

**Report on the Republic of Argentina on Judicial Independence
within the Context of the Organization of the Judiciary
Informe sobre la República Argentina en relación con la
independencia judicial en el contexto de la organización del Poder
Judicial**

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Abstract

This report examines judicial independence within the context of the organization of the judiciary in Argentina. It is divided into four parts. Firstly, it addresses the organization of the judiciary. Special attention is devoted in that part to the appointment of judges and the role of the Council of the Magistracy (*Consejo de la Magistratura*). Secondly, it discusses the autonomy of the judiciary. There, the focus is on the stability and removal of judges. Thirdly, the report offers insights into the court system, delving mainly into the operation of federal courts. Finally, the report briefly explores two aspects of the independence of judiciary. On the one hand, the report examines the court hierarchy and *stare decisis*; and on the other hand, the report offers insights on the interplay of federal and provincial orders.

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References to Argentine legislation include amendments and modifications, even when the original numbers of legislation are preserved for citation purposes. When available, references are provided also to electronic sources, where readers, beyond the borders of Argentina, can easily retrieve the official texts of the referred legislation. All websites were last visited on 5 October 2024.

Keywords: judicial independence – organization of the judiciary – magistrates – autonomy of the judiciary – court system – court hierarchy – federal and provincial orders

Resumen

Este informe examina la independencia judicial en el contexto de la organización del poder judicial en Argentina. Está dividido en cuatro partes. En primer lugar, aborda la organización del poder judicial. En esa parte dedica especial atención al nombramiento de jueces y al papel del Consejo de la Magistratura. En segundo lugar, se ocupa de la autonomía del poder judicial. Allí, el informe se centra en la estabilidad y la destitución de jueces. En tercer lugar, el informe se aproxima al sistema judicial, ahondando principalmente en el funcionamiento de los tribunales federales. Por último, el informe explora brevemente dos aspectos de la independencia del poder judicial. Por un lado, examina la jerarquía judicial y el *stare decisis*; y, por otro lado, ofrece una visión de la interacción entre el orden federal y provincial.

Palabras clave: independencia judicial – organización del poder judicial – magistrados – autonomía del poder judicial – sistema judicial – jerarquía judicial – *stare decisis* – orden federal y provincial

I. Introduction

Argentina is a federal republic, as stated in the Argentine Constitution,¹ being the second largest country in South America with a population of over 45 million inhabitants.² It is divided into 23 provinces and the Autonomous City of Buenos Aires. Argentina inherited the continental European system of law from Spain.³ In public law, however, especially in constitutional law, it incorporated elements of the US model.⁴ The Argentine Constitution adopted a federal system of government,⁵ and implemented a tripartite division of powers, encompassing a legislature, a judicial branch, and an executive office led by a president.

This report examines judicial independence within the context of the organization of the judiciary in Argentina. It is divided into four parts. Firstly, it addresses the organization of the judiciary. Special attention is devoted in that part to the appointment of judges and the role of the Council of the Magistracy (*Consejo de la Magistratura*). Secondly, it discusses the autonomy of the judiciary. There, the focus is on the stability and removal of judges. Thirdly, the report offers insights into the court system, delving mainly into the operation of federal courts. Finally, the report briefly explores two aspects of the independence of judiciary. On the one hand, the report examines the court hierarchy and *stare decisis*; and on the other hand, the report offers insights on the interplay of federal and provincial orders.

II. Organization of the Judiciary

The Argentine Supreme Court is placed at the vertex of the federal judicial structure and it started to operate in 1863.⁶ Courts are divided according to subject matter (i.e., criminal, civil and commercial, labour law);⁷ and at the federal level, they are structured in three tiers:

¹ Article 1, "National Constitution of the Argentine Republic," in *Political Database of the Americas* (June 16, 2008), http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html.

² Censo 2022 República Argentina, "Resultados del Censo 2022," https://censo.gob.ar/index.php/datos_definitivos_total_pais/. Germán Carlos Garavano, *Información & Justicia III* (Konrad Adenauer Stiftung - Unidos por la Justicia, 2011), p. 15.

³ The terms Civil Law, Romano-Germanic, and Continental European can be used indistinctly in this national report to refer to the prevailing system in Argentina.

⁴ Ricardo Zorraquín Becú, "La recepción de los derechos extranjeros en la Argentina durante el siglo XIX," *Revista de Historia del Derecho* 4 (1976), pp. 325-357.

⁵ See the complete text of the Constitution of 1853, at "Constitución de la Confederación Argentina," in *Anales de Legislación Argentina: Complemento Años 1852-1880* (La Ley, 1954), pp. 49-33.

