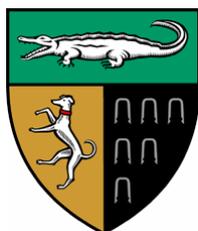




# Linkage

Noticias del Programa de Yale  
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## Brazil's Judicial Reform

The proposal of a judicial reform is currently being debated by the Brazilian Congress. This proposal, which should be voted upon by the senate very soon, is similar to the proposal which has been discussed and approved by the chamber of deputies in 1992. The previous approval of 1992 and the recent debates over the reform have something in common: they both took place while the judicial power was facing a credibility crisis because of corruption scandals.

Despite its role in public debates about judiciary reform, corruption is not the most important problem facing Brazil's judiciary. Although some judges have been found to be corrupted, the judiciary as a whole cannot be charged with widespread corruption. The legal system's real problems lie mainly in its lack of resources, procedural deficiencies, and institutional problems.

The lack of resources is certainly one of the biggest issues. Everyone agrees that to be effective, reform should promote the allocation of more resources to the judiciary so that, among other things, judges can receive better training, and so that cases can be filed and accessed electronically.

There is also little disagreement when it comes to the need for procedural reform to eliminate the excessive formalism and the multiplicity of appeals available in Brazil. On the other hand, few people seem to agree about which is the best way to do so. In fact, one of the most polemic points of the proposed constitutional amendment for the reform of the judiciary system is the one which creates a very narrow concept of a binding precedent. It would result in the reduction of the number of unnecessary appeals, but some judges argue that the adoption of the binding decision would affect the autonomy of judges. They say it is a high

### Inside this issue:

Brazil's Judicial Reform	P. 1
Prosecution of Crimes Committed in Argentina	P. 3
Asociacion por los Derechos Civiles	P. 5
A La Busqueda De Un Pasado	P. 12

price to pay for the elimination of the multiplicity of recourses.

When it comes to institutional problems, there is another polemic proposal currently being considered: the creation of a National Judicial Council. This council would be in charge of the external control and supervision of the judiciary. The members of the judiciary power are reluctant about the idea of a council whose members would not come exclusively from the judiciary. This is the main sticking point for the approval of this part of the reform.

This brief text can only give a general idea of how complicated and polemic it is to broaden the topic of judicial reform in Brazil. However, no matter how complex this long-term undertaking is, at least a part of it has to be done quickly. As numbers have shown, the Brazilian judiciary is clearly in a state of crisis. Only 30% of the population have access to justice; the Supreme Court (STF) decides over 108,000 cases each year, meaning that each justice has to decide 26 cases per day; ordinary actions can easily take almost 10 years before getting to a final decision; and Brazil has one judge for each 14,000 people, while the global average is one judge for each 7,000. Creating an effective and efficient judiciary is a challenge that must be faced soon.

*(By Ticiano Lima—Sao Paulo University Law School, Brazil)*



“The legal system’s real problems lie mainly in the lack of resources, procedural deficiencies and institutional problems.”

## Prosecution of Crimes Committed During the Last Military Dictatorship in Argentina

This presentation considers how the Argentina State has tried to deal with the problems associated with the transition from a military regime to a democracy.

In 1976, the freely-elected President was removed from power by the armed forces. The military regime embarked on a systematic plan to wipe out subversive guerrilla movements, which resulted in thousands of atrocious crimes: at least 30,000 missing persons or “desaparecidos”. Before stepping down, the military government passed a so-called “Self-Pardon” Act, exonerating any crime committed in the fight against the guerrilla organizations. The measure tried to ensure the military’s immunity against all future accusations.

In 1983, following democratic elections, Raúl Alfonsín swore into office and, shortly thereafter Congress repealed the “Self-Pardon” Act, calling the act “unconstitutional and incurably null and void”.

Courts could then apply the law existing at the time the crimes were committed by government agents during the dictatorship. Not only had the crimes not been removed from the Criminal Code, but the statutes of limitations had not yet expired.

Military officers, members of the security forces, policemen, corrections officials, and members of the guerrilla forces were brought to trial.

