

The Judicial Power as an Institutional Tool for Citizen Participation within the Framework of the Theory of Deliberative Democracy

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I. Introduction

The goal of this work is to address, from the conceptual framework of theories on “deliberative democracy”, the role played by the Judicial Power, being an integral part of the State, as the institutionalized field of deliberation for making collective decisions.

In order to do this I will start by analyzing, from a legal-institutional perspective, the way in which the National Constitution of Argentina distributes the functions of the State and how it divides the competences to decide on the *Public Thing*. Furthermore, I will analyze which are the degrees of deliberation and of citizen participation (direct or indirect) in each portion of the constituted power. Then, I will develop my intuition about the way Justice operates as an institutional form of citizen participation within a Social State of Law, comparing such proposal with the opinion of authors that highlight the countermajoritarian nature of the Judicial Power. I will present some representative cases of the intervention of the Judicial Power in the making of institutionalized public decisions, generated by the action of minorities with little or no political representation and in which, after a deliberative practice, government measures that gave a positive response to the proposals of the actors were ordered.

As an anticipation of my opinion, I will say that in our current Argentinian constitutional system there is a paradox in which the Judicial Power (being, due to its origin, the least democratic of the powers) allows for the development of procedural discursive practices, enabling the Public Decision Making to be the product of the deliberation between parties (citizens and governments) on a level of equality and freedom of speech in which arguments are exchanged in a rational way and in a previously regulated framework within a formalized procedure.

II. Theories on Deliberative Democracy

Theories on Deliberative Democracy were constituted as a bet to overcome the primitive and almost unrepeatable experiences of direct democracy and of the real and generalized representative democracies, currently in crisis.

Jon Elster¹ explains that, despite their individual characteristics, the various theories that postulate a model of participatory democracy agree to include in the collective decision-making process all those people affected by the decision or their representatives. These theories also agree on the fact that such decisions are made after taking into consideration the arguments offered *by* and *for* the participants who are committed to the values of rationality and impartiality.

Thus, this author argues that the most emblematic doctrinaires of this school of thought, RAWLS and HABERMAS, share a common core: that political choice is legitimated because it is the result of a deliberation about the goals between free, equal and rational agents.

He goes on to explain that "when a group of equal individuals has to make a decision about an issue that concerns them all, and when the initial distribution of opinions does not reach consensus, they can overcome the obstacle in three different ways: arguing, negotiating or voting."

¹ ELSTER, Jon. *Deliberative Democracy*, Barcelona: Gedisa, 2001.

Due to its generality, this theory can be applied to any decision made by a group of people related to an issue that concerns its members. However, in the present work I will make reference to the decisions made by the State (in a broad sense) and to their main goal: addressing a public concern of the community legally and politically organized by the State. I consider "institutionalized public decisions" to be those manifestations of will issued by the Legislative Power (laws), the Executive Power (administrative acts and regulations) and the Judicial Power (sentences and rulings that take part in the state decisions of the other two branches - administrative acts, regulations or laws) that have a legal impact on the direct and indirect recipients of such government measures.

I will focus on those public decisions made by the State in compliance with the formalities set forth in the National Constitution of Argentina and in the rest of the positive legal order.

III. Deliberative Practices in Institutionalized Public Decisions in the Argentinian Constitutional System

As a preliminary clarification, we must remember that the National Constitution of Argentina (1853-60), when establishing the form of government, did not use the word "democracy" to characterize the system created by it. Its 1^o and 22^o establish a representative and republican system in which the people does not deliberate or rule except through their representatives. This representative political system implies that such sovereignty is not exercised directly by the sovereign people, but it is delegated to the people elected through their vote to occupy the constitutionally created positions. After the constitutional reform of 1994, new mechanisms of semi-direct democracy were established, maintaining the representative system.

The republican form of government is characterized by the following principles; 1) Election of public officers 2) Responsibility of officers 3) Public nature of government acts 4) Periodicity of public offices 5) Equality before the law and 6) Division of powers.

As the objective of this analysis is to describe the way in which the government makes decisions in the best interest of the community, I will focus on the latter of the previously mentioned principles: the functional division of power into three organs: executive, legislative and judicial.

Since the eighteenth century, the classical republican principle of division of powers constitutes the prime organic guarantee against state abuse of power, being one of the foundations of the classical liberal constitution model. The Argentinian Constitution follows the traditional division of powers, coined by LOCKE, ROUSSEAU and MONTESQUIEU. Its organic part establishes everything related to the organization of the Legislative, Executive and Judicial Powers and to the distribution of their powers in the making of institutionalized public decisions.

First of all, I will try to describe the democratic origin and the procedures for making institutionalized political decisions, typical of a deliberative democracy, that are present in what I will call the political powers (Legislative and Executive) . Then, I will do the same with the Judicial Power.

1) The Political Powers (Legislative and Executive)

Each political power has a particular way of expressing its will, that is, of acting positively in the society, participating through the introduction of general or particular norms that transform reality, and which

² Argentinian Constitution, section 1: " The Argentine Nation adopts the federal republican representative form of government, as this Constitution establishes".

³ Argentinian Constitution, section 22: " The people neither deliberate nor govern except through their representatives and authorities established by this Constitution. Any armed force or meeting of persons assuming the rights of the people and petitioning in their name, commits the crime of sedition".

are known as government measures. The so-called political organs of democratic origin of the State (Executive Power and Legislative Power) participate by issuing administrative acts⁴, regulations⁵ or laws⁶.

Both powers have a democratic origin since the members of both legislative chambers as well as the President are elected through a constitutionally established electoral process, regulated by the electoral law.

To what extent are the procedures of deliberative democracy used to make institutionalized public decisions in each of the established powers?

In the domain of the Legislative Power, decisions are made after a formal procedure of *discussion*, where the parties with opposing positions express their arguments. But finally the decision is made on account of the will of the majority, represented in the chambers and through the vote of its members.

The citizens, once their representatives have been elected, cannot directly influence the debates and discussions that are taking place within the legislative body. Their interventions are restricted to informal public demonstrations, as well as to the opinions expressed in the mass media (the latter do not have any binding effect on the decision making). In BOURDIEU's words "(...) the isolated individuals, silent, wordless, who have neither the ability nor the power to make themselves heard, are placed before the alternative of being silent or of being spoken on their behalf... the dominant ones always exist, while the dominated ones do not exist except when they mobilize or endow themselves with instruments of representation."⁷

The decisions made by the Legislative Power, on behalf of the sovereign people, are not the product of discussions between free, equal and rational citizens, or, as defined by AUSTEN-SMITH, the result of a process materialized in a conversation in which Individuals (in this case, legislators) speak and listen consecutively before making a collective decision⁸. This situation was observed by Carl SCHMITT in the interwar Germany and was used as one of his arguments against the parliamentary system as a form of State⁹. This author claimed that in the Parliaments "the negotiations -whose objective is not to find what is rationally true but to calculate interests and to obtain a profit by asserting interests according to the possibilities- are also accompanied, of course, by speeches and discussions, but it is not a discussion in the right sense... The situation of parliamentarism is so critical today because the evolution of modern mass democracy has turned the public discussion that provides arguments into an empty formality."¹⁰ Picking up the criticisms to the parliamentary system made by an author who spoke in favor of an autocratic system and who also attacked democracy does not imply agreeing with this radical right-wing position; but it enables, from the observation of these systemic dysfunctions, the search for procedures through which discursive practices can allow the adoption of measures or the decision-making process as a result of rational discussions.

