CHAPTER VII

THE "CERTAINTY" THAT POWER GIVES

1. Certainty

IN CHORUS with KARL POPPER[1], let us say clearly from the start that science eschews worshipping "the idol of certainty," because the worship of this idol represses courage and puts in danger the rigor and integrity of our assertions. The wrong opinion of science is to pretend that it is right: what makes a man of science is not his possessing *knowledge* of irrefutable truth, but rather his *inquiring* persistently and critically into what that truth [reality] is.

POPPER also asserts - and we agree - that science never follows the illusory goal that its answers are definite, or even probable. On the contrary, science follows the goal of incessantly discovering new deeper and more general problems, and, at the same time, aims to keep the answers to these problems as nothing more than provisional contrasts that are constantly updated and become more and more rigorous over time. All this, because in the logic of science, it is possible to avoid the use of the concept of "true" and "false": It is not necessary to say that a theory is false, but only that a certain set of accepted basic statements contradicts it. Necessarily, then, the corroboration of a "false" theory cannot be a "truth," *per se*.

VIDAL PERDOMO puts this theory into a living framework when he suggests that such a difficult search sometimes discourages the spirits of those who are prepared for specific and fixed things; however, it stimulates

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[1] POPPER, KARL, *Unended Quest*, Open Court, 1976; *The Open Universe. An Argument for Indeterminism*, London, Routledge, 1991; *Popper Selections*, texts selected by MILLER DAVID, Princeton University Press, New Jersey, Princeton, 1985, p. 97, etc.

those who like new things constantly and those who love intellectual adventure[2].

2. At Power's Service

The lack of methodology and the acceptance of uncertainty - which are the only rules of any science - may, in turn, lead us to count on another false certainty, that is, justifying power at all costs. Invoking the "authority" of purely contrived affirmations for such purposes can have two effects. On one hand, it may lead us to rely on the theories of comparative law that those in power are disposed to at a particular moment, or those theories from a previous period, such as the "institutional act" of the Brazilian dictatorships, the "administration reserve" of De Gaulle's Constitution, etc. On the other hand, contrivances can lead us to look to national authors who best speak about power for guidance, that is, those ideologists of limitless administrative power. Fortunately, many of them, if not most, write in good faith.

3. The Certainty in Power of the Moment

The arguments of such authors, while being dogmatic and wrong, are not casual or innocent (even when made in good faith). In reality, they aliment the reader with a *certainty that does not exist in science*, which is *serving power at a particular moment in time*, and, if we are speaking about judges, with pieces of advice given by a MACHIAVELLI in modern clothes.

By giving the reader "certainty," the arguments have been received with uncontrollable success, even though they defy reason; *or perhaps it is precisely because they defy reason that they have been successful*. Even when faced with the fact that a State body in charge of spending State resources is unconstitutional without congressional approval, authors sustain that independent administrative agencies can be created by executive order, even though that clearly disrupts the Constitution's balance of power. Using this as a starting point, those in power wind up asserting that they possess that very authority argued by legal writers. Although nobody can find that authority in the Constitution, this "academic" power winds up winning.

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[2] VIDAL PERDOMO, JAIME, *Derecho administrativo*, Santa Fe de Bogotá, Temis, 10th ed., p. 8.

The search for the unconditional, for eternal truths and certainties in the defense of the power at the moment are the grounds for this illusory power, which are the same grounds that COMTE, "the sociologist of prehistory," uses in his search for eternal and unchanging laws. This is the exact opposite of POPPER's philosophy, in that the eternal and unchanging rules of COMTE became reality in the rules of action and reaction. These rules were, in turn, well received by local legal writers and, because of this acceptance, spread.

What is really impressive, if not pathetic, is the success that these authoritarian conceptions have had in our country. Despite the fact that the Constitution changes, that international order changes, and that subjecting a country to international human rights treaties changes, these concepts (or rather, their authors) are still quoting the same old sources or reading the present rules with the parameters used in the past.

4. The Law at Power's Service

When we reach the point where we can say that executive orders may replace the law, we have concocted something that does not exist in the Argentine Constitution and have breached its Articles 36, 42, 43, 75 subsection 22, 76, 99 subsection 3. What is more, that does not comply with human rights pacts and international treaties, and challenges the supranational organs that apply them.

Justice JACKSON pointed out the dilemma such a situation poses, because if usurping the law is supposed to be the result of "law" and "doctrine," we do not need to have a legal system or tribunals. However, administrative law is a constitutional and political right, and it is a struggle against power - any power - for the defense of individual rights and freedoms. Thus, if we were to pass all laws in favor of the administration, always legitimizing its power, we would not be making law, but rather undoing it[3].

Indeed, if we go back eight centuries in history to the time of the Magna Carta of 1215, we find LORD BRACTON's statement reading that document to say that "*The King is under no man, but under God and the law*" *(Quod*

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[3] BONNARD, ROGER, *Le droit et l'Etat dans la doctrine nationale-socialiste*, Paris, V 1939, 2nd ed.; a more recent example, is China of the *fin de siècle*, as explained in CORNE, PETER HOWARD, *Foreign Investment in China. The Administrative Legal System*, Hong Kong, Hong Kong UP, 1996, everything is *guanxi*, relationships.

Rex non debet esse sub homine, sed sub Deo et Lege)[4]. Thanks to this declaration, statements made by King JAMES I (and later CHARLES I) that it was treasonous to think that the King was under the law did not survive. In fact, Charles I did not survive, and was eventually sentenced to death[5], regardless of the fact that, during his trial, he maintained that the court did not have the competence to try him.