In 1986, in response to pressure from military officers to limit the number of cases brought to trial, Congress passed the so-called “Full Stop” Act. This act essentially put an end to the right to bring criminal charges against the military in connection with crimes allegedly committed during the fight against terrorism between the years 1976 and 1983, with some exceptions.

But the effects of the “Full Stop” ruling were just the opposite of what was intended. The courts worked harder to prosecute suspected criminals and to prevent related criminal actions from being barred. Thus, the “Full Stop” Act failed in its attempt to serve as a “blanket pardon”.

Consequently, there were a series of revolts perpetrated by factions within the Armed Forces who demanded a different solution to their legal problems. Finally,



“Truth Trials involved investigation and production of evidence in connection with crimes for the sole purpose of finding out the truth. No punishment were attached.”



the democratic government made a significant concession: an act of Congress exonerating all officers below a certain rank. That act was referred to as the “Due Obedience” Act, because it assumed that those members of the military had just been following orders.

In 1989, Carlos Menem succeeded Alfonsín as President of Argentina. In order to avoid problems with the Armed Forces, Menem signed a series of executive orders pardoning people whose cases remained pending: members of the security and armed forces, guerrillas, and others who had rebelled against Alfonsín.

Given the judiciary’s inability to move ahead with legal proceedings against most crimes, it opted to encourage so-called “Truth Trials” Those involved investigation and production of evidence in connection with crimes *for the sole purpose of ascertaining the truth*. No punishment was attached to these trials.

In 2003, a new political environment emphasized claims for justice. An act of Congress was again passed whereby the “Full Stop” and “Due Obedience” Acts were declared to be “incurably null and void.”

Federal Courts of Appeals throughout Argentina have since been reopening numerous investigations regarding human right violations.

Now we are facing different kinds of legal conflicts. The most significant is the conflict between the principle that states “*nullum crimen nulla poena sine lege*” (no crime or punishment without prior law) and the Government’s responsibility to punish those guilty of serious crimes. Defendants allege that the amnesty acts passed by Congress gave them a right to impunity, and that no subsequent law can have a retroactive effect in criminal matters. The victims and the families of victims allege, in turn, that the new context for human rights (international law), creates an exception to that rule, and that no local law can prevent crimes against humanity from going unpunished.

This is where Argentina stands today.

(By Victoria Ruiz - Palermo University, Argentina)



“Truth Trials involved investigation and production of evidence in connection with crimes for the sole purpose of finding out the truth. No punishment were attached.”

## Asociacion por Los Derechos Civiles

Although the Asociacion por los Derechos Civiles (ADC) was originally founded to defend and promote constitutional rights through public interest litigation, during my summer with the organization, emphasis was on reforming Argentina's courts. The summer proved highly eventful for both ADC and judicial reform in Argentina. Newly elected President Nestor Kirchner agreed to limit his power to appoint Supreme Court justices and to consult the people of Argentina concerning all potential candidates; Supreme Court Justice Nazareno resigned, creating the opportunity for the implementation of this practice; President Kirchner nominated Eugenio Raul Zaffaroni, generating hundreds of responses from organizations and individuals; ADC was awarded a grant to monitor the activities of the Supreme Court; and, most recently, the Governor of the Autonomous City of Buenos Aires, consenting to suggestion made by ADC and five other NGOs, agreed to follow the example set by President Kirchner and consult the public on judicial appointees. I was shown first hand the influence non-governmental organizations can have on a country's public institutions. For the first time, I became actively aware of the role NGOs can play in creating the institutions necessary for promoting human rights. While it was clear prior to my arrival in Buenos Aires that ADC had influenced Argentine constitutional law through public interest litigation, I never would have imagined that such a small NGO could have such a large impact on the political and judicial institutions of a country like Argentina. My summer experience was important because it gave me hope that organizations working to promote and defend human rights can actually make a difference. Therefore, I have chosen to write about the events related to judicial reform in Argentina that occurred during my summer at ADC.