Voting, as a way of solving the conflict of interest, unlike the discursive or negotiating procedure, as explained by ELSTER¹¹, is not a form of communication, and therefore, as stated by SCHMITT, does not allow

⁴ According to the definition of Juan Carlos CASSAGNE, an "Administrative Act" should be understood as: "any statement made by an organ of state, issued in the exercise of the materially administrative function and characterized by an exorbitant regime, which generates direct individual legal effects in relation to the administered or third party recipients of the Act. The Administrative Act may be unilateral or bilateral." (*Administrative Law*. Buenos Aires: Lexis Nexis Editorial, 2002, T^o1)

⁵ In the aforementioned work CASSAGNE defines "Regulation" as: "Any unilateral act of the Administration, in exercise of the materially legislative function, which creates general and compulsory legal norms, the effects of which operate in the external level, through the adjustment of impersonal and objective situations."

⁶ As defined by AFTALIÓN, Enrique; GARCÍA OLANO, Fernando and VILLANOVA, José, "Law" is: "The general rule established through the word of the competent body (legislator)." *Introduction to Law* (Buenos Aires, Abeledo Perrot, Buenos Aires, 1984), p.281.

⁷ Bourdieu, Pierre, *In Other Words* (Gedisa), p.159.

⁸ Quote transcribed by Jon Elster in *Deliberative Democracy*, p.21.

⁹ Aragón, Manuel, in his preliminary study of the work of Carl Schmitt *Sobre el Parlamentarismo (About Parliamentarism)* (Madrid: Tecnos, 1990), p. XX, states that: "This account of the law, says Schmitt, is consubstantial with parliamentary democracy. But, he continues, in the parliament of our time, discussion and the ability of mutual persuasion is impossible because opposing interests are represented there and, consequently, the law will only be the imposition of some interests over others or, in the best-case scenario, the transaction between interests, but never the rational product of discussion".

¹⁰ Schmitt, Carl, *The Intellectual-Historical Situation of Today's Parliamentarianism*, 1923.

¹¹ Elster, op. cit., p. 18: "Note that discussion and negotiation constitute ways of communication, that is, they are acts of speech, meanwhile voting is not."

the rationalization of the adopted decision. It becomes a method to settle a conflict in an irrational way, where the majority prevails over minorities and where each part's arguments are not taken into consideration.

This impossibility for the citizen to participate in the discussion and to control it, a power appropriated by the representatives and monopolized by the political parties, has led to harsh criticism to the parliamentary system and to the fiction of political representation. This delegation from the citizen to the ruler has also been lucidly described by Pierre BOURDIEU¹² in a paper where he analyzes the process by which citizens grant power to their representatives, who embody that group of power grantors from the beginning of their mandate. Bourdieu explains that: "Therefore, this primary act of constitution which represents the delegation, including its double meanings: the philosophical and the political, is an act of magic that enables the existence of what was merely a collection of plural people, a series of juxtaposed individuals, in the form of a physical person, a corporation, a mystical body embodied in one or more biological bodies, *corpus corporatum in corpore corporato*."

Before analyzing in depth the so-called *mystery of the ministry*, by which the representative becomes capable (by unconscious delegation) of acting in substitution of his/her power grantors, BOURDIEU describes the act in which one person delegates to another the power to act in public in his/her name and in the field of politics by wondering how can the representative have the power over the ones who give him that power.

I would like to focus on the use of the legal term *mandate* to explain the act of delegation between the citizen and his representative. This concept, taken from the legal field in order to be applied to the political field, means the legal relationship in which a person, called "the principal", attributes to another person, called "the agent", the power to act on their behalf and under the responsibility of the "Principal".

The Argentine Civil and Commercial Code in its article 1319 says that: "There is a mandate contract when one party undertakes to perform one or more legal acts in the interest of another. The mandate may be expressly or tacitly conferred and accepted. If a person knows that someone is doing something in his or her interest, and does not prevent it, being able to do so, it is understood that he or she has tacitly conferred a mandate. The execution of the mandate implies its acceptance even without an express declaration about it." (The now repealed civil code stated: "The mandate, as a contract, takes place when one party gives another the power, which it accepts, to represent it, for the purpose of executing a legal act on its behalf and on its account. , or a series of acts of this nature"). The law continues regulating the rights and obligations of both parties to the contractual legal relationship, principal and agent. This implies the presence of a requirement without which the catalog of rights and obligations would be meaningless; the determination of the parties, that is, their individualization.

The relationship between elector and elected, between principal and agent, in a secret vote system, prevents the possibility of knowing or determining the parts of the relationship. Therefore, once the representative is elected, his relationship with his principal is lost, that is to say, he knows that he had been chosen, but he cannot know who chose him. That is why it is not possible to say that the chosen one represents a certain sector, group or people, since due to this not knowing, there are no liabilities nor rights on the part of the elected and the electors. Who should the legislator or elected representative give an explanation to about his compliance with electoral promises? The answer can be found in our political reality: to nobody. Or, actually, to those groups that are duly individualized and that enabled the candidate to be included in the list, to have an adequate electoral campaign, to have the financial means to publicize his image, to conduct studies of interests of the electorate, etc. Until recently, the groups that appropriated the sovereignty of the people through the election of candidates to occupy public positions were political parties, which during the electoral campaigns offered citizens their catalogs of principles and values, their stories of success and defeat, their government programs, their ideologies, etc. Nowadays, our political reality shows us that the traditional parties stopped being the reference of the candidates, who only consider as indicators the modern structures that finance campaigns and that present themselves to us as new political parties (Pro, Una, Civic Coalition, Recrear; etc).

Despite the criticisms to the representative system presented here, the Legislative Power is, institutionally, the body in which different positions are debated in the process for sanctioning laws, giving rise - at least potentially - to the development of deliberative practices.

¹² Bourdieu, Pierre, In Other Words, p. 158.

Unlike the Legislative power, the Executive Power is in charge of the administrative function, understood as the activity performed by the state organs in an immediate, permanent, concrete, practical and normally spontaneous way to achieve the Common Good, in accordance with the Public Law regimes¹³.

Within the sphere of the National Executive Power, as in most of the provincial States, there is no generalized decision-making procedure that includes some kind of discussion where different positions are expressed regarding a certain government measure. The formalization of experiences such as the case of participatory budgeting or of participation institutes such as public hearings are still an exception.

As a first conclusion I can state that, although both political powers (Executive and Legislative) enjoy a similar democratic origin, deliberative practices for the making of institutionalized public decisions are formally included only in the procedure of enactment of laws by the Legislative Power. This possibility to deliberate is possible in the Legislative Power also because the majority and the first parliamentary minority, at least, are represented; as opposed to the Executive, where only the majority political party exercises the administrative function.

From this schematic description regarding the possibility of deliberative practices in both political powers, I would like to highlight a phenomenon that has been explained by SOUSA SANTOS and AVRITZER¹⁴ when analyzing the hegemonic conceptions of democracy in the second half of the 20th century, and which consists in the transition, after the second post-war period, from a liberal minimum State to a Social State of Law and the corresponding increasing of functions of the public sector with its correlative specialization and growth of the bureaucratic apparatus.

As regards the construction of an idea of the concept of democracy, these authors describe the way in which bureaucracy has become indispensable, placing itself in the center of the theory on democracy. They emphasize the pessimistic view of Max Weber regarding the growth in the control of those governed by means of bureaucracy when saying that this author "(...) inaugurated this line of questioning the classical theory of democracy by placing, within the heart of the democratic debate at the beginning of the century, the inevitable nature of citizens' loss of control over the process of political and economic decision and the growing control exerted by forms of bureaucratic organization (...) ". In this line they highlight the look BOBBIO's vision, which radicalizes the Weberian argument by stating that the citizen, when choosing the consumer society and the Welfare State, is renouncing his control over political and economic activities in favor of a public bureaucracy.

