Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions

Alejandro M. Garro
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I. INTRODUCTION

The Argentine Constitution created a government that closely resembles the United States' constitutional blueprint, with three branches of government that are meant to check and balance each other. Originally drafted in 1853, much of the Constitution of Argentina was simply a Spanish language translation of the United States Constitution.¹ This blueprint for a federal and republican government is still followed today, with some changes adopted in 1860, 1866, and 1898. Since then, aside from the “institutional” reforms brought about by military governments, there have been two significant amendments to the Constitution. The first, in 1957, created large welfare rights and classical legal rights.² The other, more recent reform, adopted by a constituent assembly in 1994, further increased civil and welfare rights, vesting with constitutional rank some international treaties and creating governmental bodies designed to promote integrity and balance in government.³

II. THE BASIC TENETS OF JUDICIAL REVIEW IN ARGENTINA

The jurisdiction of every court to pass judgment on the constitutionality of congressional statues and executive action is not ex-

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2. Interview with Guido Pincione, Professor of Law, Universidad Torcuato Di Tella, in Buenos Aires, Argentina (Mar. 13, 2006).

3. Id. See Nestor Pedro Sagues, An Introduction and Commentary to the Reform of the Argentine National Constitution, 28 U. MIAMI INTER-AM. L. REV. 41 (1996), for a general discussion on the political background and effects of the constitutional amendments of 1994. In particular, the amendments created branches within the executive and judicial branch. One of those creations, the Magistrate Council, is a topic of analysis later in this paper. See infra Part VIII.
licitly granted by the Argentine Constitution. However, the Supreme Court of Argentina took this power for granted in 1863, only one year after its creation, and asserted its authority to declare the unconstitutionality of legislation which it found repugnant to the Constitution. But, it was not until 1888 that the Supreme Court declared, for the first time, the unconstitutionality of a statute enacted by Congress.

The scope of constitutional jurisdiction, standing requirements, and the effects of declarations of unconstitutionality were gradually built upon a series of judicial decisions revolving around Article 116 of the Constitution (former Article 101), pursuant to which the federal courts ("[T]he Supreme Court and the lower courts of the Nation . . .") have jurisdiction "to hear and decide all cases arising under the Constitution and the laws of the Nation . . ."). Thus, in one of its earlier pronouncements, the Court held that its power of judicial review was limited to actual "cases or controversies," to the exclusion of abstract or moot issues posing constitutional questions. This means that constitutional jurisdiction is triggered only when the Court is presented with a genuine controversy between parties with opposing interests claiming actual relief.

Although the position of the Supreme Court has not always been consistent, in principle, the courts are not empowered to decide constitutional questions on their own motion, or sua sponte, but the statute or act must be challenged by a party whose interests have been genuinely affected by such statute or act. Accordingly, an employer compelled by law to withhold a percentage of his employee’s wages for union dues has been held not to be entitled to challenge the constitutionality of such law because the assets in question were not the employer’s, but rather, were the employee’s assets.

4. Fiscal v. Calvete, CSJN, 17 Oct. 1864, 1 Fallos 340, 348 ("This tribunal is the final interpreter of the Constitution, so that whenever the meaning of one of its clauses has been questioned and the decision of a lower court is contrary to the constitutional right asserted thereon, the decision is subject [to review].").
7. 260 Fallos 114, 245 Fallos 552.
8. 190 Fallos 142, 249 Fallos 51.
9. 255 Fallos 129.
Regarding the effects of a declaration of unconstitutionality, the Supreme Court has insisted that such a finding is limited to the case and parties before the Court.\textsuperscript{10}

Judicial restraint to declare a statute unconstitutional has been expressed as the "ultima ratio," meaning that such power of judicial review must be exercised with great prudence\textsuperscript{11} and only when absolutely necessary to promote justice.\textsuperscript{12}