ADC began to reconsider its approach to protecting and defending constitutional rights in Argentina in 2001. The members of the organization realized that civil liberties could not be adequately defended within the existing judicial system. Over the years, the judiciary had lost legitimacy and emerged from the twentieth century with a tarnished reputation. When democracy was restored in Argentina in 1983, people relied on the courts to play an integral role in the establishment of institutional stability and to protect rights that had been ignored and abused by the



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“ADC viewed the judiciary’s loss of legitimacy as threatening their efforts to promote constitutional rights in Argentina. ADC, in collaboration with other liberal NGOs, set out to advocate judicial reform.”

military governments. However, by 2002, confidence in the courts had all but disappeared with approximately 82% of the population saying that they did not trust the courts. Confidence in the Supreme Court was even lower. ADC and many others attributed this loss of confidence in the Supreme Court to former President Carlos Menem’s court packing during the mid-1990’s. Menem increased the size of the Court from five justices to nine, filling all of the newly created positions with his supporters. In recent years, nearly all of the Supreme Court justices were criticized for their job performance and considered for impeachment. ADC viewed the judiciary’s loss of legitimacy as threatening their efforts to promote constitutional rights in Argentina. Arguing that the democratic system was threatened by the lack of an impartial and independent judiciary that the public could rely upon to protect their rights against infringements by the government and powerful interest groups, ADC, in collaboration with other liberal NGOs, set out to advocate judicial reform.

ADC began its efforts to reform the Supreme Court at the beginning of 2002 when, along with five other non-governmental organizations (Centro de Estudios Legales y Sociales (CELS), Fundación Poder Ciudadano, Fundación Ambiente y Recursos Naturales (FARN), Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP), and Unión de Usuarios y Consumidores), it presented a document entitled “Una Corte para la Democracia” (A Court for Democracy) to President Eduardo Duhalde’s administration. The original document pointed to several issues challenging the legitimacy of the Supreme Court, including the following: the Court’s overload of cases (the Supreme Court decides approximately 14,770 cases a year); the lack of publicity of judicial proceedings, often caused by closed door policies; obstacles to citizen participation in judicial proceedings (Court rules limit participation in proceedings to those who are considered parties to the controversy); lack of transparency in the management and operation of the judicial branch; lack mechanisms for controlling the administration of the judiciary; inequality created by the fact that judges are not required to pay taxes; lack of transparency in the judicial appointment process, particularly with respect to the appointment of Supreme Court justices; and lack of transparency in judicial denunciation and removal proceedings.

The document included recommendations for reforming the judicial branch in efforts to restore the institution’s legitimacy. In particular, with respect to the designa-





“On June 19, 2002, President Nestor Kirchner issued decree number 222/03, in which he agreed to limit his own power to nominate justices to the Supreme Court.”



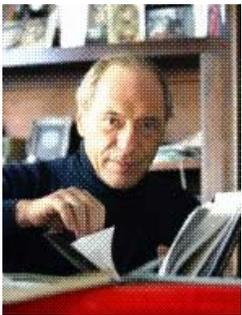
tion of judges, the authors suggested the following: the Senate should allow public participation in the debate over judicial nominees including allowing citizens to pose questions to the candidates and the president should independently limit his or her power to designate judicial nominees. In addition, the organizations proposed in efforts to restore the institution’s legitimacy. In particular, with respect to the designation of judges, the authors suggested the following: the Senate should allow public participation in the debate over judicial nominees including allowing citizens to pose questions to the candidates and the president should independently limit his or her power to designate judicial nominees. In addition, the organizations proposed several reforms to be made by the Court itself. In fact, on September 17, 2003, [Pagina 12](#) reported that the authors had taken these suggestions to the Supreme Court. Among their proposals, the authors emphasized the importance of transparency in judicial proceeding to restoring the legitimacy of the Court.

The authors of “Una Corte para la Democracia” further elaborated their recommendations on the appointment of judges in “Una Corte para la Democracia II”. Unlike the previous document, this one emphasized, above all else, the role of the political branches in judicial reform. The authors suggested that the president change the procedure for appointing justices to the Supreme Court in order to educate the public about potential candidates’ credentials and involve the public in the selection process. These proposals also included criteria the president should look for when selecting a potential nominee. The document advocated reforms to which the Senate approval process, including creating a public forum in which organizations and individuals can voice their support for or objections to the designation of a particular candidate and inviting candidates to respond to questions posed by Senators in a public hearing.

