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HUMAN RIGHTS SERIES 1

THE DICTATES OF JUSTICE

ESSAYS ON LAW AND HUMAN RIGHTS

OWEN FISS

Series Editor:
WILLIAM A. SCHABAS, *Irish Centre for Human Rights, National University of Ireland, Galway*

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The Dictates of Justice

Essays on Law and Human Rights

by Owen M. Fiss

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The Dictates of Justice.
Essays on Law and Human Rights

HUMAN RIGHTS SERIES

VOLUME 1

Dedicated to
Raúl Alfonsín, President of Argentina from 1983 to 1989,
and to a group of his advisors known as
"The Philosophers"

PREFACE

In June 1985, I traveled to Argentina for the first time. At that moment, nine of the leaders of the juntas who had ruled the country from 1976 to 1983 were on trial in downtown Buenos Aires for their human rights crimes. For much of the 20th century Argentina had been ruled by one military dictatorship or another, but the one that governed from 1976 to 1983 was the most brutal of them all. The Buenos Aires trial was the first in Argentine history, and—aside from the endeavor by Greece in the 1970s—the first in world history in which a civilian government had sought to hold its own military accountable for violations of human rights.

I was part of a small group of lawyers and philosophers who had been invited by the President, Raúl Alfonsín, to consult on issues arising from the trial. The other members of the group were Ronald Dworkin, Thomas Nagel, Tim Scanlon, and Bernard Williams. Every Argentine lawyer I met on that trip said, when pressed about his specialty, that he was a legal philosopher. So the odd academic profile of this group of international consultants was not that surprising. Still, it remained unclear to me what advice we might have to offer the government since none of us spoke Spanish, knew much about Argentine history, or had any familiarity with the Argentine legal system.

The trip lasted for about a week. In the course of that week, we met with high government officials—President Alfonsín himself; his advisors on human rights, Carlos Nino and Jaime Malamud Goti; the Undersecretary for Human Rights, Eduardo Rabossi; the Chief Prosecutor, Julio César Strassera and his assistant, Luis Moreno Ocampo; and a number of the judges, most notably Andrés D'Alessio, who were then sitting in judgment on the generals. We gave lectures in various academic settings and spent long days and nights in conversation about the trial with officials and ordinary citizens. We even sat in on it. The visit was an exhausting experience, but utterly exhilarating and in many respects, transformative.

During that week, I formed deep personal relationships with many of our hosts. The visit also marked the beginning of my professional involvement with Argentina and Latin America, and it proved to be an extraordinary learning experience. I saw in concrete detail how the law might be used to

defend human rights and for the very first time, encountered the idealism and energy of the international human rights movement. The visit to Argentina in June 1985 shaped my outlook on international human rights in ways that I could not have imagined and informs all the essays in this volume.

Human rights are universal. They belong to everyone by virtue of his personhood. The Buenos Aires trial was characterized in Argentina and the world over as a human rights trial, but it had a profoundly national dimension. The leaders of the juntas were accused and tried for violating Argentine criminal statutes. In the first Chapter, "Human Rights as Social Ideals," I focus on this feature of the trial and then try to construct an understanding of human rights that is true to it. To this end, I draw a distinction between human rights as claims and human rights as ideals and explain how these two conceptions interact. The claims against the generals were national, but the ideals that inspired and shaped the prosecution were universal in character. Reference to human rights—the imagined ideal—enabled all those who sought to hold the generals accountable for their crimes to transcend the limitations of the local culture to which they belonged.

"Human Rights as Social Ideals" was written in the early 1990s. Soon after its first appearance in 1996, human rights acquired a more secure footing in positive law. The Rome Statute of 1998 established the International Criminal Court (ICC) and, even more importantly, proscribed war crimes, genocide, and crimes against humanity. In so doing, the Rome Statute endowed human rights with the status of legal claims capable of sustaining a criminal prosecution, but it did not preclude or lessen the function of human rights as social ideals. The embodiment of any ideal in positive law, either on a national or international level, reinforces society's attachment to the ideal and thus enhances their capacity—as it did in Argentina in the mid 1980s—to mobilize citizens, guide government actors, and provide a standard to judge positive law.

