

History, Memory and Pardon in Latin American Constitutionalism

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About a lecture by Dr. Carlos Ramos Núñez

On February 20 at the Max Planck Institut für europäische Rechtsgeschichte, the Legal Historian and member of the Constitutional Court of Peru, Dr. Carlos Ramos Núñez, presented a crucial intervention on the problems that face the current constitutionalism in Latin America. Faced with a heterogeneous group of historians, philosophers and theoreticians of law, interested in the vicissitudes of Latin American juridical evolution, the political-judicial tensions of the Peruvian present served him as a framework to raise various constitutional problems and controversies.

The main theme was a key case that, for the last few days, has Peruvian society on the edge of an abyss, and involves two legal strategies that seek to achieve the freedom of former president Alberto Fujimori, who has been convicted of crimes against humanity in 2009. Each of these strategies has a particular story and actor within Fujimorism. On the one hand, Keiko Fujimori – the daughter of the former president – and leader of the main opposition force to the current government of Pedro Pablo Kuczynski -PPK-, presented a Habeas Corpus with the intention of attacking the very grounds of Fujimori's conviction (conf. art. 200 inc. 1 of Peru's Constitution). On the other hand, on 24 December 2017, President PPK conceded a pardon in favor of Fujimori, based on humanitarian grounds (art. 118, para. 21 C. P.). This last appeal of executive power was seen by many international and local observers as a counter-gift granted indirectly to Kenji, son of the former president, motivated in his abstention from voting in the dismissal of the current president of Peru in an impeachment process.^[1]

Both particular cases and their confluence raise a series of legal questions in the field of constitutional law: Do pardons have an effect in cases which involve crimes against humanity? What happens with the Habeas Corpus process once a Pardon is granted? Can the Constitutional Court give an opinion on a pardoning power of the Executive Power?

The juridical-political question of the present time required a contextualization of the problem, so history had to be used to explain the particularities of the concepts of democracy, the rule of law and human rights in Latin America. Hence, the conference began with a historical reconstruction to understand the tensions that divide Peruvian society. First, from the perspective of the history of intellectuals, the origins of Peruvian Marxist thought were reconstructed. Thus, the influence of José Carlos Mariátegui as a thinker and political activist of the Peruvian left was analyzed. Later, the subsequent formation of the political-military group Shining Path was described, which under the influence of Abimael Guzmán proceeded to radicalize the guerrilla violence that stirred the institutional structures of Peru from the 1980s onwards.

The state reaction to the Shining Path's action corresponded to what could be recognized

as State Terrorism. A way of dealing with internal commotions that were deployed by the military forces in Latin America during the various military dictatorships of the 1970s and 1980s. In this context, the paramilitary-state group “Colina”, which was part of the Army Intelligence Service, carried out the massacres of “Barrios Altos” (3.11.1991) and “La Cantuta” (18.7.1992), against alleged members of the Peruvian guerrilla. These clandestine para-states operations were later revealed by journalism and, as a result, several members of “Colina” were prosecuted for torture, death, and disappearance of neighbors, students, and university teachers.

Subsequently, it was announced that the repressive logic and state violence undertaken by “Colina” would have had the support of Fujimori, who would not only have been politically involved by the declaration of an amnesty for the military in 1995 (Law 24.479), but who, as it was later alleged, would have had a full knowledge of that illegal activity during his government. After his exile in Japan in 2000, the search for justice continued. In 2005 he was arrested in Chile, extradited to Peru in 2007 and subsequently prosecuted and sentenced in 2009. Each of these moments merited careful analysis.

The analysis of extradition allowed Dr. Carlos Ramos Núñez to reflect on the “juridical reason” that was debated at the time, and that constantly returns to the causes of crimes against humanity in Latin America. On the one hand, Fujimori’s defenders claimed the statute of limitations for criminal proceedings, to which the Court held that there was no limit in time in order to judge crimes against humanity. In the case of Chilean extradition, it can be seen how the protection of human rights was the main motive that allowed Fujimori being trialed for aggravated homicide and illegal association.

