HOW DO SUPREME COURTS SHED THEIR SKIN? CHANGING ROLES IN SOCIAL RIGHTS ADJUDICATION: ARGENTINA, 1994–2021

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ABSTRACT

Based on Katharine Young's typologies of judicial review approaches and court roles in social rights adjudication, this article analyzes the Argentine Supreme Court's treatment of social rights since the 1994 constitutional reform, which constitutionalized international human rights treaties and expanded judicial review. This article distinguishes three periods in which the Supreme Court went through membership changes, modified its role, and provided legal justifications for each shift. From 1994 to 2000, the Court played a detached role, deferring to elected branches and crafting restrictive interpretations of social rights and international sources, while its public esteem declined. A partially renewed Court sought, from 2000 to 2012, to regain legitimacy by shifting towards a supremacist role, broadening review powers, making extensive readings of social rights, and relying on international law, while tensions with the government increased and the Court risked overburdening itself with complex social issues. Since 2012, the Court has returned to a detached role by narrowing the scope of judicial review, adopting restrictive interpretations of social rights clauses, and selectively using international law while leaving precedents intact by distinguishing new cases in order to protect its technical legitimacy. In the future, the Court will likely face difficulties finding distinguishing features in upcoming cases or further departing from international law. Its current detached role risks undermining legitimacy if no new legal justification emerges. The Court will be forced to overturn precedents from the supremacist era, which would damage its technical legitimacy.

INTRODUCTION: COURTS IN CHANGE, SOCIAL RIGHTS AND THE NEED FOR LEGAL JUSTIFICATION

In her book *Constituting Economic and Social Rights*, Katharine Young develops typologies of judicial review approaches and court roles, regarding social rights cases.[1] Young outlines a spectrum from detached courts that defer to elected branches to supremacist courts that actively strike down policies.[2] This framework helps analyze the Argentine Supreme Court's treatment of social rights since the 1994 reform, which not only expanded the list of social rights by giving constitutional rank to several human rights treaties, but also established ample review powers for the judiciary. As this article will explain, the Argentine Supreme Court changed its role since 1994, undergoing three different stages and providing legal justifications for each shift. The Court played a detached role in the first period, from the reform until 2000.[3] It deferred to the elected branches' neoliberal program and built a restrictive interpretation of applicable human rights treaties, while the levels of public esteem for the Court kept waning. In the second period, from 2000 until 2012, a partially renewed Court sought to rebuild its legitimacy, further damaged during the 2001 crisis, by gradually shifting to a supremacist role, in the area of social rights. It crafted an extensive construction of judicial review powers and relied on international human rights treaties and international interpretive sources. Tensions with the elected branches increased, and the Court also ran the risk of overburdening itself by managing difficult social issues. Finally, from 2012 until 2021, the Court took back a detached role in the social rights area while avoiding overturning its rulings from the previous period to protect its technical legitimacy.[4] The Court narrowed the scope of judicial review for rights with budgetary implications, applied restrictive constructions of social rights clauses, and made a selective use of international human rights sources. The Court also denied certain groups or individuals the entitlement to specific rights. These legal arguments allowed the Argentine Supreme Court to leave its precedents untouched by distinguishing them from the new cases. In order to maintain its detached role, the Court will probably face difficulties in the future in trying to find convincingly distinctive features for upcoming cases or in

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[1] *See* KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 242 (Oxford Univ. Press, Oxford, 2012).

[2] *See id.* at 242–43.

[3] *See id.* at 242–46.

[4] *See id.*

deepening its departure from international human rights law.[5] The Court needs legally persuasive arguments regarding social rights, review powers, and international law while upholding past rulings. If it does not develop a new justification, precedent reversal seems inevitable, undermining technical legitimacy.

Supreme Courts and Constitutional Courts in modern democracies pose an often remarked paradox. While they hold ample powers, including judicial review, Constitutions usually aim to keep them insulated from political and electoral cycles. These tribunals, in general, are non-elected bodies. Thus, the independence of the courts implies a relatively lower level of democratic legitimacy. The "democratic objection" against judicial review relies on this paradox: a powerful institution designed to be exempt from a clear mechanism of popular accountability.[6]

As it is well known, adjudication underlines the objection in the case of social rights.[7] Rulings on constitutional social rights may involve the use of public resources, striking down decisions by elected branches, or issuing orders to various Government agencies to perform certain measures and not only to refrain from acting. In addition, social rights claims usually imply thorny technical questions, such as the efficacy and costs of medical treatments, the budgetary impact of a housing project or the long-term sustainability of a pension system. Since courts are generally staffed with lawyers, the lack of other scientific knowledge is also laid out

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[5] *See id.*

[6] ROBERTO GARGARELLA, THE LAW AS A CONVERSATION AMONG EQUALS 183-87 (David Dyzenhaus & Thomas Poole eds., 2022) (discussing Alexander Hamilton's arguments in The Federalist Papers related to objections against judicial review which date back to very early stages of constitutionalism). *See* ALON HAREL & ADAM SHINAR, THE REAL CASE FOR JUDICIAL REVIEW, *in* COMPARATIVE JUDICIAL REVIEW 13, 14 (Erin F. Delaney & Rosalind Dixon eds., 2018) (arguing in favor of judicial review and defining it as a mechanism to ensure citizens' right to a hearing about their grievances, and to require the State to defend its decisions in a public deliberation with the plaintiffs); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 426 (William Rehg trans., 1996) (emphasizing importance of giving all those affected "an effective opportunity to voice their demands for rights on the basis of concrete experiences of violated integrity, discrimination, and oppression").

[7] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 190–91 (2008) (emphasizing that when courts are required to defer to legislative decisions on distributional issues, problem remains—an alleged violation of social rights casts doubt on the legitimacy of legislature itself since voters may have been excluded from political process due to lack of access to food, healthcare or education and judiciary's limits depend on assumption that legislature is genuinely democratic and representative; at that point "we are left in a conceptual house of mirrors").

as an additional objection—sometimes called technical objection—to social rights adjudication.[8]

In light of these difficulties, courts take various approaches to social rights adjudication,[9] trying to preserve their institutional stability and legitimacy.[10] Comparative literature analyzes these different paths[11] and the associated instruments.[12] In recent years the enforcement of economic and social rights has become more "court-centric" in developing countries due to the continuing projects aimed at fostering and strengthening the "rule of law" as a condition for foreign investments and economic progress.[13] Some courts become models or examples, fostering a global conversation on how to achieve the most adequate role for the judiciary in

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[8] *See* DAWOOD AHMED & ELLIOT BULMER, SOCIAL AND ECONOMIC RIGHTS 17 (2nd ed., Int'l IDEA, 2017) (describing objection to judicial enforcement of social rights based on challenges judges face in analyzing budgetary implications of their decisions); *see also* Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 131 (2000) (arguing that "technical objection" advises against including enforceable social rights in a constitution, a position later modified by the author); Carlos Rosenkrantz, *La pobreza, la ley y la Constitución* [*Poverty, the Law and the Constitution*], *in* EL DERECHO COMO OBJETO E INSTRUMENTO DE TRANSFORMACIÓN [THE LAW AS AN OBJECT AND INSTRUMENT OF TRANSFORMATION] 241, 245–46 (SELA, 2003) (emphasizing judges lack "technology of justice" to make grounded decisions in the social rights area).

[9] *See* Matthias Klatt, *Positive Rights: Who Decides? Judicial Review in Balance*, 13 INT'L J. CONST. L. 354, 359 (2015) (explaining that alternatives range from reasonableness review under South African constitution to institutional dialogue carried out in Canada to a strong review as exercised by Brazil's highest court).

[10] *See* Gabriel Pereira, *Judges as Equilibrists: Explaining Judicial Activism in Latin America*, 20 INT'L J. CONST. L. 696, 700–02 (2022) (describing the combination of "fragmentation of power" approach centered in the relationship between judiciary and other branches and the "public support" approach which emphasizes how the Courts also need to respond to demands from the public at large).

[11] *See* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 190, 196–99 (2012) (arguing that courts in different countries have found specific ways to give content to social rights advising against taking any of them—such as the South African Court's approach—as a single model for analyzing multiple developments, given the incidence of local political contexts); Pereira, *supra* note 10, at 704–13 (proposing in the case of structural remedies the "equilibrist approach" as a notion to describe how courts in Latin America—and his work takes the Argentine Supreme Court as an illustration—operate in unfriendly contexts to preserve their stability and tenure while building public support and keeping a low level of conflict with the other branches).

[12] *See* DAVID FONTANA, DOCKET CONTROL AND THE SUCCESS OF CONSTITUTIONAL COURTS, *in* COMPARATIVE CONSTITUTIONAL LAW 624, 627–28 (Tom Ginsburg & Rosalind Dixon eds., 2011) (describing how "issue timing", *i.e.*, the power of courts to define its agenda, contributes to ensure decisions are enforced, without compromising the legitimacy and political relevance of the tribunal). In most systems, for instance, courts can moderate the political impact of their decisions by carefully selecting the cases to hear or to decide. *See id.*

[13] YOUNG, *supra* note 1, at 360.

this area under the local circumstances.[14] In Latin America, according to Carlos Bernal, a wave of constitutional reforms in the past four decades has shown a convergence in the entrenchment of justiciable social rights and a divergence in the various approaches applied by apex courts in the region.[15] Scholars have analyzed the social and political factors that come into play when courts make important decisions,[16] especially when dealing with social rights claims, the larger impact of any ruling on those issues,[17] and the different political processes sparked by effective enforcement of judicial decisions.[18]

This article centers on one dimension of the complex process of social rights judicial enforcement: the legal arguments offered by a court to justify its role in the matter and its shift from one role to another, while simultaneously preserving its own legitimacy. The Argentine Supreme

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[14] *See, e.g.*, COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella et al., eds., 2006) (offering an early detailed account of courts from Brazil, Hungary, South Africa, India, Colombia, Angola and Bolivia, as case studies of diverse forms of judicial intervention on social issues in a fifteen-year period); *see also*Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 109 (2009) (describing the South African court as "widely admired by legal academics" while enjoying low public support).

[15] *See* Carlos Bernal, *The Constitutional Protection of Economic and Social Rights in Latin America*, *in* COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 325, 328, 338–39 (Rosalind Dixon & Tom Ginsburg eds., 2017) (describing the trend to include judicially enforceable social rights in Latin American constitutions in the preceding decades, and the competing paradigms shared, discussed and applied by high courts in each country, according to local political contexts and the influence of the Inter-American human rights system); David Landau, *Judicial Role and the Limits of Constitutional Convergence in Latin America*, *in* COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 227 (Rosalind Dixon & Tom Ginsburg eds., 2017) (illustrating the divergent approaches between the high courts of Brazil, Chile, Colombia and Mexico).

[16] *See* Ezequiel González-Ocantos, *Courts in Latin American Politics*, *in* THE OXFORD ENCYCLOPEDIA OF LATIN AMERICAN POLITICS (Harry E. Vanden & Gary Prevost eds., 2021) (analyzing courts in Latin America by outlining three main lines of work aimed at explaining the increasing involvement of the judiciary in political questions: one is centered on courts-empowering institutional reforms while another one pays attention to the strategic interaction between courts and other branches, and a third approach focuses on the judges' ideas, values and self-conceptions as key elements); *See* Diana Kapiszewski, *Tactical Balancing: High Court Decision Making on Politically Crucial Cases*, 45 LAW & SOC'Y REV. 471, 472–81 (2011) (proposing the notion of "tactical balancing" to describe how Courts ponder a set of concerns and elements, from Justices' ideologies to public opinion to law in their decision making process).

[17] *See* Cambridge Univ. Press, *Introduction*, *in* COURTS IN LATIN AMERICA 1 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (examining a multidisciplinary approach in "judicial politics" studies by considering not only the role of courts in the political system, but also the conduct of judges as individuals and the social effects of rulings, with contributions from political science, sociology and law among other disciplines).

[18] *See, e.g.,* SANDRA BOTERO, COURTS THAT MATTER: ACTIVISTS, JUDGES, AND THE POLITICS OF RIGHTS ENFORCEMENT 85-128 (Cambridge Univ. Press ed., 2023) (emphasizing through case studies the importance of "legal constituencies" and monitoring mechanisms in implementing court decisions on the ground).

Court (SC) is the case to be examined. A long-established institution subject to various forms of manipulation throughout its history, in the past thirty years, the Court underwent a constitutional reform process, a changing political landscape, and a severe socioeconomic crisis that put social rights enforcement to the test. Taking into account the general context, this article focuses on the evolving legal concepts advanced by the tribunal to sustain its role. Therefore, the legal dimension is examined with a chronological perspective, making a distinction among three stages in the Court's history after the 1994 constitutional reform.

Designed after the American model, the SC is a non-elected body with judicial review powers. Though it deals with the interpretation of constitutional clauses, it is not a constitutional court in a strict sense.[19] It holds other attributions, including competence to rule as the first and only instance in certain matters, such as cases involving foreign representatives or suits filed by a Province against another one. A second difference relies on the Argentine judicial review system, also based on the American model.[20] Any court, local or federal, lower or higher, may strike down a statute, administrative act, or even a private agreement or rule, on constitutional grounds.[21] Such a decision is effective only for the case in question, with only exceptional instances of collective impact.[22] Established in 1863, the SC sits at the top of this decentralized judicial review system.[23] It has competence by way of exceptional appeal and operates in the context of a presidential federal republic. In another singular trait, the SC generally follows its own precedents in the context of a country that employs civil law, with no formal stare decisis rule. This practice also proves difficult because of the Court's history of instability,

[19] *See* Martín Oyhanarte, *Supreme Court Appointments in the U.S. and Argentina*, 20 WASH. UNIV. GLOB. STUD. L. REV. 697, 719 (2021).

[20] *See id.* at 699–700.

[21] *See* Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 DUQ. L. REV. 409, 410 (2007).

[22] *See* Art. 43, para. 2, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (explaining that in cases dealing with discrimination, market competition, environment, consumers' rights and rights of general public interest rulings can have a collective effect and not only directly affected people but also the Ombudsman or civil society organizations may file the claim).

[23] *See* Garro, *supra* note 21, at 409–10.

with sudden changes in its composition.[24] Periodic economic crises,[25] on the other hand, also provide a particularly hostile context for enforcing social rights, which often depends on the availability of financial resources. Finally, the increasing importance of international law, and of international human rights law, adds a relevant element to the SC's task in social rights adjudication.

This article examines the SC's changing roles from 1994 to 2021 in social rights adjudication. The analysis applies Katharine Young's typologies of judicial review and court roles.[26] The starting point is the 1994 constitutional reform, which introduced important modifications to a 19th century text that included only a singular social rights clause, which was added in 1957.[27] In 2021, the sole sitting female member quit the Court and left an incomplete, all-male four-member tribunal.

In particular, the article examines how the Court offers a range of legal arguments to justify its shifting roles along the way, preserving its public legitimacy under a technical perspective.[28] Young's typologies shed

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[24] *See* Rebecca Bill Chavez, *The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System*, 36 J. LATIN AM. STUD. 451, 454 (2004) (describing informal practices such as court-packing and opaque appointment processes as "indicators of executive subordination of the courts").

[25] *See* Mariana Llanos, *They Should All Go (Again)!: Forty years of Democracy in Argentina*, 4 GIGA FOCUS (2023), https://www.giga-hamburg.de/en/publications/giga-focus/they-should-all-go-again-forty-years-of-democracy-in-argentina (describing the 1989 and 2001 crises and their impact on the political system); *see also* COLIN M. LEWIS, ARGENTINA: A SHORT HISTORY 160–179 (2002) (outlining the process from the 1989 hyperinflation crisis to the neoliberal reform program of the 1990s, and its demise in 2001); *see generally* David Bilchitz, *Socio-economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L J. CONST. L. 710, 715 (2014) (pointing out Governments use crisis to justify extraordinary measures that would not be admitted under normal circumstances); Constantinos Kombos, *Constitutional review and the economic crisis: In the Courts We Trust?*, 25 EUROPEAN PUB. L. 105, 110–111 (2019) (explaining how the "language of crisis" emphasizes deference to expert decision-makers with only a superficial judicial control, in the context of an alleged lack of alternatives and an imperative need to prevent chaos, even enabling centralizing institutional redesign) in the context of an alleged lack of alternatives and an imperative need to prevent chaos, even enabling centralizing institutional redesign).

[26] *See* YOUNG, *supra* note 1, at 242.