Faced with these positions of WEBER and BOBBIO, who imagine a homogenous and unidirectional bureaucracy, SOUSA SANTOS and AVRITZER consider the possibility of making plural decisions in which the coordination of different groups and different solutions take place within the same jurisdiction. In the quoted work, they show experiences that allowed the construction of non-hegemonic conceptions of democracy in the second half of the 20th century.

In our country, since the restoration of democracy, there has been a strengthening of the Executive Power, expressed through the constitutionalization of the exercise of normative functions by the Legislative Power through the issuance of delegated regulations and necessity and urgency Decrees. This political supremacy of the Executive over the Legislative power threatens our democratic system and can make it fall into a crisis since, as we have seen, public administration (although having a democratic origin) is the institutional sphere where citizens have the least interference in the making of decisions, which are made without any kind of deliberative procedure.

While it is true that the complexity derived from the advent of new social functions at the head of the State gave rise to wide specialized public administrations that made decisions without the participation of the citizen, it is also true that, at the same time, the following historical processes of increasing sovereignty were taking place:

¹³ Cassagne, Juan Carlos, op. cit.

¹⁴ Sousa Santos, Boaventura y Avritzer, Leonardo, *Introducción: para ampliar el canon democrático (Introduction: to Expand the Democratic Canon)*, www.eurozine.com

- 1) A new range of social rights that generated an obligation of the State to intervene in society by providing services to meet the growing needs of the population (education, health, security, feeding, households, etc.) was legally recognized. The incorporation of these rights into our legal system took place, in the primary instance, by means of the the enactment of the 1949 Constitution, then through the incorporation of article 14 bis into the 1957 reform of the Magna Carta and recently with the ratification of a model of Social State of Law in the constitutional reform of 1994, followed and strengthened by other provincial Constitutions (for example, the one of the Province of Buenos Aires, reformed in 1994). These rights began to be effective after their express incorporation into our Constitution, through the ratification of International Human Rights Treaties that guaranteed them.
- 2) The Judicial Power began to actively intervene in public decisions through the control of the constitutionality of laws (in a diffuse manner in our country, that is, such declaration can be issued by any judge) and through the control of the legality of public administrations' actions (especially by means of the control carried out by the contentious-administrative Justice). Moreover, the reforms of state Constitutions generalized the control of the administration through the creation of a new decentralized jurisdiction with an administrative specialty. Thus, for some years now, both in the Autonomous City of Buenos Aires and in the province with the same name, the administrative litigation courts have been in charge of controlling their respective public administrations.

This combination of acknowledging social rights and judicial activism in the control of government actions (referred to by some media as "judicialization of politics"), both in its legislative and administrative spheres, created an institutional space for the rational discussion of public decisions made by the government.

Before addressing the discursive possibility regarding institutional public decisions within the sphere of the Judicial Power, I will describe its functions and I will focus on the undemocratic or counter-majoritarian nature of this state power's origin.

2) The Judicial Power

The Judiciary is a complex power (composed of several organs), compound (given that some Courts are collegiate) and hierarchical (since the constitution categorizes the Court as "supreme"). The jurisdictional function is a task of the State and is exercised by the Judicial Power, independently of the other organs of power, especially the President of the Nation, and cannot be delegated to private individuals. The creation of permanent courts inferior to the Supreme Court constitutes a state obligation which corresponds to the Legislative Power to ensure the guarantee of the natural judge.

The Argentine legal system relies on two normative traditions:

- 1) **Codified Civil Law:** the judge is perceived as the mouth that pronounces the words of the law and must, consequently, resolve conflicts of interest trying to apply and, above all, interpret the rules with special deference to the legislator's purposes and wishes. This tradition is particularly strong in the so-called common and codified law matters. The judge is considered as an administrator, who dispenses, between the parties in controversy, the justice already contained in the rules dictated by the legislator, in whom the popular sovereignty resides.
- 2) **Law of the United States:** it is manifested in the design of power that emerges from the National Constitution -written, rigid and supreme- and in which the Judicial is designated and structured as one of the powers of the State. The judge recreates the right by interpretative means, and uses the precedents. In addition, and especially when it comes to Supreme Court judges, they have the last word in matters of interpretation of the Constitution, exercising the control of constitutionality. Undoubtedly, in this case, the judge's role is political in two directions. Firstly, because when resolving conflicts of interest he develops the law and, through it, he unfolds social relationships. Secondly, because when controlling the constitutionality of the legal system, he influences its makers on what they express as a general political decision.

As we know, judges in our country are not democratically elected, they are not elected by the sovereign people, but they are appointed through a procedure in which the political power, legislative and executive, takes part. After the creation of the Council of Magistrates, also interest groups (academics, lawyers, magistrates) take part in the aforementioned procedure.

Roberto GARGARELLA says that "in most modern democracies we accept as an irrefutable fact of reality that judges review what is done by the Legislative or the Executive Power and that, if they find their decisions constitutionally questionable, they invalidate them. However, the decision of leaving such extraordinary power in the hands of judges is not obvious or naturally acceptable. Even less in a republican democratic system, in which we want the decisions that are made to reflect, in the most appropriate way possible, the will of the majority"¹⁵.

The Judicial Branch, following the U.S. constitutional model, carries out a diffuse control over legislative activity by means of the declaration, made by any judge, of the unconstitutionality of the laws passed by Parliament. In addition, the contentious-administrative Justice, operating at the federal as well as the provincial levels, performs a control of legality about the discretion of the decisions made by the national, provincial and municipal executive powers.

This was rejected within the debate about the scope of judicial control over the administration, as it was considered that judges must respect the constitutional role that the political system vests in the Executive Power. When describing this argument, Spanish professor GARCÍA DE ENTERRÍA says: "That respect is even more demandable because, in the democratic and social Rule of Law in which we find ourselves, those who exercise these functions have popular legitimacy, they have been placed in their positions by the vote and the confidence of the people to manage their interests on their behalf"¹⁶. Although this author is against the government of judges, his stance is that the Judiciary should review the legality of the administration's discretionary actions and ensure the effective judicial protection of citizens' rights and legitimate interests.

Although it is true that the Judicial Branch has a counter-majoritarian or non-democratic origin, what I am interested in emphasizing is that within it, institutional public policies are decided through deliberative procedures that constitute true democratic practices.

This type of judicial control over the made by those powers in the exercise of the so-called Discretionary Powers, in the light of the arguments presented by the private person, who rejects the decisions, and by the ruler, who maintains that decision, and which have been orderly discussed in the judicial process carried out in their courts.

The judicial procedures are previously regulated by law, through the so-called procedural codes, and enable a dialogue between the positions of the parties, arriving at a decision that must be based on the best argument, regardless whether such decision has the majority support or not. Furthermore, there are also collaborations of technicians (experts) and third parties (witnesses and *amicus curiae*) and, in some relevant cases, public hearings in which all interested parties are heard may be held.

Recently, with the new integration of the Supreme Court of Argentina (from now on CSJN), the role of the Judicial Branch with respect to the formerly called *non-justifiable political issues* has been reconsidered by the intervention of the maximum Court in decisive public decisions, where the competence corresponds to the political powers.

