Papeles el tiempo de los derechos

"Constitutional Democracy, Rights and Institutional Violence"

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Constitutional Democracy, Rights and Institutional Violence[*]

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1. - Introduction

This paper examines the modification and expansion that the concept of institutional violence has undergone in the context of constitutional democracy. The concept of institutional violence has traditionally been identified with physical violence inflected by organs of the State (in fact, by their agents). Constitutional democracy, which is the framework within which the constitutional state acquires meaning, evidently requires a modification of that view.

In this context, an analysis of the concept of violence is necessary, a concept that cannot necessarily be seen only in terms of the brute exercise of physical force but rather in terms of the traumatic alteration of what we might describe as "the conditions of normality of a specific reality." The existence of a constitutional State implies that rights form part of its basic structure and are part of its very essence. If this is the case then the violation of rights - even in cases where this does not involve the use of physical force - constitutes an evident case of violence, and institutional violence if it

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results from decisions or actions of the State.

At the heart of constitutional democracy we are seeing an expansion and deepening of the idea of institutional violence. The lack of protection for rights, in terms either of their existence not being known or there being gaps in the system for their protection now constitutes institutional violence. As a consequence we can see that State actors which were not previously associated with institutional violence, such as judges, can now be involved with it. The expansion of what is understood as institutional violence arises as a consequence of the logic of the constitutional State, a logic that involves a greater strengthening of the mechanisms for the protection of rights. In this limiting dynamic to which Power submits itself a greater sensitivity to rights is generated. This means that things which were traditionally understood as not necessarily forming part of the concept of institutional violence may now be seen as doing so.

2.-Violence, Power and Law

The phenomenon of violence is of transcendental importance for the social sciences in general and for sociology, political philosophy and philosophy of law in particular. The reason for this is that violence is a factor which we encounter inside human groups and is something to which groups or individuals may resort to organize and manage their intersubjective relations. Furthermore, the construction of the modern State and the theoretical developments which have accompanied it have sometimes coincided in emphasizing the importance of strategies for conditioning, limiting and managing the exercise of violence. Authors such as Max Weber (and before him Hobbes) have held that the State justifies its existence through its monopolization of the legitimate use of violence[1]. From this point of view, the law would be the primary strategy by which to proceed with this limitation. The fact that violence, in the context of State organization, can only be legitimately exercised by those authorized by the State to do so and in the framework of established rules, that is to say, pre-existing, well known, general, clear

[1] See WEBER, M., *Economía y sociedad. Esbozo de sociología comprensiva*, trad. de J. Medina Echevarría y otros, Fondo de Cultura Económica, Madrid, 2002, p. 1047.

and stable criteria, in other words, within a framework established by legal norms, already implies a significant limitation on its use.

Although the State governed by the rule of law would appear to imply a total justicialization of violence and hence its diminution, it cannot be denied that some of the most important thinkers about the rule of law, such as Kelsen, have not been able to rule coercion out of their understanding of law. Whether to maintain that force is an instrument of Law or that force is the content of legal norms[2], the relationships between violence, force and the law have been at the center of the concerns of such jurists as Ihering, Kelsen, Ross and Olivecrona. While for Ihering, law is "the set of norms according to which coercion is exercised in a state"[3], Kelsen sees it as "the coercive order of human conduct"[4]. Olivecrona holds that "the observance of law is conditioned by the regular use of force"[5], and Ross states that "a national legal system is a set of rules for the establishment and functioning of the State's apparatus of force"[6].

What lawyers have not done, however, is examine the question of violence itself. Indeed it may not be their role to do so. Nevertheless, by not doing so they have managed to avoid confronting a topic that is complex for at least two reasons. In the first place, it is difficult to define the term violence due, among other things, to the high level of its emotive content. In the second place, it is a concept which shares its semantic environment with a number of similar words. Hannah Arendt examined this second aspect of the term in *On Violence* and in that book distinguished it from other ideas like power, strength, force and authority[7], with all of these terms being seen as forms of domination. In her view power implies the capacity for joint action and is, therefore, the attribute of a group and not of an isolated individual. In this it may be distinguished from strength, which is the characteristic of a subject. Force is seen as "the energy released by physical or social movements". Finally, authority, linked to the

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[2] See BOBBIO, N., "Derecho y fuerza", in ID., *Contribución a la Teoría del Derecho* , ed. de A. Ruiz Miguel, Fernando Torres Ed., Valencia, 1980, p. 335. By the same author, his contributions to *Diritto e potere. Saggi su Kelsen*, Edizioni Scientifiche Italiane, Napoli, 1992.