Not only did the Rome Statute give human rights status as legal claims, but by the very act of establishing the ICC, it assigned international tribunals a primary place in the protection of human rights. In so doing, the Rome Statute built on the practice of the United Nations in the 1990s of convening ad hoc tribunals to try human rights crimes that occurred in Rwanda, Sierra Leone, and the former Yugoslavia. Nevertheless, the very act of giving the ICC permanent status reinforced the linkage between international tribunals and the protection of human rights and eclipsed what I had seen as a remarkable feature of the Argentine experience—the use of a national tribunal to try what might properly be regarded as human rights crimes. The case against the leaders of the juntas was presented to an Argentine court and it was Argentine judges who ultimately rendered judgment.

The use of a national tribunal enhanced the impact of the trial of the generals on public opinion in Argentina. Even more, it revealed the depth of Alfonsín's commitment to human rights and acknowledged the political obligations he owed the community. The trial was a tribute to his leadership and defined the basic norms of the regime he sought to establish. The use of a national tribunal to hold the generals accountable also lessened the conflict between justice and another moral or political ideal—democracy—because the tribunal was part of a governmental system that was ultimately founded upon the consent of the governed. Although international tribunals may be the creation of the United Nations or multilateral treaties and thus part of the global system of governance, there is nothing democratic about that system of governance. There is no global demos. In fact, as I argue in Chapter 3, "The Autonomy of the Law," reliance on international tribunals exacerbates the conflict between justice and democracy. In Chapter 4, "Within Reach of the State," I look to the national character of the tribunal that sat in the Buenos Aires trial and use it to assess the human rights experience in Africa.

From 1995 to 1997, I was involved in the process of drafting a constitution for Eritrea, a small country in the Horn of Africa that had, after a 30-year armed conflict, recently gained its independence from Ethiopia. The chairman of the Constitutional Commission was Bereket Habte Selassie. He had served as Attorney General of Ethiopia when it was ruled by Emperor Haile Selassie. Early in the 1970s, Bereket joined the Eritrean independence movement and later taught law in the United States, first at Howard University and then at the University of North Carolina. I worked with Bereket and his Commission in my capacity as the Chairman of the Board of Foreign Advisors.

In 2007, a conference was held at the University of North Carolina to honor Bereket and in preparation for that conference, I began examining—through the lens of my Argentine experience—all the human rights trials held in Africa. The result, described in Chapter 4, was startling: The entire docket of the ICC was devoted to Africa. In fact, virtually all of Africa's human rights trials were being conducted by international tribunals. This pattern not only contravened one of the basic lessons of the Buenos Aires trial, but also violated the proudest tradition of Eritrea—not to become dependent on foreign donors or international institutions, but rather to discharge its elemental obligations on its own.

While the use of a national tribunal for human rights trials may enhance the meaning for, and control of, those trials by the community in which the crimes occur, such a strategy may well test the norms of judicial legitimacy when, as in the case of Argentina, the trial is part of a regime change. The

issue that most concerned me was whether the requirement that the judiciary remain independent of political control was compromised by the role imposed upon it by political leaders managing a transition from dictatorship to democracy.

By putting the generals on trial, President Alfonsín invoked the authority of the judiciary stemming from its political insularity. Yet as I learned during that week in Buenos Aires, Alfonsín had an unusual conception of judicial independence. He had replaced the judges who had served the dictators with his own appointees, and in fact, had appointed all the judges who were sitting in judgment on the generals. How could such a practice be squared with familiar notions of judicial independence? In Chapter 2, "The Right Degree of Independence," I come to terms with this dilemma, not just in Argentina, but also in Chile, when, in 1989, Augusto Pinochet was ousted and Chile began its own transition to democracy. Focusing on these situations, I explain why the requirement of judicial independence is regime relative and why it does not bar a new regime from replacing the judges appointed by the previous regime.

In thinking about judicial independence as well as the role of national laws and national tribunals in the protection of human rights, I viewed the Buenos Aires trial as exemplary. I was, however, especially troubled by one aspect of Alfonsín's human rights program—the near-exclusive reliance on the criminal law. Although there were many facets to Alfonsín's plan to rebuild democracy in Argentina, including constitutional reforms to reduce the tensions between the executive and legislative branches and the impossibly unrealistic proposal of moving the national capital out of Buenos Aires, when it came to the protection of human rights, the entire focus was on the strong use of the criminal law as represented by the Buenos Aires trial. This was not in accord with the experience in the United States in protecting what we called "civil rights" but which overlapped considerably with human rights.