In order to embody these ideas, I will present three important cases in which the Judicial Branch served as a domain for the discussion of public policies and in which it formally intervened in the making or the modification of institutionalized public decisions. In these cases, as we shall see, what settled the issue was the weight of the arguments and not the numerical importance of the affected people who initiated the actions. These resolutions are distinguished by the carrying out of hearings to discuss and deliberate, hearing the parties in conflict in an orderly and pre-established manner.

¹⁵ Gargarella, Roberto, *Crítica de la Constitución. Sus zonas oscuras, Claves para todos (Criticism of the Constitution. Its Dark Areas, Keypoints for Everyone)*. Buenos Aires: Capital Intelectual, 2004.

¹⁶ García de Enterría, *Democracia, jueces y control de la administración (Democracy, Judges and Administration Control)* (Madrid: Civitas, 1998), p.34.

a) Penitentiary Policy: The Verbitsky Case¹⁷

The first example that I present in this work is the intervention by the CSJN in the *penitentiary policy* of the Province of Buenos Aires in the sentence dictated in the case "Verbitsky, Horacio upon habeas corpus", ordering the Executive Power to take a series of measures in order to guarantee the human rights of the persons deprived of liberty and urging the Legislative Power to adapt its criminal procedural legislation to international standards.

I would like to highlight that in point 6 of the resolution the CSJN decided: "to entrust the Executive Power of the Province of Buenos Aires, through its Ministry of Justice, with the organization and convening of a round table to which the plaintiff and the remaining organizations presented as *amicus curiae* will be invited, without being limited to integrate it with other sectors of civil society, having to inform this Court every sixty days of the progress achieved."

It should be noted that the stance of the claimant, a simple citizen and well-known journalist who acted in his capacity of president of an NGO (CELS), represented a minority whose political weight is nil: people held in police stations or detained in the Penitentiary Service of Buenos Aires. This circumstance did not prevent the decision from leaning in their favor, by virtue of the arguments put forward in the claim.

2) Environmental policy: Case Mendoza¹⁸

The CSJN itself intervened, in the case "Mendoza, Beatriz Silvia and others against National State and others upon damages", in the *environmental policy* of the National State, of the Autonomous City of Buenos Aires and of the Province of Buenos Aires, in dealing with the action initiated by a group of neighbors from the neighborhood of La Boca who considered that their quality of life was being affected by the contamination of the Riachuelo and the Matanza River. In this case, public hearings in which each party presented its points were also held. On June 20th, 2006, the Supreme Court of Justice of the Nation requested the defendants to submit a sanitation plan for the basin and the polluting companies to report on the precautions taken to stop and reverse pollution in the area.

Thus, on September 5th, the first public hearing before the Court was held, in which the National Government, together with the Government of the Province of Buenos Aires and the Government of the City of Buenos Aires, presented a Sanitation Plan of the Creek and the creation of an interjurisdictional Basin Committee. A week later, at the second hearing, Dr. Andrés Nápoli (from the Environment and Natural Resources Foundation (FARN) made a statement on behalf of the four NGOs (FARN, CELS, Greenpeace and Association of Neighbors of La Boca) that acted as third parties, focusing on issues related to the way in which the various plans will be addressed by the State, to the role of the Court, to health care and the responsibility for environmental damage. In February, 2007, the second public hearing was held and in it the Secretary of Environment, Romina Picolotti, presented to the Supreme Court of Justice the progress made since the presentation of the Sanitation Plan for the Matanza Riachuelo Basin six months ago. At the same time, the Supreme Court of Justice of the Nation decided to designate independent experts appointed by the University of Buenos Aires, to make a report on the feasibility of the Sanitation Plan of the Riachuelo submitted by the National State, together with the Government of the Province of Buenos Aires and the Government of the City of Buenos Aires.

Here neither the political weight of the neighbors of the Buenos Aires riverside nor its electoral importance played a role in the decision made, but rather, as a result of the debate and the weight of the arguments of these citizens, the Judicial Power intervened by obliging the political powers of the defendant States to adapt their environmental policies in order to guarantee the claimants a dignified quality of life.

¹⁷ CSJN, *Fallos (Decisions)*, 328:1146, date of sentence 05-03-2005.

¹⁸ CSJN, *Fallos (Decisions)*, 329:2316, date of sentence 06-20-2006.

c) Social Policy: Ombudsman against National State and Province of Chaco¹⁹

In a case initiated by the National Ombudsman, the CSJN decided that the National Government and the Chaco government should provide food and drinking water to the aboriginal communities of the Province. The court stipulated this after allowing a precautionary measure presented by the National Ombudsman to adopt the necessary measures to "stop the extermination" of the natives people in that province.

The Court ruled: "To grant the requested interim measure and, consequently, to order the National State and the Province of Chaco to provide drinking water and food to the indigenous communities that inhabit the southeast region of the General Güemes Department and the northwest region of the Libertador General San Martín Department of that province, as well as an adequate means of transport and communication, to each of the health centers."

In this case, the CSJN also resorted to the conducting of a public hearing to evaluate the way in which the ordered interim measure was being complied with. As published in the *Diario Judicial*, this hearing "took place on the fourth floor of the Palace of Courts. Officials from Chaco and the Nation tried to explain some of the measures adopted in response to the humanitarian disaster that led the Ombudsman, Eduardo Mondino, to file a criminal complaint. First, members of the Instituto del Aborigen Chaqueño (Institute of the Chaco Aborigin –IDACH–) spoke: Egidio Garcia, who tried without luck to express himself in his native language, and the president of the provincial body, Orlando Charole who, without hesitation and faced with a direct consultation of the president of the Court, Ricardo Lorenzetti, denied that the measure to assist the indigenous people was being applied. Based on this statement, the magistrates were responsible for investigating in depth and in detail by inquiring the officials about the number of inhabitants, the communities, what reality was contemplated by the actions that were reported, how was it possible that 'dried food was delivered but it is stated here that there is no water in this place: 'how do people cook?', asked Judge Highton de Nolasco. The magistrates did not allow the officials to make political speeches with the plans in application and looked for answers to basic questions throughout the two-hour audience. 'Why do you think the IDACH president says that no measures were taken in the emergency zone?' or "there are extraordinary programs and there are people who are not reached by them, why does this happen? What do you think?", Lorenzetti asked over and over the officials who marched before the judges. When it came to answers, the Undersecretary of Food Policies of the Ministry of Social Development, Liliana Paredes, attributed the health disaster and the evidence that the fact that the aid did not reach the indigenous people to 'provincial management problems', after explaining in detail that since the emergency began in Chaco, the Nation sent 263 tons of food and 36,400 liters of water. For his part, the Undersecretary of Sanitary Programs of the Ministry of Health, one of the last to speak, revealed that 'there are 250 cases of malnutrition' in a list of diseases detected in the two Chaco departments where a series of deaths took place the previous winter. The national official also made progress in the analysis of the case by stating that the tragedy among the tobas was due to 'three probable causes: misallocation of resources, accessibility issues and cultural guidelines'. That is why he highlighted the fact that the agency in his charge works in the hiring of 'people whose profiles allow us to address the relationship in a better way', in this case with the indigenous people. After hearing the presentations of the province and the Nation, the Court left to pronounce on the case 'Ombudsman against National State and other (Province of Chaco) on process of knowledge' in which the judges sought to know the measures adopted to comply with the interim measure to give immediate attention to the indigenous people.

In this case, the claimers, represented by the National Ombudsman, also constituted a minority group without the possibility of exerting any political pressure (many of them undocumented and, therefore, not having the possibility of exercising the right to vote) and with no more capital than their arguments.

In addition to many other CSJN resolutions that cannot be detailed in this work due to lack of space, it is important to highlight the countless judgments of the contentious-administrative Justice of the Province of Buenos Aires and the Autonomous City which intervene in decisions related to sanitary, assistance, housing, educational and urban policies, among others.