5. The Emotional, Political and Axiological Use of Language

Due to the foregoing, administrative law is full of dangerous emotive and political uses of language in its expressions, such as "police power"[6], "government acts," "regulation authority," "decree," etc. As GENARO CARRIÓ said regarding the idea of original constituent power, everything actually starts from the ambiguous character of the word "power" and its composite use: Sometimes this word means "authority" (competence, faculty, capacity, jurisdiction, authorization, etc.) and other times it means "force" (power, control, domination, etc.). From there, it takes just one more step to assert that the subject or agency in question has such authority, simply because it has the force[7]. CARRIÓ continues to state that, in order to explain the reasons behind these assertions, we would have to uncover an answer of general scope[8]; CARRIÓ himself suggests that such an answer may deal with an irrepressible tendency of mind to search for the unconditional[9]. This idea is appreciated in the concepts of public and

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[4] See LORD DENNING, *What Next in the Law*, London, Butterwoths, 1989, p. 6.

[5] LORD DENNING, *op. loc. cit.*

[6] We censured this language in La crisis de la noción de poder de policía, *Revista Argentina de Ciencia Política*, 1962, nº 2; reproduced in our book *Estudios de derecho administrativo*, Buenos Aires, Perrot, 1963, and subsequent publications; at present in our *Tratado de derecho administrativo*, vol. 2, Buenos Aires, FDA, 2000, chapter V. RASPI, ARTURO EMILIO, La publicidad de los documentos de la administración y el resguardo de la privacidad individual, *ED*, 187: 900, 907. When somebody invokes police power, he is not discussing an academic question but he is looking for unconditional power.

[7] CARRIÓ, GENARO, S*obre los límites del lenguaje normativo*, Buenos Aires, Astrea, 1973, pp. 50-51.

[8] CARRIÓ mentions "similar linguistic outrages carried out by theorists of law", *op. ult. cit.*, p. 56. The similarity with JHERING-SAVIGNY is evident.

[9] *Op. ult. cit.*, p. 57. Let our admiration for the author be an excuse for repeating the same brilliant expression with few lines of difference. And let us hope the reader remembers it.

private law - indeed, the controversy between SAVIGNY and VON JHERING is still alive today[10].

6. "Laws" that are Not Laws

Likewise, it is appropriate to correct the bad habit of the old Argentine authoritarian *de facto* governments in calling decree-laws, "laws,"[11] as was the case between 1966-1973 and 1976-1983. Once democracy was restored and the theory of the *de facto* government was condemned by Article 36 of the Argentine Constitution, it became neither legally nor politically acceptable to continue to refer to everything as "laws." Despite these efforts, Argentina is still far from having an administrative law that is constitutional, liberal and democratic, because the idea of force and limitless authority still permeates its linguistic and conceptual layers.

Although the international bodies that apply treaties compromise with Argentina regarding this shortcoming, they still remind us of it - yet we continue to ignore it. The Inter-American Court of Human Rights has said "for this reason, the protection of human rights requires that State acts that fundamentally affect human rights not be left to the free will of the government, but rather must be surrounded by a set of unbending guaranties to assure that the inviolable qualities of a person are not hurt. Amongst those guaranties, the most relevant is perhaps that *limitations are established by laws adopted by the Legislative Power, pursuant to what is set forth in the Constitution.*"[12] In this same vein, the Inter-American Commission of Hu-

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[10] See the case *Allevato*, in *Después de la reforma del Estado*, Buenos Aires, FDA, 1996, 1st ed., chapter X.

[11] *Derecho administrativo de la economía*, Buenos Aires, Macchi, 1967, pp. 447-448; Análisis crítico de la ley de desarrollo, *Revista de Legislación Argentina*, 2: 88, Buenos Aires, 1966.

[12] Paragraph 22 of the OC 6/96, in ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *Informe anual de la Comisión Interamericana de Derechos Humanos*, 1996, Washington, DC, 1997, p. 65 (emphasis added). The consulting opinions of the Inter-American Court of Human Rights are mandatory in internal law, as the Supreme Court of Justice of the Argentine Republic decided in *Giroldi* of 1995. We have explained in our note La obligatoria aplicación interna de los fallos y opiniones consultivas supranacionales, *in*: *RAP*, 215: 151, Buenos Aires, 1966. The criterion has been repeated in *Bramajo*, *DJ*, 1996-196, 8th ground and in *Arce*, *LL*, 1997-F, 696 with our note Los derechos humanos no son para, sino contra el Estado reproduced in *Cien notas de Agustín*, Buenos Aires, FDA, 1999, p. 165, § 76, "Los derechos humanos no son para, sino contra el Estado."

man Rights pronounced that "therefore, any action affecting basic rights must be prescribed by means of a law passed by the Legislative Power and must be consistent with the internal legal order."[13]

The Inter-American Court of Human Rights defines law as "the general legal rule, restricted to the public welfare, *derived from the legislative organs constitutionally set forth and democratically chosen and which is elaborated pursuant to the procedure established by the constitutions of the party States for the formation of laws.*"[14] "The principle of lawfulness, the democratic institutions and the state of law are inseparable"[15]; it is only the elected legislature that has legislative legal authority[16].

[13] *Op. ult. cit.*, paragraph 62, p. 65; what is outstanding is ours. See the clarification of the previous note.

[14] Consulting Opinion n° 6, paragraphs 23 and 32.

[15] Consulting Opinion n° 8, paragraph 24.

[16] Consulting Opinion n° 8, paragraphs 22 and 23; all that repeated in the concurrent vote of the Argentine representative before the ICHR, FAPPIANO, OSCAR LUJÁN, case 10.843, *Chile*, 15 October, 1996, Report n° 36/96, paragraph 31, p. 197 of the Report in 1996 of the INTER-AMERICAN COMMISSION OF HUMAN RIGHTS: the principle of the good faith obliges us to comply internally with what we sustain at international fora; the international treaties that we subscribe to are, of course, directly and immediately applicable within our borders.