On the other hand, in the analysis of Fujimori’s conviction (2009), Ramos Núñez observed the impact of Claus Roxin’s theory through the concept of mediating authorship in organized power apparatuses.^[2] The recall of this theory did not go unnoticed by the public, since Roxin’s theory and the overlapping reference to the Eichmann case, which accompanies the analysis of the German jurist, allowed the Peruvian experience to be inscribed in the sad record of the state massacres organized in the twentieth century.^[3]

That inscription of the case in that doctrine was not trivial. Precisely with this reflection, the Fujimori’s case was decentralized, extending the scale of analysis to the new ethical record that accompanies the development of contemporary constitutionalism. Indeed, in matters of crimes against humanity, we cannot ignore the Spanish experiences of the Civil War and Franco’s regime, the cases of the Condor Plan applied in Argentina, Uruguay, Brazil, Chile, and the various human rights violations in which state terrorism was the main actor. However, this international reference was not merely an aggregation of historical experiences. Rather, it made it possible to understand a new trend in the legal narrative, which has gradually changed constitutional thinking on the basis of a new jurisprudential reflection.

Likewise, the comparative study of the various experiences -especially in Latin America- made it possible to explain that although there are coincidences, there are also strong differences between those countries that have a Constitutional Court with respect to others that do not have one. In this case, not only the institutional architecture but also the hermeneutical reasoning is different. For example, as the Constitutional Judge Carlos

Ramos Núñez pointed out, while the Constitutional Courts have seen a great influence of Robert Alexy's work, in the Supreme Courts -as may be the case of Argentina or Brazil- there is a more literal method of interpretation.

This anthropological key from within the Tribunal also made it possible to present some notes on the relationship between the media and the constitutional judiciary. Different opinions, criticisms, and disqualifications seem to be commonplace in the tension between politics, society and the Constitutional Court.

As can be seen, far from evidencing the positions on Fujimori's case, the talk became a space to analyze the different conditioning factors that play within a Constitutional Court. Historical traditions and experiences, institutional logics, jurisprudential and hermeneutical knowledge, national and international relations, media and citizen claims, establish an order of discourse that frames the practice of the Tribunal.

In the dialogue with those present, the emotion and complexity of the topics dealt with revealed the need for an in-depth study of constitutional law and political history. It is that the present appeals increasingly strongly to think about a local and Ibero-American transitional legal history. Thus, by virtue of the manifestations that divide societies into a crossroads of memory, justice and politics.

Carlos Ramos Núñez's account, then, suspended the Fujimori case for a moment, to open the door to the question of the tension that countries are undergoing in post-dictatorial processes, which turns on constitutional reflection in societies crossed by contested memoirs. The Fujimori case, precisely, allows to recall some taxonomies thought up by Paul Ricoeur: a memory impeded by the economic-centered imperative of looking exclusively towards the future and an imposed forgetfulness (represented by the self-amnesty) which produced an inevitable return of the repressed.^[4] The difficulty of forgiveness, whether it be the pardon, for the political cloister, or the need for a supposed social reconciliation, calls into question different historical strata, which the legal reasoning must collect and analyze. In this enclave, the historical conscience and reflections of Carlos Ramos Núñez are a good entry point for thinking about Latin American constitutionalism.

[1] PPK has been implicated in the Odebrecht case, which has stirred several Latin America political regimes.

[2] C. Roxin, *Täterschaft und Tatherrschaft*, Berlin, de Gruyter, 2000, p. 246 y ss.

[3] H. Vezzetti, *Pasado y presente. Guerra, dictadura y sociedad en la Argentina*, Buenos Aires, S. XXI, 2002, p. 18.

[4] P. Ricoeur, *La memoria, la Historia, el Olvido*, Buenos Aires, FCE, 2004.

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