¹⁹ CSJN, D. 587.XLIII, date of sentence 09-18-2007, LL, 2007-F, 111.

IV. The functioning of the Benefactor State and the Legitimization of the Political System²⁰

The Welfare State consists of a state responsibility to ensure basic social protection to its citizens and in it individual contingencies are resolved through collective mechanisms of a corporate (trade unions, mutual societies) or state nature (social security, health and public education, etc.).²¹

Although its origins can be traced back to the end of the 19th century in Bismark's Germany and in his social legislation, its global consolidation takes shape in the capitalist Europe of the second post-world war, based on the English doctrine of Report Beveridge and the Keynesian economic policy.

This change in the role of the State was reflected in a new constitutionalism that was qualified as social and that was characterized by the inclusion in constitutional texts of declarations of social and economic rights that cover the field of education, culture, family, work, professional or trade union association, social property, economy, minority, old age, social security, disability, etc., establishing regulations of the "social question" which refer to the situation of the human being in terms of work and his or her relations with capital, social classes, factors of production and the state. As BIDART CAMPOS explains it, "On the one hand, because constitutionalism exhibits a tendency to highlight the social function of rights; on the other hand, it is concerned with structuring a social and economic order so that the removal of obstacles enables all men and women to have equal opportunities and a real and effective exercise of freedoms and subjective rights."

In the Argentina of the 1950s, social movements such as unionism, whose power was strengthened by the European immigration wave of the first decades of the previous century and which was founded on socialist, anarchist and communist ideas, created the necessary conditions to carry out a social change that would modify the relations between workers and employers and that would acknowledge as rights the needs of the social sectors most affected by the dysfunctions of the market.

After the arrival of Juan D. Perón to the government, this model of state organization was transformed, incorporating social rights into the legal system and modeling a social State that would be materialized in the Constitution of 1949²². Peronism wanted to harmonize social and economic conflicts, and to assert the predominance of the public apparatus over private interests. These objectives were achieved in spite of Peronism's excess of personalism, of its inclination towards authoritarianism, of its attack to the political opposition and of the reduction of institutional power controls. The government that succeeded Peronism, after seizing power by means of the 1955 coup d'état, repealed that fundamental law but kept some of its social rights in article 14 bis of the reformed Constitution of 1957.

The "Welfare State" gave birth to "social rights" which, in spite of being constitutionally embodied, have not effectively carried out the forms and guarantees with which the Rule of Law protected the rights of liberty and property.

This lack of legal protection of social rights (through institutional mechanisms that guarantee their realization) has a negative impact on the category of "social citizenship" which, according to the classic proposition by T.H. MARSHALL, is one of the central ideas of the Welfare State.

The concept of social citizenship basically implies granting social rights with the same legal and practical status of property rights to the population, this means that these rights must be inviolable and that they

²⁰ This point has been taken from my work: "The relationship between the institutional system of control of public power and the access to administrative justice in the Province of Buenos Aires (Only available in Spanish: "La relación entre el sistema institucional de control del poder público y el acceso a la Justicia administrativa en la Provincia de Buenos Aires"), published in the collective book *Acceso a la Justicia (Access to Justice)* (Buenos Aires: La Ley, 2005.), pages 47 subsequent.

²¹ Expand in Casilda Béjar, Ramón y Tortosa, José María, *Pros and contras del Estado de Bienestar (Pros and Cons of the Welfare State)*, Madrid: Tecnos, 1996.

²² Expand in Berrotarán, Patricia et.al., *Sueños de bienestar en la nueva Argentina. Estado y políticas públicas durante el peronismo 1946- 1955 (Dreams of Well-being in the New Argentina. State and Public Policies During Peronism 1946-1955)*, Buenos Aires: Imago Mundi, 2004.

must be granted universally and without any further requirement than being a citizen. This involves a demercantilization of the status of individuals in relation to the market since the welfare of these will not depend on the monetary circuit. As GOSTA ESPING-ANDERSEN explains it, demercantilization takes place when a social service is provided as a question of law and when a person can make a living without depending on the market.

The constitutional enunciation of social rights for positive public benefits has not been accompanied by the elaboration of adequate procedural guarantees, that is to say, defense and justiciability techniques comparable to those created by liberal guarantees for the protection of freedom and property rights. The development of the Welfare State in this century has taken place largely through the simple extension of the discretionary spaces of bureaucratic apparatuses and not by the implementation of guarantee techniques appropriate to the nature of the new rights.

Let us analyze, from the holistic point of view of the general systems theory, the new institutional model organized from the apex of the legal system within the framework of the social system. This legal system functions as a minor system that is included within the total society system²³.

Systems are sets of elements which are closely related, keeping the system directly or indirectly connected in a more or less stable way, and its behavior usually pursues some kind of objective. A system is an inseparable whole and not the mere sum of its parts and this interrelationship of two or more parts results in an emerging quality that cannot be explained by the parts considered separately. The totality of the phenomenon is not equal to its parts, but it is something different and superior, so if we intend to analyze a systemic phenomenon we will have to look beyond its parts and to focus on the complexity of its organization²⁴.

When we use systems theory to understand or study any phenomenon, it is essential to understand that a system is first and foremost an independent entity, no matter whether it belongs to or is part of a larger system, and that, seen in this way, it is in turn a coherent whole that we can analyze to improve our understanding of that phenomenon.

For this reason, we will study the model of society of the "Social Rule of Law" or "Welfare State" from a theoretical point of view and with the help of two German authors that have analyzed the contradictions and the legitimacy problems of late European capitalism.

In order to do so, we will resort to the theory of social systems created by Niklas Luhmann, using the model of operation of late capitalism exposed by Claus Offe and Jürgen Habermas, who find an explanation for the unfulfilled prediction of Carlos Marx regarding the existing contradiction between "democracy and capitalism" in the transition from the liberal or police state to the Welfare state. We will leave aside the criticisms to this form of state organization in Europe, made by the right and the left, to focus on its theoretical model of functioning.

The Welfare State played a pacifying role in the advanced capitalist democracies during the period following World War II. This formula for peace, explains OFFE, consists basically of the obligation assumed by the State to provide assistance and support to citizens who have specific needs and face risks that are characteristic of the mercantile society; such assistance is provided by virtue of legal claims granted to citizens (social rights). In the Welfare State, trade unions or guilds play a formal role in the collective negotiation of working conditions as well as in the formation of public plans²⁵.

This structural composition of the Welfare State has the function of limiting and mitigating class conflict, balancing the asymmetrical relation of power between labor and capital, and thus collaborating in overcoming the situation of paralyzing struggles and contradictions that constituted the most important feature of liberal capitalism.

In our country, provincial states stipulated in their local constitutions rules that define an organization typical of European democratic welfare states. The information from reality does not reflect the predicted "welfare" of society. This is where we face a problem as there is no correspondence between what is said and

²³ Expand in Bertalanffy, Von L., *General System Theory*, Mexico: Fondo de Cultura Económica, 1976.

²⁴ Buckley, W., *Sociology and Modern Systems Theory*, Buenos Aires: Amorrortu, 1973

²⁵ Offe, op. cit., p.135.

