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Normative Systems
in Legal and Moral Theory

Festschrift for Carlos E. Alchourrón
and Eugenio Bulygin

Edited by
Ernesto Garzón Valdés
Werner Krawietz
Georg Henrik von Wright
Ruth Zimmerling

With an Epilogue by
Georg Henrik von Wright

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Human Rights as Social Ideals

By Owen Fiss, Yale University

Argentina, 1976: In the face of mounting social disorder and violence, a group of generals overthrew the government of Isabel Perón 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 9,000 persons. As part of its reign of terror, the military regularly disposed of those suspected of ‘subversion’ by dumping them into the sea from an airplane.

By the early 1980s, the Argentine economy had worsened and whatever popular support the military found for their cause sharply deteriorated. Desperate to bolster their popular standing, the generals then embarked on a military campaign to re-take the Malvinas Islands from the British. When that campaign failed – miserably so – the generals decided to abdicate and call for elections. In doing so, they assumed that the presidency would be won by the Peronist candidate, who could be trusted to leave them alone, but just to be on the safe side they conferred amnesty on themselves for whatever crimes they had committed during the ‘dirty war’.

The first democratic election in many 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 what was described as ‘human rights violations’. 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 human rights movement – consisted of a criminal prosecution against nine of the leading figures of the dictatorship that ruled Argentina from 1976 to 1983. The trial was held in a federal court in Buenos Aires. It started in April 1985 and in December 1985 resulted in the conviction of five of the defendants.

Throughout the 1980s and 1990s the world encountered a new surge toward democratization. The human rights movement achieved many victories during this period, but the Buenos Aires trial must be its boldest. Without the aid of a conquering army, the Argentine people had brought to justice the leaders of the military dictatorship. This event deserves a place in world history, and will stand as a tribute to all those who brought it into being, including one of the persons being so warmly honored by this volume. The Buenos Aires trial also gave me a new insight into the nature of human rights.
Like many lawyers, I had before thought of human rights primarily as claims: as statements of what we are entitled to receive from others and, even more significantly, what some government agency is prepared to enforce or implement through its coercive powers. As claims, human rights differed from those we are usually accustomed to because of their global reach. But I had assumed that, as claims, human rights operated in much the same way as rights grounded in domestic law: violation of one of the enumerated rights would serve as a predicate or justification within the legal system for exercises of the state's coercive power. The Buenos Aires trial suggested to me instead that a more subtle dynamic was at play and that it would be better if human rights were viewed more as social ideals than as claims.

In the domestic sphere, some rights operate in both these ways, as claims and as social ideals. For example, the right against racial discrimination — one of the architectonic rights of the United States legal system today — has such a dual character. This right entitles all American citizens to be treated without harmful prejudice and to call upon the state to use its power to honor that expectation. However, this right also plays a larger role in our political culture: It defines our nation's conception of the good; and it projects an understanding of the ideal community, in this instance one in which all persons enjoy equal respect and concern, regardless of the color of their skin. Viewed from this perspective, the right against discrimination should be understood as referring not just to a claim that will be enforced by the state, but also to an ideal that can structure all our social interactions.

The ideal promoted by a given right, such as the right against racial discrimination, may, of course, have its historical origins in the actual willingness of the state to honor certain claims. Indeed, the right may be nourished and strengthened by frequent and forceful exercises of state power on its behalf. But even in such cases the ideal is not reducible to the legal claim; even if every single law protecting the right against discrimination were repealed Americans would still invoke that right, now understanding it as a social ideal rather than a legal claim. Although we should not minimize the role of the state in giving life to ideals through the adoption of a constitution, the enactment of a statute, or a series of judicial decisions, we should also recognize that the causal dynamic works in the other direction as well. Social ideals have given rise to legal claims and often endow those claims with special force and potency.

There are many lessons to be drawn from the Argentine experience, but the principal one I take concerns the role of human rights as social ideals. Unlike the rights typically found in domestic legal systems, human rights extend throughout the world, defining a universal good, simply because they have their source in our common humanity. As ideals, they embody our universal aspirations and thus constitute a culture. For that reason they can serve as a basis for dialogue and criticism, both within the nation state and beyond. Sometimes human rights may give rise to legal claims in the domestic system or in the international sphere through
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international agreements, but even when that occurs they should not be reduced to or confused with their legal embodiments. In these situations, human rights retain their separate existence—they persist as social ideals—and provide the moral energy needed to enforce or otherwise to actualize the claims to which they have given rise.

