

1989

# Constitutional Ambiguity and Abuse in Argentina - The Military Reign 1976-1983

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## Recommended Citation

Lynch, Cynthia A. (1989) "Constitutional Ambiguity and Abuse in Argentina - The Military Reign 1976-1983," *NYLS Journal of Human Rights*: Vol. 6 : Iss. 2 , Article 5.

Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights/vol6/iss2/5](https://digitalcommons.nyls.edu/journal_of_human_rights/vol6/iss2/5)

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## NOTES

### CONSTITUTIONAL AMBIGUITY AND ABUSE IN ARGENTINA - THE MILITARY REIGN 1976-1983'

#### I. CONSTITUTIONAL SHAM

For five decades Argentina endured chaos and repression.<sup>1</sup> A country which boasted of abundant resources, a literate, homogeneous population and a high standard of living, became a "wasted promise."<sup>2</sup> Ruled alternatively by military juntas and civilians from 1930 to 1983,<sup>3</sup> the country drifted into an abyss of authoritarianism. Leaders fell in and out of power, rarely able to complete a full term in office.<sup>4</sup> But one constant riddled each of the governments --"constitutional illegality."<sup>5</sup> Vague aspirations toward rule of law gave way to assaults on constitutionally guaranteed rights.<sup>6</sup> Instead of protecting the constitutional values of the governed, those governing ignored, undermined, or withheld them.<sup>7</sup> Rule of law became a hollow expression.<sup>8</sup> Government

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\* The author would like to thank Abby Fiorella for her invaluable guidance and insight.

1. See Schumacher, *Defending Argentina's New Democracy*, N.Y. Times, June 10, 1984, § 6 (Magazine), at 28.

2. Zalaquett, *From Dictatorship to Democracy*, NEW REPUBLIC, Dec. 16, 1985, at 18.

3. See G. WYNIA, ARGENTINA: ILLUSIONS & REALITIES 45-48 (1986).

4. Elon, *Letter From Argentina*, THE NEW YORKER, July 21, 1986, at 74. "In the last fifty-six years, Argentina has seen eight successful coup d'etat, innumerable aborted coup d'etat, and eleven military dictatorships; since the Second World War, no freely elected administration has lasted its full term except that of Juan Perón . . ." *Id.*

5. D. PONEMAN, ARGENTINA: DEMOCRACY ON TRIAL 128 (1987).

6. See Feinrider, *Judicial Review and the Protection of Human Rights Under Military Governments in Brazil and Argentina*, 5 SUFFOLK TRANSNAT'L L.J. 171, 187 (1981).

7. See *infra* notes 18-56 and accompanying text. See also D. PONEMAN, *supra* note 5, at 39 wherein he states:

[T]he military trumped democracy with force. Civilian politicians either collaborated in this constitutional affront or encouraged it by their incompetence. Discredit touches all.

Simple, left-right, civil-military distinctions fail. Perón first sought power through the Radicals. The Radicals later sought power through Perón . . . . Civilians sought power through military coups. . . . Opportunism was the only constant.

*Id.*

8. See D. PONEMAN, *supra* note 5, at 195.

without rules was the norm.<sup>9</sup>

A veil of legitimacy masked the deception. Ritualistically claiming adherence to the constitution, the leader of the day spouted catch phrases such as "guarding the Constitution," "saving the country," "restoring order," and "national security" to justify intrusions upon individual rights.<sup>10</sup> Over time the pattern became familiar.<sup>11</sup>

Idealistically, Argentina was a democracy with a written constitution enacted over 100 years ago.<sup>12</sup> In reality, the country was ruled by a series of authoritarian governments characterized in degrees by fraud, excess, ineptitude, and terror.<sup>13</sup> Each manipulated,

9. See Dworkin, *Report From Hell*, N.Y. REV. OF BOOKS, July 17, 1986, at 11, 12.

10. J. SIMPSON & J. BENNETT, *THE DISAPPEARED AND THE MOTHERS OF THE PLAZA: THE STORY OF THE 11,000 ARGENTINIANS WHO VANISHED* 47 (1985). For example, the day after the military seized power from Isabel Perón, the junta broadcasted a message to the Argentines declaring its intentions. "[T]he armed forces must put an end to the situation which has burdened the nation . . . This government will be imbued with a profound national spirit, and will respond only to the most sacred interests of the nation and its inhabitants." *Id.* See also G. WYNIA, *supra* note 3, at 87.

11. These proclamations began when General José F. Uriburu, who led the military coup of 1930, declared his "respect for the Constitution and the basic laws in force." D. PONEMAN, *supra* note 5, at 3.

In 1943, after another coup, General Arturo Rawson declared the military's duty "to put the nation in order." J. SIMPSON & J. BENNETT, *supra* note 10, at 43. When he was elected in 1946, General Juan Perón, Argentina's most notorious dictator, declared his intent to fashion a "new Argentina" and to make the constitution "practical." G.I. BLANKSTEN, *PERÓN'S ARGENTINA* 161, 156 (1953). Yet, Perón designed a new Argentine Constitution to expand his control and suppress individual liberty. *Id.* at 63, 161-73.

Perón, himself, was overthrown by the military in 1955 and replaced by Arturo Frondizi. A military coup forced Frondizi from power in 1962. Arturo Illia succeeded Frondizi, only to be thrown out by the military three years later in 1966. Perón returned with his wife Isabel in 1973. After Perón's death, Isabel replaced him as president. However, the military overpowered Isabel in 1976. J. SIMPSON & J. BENNETT, *supra* note 10, at 47-48. As authors Simpson and Bennett explain:

[T]ime after time, the military believed its own rhetoric and persuaded the people of Argentina to believe it too; the saviors of the nation found it both pleasurable and profitable to step in from time to time. And the longer they existed as a political force, the more the privileges grew . . . .

*Id.* at 48.

12. *Constitucion Nación*, (Argent. 1853). English translation reprinted in A. BLAUSTEIN & G. FLANZ, *1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 3 (1987) [hereinafter *CONST. ARGENT.*]. See *infra* notes 19-23 and accompanying text.

13. See Cox, *The Souring of the Argentine Dream*, HARPERS, May 1985, at 53-54. Arguably, Roberto M. Ortiz, who was appointed as presidential successor to General Agustín P. Justo in 1938, tried to stop fraudulent trends. But, due to illness, Ortiz was forced to resign after two years in office. He was replaced by Ramón S. Castillo, who perpetuated political corruption. J.A. PAGE, *PERON, A BIOGRAPHY* 42-43 (1983).

evaded, stretched, and twisted the constitution, rendering it finally, impotent.<sup>14</sup>

A constitution cannot function when the leaders, who have the responsibility to implement and protect it, pervert it to serve their own immediate political purposes.<sup>15</sup> Abrogation of this sort was never more blatant or repugnant in Argentina than during the period of military rule from 1976 to 1983.<sup>16</sup> Chilean human rights lawyer, José Zalaquett, revealed the anomaly:

[T]he greatest crime is one perpetuated by the authority against the individual, a crime that counts on the ultimate strength - the power of the state - to secure impunity. For

14. See D. PONEMAN, *supra* note 5, at 128.

15. General Juan Perón's Argentina is a vivid example of the constitutional sham that is perpetuated when a leader acts for personal power. When General Perón became president in 1946, he created a new constitution and assumed virtually all control in the country. See generally G.I. BLANKSTEN, *supra* note 11. As author George Blanksten pointed out, at the height of Perón's dictatorship:

The separation of powers has been written into the text of the Constitution of 1949, it is true; but in the "new Argentina" this division of authority is a legalistic fiction. President Perón's control of the Legislative and Judicial Powers is as complete as his domination of the Executive Power. The voice of the Constitution of 1949, whether it comes from executive, legislative, or judicial lips, is the voice of Juan Domingo Perón.

*Id.* at 132. The 1853 Constitution "remained to mingle strangely with the new." R. CRASSWELLER, *PERON AND THE ENIGMAS OF ARGENTINA* 195 (1987).

Additional examples of constitutional abrogation carried out by power mongers can be found in: Pinochet's Chile, see generally J. TIMERMAN, *CHILE: DEATH IN THE SOUTH*, (1987); Rafael Trujillo's Dominican Republic, see J.A. PAGE, *supra* note 13, at 361-62; Noriega's Panama, see Pitt, *Panama Declares 'State of Urgency' In Face of Unrest*, N.Y. Times, Mar. 19, 1988, at § 1, col. 6.

Constitutional protections have, at times, been negated in Brazil, Peru, Uruguay, and Bolivia when elected governments were overthrown by the military. See D. PONEMAN, *supra* note 5, at xv.