⁶ Jonathan M. Miller, "Courts and the Creation of a 'Spirit of Moderation': Judicial Protection of Revolutionaries in Argentina, 1863-1929," *Hastings International and Comparative Law Review* 20 (1997), p. 238; M. Masciotra, "El activismo de la Corte Suprema de Justicia (Argentina)," in Roberto Omar Berizonce, et al, *El Papel de los Tribunales Superiores*, coord. Roberto Omar Berizonce et al. (Santa Fe: Rubinzal-Culzoni, 2006), p. 470.

⁷ Alejandro M. Garro, "Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions," *Duquesne Law Review* 45 (2007), pp. 409-411.

Supreme Court, federal courts of appeal, and federal district courts.⁸ The Argentine Supreme Court is a court of constitutional guarantees, as correctly pointed by Germán J. Bidart Campos.⁹ That highest court secures the compliance with constitutional provisions, and it therefore offers justices a fundamental role in the dynamics of state governance.¹⁰ The Argentine Supreme Court is not a specialized constitutional court, and it is not divided into chambers.¹¹ It should be noted that judges of federal courts cannot be simultaneously judges of provincial courts, as noted in article 34 of the Argentine Constitution.

Justices of the Argentine Supreme Court and lower court judges are appointed in different ways by the Argentine President.¹² According to scholars, this is one of the main attributions of the head of state, having a clear political scope.¹³ Article 99, paragraph 4, of the Argentine Constitution merits transcription at this point—even when being the only provision that is reproduced verbatim in this report—because it clearly explains how these magistrates are appointed:

[The Argentine President] appoints the justices of the Supreme Court with the consent of the Senate by two-thirds of its members present, in a public meeting convoked to this effect.

He appoints the other judges of the lower federal courts according to a binding proposal consisting of a list of three candidates submitted by the Council of the Magistracy, with the consent of the Senate in a public meeting, in which the qualifications of the candidates shall be taken into account.¹⁴

⁸ See the clear diagram of the federal structure in Garavano, *Información & Justicia*, p. 35. The organization of federal courts is established in Decree-Law No. 1,285 of 1958. See article 1, Decree-Law No. 1,285 of 1958, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/35000-39999/37915/norma.htm>.

The provincial structure of courts is also divided into three levels. See Garro, "Judicial Review of Constitutionality in Argentina", 411; Garavano, *Información & Justicia III*, p. 36; and Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005), p. 175.

⁹ Germán J. Bidart Campos, *La Corte Suprema: El Tribunal de las Garantías Constitucionales* (Buenos Aires: Ediar, 1984), p. 14, cited by Marcos A. Sequeira, "La causa 'Candy' y el rol de la Corte Suprema de Justicia de la Nación: primero decido, luego razono," *La Ley Suplemento Especial Candy S.A. c. AFIP s/acción de amparo* (2009), p. 45.

¹⁰ Roberto Omar Berizonce, "Sobrecarga, misión institucional de los tribunales superiores y desahogo del sistema judicial," en *El Papel de los Tribunales Superiores*, coord. Roberto Omar Berizonce et al. (Santa Fe: Rubinzal-Culzoni, 2006), p. 470.

¹¹ Article 23, Decree-Law No. 1,285 of 1958 states that the Supreme Court may be divided into chambers. See also Víctor Bazán, "Justicia constitucional y protección de los derechos fundamentales en Argentina", en *Justicia Constitucional y Derechos Fundamentales: Aportes de Argentina, Bolivia, Brasil, Chile, Perú, Uruguay y Venezuela 2009*, editado por Víctor Bazán y Cecilia Nash, 15-16 (Konrad Adenauer Stiftung, 2010), p. 16.

¹² See generally, Lino E. Palacio, *Manual de Derecho Procesal Civil*, 17ª ed. (Buenos Aires: Abeledo Perrot, 2003), pp. 151-153.

¹³ Gelli, *Constitución de la Nación Argentina*, p. 709.

¹⁴ Article 99, paragraph 4, 'National Constitution of the Argentine Republic'.

The Council of the Magistracy was established in Argentina by means of the 1994 reform to the Argentine Constitution.¹⁵ Article 114 of that text established such a Council, entrusting it with powers to —amongst others— select federal judges and exert disciplinary control over their actions.¹⁶ This innovative creation at the federal level mirrored similar bodies already existing in some provincials¹⁷ and aimed to reduce political influence in the federal judiciary.¹⁸

A multiplicity of powers and duties are linked to the Council of the Magistracy. Law No. 24,937 of 1997 (and its subsequent reforms) regulates the establishment of the Council, within the framework offered by the constitutional text.¹⁹ According to the above-mentioned article 114 of the Argentine Constitution, the Council is “in charge of the selection of the judges and of the administration of the Judicial Power.” Further, the Council aims to attain “balance among the representation of the political bodies arising from popular election, of the judges of all instances, and of the lawyers with federal registration. It shall likewise be composed of [...] other scholars and scientists.” In addition, and pursuant to the same article, the Council is also “in charge of the resources and to administer the budget assigned by law to the administration of justice” and to “issue the rules about the judicial organization and all those necessary to ensure the independence of judges and the efficient administration of justice.”²⁰

The Council of the Magistracy took over the administration and organization role from the Argentine Supreme Court; and, in doing so, achieved an unprecedented shift in the Argentine legal system.²¹ The Council has gained a role of pre-eminence within this branch of government, and that role led the Council to be involved in a turmoil in the past years. Different political parties have engaged in power struggles to have more presence in the Council, showing that the political dimension of this body is undeniable in Argentina.²² Extensive media coverage

¹⁵ On the Council of the Magistracy, see generally María Angélica Gelli, *Constitución de la Nación Argentina: Comentada y Concordada*, 2ª ed. (Buenos Aires: La Ley, 2004), pp. 776-793.