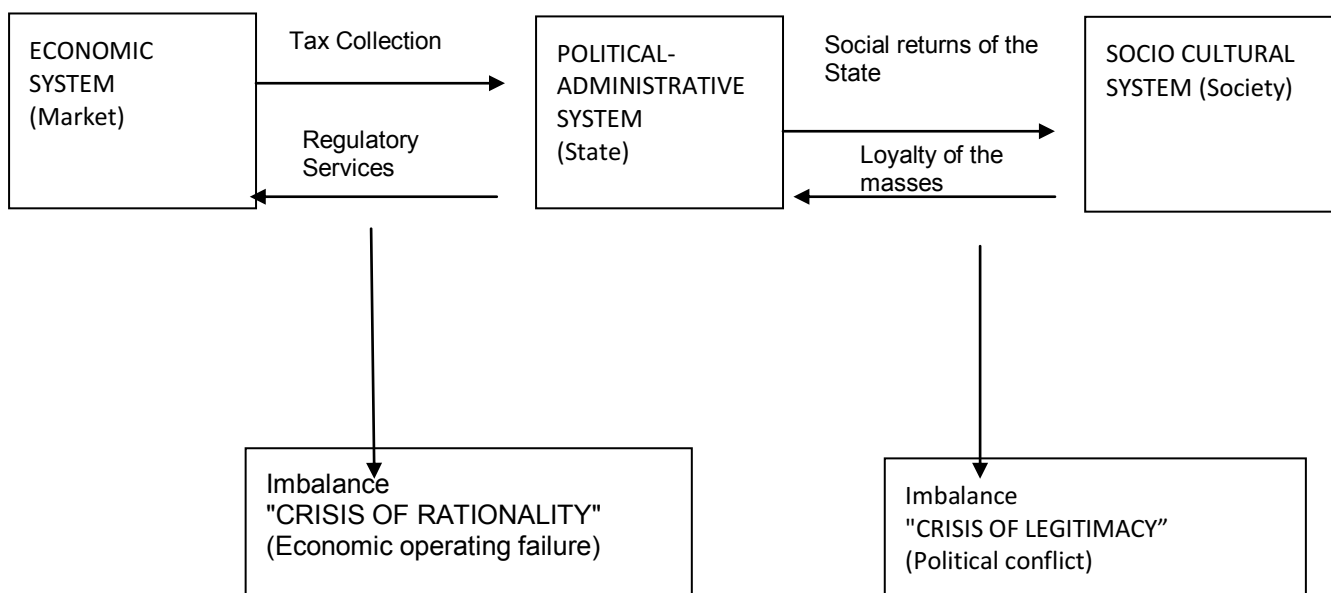
what is done, between the rights that are given to citizens and their effective exercise, and between the active roles of States and their unenthusiastic intervention in the markets.

Jürgen HABERMAS, when analyzing the tendencies to crisis in late capitalism, exposes in a descriptive model of the "Welfare State" or "capitalism regulated by the State" its most important structural features. This form of social organization, according to this philosopher from the Frankfurt School, is characterized by two phenomena: on the one hand, the process of concentration of enterprises and the organization of the goods, capital and labour markets; on the other hand, the fact that the State intervenes in the growing failures of the market mechanism²⁶.

According to Claus OFFE, this State "is characterized, rather, by organizational and constitutional structures whose specific selectivity is used to reconcile and harmonize the privately organized capitalist economy and the socialization processes triggered by this economy"²⁷.

In the last half-century, the modern State has undertaken new functions in the vast majority of developed countries, intervening in the economy and carrying out a greater number of functions for social benefit or collective interest each day.

This new construction of a welfare state intends to leave the model of liberal capitalism behind and to create a model where different social systems function in the following way:



This systemic model presented by Claus OFFE and continued, with some variants, by HABERMAS, works as follows: the functioning of the economic system depends on the continuous intervention of the state to eliminate its internal flaws (regulatory services); on its part, the economic system transfers (through the payment of taxes) parts of the value produced in it to the political-administrative system (tax collection). The political-administrative system is linked to the socio-cultural system by means of the expectations, demands and aspirations to which it is confronted and to which it reacts through organizational and other services of the Welfare State (social returns of the State). On the other hand, the autonomy and capacity for action of the political-administrative system depends on the loyalty of the masses (diffuse support)²⁸. The political-

²⁶ Habermas, Jürgen, *Problems of Legitimacy in Late Capitalism* (Buenos Aires: Amorrortu, 1998), p 49.

²⁷ Offe, Claus, *Contradictions of the Welfare State* (Madrid: Alianza, 1990), p.61 and subsequent.

²⁸ Offe, Claus, op. cit., p. 61 and subsequent.

administrative system must maintain balanced relationships with the other two systems in order to avoid crises that affect their relationships with them (crisis of rationality in its relationship with the economic system²⁹ and crisis of legitimacy, linked with the socio-cultural system)³⁰.

In order to maintain its legitimacy in the exercise of power, the political-administrative system must provide the socio-cultural system with the social returns of the State in exchange for a diffuse mass loyalty. This type of diffuse support, according to OFFE, can be described as the ability of the administrative system to gain a genuine acceptance of its structures, processes and effective political outcomes³¹.

The Tax Authority, as explained by Habermas, must bear the common costs of an increasingly socialized production: the costs of infrastructure works that directly affect production (communication systems, scientific-technical progress, professional training); the costs of social consumption that indirectly concern production (housing construction, traffic reconditioning, public health, education, social security); the costs of social assistance (programs and subsidies for the unemployed) and, finally, the external costs generated by private companies (deterioration of the environment). We must add to this list, in the case of developing countries such as ours, the cost of paying external debt (World Bank and International Monetary Fund)³². All of this must be financed with the revenue from tax collection.

V. Administrative Justice as an Institutional Channel for Citizen Participation

Since the birth of modern societies, the limitation and control of power has been a goal of democratic political systems³³. As we have already seen, at the institutional level, the division of powers³⁴ is par excellence the most effective classical technique available in civilized countries. This idea emerged from pre-revolutionary³⁵ thinkers who, by the end of the 18th century, sought to rationalize the government and to limit the absolute powers of the monarch³⁶.

²⁹ Thury Cornejo, Valentín, *Juez y división de poderes hoy (Judge and Division of Powers Today)*, Buenos Aires: Ciudad Argentina, 2002: "The economic or fiscal crisis makes reference to the tendency of intervention demands directed at the State to grow faster than the possibilities of producing interventionist responses by the latter, which puts us in one of the typical paradoxes of the system where greater state intervention is required, but, if it took place, it would threaten the possibilities for economic development of the capitalist system. Therefore, the welfare State must respond to a double dynamic of mercantilization-demercantilization, according to which the very survival of the State implies its self-limitation in the face of the capitalist system, at the same time that the moderation of its perverse effects requires its operational intervention." (p.131).

³⁰ Habermas, Op cit, p.81.

³¹ Offe, Claus, Op. cit., p.69.

³² Expand in: Lozada, Salvador María, *External Debt and the Scrapping of the National State (La deuda externa y el desguace del Estado nacional)* Mendoza: Ediciones Jurídicas Cuyo, 2002.

³³ Expand in Abril, Ernesto, *Las limitaciones del Soberano (The Limitations of the Sovereign)*, B.E.F.D.P, México DF, 1998.

³⁴ In spite of the division of powers, the power of the State is perceived by citizens as unique. This is what Villegas Basavillbaso, Benjamin (*Derecho Administrativo -Administrative Law-*, Tº V, Buenos Aires: Tipográfica Editora Argentina, 1954, p.97) expressed in this highly illustrative passage: "The power of the State is unambiguous. It imposes its will on individuals through specialized organs which have certain functions conferred by the constitutional order. As has already been stated, power in itself cannot be divided or splitted; its dismemberment would not change its substance."