III. SOME BACKGROUND INFORMATION ON THE ARGENTINE JUDICIAL STRUCTURE

Even with the recent constitutional amendments, the general structure of the Argentine Federal Judiciary remains constant. Justice is administered by provincial courts in each of the twenty-three provinces, with a three-tier structure headed by a provincial Supreme Court. The Supreme Court retains the final word on the interpretation of ordinary (i.e., non-federal) law, which includes the law embodied in the civil, commercial, criminal, labor and other codes of laws. The City of Buenos Aires, which is the federal capital of Argentina, provides for its own system of administration of justice. Many courts with jurisdiction within the City of Buenos Aires are still called "federal courts," in the sense that they exercise jurisdiction over the Federal Capital, i.e., over territory of the nation, yet these courts are still courts of "ordinary" (meaning non-federal) jurisdiction.

The federal courts are also organized in a three-tier structure, with a nine-member Supreme Court at the top (Corte Suprema de Justicia de la Nación or "CSJN"), approximately a dozen federal circuit courts of appeals (Cámaras Federales de Apelación) sitting in panels of three judges, and single federal district courts (juzgados federales de sección) scattered among the major cities of the provinces.

In a few provinces, the federal courts are courts of "general jurisdiction," in the sense that they deal with all kinds of matters falling under federal jurisdiction. However, keeping a hallmark of the court structure in civil law countries, most courts in Argentina are broken into jurisdictional branches or "fueros," each exercising its own subject matter such as civil, commercial, labor, criminal, and administrative matters (including customs and tax cases). At

\begin{flushleft}
\textsuperscript{10} 183 Fallos 76.
\textsuperscript{11} 294 Fallos 383, 300 Fallos 1087.
\textsuperscript{12} 242 Fallos 73.
\end{flushleft}
times, there are subdivisions within each fuero, such as juvenile\textsuperscript{13} and correctional courts,\textsuperscript{14} and economic-finance criminal courts.\textsuperscript{15}

IV. THE ADMINISTRATION OF DAY-TO-DAY JUSTICE IN ARGENTINA: SLOW AND CORRUPT

The administration of justice in Argentina has been facing significant challenges for quite some time. From the beginning to the end of the chain of appeals, an average lawsuit may take between four and five years to reach a final decision. It is not uncommon for attorneys and judges to become mired in mountains of paperwork. In most courts, filing is still done by hand, with very little information technology at the court's disposal. The most typical and average case may involve sifting through thousands of pages of a thick file known as "expediente." The courts are closed forty-five days a year for holidays, which only adds to the protracted pace of the litigation.

Federal district courts sitting in the City of Buenos Aires, where most cases involving government officials are concentrated, are slow to act on cases of government corruption, thus contributing to a perception that the courts are both a cause and effect of institutional corruption. A judicial process that is widely perceived as both slow and corrupt is one of the main reasons why efforts have been made to encourage the adoption of alternative dispute resolution mechanisms such as mediation and arbitration.\textsuperscript{16} Beginning in the mid 1990s, a federal statute calls for a mandatory cooling-off period of mediation before a case may proceed to trial, except for criminal, bankruptcy, labor and any disputes in which the government is involved. This reform has generally been met with mixed results.

V. EXECUTIVE DOMINANCE AS A THREAT TO JUDICIAL INDEPENDENCE

The 1994 amendments to the Constitution of Argentina provided for the explicit recognition of legislative powers in the execu-

\begin{itemize}
\item \textsuperscript{13} This subdivision hears cases in which the offender is younger than eighteen years old.
\item \textsuperscript{14} This subdivision hears cases in which the alleged criminal offense carries a penalty of less than three years imprisonment.
\item \textsuperscript{15} This subdivision hears cases dealing with financial accounting and other types of white-collar criminal offenses.
\end{itemize}
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tive branch, though only in emergency situations and under some kind of regulatory control. Under this scheme, the President may exercise legislative power through the adoption of *decretos de necesidad y urgencia* ("DNU" or "Executive Orders on Grounds of Necessity and Urgency"). A DNU need not be approved by Congress to take effect and may override congressional statutes. The constitutional provision introduced in 1994 also provides that DNUs must be submitted within ten days to a bicameral congressional committee, whose responsibility is to issue a recommendation to Congress to either override or accept the DNU. However, this parliamentary commission was never created, so to this date there is very little congressional oversight with regard to presidential DNUs. DNUs have been abused by all administrations since the time of their adoption, the administration having succeeded to curtail this presidential prerogative that is responsible for much of the destabilization among branches of government that are meant to be co-equal. Some constitutional scholars argue that DNUs are immune from judicial review; yet the weight of authority is that the Supreme Court retains the power to review at least that the necessity and urgency requirements have been met.