Immediately following my arrival at ADC, the organization began to see progress with respect to these proposals. On June 19, 2002, President Nestor Kirchner issued decree number 222/03, in which he agreed to limit his own power to nominate justices to the Supreme Court. Adopting the suggestions made by ADC and its fellow NGOs in “Una Corte para la Democracia II,” Kirchner made the following changes to the appointment procedure: within thirty days of the creation of a vacancy in the Supreme Court, the name and credentials of potential candidates (including information



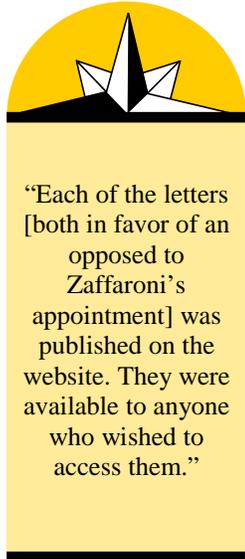
“As I began to understand all of the problems that the judiciary had faced since the restoration of democracy in Argentina, I recognized ADC’s integral role in rebuilding the country’s democratic institutions.”



about the person’s family, the organizations he or she has belonged to, the clients the candidate has represented during the last eight years, and any other information that might affect the candidate’s ability to be impartial) will be published in the Boletín Oficial, at least two major daily newspapers, and the Ministry of Justice and Human Rights’ website for a period of three days; within the 15 days following the last publication of the candidates’ credentials, organizations and individuals may present written observations about the candidates to the Ministry of Justice and Human Rights; and the President may require the opinions of certain organizations; and within 15 days after the completion of the above mentioned presentations, the President must decide whether the candidate will be proposed to the Senate or not.

During my first two weeks in Argentina, my experience was largely shaped by this development. The decree played an important role both in and out of the office. In the office, the attorneys were overjoyed. Members of the organization met with the president following his announcement. Outside of the office, the President’s decree dominated the headlines. ADC President Alejandro Carrio and Executive Director Roberto Saba were interviewed by country’s leading news organizations. Although the six organizations that had authored “Una Corte para la Democracia I y II” lamented that a public hearing before the Senate in which organizations and individuals could debate the credentials of a particular candidate was necessary to make the reforms complete, they concluded that their country had taken an important first step to restoring the credibility of the country’s democratic institutions. At this point, having been at ADC for only three days, I was busy trying to make sense of everything that was going on around me. I did not have a complete grasp on Argentine institutions and the challenges they were facing and, therefore, could not fully appreciate the impact these reforms would have on the Argentine Supreme Court. However, over the summer, as I began to understand all of the problems that the judiciary had faced since the restoration of democracy in Argentina, I recognized ADC’s integral role in rebuilding the country’s democratic institutions.

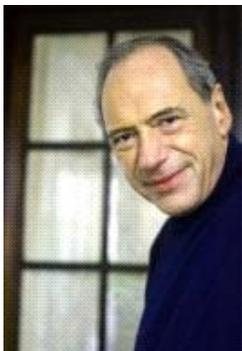
The week after President Kirchner issued Decree 222/03, the President of the Supreme Court, Julio Nazareno, announced his resignation. When Kirchner announced his decision to limit his own appointment powers, Nazareno’s resignation was expected. However, the exact timing of the resignation allowed for the almost



immediate implementation of the new procedures. Nazareno’s resignation was itself an important step towards restoring faith in the Supreme Court. His resignation eliminated the automatic majority created by Carlos Menem’s enlargement of the Court. Prior to his resignation, the Senate Judicial Committee had been considering Nazareno’s impeachment after receiving a series of complaints related to his job performance. At ADC, Nazareno’s resignation caused commotion. ADC called an emergency meeting of the entire organization. I, unfortunately, was unable to take part in the meeting because of illness. However, from what I learned later, the members discussed the upcoming implementation of the President’s decree and the possibility that one of the organization’s board members might be chosen to fill the position. However, on July 1 President Kirchner announced that he had offered the vacant position to criminal law expert Eugenio Raul Zaffaroni. This marked the beginning of the implementation of the President’s decree. On July 13, 2003, Zaffaroni’s credentials were published in the evening editions of two Buenos Aires newspapers.