16. See A. DABAT & L. LORENZANO, *ARGENTINA: THE MALVINAS AND THE END OF MILITARY RULE* 145 (1984 ed.).

The military dictatorship installed by the coup of March 1976 was the most totalitarian and authoritarian ever seen in Argentina, and perhaps anywhere in Latin America. Unlike the Brazilian military or the Pinochet regime in Chile, the Argentinian Junta could not directly base itself upon any organized civilian force, and therefore had to rely on the army and police themselves in order to construct a new institutional system. The supreme authority resided in the heads of the army, navy and air force, who jointly appointed the president of the Republic and supervised his activity. The rest of the state apparatus was structured around this purely military force, which held in thrall the judiciary, the educational system, the mass media and the various social organizations, and carried decisive weight in provincial and municipal government, and in the main companies and offices depending on the federal government.

*Id.* at 145-46.

the people are never more helpless than when the force meant to protect their rights is used to violate them. It is the starkest defenselessness. The terror of the shepherd turned wolf. State terrorism.<sup>17</sup>

## II. CONSTITUTIONAL GUARANTEES

Argentina has one of the oldest and most enduring constitutions in Latin America.<sup>18</sup> Closely modeled after the United States Constitution, it provides for a tripartite government of divided and enumerated powers.<sup>19</sup> Provisions similar to those in the United States Constitution protect individual rights such as the rights to work, trade, enter, travel through, and leave Argentina, publish ideas uncensored, associate, teach, practice religion, and dispose of property.<sup>20</sup> Also guaranteed are the rights to equal protection<sup>21</sup> and due process.<sup>22</sup> Indeed, in the Preamble, the framers expressed their objective of "constituting a national union, ensuring justice, preserving domestic peace, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to ourselves, to our posterity, and to all men in the world who wish to dwell on Argentine soil . . . ."<sup>23</sup>

Until 1930 Argentina enjoyed a "seventy year unbroken stretch of constitutional succession to the presidency."<sup>24</sup> But, by 1930, domestic and foreign elements had conspired against the president,

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17. Zalaquett, *supra* note 2, at 19.

18. CONST. ARGENT., *supra* note 12, at 3. See Snyder, *State of Siege and Rule of Law In Argentina: The Politics and Rhetoric of Vindication*, 15 LAW AM. 503, 506 (1984). See also Winizky, *A Survey of Constitutional Developments In Argentina And Uruguay*, 8 SW. L.J. 418, 420-33 (1954) (for a discussion of the creation and history of the 130-year old Argentine Constitution).

19. CONST. ARGENT., *supra* note 12, at 3. See G.I. BLANKSTEN, *supra* note 11, at 29-30. See generally Quintana, *Comparison Of The Constitutional Basis Of The United States And Argentine Political Systems*, 97 U. PA. L. REV. 641 (1949).

20. CONST. ARGENT., *supra* note 12, art. 14, at 4-5.

21. CONST. ARGENT., *supra* note 12, art. 16, at 5.

22. CONST. ARGENT., *supra* note 12, art. 18, at 5.

23. CONST. ARGENT., *supra* note 12, at 3 (preamble).

24. D. PONEMAN, *supra* note 5, at 3. See also G.I. BLANKSTEN, *supra* note 11, at 30 wherein the author states that "[t]he period from 1853 until 1930 was, on the whole, auspicious for the progressive development of the Argentine nation; and the republic was favored, especially in the early portion of the period, by a succession of outstanding statesmen occupying the presidency." *Id.*

Hipólito Yrigoyen.<sup>25</sup> When the Depression hit Argentina in 1929, Yrigoyen was unprepared to handle the losses Argentina incurred from a failing export market, the split of his Radical party and violent opposition groups calling for immediate resolutions to the crisis.<sup>26</sup> Especially disturbed was the military, which resented the executive's use of the armed forces for routine interventions in the provinces, Yrigoyen's disregard of regulations, his granting of favors and re-enlistment of loyal retired officers.<sup>27</sup> Yrigoyen had upset "what the majority of the military saw as the order, discipline and balance of a hierarchical institution."<sup>28</sup> Pushed far enough, on September 6, 1930, the military rolled in the tanks.<sup>29</sup> Led by General José F. Uriburu,<sup>30</sup> the military staged a coup and toppled the government of Hipólito Yrigoyen.<sup>31</sup> The military coup was not resisted by Yrigoyen or the people.<sup>32</sup> By that time the Yrigoyen administration had virtually "disappeared."<sup>33</sup>

Until the coup, military power had been outwardly subordinate to civilian authority.<sup>34</sup> The events of 1930 shifted this arrangement.<sup>35</sup>

25. See R. CRASSWELLER, *supra* note 15, at 55-63, 71-73 (1987), for information on the background and presidency of Hipólito Yrigoyen, who was elected president of Argentina in 1916.

26. *Id.* at 71.

27. *Id.* at 71-72.

28. *Id.* at 72.

29. See D. PONEMAN, *supra* note 5, at 3.

30. J.A. PAGE, *supra* note 13, at 28-31. General José F. Uriburu is described as a German-trained cavalry officer and former conservative deputy (congressman) who led the nationalist faction that overthrew Yrigoyen. *Id.* at 29. Following the coup, General Uriburu declared himself president of Argentina. *Id.* at 31. See D. ROCK, ARGENTINA 1516-1985: FROM SPANISH COLONIZATION TO THE FALKLANDS WAR 215-16 (1985).

31. D. PONEMAN, *supra* note 5, at 3.

32. *Id.*

33. G.I. BLANKSTEN, *supra* note 11, at 35. At the time, a political leader remarked that "[o]n September 6, there was no ruler in the Casa Rosada except the doorman, who gave the keys to the first people who presented themselves as occupants." *Id.* at 35 n.26 (quoting from E. DICKMANN, RECUERDOS DE UN MILITANTE SOCIALISTA 309-10 (Buenos Aires: La Vanguardia, 1949)).

34. R. CRASSWELLER, *supra* note 15, at 73. See also CONST. ARGENT., *supra* note 12, arts. 23 & 24, at 13.

35. R. CRASSWELLER, *supra* note 15, at 73. Though claiming to be guardians of the Constitution, the military, in reality, became another political force. See also G. WYNIA, *supra* note 3, at 86-87.

[A]t one time or another members of the lower, middle, and upper classes, as well as leaders of labor, industry, and agriculture, have turned to the armed forces for help . . . . The military once responded cautiously . . . but when officers carried out their first coup on September 6, 1930, they accepted new responsibilities, thereafter

Rallying to the defense of law and constitution, the military became "contenders in the political battleground rather than guardians well above it."<sup>36</sup> Writer, Gary Wynia pointed out:

The coup set a precedent that would be emulated many times afterward. By stepping in and taking it upon themselves to "organize" the nation's affairs, the armed forces became a legitimate participant in the nation's politics, one that every interest would thereafter consider a potential ally. They had in effect become the *partido* militar, a political organization with commitments that obligated future generations of officers to assume responsibility for the nation's governance whether in office or not.<sup>37</sup>

The military would not be satisfied by a single tumble with politics. Coups followed in 1943, 1955, 1962, 1966, and 1976.<sup>38</sup> Military and politics made vexing bedfellows. Marching in to "restore order," the military only created disorder.<sup>39</sup> Constitutional

becoming a self-proclaimed "guardian of the constitution" that considered itself above civilian law.

*Id.*

36. R. CRASSWELLER, *supra* note 15, at 74.

37. G. WYNIA, *supra* note 3, at 88.

38. D. PONEMAN, *supra* note 5, at 4. For a discussion of the various coups see D. ROCK, *supra* note 30, at 245-49 (1943 coup), 312-19 (1955 coup), 338-42 (1962 coup), 345-46 (1966 coup), 360-66 (1976 coup). Governments overthrown by military coups include those of Hipólito Yrigoyen (1930), Roberto Ortiz (1943), General Juan Perón (1955), Arturo Frondizi (1962), Arturo Illia (1966) and Isabel Perón (who, as vice-president, succeeded her husband as president when he died in 1974) (1976). G. WYNIA, *supra* note 3, at 46.