[3] IHERING, R. v., *El fin en el Derecho*, Heliasta, Buenos Aires, 1978, p. 158.

[4] KELSEN, H., *Teoría Pura del Derecho*, trad. de R. Vernengo, UNAM, México, 1982, p. 51.

[5] OLIVECRONA, K., *El Derecho como hecho*, trad. de L. López Guerra, Labor, Barcelona, 1980,

[6] ROSS, A., *Sobre el Derecho y la Justicia*, trad. de G. Carrió, Eudeba, Buenos Aires, p. 34.

[7] See ARENDT, H., *Sobre la violencia*, trad. de G. Solana, Alianza, 2006, specially pp. 48-78.

idea of respect, supposes its recognition by those who have to obey the criteria of those who possess it. For this reason its exercise requires neither coercion nor persuasion and insofar as it implies the existence of respect its greatest enemy is "contempt and the best way to undermine it is the laugh"[8]. What characterizes violence, by contrast, is that it relies on its instruments, on a particular way of acting. It is arising from this that Arendt distinguishes between various aspects of power, which requires a certain degree of structure and organization, "There has never been a government exclusively based on violence. Even the totalitarian leader, whose principle instrument of domination is torture, needs a basic power; the secret police and its web of informers"[9].

The reason for bringing Arendt into play is to demonstrate the difficulties in identifying exactly what violence is. It is evident that what is of interest to us here is violence in the legal-political context and not others. In any case I believe that violence can be defined in terms of certain basic characteristics. It firstly implies a traumatic, radical intervention (accompanied by a possible change) in what might be considered the normal state of things. Secondly, even though we are accustomed to identifying violence with the exercise of physical force, violence does not always involve physical action.

We know that while the semantic universe which includes the idea of violence is complex, violence has an instrumental dimension, that is, it is used to achieve specific goals. This instrumental dimension is shared by the law and by political organization in general. When it comes to organizing a specific human group we have various strategies at our disposition to achieve our ends. A violent person may be able to oblige other individuals to act in compliance with his orders. However, this way of doing things is the opposite of one involving the organization of the group on the basis of a set of rules. As Hart says, "In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. If it were not possible to communicate general standards of conduct, wich multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we

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[8] ARENDT, H., *Sobre la violencia*, cit., p. 62.

[9] ARENDT, H., *Sobre la violencia*, cit., p. 69.

now recognize as law could exist"[10].

Respect for the law is, therefore, respect for the idea of the rule, is respect for the idea that group organization by means of the establishment of models of behavior is preferable to recourse to isolated or capricious decisions, or to decisions based on chance. We lawyers know well the advantages of rules[11]. The first of these is fairness. The existence of general rules is related to their impersonal character. Rules regulate situations, abstractions made from individual elements that coincide in them. The generality of rules allows for the depersonalization of those situations which rules are meant to regulate. A system for taking decisions based on rules allows decisions to be taken on what an individual does rather than in who that individual is. Rules constitute an obstacle to particularization. Secondly, they generate confidence because as system that orders conduct on the basis of rules allows subjects to know what sort of behavior is expected of them as well as the likely consequences of their failing to behave in the way expected of them. Confidence, therefore, is the result of certainty and predictability. Thirdly, norms encourage efficiency. The existence of a system for taking decisions based on rules frees individuals from having themselves to consider each and every one of the factors that ought to be taken account of in the taking of any decision. Fourthly, it has to be remembered that the existence of a system for taking decisions based on rules produces stability, both for those subjects that produce them and those that follow them. In the case of the former, the production of a rule within the framework of rules will itself be an activity guided by rules while in the case of the latter the rules will produce an environment in which it is possible to act and to plan behavior.

The existence of a system of rules contributes to determining the success of collective actions. We may here recall the example produced by Carlos Nino referring to his native Argentina. Nino demonstrated how long periods of massive illegality in the political, social and legal history of Argentina produced much inefficiency, a conclusion which once more highlights the importance of the obeying of rules for the achievement of collective goals. In Nino's view, there is a close relationship between the observance of legal and social rules and the development of a society. This is

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[10] HART, H. L. A., *The concept of law*, sec. ediction, Oxford University Press, 1994, p. 124.