¹⁶ Justices of the Argentine Supreme Court are not reached by article 114, it should be noted. See, for example, Hernán V. Gullco, “El Consejo de la Magistratura y sus problemas,” en *Garantizando la independencia de la justicia: El papel del Consejo de la Magistratura* (Buenos Aires: ADC, 2023), p. 3.

¹⁷ Gullco, “El Consejo de la Magistratura y sus problemas,” p. 3.

¹⁸ Gullco, “El Consejo de la Magistratura y sus problemas,” p. 3.

¹⁹ Law No. 24,937 of 1997, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/48231/texact.htm>.

²⁰ See also Palacio, *Manual de Derecho Procesal Civil*, pp 42-43.

²¹ Gelli, *Constitución de la Nación Argentina*, p. 777.

²² See, for example, Gustavo Ybarra y Hernán Capiello, “Las tensiones políticas dilatan la reforma en el Consejo de la Magistratura”, *La Nación*, 6 de febrero de 2022, <https://www.lanacion.com.ar/politica/las-tensiones-politicas-dilatan-la-reforma-en-el-consejo-de-la-magistratura-nid06022022/>.

has taken place during the past years regarding the composition, activities, and effects of the Council, most of the times embedded within political tensions.²³

III. Autonomy of the Judiciary

Judges in Argentina have permanent appointments.²⁴ They preserve their positions subject to good behaviour and their salaries cannot be diminished.²⁵ Exceptions to these rules are found, amongst other reasons, in reaching retirement age; or in light of improper behaviour, requiring impeachment (*juicio político*).²⁶ The dimension of judges' permanency in the position also relates to their right not to be transferred to other jurisdictions without their consent.²⁷

Judges can only be removed from office by means of impeachment.²⁸ On the one hand, article 115 of the Argentine Constitution puts forward the procedure when dealing with Justices of the Argentine Supreme Court. In those cases, the process will be undertaken 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. But the condemned party shall nevertheless be subject to accusation, trial, and punishment according to law before the ordinary courts.

When dealing with Justices of the Argentina Supreme Court, article 53 of that same text instructs that "only the House of Deputies has the power to impeach [Justices] before the Senate." The proceedings in those cases will be completed by the Senate and following due process, requiring the positive vote of a majority of two-thirds of its members present.

On the other hand, article 114, paragraph 5 of the Argentine *magna carta* puts forward the procedure when dealing with lower court judges. In those cases, the proceedings fall under the scope of the Council of the Magistracy. There, an impeachment jury will be appointed to complete the proceedings.²⁹

IV. Court System

²³ See, for example, Hernán Capiello, "Vuelve a reunirse el Consejo de la Magistratura tras casi un año de parálisis", *La Nación*, 21 de marzo de 2023, <https://www.lanacion.com.ar/politica/vuelve-a-reunirse-el-consejo-de-la-magistratura-tras-casi-un-ano-de-paralisis-nid21032023/>.

²⁴ Palacio, *Manual de Derecho Procesal Civil*, pp. 150-151.

²⁵ Article 110, 'National Constitution of the Argentine Republic'.

²⁶ Palacio, *Manual de Derecho Procesal Civil*, pp. 160-161.

²⁷ Palacio, *Manual de Derecho Procesal Civil*, pp. 160-161.

²⁸ Palacio, *Manual de Derecho Procesal Civil*, pp. 162-164.

²⁹ Palacio, *Manual de Derecho Procesal Civil*, pp. 162-164.

Argentines are not reluctant to claim before their courts. For example, 4.5 million claims were filed only in the year 2008 in Argentina, with 45% of those claims being filed in the federal courts and in the province of Buenos Aires.³⁰ That —already almost two decade old— number is significant in light of the total population of Argentina, which has continued growing steadily during this century. It further helps to anticipate a growth that will shape the operation of the system in the decades to follow. Courts are slow in Argentina, with delays of approximately half a decade before reaching a decision.³¹ The Argentine Supreme Court deals with a backlog of cases,³² showing a significant difference with some common law jurisdictions.³³ Some scholars therefore claim that the Argentine Supreme Court should only resolve a limited number of transcendental cases, following the example of the US Supreme Court.³⁴ The backlog in Argentina continues even after the inclusion in 1990 of a filter established in article 280 of the Code of Civil Procedure,³⁵ a tool that is somehow similar to the US writ of certiorari.³⁶ Argentine Law No. 23,774 of 1990 welcomed in article 280 of the code a type of writ of certiorari by which extraordinary appeals can be declined in a discretionary manner.³⁷ That article therefore enables the discretionary rejection of extraordinary appeals by the Argentine Supreme Court.³⁸ It should

³⁰ Garavano, *Información & Justicia*, p. 25.