39. P. LERNOUX, *CRY OF THE PEOPLE* 200 (1982). The military has created problems in the political, economic, and foreign arenas. In 1933 the military signed the Roca-Ronciman Pact with Britain "under which Argentine beef was supplied to the British market at unrealistically low prices, and the ad hoc tram and bus services in Buenos Aires were dismantled so that British firms would have exclusive right to run a transport system in the city." J. SIMPSON & J. BENNETT, *supra* note 10, at 50-51. Surprisingly, the Argentines suggested these concessions. *Id.*

Witness also how Argentina's 1982 invasion of the Falklands, conceived by the junta as a "diversionary gambit . . . to unite the country behind the regime, turned into a bloody disaster, exposing monumental diplomatic and military misjudgments on the part of the high command." J.A. PAGE, *supra* note 13, at 501. As journalist Penny Lernoux has commented:

One of the basic issues so conveniently ignored is that the military governments are a destabilizing force . . . . The constant intervention of the armed forces in politics and government both overtly and covertly, has made civilian political development virtually impossible . . . . The military had staged innumerable coups, ousted elected Presidents, dismissed Congresses, changed and discarded constitutions,

guarantees were suspended nearly forty-five percent of the time between 1930 and 1970.<sup>40</sup> Electoral fraud and violence were employed to install conservative governments.<sup>41</sup> Political parties were shut out of the election process; opposition leaders were arrested or exiled; police confiscated ballots; voting registers were falsified; the dead were brought back to life to vote; voters were bribed.<sup>42</sup> Bombings and riots occurred daily.<sup>43</sup> The army and police were used often during campaigns to consolidate candidates' positions.<sup>44</sup> Argentine politics became a "matter of calculating the number of tanks that [could] move against the Casa Rosada."<sup>45</sup>

Despite breaches of constitutional order, the Supreme Court was forced to "recognize and 'legitimate'"<sup>46</sup> these de facto governments in 1943, 1955, 1962 and 1966.<sup>47</sup> The Court realized these provisional governments were "backed by the military and police power essentially to maintain peace and order"<sup>48</sup> and acquiesced to their monopoly of power.<sup>49</sup> Latin scholar Germain J. Bidart Campos has said the Court's resolution "was an attempt to

imposed states of siege, closed universities, expelled and imprisoned political opponents, and established censorship -- all this in addition to its own internal feuding. "Law and order" is a myth . . . .

P. LERNOUX, *supra*, at 200.

40. Feinrider, *supra* note 6, at 187.

41. Cox, *supra* note 13, at 53.

42. D. ROCK, *supra* note 30, at 214-17.

43. See G.I. BLANKSTEN, *supra* note 11, at 67-71.

44. *Id.* at 67.

45. Cox, *supra* note 13, at 51. The Casa Rosada is Argentina's White House. G.I. BLANKSTEN, *supra* note 11, at 33.

46. Feinrider, *supra* note 6, at 187.

47. *Id.*

48. G.J. BIDART CAMPOS, *THE ARGENTINE SUPREME COURT: THE COURT OF CONSTITUTIONAL GUARANTEES* 116 (W. J. Brisk trans. 1982).

The judiciary's role during these de facto regimes has been cautious. Soon after seizing the presidential palace in September 6, 1930, General José F. Uriburu formally notified the Court that he had set up a provisional government. The Court was faced with three options: it could ignore the provisional government altogether, it could challenge its legitimacy, or it could formally recognize the provincial government. [The court chose the third option].

The high court . . . wrestled with the consequences of recognizing a government which had come to power following a patent breach of constitutional order in deposing the elected government of President Yrigoyen. But the Court, *as the only remaining legitimate remnant of constitutional democracy*, responded with both firmness and prudence.

*Id.* at 115-16 (citation omitted) (emphasis added).

49. *Id.* at 116.



reconcile dedication to constitutional principles with practicality."<sup>50</sup> While the Court acknowledged the authority of provisional governments, it resolved to remain the "arbiter of constitutionality and protector of personal rights."<sup>51</sup> By implication, the Court insisted the regimes obey judicial decisions.<sup>52</sup> But, judicial strength was sapped by purges in 1946, 1955, 1966, 1973 and 1976.<sup>53</sup>

Civilian governments were hardly distinguishable from those of the military.<sup>54</sup> Acting as puppets of the military or dictators, civilian rulers perpetuated the sham of democracy.<sup>55</sup>

Lawyer and author, Daniel Poneman, described the circumstances which result when a constitution becomes an instrument of personal power:

A democracy must be ruled by laws, not men. Argentina has been ruled by men, not laws. Every usurper touts the democratic 1853 Constitution, while breaking the most basic rule of the game: governments must be chosen by voters, not cabals . . . . To the extent he could get away with it, each man became a law unto himself.<sup>56</sup>

### III. THE COUP OF 1976

Against this background of "revolving-door politics,"<sup>57</sup> the military dislodged the government of Juan Perón's<sup>58</sup> widow, Isabel, in March,

50. *Id.*

51. *Id.* at 117.

52. *Id.*

53. Feinrider, *supra* note 6, at 187. After seizing power in 1976 and appointing General Jorge R. Videla as president, the junta, by decree, dismissed the judges of the Superior Courts in all the provinces and suspended life tenure. *Id.* at 197. New judges replaced those relieved. *Id.* See also *Human Rights in the World: Argentina*, 16 INT'L COMMISSION JURISTS 1, 3 (1976) [hereinafter *Human Rights*].

54. Feinrider, *supra* note 6, at 186.

55. *Id.* See also D. PONEMAN, *supra* note 5, at 39-40; G.I. BLANKSTEN, *supra* note 11, at 51.

56. D. PONEMAN, *supra* note 5, at 127.

57. G. WYNIA, *supra* note 3, at 195. Wynia refers to Argentine politics as being "quite repetitive, the military coming and going at almost regular intervals and civilian governments doing much the same." *Id.* at 45.

58. See J.A. PAGE, *supra* note 13 for a thorough biography of General Juan Perón, who was president of Argentina from 1946-1955, and again in 1973-1974. *Id.* at 155, 316-28.

1976.<sup>59</sup>

Isabel's inability to control inflation, repair rifts within the Peronist party, subdue violence and quell union strikes left her without popular support.<sup>60</sup> Any authority Isabel enjoyed deteriorated when Congress began impeachment proceedings against her for diverting charitable funds to her personal account.<sup>61</sup> The disintegrating state of the nation presented a "classic scenario" once more for a coup d'état.<sup>62</sup>

The military group inherited a troubled country. Terrorism threatened many.<sup>63</sup> Chronic inflation soured the economy.<sup>64</sup> Government control was eroding.<sup>65</sup> When the military took control, the Argentines welcomed "a return to sanity"; gentleman would govern Argentina again.<sup>66</sup>

Members of the military, however, had priorities beyond acting mannerly. Interpreting its mission to end terrorism and repair the economy as a mandate to remake the nation, the military junta established the "Process of National Reorganization."<sup>67</sup> A series of

59. Dworkin, *supra* note 9, at 11. See also Schumacher, *Argentina and Democracy*, FOREIGN AFF., Summer 1984, at 1075.

60. D. ROCK, *supra* note 30, at 364-66.

61. *Id.* at 366.

62. *Id.*

63. See Elon, *supra* note 4, at 74-76. Although left-wing terrorism was chronic, author Daniel Poneman suggests:

The terrorists' targets were generally security forces or prominent figures, so the man in the street was not greatly threatened. The disappearances [caused by the military and police forces] touched many more, but a shroud of silence allowed people to fool themselves into thinking that the terror was an illusion or a minor excess above a dirty but necessary task.

D. PONEMAN, *supra* note 5, at 38.

64. Schumacher, *supra* note 59, at 1075.

65. See D. ROCK, *supra* note 30, at 364.

66. Dworkin, *supra* note 9, at 11. See also G. WYNIA, *supra* note 3, at 99 wherein he states: Support for military intervention is usually motivated by rather narrow, short-term self-interests rather than philosophical convictions. Rampant inflation, working-class protest, terrorism, or a bad business climate frighten them and alienate them from weak civilian-run governments, prompting their acceptance of military intervention as a necessary evil in times of crisis.

*Id.* That Argentines can view the military as a "necessary evil" as well as "gentleman" is an indication of the peculiar hold the military has over the country. When needed, the military become "gentleman," but once in power, the "evil" side becomes apparent.

67. Statute For The Process of National Reorganization, B.O. (1978) English translation reprinted in A. BLAUSTEIN & G. FLANZ, *supra* note 12, at 26 [hereinafter Statute for the Process].

decrees<sup>68</sup> were issued in which the junta "assumed the principle powers of the Executive and Legislative branches of the Argentine government."<sup>69</sup> Congress was dissolved.<sup>70</sup> The junta was empowered to appoint the president and replace the Supreme Court.<sup>71</sup> The president was granted legislative powers.<sup>72</sup> Provincial governments were displaced.<sup>73</sup> Political parties were banned.<sup>74</sup> Union activity was curtailed.<sup>75</sup> Newspapers were closed or censored.<sup>76</sup> Moral codes were imposed on the Arts.<sup>77</sup> Student unions were silenced.<sup>78</sup> Teachers were dismissed.<sup>79</sup> Books were destroyed.<sup>80</sup> Educational curricula were modified.<sup>81</sup> Restrictions on religious practice were imposed.<sup>82</sup> Friends were rewarded, enemies were persecuted.<sup>83</sup>

Through these decrees, the military effectively subverted the Constitution into theory and became "the judge and jury of national politics."<sup>84</sup> Indeed, the most "basic right -- the right to life -- lacked effective protection from either the courts, the bar, the parties, or popular opinion."<sup>85</sup> Determined to end terrorism, the junta embarked on a fierce attack on subversion of any kind.<sup>86</sup> "Tens of thousands of citizens were abducted by security forces, beaten, tortured, raped, and held prisoner in clandestine detention centers

68. See *Report of the Mission of Lawyers to Argentina: April 1-7, 1979*, 34 REC. A. B. City N.Y. 473, 476, 493 n.23 (1979) [hereinafter *Mission of Lawyers*]. See also Snyder, *supra* note 18, at 508-09.