The newly enacted procedures were successfully implemented, and following the publication of Eugenio Zaffaroni’s resume and credentials in the Boletín Oficial and two major daily newspapers, organizations, law professors, bar associations, and legal professionals began to respond with observations about the potential candidate. As expected, observations were offered both in favor of and opposed to Zaffaroni’s appointment. Each of the letters received was published on the website of the Ministry of Justice and Human Rights. They were available to anyone who wished to access them. In addition, certain powerful interest groups published versions of their observations in daily newspapers. The Executive received a total of 926 submissions. Each step of process was reported in the press. The discussion over Zaffaroni’s candidacy centered around his previous interpretations of the Constitution and concerns that he believed in broad interpretations of constitutional rights that threatened the application of the criminal law.

ADC was one of many organizations to contribute to the debate over Zaffaroni’s nomination. The organization supported Zaffaroni’s nomination on the grounds that he was a reputable, accomplished attorney dedicated to the defense of human rights and democratic principles. ADC commented specifically on the debate that arose over Zaffaroni’s nomination regarding different perspectives on constitu-





“After reviewing the observations submitted by organizations and individuals from all parts of Argentina, Kirchner officially nominated Eugenio Raul Zaffaroni for the Supreme Court.”

tional rights. In addition to offering its support Zaffaroni, ADC took this opportunity to suggest further changes to the appointment process. In particular, ADC reiterated the importance of both a public hearing in the Senate and a colloquium in which questions could be posed to candidates prior to the confirmation. In addition, ADC recommended that all of the observations submitted to the Ministry of Justice and Human Rights regarding the designation of Zaffaroni should be published on the Ministry’s website. ADC emphasized that this would strengthen the debate over the candidate by enabling all parties to make their opinions known. ADC also indicated that, because Decree 222/03 recognized the importance of having both men and women on the Court, this would have been an ideal opportunity for President Kirchner to nominate a woman to the all male Court. Finally, the organization attached to its submission several questions that the members believed potential candidates such as Zaffaroni should answer.

After reviewing the observations submitted by organizations and individuals from all parts of Argentina, Kirchner officially nominated Eugenio Raul Zaffaroni for the Supreme Court. His records were transferred to the Senate at the end of August. Beginning in early September 2003, the Agreements Committee began accepting observations from individuals and groups on the subject of Zaffaroni’s appointment. A Public Hearing has been schedule for October 6, 2003 at which time Zaffaroni will have the opportunity to defend his candidacy.



As the summer drew to an end, I was given the opportunity to contribute to ADC’s efforts to reform democratic institutions in Argentina. In particular, I was asked to assist Sebastian Schwartzman in drafting a letter to the Sub-Secretary of Justice of the Autonomous City of Buenos Aires to convince the Governor to limit his own power to make judicial appointments and to adopt a procedure similar to that adopted by President Kirchner. The Sub-Secretary of Justice originally declined to implement a procedure similar to that laid out in Presidential Decree 222/03 on the grounds that, unlike the federal constitution, the Constitution of the City of Buenos Aires provides for a public hearing in the Senate before the approval of any judicial appointee. However, we argued that despite this provision, the procedures adopted by President Kirchner permitted greater transparency, public participation, and than the hearings provided for in the city’s constitution. As in “Una Corte para la Democ-



“Of 88 organizations that entered institutional reform projects in the ‘Iniciativas’ contest in Argentina, ADC was one of only ten winners. As a winner, they received a grant from the Ford Foundation to implement their project entitled A Eye on the Court.”



racia II”, we argued in our response that the two procedures were complementary and not mutually exclusive. In particular, we made the following legal and practical arguments: the Constitution of the Autonomous City of Buenos Aires permits the Governor to call for a non-binding referendum to discern the opinion of the public on a particular issue and the procedure suggested by ADC and the other five NGOs falls squarely within this provision; the procedure adopted by President Kirchner allows for greater transparency by requiring the publication of the candidate’s credentials in the Boletín Oficial and two major newspapers (the existing procedure in the City of Buenos Aires calls for the distribution of this information only to people and organizations that specifically request it); the procedure adopted in the federal system gives organizations and individuals more time to prepare their observations, which is likely to result in better researched and more useful commentary.