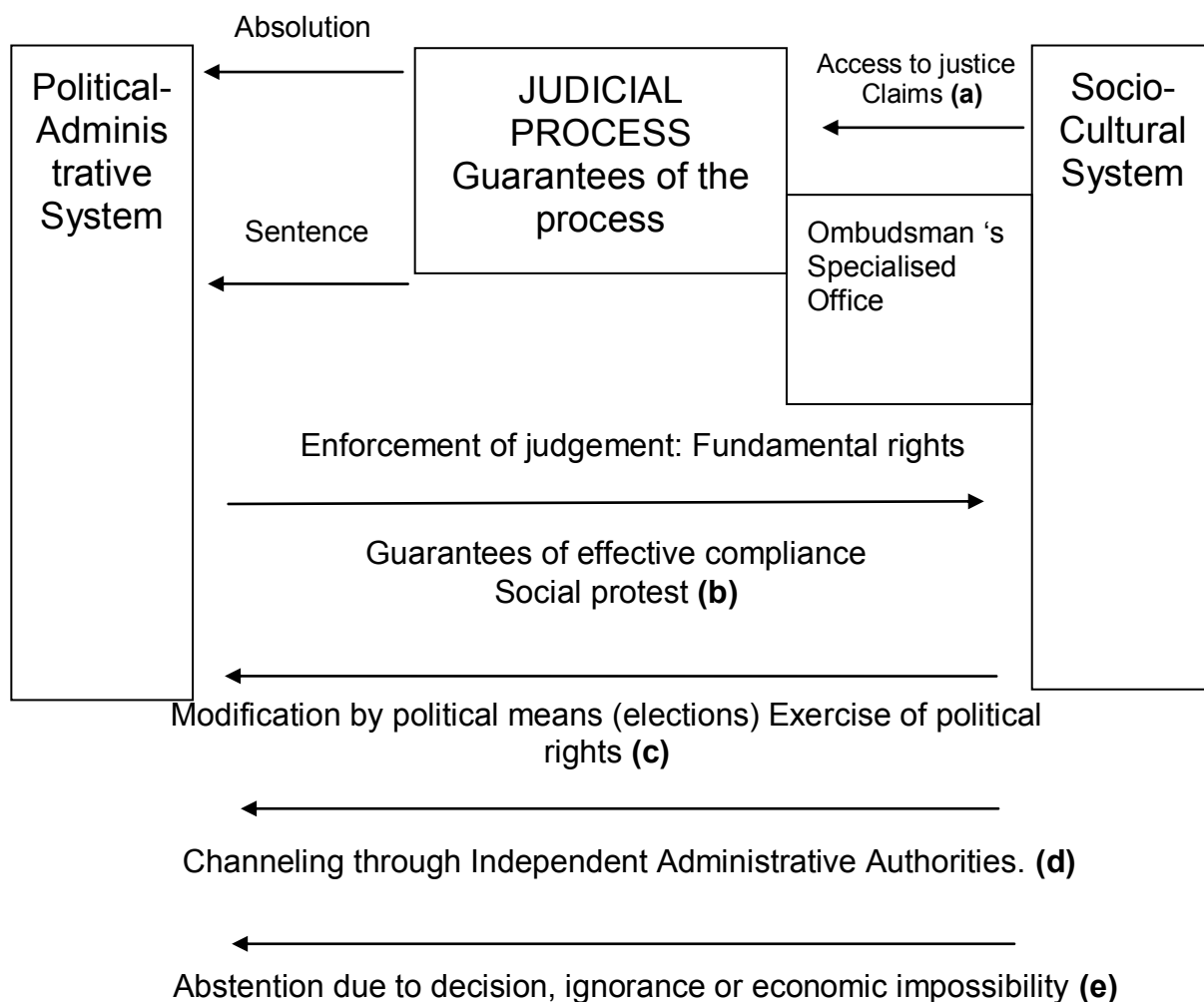
³⁵ Expand in García de Enterría, Eduardo, *Revolución Francesa y Administración Contemporánea (French Revolution and Contemporary Administration)*, Madrid: Civitas, 1994.

³⁶ The idea of systematically submitting Power to a trial in which any citizen can demand a justification for its behavior before the Law, said García de Enterría, is an idea that arises from the State created by the French Revolution, but which appears occasionally." Conf. García de Enterría, Eduardo, *La Lucha contra las inmunidades del poder (The Fight against the Immunities of Power)*, Revista de Administración Pública Español (RAP), No. 38 and subsequently published as a book, in Civitas, Madrid, 1974 and reedited by the same company in 1995.

It was constitutional law in its historical path that had the mission to implement the means to make the aforementioned control of power effective, using various legal techniques for that purpose³⁷. This function of the Judicial Power can be included in the model of systemic relationships between the state's political and administrative organization and civil society (Figure 2), identifying the stages of the process (in a broad non-legal sense) in which the guarantees of the concept of effective judicial protection (access to justice, procedural guarantees and guarantees of effective compliance with the judicial decision) must be made effective, adding to these considerations the rational alternatives in which the behavior of society can be expressed before the government.

Figure No.

2



In this schematic model we can observe how social disconformity, caused by the incomplete satisfaction of created expectations, can be channeled into four ideal types of social action: a) Judicial claim conduct that is expressed through the initiation of a lawsuit requesting the recognition of a right before the Judicial Power. This action should be facilitated by the presence of ombudsmen's offices specialized in public

³⁷ Ziulu, Adolfo Gabino, *Derecho Constitucional (Constitutional Law)* op. cit., T° I, p. 41, explained that "constitutionalism is the historical process by virtue of which provisions that protect the liberty and the dignity of people, and adequately limit the exercise of public power are incorporated to the main laws of States." Isidro MOLAS, for his part (*Derecho Constitucional -Constitutional Law-*), Madrid: Tecnos S.A, 1998, p.31), said to that effect that "constitutionalism, which has included different ideological and political orientations, appeared with the aim of placing the State under the control of the members of the community and of ensuring security in the person's enjoyment of his or her rights, that is to say, of eliminating arbitrariness of power."

law. b) Social protest conduct to try to modify governmental decisions and/or transform the political-institutional system. c) Political-electoral conduct, to exercise the political right to vote and to try to modify state policies based on the change of political actors. d) Conduct of channeling through Independent Administrative Authorities. e) Conduct of social abstention by own decision: ignorance of his or her rights or economic impossibility to use judicial channels.

Can all those situations that generate social discontent be channeled indistinctly by these four types of positive behaviors (a, b, c, and d)?

In a social democratic state governed by the rule of law such as the one formally established in our Constitution, the answer to this question must be affirmative since the legal system has recognized individual rights, political rights, social rights and finally the so-called third generation rights (gender, environment and cultural heritage protection, etc.).

Our nation's experience in its recent political history shows us that the social protests that began during the 90's adopted new forms and modalities such as roadblocks, picket lines, neighborhood assemblies, etc.

In most cases, disagreement was based on the fact that certain groups of citizens were condemned to poverty and exclusion by the neoliberal policies of the government of President Carlos Menem. All claims aimed to satisfy a social right (food, health, housing, work, etc.) and to obtain the direct intervention of the State to solve the problems.

As explained in the CELS report on "The State Facing Social Protest. 1996-2002", "Unlike in strikes, where a private conflict between employers and employees is usually expressed, in roadblocks government officials are always questioned because the claims concerned require direct intervention by the State when questioning the public thing..."³⁸. 38. Picketers have used the public space to demand specific responses to specific problems from the representatives of the powers of the State.

These forms of protest were used by the excluded sectors and by territorial groups of different left-wing parties as a tool to modify their situation and to satisfy their needs, often essential.