69. *Mission of Lawyers, supra* note 68, at 476.

70. *Id.*

71. Statute for the Process, *supra* note 67, arts. 1 & 2, at 26-27. See also *Mission of Lawyers, supra* note 68, at 476-77.

72. Statute for the Process, *supra* note 67, art. 5, at 28. See also *Mission of Lawyers, supra* note 68, at 477.

73. D. PONEMAN, *supra* note 5, at 35.

74. J. SIMPSON & J. BENNETT, *supra* note 10, at 40.

75. *Id.*

76. *Id.* at 231-48.

77. *Id.* at 210, 219-30.

78. *Human Rights, supra* note 53, at 3.

79. *Id.* at 212-15.

80. *Id.* at 210, 216-17.

81. *Id.* at 212-15.

82. *Id.* at 215-16, 249-67.

83. See D. PONEMAN, *supra* note 5, at 8.

84. *Id.* at 40.

85. *Id.*

86. *Id.* at 35-37. See also *Mission of Lawyers, supra* note 68, at 477.

or simply killed outright.<sup>87</sup> Access to courts was almost impossible since the junta severely restricted the right to habeas corpus.<sup>88</sup> Defense lawyers risked death or disappearance if they represented "subversives."<sup>89</sup> Constitutional protections were suspended "in favor of the terrifying logic of 'national security.'"<sup>90</sup>

The imminence of the terrorist threat did not justify "the abdication of all responsibility to decide who shall live and who shall die to an uncontrolled group of soldiers and marauders beholden only to themselves. It cannot excuse torture and murder even of the guilty *without benefit of legal procedures.*"<sup>91</sup>

#### IV. THE DIRTY WAR

The major focus of the junta's "process" was to eliminate subversion.<sup>92</sup> Since the death of Juan Perón in 1974, violence by left and right-wing factions raged.<sup>93</sup> When Isabel succeeded her husband as president, she failed to control the violence.<sup>94</sup> By 1976, when the military seized power, "the battle between state security forces and the country's many and varied guerrilla groups was

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87. Tweedy, *The Argentine "Dirty Wars" Trials: The First Latin American Nuremberg?*, 44 NAT'L L. GUILD PRAC. 15, 16 (1987).

88. Feinrider, *supra* note 6, at 196-97.

89. J. SIMPSON & J. BENNETT, *supra* note 10, at 72.

90. Tweedy, *supra* note 87, at 15.

91. D. PONEMAN, *supra* note 5, at 39 (emphasis added).

92. *Id.* at 35.

93. *Mission of Lawyers*, *supra* note 68, at 476. See also Dworkin, *supra* note 9, at 11. Several revolutionary groups emerged in the late 1960's and early 1970's. D. ROCK, *supra* note 30, at 353. Three Peronist factions were the Monteneros, Fuerzas Armadas Peronistas (FAP), and Fuerzas Armadas Revolucionarias (FAR). *Id.* These groups united under the Monteneros in 1973. *Id.* A more anti-Peronist leftist group, the People's Revolutionary Party (ERP), emerged in 1970. *Id.* To combat these guerrilla groups, the government organized its own para-police force, the Argentine Anti-Communist Alliance, or as commonly known, the Triple A. G. WYNIA, *supra* note 3, at 81. By 1974 most of the kidnappings and murders were the work of these Triple A death squads. See D. ROCK, *supra* note 30, at 360. By the end of 1976 both the ERP and the Monteneros were destroyed. J. SIMPSON & J. BENNETT, *supra* note 10, at 28. When the junta assumed control in 1976, the Triple A was not a target of its attack on subversion. *Mission of Lawyers*, *supra* note 68, at 476, 493 n.21 (citing AMNESTY INT'L, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO ARGENTINA 35 (1977)). Left-wing terrorist organizations were the subversives, and, as the Argentine Foreign Minister said: "Subversion or terrorism of the right is not the same thing." *Id.*

94. Dworkin, *supra*, note 9, at 11.

claiming hundreds of lives a week."<sup>95</sup>

For the military, World War III had begun.<sup>96</sup> The enemy was not a foreign army. The enemy was the corrupt and subversive behavior of Argentines themselves.<sup>97</sup> Only the armed forces could protect the nation.<sup>98</sup> "Unconventional means were needed to fight an unconventional enemy; they would use terror to fight terror."<sup>99</sup> With impunity, the military mimicked the terrorists.<sup>100</sup> A state terror network developed.<sup>101</sup> Didionesque phrases appeared to describe the process:

Perón's guerrilla supporters did not kill or murder, they "applied justice." Later the Montoneros became "special formations," to distinguish them from the ERP cadres, who were simply "terrorists." Anyone who opposed the military regime, from a committed terrorist to a non-violent dissident . . . as well as anyone who did not publicly support it, from a critical journalist to a questioning schoolteacher, was a "subversive." And subversives could be "eliminated" by the "forces of order," with no questions asked.<sup>102</sup>

The junta sought to "eliminate physically all those who in any way participated in the world it wanted to modify."<sup>103</sup> The military's counterattack against subversion:

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95. Cox, *supra* note 13, at 54. See generally D. ROCK, *supra* note 30, at 346-69; J.A. PAGE *supra* note 13, at 363-49, 496-501.

96. Lernoux, *Can Alfonsín Survive? The Threats to Argentine Democracy*, THE NATION, Feb. 2, 1985, at 114.

97. See G. WYNIA, *supra* note 3, at 100.

98. *Id.* at 88. The military contends only they, "with their code of honor, patriotism, and superior sense of organization and discipline, could provide the leadership necessary to bring about national revitalization." *Id.* at 95.

99. Schumacher, *supra* note 59, at 1076.

100. See Cox, *Total Terrorism: Argentina, 1969-1979, TERRORISM, LEGITIMACY, AND POWER: THE CONSEQUENCES OF POLITICAL VIOLENCE* 140 (M. Crenshaw ed. 1983).

101. Schumacher, *supra* note 59, at 1076. See also P. LERNOUX, *supra* note 39, at 9-10, wherein Penny Lernoux describes a "vast network of government spies, secret police, and para-police operations with their attendant torture chambers and death squads." *Id.* at 10.

102. Cox, *supra* note 13, at 54. "Didionesque" refers to the writing style of author Joan Didion, whose works include *SLOUCHING TOWARD BETHLEHEM* (1968), *THE WHITE ALBUM* (1979), *SALVADOR* (1983), *DEMOCRACY* (1984), and *MIAMI* (1987).

103. J. TIMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER* 95 (1981).

extended to sympathizers and fellow travelers, to the disseminators of ideas the armed forces found uncongenial, and to foreign refugees and political activists who might be suspect. The army understood that the net of repression cast so wide, would certainly bring in many who were marginal or entirely innocent; it did not welcome this prospect, but it accepted it, deeming it inevitable since the state had to be preserved and there was insufficient time and manpower (and in some cases, desire) to fine-tune the process.<sup>104</sup>

By the end of 1977, the left-wing guerrilla movement was quashed.<sup>105</sup> Though an "internal directive issued by the army itself" had estimated the "enemy" to be only 300-500 in number, repression remained pervasive.<sup>106</sup> Three-quarters of the political deaths in 1976 were attributed to individuals from the extreme right.<sup>107</sup> None were arrested or tried.<sup>108</sup> "On the contrary, the government gave dozens of paramilitary and para-police organizations a free hand to torture, murder, and blackmail their victims: thuggery was thus institutionalized on a national scale."<sup>109</sup> The savagery of the terrorists shrank in comparison to "official barbarism."<sup>110</sup> Argentina

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104. R. CRASSWELLER, *supra* note 15, at 371. The repression initially aimed a left-wing terrorists and students "expanded to include union leaders, moderate politicians, lawyers, journalists, scientists, priests, even right-wing businessmen. It was enough to deplore the carnage to become a victim." P. LERNOUX, *supra* note 39, at 336.

105. P. LERNOUX, *supra* note 39, at 335.

106. Comment, *Judgment of Former Military Rulers for Human Rights Violations: Jorge R. Videlo et. alia*, 4 N.Y.L. SCH. HUM. RTS. ANN. 809, 827 (1987); P. LERNOUX, *supra* note 39, at 335.

107. *Id.* at 335.

108. *Id.*

109. *Id.* See also G. WYNIA, *supra* note 3, at 82 wherein the author explains the military's system to eliminate terrorism:

In the past when terrorists were caught they were sent to prison, where they were tortured but usually kept alive. Not any longer. On orders from the highest command, military intelligence and paramilitary units abducted whomever they wished (averaging fifteen per day during the last quarter of 1976), took them to secret concentrations camps, tortured them for information about their colleagues, and then killed them without even recording their deaths.