From September 1966 to July 1968, I worked in the Civil Rights Division of the Department of Justice in the United States, which focused on the protection of civil rights through, for example, school desegregation, voting, and employment discrimination cases. Now and then, resort was made by the Division to the criminal law. For the most part, however, civil rights were protected through civil proceedings seeking an injunction, which sometimes consisted of an order stopping a discrete act, but more often was the means by which the judiciary reorganized an ongoing bureaucratic organization to remove the threat it posed to fundamental rights.

In "The Awkwardness of the Criminal Law" (Chapter 5), I describe and analyze the American practice in such cases and use it to criticize the near

exclusive reliance on the criminal law by the Alfonsín administration. This paper was first presented at a conference held at the Universidad de Buenos Aires in April 1987. Only days after the conference ended, troops, confronted with the ever increasing prospect of being criminally prosecuted, rebelled. To restore order, President Alfonsín personally met with the leaders of the rebellion. Soon after that meeting, he sponsored a measure in Congress that effectively precluded any further criminal prosecutions of the military—until 2005, when the Supreme Court of Argentina, giving force to an international obligation assumed by the constitutional reform of 1994, declared that law unconstitutional.

As was particularly clear from my criticism of Alfonsín's heavy reliance on the criminal law, I had arrived in Buenos Aires in June 1985 on a white horse, carrying with me the triumphs of American law. Some people in the Alfonsín administration wanted to learn more about American law as it was forged in the 1960s under the stewardship of Earl Warren, the Chief Justice of the Supreme Court, and I was proud to share my experience with them. During that period, often and only half-jokingly referred to as the "Golden Age," law was seen as the embodiment of the highest ideals of the nation and the task of the judiciary was to give, through the exercise of reason, concrete meaning and expression to these ideals in our daily life. The decision of the Supreme Court in *Brown v. Board of Education*, condemning the racial caste structure that had marred America from its very beginning, became a beacon for the entire world. As my hosts knew, in the 1960s I had clerked for Thurgood Marshall and later for William Brennan, important architects of Supreme Court doctrine of that period. Brennan was Chief Justice Warren's trusted lieutenant and Marshall was the victorious lawyer in the *Brown* case and later a Justice of the Court.

By the mid 1970s, a number of the Justices who were responsible for the heroic decisions of the civil rights era retired. The group included Earl Warren, Hugo Black, William Douglas and Abe Fortas. They were replaced by a group of Justices, led by William Rehnquist, who were dedicated to the eradication of the Warren Court legacy and intent on moving the law in a different direction altogether. Yet the decisions of the Supreme Court during the civil rights era were still within reach of our imagination and were presented to my audiences on my initial visit to Argentina and the countless visits that followed during the late 1980s and 1990s, as the way the law once was and might once again be.

On September 11, 2001, all that changed. I still travelled abroad, but now I went to listen. In response to the deadly terrorist attacks on that day, President Bush announced a War on Terror and in the fall of 2001, launched military operations against both al Qaeda, the perpetrator of those attacks, and

Afghanistan, for harboring and sheltering al Qaeda. In March 2003, President Bush broadened the United States military operations in the Middle East by invading Iraq. The 9/11 attacks were not the basis of that invasion. Yet, terrorism, often at the hands of al Qaeda, was provoked by the invasion and the occupation that soon followed. As a result, the war in Iraq also came to be seen as part of the War on Terror that so defined the Bush presidency.

Sadly, we fought this war in an unholy manner. We put in jeopardy, and sometimes transgressed, a number of principles that had long been part of our constitutional tradition and that allowed us to speak proudly and boldly about human rights. In our fight against terrorism, we tortured suspected terrorists; imprisoned some for prolonged, indefinite periods without charging them with a crime and bringing them to trial; placed still others on trial before military commissions; and tapped, without prior court authorization, the telephones of ordinary citizens who might talk to persons abroad suspected of al Qaeda links.

President Bush and his administration initiated these polices and were responsible for implementing them, but many were endorsed, sometimes actively, by Congress and the federal judiciary, including the Supreme Court. In November 2004, at a time when some, though not all, of these policies were public knowledge, Bush was elected President for a second term. In light of all this, the policies initiated by President Bush as part of his War on Terror could fairly be attributed to the nation. Every American citizen, even those who criticized these policies, bore some responsibility for them.