VI. JUDICIAL INDEPENDENCE UNDER MILITARY AND CONSTITUTIONAL RULE

Argentina's government and constitutional structure must be considered against the backdrop of the nation's troubled recent history. Most significantly, Argentina endured a military dictatorship from 1976 until 1983. Although the military no longer poses a constant threat of a coup d'état, the executive branch has retained considerably more power than either the Legislature or Judiciary, even during the recent years of constitutional rule. The early years of the Alfonsin Administration (1983-1989) were quite respectful of judicial independence, while proving incapable of managing a seemingly unstoppable social and economic decline. Yet, during the presidency of Carlos Menem, who led Argentina from 1989 through 1999, judicial independence and the public's perception of the Judiciary suffered a blow from which it has yet to recover.

As with previous presidential regimes, Menem's arrival brought about a significant overhaul in the composition of the Judiciary. President Menem inherited a Supreme Court comprised of five members appointed by a previous administration, with the opportunity to fill one vacancy due to the resignation of one justice.
Rather than assume the challenge to govern with an independent Court, President Menem promoted an increase in the composition of the Court, appointing five additional justices so as to reach the current body of nine members. The appointments, generally, were not well-screened. Senatorial hearings took place immediately after the nominations, without the allowance of any input by the public or interested parties. Thus, a period followed during which the Court, under Chief Justice Rodolfo Barra, a crony of President Menem, ruled on divisive issues as varied as homosexuality, the rights of criminal defendants, and the right to property, invariably siding with the position of the Catholic Church, the views of the political party in office, or the government. These decisions were widely perceived as if an "automatic majority" of justices would readily trump the applicable law and the facts of the cases for the expediency of validating government policies or ideology.

VII. MORE RECENT DEVELOPMENTS PERTAINING TO JUDICIAL INDEPENDENCE IN ARGENTINA: THE APPOINTMENT PROCESS FOR JUSTICES OF THE SUPREME COURT

The Argentine Judiciary has also been in a state of flux, even during the last two decades or so of constitutional rule. Shortly after taking office, President Kirchner sought the impeachment or resignation of a majority of Menem's appointees. Although the impeachment process itself left much to be desired in terms of fairness, few were willing to raise their voices on behalf of judges who had fallen in disrepute. Recognizing that independence problems stem, in part, from a lack of transparency in the nomination, confirmation, and appointment process, non-government organizations (NGOs) in Argentina came forward with a proposal for the President to self-limit his powers. Rather than send the nominee's name to the Senate for an immediate vote, as has traditionally been the case, the suggestion of the NGOs was that the President should make the nominee public and allow a thirty-day public comment period. Accordingly, while retaining his power to nominate whomever he chooses, the President would suffer political costs if the nominee is under qualified or unpopular. Also, pursuant to the proposal, instead of using a secret procedure and voting immediately, the Senate was required to wait an additional

period of thirty days, during which the nominees would be subject
to public questioning by civil society and the public at large. President Kirchner adopted these proposals in a presidential de-
cree, and his four nominations were in conformity with this proce-
dure.