All too often, of course this culture of human rights is ignored, and the good they promote is flouted. Confronting this fact, many human rights advocates acknowledge the role of human rights as social ideals, but deeply regret the fact that these rights are not fully treated as legal claims. They bemoan the gap between human rights as ideals and human rights as legal claims and see this gap as an unfortunate consequence of the absence of an agency that can enforce human rights on a global scale.

My perspective is just the opposite. I too want human rights to be respected throughout the world and thus to be given legal recognition, but I find the status of human rights as social ideals to be one of their most appealing features. Viewing human rights as social ideals, transcending the existing legal order, enables us to use those rights as an independent standard by which to judge all social practices, including the law, even those laws that purport to transform human rights into legal claims. As social ideals, human rights can move the law toward the creation or recognition of certain claims as a matter of positive law, both international and domestic, yet they will always stand apart from the world as it is presently constituted. They serve both as a standard for evaluating what is and as a reminder of what could be.

In Argentina, human rights functioned not as claims, but as ideals. Human rights did not nullify the self-conferred amnesty law; that law was repealed by the newly elected Congress—its first act, passed unanimously. Nor were the generals charged with human rights violations, as they would have been if human rights were claims. The generals were tried for violations of the Argentine criminal code, meticulously laid out by the court conducting the trial. Yet human rights were a crucial factor in these events: They gave Congress a reason to reexamine the amnesty law and also mobilized support for the prosecutions.

Although the Argentine military was humiliated by the defeat in the Malvinas, the generals were tried at the time when the military was still a strong and autonomous force within Argentine society; loyalty within the ranks was as firm as ever. The only power President Alfonsin had at his disposal was moral and popular. That power was in significant part generated by his own and the Argentine people's belief in human rights. To the Argentine people, the military had violated not only their own laws and edicts, but also basic human rights and for that reason had to be prosecuted. Human rights were reasons for enforcing positive law.

As social ideals, human rights are never self-contained, but often are supported by the very legal proceedings that they motivate and regulate. This too occurred in Argentina. The trial of the generals exposed their practices to public view and
helped define the limit beyond which no government should go. The trial began before a military tribunal that conducted its proceedings behind closed doors, but when that tribunal refused to proceed any further, jurisdiction passed to the federal Court of Appeals. Ordinarily, criminal trials in Argentina are conducted just on the basis of documentary evidence. But because this case was first tried before a military tribunal, composed of representatives from the three branches of the military, it had used oral testimony when it began and continued to do so when it moved to the Court of Appeals.

As is customary for the Court of Appeals, the trial was public. The trial was held in downtown Buenos Aires and was widely attended by the public; there was always a line of people waiting to get in. The trial was also fully covered by the press and the testimony of the day was on everybody’s lips. Portions of the trial were televised, and though those broadcasts were without voice (due to a ruling of the Court of Appeals), a full transcript of the proceedings appeared daily in one of the local papers. In this way, the trial allowed the Argentine people to see the horror of what they had done to themselves and strengthened their resolve to abide by a set of norms that transcended positive law.

The trial was not the public’s only lesson in human rights. To some extent, publication of Nunca más – the report of the commission first appointed by President Alfonsín to investigate and report on human rights violations – had performed a similar function. From the very beginning, the report was a runaway best-seller. Yet the public testimony at trial and the precise and deliberate methods of the judiciary gave the trial a claim to public attention and public consciousness that Nunca más never achieved. The judgment of the Court of Appeals confirmed the ideals embodied in the demand for human rights and gave those ideals a special vibrancy.

Energized by the public trials and the judgment itself, the commitment to human rights – simply as social ideals – also acted as a constraining force on the political developments that soon unfolded. In the year immediately following the judgment of the Court of Appeals only about 40 prosecutions were begun. Some observers estimated that 1,500 cases could be brought. Fearing that the prosecutions would go on indefinitely, thereby keeping the country mired in the past and interfering with the pursuit of other public policies, the Alfonsín administration made an effort to bring some closure to its human rights program. In December 1986, a law was passed requiring all further prosecutions to be commenced within sixty days. At first, this measure was denounced by some human rights activists, who viewed it as nothing more than a strategy for limiting the prosecutions, but in fact the law had the effect of sharply and quickly increasing the number of prosecutions. By the end of February 1987, more than 400 indictments were filed throughout the country, many against mid-rank officers.