I recently heard from ADC that they received a response from the Sub-Secretary of Justice stating that the administration was considering issuing a decree limiting the powers of the governor to appoint judges.

On August 15, 2003, ADC achieved another victory with respect to its efforts to restore the legitimacy of the Supreme Court of Justice. Of 88 organizations that entered institutional reform projects in the “Iniciativas” contest in Argentina, ADC was one of only ten winners. As a winner, they received a grant from the Ford Foundation to implement their project entitled “A Eye on the Court.” The project is aimed at monitoring the activities of the Supreme Court and educating the public about the Court’s composition, decisions, and role in protecting constitutional rights. The project involves monitoring the judicial selection process, publishing reports on Supreme Court decisions that involve constitutional interpretation, working with journalists to educate the public about the Supreme Court, disseminating information about judicial nominees, and arranging meetings with organizations and individuals to discuss issues related to the Supreme Court and to generate suggestions for its improvement. I had the opportunity to participate in the first stages of this project prior to my departure. ADC chose to begin its analysis of Supreme Court cases by looking at a series of decisions that, together, had resulted in the denunciation of nearly all of the justices. I was assigned to find and analyze the Court’s decisions on the rebalancing of telecommunications tariffs in the late 1990s. I also located news articles that were



published subsequent to the Court's decisions and documents related to the telecommunications industry referenced in the decision. This was actually one of the more interesting assignments that I was given during the summer, but I was, unfortunately, unable to complete it before having to return to the United States.

I was influenced by my experience in Argentina to seriously consider a career with a non-governmental organization. Although I have always been interested in the work done by NGOs, I have also been concerned that a lot of their work amounts to very little. However, my experience at ADC illustrated the influence an NGO can have on a country's institutions. I was very impressed by the fact that ADC and the five other organizations working with it could actually convince the President of Argentina to adopt their suggestions nearly word for word. I have high hopes that ADC may now be able to encourage the Supreme Court to make changes of its own. I am anxiously awaiting the results of ADC's most recent action—taking their suggestions to the Supreme Court.

*(By Hillary Forden - Yale Law School '05)*



“I was influenced by my experience in Argentina to seriously consider a career with a NGO. My experience at ADC illustrated the influence an NGO can have on a country's institutions.”

## A LA BÚSQUEDA DE UN PASADO

### Las sociedades democráticas complejas

Las democracias occidentales son un experimento formidable de promoción de la diversidad ideológica y moral, como resultado de su compromiso con el respeto de la autonomía de las personas.

A su vez, en cuanto experimento social positivamente utópico, una comunidad constitucional-democrática puede reconocerse cuando sus participantes comparten en condiciones relevantes:

- 1.- El compromiso de que todos seamos incluidos en la discusión, definición y realización de un futuro conjunto que podamos presentar como “nuestro”, incluso cuando nosotros favorezcamos soluciones diferentes para ciertas decisiones institucionales adoptadas.





2.- La aspiración de que todos podamos compartir el relato de una historia común de nuestra comunidad, que a su vez todos reconozcamos como “nuestra”.

En este sentido, las democracias constitucionales son un experimento de tensión constante entre la promoción de la diversidad y la búsqueda de un relato común, y uno de los desafíos de la construcción de legitimidad de nuestros sistemas consiste en articular estas dos dinámicas, promoviendo al mismo tiempo una cooperación social estable que sea más que un mero “modus vivendi” y estimulando la diversidad que resulta del hecho del pluralismo.

### **La Argentina: su compromiso democrático y su pasado anti-democrático**

Creo que históricamente nuestra práctica política ha estado marcada por una dinámica antagónica de eliminación de la diversidad –y en este sentido notoriamente antidemocrática y anticonstitucional.

Creo también, que desde 1983 hemos comenzado a asumir mutuamente el compromiso de constituir una comunidad democrática. El vigor y estabilidad de este compromiso fue puesto a prueba en varias oportunidades a lo largo de estos 20 años. Y estos desafíos fueron a la vez una oportunidad en la que exitosamente reafirmamos ese proyecto colectivo.

A su vez, en tanto comunidad democrática naciente, pero que tiene una historia autónoma antidemocrática, el desafío de articular un relato común de ese pasado es complejo, y las dificultades son enormes.