*Id.*

110. Cox, *supra* note 100, at 124. See also Tweedy, *supra* note 87, at 25. The National Commission on Disappeared Persons (CODEP), appointed by Argentina's current president Raul Alfonsín to investigate the thousands of disappearances during the "dirty war," concluded, in September, 1984, that "the armed forces responded to the terrorists' crimes with a terrorism infinitely worse than that which they were combating." National Commission of

became a "terrorist state without terrorists"<sup>111</sup> by 1979. Jungle justice had triumphed, but the nightmare continued.

#### V. WORKING WITHIN THE CONSTITUTIONAL FRAMEWORK

Upon taking power, the junta assumed the authority to enact measures to combat terrorism and install order.<sup>112</sup> The military government claimed power from constitutional sources as well as self-perpetuated rules of questionable legality.<sup>113</sup> That these measures could appear legitimate and legal was due both to the ambiguity of the Constitution and the loopholes created by certain provisions of the document.<sup>114</sup>

The Argentine Constitution provides for a strong executive.<sup>115</sup> As "[s]upreme head of the nation,"<sup>116</sup> the president possesses a wide array of authority. He may propose law, veto legislation, issue decrees that have the force of law, and appoint and remove cabinet ministers and other administrators without consulting Congress.<sup>117</sup> In addition, the Constitution permits the executive to declare a "state of siege"<sup>118</sup> and to "intervene" in a province to "guarantee the republican form of government."<sup>119</sup>

The legislature, though, is weak compared to the executive.<sup>120</sup> Overwhelmed by presidential powers, Congress plays second fiddle,

Disappeared Persons (CODEP), *reprinted in* J. SIMPSON & J. BENNETT, *supra* note 10, at 339.

111. Cox, *supra* note 100, at 124.

112. See Statute for the Process, *supra* note 67, at 26-30 and accompanying text.

113. See Dworkin, *supra* note 9, at 14.

114. See Note, *Similarities And Differences In Letter And Spirit Between The Constitution Of The United States And Argentina*, 40 GEO. L.J. 582, 595 (1952).

115. CONST. ARGENT., *supra* note 12, art. 86, at 17. See also J.A. PAGE, *supra* note-13, at 162.

116. CONST. ARGENT., *supra* note 12, art. 86, at 17.

117. *Id.* See also J. BRUCE, *THOSE PERPLEXING ARGENTINES* 266-67 (1953).

118. CONST. ARGENT., *supra* note 12, art. 23, at 6.

119. CONST. ARGENT., *supra* note 12, art. 6, at 4.

120. D. PONEMAN *supra* note 5, at 130.

Partly by design and partly by custom, the Argentine National Congress is less active than reactive. Lack of practice has worsened the problem. During the first two Peronist presidencies, the Radical block in Congress faced the dilemma of making little difference or making no difference when faced by large Peronist majorities and a president who jailed Radical leaders. Military governments resolve this cruel choice by dissolving the Congress.

*Id.*

rarely able to assert "independent power . . . to defend the Constitution."<sup>121</sup> Any system of checks and balances, crucial to federalism, is thwarted.<sup>122</sup>

Together, these powers (or lack thereof) have been used to undermine democracy in Argentina.<sup>123</sup> The continued exercise of executive prerogative by leaders has exacted a high price from the Argentines. Article 14 of the Argentine Constitution guarantees rights among others, to assemble, petition authorities, and publish ideas.<sup>124</sup> Yet, these rights are restricted by the qualifying words "in accordance with the laws that regulate their exercise."<sup>125</sup> Through decrees issued under the "Process of National Reorganization," the junta promulgated such regulatory laws.<sup>126</sup> The potential for abuse proved deadly to the constitutional process. Divining a right to run the country, the junta availed itself of these constitutional weaknesses to promote its peculiar vision of the way the Argentine world should be.<sup>127</sup>

#### A. Intervention

Article 6 of the Constitution is a general power which permits the federal government to intervene in a province "to guarantee the republican form of government or repel foreign invasion."<sup>128</sup> Intervention has occurred so frequently in Argentina that even by 1917 one commentator stated:

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121. *Id.*

122. See J.A. PAGE, *supra* note 13, at 162.

123. *Id.*

124. CONST. ARGENT., *supra* note 12, art. 14, at 4.

125. *Id.* See Note, *supra* note 114, at 595.

126. See Snyder, *supra* note 18, at 509. An example of such a decree was the "Act to Consider the Conduct of those Persons Who Prejudice the Higher Interests of the Nation." *Id.* at 509 n.26 (quoting from the act). The junta assumed "the power and responsibility to review the actions of those individuals who have injured the national interest." *Id.*

127. See Lernoux, *supra* note 96, where journalist Penny Lernoux describes the military's vision:

The military leaders inhabit a dark, conspiratorial world in which social realities rarely intrude. They propound a pseudo-fascist theory called the Doctrine of National Security, which holds that World War III has already begun and that the Christian forces of the West are locked in a struggle with communism. The enemy is anyone who thinks differently from them; so to save Argentina, the military must wipe out all signs of dissent.

*Id.* at 114. See also Zalaquett, *supra* note 2, at 18-19.

128. CONST. ARGENT., *supra* note 12, art. 6, at 4.



In a word, federal intervention is accepted willingly . . . . [I]n the political field, the federal intervention is also accepted with great pleasure, whenever it benefits the party to which one belongs; and thus there is no governor, no legislature, no faction of a provincial legislature, which does not turn its eyes to the President of the Republic or to Congress whenever they feel weak or in danger.<sup>129</sup>

By 1953, every president had intervened in at least one province.<sup>130</sup> Through intervention, allies replaced political enemies, and faltering presidencies were saved.<sup>131</sup> The purpose of intervention has thus been distorted for political benefit.<sup>132</sup>

Intervention results in the "suppression of the provincial constitution" and the removal of "legislative, executive and judicial authorities" in the province.<sup>133</sup> The federal government then exercises authority through a presidential official who is answerable only to the executive.<sup>134</sup>

Although intervention is supposed to be a temporary measure, any check on this power was effectively barred when the Supreme Court ruled that the decision to intervene was a non-justiciable political question.<sup>135</sup> The Court would not "pass judgment on the wisdom, necessity or proper duration of national intervention in any instance."<sup>136</sup> With that decision, the intervenor system "stood as a ready-made instrument of dictatorship at the disposal of the military men."<sup>137</sup>

Military regimes proceeded to intervene routinely,<sup>138</sup> leaving the provinces with so little autonomy that they resembled "occupied countries rather than free states."<sup>139</sup> With Congress usually dissolved

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129. Quintana, *supra* note 19, at 650 n.33 (quoting MATIENZO, *EL GOBIERNO REPRESENTATIVO FEDERAL EN LA REPUBLICA ARGENTINA* (2d ed. 1917)).

130. See G.I. BLANKSTEN, *supra* note 11, at 139.

131. See D. PONEMAN, *supra* note 5, at 129.

132. See Winizky, *supra* note 18, at 432.

133. G.I. BLANKSTEN, *supra* note 11, at 138-39.

134. *Id.* at 139.

135. *Id.* at 138.

136. *Id.*

137. *Id.* at 139.

138. See G.I. BLANKSTEN, *supra* note 11, at 149 n.26.

139. *Id.*

and the Court without jurisdiction, two crucial checks on executive authority were silenced.

Additionally, key phrases in Article 6 such as "federal government" and "republican form of government" are undefined in the text.<sup>140</sup> The vagueness of these terms raises questions: Does "federal government" mean the branches of the government act together or separately in deciding when to intervene? If together, how is agreement to intervene to be reached? If separate, which branch is authorized to order intervention? What does "republican form of government" mean and who determines its meaning? Evidently much was left open for the junta to define. Thus, Article 6, in effect, served as a dangerous catch-all for the junta to interpret as it desired and to act as it pleased, unhampered by textual limitations.

### B. *State of Siege*

Article 23 of the Argentine Constitution allows a "state of siege" to be declared in an area, if "internal disorder or foreign attack" endangers "the operation of this Constitution and the authorities created thereby."<sup>141</sup> If a "state of siege" is declared, then Constitutional guarantees are suspended in that territory.<sup>142</sup>

The clause identifies the limits within which the president may act during a state of siege:

[D]uring such suspension the President of the Republic shall not convict or apply punishment upon his own authority. His power shall be limited in such a case, with respect to persons, to arresting them or transferring them from one point of the Nation to another, if they do not prefer to leave Argentine territory.<sup>143</sup>

Argentine citizens enjoy many rights and protections under the Constitution.<sup>144</sup> Article 23 "has made a mockery of these noble

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140. CONST. ARGENT., *supra* note 12, art. 6, at 4.

141. CONST. ARGENT., *supra* note 12, art. 23, at 6.

142. *Id.* See also Snyder, *supra* note 18, at 509-10.