[27] For an overview of the 1994 reform, prepared by a leading Argentine constitutional law scholar, *see* Néstor P. Sagüés, *An Introduction and Commentary to the Reform of the Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41, 65 (1996–1997) (underlining that the reform "accentuated the social bent" of the Constitution, particularly by including the principle of social justice and of real equal opportunities).

[28] *See* Juan F. González-Bertomeu, *Judicial Politics in Latin America*, *in* ROUTLEDGE HANDBOOK ON LAW AND SOCIETY IN LATIN AMERICA 169, 177–78 (Rachel Sieder et al., eds., 2019) (highlighting the potential of studying judges' opinions and votes, *i.e.*, legal arguments, as part of the scholarly effort to understand courts; such a "legal model" of study may be compatible with contributions from other disciplines).

light on the Argentine Court's evolving approaches to social rights in complex contexts and with a diverse membership.[29]

As the Court is an unelected institution, legal justification plays a crucial role in maintaining the Court's public legitimacy. This social perception depends in part on the belief that the Court's decisions are legally justified.[30] In addition, legal arguments included as grounds for the SC's decisions become building argumentative blocks in lower court rulings in Argentina.[31] These arguments are also generally drawn upon by the legal profession as a whole. Therefore, legal arguments embedded in Court precedents have a powerful projection, considering the multitude of audiences the Justices address.[32]

I. TYPOLOGIES TO READ WHAT COURTS DO: AN INTERPRETATION TOOL

To reach a renewed understanding of the SC decisions on social rights since 1994, this article relies on Katharine Young's connected typologies of judicial review and of court roles. Through these categories, it is possible to distinguish periods in the trajectory of the SC. In each period, the Court adopts a particular role in the adjudication of social rights, associated with the preferred use of certain approaches to the task. Young's work provides the tools for examining how the Court sustained, from a legal point of view, its technical legitimacy despite embracing different roles after the 1994 constitutional reform. At the same time, this article intends to explore the fertility of Young's categories for the analysis of a specific court from the Global South, which is not a centralized constitutional court, belongs to the Civil Law tradition, and operates in a

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[29] *See* YOUNG, *supra* note 1, at 242.

[30] *See* Alba Ruibal, *The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts*, 3 MEX. L. REV. 343, 345–46 (2010) (explaining that the legal perspective on legitimacy "implies an internal or intra-institutional point of view based on the . . . comparison between judicial behavior and the established rules and principles that govern it"); *see also* Klatt, *supra* note 9, at 361 (explaining that while courts change their role over time, the decisive question is "how to rationally justify the choice of a particular review approach").

[31] *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 757 (1982) (underscoring "[t]he search for meaning is always arduous, but even more so when one realizes that the interpretation will become authoritative").

[32] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 175 (2006) (emphasizing that courts shape their decisions partly in order to gain approval from peers and superiors in the judiciary, interested parties, academics, the general public, and elite opinion-makers; this approach, according to Baum, reopens a debate about the "the balance between legal and policy considerations in judges' choices").

federal, presidentialist republic. These features, among others, distinguish the Argentinean case from the courts thoroughly analyzed in Young's pioneering works.

After laying out Young's typology of judicial review, this section presents the four roles courts can play regarding economic and social rights.[33] These concepts, in turn, provide a sound basis for recognizing those roles in the SC's performance, as analyzed in the following sections.

Young outlines five types of judicial review: deferential, conversational, experimentalist, managerial, and peremptory.[34] This spectrum ranges from the least intrusive to the most court-empowering alternative.[35] It also includes the possibility that actors other than the judiciary and the elected branches may participate in the process.[36] Young argues that all of these forms of review can be found in different courts and jurisdictions—a sign of the migrations taking place in the contemporary legal sphere, in some cases encouraged by constitutional or legal clauses that connect local interpretation to international law.[37]

Under a *deferential* approach, courts acknowledge elected branches hold greater decision-making powers and possess superior epistemic authority when it comes to interpreting the scope and content of economic, social, and cultural rights. Out of respect for the democratic principle, legislation or policy will usually survive this type of review. However, weak protections may result in rights violations, which Young labels "judicial abdication."[38]

A *conversational* approach implies that the court has confidence in engaging in a sustained dialogue with the executive or the legislature to determine how to properly secure these rights in a joint interpretive endeavor—carried out over time—where there is room for disagreement.[39]

The *experimentalist* stance expands that interaction, including other relevant agents, such as groups, communities, or civil society organizations, always in the search for a plausible reading of the right at

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[33] *See* Katharine G. Young, *A Typology of Economic and Social and Rights Adjudication:Exploring the Catalytic Function of Judicial Review*, 8 INT'L J. CONST. L. 385, 410 (2010).

[34] *See id.* at 387.

[35] *See id.* A plural vision of enforcement mechanisms in the area of social rights is also discussed in TUSHNET, *supra* note 7, at 226–64 (outlining "weak" and "strong" forms of judicial review, and emphasizing that "weak" forms take into account "the existence of reasonable disagreement over what an abstractly described constitutional right means in a particular context," and the difficulties both political processes and judicial power face in searching for that meaning).

[36] *See* Young, *supra* note 33, at 387-88.

[37] *Id.* at 410.

[38] *Id.* at 392–95.

[39] *Id.* at 395–98.

stake.[40] Rather than following a deferential path, the court examines the reasonableness of legislation and policy and, where necessary, promotes structural changes by proposing new priorities and bringing new voices and actors into the process.[41]

When a court conducts a *managerial* review, it interprets the right's content, and creates specific mechanisms and timetables to protect it.[42] This includes regularly monitoring the right to ensure its protection.[43] The court summons the other branches to produce plans for the judges' approval and control.[44] The judiciary needs to devote a large amount of technical and financial resources, with a significant impact on the institutional budget.[45]

Lastly, a *peremptory* review implies that the court is competent to provide the final interpretation of the right at stake, direct other branches of government on its implementation, and supervise the enforcement of those directives.[46] The court has the authority to strike down legislation, reinterpret it, or uphold it.[47]

A. From Judicial Review Approaches to Court Roles

While all judicial review types may be available to any court,[48] different combinations of approaches shape four court roles: catalytic, detached, engaged and supremacist.[49] Thus, judicial review typology provides the building blocks for a second, non-exhaustive typology—that of court roles,[50] aimed at classifying and connecting previously dispersed elements, for heuristic purposes.[51] Young contends that a courts' legitimacy comes from assuming the proper role according to the institutional context.[52]

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[40] *Id.* at 398.
[41] *Id.* at 398–401.
[42] *Id.* at 402.
[43] *Id.*
[44] *Id.* at 402–07.
[45] *See id.* at 402–07.
[46] *See id.* at 407.
[47] *Id.* at 387, 407.
[48] *See* Klatt, *supra* note 9, at 360 (emphasizing that Young's typology offers no normative guidance or justification for any form of judicial review).
[49] *See* YOUNG, *supra* note 1, at 312–13.
[50] *See* Young, *supra* note 33, at 411.
[51] *See* YOUNG, *supra* note 1, at 243.
[52] *See id.* at 339.

Various explanations may account for specific choices regarding judicial review approaches, according to Young.[53] Positive or negative state obligations may favor a more deferential or a more peremptory approach, respectively, though this is not a systematic link.[54] A second explanation emphasizes the court's growing confidence in its own legal creations: deference may have been an appropriate stance initially, but a more intellectually robust court may opt for a more interventionist approach.[55] Complexity is also cited as a significant factor: for example, deference may be in order for dealing with more intricate issues, while simpler solutions would warrant a bolder stance.[56] Finally, the costs appear to be a relevant factor.[57]

The adoption of a particular judicial review approach, in turn, usually correlates with how the court reads the Executive or Legislative position and the behavior regarding the right at stake.[58] The court's choice of a specific review approach is linked to its assessment of the extent to which governmental negligence, inadequate resources, or deliberate obstruction undermine the rights in question.

Catalytic courts, in Young's typology, may deploy all five types of judicial review approaches, according to circumstances, to open communication and deliberation channels with other branches of government and social actors, and between them, in order to achieve substantial rights protection, with less political friction.[59] The court does not design a solution, but makes it possible for the other branches to do it through a deliberative process. At the same time, the court keeps itself out of the focus of change. Young categorizes South Africa's Constitutional Court as a catalytic institution that also connects procedural safeguards to a substantial reading of democracy, including economic and social rights.[60]

A detached court resorts to deferential or conversational approaches to judicial review. The United Kingdom courts, according to Young, assume this role even after the approval of the 1998 Human Rights Act.[61] The judiciary can interpret any piece of legislation according to the Act, or declare it to be incompatible with it. The latter decision does not strike down that piece of legislation nor makes it inapplicable. It only works as

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[53] *See* Young, *supra* note 1, at 387, 413–16.
[54] *See id.* at 413–14.
[55] *See id.* at 414–15.
[56] *See id.* at 415.
[57] *See id.* at 416.
[58] *See id.* at 387, 416–17.
[59] *See id.* at 387.
[60] *See id.* at 387, 410–12, 418, 420; *see also* YOUNG, *supra* note 1, at 269.
[61] *See* YOUNG, *supra* note 1, at 206–12.

a signal to the Parliament. Judicial culture, steeped in a history of parliamentary sovereignty, reinforces the courts' detachment, especially when the decision implies resource allocation. Young contends a detached role may be effective for economic and social rights enforcement under certain institutional contexts, where the elected branches are traditionally responsive or attentive to judicial prompts and social demands.[62]

An engaged court employs an experimental or a conversational approach to judicial review.[63] Young contends that India's Supreme Court offers an example. While economic and social rights are included in the Indian Constitution only as formally non-enforceable "Directive Principles of State Policy," the Court has developed social rights jurisprudence since the 1980s.[64] Through an expanded interpretation of the enforceable right to life, and by considering the principles of interdependence and indivisibility of rights and the contents of the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the Court included housing, emergency healthcare, education, clean working conditions, and food as parts of the right to life.[65]

Supremacist courts favor a managerial approach or a peremptory approach to judicial review.[66] Examples of managerial stance include establishing admission tests for state-run healthcare systems, quotas for elementary education, or specific housing financing schemes.[67] A peremptory orientation accounts for decisions that strike down legislation or policies, such as pension cuts.[68] In many cases, these decisions come after a series of information-gathering measures and public hearings.[69]

Young describes the Constitutional Court of Colombia as an example of a supremacist court.[70] Based on its civil law tradition of inquisitorial

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[62] *See id.* at 206–08. A detached role in Latin American courts, such as the Argentine Supreme Court, cannot be explained by a history of legislative sovereignty, since the region shows, on the contrary, a historic pattern of strong Executives. *See* Bernal, *supra* note 15, at 338–40 (highlighting the "hyperpresidentialism" and the lack of adequate Congressional control over the Presidency as key elements for understanding the behavior of high courts in Latin America); DIANA KAPISZEWSKI, HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL 195 (Cambridge Univ. Press ed., 2012) (describing a pattern of "submission" of the Argentine Court to the Executive, interspersed by instances of confrontation).

[63] *See* YOUNG, *supra* note 1, at 242.

[64] *See id.* at 223–31.

[65] *See id.*

[66] *See id.* at 313–14.

[67] *See id.* at 317.

[68] *See id.* at 269.

[69] *See id.* at 318.

[70] *See id.* at 317.

powers, this new Court adopted a bolder, less bureaucratic stance, empowered by the 1991 Constitution and its wide standing rules and institutions, including the *tutela*—a petition procedure open to anyone seeking judicial protection for human rights.[71] In addition to that, the judges of the Court share a common belief in both the importance of rights and the relevant role of the judiciary in enforcing them, given Colombia's violent, authoritarian political history and the dysfunctional behavior of contemporary elected branches.[72]

In a closer look at the Colombian case, Young underscores the managerial approach has drawn heavily on judicial resources and overtaxes the Court's capacity. The peremptory approach has also shown its downsides, at least in the realm of public opinion. Since the Court has struck down legislation or policy for being "retrogressive" in terms of economic or social rights, some critics have described those decisions as biased in favor of the middle-class or registered workers, already benefited by traditional social policy and labor regulations, while the most vulnerable population remains unprotected. Where institutional dialogue seems inapt to promote changes, or the affected parties lack any political clout or relevance, the supremacist role seems the more adequate response, according to Young.[73]

The trend is not restricted to Colombia. According to Young, elements of supremacy can also be found in the high courts of Argentina and Brazil, after judicially enforceable social rights became part of the constitutions in the late 1980s and early 1990s.[74] This article, precisely, examines the shifting Court roles in social rights adjudication after the 1994 reform, and the following section lays out the salience of legal arguments offered by the Court to justify its evolving behavior.

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[71] *See id.* at 318.

[72] *See id.* at 317–18. The Argentine SC, as previously explained, is not a novel institution, having been established 160 years ago, in the early stages of Argentina's state-building process after a four-decade long civil war. *See* DAVID ROCK, ARGENTINA 1516–1982: FROM SPANISH COLONIZATION TO THE FALKANDS 125 (1986) (describing the simultaneous creation of national institutions such as a taxation system, a judiciary and the basic units for an army).

[73] *See id.* at 319–20; *see also* Landau, *supra* note 15, at 246–47 (describing the high-profile role of Brazil's highest federal court in enforcing social rights, particularly through the issuance of rulings involving individual cases).

[74] *See* YOUNG, *supra* note 1, at 322.

II. WHAT COURTS SAY: THE IMPORTANCE OF LEGAL JUSTIFICATION IN THE QUEST FOR LEGITIMACY

While the Argentine SC is not subject to electoral accountability and enjoys constitutional protections for its stability,[75] it needs to offer legal justifications for its decisions, as one of the main instruments to maintain its public legitimacy. The use of its own precedents as a legal foundation emerged very early in the Court's practice. Because Argentina belongs to the civil law tradition, there is no formal rule of *stare decisis*. In addition, the Court may exceptionally overrule previous decisions under certain conditions, also defined by applicable precedents. In the absence of such requirements, the Court needs to follow a different method to change course without formally overturning precedents, to avoid jeopardizing the Court's technical legitimacy.

Various factors, including the political landscape, the moral and ideological leanings of the Justices, their personal affinities or antagonisms, short-term urgencies or long-term institutional needs can be examined to explain any given judgment. However, the Court is expected to provide sound technical arguments, according to the standards of legal discipline[76]. Being a non-elected body, technical proficiency serves as one

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[75] *See* Arts. 99(4) & 110, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Under articles 99(4) and 110 of the Argentine Constitution, Supreme Court Justices hold their positions "during their good behavior" until they reach 75 years of age; at that point the President can nominate the same judge again and the Senate can confirm for a renewable five-year term. *See id.* Art. 99(4) & 110. Supreme Court Justices can be removed only by impeachment, which requires a two-thirds supermajority in both Houses of Congress (the lower House drafts the accusation while the Senate delivers the final decision). *See id.* Art. 99(4). In addition to that, the compensation clause—inspired by a similar provision included in the U.S. Constitution as part of Art. III, Sec. 1—ensures compensation for all federal judges "may not be diminished in any way during their tenure." *See id.* Art. 110. This clause intends to prevent financial manipulation by Congress or the use of pay cuts as political pressure on the judiciary. *See* Francisco José Quintana & Justina Uriburu, *Comentario al art. 110*, *in* 2 CONSTITUCIÓN DE LA NACIÓN ARGENTINA: COMENTADA 874 (Roberto Gargarella & Sebastián Guidi eds., 2019); NÉSTOR P. SAGÜÉS, 2 DERECHO CONSTITUCIONAL 442–46 (2017) (describing the protections granted by the Argentine Constitution to the judicial branch); *see also* MARÍA ANGÉLICA GELLI, CONSTITUCIÓN DE LA NACIÓN ARGENTINA: COMENTADA Y CONCORDADA 849–54 (3d ed. 2005); N. GUILLERMO MOLINELLI, M. VALERIA PALANZA & GISELA SIN, CONGRESO, PRESIDENCIA Y JUSTICIA EN ARGENTINA 637–42, 644–47 (1999).

[76] *See* Jonathan M. Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983–1999)*, 7 SW J.L. & TRADE AMS. 369, 376 (2000) (highlighting that "the relative degree of dependence of the Court on the Executive and the degree to which

key source of legitimacy, through what may be termed legal or technical legitimacy. Theunis Roux analyzes the Constitutional Court of South Africa and explains that, "legal legitimacy of judicial review depends on a court's capacity to decide cases according to forms of reasoning acceptable to the legal community of which it is a part."[77] Alba Ruibal, in turn, refers to a Court's "procedural legitimacy" as "the perceptions of principled and lawful decision-making," and the connected idea that judges' legitimacy implies that they "do not only make their decisions based on their political and personal preferences."[78] Legal grounds for judicial decisions thus contribute to what Marc Loth labeled "output legitimacy,"[79] *i.e.*, the legitimacy based on what the courts develop and deliver. This article discusses in later sections the main legal argumentative lines developed by the SC to justify its role changes related to social rights adjudication and to preserve its legal or technical legitimacy.