In response to this sudden escalation of prosecutions, dissent within the ranks grew and in April 1987, only days before Easter, the military rebelled. Individual officers openly refused the orders of the courts to which they were summoned; in
various locations throughout the country, some officers broke rank, took charge of their garrisons and began to deploy the weaponry in their control, including tanks. But this time, in contrast to what had transpired in 1976, the military uprising was met with enormous resistance by the Argentine people. Some 400,000 citizens took to the streets of Buenos Aires to defend the administration, thereby transforming what in earlier times would have been a coup d'état into a mutiny. This, too, was a tribute to the mobilizing force of human rights as a social ideal.

President Alfonsín and the Chief of the Armed Forces had nominal control over the military, but were unable to deploy the forces within their control to quell the mutiny and restore order in the garrisons that were in rebellion. Concessions had to be made. The result was a law passed in June 1987, referred to as the “Law of due obedience”. It established a presumption that during the dictatorship all officers below the rank of lieutenant were following superior orders and therefore were not, according to Argentine law, personally liable for their actions. The due obedience statute was duly respected as authoritative by all the parties, but it did not silence those who invoked the ideal of human rights. Indeed, because human rights was an ideal that transcended positive law, it was forcefully used to criticize the President’s action and the due obedience law itself. The charge was that Alfonsín had betrayed the very ideals he stood for, not that he was acting unlawfully.

In time, problems with the Argentine economy overtook human rights issues. From the beginning President Alfonsín was beleaguered by the economic problems he inherited, specifically inflation and a heavy foreign debt incurred by the dictatorship. (From 1976 to 1983 the foreign debt increased from $6 billion to more than $45 billion.) Alfonsín primarily resorted to price and wage controls to deal with inflation, and had some initial successes. In June 1985, in the midst of the trials, he announced the “Austral Plan”, which included a price stabilization program and an agreement to refinance the foreign debt. By 1987, however, the situation had deteriorated, inflation began to gather steam, and by April 1988 payment on the foreign debt was suspended. In August 1988 a new stabilization plan was announced (the “Primavera Plan”). It too had some initial success in reducing inflation but that success was very short-lived, even more so than under the Austral Plan. By February 1989, the country had spiralled into a period of hyperinflation, when prices dramatically and quickly rose, calculated by some at an annual rate of 2,000 percent. The impact on the Argentine people was severe and soon the runaway inflation took its toll on politics, specifically the elections that were to be held in May 1989.

Under the terms of the Argentine constitution (which, at that time, provided a single six year term for president), Alfonsín was not eligible to run again. The Radical Party candidate, Eduardo Angeloz, tried to distance himself from Alfonsín’s economic policies, but failed on that score, and was roundly defeated by the Peronist Candidate, Carlos Menem. Menem was scheduled to take office in December 1989. Many saw an orderly succession of power from one elected President to an-
other as one of the great achievements of the Alfonsín administration — apparently, it had not occurred in Argentina since the 1920s — but the spiralling hyperinflation made that impossible. As prices escalated and escalated, food riots broke out throughout the country. On June 30 President Alfonsín announced in a broadcast to the nation that he had decided to turn over the Presidency to Menem immediately. Menem took office in July.

Over the years, labor had been the principal source of support for the Peronist party. Menem had run on a traditional Peronist platform, alluding to a possible moratorium on the foreign debt and large salary increases for workers. But once in office he embarked upon a different course altogether and announced an intention to restructure the economy along so-called “neoliberal” lines. The centerpiece of this program was the privatization of many state enterprises, including the airlines, the telephone company, the utilities, and the petroleum industry. In fact, the task of restructuring the economy and bringing inflation under control proved more difficult than Menem imagined. He too suffered two spurts of hyperinflation — once in the early part of 1990, the other in late 1991 — but by 1992, with the appointment of Domingo Cavallo as minister of finance, the economy was brought under control, at least according to North American standards. Unemployment increased, to nearly 10 percent in Buenos Aires, and there was a deterioration of public services, but inflation was reduced to tolerable levels, and Menem was able to complete the program of privatization, which enabled him to reduce the deficit and service the foreign debt.

In the economic sphere, Menem achieved results that eluded Alfonsín. In the human rights domain, the contrast was more striking. He sought to erase Alfonsín’s achievements. At the end of the Alfonsín administration, fifteen military officers had been convicted of crimes during the “dirty war” and another forty human rights cases were working their way through the courts. At the very moment power was being transferred, Menem floated the idea of pardoning the military; he tried to get President Alfonsín to cosign the pardons, but when Alfonsín refused Menem took that task upon himself.