143. CONST. ARGENT., *supra* note 12, art. 23, at 6.

144. See *supra* notes 20-22 and accompanying text.

protections.<sup>145</sup> Other democracies have "tinkered with constitutional safeguards during periods of domestic upheaval,"<sup>146</sup> but reluctantly and cautiously.<sup>147</sup> However, in Argentina, such incursions are predictable.<sup>148</sup> By 1949, states of siege had been pronounced over thirty times.<sup>149</sup> Declared for a variety of reasons, ranging from riots and strikes to the invasion of Pearl Harbor, states of siege have lasted for long and short intervals.<sup>150</sup> In 1969 President Onganía<sup>151</sup> imposed a state of siege that ran almost four years.<sup>152</sup> Before the elections in 1973 it was lifted.<sup>153</sup> But late in 1974, Isabel Perón instituted another that lasted until election day in 1983.<sup>154</sup>

Theoretically, Article 23 defines boundaries for presidential action: arrests and transfers are permitted, however, punishment is prohibited.<sup>155</sup> According to Article 86, when there is a foreign invasion, the president declares a state of siege with the consent of the Senate.<sup>156</sup> The Senate, through Article 53, can authorize the president to declare a state of siege if there is a foreign invasion.<sup>157</sup> With internal disorder, the president has "power only when the Congress is in recess," since this is a power belonging to that body.<sup>158</sup> Pursuant to Article 67, Congress is empowered to declare a state of siege "in case of internal disturbance, and to approve or suspend a state of siege declared by the Executive during a recess of the Congress."<sup>159</sup> Theoretically then, the president cannot authorize

145. D. PONEMAN, *supra* note 5, at 130.

146. Snyder, *supra* note 18, at 506.

147. *Id.*

148. *Id.*

149. Quintana, *supra* note 19, at 648-49.

150. D. PONEMAN, *supra* note 5, at 131.

151. See D. ROCK, *supra* note 30, at 346-55. General Juan Carlos Onganía, former Army Chief of Staff, led a coup in 1966 that overthrew President Arturo Illia. *Id.* at 346. Onganía's presidency was characterized by violence and repression. *Id.* at 347. In 1970 he was removed by a military coup that installed General Roberto M. Levingston as president. *Id.* at 355.

152. D. PONEMAN, *supra* note 5, at 131.

153. *Id.*

154. *Id.*

155. CONST. ARGENT., *supra* note 12, art. 23, at 6. See also *infra* notes 185-208 and accompanying text.

156. CONST. ARGENT., *supra* note 12, art. 86, § 19, at 18.

157. CONST. ARGENT., *supra* note 12, art. 53, at 10.

158. CONST. ARGENT., *supra* note 12, art. 86, § 19, at 18.

159. CONST. ARGENT., *supra* note 12, art. 67, § 26, at 13.

much unilaterally. If the country is invaded, he must receive the Senate's consent or authorization.<sup>160</sup> If internal disorder threatens the country, Congress must be reckoned with at some point.<sup>161</sup>

In practice, however, this legislative check is useless since, in Argentina, Congress is often in "permanent" recess -- dissolved by the ruling regime.<sup>162</sup> The president alone is left to define what is an emergency and to decide when one exists. Indeed, when carried out, without effective review, this power serves to "free the government from restraint and strip the citizen of protection."<sup>163</sup> The legal system of a nation can become a "tool of tyranny."<sup>164</sup> The ambiguity of the text enables regimes to invoke the clause in times of national emergency to "create a legal image for itself, or rather, an image of the power it is exercising as 'legal,' *i.e.*, as grounded in law."<sup>165</sup> During troubled periods, when constitutional claims are tested, the state of siege prerogative increases opportunity for manipulation and disregard of liberties.<sup>166</sup> Since the Constitution does not designate a time limit, the state of siege can continue indefinitely.

Ironically, though executive discretion to authorize a state of siege is quite limited in Argentina, presidents declare states of siege freely, seemingly unencumbered by constitutional restraints.<sup>167</sup> Even if the "state of siege" articles did preclude presidential initiative, the open-ended language of Article 6, which permits intervention, probably would allow the president to achieve similar results.<sup>168</sup>

The junta used this "apparatus of legality"<sup>169</sup> freely while it governed. Immediately following the coup, the junta announced that the state of siege imposed by Isabel Perón would continue.<sup>170</sup> Promising to safeguard individual rights, the new president, General

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160. CONST. ARGENT., *supra* note 12, art. 86, §§ 19, art. 53, at 18, 10.

161. CONST. ARGENT., *supra* note 12, art. 86, § 19, at 18, art. 67, § 26, at 13.

162. D. PONEMAN, *supra* note 5, at 130.

163. *Id.* at 131.

164. *Id.*

165. Snyder, *supra* note 18, at 507.

166. *See* D. PONEMAN, *supra* note 5, at 131.

167. *See supra* notes 148-54 and accompanying text.

168. CONST. ARGENT., *supra* note 12, art. 6, at 4.

169. Snyder, *supra* note 18, at 507.

170. *Mission of Lawyers, supra* note 68, at 476.

Jorge Rafael Videla,<sup>171</sup> stated:

[W]e assume the full exercise of *authority*; not to infringe upon *liberty*, but to affirm it; not to twist *justice* but to impose it. After reestablishing an effective *authority*, which will be revitalized at all levels, we will turn to the *organization of the state*, whose performance will be based on *permanence and stability of judicial norms* which will guarantee the *primacy of law* and the observance of it by the governors and governed alike.<sup>172</sup>

Through the "Process of National Reorganization," the junta determined to fulfill its mission. The "Statute for the Process of National Reorganization" articulated the norms by which the government would rule and society would live.<sup>173</sup> But, President Videla's words took on macabre meanings when actions followed. *Exercising authority* meant the junta operated as the exclusive source of law. *Affirming liberty* meant restrictions on individual rights and repression. *Imposing justice* meant torture and disappearance. *Revitalizing authority* meant dismissing officials. *Organizing the state* meant dissolving federal and provincial bodies. *Judicial permanence and stability* meant purging the Supreme Court. *Primacy of law* meant the Constitution was to "remain in effect only 'to the extent that it [did] not oppose the main objectives set forth by the military junta or the provisions' of the law."<sup>174</sup>

Although the emergency power licensed by the Constitution offered adequate legal means to enforce order,<sup>175</sup> the junta required more. Article 23 proscriptions were manipulated to broaden the military's reach over citizens who could not be called criminals, yet were equally reprehensible to the junta.<sup>176</sup> In addition to using the

171. General Jorge Rafael Videla, former teacher and head of Colegio Militar, became commander-in-chief of the army in 1975. G. WYNIA, *supra* note 3, at 100. Following the 1976 coup, he was appointed president of Argentina by the junta. *Id.* at 101.

172. Snyder, *supra* note 18, at 508 (emphasis added).

173. See Statute for the Process, *supra* note 67, at 26.

174. Snyder, *supra* note 18, at 509.

175. See Comment, *supra* note 106, at 826. These legal means included executive arrest pursuant to Article 23, use of the right of option constitutionally mandated under state of siege, and adherence to the United Nations Charter and Geneva Convention of 1949 regarding legal obligations owed prisoners of war. *Id.* at 18.

176. See *supra* notes 92-111 and accompanying text.

existing Penal Code the junta introduced new crimes and harsher penalties.<sup>177</sup> Pursuant to the "Act to Consider the Conduct of Those Persons Who Prejudice the Higher Interests of the Nation," the junta parlayed "the power and responsibility to review the actions of those individuals who have injured the national interest."<sup>178</sup> Government action became necessary if negligence in public, political, or social duties was found; subversive acts were committed; administrative corruption was discovered or tolerated; or moral principles were compromised by political or professional activities.<sup>179</sup>

Behavior previously lawful was deemed criminal. Statutes declared participation in political parties<sup>180</sup> and labor strikes<sup>181</sup> illegal. Publication of news recounting "terrorist activity, subversion, abductions or the discovery of bodies, unless officially announced,"<sup>182</sup> was banned. Political criticism was forbidden.<sup>183</sup> The scope of the Penal Code was expanded to increase the severity of certain crimes:

[A] breach of the peace punishable by a fine or 30 days confinement became a federal offense punishable by imprisonment for up to ten years. The sentence for the old crime of 'illicit association' rose from 3-8 years to 5-12 years. The death penalty, abolished in 1972, was revived, and would now be carried out within 48 hours of the sentence, leaving little time to file an appeal. The age of majority for criminal responsibility was reduced from 18 to 16 years for certain crimes.<sup>184</sup>

By either ignoring, evading or distorting the proscriptions of Article 23, the junta stretched its authority. The language of the text became a toy to contort according to need. Since conviction and punishment were prohibited, sanctions short of punishment were administered.<sup>185</sup> Lesser penalties included "loss of political or union

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177. See *infra* notes 180-93 and accompanying text.