Legal training is a constitutionally required condition for becoming a member of the Court.[80] Legal arguments are, in principle, the only type of arguments admitted as a foundation for deciding cases. As the Court highlights in a 2015 ruling on healthcare benefits, "[j]udgments must have consistent and rationally sustainable grounds," to respect the constitutional rights to "defense in trial and effective judicial protection."[81] In the same paragraph, this unanimous vote stresses that "expressing the reasons that the law provides for the resolution of controversies" favors "the credibility

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the Court's reasoning in important constitutional cases is based on legal principles" are key elements for leading lawyers in Argentina to perceive the Court's behavior "as a legitimate use of judicial authority").

77 Roux, *supra* note 14, at 106, 108 (distinguishing "legal legitimacy" from "sociological legitimacy," understood as a general support from the public). That general notion encompasses the three types of legitimacy—institutional, substantial and authoritative—that a judicial organ like a Supreme Court can possess. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1827–29 (2005); *see also* Diana Kapiszewski, *Economic Governance on Trial: High Courts and Elected Leaders in Argentina and Brazil*, 55 LATIN AM. POLS. & SOC'Y 47, 54 (2013) (defining legitimacy as a reflection of the Court's standing among the general public as well as legal community).

78 *See* Ruibal, *supra* note 30, at 346, 354.

79 Marc Loth, *Courts in a Quest for Legitimacy: A Comparative Approach*, *in* THE LEGITIMACY OF HIGHEST COURTS' RULINGS 267 (Nick Huls et al., eds., 2009) (distinguishing between "input-legitimacy," related to institutional factors such as recruitment and training of judges, and "output-legitimacy," based on the court's performance and its communication with the parties).

80 *See* GELLI, *supra* note 75, at 770–71 (explaining that the Argentine Constitutional requirement of Supreme Court candidates to have at least eight years of professional legal experience is absent in the U.S. Constitution taken as a model—and defines the Supreme Court as a "court of law" and excludes laypeople from its membership).

81 Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/6/2015, "P., A. c. Comisión Nacional Asesora para la Integración de las Personas Discapacitadas y otro s/ amparo," Fallos (2015-338-488) (Arg.).

of the decisions made by the judiciary in the framework of a democratic society."[82] According to this view, individual rights in a trial setting, connect to democracy and to the non-elected Court's public esteem through the explicit articulation of legal grounds for judicial decisions.

This technical, non-political profile has another consequence. The Court has consistently refused to analyze the political merits or the social appropriateness of any given statute or decision adopted by the elected branches,[83] focusing on law as its central area of competence.[84]

A. Legal Justification and Precedents at Argentina's Apex Court

While it is not a formal rule,[85] the Argentine SC has tended to respect its own precedents since the earliest stages of its history.[86] This practice

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[82] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488, 492) (author's translation). A year before, the Court linked this requirement of legal foundation to Inter-American Court of Human Rights decisions. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/5/2014, "L., E. S. c. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno (CEMIC) s/ amparo," Fallos (2014-337-580, 589) (Arg.).

[83] *See* Susan Rose-Ackerman et al., *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines*, 29 BERKELEY J. INT'L L. 246, 313 (2011). In defining the scope of judicial competence, the Supreme Court developed over time its own version of the "political question" doctrine, which prevents the Argentine apex tribunal from assessing "the opportunity, merits or convenience" of decisions made by the political authorities. *See id.* (describing the local version of the "political question" doctrine as a defining element of judicial self-restraint in Argentina with respect to policy choices made by the elected branches). Leaving policy assessments to the Executive and Legislative powers, the Supreme Court affirms its own competence to engage in legal analysis and, if necessary, constitutional review. While the line between political assessments and legal judgments has often proved difficult to draw, it remains as a conceptual framework for the Court's activity, even if its explicit mention has diminished since the late 1990s. *See id.*

[84] JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 239, 248 (Ciaran Cronin & Pablo De Greiff eds., 1998) (arguing that in a "deliberative democracy" courts in modern democracies rely on law as a key legitimizing instrument due to the role of law in pluralist societies as central instrument of social integration).

[85] *See* Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 258, 291 (2019).

[86] *See id.* at 258, 274, 288 (highlighting that the Supreme Court officially publishes its decisions since 1863 and that the practice of respecting precedents diverged from the Civil Law tradition and catered to the demands of the legal profession of the mid-1860s Argentina); *see also* Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. UNIV. L. REV. 1483, 1559, n. 556 (1997) (providing multiple 19th century examples of Argentine SC rulings based on the Court's own precedents). In the preamble to the first volume of the official record of the Court's decisions (issued in 1864),

ensures the Court's credibility even in a Civil Law country.[87] As the Court stated in a 1939 case, "the tribunal could not move away from its case law but under causes sufficiently serious to justify the change of criteria" otherwise "it would be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed," according to the unanimous vote.[88] Following established precedents, reinforces the secular constitutional principle of equality before the law:[89] if a current case is like a previous one, equality demands that the same treatment be applied. On the other hand, it also contributes to the impersonality of the Court,[90] *i.e.*, to the separation of its decisions from the individual members of the current composition. It also reinforces the notion of judicial independence, understood here as independence from the Court, and from the personal biases or interests of its Justices. Finally, respect for precedent helps to achieve stability and predictability in constitutional interpretation and enforcement.[91] It is also relevant since the SC expects lower courts to follow its precedents,[92] in a process known as "vertical stare decisis,"

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the Secretary of the Court stressed the importance of publishing judgments, not only to make them generally known, but also "to raise before the Supreme Court the power of the people's opinion." *See* SECRETARÍA DE JURISPRUDENCIA, CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, NOTA DE JURISPRUDENCIA: HISTORIA DE LA COLECCIÓN "FALLOS DE LA CORTE SUPREMA DE JUSTICIA" (2021), https://sj.csjn.gov.ar/homeSJ/notas/nota/25/documento.

[87] *See* Santiago Legarre & Christopher R. Handy, *A Civil Law State in a Common Law Nation, A Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina*, 95 TUL. L. REV. 445, 473–74 (2021) (describing Argentina as a "hybrid" case, which incorporates an American style decentralized judicial review in the context of Civil Law tradition).

[88] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/5/1939, "Miguel Baretta c. Provincia de Córdoba," Fallos (1939-183-409, 413) (Arg.).

[89] Art. 16, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) ("The Argentine Nation admits neither blood nor birth prerogatives: there are neither personal privileges nor titles of nobility. All its inhabitants are *equal before the law*, and admissible to employment without any other requirement than their ability. Equality is the basis of taxation and public burdens." (italics added)).

[90] *See* Garay, *supra* note 85, at 314 (linking the notion of judicial "impersonality" to the practice of the U.S. Supreme Court); *see also* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 41 (Cambridge Univ. Press ed., 2017) (distilling the notion of impersonality from U.S. Supreme Court case law, which underscores the need for principles to be "founded in law, rather than in the proclivities of individuals").

[91] *See* GELLI, *supra* note 75, at 986.

[92] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/7/1985, "Incidente de prescripción Cerámica San Lorenzo," Fallos (1985-307-1094) (Arg.) (explaining that the Court ruled that lower courts have the duty to conform their rulings to those of the Court in similar cases and departing from these rulings requires the development of new arguments). This reaffirmation of a qualified version of "vertical stare decisis" took place in the context of a newly restored constitutional democracy where most lower court judges had been appointed or confirmed by the military dictatorship, and

which requires a well-developed and consistent rationale for its decisions over time to provide that guidance. The Court must not only lay the legal groundwork for its rulings, but also place those foundations within a larger, long-term structure of legal decisions, even if the Argentine Court—as Alberto Garay points out—takes this idea in loose terms, since it does not always adequately articulate the relevant facts of cases, focusing only on the similarities between them.[93]

However, the approach to precedents is not rigid, as there are exceptions. In particular, the Court has made it clear that preserving its constitutional function as an apex tribunal should come before the need to maintain a certain line of precedents. The Court has given three reasons for overruling a previous decision: (1) because it was an "erroneous" decision; (2) the lessons of experience; and (3) changing historical circumstances.[94] The first reason is based on technical arguments, while the other two are based on changes in context, at least as perceived by the Justices. In any event, a shift in course requires the Court to provide, in turn, a sufficient justification for it under one or more of the three possible scenarios.

On the other hand, a mere change in the composition of the Court is not a formally permissible reason to modify a line of precedents—at least not in principle. Nevertheless, governments have often tried to modify membership of the Court, by appointing Justices who share their

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according to Alberto Garay, lower courts took the ruling in *Cerámica San Lorenzo* as a permission to build their own legal paths if necessary. *See* Garay, *supra* note 85, at 285, 319 (emphasizing that after 1985 the Supreme Court had to overturn multiple lower court decisions that contradicted its precedents). More recently, the Court has confirmed this approach in the *Farina* (2019). *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/12/2019, "Farina, Haydée Susana s/ homicidio culposo," Fallos (2019-342-2344, 2352, 2357-58) (Arg.); *see also* Legarre & Handy, *supra* note 87, at 477–78 (underscoring the "soft" nature of the lower court's obligation to follow the Supreme Court's precedents and even though "vertical stare decisis" is not a strict rule, it is still necessary for the SC to provide sound legal justification).

[93] *See* Garay, *supra* note 85, at 285, 300–01 (describing the Court's difficulties in using facts as determinative elements in selecting applicable precedents and linking these weaknesses to the civil law training of most of the Justices).

[94] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/3/2006, "Alberto Damián Barreto y otra c. Provincia de Buenos Aires," Fallos (2006-329-759, 765). The Court also cited a 1960 ruling, where a unanimous vote justified an exception to the respect for precedents. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/10/1960, "Thorndike, María Helena García de s/ pensión," Fallos (1960-248-115, 125) (Arg.) (discussing with specific regards to pension rights, "[a]lthough the permanence of case law is desirable, based on the preservation of legal certainty, it should not prevent its revision when there are sufficient reasons of justice to that effect").

worldview, in order to secure favorable rulings.[95] Sometimes, a renewed Court bluntly changes course, explaining that the new stance is held by the "present composition" of the tribunal, without any effort to tie the new position to a pre-existing line of cases.[96] This approach can be seen as legitimate in the context of a restored rule of law after a dictatorship:[97] the 1983 SC, for instance, could invoke its legitimacy to depart from the holdings sustained by the military-era Court, due to their irregular origin. In other situations, the sheer departure from established precedent may take its toll on the Court's legitimacy.

Therefore, to protect its technical standing and public legitimacy, the Court needs to pursue a new legal path when overruling a certain precedent, if it cannot be done under the legally admissible grounds set by the Court itself. By distinguishing a current case from a previous one, the Court can leave the precedent untouched while applying a different solution to the new case, even if it is a similar one or shares relevant traits with the previous one. The Court has done this in the past, especially when following a precedent regardless of the concrete circumstances would contradict the deep rationale of the original decision or would damage the Court's credibility if no distinctions are made. For example, after a controversial 1986 ruling decriminalizing the private possession of small amounts of illegal drugs for personal use, subsequent decisions carved out a few exceptions to the first decision without overturning it.[98] This technique will be analyzed in rulings on social rights from the past decade.

III. ARGENTINA'S CONSTITUTIONAL FRAMEWORK ON SOCIAL RIGHTS: GRADUAL RECOGNITION, INTERNATIONAL LAW SOURCES, JUDICIAL ENFORCEABILITY

[95] ANDREA CASTAGNOLA, MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA 30-83 (2018) (discussing a detailed study of the various mechanisms for political manipulation of Argentine Supreme Court along the past century).

[96] *See* Garay, *supra* note 85, at 286, 310 (criticizing the use of a new composition as an argument to depart from precedents).

[97] *See* Juan F. González Bertomeu, Tell Me Who You Cite and I Will Tell You Who You Are. Supreme Court Citations Under Regime Instability in Argentina (Nov. 11, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3487114 (discussing a historical analysis of how the Supreme Court cites its own case law through the tumultuous political context of twentieth century Argentina).

[98] *See* Garay, *supra* note 85, at 296–97 n. 114 (2019) (including at least nine cases decided between 1986 and 1989 where the Court revised the initial holding in light of the specific facts of each case); *see also* Alberto B. Bianchi, *La Corte Bajo la Presidencia de Raúl Alfonsín (1983–1990)*, *in* 3 HISTORIA DE LA CORTE SUPREMA ARGENTINA 1983-2013: EL PERÍODO DE LA RESTAURACIÓN DEMOCRÁTICA 1163, 1248 n. 546 (Alfonso Santiago ed., 2014).

Social rights gradually became part of Argentina's Constitution. A first version, adopted through the 1949 constitutional reform, was eliminated by a military government in 1956.[99] A year later, a constitutional convention drafted a new article, known as article 14 *bis*, to grant labor rights, union rights and social security rights.[100] The 1994 reform significantly expanded social rights by giving constitutional status to various international human rights treaties and declarations.[101] Language from these instruments must be harmonized with the rest of the Constitution since all these elements share an equal rank.[102] The Constitution and the relevant international human rights treaties form what Argentine law scholars label as "[federal] constitutional block,"[103] which is a defined set of legal instruments endowed with the highest domestic rank. As explained in a later section, this reform took place while the

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[99] *See* Leticia Vita, *Weimar in Argentina: A Transnational Analysis of the 1949 Constitutional Reform*, 27 RECHTSGESCHICHTE-LEGAL HIST. 176 (2019) (analyzing the influence of the interwar German constitutional process in the adoption of social rights in the Argentine Constitution).

[100] Art. 14 *bis*, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). *See* CARLOS MARUCCI & GERARDO CIRES, HISTORIA CONSTITUCIONAL: REFORMAS CONSTITUCIONALES ARGENTINAS DESDE 1860 A 1994 114–19 (2022); *see also* Dardo Pérez Guilhou, *Los Partidos "del Centro" Ante la Convención*, *in* LA CONVENCIÓN CONSTITUYENTE DE 1957 327, 349 (2007).

[101] *Id.*, Art. 75(22) (explaining that Congress is entitled to remove treaties from the constitutional framework and to incorporate new human rights treaties which requires a supermajority of votes which is two-thirds of all members in each House); *see* Janet Koven Levit, The Constitutionalization of Human Rights in Argentina: Problem or Promise?, 37 COLUM. J. TRANSNAT'L L. 281, 291–92 (1999) (underlining that "Argentina's constitutionalization of human rights was a unique development" in Latin America at the time). In article 75(22), the following treaties are endowed with constitutional rank: (1) American Declaration of the Rights and Duties of Man; (2) Universal Declaration of Human Rights; (3) American Convention on Human Rights; (4) International Covenant on Economic, Social, and Political Rights; (5) International Covenant on Civil and Political Rights, and its Optional protocol; (6) Convention on the Prevention and Punishment of the Crime of Genocide; (7) International Convention on the Elimination of All Forms of Racial Discrimination ; (8) Convention on the Elimination of All Forms of Discrimination Against Women; (9) Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment; (10) Convention on the Rights of the Child.

[102] *See* GELLI, *supra*, note 75, at 716–17; Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577, 591–94 (2003).

[103] *See* HUMBERTO QUIROGA LAVIÉ ET AL., DERECHO CONSTITUCIONAL ARGENTINO 562 (Rubinzal – Culzoni, 2d ed., 2009) (explaining the need for the concept of "constitutional block" to encompass a group of dispositions of equal rank distributed in separate instruments, namely, the Constitution and selected human rights treaties); *see also* Alicia Ely Yamin & Agustina Ramón Michel, *Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina*, 46 FORDHAM INT'L. L. J. 377, 395 (2023) (underscoring that the notion of constitutional block "transformed the nature of the harmonization between the national and international").

government carried out a neoliberal program, started in 1989. The new text, on the other hand, seems to embrace a different, though implicit, economic model which includes "an active Social State."[104] While some commentators describe the Argentine case as a "paradox,"[105] Whitney Taylor considers, in a review of constitutional changes from the 1990s and the early twenty-first century, that social rights and neoliberalism do not necessarily conflict, since both approaches turn socioeconomic issues into individualized claims, duties, or questions.[106]

As a result of this gradual incorporation process, Argentina grants today the right to work under fair conditions with fair pay,[107] the right to rest and leisure,[108] the right to join trade unions,[109] the right to strike,[110] the right to enjoy "the highest attainable standard of physical and mental health,"[111] and the right to have an adequate living standard including housing, food and clothing,[112] the right to tuition-free public education,[113]

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[104] ANDRÉS GIL DOMÍNGUEZ, CONSTITUCIÓN SOCIOECONÓMICA Y DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES 41–42 (AD-HOC, 2009); *see also* SUSANA CAYUSO, CONSTITUCIÓN DE LA NACIÓN ARGENTINA: CLAVES PARA EL ESTUDIO INICIAL DE LA NORMA FUNDAMENTAL 262 (La Ley, 2d ed., 2006).