The four justices nominated by President Kirchner, punctually
confirmed by the Senate, are generally well-respected jurists. Elena I. Highton de Nolasco came with judicial experience and a
background as a leader of the mediation reform movement; Car-
men Maria Argibay is a career judge who, quite unusually, upon
the President’s nomination, openly disclosed her feminist, pro-
choice, and atheist credo; Eugenio Raul Zaffaroni is a former ap-
peals court judge and criminal law scholar of the highest caliber,
though on the liberal, left side of the spectrum; and Ricardo Luis
Lorenzetti, the current Chief Justice, is a low-key but well-
respected scholar on contracts and a zealous advocate for con-
sumer rights.18

VIII. THE APPOINTMENT PROCESS OF FEDERAL JUDGES AT A
LOWER LEVEL

The creation of the Consejo de Magistratura (“Magistrate Coun-
cil” or “Council”) is one of the most significant constitutional
amendments brokered by Presidents Menem and Alfonsin in 1994.
The establishment of the Council was inspired by the need to
strengthen the independence of the Judiciary, insulating the ap-
pointment process from the overriding influence of the executive
branch. Among the most significant functions of the Council are
those related to appointment, discipline, and removal of lower fed-
eral judges. Thus, Article 114 of the Argentine Constitution reads:

The Magistrate Council . . . shall be in charge of the selection
of the judges and of the administration of the Judicial Branch.
The Council shall be periodically constituted so as to achieve
a balance among those representing political bodies popularly
elected, judges of all instances, and lawyers with federal reg-
istration. It shall likewise be composed in number and form
by other scholars and academics, as provided by law. The
Council shall:

18. More recently, and at the initiative of the executive branch, Congress decided to
reduce the composition of the Supreme Court from nine to seven justices.
1. Select the candidates to the lower courts through a public competitive process.

2. Issue proposals of three candidates for the appointment of the judges of the lower courts.

4. Apply disciplinary measures to judges.

5. Decide the opening of the proceedings for the removal of judges, order their suspension in office where appropriate, and issue the pertinent accusation.

6. Adopt regulations pertaining to the organization of the judiciary and others aimed at ensuring the independence of judges and the efficient administration of justice.\textsuperscript{19}

The implementation of this constitutional provision was left to Congress. It took more than four years for the statute to be adopted. As originally enacted, the implementing legislation provided for a twenty-member Magistrate Council headed by the Chief Justice of the Supreme Court and comprised of four judges, eight legislators, four lawyers, one representative of the executive branch, and two academics.\textsuperscript{20} With this cadre of twenty members, a multi-step and lengthy process was devised whereby the Magistrate Council would appoint and remove federal judges.\textsuperscript{21}

In essence, the Magistrate Council limits executive discretion in the appointment process by selecting nominees from which the President must select those to be confirmed by the Senate. Any qualified lawyer may apply to the Magistrate Council to be considered for a judicial post. The applicant must first submit a written


\textsuperscript{20} Law No. 24937, Dec. 20, 1997, [LV-III] A.D.L.A. 72. Of the eight legislators that are appointed to the council, four are senators and four are representatives from the two houses of the federal legislative branch. Members of the Magistrate Council are elected officials and serve a term of four years; they are eligible for reelection for a second term.

\textsuperscript{21} The Magistrate Council, in fact, has multiple responsibilities with regard to judicial administration in addition to appointment and removal, including budgeting and the creation of continuing judicial education, which are outlined in the law that implemented the Magistrate Council. \textit{See Consejo de Magistratura, Memoria Anual} (2004). This paper focuses primarily on the appointment and removal function because these aspects are most relevant in light of Argentina’s historical legal landscape and recent developments. \textit{See supra} Part II.
list of credentials, for which he or she is given a score up to 100 points. This initial screening is followed by an examination that includes writing an opinion to decide a hypothetical case, for which the candidate is also granted up to 100 points. A list of the three highest-ranking applicants is transmitted to the President, at which time there is an opportunity for public comment. Next, the President may decide to select any one of the three candidates for confirmation by the Senate, at which time there is another public comment session.

A Disciplinary Commission (Comisión de Disciplina) is in charge of investigating charges of misconduct brought against judges. If the Disciplinary Commission determines that there are grounds for censure, it may recommend action to the Council, which can then sanction the judge if two-thirds of its members vote in approval. The more serious sanction of removal calls for a two-step procedure involving two other branches of the Council. If the evidence gathered by the Disciplinary Commission warrants a motion for removal, such motion must be supported by a majority vote by the Council and is accompanied by a suspension of the judge in question. This responsibility falls within the jurisdiction of the Comisión de Acusación ("Accusation Commission"), which is in charge of setting up a nine-member Jurado de Enjuiciamiento ("Jury of Prosecution" or "Jury") — three lawyers, three elected officers, and three judges. After hearing the evidence gathered by the Accusation Commission, the Jury must decide within 180 days whether to remove the judge from office or reinstate him in office.