178. Snyder, *supra* note 18, at 509 n.26.

179. *Id.*

180. *Id.* at 510.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 509.

rights; loss of citizenship for naturalized Argentians; disqualification from public office; and confinement."<sup>186</sup> Laws were promulgated granting "extraordinary powers of arrest, detention and interrogation"<sup>187</sup> to the armed forces, security groups and ordinary police.<sup>188</sup> Security forces could fire on individuals who breached the peace and failed to stop after being warned once.<sup>189</sup> Those confined were interrogated and held for infinite duration, waiting for evidence to accumulate against them.<sup>190</sup> Their other choice was to go before military tribunals for summary proceedings.<sup>191</sup> Conversely, the military and police forces were subject only to military jurisdiction for infractions committed on duty.<sup>192</sup> Any violent act against such officers was subject to severe penalties. Effectively immune from prosecution, the military and police could "roam city streets at will, veritable sovereignties in competition only with each other."<sup>193</sup>

Rights supposedly protected even during a state of siege were trampled.<sup>194</sup> According to the Constitution, persons arrested by the president during a state of emergency can elect to leave the country.<sup>195</sup> This "right of option," conferred by Article 23, was suspended by the junta.<sup>196</sup> Although this complete suspension was modified in 1977, the new procedures limited the detainee's exercise of the right.<sup>197</sup> A presidential veto could prevent exile if the detainee "would endanger the peace and security of the nation if permitted to leave" Argentina.<sup>198</sup> Long periods of time could elapse between arrest, request to leave, denial by the president, and

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186. *Id.* at 509-10

187. K. PEHME, *ARGENTINA'S DAYS OF RAGE: THE GENESIS OF ARGENTINE TERRORISM* 68 (1980).

188. The powers extended to these groups were "extraordinary" because Article 23 bars executive conviction or punishment on its own authority. *See* CONST. ARGENT., *supra* note 12, art. 23, at 6. In addition the Supreme Court has held that only the president can order arrest and he *may not delegate* such power. 235 Fallos 355, 252 Fallos 90 (cited in G.J. BIDART CAMPOS, *supra* note 48, at 102) (emphasis added).

189. *See* Snyder, *supra* note 18, at 511.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 511-12.

194. *See* D. PONEMAN, *supra* note 5, at 131.

195. CONST. ARGENT., *supra* note 12, art. 23, at 6.

196. *Mission of Lawyers*, *supra* note 68, at 477.

197. *Id.* at 482.

198. *Id.*

submission of a new request.<sup>199</sup>

The "unconditional grant" of the option to leave, in Article 23, raised questions about the legitimacy of suspending the right.<sup>200</sup> National security concerns were recited again to justify yet another restraint on individual liberty.<sup>201</sup> Arguably, with the domestic war against subversion going on, these expletives sounded more like the messages of legalistic vigilantes than the assurances of patriotic protectors. In this light, the validity of curbing the right of option was suspect.

Violence done to individual rights was due in part to the junta's brazen disregard of the law. Admittedly, constitutional defects and ambiguities made these rights vulnerable to encroachment. Specifically, Article 23 established no time limit on the duration of a state of siege.<sup>202</sup> Denial of constitutional guarantees could continue for years.<sup>203</sup> Without a right to leave, detention could go on eternally.<sup>204</sup> Because "conviction" and "punishment" were vague and undefined, they could be creatively interpreted.<sup>205</sup> Conflicts with the language of the article could be avoided by a turn of phrase. Alternative sanctions often sounded better, but when inflicted, were more punishing. People in Argentina were not "convicted" or "punished"; they were "detained" and "tortured."<sup>206</sup> They "disappeared."<sup>207</sup> "Transfer," allowed under a state of siege, "became synonymous with 'execution.'<sup>208</sup>

Changes in jargon, however, could not alter the essence of lawlessness. Constitutional ambiguity could not justify heinous excess.

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[T]here was a law within a law, for a state within a state. Or,

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199. *Id.*

200. *Id.*

201. These concerns are reflected in the Code of Crim. Proc., Law No. 21,650, (Sept. 1, 1977) which stated that a president could veto a person's "right of option" if a detainee "would endanger the peace and security of the nation if permitted to leave Argentine territory." *Mission of Lawyers, supra* note 68, at 482.

202. D. PONEMAN, *supra* note 5, at 131.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 131-32.



more accurately, a sphere of utter lawlessness beneath the facade of an official lawlessness bankrupt of any real content. The one a mask to disguise the other, grinning its ghoulish grin at all those who still held dear some hope and faith in the virtue and power of mere legality.<sup>209</sup>

## VI. THE JUDICIAL DILEMMA

The Supreme Court in Argentina, as the United States Supreme Court, is arbiter of constitutional meaning.<sup>210</sup> However, in practice, "the underlying legal culture . . . is one of idealism, legalism, formalism, and lack of penetration."<sup>211</sup> Repeated purges, attacks, and threats have gutted judicial strength.<sup>212</sup> As targets themselves, the courts were unable to effectively counter the strong-arm of military governments.<sup>213</sup> Given the choice between compromise or annihilation, the Supreme Court delivered assertive opinions, but assented to military dominance.<sup>214</sup>

Government succession in Argentina rarely flows according to constitutional procedures.<sup>215</sup> De facto governments, installed by military coups, have interrupted the constitutional scheme.<sup>216</sup> The Supreme Court has addressed the constitutional dilemma presented by these governments by developing a "de facto doctrine."<sup>217</sup> In exchange for a promise from the government to respect the Constitution, the Supreme Court has recognized these governments.<sup>218</sup> Faced with the first of these regimes, the Court had few options.

If it held the usurpation unconstitutional, its decision

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209. Snyder, *supra* note 18, at 512.

210. Quintana, *supra* note 19, at 656.

211. Feinrider, *supra* note 6, at 175 n.20 (citing K. KARST & K. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA (1975)).

212. *Id.* at 187.

213. *Id.* at 198-99.

214. *Id.* at 175.

215. Quintana, *supra* note 19, at 657.

216. Feinrider, *supra* note 6, at 175.

217. Quintana, *supra* note 19, at 658.

218. Feinrider, *supra* note 6, at 193.

(unsupported by physical force) could be ignored and the judges (unprotected by physical force) could well be dismissed, thereby depriving them of the opportunity to try to keep a modicum of constitutional control over the new, de facto government. On the other hand, if it adopted the so-called "de facto doctrine," which held that governments unconstitutional in origin could be constitutional in practice, it would set a dangerous precedent (that coups are constitutional) and compromise its image as an independent branch of government . . . . In a one-page opinion, the Court upheld the de facto doctrine, thereby ratifying the illegal government.<sup>219</sup>

A dangerous precedent in fact was set. In 1943, 1955, 1962, and 1966 the Court "recognized" de facto governments.<sup>220</sup>

The judicial system was further weakened by en masse impeachments.<sup>221</sup> Though judicial power is supposed to remain in force even during a state of siege,<sup>222</sup> in 1976, the junta dismissed and replaced the Supreme Court and all Superior Tribunals of the provinces,<sup>223</sup> despite life tenure.<sup>224</sup>

While the Supreme Court, in earlier cases, interpreted Article 23 to permit extraordinary powers during emergencies, in *Juan C. Rodriguez*,<sup>225</sup> the Court held that a state of siege "does not suspend the constitution nor does it eliminate constitutional guarantees; the separation of powers continues and the judiciary remains responsible for sentencing criminals."<sup>226</sup> In *Avico V. de la Pesa*,<sup>227</sup> the dissent stated that "an emergency does not create new powers or even increase them, nor does it diminish rights accorded by law; it only justifies the exercise of those powers which are expressly or

219. D. PONEMAN, *supra* note 5, at 134 n.10 (citing 158 Fallos 290). See also G.J. BIDART CAMPOS, *supra* note 48, at 115-17.

220. See *supra* notes 45-46 and accompanying text.

221. D. PONEMAN, *supra* note 5, at 134.

222. G.J. BIDART CAMPOS, *supra* note 48, at 100.

223. Feinrider, *supra* note 6, at 196.

224. CONST. ARGENT., *supra* note 12, art. 96, at 20.

225. 250 Fallos 116 (1962) (cited in G.J. BIDART CAMPOS, *supra* note 48, at 100).

226. *Id.*

227. 254 Fallos 116 (1962) (cited in G.J. BIDART CAMPOS, *supra* note 48, at 100).

implicitly authorized in the Constitution."<sup>228</sup> Article 23 has not been interpreted as suspending the Constitution completely. Indeed, the Court has insisted that during a state of siege, the Constitution must survive.<sup>229</sup>

Resolutions passed during states of seige which would significantly abridge the structure of political authority were found to contravene the "very essence of the Constitution"<sup>230</sup> and thus beyond the intent of Article 23. In addition, the Supreme Court held that "the president could not delegate his power to arrest and transfer citizens."<sup>231</sup> Despite this nondelegation rule, the presidents, during the "dirty war," delegated authority and "allowed the struggle against subversion to be waged without his knowledge by autonomous 'cells,' which were thought necessary to prevent infiltration in the security forces and to fight the guerrillas on equal terms."<sup>232</sup>

A formidable constitutional check to the junta's excesses was removed when the Supreme Court refused to review the legitimacy of states of seige. The Court held the decision to enforce a state of seige to be a non-justiciable political question.<sup>233</sup> Some progress was made in 1959 when the Court, in *Antonia Sofia*,<sup>234</sup> suggested that although the declaration of a state of seige was not reviewable, the test of reasonableness should be used in reviewing specific executive measures not related to restoring order.<sup>235</sup> But, executive restraints on individual rights directly connected to the internal disorder were not reviewable.<sup>236</sup> In 1972, the Court, in *Daniel Mallo*,<sup>237</sup> held that under a state of seige only "some rights and guarantees may be temporarily restricted - those which are incompatible in each case with the domestic or external threats to order."<sup>238</sup> In 1977, the Court, in *Carlos Mariano Zamorano*<sup>239</sup>

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228. *Id.*

229. Snyder, *supra* note 18, at 512.

230. *Id.* at 512-13. See also G.J. BIDART CAMPOS, *supra* note 48, at 100.