[105] *See* ALBERTO R. DALLA VIA, DERECHO CONSTITUCIONAL ECONÓMICO 124, 298 (Abeledo Perrot, Buenos Aires 2d ed., 2006).

[106] *See* WHITNEY TAYLOR, THE SOCIAL CONSTITUTION. EMBEDDING SOCIAL RIGHTS THROUGH LEGAL MOBILIZATION 9 (Cambridge Univ. Press ed., 2023) (pondering alternative explanations for the development of social rights language in turn-of-the-century constitutions in the context of simultaneous neoliberal programs).

[107] These rights can be found in International Covenant on Economic, Social, and Cultural Rights article 8(2) Dec. 16, 1966, 993 U.N.T.S. 3, S. EXEC. DOC. NO. D, 95-2 [hereinafter ICESCR]; G.A. Res 217 (III) A, Universal Declaration of Human Rights, art. 23 (Dec. 10, 1948) [hereinafter UDHR]; Art. 14 *bis* para.1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (granting workers "dignified and equitable working conditions . . . fair remuneration; minimum vital and adjustable wage").

[108] ICESCR, *supra* note 107, at 993 U.N.T.S. 15, S. EXEC. DOC. NO. D, 95-2, 3-4; UDHR, *supra* note 107, art. 24; Art. 14 *bis* para.1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (ensuring workers are entitled to "limited working hours . . . paid rest and vacations").

[109] ICESCR, *supra* note 107, at 993 U.N.T.S. 15-16, S. EXEC. DOC. NO. D, 95-2, 4-5; UDHR, *supra* note 107, art. 23; Art. 14 *bis* para.1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (granting workers "free and democratic labor union organizations recognized by the mere registration in a special record").

[110] ICESCR, *supra* note 107, at 993 U.N.T.S. 15-16, S. EXEC. DOC. NO. D, 95-2, 4-5; Art. 14 *bis* para.2, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (establishing trade unions have "the right to strike").

[111] ICESCR, *supra* note 107, at 993 U.N.T.S. 17,S. EXEC. DOC. NO. D, 95-2, 6-7; UDHR, *supra* note 107, art. 25.

[112] ICESCR, *supra* note 107, at 993 U.N.T.S. 16, S. EXEC. DOC. NO. D, 95-2, 6; UDHR, *supra* note 107, art. 25.

[113] ICESCR, *supra* note 107, at 993 U.N.T.S. 17-18, S. EXEC. DOC. NO. D, 95-2, 7-8; UDHR, *supra* note 107, art. 26; Art. 75(19), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (providing that education statutes enacted by Congress should "guarantee the principles of free and equitable State public education").

the right to social security including mobile pensions,[114] and the right to participate in cultural life, and the right to benefit from scientific progress,[115] among others.[116] The 1994 reform also included two principles relevant for interpreting and applying social rights: "social justice" (art. 75.19) and "real equality of opportunity and treatment" (art. 75.23), both associated with the social constitutionalism tradition.[117] According to article 75.19, Congress has the powers to "provide whatever is conducive to human development, to economic progress with social justice . . . ."[118] The concept had already been included in the abrogated 1949 reform,[119] and the SC recognized it as an implicit principle in *Berçaitz*, a 1974 ruling. Describing it as "justice in its highest expression," the Court added social justice implies ordering resources and activities in order to "ensure that each and every one . . . . shares in the material and spiritual goods of civilization."[120] After 1994, constitutional commentators have linked the notion to a certain "ethical direction" for economic growth,[121] or to the "equitable distribution of wealth among the whole population of the country."[122] On the other hand, the notion of "real equality" complements equality under the law, or formal equality, granted in nineteenth-century article 16. Congress, by virtue of article 75.23, is also entitled to establish

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[114] ICESCR, *supra* note 107, at 993 U.N.T.S. 16, S. EXEC. DOC. NO. D, 95-2, 9; Art. 14 *bis* para. 3, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (establishing workers are entitled to "adjustable retirements and pensions" while the State shall also "grant the benefits of social security, which shall be of an integral nature and may not be waived").

[115] ICESCR, *supra* note 107, at 993 U.N.T.S. 18, S. EXEC. DOC. NO. D, 95-2, 8-9.

[116] The 1994 reform also added some rights and guarantees in the constitutional text, such as consumers' rights or the right to a healthy environment in Art. 42, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* Art. 41.

[117] Art. 75(19), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* Art. 75(23).

[118] *Id*. Art. 75(19).

[119] *See* Luis Guillermo Piazza, *The Argentine Constitution and Its 1949 Reform*, 2 ANUARIO JURIDICO INTERAMERICANO 140, 146-47 (1949).

[120] The ruling also established as an interpretative principle *in dubio pro iustitia socialis*. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/9/1974, "Berçaitz, Miguel Ángel s/ jubilación," Fallos (1974-289-430), at 436 (Arg.) ("[W]hen in doubt, rule in favor of social justice . . . ."). In more recent times, the Supreme Court mentioned the social justice principle again in *Gentini* (2008), majority vote, parag. 1, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/8/2008, "Gentini, Jorge Mario y otros c/ Estado Nacional Ministerio de Trabajo y Seguridad s/ part. accionariado obrero," Fallos (2008-331.2-1815).

[121] DALLA VIA, *supra* note 105, at 374.

[122] *See* HUMBERTO QUIROGA LAVIÉ, CONSTITUCIÓN NACIONAL COMENTADA442 (3d ed., 2000).

"positive" or proactive measures to foster human rights enjoyment, for groups like children, women, the elderly, and people with disabilities.[123]

Traditionally, legal scholars considered social rights unenforceable through judicial review in the absence of statutory regulation by Congress. Pensions, on the other hand, were subject to occasional constitutional challenges by plaintiffs seeking improvement in their retirement income.

The 1994 reform modified the applicable framework by explicitly granting courts the power to declare statutes and regulations unconstitutional, a practice already carried out by the judiciary since the mid-1860s.[124] According to article 43 as drafted in 1994, constitutional review can be carried out through the *amparo* action,[125] which provides quick injunctive relief. As previously explained, this action is also suitable to cases involving groups or classes of citizens for claims regarding rights of general public interest, the right to a healthy environment, or consumers' rights. The revised Constitution, in sum, opens the way for judicial enforcement of all rights, including social rights.[126]

The current Argentine Constitution contains a robust set of social rights provisions, including detailed clauses from international law sources. All of these rights are now subject to enforcement through

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[123] *See* QUIROGA LAVIÉ ET AL., *supra note* 103, at 415–19 (describing art. 75.23 as inspired by European post-1945 constitutions' focus on substantial equality and connecting the reference in article 75.23 to "positive measures" with article 4.1 of the Convention on the Elimination of All Forms of Discrimination Against Women, which enables States to adopt "temporary special measures . . . aimed at accelerating de facto equality [between men and women]").

[124] *See* Miller, *supra* note 86, at 1548 (observing that recognition of the authority of the Supreme Court to review the conduct of Congress and the Executive predated even the appointment of the first group of Justices).

[125] Previous constitutional reforms in 1949 and 1957 included social rights but did not establish specific judicial enforcement procedures, as the 1994 reform explicitly did in article 43. It should be noted, though, that the *amparo* action emerged in 1957 through a Supreme Court decision in *Siri* (1957). *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1957, "Siri, Ángel s./ interpone recurso de hábeas corpus," Fallos (1957-239-459). A year later, the SC adopted in *Kot* (1958) a similar solution to a case where the amparo challenged conduct carried out by a private party (in the case, a trade union). *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/9/1958, "Kot, Samuel s/ recurso de hábeas corpus," Fallos (1958-241-291); *see also* Sagüés, *supra* note 27, at 64.

[126] Art. 43 para. 1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) ("Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten *rights and guarantees recognized by this Constitution, treaties or laws*, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission *is based on an unconstitutional rule.*" (italics added)).

constitutional judicial review. The 1994 reform empowered the judiciary to act as guardian of constitutionally enshrined social rights.[127]

A. Argentina's Supreme Court: Instability at the Apex

The highest court of law in the country deals with the interpretation of constitutional clauses and functions as a last resort tribunal. Its rulings cannot be appealed and its competence in matters of appeal includes only questions of law. While the Court's original jurisdiction is limited, its appellate jurisdiction is expansive. Multiple mechanisms exist for appealing federal lower court or provincial supreme court decisions to the Court, which must fully consider all properly filed cases. Since 1990, on the other hand, Law 23.774 enables the Court to dismiss non-important cases without giving any formal argument.[128]

The Court is composed of five Justices appointed by the President with confirmation of two-thirds of the Senate. As explained in a previous section, the magistrates' term ends at seventy-five years old, when the President and the Senate can keep the judges for an additional term of five years, following the same process established for the appointment. The five-year extension can be repeated indefinitely.[129]

Over the last thirty years, the SC has undergone significant changes in its composition,[130] as mentioned in a previous section. In the 1990s, a nine-member Court included a majority of members appointed by President Carlos Menem (1989–1999). This Court offered reliable support to his neoliberal agenda, including reforms to labor laws, the pension system, and social welfare programs, under an ample program aimed at Government downsizing, privatization, deregulation, and attracting foreign investment. The Court failed to build public legitimacy, and by the end of Menem's presidency, it ended its term being held in very low public esteem.

A reshaping of the SC took place in the wake of the 2001 crisis. President Néstor Kirchner (2003–2007) started a reform process in 2003:

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[127] *See* TAYLOR, *supra* note 106, at 5 (discussing that the 1994 reform may be included in a "fourth wave of constitutionalism," globally prominent since the 1980s until the early 2000s).

[128] Law No. 23774, Apr. 11, 1990, B. O. 175 (Arg.); *see* KAPISZEWSKI, *supra* note 62, at 71 (arguing that even under Law 23.774, the Supreme Court has no extensive control of its own docket, since it must analyze, at least formally, all cases); Pereira, *supra* note 10, at 716 (pointing out that while the Court has no formal instruments to steer its caseload, "[i]t has ample room for discretion when deciding which cases to consider at what time").

[129] Art. 99(4), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *id.* Art 110.

[130] *See generally*, CASTAGNOLA, *supra* note 95.

two Justices were impeached while three resigned. By 2004–2005, a new composition was in place, and a legal reform gradually brought the Court back to its traditional format of five justices.[131]

By 2015, resignations and deaths had left the Court with only three members, and the opposition refused to discuss any nominee by President Cristina Kirchner (2007–2015).[132] In 2016, two new members joined the Court, appointed by President Mauricio Macri (2015–2019). In 2021, the only female sitting member of the Court resigned, and her seat remains vacant as of December 2023.

Reconfiguration of the Court's ideology has generally been "not subtle," according to Martín Oyhanarte: impeachment (1946, 2002–2005), *de facto* dismissal (1955, 1966, 1976), dismissal as a result of a return to constitutional rule (1973, 1983), and modification of the number of members (expansion in 1960 and 1989, reduction in 2006).[133]

In summary, the composition and legitimacy of Argentina's highest court have fluctuated due to appointments by different presidents over the past 30 years. The Court has shifted between different ideologies and has endured periods of understaffing. These changes in membership may affect the Court's technical legitimacy since Justices are expected to follow precedents or argue extensively to justify a departure from previous solutions. The following sections analyze the different roles the Court assumed in the area of social rights, and how it built legal grounds for them.

IV. AFTER THE REFORM, WAITING FOR THE CRISIS TO COME: A DETACHED SUPREME COURT (1994–2000)

A 1996 social security case showed the Court's deferential approach in the area of social rights. The ruling dismissed a retiree's claim for an indexed increase in his pension, as established by the constitutional mobility clause since 1957. According to the Court, Congress has the authority to define the applicable rate for pensions.[134] Despite new rights and innovative judicial attributions included in the 1994 constitutional reform, the majority kept a detached role by maintaining a deferential approach in the adjudication of social rights. This stance was part of the

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[131] Law No. 26183, Dec. 15, 2006, B.O. 123154 (Arg.).

[132] *Rechazo opositor a los candidatos de Cristina Kirchner para la Corte Suprema*, CLARÍN (Oct. 29, 2015, 10:49 AM), https://www.clarin.com/politica/rechazo-cristina-kirchner-corte-suprema_0_B1pg-WYPQl.html.

[133] *See* Oyhanarte, *supra* note 19, at 715.

[134] *See* CSJN, 27/12/1996, "Chocobar, Sixto Celestino," Fallos (1996-319-3264) (underlining Congress is constitutionally entitled to define the indexing methodology for pensions).

general trend of support for President Carlos Menem's neoliberal reform program, which was launched in the wake of the 1989 hyperinflation crisis.

A. From Neoliberal Stability to Increasing Recession and Political Change: a Court in Discredit

Economic stability and growth, under fiscal discipline and a very tight monetary regime,[135] led to President Menem's re-election in 1995, despite criticism of perceived corruption and concentration of power in presidential hands. During his second term, unemployment rose, and external crises led to a recession, while foreign debt continued to grow beyond acceptable risk levels. A coalition of center and left-of-center parties won the 1999 elections[136] and Fernando de la Rúa became President on an anti-corruption and poverty alleviation platform, without an articulate alternative for economic issues.[137]

The SC, in turn, continued to face severe legitimacy problems during this period. Public opinion saw the Court as lacking institutional independence and technical solvency since President Menem packed it

[135] Argentina adopted in 1991 a currency board system, pegging the local peso to the U.S. dollar through Law 23.928 (known as Convertibility Law). *See* Mariana Heredia & Pablo Nemiña, *Beyond the Diffusion of Neoliberalism: Embedded Reasoning and Policy Innovation in the Origins of the Argentinian Currency Board*, 25 REVISTA HISTÓRIA UNISINOS 250, 253–54 (2021) (explaining that Convertibility's success in curbing inflation—endorsed by international organizations—made economists overlook its negative repercussions and its likely demise, which had been clearly visible in its early stages).

[136] On the origins and proposals of the 1999 triumphant coalition, *see* Héctor E. Schamis, *Argentina: Crisis and Democratic Consolidation*, 13 J. DEMOCRACY 81, 85-88 (2002) (attributing part of the political problems of President De la Rúa to the internal differences inside the ruling coalition and the prevalence of personally close advisors to the President in day-to-day decision-making); *see also, generally*, Violeta Dikenstein & Mariana Gené, *De la creación de la Alianza a su vertiginosa implosión. Reconfiguraciones de los elencos políticos en tiempos de crisis*, *in* LOS AÑOS DE LA ALIANZA. LA CRISIS DEL ORDEN NEOLIBERAL 35 (Alfredo Pucciarelli & Ana Castellani, eds., 2014) (explaining the coalition lacked a unified vision of the way out of the recession).

[137] *See also* Brad Setser & Anna Gelpern, *Pathways through Financial Crisis: Argentina*, 12 GLOB. GOVERNANCE 465, 467-68 (2006) (highlighting that after 1998, Argentine recession due to external shocks fostered continuous political tension, which in turn led "successive groups of creditors to lose confidence," sparking an external debt crisis that exploded in 2001). For a general description of the 1990s reform program and its connection to the 2001 crisis, *see generally* Ignacio Hirigoyen, *Bank Crisis in Argentina: The Constitutionality of Bank Deposits Pesification, the Massa Case*, 14 LAW & BUS. REV. AM. 53 (2008).

with six new appointees in 1990.[138] As the economic crisis deepened, a massive popular contempt for political institutions developed at the turn of the century. The Court was one of the main targets of public discontent since it had been consistently deferential to the policy decisions of the Executive branch regarding resource management.[139]

B. A Hands-off Court: Traditional Vision and Conservative Reading of International Human Rights Law

In the area of social rights, the SC exercised a deferential approach during this period to uphold labor law reforms reducing workers' rights under a general deregulation model with a pro-business orientation. In his extensive historical study of the apex tribunal, Alfonso Santiago describes this composition of the Court as "comparatively, the least protective of workers' rights" of all Courts acting during Peronist administrations since 1946.[140] For instance, the 1996 ruling in *Sallago*[141] upheld a Necessity and

[138] The Court increased its size through the Law 23774, which raised the number of Justices from five to nine, and created, as mentioned in a previous section, a procedural mechanism for the Court to dismiss claims without offering grounds. *See* Miller, *supra* note 76, at 394–99 (providing a thorough revision of the subordination of the Supreme Court to the Executive Power during the Menem administration, and describing the consequent loss of public trust in the Court); *see also* Alfonso Santiago (h), *La Corte de los Nueve (1990-2003)*, *in* 3 HISTORIA DE LA CORTE SUPREMA ARGENTINA 1983-2013, EL PERÍODO DE LA RESTAURACIÓN DEMOCRÁTICA 1295, 1669–70 (2014) (describing the Court between 1990 and 2003 as one of the most "politicized, questioned, criticized, controversial and discredited" in Argentine history, and offering a panoramic review of multiple objections against that Court from local and foreign scholars (author's translation)); *see also* CASTAGNOLA, *supra* note 95, at 47–49 (describing the specific process of the 1990 court-packing).