Ni una comunidad con larga tradición democrática, ni una recientemente independizada enfrentan grandes problemas para contar su pasado de manera consistente con su compromiso democrático (en un caso, el pasado es un pasado común, y en el otro, no es el pasado de la comunidad). En Argentina, el pasado es nuestro, pero carecemos de un relato común para contarlo.

### **Una mirada a la discusión sobre el pasado reciente en Argentina**





“Creo también, que desde 1983 hemos comenzado a asumir mutuamente el compromiso de constituir una comunidad democrática.”

Propongo que analicemos los desacuerdos acerca del tratamiento que debemos dar a los crímenes de lesa humanidad cometidos por la dictadura, y la incertidumbre institucional generada a partir de la anulación de las leyes de obediencia debida y punto final (“las leyes”) y los indultos dictados por el ex presidente Menem (“los indultos”), como parte de las dificultades que enfrentamos para contar el pasado inmediato –en particular nuestro pasado de los primeros años de democracia- con una voz común.

### Un ejemplo exitoso de construcción de un relato común del Pasado

Considero que el “Juicio a las Juntas” y el trabajo de la “CONADEP” fueron el núcleo de un exitoso proceso institucional de construcción democrática del pasado, que se consolidó como un acuerdo extendido e inclusivo sobre cómo contarnos lo ocurrido en los años 70.

Encuentro en ellos cuatro características para resaltar: (a) Publicidad: que permitió -y casi obligó- a la comunidad a “mirar” (b) Progresividad: que permitió la asimilación del horror que el experimento iba revelando (c) Participatoriedad: que permitió que el relato tuviera credenciales de universalidad (d) Equidad Procedimental: que excluyó impugnaciones al relato así construido por parte de los perdedores.



Resalto estas características pues ellas son condiciones evaluatorias especialmente valoradas en cualquier modelo democrático-constitucional.

Esta consideración me lleva a la siguiente hipótesis: Las posibilidades de éxito que un relato del pasado no democrático tenga para consolidarse como relato común en el curso de la experiencia democrática de la comunidad son sensibles a la calidad democrática de los procedimientos de construcción de ese relato.

La evaluación de la calidad democrática que la comunidad va adquiriendo no sólo se aplica a- y condiciona a- la forma en que esa comunidad va moldeando su experiencia actual, sino también a la forma en que construye un relato de su pasado de antagonismo radical.

### Las “Leyes” y los “indultos. Una explicación de su fracaso narrativo



“¿Cómo podría sostenerse hacia el futuro un relato que incluyera como capítulos directamente secuenciales un juicio ejemplar, una exposición pública de los peores horrores cometidos y el inmediato perdón a sus autores?”

Las leyes y los indultos no fueron actos que ofrecían un relato del pasado, sino diversas formas de propuesta de solución hacia el futuro de la comunidad, pero que hoy sí enfrentamos como un capítulo de nuestro pasado reciente que también debemos contar.

Creo que esas propuestas de soluciones han fracasado en su desafío de ser aceptadas como “nuestra solución”, y hoy no podemos contarlas como “nuestro” pasado. Y más allá de sus méritos o defectos sustantivos, su fracaso para constituirse en soluciones narrativas aceptadas se explicaría en buena medida, porque la calidad democrática de dichas soluciones fue bajísima, o prácticamente límite. Por razones de espacio no voy a argumentar estas deficiencias; creo que ellas son autoevidentes en relación con los indultos y fácilmente verificable respecto de las leyes.

Otro aspecto que creo relevante para explicar su fracaso autoritativo es el hecho de que las soluciones eran narrativamente inconsistentes con la propia secuencia del relato que nos dimos en los primeros años de democracia. ¿Cómo podría sostenerse hacia el futuro un relato que incluyera como capítulos directamente secuenciales un juicio ejemplar, una exposición pública de los peores horrores cometidos y el inmediato perdón a sus autores?. ¿Cómo explicar a las generaciones futuras esta secuencia?.