231. D. PONEMAN, *supra* note 5, at 132.

232. *Id.*

233. G.J. BIDART CAMPOS, *supra* note 48, at 100.

234. 243 Fallos 504 (1959) (cited in G.J. BIDART CAMPOS, *supra* note 48, at 101).

235. *Id.*

236. *Id.*

237. 282 Fallos 392 (1972) (quoted in G.J. BIDART CAMPOS, *supra* note 48, at 103-04).

238. *Id.*

239. 298 Fallos 441 (1977) (cited in G.J. BIDART CAMPOS, *supra* note 48, at 104).

decided that arrests during a state of seige could be challenged by habeas corpus petitions.<sup>240</sup> Prior to this case these executive arrests were not reviewable unless the prisoner's Article 23 right of option was denied.<sup>241</sup> But, in *Zamorano*, the Court held:

Specific applications of the President's exceptional powers to suspend constitutional freedoms are subject to judicial review which, far from disappearing during emergencies, must be developed to the point that it satisfies both jurisdictional requirements and Argentine social values which are placed in its care . . . . [The judiciary has] a duty to determine whether the severity of the restrictions bears a reasonable relationship with the state of emergency . . . .<sup>242</sup>

Based on this decision, presidents are required to submit precise reasons for detention to enable judges to determine the "reasonableness" of the executive's use of emergency powers.<sup>243</sup> Although this obligation was designed to limit executive discretion during a state of seige, the courts have allowed imprisonment merely upon executive assertions of subversion without verifying such allegations.<sup>244</sup> Here, again, the Court treated the executive's conclusions as political matters beyond the purview of judicial review.<sup>245</sup> Thus, not only was the possibility of enforcing these decisions unlikely when the enforcers, who wielded the power, were not inclined to agree with the Court, but the Court itself conceded the fight with empty maxims.<sup>246</sup>

A safeguard available under judicial power was the writ of habeas corpus; however, the junta curbed this right by declaring detainees ineligible to petition for such writs.<sup>247</sup> Although the Court received

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240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 105. See also Snyder, *supra* note 18, at 514.

244. G.J. BIDART CAMPOS, *supra* note 48, at 105-06.

245. *Id.* at 106.

246. See D. PONEMAN, *supra* note 5, at 136-37. See also Feinrider, *supra* note 6, at 196-97.

247. Feinrider, *supra* note 6, at 196-97 n.185 (citing *Attacks on the Independence of Judges & Lawyers in Argentina*, 1 BULL. CENTRE INDEPENDENT JUDGES & LAW. 1 (1978)). See also *Plight of Defense Lawyers in Argentina*, 14 INT'L COMMISSION JURISTS 1 (1975).

petitions for habeas corpus frequently, the military and police refused to cooperate.<sup>248</sup> Whether officially held (detenidos) or disappeared allegedly without government knowledge (desparacidos), recourse to the courts by the detainees' families was almost futile.<sup>249</sup> When people disappear, when knowledge of them is denied, when records do not exist -- how can a safeguard requiring the existence of a body and the identification of a responsible official be helpful?

The courts stayed open during the years of repression from 1976 to 1983. But the few habeas corpus writs granted amounted to a "figleaf, a 'discourse of rationality,' that the military government could point to in defending its record. Freedom granted one victim obscured perdition for thousands."<sup>250</sup>

The judicial process was incapable of restraining executive power.<sup>251</sup> Often cited to exemplify the breakdown in justice was the Court's tolerance of the junta's use of Article 23 to detain thousands, while suspending the right of option afforded by the same provision.<sup>252</sup> The legality of the junta's exercise of authority was never discussed.<sup>253</sup> The legality of the overthrow of the Perón government and the continuation of the state of seige was never addressed.<sup>254</sup> The Court refused to review emergencies declared by the executive, which called for a state of seige, because this exercise of Article 23 power was considered a non-justiciable political question.<sup>255</sup> The only judge to declare the state of seige unconstitutional fled the country right after he decided the case.<sup>256</sup>

The ravage and pillage set was too great a threat even for an "equal" branch of the government. Judges and bar members were removed, murdered, or disappeared.<sup>257</sup> By trying to protect and save

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248. Feinrider, *supra* note 6, at 197.

249. *Id.* See also J. SIMPSON & J. BENNETT, *supra* note 10, at 70-73.

250. D. PONEMAN, *supra* note 5, at 132.

251. See J.A. PAGE, *supra* note 13, at 166.

252. *Mission of Lawyers*, *supra* note 68, at 482.

253. Snyder, *supra* note 18, at 517.

254. *Id.*

255. 170 Fallos 246, 195 Fallos 439, 235 Fallos 681, 246 Fallos 205, 252 Fallos 244 (cited in G.J. BIDART CAMPOS, *supra* note 48, at 100). See also Snyder, *supra* note 18, at 517.

256. Snyder, *supra* note 18, at 517.

257. Feinrider, *supra* note 6, at 196 wherein he points out the immediate threat: "By the beginning of 1978, a total of twenty-three members of the bar had been murdered, one-hundred nine detained, and forty-one had 'disappeared.' Among these members of the bar were judges, law professors and officials of the Bar Association." *Id.* (citations omitted).

lives, they became targets themselves. "In the end . . . bullets [were] more powerful than writs."<sup>258</sup>

## VII. CONCLUSION

If bullets speak louder than words, can constitutional weakness be blamed for the excesses of those firing? The rhetoric of reason is often employed to justify infractions and constitutional ambiguity affords plenty of room to make such rationalizations. Tragically for Argentina, this considerable leeway has been exploited by rulers. The junta was not satisfied with constitutional maxims. The rules of the game were rewritten in language understood only by reading the minds of the military leaders, sharing their phobias of World War III and believing their fantasies of the future.

Enemies were repressed, so were the innocent. Rights valued as fundamental were refused. The country was at war, the military argued. War is "grim." War is "brutal." "Excesses" are an expected part of every war.<sup>259</sup> Both sides committed excesses; the military routinely explained away its excesses. Particularly disturbing to some was equating the excesses of the two sides, "where one side represents and exercises the powers of the state."<sup>260</sup> This "eye for an eye" mentality does not justify the excesses of the junta. Ample legal resources were available to overcome the *real* terrorists.<sup>261</sup>

A replay of the "dirty war" must never happen. Solutions to conflicts must be found within constitutional bounds. Prevention lies in clarifying constitutional ambiguities and deepening the resolve of leaders to work within it.<sup>262</sup> Perhaps the Supreme Court should rethink the wisdom of the *de facto* doctrine or its refusal to review the exercise of state of seige authority. Possibly the state of seige

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258. *Id.* at 199.

259. *Mission of Lawyers, supra* note 68, at 485.

260. *Id.*

261. *See* Comment, *supra* note 106, at 827.

262. Author Daniel Poneman indicates that restraints on volatile forces in Argentina -- the military, labor and the Church -- are virtually nonexistent in the Constitution. D. PONEMAN, *supra* note 5, at 133. He suggests:

If the Constitution had taken hold, this omission would not have mattered; generals, unionists, and bishops would simply lobby, as helpful contributors to the constitutional scheme. But coups have gutted the constitutional center, and these institutions have filled the vacuum. Now, if the Constitution cannot beat them, perhaps it should join them, or at least set some ground rules.

*Id.*

clause should be amended to eliminate gaps and define parameters less vulnerable to insidious interpretation. Admittedly, this escape clause is a necessary tool for endangered governments, but as it exists and is used in Argentina, Article 23 invites abuse and threatens to destroy the constitutional values it was meant to preserve. As former United Nations Ambassador Jeane J. Kirkpatrick pointed out: "Constitutions produce political goods by respecting and harmonizing the diverse parts of the political community. All the important political goods -- democracy, due process, protection of rights to free speech, assembly -- are . . . the consequence of a wisely structured constitution."<sup>263</sup>

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263. J.J. KIRKPATRICK, IDEAS AND INSTITUTIONS, THE REAGAN PHENOMENON, AND OTHER SPEECHES ON FOREIGN POLICY 43 (1983).