³¹ Garro, "Judicial Review of Constitutionality in Argentina", p. 411.

³² There is legislative silence on the time within which the Argentine highest court has to render a decision. That situation triggered academic debate on the terms that apply to that court, being different from other courts in which terms are indicated in the procedural codes. On this matter see the clear explanation by a renowned legal scholar aimed to the public at large, at Néstor Pedro Sagüés, "La Corte no tiene plazos, una leyenda urbana," *La Nación*, 21 de septiembre de 2020, <https://www.lanacion.com.ar/politica/la-corte-no-tiene-plazos-leyenda-urbana-nid2456792/>.

³³ Helmke, *Courts under Constraints*, p. 177; and Ricardo Gil Lavedra, "Cambios en la Corte," *La Ley* 2004-E (2004), p. 1234.

³⁴ Alberto F. Garay, "El recurso extraordinario por sentencia arbitraria. Propuesta para un manejo más ágil," *La Ley Suplemento Constitucional* (2010), p. 27.

For a contextualization of the Argentine experience in light of the US precedent, see A.B. Bianchi and S. Legarre, 'El "certiorari" en acción (Hacia un control de constitucionalidad basado en la trascendencia)' (1993) 1993-C La Ley 841.

³⁵ Article 280, Law No. 17,454 of 1967, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16547/texact.htm>.

³⁶ Helmke, *Courts under Constraints*, p. 178; and Gil Lavedra, "Cambios en la Corte".

See, for example, the statistics for the period 2006-2008. There were 13,454 cases pending decision in the year 2008. M.E. Kaminker, 'Algunas ideas sobre ciertos instrumentos útiles para mejorar la eficiencia de las cortes' in Eduardo Oteiza, *Cortes Supremas: Funciones y recursos extraordinarios* (Buenos Aires: Rubinzal-Culzoni, 2011), pp. 191, 193-194. See also the decline of cases after a peak reached with the economic crisis of 2001, as reflected in the statistics in A. Rivas, 'El acceso a la Corte' in Oteiza, *Cortes Supremas*, pp. 251-263.

³⁷ Alberto B. Bianchi, "Una meditación acerca de la función institucional de la Corte Suprema," *La Ley* 1997-B (1997), p. 994; C. D. Yáñez, "La nueva Corte Suprema de Justicia de la Nación. Ley 23.774," *La Ley* 1990-C (1990), p. 841; and Garay, "El recurso extraordinario por sentencia arbitraria".

On the criticisms to article 280 see, Ronald Arazi, *Derecho Procesal Civil y Comercial. Parte General y Especial*, 2ª ed. (Buenos Aires: Astrea, 1995), p. 536.

³⁸ Justice Eugenio R. Zaffaroni stated that the filters do not work properly. See Eugenio R. Zaffaroni, "El rol de la Corte. El parlamentarismo. Inseguridad y sistema judicial," *La Ley Suplemento Actualidad* (2008), p. 1.

be noted that the backlog is detrimental in the reasonable time required to resolve a case and in the intrinsic quality of decisions: justices are not machines.³⁹

The Argentine Constitution states in article 116 the jurisdiction of federal courts.⁴⁰ According to that article, the federal judicial structure will be activated when dealing with, amongst others, matters ruled by the Argentine Constitution, by federal laws, and by international treaties. Claims can reach the Argentine Supreme Court, i.a., by means of original jurisdiction⁴¹ and by means of extraordinary appeal.⁴² Article 117 of the same constitutional text indicates that original jurisdiction—following the US constitutional model—is activated when dealing with ambassadors, ministers, and foreign councils, and in cases when Argentine provinces are involved.⁴³ Extraordinary appeal⁴⁴ before the Argentine Supreme Court proceeds in the cases established in, amongst others,⁴⁵ article 14 of Law No. 48 of 1863⁴⁶—as stated in article 256 of the Code of Civil Procedure⁴⁷—and in the cases created by the court itself. On the one hand, article 14 of Law No. 48 was inspired by section 25 of the US Judiciary Act of 1789,⁴⁸ and therefore welcomes extraordinary appeals when a decision denies the validity of a treaty or law of the Argentine Congress; when a decision states the validity of a provincial provision over the validity of a

³⁹ E.N. de Lázari, ‘La denegación de recursos extraordinarios que versan sobre cuestiones insustanciales o carentes de trascendencia’ in Oteiza, *Cortes Supremas*, p. 94.