[11] See SCHAUER, F., *Playing by the rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford, 1991, p. 135.

because the phenomenon of massive illegality, which combines conduct contrary to the norms and also a specific attitude to them, namely ignorance or contempt regarding the aims they seek to achieve, produces underdevelopment and inefficiency. Nino thus defends the thesis that "the existence of *certain* norms is, in general, a *necessary* condition for the development of efficient collective actions"[12]. Nino explains that the cause of Argentina's underdevelopment can be understood in terms of anomie in general and illegality in particular, that is the failure to comply with moral, legal and social norms. Illegality can be of various sorts. In the first place we may refer to individual deviations. Secondly, we may consider cases of social conflict in which a particular group refuses to recognize the legitimacy of the norm-giving authority. Nino's third category is one which he refers to as "silly" (*boba*), by this he means social situations in which subjects suffer a negative impact from the illegality. In Nino's opinion this kind of "silly" anomie produces inefficiency. The relationship between anomie and inefficiency is produced when norms necessary to achieve individual or social goals are not complied with.

The consequences of anomie cannot be solely reduced to difficulties in social cooperation or with regard to the efficiency of collective actions. As Dahrendorf has reminded us, anomie understood as a situation whereby norms are violated with impunity generates uncertainty and insecurity. "People no longer know if their neighbor is going to kill them or give them their horse. Norms seem no longer to exist or if they are invoked they seem powerless. All sanctions appear to have faded away. This points towards a disappearance of power, or in more technically accurate terms, the transformation of authority into naked and arbitrary power. It is unlikely that anyone would want to live in such a state. It's probable that people wouldn't survive in it for very long"[13].

The world of law is the world of the rule, the criterion for behavior, of predictability and certainty. It is not the world of traumatic alteration of reality, of the whim, the unexpected and the arbitrary, elements better associated with the idea of violence.

Nonetheless, we cannot disassociate the law from the reality of power. At the end of the day norms, understood as imperatives, are expressions of a will. Seen like

[12] NINO, C. S., *Un país al margen de la ley. Estudio de la anomia como componente del subdesarrollo argentino*, Emecé, Buenos Aires, 1992, p. 176.

[13] DAHRENDORF, R., *Ley y orden*, trad. de L. M. Díez-Picazo, Cívitas, Madrid, 1994, p. 44.

this law is, therefore, an instrument of power, through which it may exercise its will, including by the use of violence. What distinguishes violence exercised within the framework of the law from violence exercised extra-judicially is that it is always subject to a limiting element deriving from the very action of the system of norms itself. Here we find the basic difference between the law and arbitrariness.

3.-Violence and Rights

If we focus our attention on the legal systems of constitutionalism we can see new aspects of the relationship between violence and rights. In the framework of a reflection on how the discourse of human rights operates in a democratic, constitutional system it is possible to look at the question of the contradiction between violence and the sense of human rights, the values that underlie them and the organization of a democratic system based on them

We know that violence implies a failure to recognize the value of law as it involves the use of force to deal with events and not a form of action supported and justified by rules. But now it also means a failure to recognize the value of the rights and criteria basic to democracy.

The question of the exercise of power in the framework of a democratic political system can be seen as a human rights problem and the relationship between a democratic system and human rights can be examined. Without going too deeply into the matter for the moment, this relationship can be examined from two perspectives. First, we can refer to the *perspective of limits:* the democratic system is the only scenario in which it is possible to speak of human rights since the democratic power is the only one able to place limits on itself with regards the protection and guarantee of rights and to commit itself to the moral scheme expressed in these rights. Secondly, we have the *perspective of participation*: human rights are constitutive elements of the democratic system (through participation rights)

The tension between violence and human rights, which at the end of the day is also the tension between violence and democracy can also be analyzed from diferent perspectives. First, let us recall that human rights suppose a vindication of the individual. The discourse according to which the subject has value for his or her own sake, regardless of his or her religion, ideology, nationality, profession or political affiliation can be analyzed throughout the historical development of these rights. The

vindication of the rights of the individual arises from a consideration of the interrelated set of values of dignity, liberty and equality. Violence amounts to a refusal to recognize the value of the subject, with the individual being used instrumentally and not as an end in his or herself. The individual's destruction or the violation of his or her integrity is justified as a means to achieve ends which exceed in him or her in value and merit greater consideration.