[139] Nonetheless, the Court's most notable concession of power to the Executive took place four years before the 1994 constitutional reform. It concerned government control over private property. In *Peralta* (1990), the majority of Justices upheld a Necessity and Urgency Decree that, in response to the country's severe hyperinflation and the threat of a collapse of the financial system, forcibly converted most private bank accounts into long-term government bonds. With this decision, the Court allowed the Executive to seize control of citizens' private savings in an attempt to stabilize the spiraling inflation and prevent financial chaos. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27/12/1990, "Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economía BCRA.) s/ amparos," Fallos (1990-313-1513) (Arg.); *see also* Miller, *supra* note 76, at 400–03 (highlighting that the majority opinion "[S]imply stated that the failure of Congress to explicitly reject the decree allowed the Court to infer Congressional acceptance of the measure," in an extremely deferential approach to Executive decisions over private property).

[140] *See* SANTIAGO (h), *supra note* 138, at 1556-57 (underscoring how the Supreme Court since 1990 reversed lower courts decisions favorable to workers, upheld regressive changes in labor conditions and limitations on severance payments, among other measures objected by trade unions and labor activists).

[141] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/10/1996, "Sallago, Alberto Asdrúbal c. Astra C.A.P.S.A. s/ despido," Fallos (1996-319-2267) (Arg.).

Urgency Decree that curtailed statutory rights of merchant marine workers, illustrating the majority of the Court's inclination to confirm the Executive actions aimed at deregulating certain economic activities, even when the President exercised Congressional competences in the emergency context.

In a notable exception to the general deferential approach in labor rights, the majority of the Court struck down a statute on constitutional grounds, only to deny banking personnel a special protection granted by a 1988 law.[142] The statute required private banks to give priority to rehiring workers who had been fired for joining strikes in previous decades. The Bank had to pay a substantial monetary compensation as an alternative to rehiring. In *Agnese* (1998),[143] the Court held that this "preference right" contradicted the constitutionally protected freedom of contract and ruled against the plaintiff, a former employee of a large private bank. In this case, the Court embraced a peremptory approach against an act of Congress, though with a clear orientation in favor of traditional contractual freedoms. Probably, the result also suited the general labor deregulation model spearheaded by the Menem administration.

Throughout this period, pensioners demanded an improvement in their incomes. The privatization of the pension system in 1993 did not substantially benefit pensioners at the time. They were dependent on the pre-existing state-funded system, which remained as a residual institution. In addition, the currency board system adopted in 1991 as an anti-inflationary tool banned all forms of indexation, including any mobility scheme for pensions, required by article 14 *bis* of the Argentine Constitution. The Menem administration left pensions broadly fixed, in an attempt to maintain fiscal balance and avoid inflationary pressures.[144] Congress also failed to adopt an indexing methodology. Judicial demands multiplied as the only channel left open for seeking redress. In considering these claims, the SC would again demonstrate its deferential approach to adjudication of social rights, in this case, the right to social security.

In *Chocobar*[145] a slim majority of the Court acknowledged Congress holds ample discretionary powers to adapt the pension system to new

[142] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/11/1998, "Agnese, Miguel Angel c. The First National Bank of Boston (Banco de Boston) s/ ac. de reinc. ley 23.523," Fallos (1998-321-3081) (Arg.).

[143] *Id*.

[144] *See* Rafael Rofman, Eduardo Fajnzylber & Germán Herrera, *Reforming the pension reforms: Argentina and Chile,* 101 CEPAL REVIEW 83, 85–86 (2010). The re-nationalization of the pension system is described in a later section of this article.

[145] *See id.* Fallos (1996-319-3264) (highlighting Congress is constitutionally entitled to establish the indexing methodology for pensions).

situations.[146] This deferential approach even found basis in a specific reference to article 22 of the Universal Declaration of Human Rights: the majority of Justices stressed the right to social security is to be implemented "in accordance with the organization and resources of each State;" they quoted similar language from article 26 of the American Convention of Human Rights.[147] In other words, the Court turned to international human rights law to broaden Congressional powers. Pension rights remained conditioned to the available resources as determined by the legislative branch. This specific use of international law differed[148] from the one contemporarily applied in judicial review of civil rights and procedural guarantees, where clauses from human rights treaties set limits to State powers, even before 1994.[149] In *Giroldi* (1995),[150] for instance, the Court relied on decisions by the Inter-American Court of Human Rights to strike down a passage of the applicable criminal procedure code for failing to ensure the right to appeal the judgment to a higher court.[151]

The immediate aftermath of the 1994 reform did not bring a more active Court in the area of social rights. Despite the significant changes in terms of rights and judicial attributions, the apex body sustained the traditional view of social rights as non-enforceable through judicial review

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[146] *See id.* Fallos (1996-319-3269) (emphasizing Congressional authority to completely modify the pension system in light of "the different situations that society may go through," among other changing circumstances).

[147] *See id.* Fallos (1996-319-3265) (emphasizing availability of resources as a limit to the effective realization of the right to social security). The reference to "available resources" is included only in the Spanish-language version of the article 26 of the American Convention on Human Rights, while it is absent in the English version. *See* Damián A. González-Salzberg, *Economic and Social Rights within the Inter-American Human Rights System: Thinking New Strategies for Obtaining Judicial Protection*, 18 INT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 117, 130 (2011) (considering the impact of the textual difference in assessing State duties with regard to social rights).

[148] In analyzing *Chocobar* shortly after its publication, Janet Koven Levit criticized the ruling for forcing international human rights treaties to yield to the Supreme Court precedents on the constitutional rights at stake. *See* Koven Levit, *supra* note 101, at 326–27.

[149] *See* Hernán Victor Gullco, *The Clash of Constitutional and International Law in Argentinean Case Law*, 27 SW. J. INT'L L. 315, 323–27 (2021) (explaining the primacy of international law since a 1992 Supreme Court ruling).

[150] Corte Suprema de Justicia [CSJN], [National Supreme Court of Justice], 7/4/1995, "Giroldi, Horacio David y otro s/ recurso de casación," Fallos (1995-318-514) (Arg.).

[151] Isaías Losada Revol, *The Ministry of Foreign Affairs Case: A Ruling with Unforeseen Consequences in the Enforcement of Human Rights in Argentina*, 49 GEO. J. INT'L L. 461, 468–69 n. 36 (2018) (enumerating a group of Argentine Supreme Court rulings since 1995 based upon Inter-American Court decisions); *see also* Antonio Moreira Maués, Breno Baía Magalhães, Paulo André Nassar & Rafaela Sena, *Judicial Dialogue between National Courts and the Inter-American Court of Human Rights: A Comparative Study of Argentina, Brazil, Colombia and Mexico*, 21 HUM. RTS. L. REV. 108, 117–18 (2021) (explaining that the Argentine Supreme Court in 1992 relied on the 1969 Vienna Convention on the Law of Treaties to justify the direct application of international human rights treaties, even before the 1994 constitutional reform).

but rather conditioned upon Congressional or Presidential regulation. The Court did not find a way to reconcile a social rights discourse and a neoliberal economic model,[152] and chose to stay away from enforcing those rights. Such a deferential role, exercised even in cases related to stagnant pensions, did not help the Court to improve its decaying public image or to show technical proficiency to deal with a renewed Constitution.

V. Rebuilding an Institution, Rediscovering Social rights: a Predominantly Supremacist Court (2000–2012)

In mid-2000, the Argentine SC upheld a lower court ruling that determined the government had an obligation under the 1990 AIDS law to provide treatment to all HIV/AIDS patients registered with health care providers, both Government-funded and private.[153] The Court rejected the Government's argument that economic constraints and the worsening financial situation excused non-compliance, holding that the right to health care was justiciable and that the State was ultimately responsible under the Constitution and the law.[154] This decision marked the start of a gradual transition from the previous detached role to a supremacist one in the adjudication of social rights. This stance would consolidate over the following decade, as the Court suffered the deep social and political crisis that hit Argentina in 2001 and later undertook—with a partially-renewed composition—an institutional effort to restore its public legitimacy, just like the rest of the State branches had to.

As will be discussed in greater detail in the following sections of this article, under an increasing supremacist role, the Court engaged in a constitutional review of the decisions of the elected branches while trying to contain the wider effects of its rulings on healthcare, labor and union rights, and social security in order to prevent an excessive financial impact. During this phase, the Court invalidated legislation and policies on constitutional grounds, as well as decisions by private employers and health providers. Though a deferential approach was still applied in the initial stage of this period to some rights with potential budgetary implications, after 2003 a renewed Court abandoned that position. In the

[152] As explained before, both developments could be combined in a general individualization of claims and problems. *See* TAYLOR, *supra* note 106, at 9.

[153] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/6/2000, "Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social - Estado Nacional s/ amparo ley 16.986," Fallos (2000-323-1339) (Arg.).

[154] *Id.*

specific case of pension claims, the Court also tried a conversational approach with Congress, considering the financial implications of ruling on such a thorny matter—yet a year later returned to a peremptory stance because of legislative inaction. In embracing this supremacist role the Court, in turn, ran the risk of judicial usurpation and of overtaxing the tribunal with an increasing number of demands by people and groups hit by the crisis. The Court could also get trapped in the day-to-day detailed administration of difficult issues such as social welfare, education, or healthcare. Nonetheless, a Court focused on social needs could achieve growing public legitimacy, after a period of declining popularity and serious attempts of impeachment.[155] All major interventions by a supremacist Court had to be carried out with care in order to maintain public esteem, recognition by the other branches, and acceptance by the legal community. Procedural rules provide the Court with the necessary flexibility to decide when to issue judgments, or to reject claims without providing legal reasons.[156]

From a legal standpoint, the SC based its new role on the explicit presence of social rights in the Constitution and the judicial competence to enforce them in the same way as any other right. An additional legal argument came from international human rights law: the Court emphasized that treaties had to be internally applied—especially those endowed with constitutional rank after the 1994 constitutional reform. At the same time, the Court increasingly turned to decisions and materials issued by the monitoring bodies of human rights treaties as sources of interpretation.[157] This methodology would provide the Court an external, technically sound support for its rulings, separating them from local, day-to-day political pressures and reinforcing its image of independence.

In some cases, the specific construction of a certain social right would use an extensive reading to expand its content for enforcement purposes. In Argentine constitutional scholarship, a legal interpretation that departs from textual meaning is labeled a "corrective" interpretation. If this non-

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[155] *See* Roux, *supra* note 77, accompanying text; Fallon, *supra* note 77, accompanying text; Kapiszewski *supra* note 77, accompanying text.

[156] *See* Garay, *supra* note 85, at 284–85 (explaining articles 280 and 285 of the Argentine National Civil and Commercial Procedure Code explicitly allow the Court to reject appeals from a lower court decision in the absence of a substantial constitutional question); *see also* Kapiszewski, *supra* note 62, accompanying text; Pereira, *supra* note 128, accompanying text.

[157] Walter F. Carnota, *Judicial Globalization: How the International Law of Human Rights Changed the Argentine Supreme Court*, *in* GLOBALIZING JUSTICE. CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS 255, 263–64 (Donald W. Jackson et al., eds., 2010) (explaining the gradual but sustained increase of international human rights law relevance in the Argentine Supreme Court decisions even before the 1994 constitutional reform, initially as a means to accelerate and secure Argentina's integration to global markets).

literal construction renders an expanded reading, it is considered an "extensive" interpretation. In other words, *extensive interpretation* includes—in a certain rule's reach—a case that under everyday language would be excluded.[158] The development of robust legal arguments, including those initially provided by international institutions, cemented the technical legitimacy of the Court.

A. A Court in Flux: From the Social Outbreak to the Arduous Reconstruction

The 2001 crisis marked the end of a decade-long neoliberal reform process. Centrist President Fernando de la Rúa had to resign in the wake of financial collapse and popular outbreaks that were lethally repressed.[159] With a record 20% unemployment rate,[160] half of the population lived below the poverty line and the discredited political elite did not offer a clear way out of a billionaire external debt default[161] combined with a 40% devaluation.[162] Massive street protests put interim President Eduardo Duhalde to the test during his year in tenure.[163]

Center-left Peronist Néstor Kirchner took office after his rival, former President Carlos Menem, declined to participate in the 2003 runoff election. Economic recovery and institutional renewal, including changes in the Court and the reduction of its size, helped the Executive to rebuild political authority and ensure continuity through the election of Cristina Kirchner in 2007.

Between 2003 and 2005, through impeachments and resignations, new vacancies allowed a partial renovation of the Court membership. By

[158] *See* NÉSTOR P. SAGÜÉS, 1 DERECHO CONSTITUCIONAL 166–167 (2017); Antonio M. Hernández, *Teoría Constitucional*, *in* 1 DERECHO CONSTITUCIONAL TOMO I, 73 (Fedye Fondo Derecho Editorial de Derecho y Economía 2012); GREGORIO BADENI, TRATADO DE DERECHO CONSTITUCIONAL TOMO I 102-03 (2d ed., 2006).

[159] For a general description of the crisis, *see* Santiago (h), *supra* note 138, at 1308–10.

[160] Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIA. INTER-AM. L. REV. 409, 449 (2008).

[161] *Id.* at 452.

[162] Jayson J. Falcone, *Argentina's Plight-An Unusual Temporary Solution to a Sovereign Debt Crisis*, 27 SUFFOLK TRANSNAT'L L. REV. 357, 362 n. 25 (2003).

[163] *See id.* at 449–61 (analyzing the impact of mass protest in the political outcome of the 2001 crisis); *id*. at 359–65 (describing the process that led to the 2001 crisis and the emergency legislation adopted in the immediate aftermath); *see also* John V. Paddock, *IMF Policy and the Argentine Crisis*, 34 U. MIA. INTER-AM. L. REV. 155, 184–85 (2002–2003) (describing the high unemployment and poverty rates in 2002 and highlighting the Supreme Court's clashes with the Executive over emergency economic measures).

Executive Decree,[164] President Néstor Kirchner established a self-restraining, public scrutiny mechanism for every potential Court nominee. The Decree also adopted a series of guidelines to ensure gender and geographic diversity in the candidates, which were to be confirmed or discarded by two-thirds of the Senate. Four new Justices joined the Court in this initial stage through the new procedure.[165]

Leaving behind the neoliberal program, Kirchnerist economic policy focused on the domestic market, involving a greater role for the State.[166] Significant growth, reduced unemployment, and rising wages contributed to the Government's popularity. Large-scale social policies, such as the Universal Child Allowance,[167] increased social security coverage and the renationalization of the pension system,[168] also strengthened the Executive. On the other hand, Kirchnerism clashed with agricultural businesses over export taxes while keeping a protracted conflict with powerful media businesses about the regulation of audiovisual broadcasting. The main criticisms against Néstor and Cristina Kirchner included accusations of poor governance, corruption, and political centralism.[169] After 2011, the relationship between the re-elected President Cristina Kirchner and the Court showed some signs of tension.

As a general trend, the new Court rebuilt its public legitimacy during this period through various means.[170] It adopted institutional transparency measures in dialogue with leading NGOs and created new offices for

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[164] Decree No. 222/2003, Jun. 19, 2003, [30175] B.O. 2 (Arg.).

[165] *See* Alba M. Ruibal, *Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court*, 51 LATIN AM. POLS. & SOC'Y 59, 51, 67 (2009) (describing the process innovation as a form of strategic self-restriction intended to bolster the legitimacy of the Government and the credibility of the renewed Court in a climate of social and institutional turmoil and mounting pressure from civil society).