Many legal scholars and non-governmental organizations perceive the Magistrate Council as a positive step forward in creating a Judiciary that is less vulnerable to the influence of the executive branch. Indeed, the overall quality of judges has increased since

23. Law No. 24937, Dec. 20, 1997, [LV-III] A.D.L.A. 72. Article 115 institutes the Jury of Prosecution as the protocol by which lower federal court judges must be removed. Specifically, the clause states "the judges of the lower courts of the Nation shall be removed... by a special jury composed of legislators, judges, and lawyers with federal registration. The decision, which cannot be appealed, shall have no other effect than the removal of the accused." Const. Arg. div. III, ch. I, § 115.
the implementation of the Magistrate Council, whose removal procedure is, by design, carried out by a multi-leveled decision-making process, which prevents politically driven removal decisions. However, since the time of its creation more than twelve years ago, the Magistrate Council has been a lightning rod of both support and criticism from legal scholars, practitioners, organizations and politicians.26 For all its benefits, the Council is not without its shortcomings. One of the recurring criticisms has been the slow process under which candidates are selected, and the even slower process for removing judges — even if the end result has been positive. This is not surprising, because the Council is made up of twenty different decision-makers from varied backgrounds. Another criticism is that, due to the discretion granted to the President to ultimately select among the three supposedly qualified candidates, the final decision continues to rest on political connections.

On February 22, 2006, by a vote of 148 to 89, Congress passed a bill forcefully pushed forward by Senator Cristina Fernandez de Kirchner, President Kirchner’s wife, introducing controversial changes to the composition of the Magistrate Council whose implications are likely to play out in the years to come.27 The highly criticized bill was signed into law two days later by President Kirchner and is designed to take effect in mid-2007.28

Law 26.080 reduces the total number of Magistrate Council members from twenty to thirteen, reducing the number of members necessary to obtain a quorum while, most significantly, changing the proportional representation of elected officials.29 Prior to the passing of the new law, there were nine politicians on the twenty-member body, whereas now those elected officials — six legislators (four from the majority party) and one representative from the executive branch — hold a majority on the Council.30 Thus, politicians outnumber those with more institutional competence on judicial matters, namely the three judges, two lawyers,

26. See MARIA DAKOLIAS, ARGENTINA: LEGAL AND JUDICIAL SECTOR ASSESSMENT 29 (2001) (stating that 70 percent of Argentines believe that the government influences the decisions of judges).
30. Id.
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and one academic. Because the majority political party holds five seats (four legislators and one representative from the executive branch), and appointments and disciplinary sanctions call for a two-thirds vote, from now on the ruling party will be able to block decisions it does not agree with. As a result of this change in the proportion of elected officials in the Council, because a simple majority makes a quorum, the seven politicians would be able to conduct meetings without the presence of the other members of the Council.

In addition to changes regarding the composition of the Magistrate Council, the Disciplinary Commission and the Accusation Commission are now gathered into one branch of the Council comprised of seven members — four politicians, two lawyers and one judge. This means that disciplinary sanctions, including the removal of a judge, which only calls for a majority vote, may rest exclusively in the hands of the politicians. Under the new law, the Jury of Prosecution is comprised of seven members (four politicians, two judges, and one lawyer), allowing for the possibility to remove a judge on the basis of undue political considerations.

Those in favor of the reforms argue that reducing the membership of the Magistrate Council to thirteen will speed up the decision-making process. They also argue in favor of the democratic legitimacy of enhancing the voices of elected officials, who are voted into office and represent the people in the decision-making process involving the administration of justice. On the other hand, while conceding that the Council is not as efficient as desired, critics warn about the danger of increased political manipulation in the appointment and removal processes. According to Article 114 of the Argentine Constitution, the “Council shall be periodically constituted so as to achieve a balance among the representation . . . .” Arguably, the increased proportion of politicians in the Council would violate the constitutional mandate for balance in representation.