Secondly, violence supposes ignorance of the value of the rules and procedures of democracy. Democracy is a system for the adoption of collective decisions, while respecting rights, by a way of a procedure. This means that one has to submit oneself to certain rules of the game, the rules of the game of democracy. This, possibly, is one of the few limitations placed by democracy on those who wish to participate in it and defend their ideas. These limits may be formal or procedural. Respect for the rules of the game has a lot to do with respect for the law (the rule of law). It is also possible to speak of material limitations (rights). It is here that we find the value of a public ethic as a minimum common ethic essential for all societies in that it brings with it a tendency towards that society's survival and a platform for the development of individual preferences.

Thirdly, violence supposes a rejection of the value of reason in the deliberation on and resolution of social problems. The procedures and rules of the game of democracy are the mechanisms by which debate is produced in democracy. Democracy is a system for the taking of collective decisions through, in the last analysis, resort to the principle of majority rule. However, majority rule functions in the last instance, when a decision has to be taken, before that there comes discussion and deliberation with the to and fro of arguments and reasons. In a democratic context in which all have the opportunity to participate in the debate in conditions of real equality it is those positions which have the best arguments and reasons and which are best defended that emerge victorious. In democracy some methods for defending positions are prohibited, methods which tend to lead to violence. For this reason violence is a negation of discussion and deliberation. It is characterized by a lack of confidence in debate. The strategy used to impose one's will on the political scene is that of aggression and fear. Violence is used by the violent to impose themselves on all who do not share their positions or submit to their will. It bases itself on an enemy-friend friend dichotomy. The violent lack the capacity to put themselves in the position of the other, an ability which forms part of democratic morality. They, therefore, lack a

logic compatible with the democratic system

4.-Constitutionalism and the Expansion of the Concept of Institutional Violence.

Constitutionalism and its legal-political model, the constitutional State, present themselves to us as strategies for the limitation of power. The constitutional State is an advanced model of the rule of law and it is characterized by a deepening and growth in complexity of the mechanisms for the vigilance and control of power. The existence of mechanisms to ensure the constitutionality of laws is good evidence of this. Behind these mechanisms there lies the idea that the guaranteeing of rights and liberties involves the placing of legal limits on power. Thus, constitutionalism rests on a pessimism about the power, which by definition is seen as dangerous, and an optimism about the law, able to control, rationalize and limit the exercise of political power[14]. The limitation on power exercised by the law is aimed at limiting the violence that power can exercise. Ferrajoli has stated that in a democratic State "There should not exist more violence than that which is absolutely necessary for controlling other forms of violence, evidently illegal, of greater gravity and more humiliating, or to put it another way, the violence of legal punishments - legally speaking - is only legitimate in so far as it prevents the greater violence that would be produced by the commission of those crimes its existence prevents."[15] As is well known Ferrajoli's proposal is for a minimal criminal law, set out in such a way as to reduce the exercise of legal violence. It can be summarized thus, "minimization of violence and arbitrariness both of the offenses classified as crimes and the excessive and informal reactions that would be produced in its absence"[16]. The violence of the criminal law must prevent the greater violence that would be produced in the absence of its punishment. This amounts to a duty of the State, "a criteria of legitimacy or justification for legal violence but also, and fundamentally, a criteria for the delegitimation of superfluous legal violence, both that produced by the criminal law and other sorts"[17].

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[14] See ZOLO, D., "*Teoria e critica dello Stato di diritto*", VVAA., *Lo Stato di diritto. Storia, teoria, critica*, (P. Costa, D. Zolo, eds.), Feltrinelli, Milano, 2002, pp. 35-37.
[15] FERRAJOLI, L., "*La legalidad violenta*", in ID., *Democracia y garantismo*, ed. de M. Carbonell, Trotta, Madrid, 2008, p. 175.

[16] FERRAJOLI, L., *Principia Iuris. Teoría del diritto e della democracia. (2. Teoría de la democracia)*, Laterza, Bari, 2007, p. 358.

[17] FERRAJOLI, L., ""*La legalidad violenta*"cit., p. 175.

Ferrajoli here alludes to two models of legality: that of strict legality and mere legality. The model of strict legality "… is articulated through a legislative technique suitable for disciplining institutional violence as firmly as possible and in general, the exercise of its coercive powers through the normative determination of its presuppositions." According to this model, "The sole and only legitimate forms of violence are those clearly authorized as legal sanctions against criminal forms of behavior that are themselves legally determined and classified as such"[18]. The mere legality model, on the other hand is that which "…consists of the legal authorization of violence without a firm relationship to the law itself"[19]. These are two models of the relationship between the law and violence which are differently articulated. In the case of the strict legality model, the law serves to limit institutional violence while in the case of the mere legality model, the law legitimates the use of violence. It seems evident, therefore, that the debate on institutional violence had better focus on this latter model.