⁴⁰ Article 116, ‘National Constitution of the Argentine Republic’.

⁴¹ See article 255, Law No. 17,454 of 1967 (n 35); and Decree-Law No. 1,285 of 1958. See also Arazi, *Derecho Procesal Civil y Comercial*, p. 518.

⁴² Helmke, *Courts under Constraints*, p. 176; and Arazi, *Derecho Procesal Civil y Comercial*, p. 36.

A per saltum is also allowed as an extraordinary appeal, according to articles 257bis and 257ter of the Code of Civil Procedure. See articles 257bis-257ter, Law No. 17,454 of 1967 (n 35); Arazi, *Derecho Procesal Civil y Comercial*, pp. 537-538; M. Masciotra, ‘El activismo de la Corte Suprema de Justicia (Argentina)’; Pablo L. Manili, ‘El per saltum. En la jurisprudencia de la Corte Suprema,’ *La Ley* 2012-F (2012), p. 810.

⁴³ Article 117, ‘National Constitution of the Argentine Republic’ (n 1). See also Helmke, *Courts under Constraints*, p. 176; and Garavano, *Información & Justicia*, p. 36.

⁴⁴ They are generally submitted before the lower court that has to decide if the appeal is granted to the higher court, and if it is rejected a third appeal may be filed directly before the high court to decide if the rejection was proper (*queja*). See, for example, article 285, Law No. 17,454 of 1967; and Helmke, *Courts under Constraints*, p. 177.

The extraordinary appeal in Argentina followed the US model; while other countries in Latin America followed other models, such as Brazil that looked at the Swiss model. See Augusto M. Morello, ‘Recursos extraordinarios: visión comparada brasileña-argentina,’ *Doctrina Judicial* 1995-2 (1995), p. 441.

⁴⁵ See also article 24, Decree-Law 1285 of 1958 (n 8).

⁴⁶ Article 14, Law No. 48 of 1863, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/115000-119999/116296/textact.htm>.

⁴⁷ Article 256, Law No. 17,454 of 1967 (n 35); and Arazi, *Derecho Procesal Civil y Comercial*, pp. 519-523.

⁴⁸ Helmke, *Courts under Constraints*, p. 176; and H. O. Sagretti, ‘Adecuación de los fallos pronunciados por los tribunales inferiores a los dictados por Corte Suprema de Justicia de la Nación. La acusación mantenida durante el debate como presupuesto para una sentencia condenatoria. Correcta interpretación del caso ‘Marcilese’ como pauta para la resolución en casos futuros,’ *La Ley Córdoba* (2003), p. 45.

federal provision; and when a decision states the invalidity of a right that derives from the Argentine Constitution, or a treaty, or law of the Argentine Congress.⁴⁹

On the other hand, the highest court created cases that represent federal matter, and that relate to situations that: affect the community at large (*gravedad institucional*),⁵⁰ represent a gross mistake in applying the law and an absurd appreciation of evidence (*sentencia arbitraria*), and result in applying formalistic rituals that may frustrate the application of the law (*exceso ritual manifiesto*).⁵¹ Extraordinary appeals deal with matters of law and not of fact and aim to offer a remedy to the violations to constitutional provisions and federal legislation.⁵² The use of extraordinary appeals increased drastically during the past half century. For example, they comprised 57% of decisions rendered during the period 1974-1983 and 99% of the decisions rendered during the period 1984-1997.⁵³

V. Judicial Independence

The degree of independence of the judiciary, in Argentina and beyond, can be sensed by looking at different traits within a legal system. In this report, attention will be first to court hierarchy and *stare decisis*, to be followed by insights on the interplay of federal and provincial orders.

A. Court Hierarchy

There are no horizontal or vertical *stare decisis* in Argentina,⁵⁴ although there are hybrid representations.⁵⁵ Argentina does not fully welcome the doctrine of *stare decisis*, amongst other

⁴⁹ See also Arazi, *Derecho Procesal Civil y Comercial*, pp. 519-520.

⁵⁰ It should be noted that the Argentine highest court established that the *gravedad institucional* empowers that court to waive certain formal requirements, but not to remedy the absence of a federal matter. See Fallos 339:1493.

⁵¹ Arazi, *Derecho Procesal Civil y Comercial*, pp. 520-525.

See the decisions of the Argentine highest court that created those situations, at Fallos 248:189 (*gravedad institucional*), Fallos 112:384 (*sentencia arbitraria*), and Fallos 238:550 (*exceso ritual manifiesto*).

⁵² Arazi, *Derecho Procesal Civil y Comercial*, p. 520; and Helmke, *Courts under Constraints*, p. 177.

⁵³ Helmke, *Courts under Constraints*, p. 177; see also Gil Lavedra, "Cambios en la Corte".