[166] *See* Fernando Porta et al., *Un Proyecto Político con Objetivos Económicos. Los Límites de la Estrategia Kirchnerista*, *in* LOS AÑOS DEL KIRCHNERISMO: LA DISPUTA HEGEMÓNICA TRAS LA CRISIS DEL ORDEN NEOLIBERAL 99, 99–102 (Alfredo Pucciarelli & Ana Castellani eds., 2017).

[167] Decree No. 1602/2009, Oct. 29, 2009, [31770] B.O. 1 (Arg.); *see also* Pilar Arcidiácono, *Expansion and Exclusion in the Universal Child Allowance Programme in Argentina*, 13 SUR-INT'L J. ON HUM. RTS. 27, 28–29 (2016).

[168] Law No. 26425, Nov. 20, 2008, [31548] B.O. 1 (Arg.); *see also* Fabio Bertranou et al., *Pension Privatization and Reversal of Pension Reforms in Argentina* 1–7 (Int'l Labour Off., Geneva, Working Paper No. 64, 2018) (analyzing Argentina's changing pension system, specially from the 1993 reform to the re-nationalization in the wake of 2008 global financial crisis).

[169] Ernesto Calvo & M. Victoria Murillo, *Argentina: The Persistence of Peronism*, 23 J. DEMOCRACY 148, 157–59 (2012).

[170] Alba Ruibal, *Innovative Judicial Procedures and Redefinition of the Institutional Role of the Argentine Supreme Court*, 47 LATIN AM. RSCH. REV. 22, 23 (2012) (attributing innovations by the Court since 2003 to the need "to recover its institutional legitimacy" in the context of a vibrant NGO-led demand for reforms).

socially relevant issues, such as domestic violence.[171] The Court also ruled on politically charged questions, including the economic emergency program, the unbearable living conditions of aboriginal peoples and the renewed prosecution of human rights abuses from the 1976–1983 dictatorship era. Moreover, the Court explored new procedures in adjudication, from convening public hearings[172] and receiving *amicus curiae* reports to issuing rulings with collective effect and engaging in structural reform processes. This managerial (in Young's terms) approach guided the Court's intervention in a large-scale environmental case[173] and in a collective habeas corpus promoted by a leading human rights NGO to spark a desperately needed relief on the imprisonment conditions in Argentina's largest province.[174]

As part of the context, the decision handed down in *F., A. L.* (2012)[175] surely counts as one of the most widely discussed rulings of the period. Resolving a decades-long debate over the meaning of the then-current article 86 of the Penal Code (enacted in 1921), the Court defined abortion as legal when the pregnancy results from rape.[176] Based on the right to personal autonomy, the ruling took the right to health only as an additional consideration to be addressed once access to the medical procedure was

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[171] *Id.*

[172] *See* Ricardo Lorenzetti, *Las audiencias públicas y la Corte Suprema*, *in* POR UNA JUSTICIA DIALÓGICA. EL PODER JUDICIAL COMO PROMOTOR DE LA DELIBERACIÓN DEMOCRÁTICA 345 (Roberto Gargarella ed., 2014) (explaining the importance of public hearings, especially in cases with "institutional relevance," for promoting debate in a divided society).

[173] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/8/2008, "Mendoza, Beatriz Silvia y otros c. Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza – Riachuelo)," Fallos (2008-331-1622) (Arg.). For a complete analysis of the case, *see* Charles Sabel & María Emilia Mamberti, *Participación, Colaboración y Coordinación para Ejecutar Sentencias Estructurales: La Arista Inexplorada de un Conocido Litigio Ambiental*, *in* DIÁLOGO SOBRE LA PROTECCIÓN JURISDICCIONAL DE LOS DERECHOS A LA SALUD, EDUCACIÓN, TRABAJO, SEGURIDAD SOCIAL Y MEDIO AMBIENTE SANO EN PAÍSES DE AMÉRICA LATINA: INFORME DE MEDIO AMBIENTE 91 (Gonzalo Fibla, ed., 2019). *See also* Mario Campora, *The Power to Judge, the Power to Act: the Argentine Supreme Court as a Policymaker,* 10 L. & DEV. REV. 341, 354–56 (2017) (analyzing how the Court's approach contributed to a heightened visibility of the specific environmental question at stake).

[174] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2005, "Recurso de hecho deducido por el Centro de Estudios Legales y Sociales en la causa Verbitsky, Horacio s/ habeas corpus," Fallos (2005-328-1146) (Arg.); *see also* Martín Oyhanarte, *Public Law Litigation in the U.S. and in Argentina: Lessons from a Comparative Study*, 43 GA. J. INT'L & COMP. L. 451, 472–77 (2015) (describing the details of the approach used by the Supreme Court in dealing with an overcrowded prison system).

[175] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/3/2012, "F., A. L. s/ medida autosatisfactiva," Fallos (2012-335-197) (Arg.).

[176] CSJN, 13/3/2012, "F., A. L.," Fallos (2012-335-197, 198).

granted. The Court upheld a specific interpretation of the law, settling a politically explosive debate and displaying its willingness to participate in the public conversation.[177]

B. Health, Labor, and Social Security: the Gradual Shift to Supremacy in the Midst of the Crisis

In the area of social rights, the transition to a supremacist role started with two important healthcare cases in 2000. In the context of an impending political and economic crisis, after more than two years of recession and almost five years of double-digit unemployment rates,[178] the Court enforced the right to healthcare against a government hit by rapidly declining popularity levels.

In *Asociación Benghalensis* (2000),[179] the SC ordered the Executive branch to provide HIV/AIDS drugs to both public and private healthcare patients, as established in the 1990 AIDS law,[180] rejecting budgetary and separation of powers arguments. Once a commitment was embodied in a statute, and constitutional rights were at stake, the Court would enforce these commitments. The ruling surprised some observers,[181] given the Court's previous deferential stance and its general support for 1990s austerity policies. The divided decision included concurrent opinions and a dissent.[182] The majority vote focused on the right to health as enabling the exercise of personal autonomy—another constitutional right. Concurring votes grounded the right to treatment in the right to life, which

[177] *See* Yamin & Ramon Michel, *supra* note 103, at 406–09.

[178] According to the International Labour Organization figures, *see* International Labour Organization, *Unemployment, total (percentage of total labor force) (modeled ILO estimate) – Argentina,* THE WORLD BANK (Sept. 5, 2023), https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=AR.

[179] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/6/2000, "Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social - Estado Nacional s/ amparo ley 16.986," Fallos (2000-323-1339) (Arg.).

[180] Law No. 23798, Aug. 16, 1990, [26972] B.O. 2 (Arg.).

[181] Graciela Biagini, José C. Escudero, Marisa Nan & Marita Sánchez, *Comentarios a la sentencia de la Corte Suprema de Justicia de la Nación con relación a la obligación del Estado Nacional de suministrar tratamiento antirretroviral a las PVVS*, JA 2005-IV, 1033 (describing the ruling as "paradoxical," since the Court had been "an active element" of neoliberal policies).

[182] The Chief Justices and two Associate Justices dissented without offering arguments, as authorized by the already mentioned Law 23774. *See* CSJN, 1/6/2000, "Asociación Benghalensis," Fallos (2000-323-1373).

some Catholic Justices labeled a "natural right" superior to any statute.[183] Either way, enforcing HIV/AIDS patients' rights against Executive objections evidenced a shift. Months later, in *Campodónico* (2000),[184] the Court also held the Federal Government responsible for ensuring a child's healthcare after loss of medical coverage. The majority vote emphasized the right to health in connection with the right to life[185] and turned to international human rights treaties endowed with constitutional rank as grounds for the decision.[186]

Rulings on health rights did not signal a complete shift in the approach toward judicialization of social rights. A day after *Asociación Benghalensis*, the SC upheld austerity pay cuts imposed on public employees by a Necessity and Urgency Decree.[187] Applying an extremely deferential approach, the majority and concurring votes admitted that the economic emergency enabled the President to reduce public wages with no expected compensation or reimbursement.[188] Under these circumstances, the Court argued that constitutional property rights and the constitutional right to a fair retribution were not sufficient grounds for striking down the constitutional property rights and the constitutional right to a fair retribution were insufficient grounds for striking down the Executive decision.[189] Such a divergent stance immediately following a

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[183] *See* CSJN,1/6/2000, "Asociación Benghalensis," 323 Fallos (2000-323-1354) (emphasizing the right to health is a part of the "right to life," defined, quoting language from previous Supreme Court's rulings, as "the first natural right of the human person, pre-existent to any positive legislation"). *But see* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/03/2002, "Portal de Belén c. Ministerio de Salud Ministerio de Salud y Acción Social de la Nación s/ amparo" Fallos (2002-325-292, 299). Two years later, the majority of the Court, including Justices Boggiano, Moline O'Connor and Vasquez [who also supported, in his separate opinion, the outcome in *Asociacion Benghalensis*], used the same language in a decision that banned the production and sale of an emergency contraception pill. CSJN, 05/03/2002, "Portal de Belén," Fallos, (2002-325-299).

[184] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/10/2000, "Campodónico de Beviacqua, Ana Carina c. Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas," Fallos (2000-323-3229, 3237-38) (Arg.).

[185] *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3239). This time the right to life did not appear as superior to any positive legislation. *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3239).

[186] *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3245) (explaining the dissent signed by one justice dismissed the claim and confirmed the sentence from the lower court, without providing any argument).

[187] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/6/2000, "Guida, Liliana c. Poder Ejecutivo Nacional s/ empleo público," Fallos (2000-323-1566, 1596) (Arg.).

[188] *Id. Fallos* (2000-323-1601).

[189] *Id. Fallos* (2000-323-1605-06).

peremptory ruling on health rights illustrates the gradual nature of the Court's change in approach. The worsening crisis and subsequent composition modification would expand and accelerate the shift. In front of a discredited political elite, a supremacist approach would arguably be less affected by the democratic objection.

As the 2001 economic collapse prompted President Fernando de la Rúa's resignation after two years in office, opposition senator Eduardo Duhalde assumed the presidency on an interim basis until the 2003 elections.[190] During 2002, Congress faced extreme difficulties with finding solutions to institutional disarray, economic depression, loss of confidence in the financial system, growing unemployment and skyrocketing poverty levels.[191] The SC also faced extreme public backlash, with repeated demonstrations at its doors where bank customers demanded access to personal savings accounts frozen by emergency decrees, while professional associations called for the impeachment of the Justices.[192] Some legislative blocs moved to impeach all Justices.[193] The Court reacted to the context in *Smith* (2002),[194] holding the unpopular freeze on bank accounts unconstitutional. The ruling asserted the individual plaintiff's right to property against the measures aimed at fighting the crisis.[195] Despite the formally limited impact of the decision, the lower courts soon applied the same criteria in thousands of similar cases. A property rights case, with enormous economic and political effect, was treated through a peremptory approach.

However, social rights now faced a different fate. Just four weeks after *Smith* (2002), the Court rejected in *Ramos* (2002),[196] an unemployed woman's claim for healthcare, food, and education for her eight children. According to the majority vote, the woman had not proved that the Government explicitly refused to comply with her request.[197] At the hardest moment of an unprecedented crisis, the majority took a clearly

[190] Jouet, *supra* note 160, at 453.

[191] Mauro Benente, *"Fuera La Corte Suprema". Breves Notas Sobre las Protestas Frente al Máximo Tribunal*, 88 LECCIONES Y ENSAYOS, 231, 235–36 (2010).

[192] *Id.* at 232–33 (analyzing the recurrent protests in front of the Supreme Court building in late 2001 and early 2002, with a focus on the Labor Lawyers' Association and its request for the removal of the Court).

[193] *See* Santiago, *supra* note 138, at 1580–89 (outlining the impeachment process and the numerous charges brought against the nine sitting Justices).

[194] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/2/2002, "Smith, Carlos Antonio c. Poder Ejecutivo Nacional o Estado Nacional s/ sumarísimo," Fallos (2002-325-28, 40) (Arg.).

[195] CSJN, 1/2/2002, "Smith, Carlos Antonio," Fallos (2002-325-40).

[196] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/3/2002, "Ramos, Marta Roxana y otros c. Buenos Aires, Provincia de y otros s/ amparo" Fallos (2002-325-396, 402) (Arg.).

[197] *Id. Fallos* (2002-325-396, 401).

deferential approach. The claim, according to the Justices, "although revealing a dramatic social situation, cannot be solved by the Court."[198] In a crisis context, the Court seemingly took the protection of the right to property—and not social rights, as the path to its political recovery.

A few months later the wages of public sector employees came to the forefront in *Tobar* (2002),[199] though the issue was framed as a property rights case. The majority of the Court held that the pay cuts based on the "zero deficit" policy adopted in 2001 were unconstitutional,[200] since they were not temporary nor reasonable emergency measures and they affected the constitutionally protected right to property.[201] With no clear endpoint in sight, this policy affected the nature of the public employment relationship, and deprived government workers of any certainty as to their futures. This made it different from previous austerity measures, like the one upheld two years before in *Guida* (2000).[202]

As the 2003–2005 membership renovation process took place, the Court affirmed its peremptory approach to social rights, including health but also labor rights, union rights, and social security, and increased its use of human rights language. In the area of healthcare, in *Martín* (2004) the court ordered that the Argentine Air Force office for social services, provide full and comprehensive coverage for a disabled girl affiliated with the institution.[203] Complete protection for people with disabilities—the majority of the Court underscored—is not only a "public policy," enshrined in the law and sustained by Court judgments, but also a commitment before the international community by virtue of international human rights treaties, such as the Convention on the Rights of the Child.[204] This ruling sums up converging argumentative lines developed during this

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[198] *Id. Fallos* (2002-325-396, 402).

[199] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/8/2002, "Tobar, Leónidas c. E.N. M° Defensa -Contaduría General del Ejército- Ley 25.453 s/ amparo -Ley 16.986," Fallos (2002-325-2059) (Arg.).

[200] CSJN, 22/8/2002, "Tobar, Leónidas," Fallos (2002-325-2066). In July 2001, the Argentine Government initiated a "zero deficit" policy, incorporating measures such as monthly reductions in wages and pensions to achieve fiscal balance; shortly after the decree, Congress reaffirmed the policy through Law 25.453, but both were invalidated by the Supreme Court in Tobar (2002). CSJN, 22/8/2002, "Tobar, Leónidas," Fallos (2002-325-2066).

[201] CSJN, 22/8/2002, "Tobar, Leónidas," Fallos (2002-325-2072) (grounding the judicial review on article 17 of the Argentine Constitution, which forbids violation of property, and including wages as part of personal property).

[202] CSJN, 2/6/2000, "Guida, Liliana," Fallos (2000-323-1596).

[203] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/6/2004, "Martín, Sergio Gustavo y otros c. Fuerza Aérea Arg. Direc. Gral. Bienestar Pers. Fuerza Aérea s/ amparo," Fallos (2004-327-2127, 2136) (Arg.).

[204] CSJN, 8/6/2004, "Martín, Sergio Gustavo," Fallos (2004-327-2127, 2135).

period: the reference to rights as a central foundation, the emphasis on the plaintiff's welfare as guiding concern, the "real equality" for disadvantaged groups such as people with disabilities,[205] the connection to international law and the continuity of a State's duties, beyond changes in the Government. On the other hand, the dissent rejected the claim since the Air Force had properly followed the duties established by the applicable statute, and no additional obligations could be imposed on the institution.[206] A key argument for the dissenters was the literal reading of the statutes, with no review based on the right to healthcare.

A year later, in *Orlando* (2005), the Court ordered the federal government to provide an expensive life-saving medication to a woman affected by a serious degenerative disease.[207] The ruling emphasized the connection between the right to health and the right to life.[208] Moreover, the Court recalled the international nature of State obligations in this area, including positive duties.[209] In an extensive construction of applicable legislation, the ruling issued the order, although the plaintiff's specific medical condition was not included in the official list of covered diseases. In other words, the Court's reading made it possible to expand the scope of State obligations to a disease absent in the literal legislative language. A similar extensive construction appears in *Reynoso* (2006):[210] going beyond the literal content of the medical benefits established by a resolution of Federal Health authorities (known as the Mandatory Medical Program),[211] the Court ordered PAMI, the public health insurance agency

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[205] Art. 75(23), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

[206] CSJN, 8/6/2004, "Martín, Sergio Gustavo," Fallos (2004-327-2136).

[207] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/5/2005, "Orlando, Susana Beatriz c. Buenos Aires, Provincia de y otro s/ amparo," Fallos (2005-328-1708, 1713) (Arg.).

[208] CSJN, 24/5/2005, "Orlando, Susana Beatriz," Fallos (2005-328-1708, 1714).

