that men have made up at certain circumstances of their lives."[214]

Reigns without justice are nothing but large larcenies,[215] and there is no worst thing than poor citizens to only be left —as last option — resorting to heaven (or the Supreme Court of Justice of the Nation) or simply, at least, one day of justice.[216]

Justice, defined by ULPIAN—and later taken by Santo Tomas— is a constant and perpetual will to give to each other what is theirs,[217]and it turns out to be the last of values (principles) to be retained, apparently, by a society in ruins, where the *pacta sunt servanda* is no other thing than a general principle no longer used, together with good faith. Nowadays, these are simple anecdotes of a legal system that the political system itself took the charge of destroying, gradually.

SAN AGUSTIN has stated that: "the utility, the necessity of justice, has been understood by the society since the beginning. Should society lack justice, government and society would be impossible. If we cannot count on our personal

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[213] De Tocqueville, Alexis, *La democracia en América (Democracy in America), México, Fondo de Cultura Económica*,
2000, p. 248.
[214] Ortega y Gasset, J., Historia… (History…), op. cit., pp. 101-102.
[215] "*Remota itaque iustitia*, *¿qui sunt regna nisi magna latrocinia*?," en Bidart Campos, Germán, *Manual de Historia Política*, Buenos Aires, Ediar, 1970, p. 66, quoting San Agustín.
[216] As Gordillo, Agustín recalls, "*Un día en la justicia: los amparos de los artículos 43 y 75 inciso 22 de la Constitución Nacional*," (One day in justice: the protections of Articles 43 and 75 paragraph 22 of the Constitution) LL, 1995-E, 988.
[217] "*Iustitia est constans et perpetua volunta sius suum quique tribuendi*."

safety, on that of our property, we shall not live among civilized people, but in the middle of the wild and robbers."[218]

The relationship between the *de facto* and the *economic emergency doctrines*, as coadjuvant factors, legitimizing one another, born within a state of exception and in violation of the national Constitution, [219]was tolerated and even affirmed by jurisprudence and held by part of the Argentine authors of opinion, who still require for a more precise analysis than the present, and on a case by case basis.

At the same time, and even as an aspect contradictory of what has been stated in the above paragraph, it is recognized that it has also been case law itself, especially that of Argentina's Supreme Court of Justice, and part of other authors of opinion, who have balanced the abuses and disorders of political power, following the classical formula of MONTESQUIEU.

An eternal Professor has pointed out that "the rights of the individuals, in the place of subjects of the equation individual-State, become a mere object of the controlling and restrictive action of the state power. It starts from power, outlining it at the starting level, unconsciously reaching the maximum level, and then it is idolized.

This is a very serious starting point for a country with authoritarian tradition as it is ours, that has lived under *de facto* powers, governments and theories, with laws developed according to the necessity of State, statutory rules of necessity and urgency, decree-laws that everybody calls and treat as laws, as if the differences had disappeared from the collective memory; a country where corruption is endemic and mixes together with parallel practices arising out from the exercise of power."[220]

Freedom is equally affected by abuses on the part of the State —to be technically correct, those of governments and, with them, those of men— as for their omissions but, fortunately, it is safeguarded by the intervention of our judges who are the final guardians of rights and guarantees.

Therefore, "even when at some occasions the courts of justice are the ones to oppress individuals, general freedom of people is not to fear menaces from such direction [...] whereas the judicial department is kept really isolated both from the legislative and the executive branches."[221]

There is nothing casual in the force of words applied in the legal discourse as from the State and also outside of it. It is facts what will determine the justice of the content of different powers of the State that, under the excuse of content of the actions of the different branches of the State, and under the excuse of an exceptional, limit situation, affect constitutional rights and guarantees.

The role of support played by the Judicial Branch cannot be translated into the silence of our judges.[222]

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[218] Gomez, Florentino, quote, page 368.

[219] As regards the economic emergency doctrine, the constitutional violation is given by the disrespect, its extraordinary nature, thus transforming what is exceptional into ordinary and normal.

[220] Gordillo, Agustin A., *Tratado de derecho administrativo, t. 2, La defensa del usuario y del administrado (Administrative Law Manual)*, 6ª ed., Buenos Aires, FDA, 2003, cap. V-3/4.

[221] Hamilton, Madi son y Jay, quoted., p. 331.

[222] As Bianchi remembers, "It is the Supreme Court of Justice that by way of its decisions and its noisy but effective action is in charge of making the Constitution grow in the heart of people, turning into a true practice, and the different powers, be these national or provincial, be kept within

The authoritative opinions cannot escape the consequences of their own actions either, overlapped and accepted most of the times, by the authority of academic discourse, less neutral than the judicial discourse.

Freedom cannot and should not have anything "to fear from the administration of justice alone, except for its union with any of the other branches."[223]

Although it is expected that "political powers simply respect the constitutional system and the Judicial Branch controls the exercise of such statutory, exceptional powers appropriately,"[224]it is mandatory to include in this sum of concurrent responsibilities the commitment of the citizen in the institutional enhancement, as one of the pillars to obtain our democratic fulfillment, as a State and as a Nation.

The present chapter serves as a renewed tribute to those who have known how to defend our young Latin-American republics, within institutionalism and not outside the limits thereof, or above men.

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the scope of its functions. It is the Court the one to show the people, the nation and the world the good thing about a system that lacked a model or preparation in the history of human bloodline and to destroy arguments that its enemies have used to combat it. It is the Court that is in charge of bringing conviction of spirits back as to the democracy organized under a formula so complete as to make the greatest conquer of the American genius according to the happy expression of Rawson, the association of these three facts: Republic, Freedom and Order."(Bianchi, Alberto B., "*Una meditación acerca de la función institucional de la Corte Suprema*," (A meditation on the institutional role of the Supreme Court) LL, 1997B, 994.)

[223] Hamilton, Madi son and Jay, quoted, p. 331.

[224] Balbín, Carlos, *Reglamentos delegados y de necesidad y urgencia (Delegate, and necessity and urgency Regulations)*, Buenos Aires, La Ley, 2004, p. 405.