⁵⁴ Santiago Legarre, "La obligatoriedad horizontal de los fallos de la Corte Suprema Argentina y el *stare decisis*," *Derecho Público Iberoamericano* 4 (2014), pp. 237-252; Dafne Ahe y María Eva Miljiker, "Algunos mitos sobre el funcionamiento del sistema continental: El caso de la Argentina y la regulación de la responsabilidad del Estado," *La Ley* 2007-A (2007), p. 753; Santiago Legarre y Julio C. Rivera, "La obligatoriedad atenuada de los fallos de la Corte Suprema y el *stare decisis* vertical," *La Ley* 2009-E (2009), p. 820; and Santiago Legarre, "Precedent in Argentine Law," *Loyola Law Review* 57 (2011), pp. 781-787.

⁵⁵ Legarre, "La obligatoriedad", p. 252. See also Eduardo Oteiza, "Reflexiones sobre la eficacia de la jurisprudencia y del precedente en la República Argentina. Perspectivas desde la CSJN," in *Cortes Supremas: Funciones y recursos extraordinarios*, coord. Eduardo Oteiza (Santa Fe: Rubinzal-Culzoni, 2011), p. 386. For a brief evolution that highlights that lack of certainty regarding the vertical and horizontal value of precedents, see Oteiza, "Reflexiones sobre la eficacia", pp. 381-386.

reasons, because of its civil law heritage.⁵⁶ In Argentina, the unconstitutionality of a provision is decided only *inter partes* for a specific case, and the control is therefore judicial and diffuse in Argentina.⁵⁷ From an early time, the highest court adopted the tradition to cite its own precedents in future decisions and that tradition still prevails.⁵⁸ Even more, on occasions the highest court decides by referring to its own previous cases.⁵⁹ It should be noted that horizontal *stare decisis* could help to maximize procedural economy and to expedite the work of the court.⁶⁰

Plenary decisions (*fallos plenarios*) within the different courts of a chamber can offer some gravitation to the notion of precedents in Argentina. Even when not attaining the status of *stare decisis*, these decisions have an impact on future rulings within a chamber, motivating lower courts to also consider the outcome that was stated in *plenum*. This ‘pacification’ of the case law in different areas of the law was not free of challenge by constitutional law scholars in Argentina, it should be noted, due to the implications that the decisions could have in the legislative arena.⁶¹

Horizontal *stare decisis* refers to the obligation of courts to follow their own precedents; while vertical *stare decisis* refers to the obligation of lower courts to follow the precedents of their superiors.⁶² Santiago Legarre explained that in Argentina vertical *stare decisis* could be deemed a *soft principle* while horizontal *stare decisis* could be deemed a *relaxed policy*.⁶³ The Argentine Constitution does not provide for vertical *stare decisis*, though it is common for lower

⁵⁶ Roberto Saba, “Constitutions and Codes, a Difficult Marriage: The Unusual Merging of the American Constitutional Law Tradition with the Continental Law Tradition,” *Revista Jurídica de la Universidad de Puerto Rico* 77 (2008), p. 290.

⁵⁷ Bazán, “Justicia constitucional”, p. 15; Jorge Luis Portero y Eduardo O. Magri, “El caso ‘Thomas’. La Corte Suprema de Justicia de la Nación Argentina puso las cosas en su lugar. Los efectos no deseados de la ampliación de las fronteras de la justiciabilidad sobre la gobernabilidad democrática,” *La Ley* 2010-C (2010), p. 717; and María Alejandra Bottoni y Marcelo Julio Navarro, “El control de constitucionalidad en la jurisprudencia de la Corte Suprema de Justicia de la última década,” *La Ley* 2011-B (2011), p. 1112.

⁵⁸ Legarre, “La obligatoriedad”, pp. 249-250; and Eduardo Oteiza, “La Corte Suprema de Justicia de la Nación y el sistema interamericano de protección de los derechos humanos,” en *El Papel de los Tribunales Superiores*, coord. Roberto Omar Berizonce et al. (Santa Fe: Rubinzal-Culzoni, 2006), pp. 339, 343.

⁵⁹ Legarre, “La obligatoriedad”, p. 250.

⁶⁰ M. G. Abalos, “Las cortes supremas provinciales y su lealtad con la Corte Suprema Nacional y con la Corte Interamericana de Derechos Humanos,” *La Ley Gran Cuyo* (2014), p. 929.

⁶¹ See, for example Emilio A. Ibarlucía, “Los fallos plenarios. Su constitucionalidad y aplicación retroactiva,” *La Ley* 2009-D (2009), p. 1217; Mario Hernán Laporta, “Los fallos plenarios de la Cámara Nacional de Casación Penal: ¿son constitucionales? de Octavio Aráoz de Lamadrid,” *elDial.com – CCAB.*; and H. Quadri, “Obligatoriedad de los fallos plenarios,” *La Ley* 2014-B (2014), p. 168.