[209] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/7/2006, "Floreancig, Andrea Cristina y otro por sí y en representación de su hijo menor H., L. E. c. Estado Nacional s/ amparo," Fallos (2006-329-2561) (Arg.). Under a similar reasoning, which also included a reference to the right to personal autonomy in connection with the right to health, the Court ordered the Federal Government to provide medication for a disabled child after his trade union-run health insurance could not afford it. CSJN, 11/7/2006, "Floreancig, Andrea Cristina," Fallos (2006-329-2552, 2561).

[210] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/5/2006, "Reynoso, Nilda Noemí c. I.N.S.S.J.P. s/ amparo," Fallos (2006-329-1638).

[211] *See* Ministerio de Salud, Programa Médico Obligatorio (P.M.O.), Resolución 201/2002, ARGENTINA.GOB.AR (Apr. 9, 2002), https://www.argentina.gob.ar/sssalud/programa-medico-obligatorio (created by Executive Decree 492 in 1995, the Medical Mandatory Program includes all medical services that public health providers must cover as established by resolution of the Minister of Health).

for retirees, to provide medicines and disposable items to a patient who has senile dementia and impaired mobility.[212]

Private for-profit health insurance companies were also subject to a peremptory approach. The SC, through an extensive interpretation of applicable clauses, ordered these entities to provide comprehensive assistance for people with disabilities, though applicable legislation did not explicitly mandate it. In *Cambiaso Péres* (2007),[213] the majority vote extended to private companies the assistance required by union-owned health providers and state-financed health facilities. Despite being organized as commercial businesses, the majority of Justices argued that these companies assume a "social commitment" to patients in order to ensure "constitutional guarantees such as life, health, personal safety, and personal integrity."[214] The case involved medication and other items, such as disposable adult diapers, for a twenty year old patient with cerebral palsy.[215] The decision had two dissenting opinions, which followed different lines of reasoning. Justice Argibay and Justice Highton offered a literal construction of applicable statutes to exclude the private health provider from the most demanding legislation.[216] On the other hand, Justice Lorenzetti based his dissent on the notions of property and contract, which enjoy "constitutional protection."[217] Since the agreement between the patient and the company did not provide for the specific assistance claimed by the plaintiff, a judicial decision should not go beyond the clear terms of the agreement against any of the contracting parties. This recourse of strict statutory construction and the contract as the defining element will gain greater relevance in the ensuing decade.

In another example of extensive construction of relevant statutes, *Chamorro* (2008) determined that mutual assistance associations—health providers linked to civil society organizations—must furnish the same medical services required of both union-run health insurers, and private for-profit companies.[218] The ruling underscored the serious medical

[212] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/5/2006, "Reynoso, Nilda Noemí c. I.N.S.S.J.P. s/ amparo," Fallos (2006-329-1638).

[213] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 28/8/2007, "Recurso de hecho deducido por la demandada en la causa Cambiaso Péres de Nealón, Celia María Ana y otros c. Centro de Educación Médica e Investigaciones Médicas" Fallos (2007-330-3725, 3739) (Arg.).

[214] *Id.*, *Fallos* (2007-330-3725, 3735).

[215] *Id.*, Fallos (2007-330-3725, 3730).

[216] *Id.*, Fallos (2007-330-3725, 3745).

[217] *Id.*, Fallos (2007-330-3725, 3754).

[218] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/4/2008, "Chamorro, Carlos c. Sociedad Argentina de Autores y Compositores de Música s/ amparo," Fallos (2008-331-453, 455) (Arg.).

condition of the plaintiff and as highlighted in previous cases, the connection between the rights to life, health, and personal autonomy, with specific references to international human rights treaties endowed with a constitutional rank. To justify its extensive construction, the majority reasoned by means of analogy: much like private insurers, mutuals collect regular fees from members to guarantee care when health issues eventually surface.[219] Thus, given the similarities in their financing models, these non-profit organizations should provide comparable coverage.

Beyond healthcare cases, the renewed composition of the SC also exercised a peremptory approach regarding other social rights. In late 2004, the Court invoked constitutional social rights to invalidate clauses included in labor laws passed during the 1990s neoliberal era.[220] In *Aquino* (2004), citing article 14 *bis* among other legal provisions, the Court declared the prohibition of suing employers in civil courts for work-related injuries, unconstitutional.[221] Similarly, in *Vizzoti* (2004), the Court struck down strict ceilings imposed on severance pay.[222] The *ATE* (2008)[223] and *Rossi* (2009)[224] rulings strengthened protections for workers' representatives not affiliated with dominant unions and promoted trade union pluralism against the interests of the centralized trade union confederation, allied to the Government.[225]

Decisions by private employers also underwent constitutional review. *Álvarez* (2010), involved the discriminatory firing of six private-sector employees after their company discovered the workers' attempts to

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[219] *Id.*, Fallos (2008-331-453, 456).

[220] *See* Alberto B. Bianchi, *La Corte en la Era de los Kirchner (2003-2011)*, *in* 3 HISTORIA DE LA CORTE SUPREMA ARGENTINA. 1983-2013. EL PERÍODO DE LA RESTAURACIÓN DEMOCRÁTICA 1677, 1872-75 (Alfonso Santiago (h), ed.) (2014) (highlighting the main constitutional arguments of the Court, namely, the workers' rights to a full reparation for labor-related injuries and to proper working conditions and noting that the 2004 Court did not share the philosophy of the labor law reforms from the preceding decade).

[221] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/9/2004, "Aquino, Isacio c. Cargo Servicios Industriales S.A.," Fallos (2004-327-3753, 3760) (Arg.).

[222] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/9/2004, "Vizzoti, Carlos Alberto c. AMSA S.A. s/ despido," Fallos (2004-327-3677, 3693) (Arg.).

[223] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/11/2008, "Recurso de hecho deducido por la actora en la causa Asociación Trabajadores del Estado c. Ministerio de Trabajo s/ Ley de Asociaciones Sindicales" Fallos (2008-331-2499-15) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/12/2009, "Recurso de hecho deducido por la actora en la causa Rossi, Adriana María c. Estado Nacional – Armada Argentina s/ sumarísimo," Fallos (2009-332-2715, 2715-35) (Arg.).

[224] CSJN, 11/11/2008, "Asociación Trabajadores del Estado," Fallos (2008-331-2499); CSJN, 9/12/2009, "Rossi, Adriana María," Fallos (2009-332-2715, 2726).

[225] *See* Ruibal, *supra* note 170, at 29 n. 33.

unionize management.[226] The majority of the Court ordered the employees reinstated.[227] The ruling distinguished between simple dismissal without cause, which entitles an employee to severance pay, and termination for discriminatory reasons like union activity, which should be considered null and void.[228] Specifically, the Court ruled that the employer unlawfully targeted the six workers for trying to organize.[229] As such, the firings could not stand, and the company had to reinstate the employees. Legal grounds for the decision included quotes from at least eight international human rights treaties with constitutional rank, since the majority of Justices highlighted that the nondiscrimination principle is a part of international *ius cogens*, in other words, a legal principle applicable to any State.[230] The dissenters, in contrast, emphasized that the protection of workers in private employment relationships should be enforced without infringing on the constitutionally protected freedom of contract: a mandatory reinstatement may amount to an excessive restriction of that right.[231] A year later, a similar decision in *Pellicori* (2011) fleshed out the anti-discrimination review.[232] If a dismissal has a *prima facie* discriminatory reason, the employer must prove the existence of an "objective and reasonable" motivation to characterize it as a simple firing without cause.[233] The Court also included several references to international human rights instruments, decisions of the Inter-American organisms, and judgments of various foreign and regional courts.[234] Moreover, it underlined that it would consider materials issued by international monitoring bodies, which it described as "authoritative interpreters" of human rights treaties.[235] These decisions on discriminatory dismissals show a peremptory approach to the judicial review of private employers' decisions, traditionally considered an expression of contractual freedom.

Furthermore, the *Madorrán* (2007) decision recognized public sector personnel's right to job stability, grounded in Article 14 *bis*, and struck

[226] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/12/2010, "Alvarez, Maximiliano y otros c. Cencosud S.A. s/ acción de amparo," Fallos (2010-333-2306, 2307-08) (Arg.).

[227] *Id.*, Fallos (2010-333-2306, 2307-08).

[228] *Id.*, Fallos (2010-333-2306, 2318).

[229] *Id.*, Fallos (2010-333-2306, 2310).

[230] *Id*., Fallos (2010-333-2306, 2311).

[231] *Id.*, Fallos (2010-333-2328).

[232] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/11/2011, "Pellicori, Liliana Silvia c. Colegio Público de Abogados de la Capital Federal s/ amparo," Fallos (2011-334-1387) (Arg.).

[233] *Id*., Fallos (2011-334-1387, 1404-05).

[234] *Id.*, Fallos (2011-334-1387, 1403-04).

[235] *Id.*, Fallos (2011-334-1393).

down a particular set of rules for Customs employees.[236] Under this revised approach, no state employee can be fired without just cause. Additionally, citing Article 7(c) of the ICESCR, the majority ruled that stability constitutes part of the "just and favorable conditions of work," that the State must respect and provide.[237] Although the majority opinion did not differentiate among categories of public servants, Justice Highton and Justice Maqueda's concurring opinion did, noting that treatment could vary depending on each agent's contract.[238] This distinction would become relevant in the following period.

The ruling in *Rodríguez* (2006) also revealed the renewed Court's change in approach.[239] Dealing with a claim like the one rejected in *Ramos* (2002),[240] the majority of the Court ordered—as an interim measure—the provision of food to children at risk of malnutrition. Though the majority vote reaffirmed that the Court had no jurisdiction to consider the case, it took this emergency measure while the case was being referred to a lower tribunal.[241] A more flexible attitude toward formalities allowed for a timely intervention that could easily qualify as part of a peremptory stance, notably in contrast to the deferential decision in *Ramos* (2002).[242]

As a general trend, all these cases on labor and union rights and the right to food show a peremptory approach because the SC exercises constitutional review and strikes down statutes, sector-specific regulations (such as working conditions for Customs employees), and even private employers' decisions.

A conversational approach, however, appeared at an individual pension claim, which included an issue with substantial budgetary implications. As explained in a previous section, article 14 *bis* of Argentine Constitution grants mobility for pensions.[243] In *Badaro* (2006), a unanimous Court ruled that the absence of an adequate pension indexing mechanism in prior annual budgets, resulted in the plaintiff's pension

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236 Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2007, "Madorrán, Marta Cristina c. Administración Nacional de Aduanas s/ reincorporación," Fallos (2007-330-1989, 1998-97) (Arg.).

237 *Id.*, Fallos (2007-330-2005).

238 *Id.*, Fallos (2007-330-2011).

239 Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/3/2006, "Rodríguez, Karina Verónica c. Estado Nacional y otros s/ acción de amparo," Fallos (2006-329-553) (Arg.).

240 Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/6/2002, "Marta Roxana Ramos y otros c. provincia de Buenos Aires y otros," Fallos (2002-325-1603) (Arg.).

241 CSJN, 7/3/2006, "Rodríguez, Karina Verónica," Fallos (2006-329-553).

242 CSJN, 12/3/2002, "Ramos, Marta Roxana," Fallos (2002-325-396).

243 Art. 14 *bis*, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

lagging far from an adequate level.[244] This infringed on his constitutional right to a sufficient pension. However, the Court declined to unilaterally impose a specific indexing rate, cognizant that general financial implications must be considered in order to determine appropriate levels, given that any increase would sooner or later extend to all pension recipients.[245] Embracing a conversational approach, the Court held that Congress should define an updated formula to preserve pensions' real value within the "sufficient" time to enact the requisite measures.[246] While undoubtedly affirming pensioners' rights, the ruling sought to spark a dialogue with lawmakers to ensure reforms that balance retirees' interests, fiscal sustainability, and the Court's proper role in guiding policy for issues with immense economic and social impacts. The conversational stance seemed to recognize not only the democratic legitimacy of Congress, but also its technical expertise to conduct an assessment of pension levels. In a broader analysis, the choice of a conversational approach may be seen as an attempt to temper the political impact of declaring the infringement of a constitutional right held by millions of potential plaintiffs.[247]

Nonetheless, the approach did not yield the desired effect. A little more than a year later, Congress had not made any progress. The plaintiff came back to the Court asking for relief since the new annual budget did not adjust pensions according to the past ruling's guidelines. *Badaro* (2007),[248] marked the return to the peremptory position. Thus, in light of legislative inaction, the SC had no alternative but to establish a reasonable adjustment mechanism, based on the official general wage index—to be applied only to the individual case.[249]

In sum, during this period, the Court assumed mostly a supremacist role in the area of social rights. The key arguments to justify this shift, strengthened after a change in the Court's composition, were a recovery of the social rights explicitly included in the Constitution and the Court's

[244] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2006, "Badaro, Adolfo Valentín c. ANSeS s/ reajustes varios," Fallos (2006-329-3089, 3095-96) (Arg.).

[245] *Id.*, Fallos (2006-329-3094).

[246] *Id.*, Fallos (2006-329-3096).

[247] *See* Pereira, *supra* note 10, at 720–23 (describing the 2006 *Badaro* ruling as a way to avoid full confrontation with the political branches, and underlining the "strongly positive public reactions" to the decision).

[248] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/11/2007, "Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios," Fallos (2007-330-4873) (Arg.).

[249] *Id.*

authority to enforce these rights similarly to any other right, particularly after the 1994 reform. Related legal rationale came from international human rights law, as the Court fostered the domestic application of ratified treaties, particularly those given constitutional rank. Furthermore, the Court turned to interpretations and documents from human rights treaty monitoring bodies. In certain cases, the Court extensively construed a specific social right to broaden its scope for enforcement. All these interpretive resources cemented the technical legitimacy of the Court but also created new risks, such as judicial usurpation, confrontation with the elected branches, and the overburdening of the tribunal with insurmountable social issues.

VI. Reclaiming Autonomy and Shifting Course Without Losing Legitimacy: A New Detached Court (2012–2021)

In 2012, the Court ruled on the right to housing in a high-profile case involving a mother and her disabled infant, who were living on the streets.[250] While the Court ordered the Government of the City of Buenos Aires to provide a dwelling place for them, it made clear that judicial enforcement of the right to housing was exceptional, subject to the existence of survival risk for the affected parties.[251] This ruling marked the beginning of a return to a detached role in social rights adjudication. To preserve its technical legitimacy, the Court did not explicitly overturn any of its previous rulings on the matter. This turn rested on reducing the judicial enforceability of social rights, and restricting the scope of entitlement to some of them by applying a restrictive approach to interpretation. In a more general perspective, the Court also moved toward a more distant and cautious approach to international human rights law, affirming its position as the apex of the domestic legal system.

Regarding the new attitude toward international law, the Court took steps to assert its autonomy from external, multilateral oversight.[252] During this period, a specific decision stood out: in *Ministerio de Relaciones Exteriores* (2017), where a majority of Justices[253] declined to

[250] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2012, "Q. C., S. Y. c. Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos (2012-335-452) (Arg.).

[251] *Id.*

[252] Young points out that discrepancies between international law and national law emerge over time, as do claims to legal authority between the global, regional, and local systems. *See* YOUNG, *supra* note 1, at 294.

[253] Justices Highton, Lorenzetti and Rosenkrantz drafted a single opinion, while Justice Rosatti concurred and Justice Maqueda dissented. *See generally,* CSJN, 14/2/2017, "Ministerio de Relaciones Exteriores," Fallos (2017-340-62).

enforce a resolution by the Inter-American Court of Human Rights ordering to revoke in its entirety a 2001 Argentina's SC ruling found to be in violation of the American Convention.[254] This challenge surprised legal commentators and law academics.[255] The Argentinean Court explicitly scaled back its previous favorable approach to the incorporation of international law:[256] "It is beyond discussion that the state is, *in principle*, obliged to comply with decisions by the Inter-American Court pronounced in compulsory proceedings against the state," according to the majority vote.[257] This qualified, cautious commitment to the hemispheric system also implied that the nation's apex court claimed authority to review the scope of the regional tribunal's competence granted by the American Convention on Human Rights (ACHR).[258] The Argentinean Court concludes the Inter-American tribunal cannot function as a "fourth instance," as it lacks authority to revoke a decision by the highest local tribunal. The SC also emphasized that complying with this regional ruling would undermine the highest rank of the Argentine court, which would contradict Argentina's "public law principles" protected by article 27 of the Constitution.[259]

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[254] *See* Gullco, *supra* note 149, at 327.