In fact, it is a model which should be rejected from the perspective of the constitutional State, which supposes a model of the rights based State. Stating this not only means that rights are recognized and guaranteed by the constitution (the Constitution of constitutionalism is the Constitution of rights) but also that the guaranteeing of rights is the reason for the existence of the legal and political framework . It is here that the law and political organization show themselves to be instrumental and artificial in relation to rights. Rights are the essential configuring element of the constitutional State and its law.

I believe that the forgoing observation may have direct consequences for the identification of institutional violence in the constitutional State. And it is, in fact, the case that rights are a conceptual element of the constitutional State. They constitute a normative factor with procedural and substantive consequences that characterize the workings of the legal-political system from the ordinary functioning of the institutions to the reasoning and argumentation offered by the actors in the legal system. For this reason we may affirm that rights constitute structural elements of the constitutional State, they define what we might describe as "the situation of normality" of the constitutional State. Any harm done to rights, however trivial it may appear, amounts

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[18] FERRAJOLI, L., "*La legalidad violenta*"cit., p. 176.

[19] FERRAJOLI, L., "*La legalidad violenta*"cit. p. 177

to a grave injury to the sense of the system and an alteration of its essence. Violations of rights are not, therefore, comparable to violations of other sorts of norms. While the latter are predictable, though not desirable, violations of rights are of a graver nature in the constitutional State as they involve an attack on its very founding reasons.

We might here return to the previous analysis concerning the nature of violence in which it was mentioned that the idea of violence implies a traumatic alteration of that which we might describe as the situation of normality. We can now see that it is rights that define what we may call the situation of normality in the constitutional State. "The normal run of things" in a constitutional State implies a situation in which rights are effectively recognized and protected and in which all the institutional machinery directs its efforts to maintaining that situation. If this is the case then the refusal to recognize rights may be considered to be violence and if it is institutions of the State that do so then we may speak of institutional violence.

We are presented, therefore, with a situation which we can characterize on the basis of two features. Firstly, we are seeing a broadening of the idea of institutional violence. The violation of rights does not only imply recourse to physical force, and violence may on many occasions involve an element which allows us to identify, or at least suspect, the violation of a right. Furthermore, the violation of rights by the State is not only carried out by means of physical violence, it may also be carried out by other means. Robert Alexy has indicated that in the case of the right to a legal defense, which implies negative actions by the State, the State can impede, prevent or make sure that an action is legally impossible and in both cases through normative decisions without resorting to physical force[20]. This fact invites us to think beyond certain institutions (the armed forces and the police) when we think about institutional violence. Secondly, and as a consequence of the previous point, the possibility of exercising institutional violence against rights can be seen to spread across other organs and institutions of the state, whose decisions affect rights on an ordinary and daily basis. The legislative and judicial branches of government have no competence for the exercise of physical force (though they may order it to be exercised) but they may take decisions which lead to a violation of rights and thus an attack on the basic structures of the constitutional system.

We are, therefore, presented with a situation, that of the constitutional State,

[20] See ALEXY, R., *Teoría de los derechos fundamentales*, trad. de E. Garzón Valdés, Centro de Estudios Constitucionales, Madrid, 1993, pp. 189-191.

which demands greater sensitivity to rights. This greater sensitivity expresses itself through a progressive expansion and growth in complexity of the mechanisms for the protection of rights. However, it is also expressed thorough an expansion of what are considered to be attacks on rights and the situations in which these may occur. Arising from the central and defining role occupied by rights in constitutional States, attacks on rights involve an alteration at the heart of the system, and which is traumatic from three points of view: legally we are faced with violations of norms, politically we are faced with behaviors incompatible with the requirements of democracy and morally we are faced with a refusal to recognize the values which define the moral project of rights. The spread of what can be understood as institutional violence in the constitutional State is, at the end of the day, a consequence of the demands and commitments deriving from the place occupied by rights inside it. It also amounts to a warning for those powers and institutions which, in the exercise of their faculties may affect rights and liberties, a warning for the legislator who in the development of the Constitution and in the taking of normative decisions may damage the system of rights to such a degree as to make it unrecognizable and a warning to the judge who, despite his or her central role in the constitutional State as a guarantor of rights, may, by his decisions, damage the right to a fair trial and a just verdict. In all of these cases we would be faced with institutional violence against rights, something incompatible with the demands of the constitutional State.