The response of the State to social protest, from a legal perspective, has been to criminalize the conduct of the complaining social sectors by categorizing acts of protest as criminal offenses.

Independently of the legitimacy of the use of any of the previously described channels in cases of disconformity of the citizen with the social system, we think that the use of the judicial claim (a) can offer, under certain conditions, concrete results in a short term and with the possibility of generating a genuine exchange of arguments and reasons with respect to the fundamental rights at stake in the procedural domain.

The non-existence, in practice, of all the channels of institutionalized positive behavior (a, c, and d) give rise to both non-institutionalized positive behavior (b) and negative behavior (e).

A concrete example of the institutional channeling of citizen claims was the massive filing of legal protective actions before the Federal Justice by Argentine savers whose bank deposits were withheld by credit institutions due to a decision of the national Government materialized by means of decrees 1570/01, 214/02 and 320/02³⁹.

As Agustín GORDILLO explains it, this economic measure adopted by the National Executive Power and known as "corralito", "(...) led to a multiplication of actions that (according to some calculations; nobody knows exactly) must have reached the amount of two hundred thousand or two hundred and twenty thousand protective actions only against the corralito...The magistrate has to solve everything. There is a very large amount of cases which are extremely diverse, but the public administration does absolutely nothing, not even at least fix the problems that the law itself contemplates. It does not solve them and neither do the banks (...)"⁴⁰.

³⁸ Center for Legal and Social Studies, *El Estado frente a la protesta social (The State in the Face of Social Protest)* (Buenos Aires: Siglo XXI Editores Argentina S.A., 2003), p.21.

³⁹ Expand in the work of Mauricio Obarrio, *La acción de amparo en la emergencia (The Protective Action in the Emergency)*, in the collective work *El derecho administrativo de la emergencia, (Administrative Law of the Emergency)*, III, Buenos Aires: Fundación de Derecho Administrativo, 2003, p.77 and subsequent.

⁴⁰ Gordillo Agustín. *Justicia Federal y Emergencia Económica (Federal Justice and Economic Emergency)*, published in the collective work *Control de la Administración Pública (Public Administration Control)* (Buenos Aires: Ediciones RAP, 2003) p.117 and others.

Daphne Soledad AHE described this situation by saying that: "Although no exact data are available, the Federal Contentious Administrative Jurisdiction has acknowledged the initiation of 120,000 cases filed to challenge the legal and complementary norms which established quantitative and qualitative restrictions for the withdrawal of deposits in the financial system. Only 65,000 of those cases were referred to the Courts of First Instance but it is estimated that around 50,000 or 70,000 more cases are missing from the computer-based system of the General Secretariat of the Federal Contentious Administrative Jurisdiction. These 120,000 (understood as protective actions with precautionary measures, autonomous precautionary measures or protective actions of law 16,986) must be addressed and resolved by twelve judges... We are dealing with more than 120,000 processes that need and demand a quick resolution"⁴¹.

Finally, the Federal Judicial Power responded to this avalanche of lawsuits filed by citizens who considered that the measure taken by the National State affected their constitutional rights.

What would have happened if people had not had the possibility of claiming for their rights by means of the judicial channel of protective actions?

The obvious answer is also found in the words of GORDILLO, who said: "If the Bank does not pay the people who have the age contemplated in the regulation to be paid; if the Bank fails to pay the sick; if the Central Bank, with the office it created, does not address and solve this issue, do you want people to really start shooting themselves or other people? Let's not provoke collective fury and these are not my words; the President of the Nation himself says it and all public officials and foreigners say it: we shall not provoke the anger of people; we shall not provoke it too much. Even they are afraid of popular fury, but they still feed the fire by not resolving the problems in administrative or banking headquarters, and, on top of that, they complain when the justice provides solutions..."

The administrative justice is responsible for monitoring state activity and for intervening in conflicts that occur between individuals and the public administration, seeking to protect all the rights that the law guarantees to citizens.

This is the way in which citizens participate institutionally by controlling the way in which the political class manages the interests of the community.

VI. Conclusions

In this work I have tried to demonstrate that the Judicial Power, especially the contentious-administrative Justice, in spite of not having a legitimacy based on a democratic origin, allows for concrete decision-making practices by means of procedures typical of deliberative democracy.

The *democratic component* of this intervention is given by the possibility for any citizen, regardless of his/her political or economic power and provided that the state organs for free representation and legal advice work properly, to open the discussion in the judicial sphere, to have access to Justice, and to present their arguments against or in favor of a certain institutional public decision.

The *deliberative component* is found both in the structure of the judicial process itself and in the holding of public hearings where not only the parties but also third parties, interested parties and *amicus curiae* participate.

HABERMAS says that discursive theory, unlike the liberal and republican conception, understands that the procedures and communicative presuppositions of the democratic formation of opinion and will function as the most important reasons for the discursive rationalization of the decisions made by a government and by an administration, which are subject to the law⁴².

In contrast to the deliberative practices that take place in the Legislative Power (as the central organ of the representative system), in the judicial procedure the parts of the procedural relationship are identified,

⁴¹ Ahe, Dafne Soledad, *La realidad del fuero en lo contencioso administrativo federal: El desamparo del amparo (The Reality of the Federal Contentious-Administrative Jurisdiction: the Helplessness of the Protective Action)* published in the collective work *El derecho administrativo de la emergencia (The Administrative Law of the Emergency)* (Buenos Aires: Fundación de Derecho Administrativo, 2002), p.41.

⁴² Habermas, Jürgen, *The Inclusion of the Other. Studies in Political Theory* (Barcelona: Editorial Paidós, 1999), p.244.

citizens recover their word, they speak for themselves, they freely present their arguments, they share their needs and demand their rights before the administration on equal terms, guaranteed by the principle of equality of arms. Here, the political weight of the shareholder is not what matters but his/her reasons, it does not matter whether the claim comes from a minority sector, excluded from society (prisoners, the sick, sexual minorities, the unemployed, the cartoneros –scavengers-, etc.), what matters are his/her arguments, in short, his/her rights⁴³.

In our representative system it is difficult for these minority groups to obtain answers from the candidates they have voted for in the last election and who, according to our Constitution, represent and govern them. The judicial action is another strategy to enable these people to be present and to participate in the public arena with their own voice, thus recovering their political identity and breaking the magic spell of representation.

I believe that a citizen who thinks that the State is not acting correctly, either because the actions of the administration damages his/her rights or because the omission of the administration results in its failure to comply with its obligation to provide benefits, and who channels his/her disagreement through the filing of a judicial action, is participating, in a rational and active way, in the management of the public thing.

It is through the Judicial Power, independent of the political power, that the citizen obtains a response to his/her problems, concerns or needs. Even in the event that the lawsuit does not prosper, the citizen obtains a well-founded and substantiated explanation for the rejection of his/her claim. Thus, each judicial action recreates a model of rational communicative action between the individual and the State.

The judge who, based on the aforementioned action filed by an individual, requests a report from the administration and commands it to perform its obligations, annuls an act with vitiated elements, sentences the administration to indemnify a citizen, orders it to provide a service or forces it to comply with a legal deadline, is providing a positive response to the citizen's claim and is helping to improve the State's administration.

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⁴³ I would like to clarify that, although this is theoretically accurate, the correct functioning of the Judicial Power is directly linked to the way judges are elected and to their real independence from the political power that appoints them. An example of judicial independence is the current integration of the Supreme Court of Justice of the Nation, and its counterpart would be the so-called Court of *automatic majority* of Carlos Saúl Menem's government.