As a result, I was knocked off that white horse that I rode into Argentina in 1985. I was embarrassed by the policies that were now being implemented by the United States and felt emotionally unprepared to deliver a sermon about the achievements of the Warren Court or to talk about the Golden Age. In the eyes of my friends and professional colleagues in Argentina and Latin America, or for that matter, throughout the world, I saw a sense of disappointment. This experience impelled me to look critically upon the policies that had been initiated during the Bush years and when I did, I found guidance in the work of a singular figure in the history of human rights, Aharon Barak.

As a Justice and then the President of the Supreme Court of Israel, Barak used the reason of the law to temper his nation's response to terrorism. He appeared on the world stage as the apostle of the Enlightenment. In Chapter 6, "Law is Everywhere," I describe the depth of his commitment to reason and point to a number of his national security decisions—one involving the placement of a security fence or wall, another involving torture, and still another involving the targeted killing of suspected terrorists—in order to

construct a vantage point from which I could examine the policies of the United States in its fight against terrorism.

The Presidential election of 2008 was a transcendent moment in the history of the United States. A nation founded on slavery elected a black man President. It also seemed that the breaches in our legal tradition that occurred on Bush's watch were about to come to an end. Throughout his campaign, Barack Obama was critical of many of Bush's policies. He denounced Bush's decision to invade Iraq and promised to end the occupation of that country. He unqualifiedly proclaimed his opposition to torture and promised to close Guantánamo, the prison in which so many of the human rights abuses of suspected terrorists occurred. In his inaugural speech he declared that we would continue the fight against terrorism, and promised that he would do so without compromising any of our ideals. The last two essays in this volume, "The Example of America" (Chapter 7) and "Imprisonment without Trial" (Chapter 8), seek to determine whether he has fulfilled this promise.

As these two essays indicate, President Obama's record is mixed. He issued a regulation prohibiting torture, but refused to renounce the practice of extraordinary rendition, in which American officials sent suspect terrorists to foreign countries for interrogation under torture. In fact, in proceedings brought by victims of extraordinary rendition, the Obama administration urged lower federal courts not to examine the legality of that practice. Obama also continued the policy of incarcerating some suspects for prolonged, even indefinite periods without accusing them of a crime or placing them on trial. He continued the use of military commissions to try some persons accused of terrorism. As a senator he abstained on a vote in June 2008 on legislation authorizing warrantless wiretaps of calls abroad to persons suspected of al Qaeda ties. After the election, his Attorney General vowed to defend the constitutionality of the statute.

From his very first days in office, Obama was pressed to address the grossest human rights abuses that had occurred during the Bush years, for example, the torture of suspected terrorists through a technique known as waterboarding. Some wanted truth commissions, others demanded criminal prosecutions. Obama would have none of it. He insisted that he was interested only in the future, not the past, without understanding, as President Alfonsín had, that the future will be largely governed by how one deals with the past. In August 2009, President Obama relented and allowed his Attorney General to open a criminal investigation into charges that a C.I.A. official had engaged in torture of the most bizarre type. He was accused of threatening a hooded and shackled prisoner with imminent death by revving an electric drill near his head. This investigation was launched without

any conviction or energy, and it is not entirely clear, at this writing, what will come of it.

Obama may have thought that he was at the limits of his political power. He may have feared that a more robust human rights policy would have jeopardized other initiatives, such as healthcare or economic recovery, to which he was committed. There is, of course, no way of knowing whether he acted out of such fear or even if he had, whether this fear was justified. The reasons for Obama's decision to continue many of Bush's counterterrorism policies and his refusal to hold the previous administration accountable for its human rights abuses will always remain in the domain of speculation, though the consequences are unmistakable. Obama reneged on his promise to be true to the ideals of the nation.

This odd turn of events has left me with a sense of regret. It also led me to appreciate, more deeply than I had before, how remarkable a leader President Alfonsín was and why the Buenos Aires trial of 1985 will always have an honored place in world history. The challenges President Alfonsín confronted in his transition were, from almost any perspective, far greater than those facing Obama. He risked everything to see that justice was done.