In sum, while the Magistrate Council constitutes a step forward in the enhancement of independence

34. Valente, supra note 32.
37. Id.
within the lower federal courts, this new law threatens to undo any positive effect by creating inroads for political manipulation.

IX. PERSPECTIVES ON JUDICIAL REVIEW IN ARGENTINA: SOME POSSIBLE IMPROVEMENTS

Frequent turnover in court membership and inconsistent jurisprudence has contributed to the image of a Supreme Court that automatically adheres to government views or prevailing public opinion, in contrast with the image of an effective protection of core values which may, at times, be at odds with current public sentiment.

The problem of a series of inconsistent and even contradictory lines of cases is exacerbated by the sheer number of cases the Supreme Court decides each year — an average of 14,000 cases per year. Part of the problem stems from the absence of the discretion to manage the Court’s own docket, which is currently limited to discretion to dismiss a writ without providing a reason, as opposed to discretion to take a case. Another contributing factor to the problem is the mounting caseload represented by the large number of cases which the Supreme Court decides to hear on grounds of “arbitrariness” (sentencia arbitraria), that is, the power of the Court to set aside lower court judgments whose reasoning is either nonexistent or so poor as to amount to a violation of due process.

Improving the style of judicial opinions may go a long way to enhance the institutional prestige of the Supreme Court. Dissenting opinions are many times hidden or disguised, preventing a review of dissents or concurrences. 38

Another improvement may come through the allowance of oral arguments, at least in cases whose institutional significance warrants a hearing. Recently, the Supreme Court allowed the submission of amicus briefs, whose participation is likely to enhance the institutional stature of the Court and the cases it decides. But there are more basic structural reforms that are needed for oral arguments and the intervention of amici to play a significant role. Currently, the Supreme Court does not publish an agenda of cases for the upcoming year. This makes it very difficult for outside commentators to know which cases will be heard by the Court and to provide amicus briefs on important issues. 39 Limiting the cases

38. Id.
39. Id. Often, the only way NGOs and reporters hear of upcoming cases is through the litigating parties themselves.
to those of institutional significance would allow for the annual publication of a calendar of hearings, thus encouraging legal scholars and the public to comment on the upcoming cases.

As stated before, placing greater emphasis on precedent is also important. It is not uncommon for lower courts to decide cases with similar fact patterns in completely dissimilar ways, giving rise to a speculation of arbitrariness in the court system.

Transparency in the judicial nomination process is also important. Subjecting the nomination of Supreme Court Justices to vigorous public debate is helpful in provoking public commentary about the candidates' qualifications and political affiliations. As indicated above, the last few Justices that have been confirmed were subject to this public commentary. This has been a recent and welcomed development in Argentina, where nominees to the Supreme Court have been elevated to office with relatively little public debate. These plausible changes introduced by President Kirchner through a presidential decree should be formalized and preserved for the future, possibly by taking the form of a constitutional amendment.

Also, the government should be required to fill open positions within a reasonable amount of time. At the time this article was written, there were two open positions on the Supreme Court, causing undue delay in rendering decisions on a number of important cases. President Kirchner has been reluctant to appoint Justices to the remaining two positions due to the fact that this would result in his appointing six of the nine Justices in the current Supreme Court.

However, the uncertainty caused by the open positions is not helping to lend credibility to the Court. Instead, some view the Court as paralyzed based on the President's powers. If President Kirchner were to reduce the membership of the Court from nine to seven, as suggested by several NGOs, the administration of President Kirchner could avoid both the perception of court-packing and the sense that his nomination was overtly political.40

40. Subsequent developments in Argentina confirmed this scenario because the government under President Kirchner finally decided to decrease the number of justices on the Supreme Court, pushing through Congress a decrease from nine to seven justices.