The first wave of pardons were issued in October 1989. They reached all the cases still in process, both those involving officers who committed crimes during the “dirty war” as well as those who participated in the initial mutiny of Easter week 1987 and the two other mutinies that occurred during the remainder of Alfonsín’s term. In early December 1990, Menem also faced a mutiny by the same rebel- lious group of officers — now known as the “carapintadas”. In contrast to Alfonsín, however, Menem was able to use loyal troops to suppress the uprising and restore order. But Menem did not yet have the economy fully under control and needed the support of the sectors of the population still loyal to the military, and so on December 29, 1990, he confronted the Alfonsín legacy head on: Menem pardoned all those who had already been convicted, including the five generals who had been imprisoned as a result of the historic trial of 1985.
The human rights commitment that gave rise to and informed that trial, and that was itself in turn nourished by the trial, was too weak to prevent President Menem from taking the action he finally did. Yet that did not mean that the ideal had no real world effects. Human rights were a crucial source of resistance to the proposed pardons, and when the pardons were finally granted, human rights, precisely because they were to be considered not a claim, but a social ideal, served as a basis of criticism for what had been done. Some disputed whether the President acted within his constitutional powers when it came to stopping the prosecutions that had not yet come to judgment, but for the most part the critics were prepared to assume that the President’s action with those prosecutions, and the one that had come to judgment, was authorized. The problem, they felt, was that this power should not be used for crimes so atrocious as to constitute violations of human rights. Once again, as when Alfonsín endorsed the due obedience law of June 1987, human rights became a standard of criticism and judgment, and served this function because they stood apart from positive law. Human rights were not claims that somehow nullified the pardons, but rather ideals for judging them.

My understanding of human rights as social ideals, shaped so decisively by these events, should not be seen as a kind of “natural law” theory. Like natural law theorists, I reject an understanding of rights in narrowly positivistic terms: the rights named and enforced by a given state do not exhaust what individuals may claim as their due. My rejection of positivism is no less intense when the law in question emanates from an international organization (for example, the United Nations), than a nation-state (be it the United States or Argentina). However, I differ from natural law theorists in two important respects. First I do not see human rights as having formal bite: they were not the legal charges asserted against the junta. Nor did they, in and of themselves, nullify the dictators’ amnesty, Alfonsín’s due obedience law, or Menem’s pardons. Rather, they stood apart and above the law and provided reasons for acting and standards by which all those official acts can be judged. Second, I believe human rights can operate in this way – as social ideals – without making a direct appeal to philosophical first principles. Human rights should not be seen as the conclusions of philosophers but rather as the means by which people define the culture within which they want to live. In the case of Argentina, people claimed freedom from arbitrary arrest and torture as their due – as their human rights – on the basis of their understanding of terms of a liberal and democratic polity.

In sum, I reject both narrow positivism and the classical natural law approach on the ground that both kinds of theories fail to describe how rights actually function in a concrete political culture - here, Argentina. This view of human rights, seeing them more as standards for criticizing and transforming political and legal structures, may enable us to transcend or avoid the familiar disputes that have so engaged Eugenio Bulygin and other legal philosophers - positivism vs. natural law - but it does not solve all the conceptual or theoretical problems attending those debates. Specifically, we must confront many of the same intellectual problems that
often frustrate the view of human rights as determinate legal claims: What authoritative sources ground and give rise to human rights? What rights are all individuals entitled to by simple virtue of their humanity? What is the scope of these rights?

These were the questions that were debated in the 1980s throughout Argentina, in the newspapers, at political rallies, and in both the halls of justice and the cafes. Those who lent their support to the Buenos Aires trial, or who criticized Alfonsin's due obedience law and Menem's pardons, were moved by a belief - not simply rhetoric or myth - that there are human rights and that those rights were brutally violated by the military. They acted on the assumption that this belief was true, and had to explain themselves to the defenders of the military and the "dirty war". They had to demonstrate that there are human rights.

In assessing the burden of that particular challenge, and determining whether it could ever be met, it should be remembered, that establishing the truth of a social ideal is radically different from establishing the truth of a claim that is presented to and enforced by the state. Because a claim must provide the justification for an act by the state that is always concrete and often swift and decisive, the methods for establishing its truth must be sharply determined. In contrast, the search for truth in the realm of ideals is almost conversational. Not endless, it contemplates a process of deliberation and discussion that reaches conclusions by small, but steady, increments.