September 2010

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HUMAN RIGHTS AS SOCIAL IDEALS

Argentina, 1976: In the face of mounting social disorder and violence, a group of generals overthrew the government of Isabel Peron and launched its "dirty war" against the left—a brutal military operation that included kidnapping, rape, torture, and murder and resulted in the death or disappearance of more than nine thousand persons, and perhaps as many as fifteen thousand.[1] As part of its reign of terror, the military regularly disposed of those suspected of subversion by dumping them into the sea from airplanes. The victims were often alive and their faces were disfigured in order to defy recognition should they ever be washed ashore.

In the midst of this state terror, a protest movement haltingly emerged and raised the banner of human rights. This movement was spearheaded by the Madres de Plaza de Mayo—a group of women who stood vigil before the Casa Rosada demanding the return of their children—but in time it found sources of support in other sectors of Argentine society, and then internationally.[2] The 1980 Nobel Peace Prize was awarded to one of the leaders of the human rights movement in Argentina, Adolfo Perez Esquivel. Both the human rights policy of President Jimmy Carter and the appearance in *The New Yorker* of Jacobo Timerman's account of his own arrest and ordeal focused attention in the United States on the reign of terror then going on in Argentina.[3]

As the protest movement gathered force, the Argentine economy worsened, and the standing of the junta plummeted sharply. The generals became

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This essay first appeared in Spanish in 1996 in *Lecciones y Ensayos*, a publication of the Universidad de Buenos Aires. Later it appeared in English in two books: *Normative Systems in Legal and Moral Theory* (Berlin: Duncker and Humbolt, 1997), edited by Ernesto Garzón Valdéz et. al; and *Human Rights in Political Transitions* (New York: Zone Books, 1999), edited by Carla Hesse and Robert Post.

1 Comision Nacional sobre la Desaparcion de Personas, *Nunca Más: The Report of the Argentine National Commission on the Disappeared* (1986).

2 See generally Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), 41-104.

3 Timerman's article was later published as *Prisoner Without a Name, Cell Without a Number* (Madison: University of Wisconsin, 1981).

desperate and then played their last card: nationalism. As a last ditch effort to bolster their popular standing, the junta embarked on a military campaign to retake the Malvinas (Falkland Islands) from the British. When that campaign failed—miserably so—the generals decided to abdicate and in late 1982 called for elections. They were to be held the next October.

In calling for elections, the generals assumed that the presidency would be won by the Peronist candidate, who could be trusted to leave them alone. Just to be on the safe side, however, they decided to confer amnesty on themselves and their subordinates for all crimes committed during the "dirty war." On hearing rumors of what was being planned, a group of some forty thousand Argentine citizens gathered in protest, but the generals remained undeterred. Just five weeks before the scheduled election, an executive decree was issued by the president of the junta conferring amnesty on the military as well as on those terrorists who laid down their arms. He claimed that the measure was necessary to restore national unity.

The first democratic election in Argentina in ten years was held in October 1983. Much to the surprise of many—certainly the generals—the election was won by Raúl Alfonsín, the Radical Party candidate, who had campaigned on a platform promising to use the law to redress human rights violations of the junta. Once in office, Alfonsín was true to his word. His human rights program had many facets, but the centerpiece—and the event of greatest significance for understanding the nature of human rights—consisted of a criminal prosecution against nine of the leading figures of the juntas that ruled Argentina from 1976 to 1983.

This proceeding began in a military tribunal, but because of the unwillingness of that tribunal to proceed to judgment, the trial was soon moved to the civilian Federal Court of Appeals in Buenos Aires. The trial started in April 1985 and in December of that year resulted in the conviction of five of the defendants. The court held the five generals responsible for their own crimes of kidnapping, torture, and murder. The generals were also held responsible for the crimes of their subordinates. The generals received sentences ranging from life imprisonment and absolute disqualification from public office, to four and a half years' imprisonment.[4]

Throughout the 1980s and '90s the world encountered a new surge toward democratization. During this period, the human rights movement achieved many victories, but the Buenos Aires trial remained one of its boldest and stands as a tribute to all those who brought it into being. Without the aid

4 Federal Criminal and Correctional Court of Appeals for the Federal District of Buenos Aires, judgment in case no. B (Dec. 9, 1985). The judgment is translated by Alejandro M. Garro and Henry Dahl, "Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward," *Human Rights Law Journal* 8 (1987).