En este marco, sugiero que analicemos la derogación de las leyes realizada en los 90, la nulidad e inconstitucionalidad declarada por los tribunales inferiores, la reciente “anulación” decidida por el Congreso, así como el fallo que inevitablemente dictará la Corte Suprema, como movimientos en el intento de construir un relato alternativo para las soluciones de fines de los 80/principios del 90, el intento de torcer el final de ese capítulo de nuestra historia –uno escrito ya en nuestro nacimiento democrático.

### **A la Búsqueda de un pasado**

Sin embargo no estamos como en 1986. En términos de historia institucional, tenemos las leyes, indultos y fallos de la Corte Suprema que tomar en cuenta; y tenemos que hacerlo porque la definición que estamos haciendo de nuestra





Los actos institucionales en los momentos cruciales de una comunidad son “actos de esperanza”, actos que aspiran a consolidarse como un relato común. Las leyes y los indultos fueron actos de esperanza fallidos, no obstante haber sido elaborados por las instituciones creamos para escribir nuestros relatos comunitarios.

democracia incluye nuestra respuesta a la pregunta: qué valor tienen las leyes del Congreso y los fallos de la Corte Suprema –dos instituciones centrales en nuestro diseño constitucional.

Lo que digamos sobre las soluciones del 80/90 –en tanto dictadas ya en nuestra etapa democrática- marcará también en buena medida nuestras posibilidades de entendimiento futuro –nuestra narrativa- sobre la forma de gobierno que construimos.

Los actos institucionales en los momentos cruciales de una comunidad son “actos de esperanza”, actos que aspiran a consolidarse como un relato común. Las leyes y los indultos fueron actos de esperanza fallidos, no obstante haber sido elaborados por las instituciones creamos para escribir nuestros relatos comunitarios. Y ello se debe a que en Argentina la sola utilización de formas institucionales no garantiza el componente autoritativo necesario.

Qué valor narrativo tiene pues la ley anulatoria dictada por el Congreso? Mínimo, creo yo. Como mínimo fue el valor narrativo de la ley derogatoria dictada en los 90. Y creo que el mismo escaso valor tendrá un fallo de la Corte –en la medida en que sea un fallo de esta Corte y con estos procedimientos.

Y todo esto por la razón que he apuntado previamente: la mínima calidad democrática de estos actos institucionales.

Las sesiones del Congreso –unas pocas horas de discursos, precedidas por negociaciones cuasi secretas, con senadores que luego reconocen públicamente que la verdadera motivación era “evitar las extradiciones”, y la negativa del partido de gobierno a anular los indultos- son, previsiblemente, demasiado poco como para constituirse en un acto institucional de producción de relato democrático. Y lo mismo lo será un fallo de 100 páginas de la Corte Suprema, dictada luego de deliberaciones secretas, sin audiencias y calculado como una herramienta de posicionamiento político.

## Conclusiones

La elaboración exitosa de una narrativa común depende en buena medida de que podamos utilizar herramientas que honren nuestro compromiso democrático





“La elaboración exitosa de una narrativa común depende en buena medida de que podamos utilizar herramientas que honren nuestro compromiso democrático para contarlos.”

para contarlos.

En relación con las soluciones del 80/90 –y en la medida en que éstas fueron adoptadas recurriendo a formas constitucionales- el logro de un relato alternativo consistente que supere su fallido intento de constituirse como nuestro relato, requiere (a) que encontremos un recuento de dichas prácticas que sea lo menos frustrante posible para el progresivo afianzamiento de nuestro compromiso con la construcción de instituciones democráticas (b) que dicho recuento sea lo más consistente posible con los capítulos pasados, básicamente con la historia que aceptamos acerca de lo ocurrido en el 70 (c) que los actos de esperanza que encarnen estos relatos alternativos tengan la mayor calidad democrática posible en términos de inclusión, publicidad y transparencia.

Las herramientas que estamos utilizando a tal efecto –ley anulatoria del Congreso- satisface la condición “b” de manera relevante, pero tiene enormes dificultades para dar satisfacción a la condición “a” y prácticamente no tiene ninguna consideración por la condición “c”. Sus credenciales parecen pues relativamente pobres –más allá de que nos simpatice en términos sustantivos.

Las posibilidades para encontrar “actos de esperanza” exitosos en la búsqueda de nuestro pasado son cada vez más limitadas. Sería un gran error desaprovecharlas.

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