⁶² Santiago Legarre y Julio C. Rivera, “Naturaleza y dimensiones del *stare decisis*,” *Revista Chilena de Derecho* 33 (2006), p. 109, 113.

⁶³ Legarre, “Precedent in Argentine Law,” p. 785. On vertical *stare decisis*, see Santiago Legarre y Julio C. Rivera, “La obligatoriedad atenuada de los fallos de la Corte Suprema y el *stare decisis* vertical,” *La Ley* 2009-E (2009), p. 820.

courts to know and to follow the decisions of the highest court.⁶⁴ A departure from the opinion of the highest court could occur when “new arguments” are found by the lower court, however.⁶⁵ The Argentine Constitution likewise does not provide for horizontal *stare decisis*, though courts feel inclined to subscribe to prior decisions at the appeal level.⁶⁶ It must be noted that it is not unusual for the Argentine Supreme Court to ignore its own precedents, especially if there is a change in the composition of the highest court. On those occasions, justices would for example claim: “the Argentine Supreme Court in its current composition understands that it should not follow the decision in case X.”⁶⁷

B. Interplay of Federal and Provincial Orders

The National Congress has the power to enact substantive laws (*i.a.*, civil and commercial code, criminal code),⁶⁸ while provinces preserve the power to enact their procedural codes. Furthermore, provinces enact their own constitutions in accordance with the Argentine Constitution, and ensure administration of justice and municipal regimes.⁶⁹ The constitutionalization of private law has paved the way for the incorporation of procedural elements within substantive laws. For example, in Argentina, the Civil and Commercial Code, enacted in 2015, addresses procedure within family law aiming at protecting constitutional standards of those involved in family conflicts.⁷⁰ This novel procedure provides further guidance to family judges to perform their duties and reinforces and ensures the possibility of parties to exercise their family rights.⁷¹

⁶⁴ Legarre and Rivera, “La obligatoriedad atenuada”; Legarre, “Precedent”, p. 786; and Abalos, “Las cortes supremas provinciales”. It should be noted that the 1949 Constitution, enacted during the presidency of Juan Domingo Perón, called for vertical *stare decisis*. See Legarre and Rivera, “La obligatoriedad atenuada”; Oteiza, “Reflexiones sobre la eficacia”, p. 381; and Jonathan M. Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process,” *American Journal of Comparative Law* 51, no. 4 (2003), p. 871. Also, there was recently a short period of time in which vertical *stare decisis* applied to social security decisions.

⁶⁵ Legarre, “Precedent in Argentine Law,” pp. 786-787. See also J. A. Amaya, “El caso ‘C.’: Lecturas constitucionales y procesales constitucionales,” *La Ley* 2013-C (2013), p. 179; and I. C. Espeche, “Doctrina plenaria y jurisprudencia de la CSJN,” *La Ley*, Suplemento Doctrina Judicial Procesal (2012), p. 21.

⁶⁶ Legarre, “Precedent in Argentine Law,” p.787.

⁶⁷ Ahe y Miljiker, “Algunos mitos sobre el funcionamiento del sistema continental”.

⁶⁸ Article 75, paragraph 12, ‘National Constitution of the Argentine Republic’ (n 1).

⁶⁹ Articles 5, 28, and 123, National Constitution. See also Julieta Marotta, *Access to Justice and Legal Empowerment of Victims of Domestic Violence through Legal Organizations in the City of Buenos Aires: A Qualitative Empirical Legal Study* (Doctoral thesis, Maastricht University, Maastricht: Boekenplan, 2017), pp. 44-45.

⁷⁰ For a general analysis of the law of procedure as to family law, see Angelina Ferreyra de De la Rúa, “El procedimiento de familia en el Proyecto,” *La Ley* 2012-D (2012), p. 722.

⁷¹ Marissa Herrera et al., eds., *Código Civil y Comercial de la Nación comentado*, vol. 2 (Buenos Aires: Infojus, 2015), p. 559.

The Argentine Constitution is at the vertex of the hierarchy of the Argentine legal framework.⁷² The latest reform, enacted in 1994, granted constitutional status to a selection of international treaties through article 75, paragraph 22. In addition, it should be noted that federal legislation prevails over provincial legislation.⁷³

VI. Closing Remarks

This brief national report dealt with judicial independence within the context of the organization of the judiciary in Argentina. It addressed the organization and autonomy of the judiciary; and then dealt with the court system and with aspects of the independence of the judiciary. The different points addressed in this report offer insights on the life of the judiciary, while they also invite readers to reflect on the interplay of the different branches of government and on the political role of judges in Argentina. Each point is a tessera of a mosaic that helps illustrate the degree of judicial independence in Argentina: no point outweighs another, since they are all needed to fully depict the situation.

Judges play a role in legal development. They were incorporated within the structure of modern states by democratic societies, and have the ability to create guidelines for coexistence within those structures.⁷⁴ Judges must be equidistant, impartial, and objective;⁷⁵ and their discussions should be shared by colleagues, members of the bar, political leaders, intellectuals, and members of social groups.⁷⁶ Their discussions are to be placed within a social context, as judges offer a guarantee for the right of defence to all parties and are conductors of the different processes.⁷⁷ They are indeed custodians of republican institutions,⁷⁸ while they are neither only historians nor soothsayers.⁷⁹

Judges play a political role in Argentina. For example, in the 1980s, the Argentine Supreme Court was a main actor in the events dealing with the reestablishment of democracy and the

⁷² Article 31, 'National Constitution of the Argentine Republic' (n 1); and Gelli, *Constitución de la Nación Argentina*, pp. 284-295.

⁷³ Articles 5 and 31, 'National Constitution of the Argentine Republic' (n 1). See also Julio César Rivera, *Instituciones de Derecho Civil - Parte General*, 3ª ed., vol. 1 (Buenos Aires: Abeledo Perrot, 2004), p. 129.

⁷⁴ Carlos E. Camps, "Jurisprudencia obligatoria y doctrina legal en la Corte bonaerense," *Jurisprudencia Argentina* 2004-II (2004), p. 1164.

⁷⁵ M. J. López Mesa, "El juez en el proceso. Deberes y máximas de experiencia," *La Ley* 2012-C (2012), p. 1269. See also Augusto M. Morello, "Una justicia civil para el siglo XXI," *La Ley* 2006-F (2006), p. 906.

⁷⁶ J. O. Ramírez, "Cómo los jueces dictan sentencia," *La Ley* 2007-F (2007), p. 1434.

⁷⁷ López Mesa, "El juez en el proceso". See also Morello, "Una justicia civil para el siglo XXI".

⁷⁸ Morello, "Una justicia civil para el siglo XXI".

⁷⁹ López Mesa, "El juez en el proceso".

development of the institutional process.⁸⁰ More recently, that high court again had the chance to highlight the link between law and politics.⁸¹ Copious literature exists on the political role of the Argentine highest court throughout the different decades. Attention was devoted, for example, to its role in defending the rule of law, and to its independence, degree of defection, or its image of confidence amongst citizens.⁸²

Practical experience and the challenges faced by the Argentine Supreme Court show that justices are actors of the political process, rendering decisions on social, political, and institutional concrete cases.⁸³ The highest court creates policies: that is indeed a natural and unavoidable fact.⁸⁴ For example, the highest court protected the integrity of property rights from the impact of inflation and was a forerunner for divorce in Argentina, before the pertinent law was enacted.⁸⁵ The Argentine Supreme Court stated in the 1961 case *Manzanares*⁸⁶ that judges are servants of the law for the fulfilment of justice and they contribute to its production jointly with legislators.⁸⁷ Likewise, Carlos S. Nino stated that judges must undertake the control of the democratic procedure.⁸⁸ In other words, judges must “divide the bread of justice in the best possible way.”⁸⁹

⁸⁰ Oteiza, “Reflexiones sobre la eficacia de la jurisprudencia,” p. 365.

⁸¹ Sequeira, “La causa ‘Candy’ y el rol de la Corte Suprema”.

⁸² See, for example, Miller, “Courts and the Creation of a “Spirit of Moderation””; Christopher J. Walker, “Judicial Independence and the Rule of Law: Lessons from Post-Menem Argentina,” *Southwestern Journal of Law & Trade in the Americas* 14 (2007), 89.; Christopher J. Walker, “Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law,” *Florida Journal of International Law* 18 (2006), p. 745; and Helmke, *Courts under Constraints*, p. 175.

⁸³ Oteiza, “Reflexiones sobre la eficacia de la jurisprudencia,” p. 365.

⁸⁴ Bianchi, “Una meditación acerca de la función institucional de la Corte Suprema”.

⁸⁵ Bianchi, “Una meditación acerca de la función institucional de la Corte Suprema”.

⁸⁶ CSJN, Recurso de hecho deducido por el recurrente en la causa *Manzanares*, Juan Carlos s/ su adopción, 8 February 1961, Fallos 249:37.

⁸⁷ § 5 of the vote of the majority. See also Eduardo Luis Tinant, “En torno a la justificación de la decisión judicial,” *La Ley* 1997-E (1997), p. 1395.

⁸⁸ Carlos Santiago Nino, *Fundamentos de Derecho Constitucional*, 2ª reimp. (Buenos Aires: Astrea, 2002), p. 693, cited by Pablo L. Manili, “Una disidencia republicana y una tensa espera de una decisión final de la Corte Suprema en el caso de las candidaturas ‘testimoniales’,” *La Ley* 2009-C (2009), p. 601.

⁸⁹ Alejandro Alberto Fiorenza, “¿Cuándo es justa una sentencia?”, *Suplemento Doctrina Judicial Procesal* (septiembre de 2014).

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