[255] *See* Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. 179, 219–20 (2019) (citing opinions and articles by Argentine legal scholars who voiced their perplexity in the wake of the national apex court's decision). For a favorable comment on the Supreme Court's decision, *see* Alberto F. Garay, *La Corte Interamericana No Puede Ordenar que se Dejen sin Efecto Sentencias Firmes*, in ANALES DE LA ACADEMIA NACIONAL DE CIENCIAS MORALES Y POLÍTICAS 415, 436–37 (2017) (underscoring that the Supreme Court, by virtue of its own position in the Argentine judicial system, is entitled to review whether the regional court's decision is consistent with the national Constitution).

[256] *See* Gullco, *supra* note 149, at 323–27, 341 (discussing Argentine Supreme Court's "exemplary conduct of compliance" in cases between 1992 and 2017, where international law and the rulings by the Inter-American Court prevailed over local law found to be in breach of human rights treaties).

[257] CSJN, 14/2/2017 "Ministerio de Relaciones Exteriores," Fallos (2017-340-57) (author's translation).

[258] *See* Contesse, *supra* note 255, at 220 (describing this approach by the Argentinean Court as "astonishing," since it placed itself above the regional tribunal).

[259] Art. 27, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) ("The Federal Government is under the obligation to strengthen its relationships of peace and trade with foreign powers, by means of treaties in accordance with the *principles of public law* laid down by this Constitution." (emphasis added) (author's translation)). Unmodified since 1853, this article sets guidelines for the Executive and Congress in the area of foreign relations, requiring international treaties to be consistent with the basic lines of domestic constitutional law. *See* Julián Rotenberg, *Comentario al art. 27*, *in* 1 CONSTITUCIÓN DE LA NACIÓN ARGENTINA. COMENTADA 928, 939 (Roberto Gargarella & Sebastián Guidi eds., 2019) (explaining that the

After a compliance monitoring hearing held a few weeks later, the Inter-American Court underscored that Argentina had not objected in the past to similar remedies, and it explained that alternatives to revoking the local decision could also be considered. For instance, the regional tribunal explained that the Argentine SC may include a specific annotation to the decision, officially stating it was incompatible with the ACHR.[260] In a brief resolution, the Argentine SC accepted that option, highlighting it was in line with "public law principles."[261] This significant and widely debated episode[262] revealed Argentina's SC had reclaimed its autonomy under the Inter-American human rights system, at least as the local court of last resort.[263] Social rights cases analyzed in this section show another version of this autonomist turn. In some instances, the Argentine Court refused to follow the guidance of the Inter-American Court of Human Rights interpretive contributions, while in other cases the Justices omitted any reference to relevant human rights treaties endowed with constitutional rank or made a selective use of materials from international human rights monitoring bodies.

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majority vote in *Ministerio de Relaciones Exteriores* reads article 27 as defining a "sovereign sphere" that prevails over international treaties and considers that the protected public law principles include the Supreme Court's highest rank in the domestic judicial system (author's translation)).

[260] Inter-Am. Ct. H.R., Judgment Supervision Hearing, (Aug. 21, 2017), ¶ 21.

[261] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/12/2017, Resolución No. 4015/17 (Arg.), https://www.cij.gov.ar/nota-28770-La-Corte-considera-compatible-con-la-Constituci-n-el-requerimiento-de-la-Corte-Interamericana-de-dejar-asentada-su-decisi-n-en-una-sentencia-nacional-previa.html.

[262] *See, e.g.*, Rolando Gialdino, *Incumplimiento de una Sentencia de la Corte Interamericana de Derechos Humanos: Un Acto Internacionalmente Ilícito de la Corte Suprema Argentina*, 15 ESTUDIOS CONSTITUCIONALES 491, 492–93 (2017) (criticizing the Argentine ruling); Juan Carlos Hitters, *Control de Convencionalidad: ¿Puede la Corte Interamericana de Derechos Humanos Dejar Sin Efecto Fallos de los Tribunales Superiores de los Países? (El caso Fontevecchia vs. Argentina)*, 22 PENSAMIENTO CONSTITUCIONAL 109, 127–28 (2017) (underlining that the competence of the Inter-American Court cannot be defined by the Argentine Court); Víctor Abramovich, *Comentarios Sobre* "*Fontevecchia", la Autoridad de las Sentencias de la Corte Interamericana y losPrincipios de Derecho Público Argentino*, 10 PENSAR EN DERECHO 9, 12–13 (2017) (emphasizing the Inter-American Court did not act as a "fourth instance" since it did not interpret domestic law, but the international duties imposed to Argentina by the ACHR (author's translation)).

[263] According to Juan F. González Bertomeu and Ramiro Álvarez Ugarte, the Court in 2017 Court "expressed an apparent will to distance itself from the commands of international courts." *See* Juan F. González-Bertomeu & Ramiro Álvarez-Ugarte, *Argentina: The State of Liberal Democracy*, *in* 2017 GLOBAL REVIEW OF CONSTITUTIONAL LAW 13, 17 (Richard Albert et al., eds., 2018); *see also* Claudina Orunesu, *Conventionality Control and International Judicial Supremacy: Some Reflections on the Inter-American System of Human Rights*, 40 REVUS: J. CONST. THEORY & PHIL. LAW 45, 60 (2020) (taking into account objections to the lack of democratic legitimacy of the regional tribunal and highlighting that the conflict illustrates the need for a dialogue between the two Courts, leaving behind the notion of mandatory application of the Inter-American Court's interpretive criteria).

A. A Court in the Midst of Political Alternation and Institutional Controversy

During this period, the Court coexisted with three different Presidents: Cristina Kirchner (until 2015), Mauricio Macri (from 2015 to 2019), and Alberto Fernández (since 2019). In the final years of President Kirchner's term, tensions grew between her Peronist administration and the Court over media regulation and judiciary reform, among other issues. In 2013, while the Government in *Grupo Clarín*[264] secured a conditioned validation of the long-debated Law of Audiovisual Communication Services,[265] the Court dealt a serious blow to the Executive by holding that a reform to the Council of the Magistracy statute, which heightened electoral accountability of its members, was unconstitutional.[266] The Council, according to article 114 of the Constitution, oversaw the selection and removal of lower federal court judges. To establish a more transparent and impartial process, the 1994 constitutional reform introduced a fair balance of representation from the judiciary, the elected branches, academia, and legal professionals. Only forty days after Congressional approval, the Court struck down a 2013 statute, which made judicial representatives dependent on the votes of the general electorate, in addition to their peers' votes.[267] Meanwhile, social and economic policies from the previous decade began faltering, with rising inflation as a salient issue.[268] In early 2015, President Christina Kirchner's allies in Congress

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[264] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2013, "Grupo Clarín SA y otros c. Poder Ejecutivo Nacional y otro s/ acción meramente declarativa," Fallos (2013-336-1774) (Arg.) (upholding the limits on the number of broadcast stations an entity can own but also underlining the need to respect property rights of media businesses in applying those limits); *see also La Corte Suprema Declaró la Constitutionalidad de la ley de Medios*, CENTRO DE INFORMACIÓN JUDICIAL (Oct. 29, 2013), https://www.cij.gov.ar/nota-12394-La-Corte-Suprema-declar--la-constitucionalidad-de-la-Ley-de-Medios.html.

[265] Law No. 26522, Oct. 10, 2009, B.O. 25 (Arg.).

[266] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/6/2013, "Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c. Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. N° 3034/13)," Fallos (2013-336-780) (Arg.).

[267] Law No. 26855, May 8, 2013, B.O. 1 (Arg.).

[268] ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), ARGENTINA 1 (2016), https://repositorio.cepal.org/server/api/core/bitstreams/b9a3e81f-44ce-4b87-ad36-c45a5b836aba/content (describing Argentina's inflation in the preceding years as "well above the regional average").

unsuccessfully tried to impeach ninety-seven year-old, Justice Carlos Fayt, who resigned a day after she left office.[269]

Peronism lost the November 2015 presidential runoff election to center-right Buenos Aires Mayor Mauricio Macri, leader of the *Cambiemos* coalition. Due to resignations and deaths in the preceding year, the SC in late 2015 had only three members left out of five, since Kirchner could not secure the Senate's approval for any of her three successive nominees for the two vacant seats. In turn, President Macri appointed two new Justices, Carlos Rosenkrantz and Horacio Rosatti, during the first semester of his administration, having previously failed to do so through temporary appointments in his first week in office.[270] Despite the two new appointees' academic and professional credentials,[271] this renewed Court soon faced widespread criticism for its ruling in *Muiña* (2017),[272] which granted pre-trial detention benefits to indicted military officers accused of dictatorship-era human rights abuses, and provided the opportunity for an anticipated release.[273] Massive street protests expressed a deep rejection of the ruling, and Congress immediately passed an "interpretive statute" that excluded these inmates from the benefits in question. A little more than a year later, a Court majority in *Batalla*

[269] *See* CASTAGNOLA, *supra* note 95, at 88–90.

[270] *See* Oyhanarte, *supra* note 19, at 728 (pointing out that President Macri's attempt to temporarily appoint both Justices by Executive Decree met "marked disapproval from a large portion of the political spectrum" and had to be reversed); *see also* Andrés del Río, *President Macri and Judicial Independence on the Argentine Supreme Court*, BLOG INT'L J. CONST. L., (Feb. 5, 2016), https://www.iconnectblog.com/president-macri-and-judicial-independence-on-the-argentine-supreme-court/ (suggesting that attempting to bypass the Senate in the confirmation process affected the chance "to provide legitimacy and stability to the new judges").

[271] *See, e.g., Vacantes en la Corte: Macri envió los pliegos de Rosatti y Rosenkrantz al Senado*, LA NACION, (Feb. 1, 2016), https://www.lanacion.com.ar/politica/vacantes-en-la-corte-macri-envio-los-pliegos-de-rosatti-y-rosenkrantz-al-senado-nid1867267.

[272] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2017, "Recurso de hecho deducido por la defensa de Luis Muiña en la causa Bignone, Reynaldo Benito Antonio y otro s/ recurso extraordinario," Fallos (2017-340-549) (Arg.).

[273] The Court held, by a 3-2 majority, that Luis Muiña, member of a military "death squad" that operated at a public hospital between 1976 and 1977, was eligible for a law that counts each day spent in pre-conviction detention as two towards the total sentence. *See id.* at 569 (author's translation).

(2018),[274] reversed its previous decision.[275] The tribunal kept a generally peaceful relationship with the Macri administration. The Executive did not appeal a 2017 lower court decision that allowed Justice Highton to stay in the Argentine SC after turning 75[276] by virtue of a 1999 precedent that was overturned by the Court itself a few days later.[277] In 2018, after eleven years in office, Ricardo Lorenzetti stepped down as Chief Justice. Carlos Rosenkrantz, the member considered most closely attuned to the Executive Office,[278] became the new head of the Court in a contested vote that received significant media attention.[279]

Mounting economic troubles and steady inflation undermined Macri's reelection bid in 2019. Earlier in 2018, his administration had

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[274] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/12/2018, "Recurso de hecho deducido por Batalla, Rufino en la causa Hidalgo Garzón, Carlos del Señor y otros s/ inf. art. 144 bis inc. 1—último párrafo—según ley 14.616, privación ilegal libertad agravada (art. 142 inc. 1), privación ilegal libertad agravada (art. 142 inc. 5), inf. art. 144 ter 1° párrafo—según ley 14.616—inf. art. 144 ter 2° párrafo—según ley 14.616—homicidio agravado con ensañamiento—alevosía, sustracción de menores de diez años (art. 146)—texto original del C.P. ley 11.179 y supresión del est. civ. de un menor," Fallos (2018-341-1768) (Arg.).

[275] Luciana Bertoia, *Supreme Court Set to Finally Overturn Controversial '2x1' Ruling*, BUENOS AIRES TIMES (Dec. 3, 2018), https://www.batimes.com.ar/news/argentina/supreme-court-set-to-finally-overturn-2x1-ruling.phtml.

[276] Centro de Información Judicial, *El JuezLavié Pico hizo Lugar a un Amparo Presentado por Elena Highton de Nolasco, Vicepresidenta de la Corte Suprema,* CENTRO DE INFORMACIÓN JUDICIAL (Feb. 10, 2017), https://www.cij.gov.ar/nota-24789-El-juez-Lavi--Pico-hizo-lugar-a-un-amparo-presentado-por-Elena-Highton-de-Nolasco--vicepresidenta-de-la-Corte-Suprema.html (Arg.).

[277] Centro de Información Judicial, *La Corte Suprema, por Mayoría, Reconoció las Facultades de la Convención Constituyente de 1994 y Restableció el Límite Constitucional de 75 Años de Edad para la Función Judicial,* CENTRO DE INFORMACIÓN JUDICIAL(Mar. 28, 2017), https://www.cij.gov.ar/nota-25386-La-Corte-Suprema--por-mayor-a--reconoci--las-facultades-de-la-Convenci-n-Constituyente-de-1994-y-restableci--el-l-mite-constitucional-de-75-a-os-de-edad-para-la-funci-n-judicial.html.

[278] Juan F. González Bertomeu & Ramiro Álvarez Ugarte, *Argentina*, *in* 2018 GLOBAL REVIEW OF CONSTITUTIONAL LAW 8 (Richard Albert, David Landau, Pietro Faraguna & Simon Drudga eds., 2019).

[279] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/9/2018, Acordada No. 29/2018, https://www.csjn.gov.ar/documentos/descargar/?ID=111978 (detailing the 4 votes for Justice Rosenkrantz, including his own) (Arg.); Luciana Bertoia, *Supreme Court Enters New Era as Lorenzetti is Squeezed Out*, BUENOS AIRES TIMES, (Sept. 15, 2018, 11:32 AM), https://www.batimes.com.ar/news/argentina/supreme-court-enters-new-era-as-lorenzetti-is-squeezed-out.phtml.

secured a record $50 billion IMF loan.[280] However, these efforts did not reverse his waning public approval ratings.[281]

Alberto Fernández went on to win the October 2019 election, with Cristina Kirchner as his running mate in a broad Peronist coalition. Following their criticism of alleged political interference with the judiciary during Macri's presidency, the victors pledged to implement judicial reforms. After Fernández took office, failed reform attempts increased tensions with the Court. A 2020 Presidential Commission released a report on reorganizing the judiciary;[282] however, the recommendations did not gain sufficient political momentum. As a result of the most severe stage of the pandemic, confrontation with the Executive intensified. Two decisions stand out as examples of this tension. In early 2021, the SC sided with opposition leader and Buenos Aires mayor, Horacio Rodríguez Larreta, in a high-profile lawsuit[283] to keep the City's elementary schools open for in-person classes after the Federal Government extended COVID-19-related school closures on public health grounds.[284] A few months later, the Court strengthened its supremacist role in the institutional area by holding the 2006 reform of the Council of the Magistracy unconstitutional.[285] According to the Court, the reduced thirteen-member Council granted the elected branches a disproportionate

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[280] *Press Release No.18/25:IMF Executive Board Approves US $50 Billion Stand-By Arrangement for Argentina*, INT'L MONETARY FUND (June 20, 2018), https://www.imf.org/en/News/Articles/2018/06/20/pr18245-argentina-imf-executive-board-approves-us50-billion-stand-by-arrangement.

[281] Benjamin N. Gedan, *Opinion: Much of Argentina Wants its Populists Back*, (Aug. 10, 2019, 9:00 AM), https://www.npr.org/2019/08/10/748419903/opinion-much-of-argentina-wants-its-populists-back (pointing out that President Macri's popularity had dropped below 40% on the eve of a re-election bid, after a yearlong economic crisis).

[282] *See* Decree No. 635/2020, July 30, 2020, [29737] B.O. 6, (creating the Presidential Advisory Council for Strengthening the Judiciary and the Attorney General's Office) (Arg.); *see also Reforma judicial: Recomendaciones del Consejo Consultivo para el Fortalecimiento del Poder Judicial y el Ministerio Público*, UNIDAD DE INFORMACIÓN FINANCIERA (Nov. 23, 2020), https://www.argentina.gob.ar/noticias/reforma-judicial-recomendaciones-del-consejo-consultivo-para-el-fortalecimiento-del-poder.

[283] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/5/2021, "Gobierno de la Ciudad de Buenos Aires c. Estado Nacional (Poder Ejecutivo Nacional) s/ acción declarativa de inconstitucionalidad," Fallos (2021-344-809) (Arg.).

[284] The case did not center on the right to education, but rather on which level of government, local or federal, had the authority to order school closures. *See* Magdalena Rochi Monagas & Maricel Asar, *Legal Battle Over the Closure of Schools in the City of Buenos Aires*, LEX-ATLAS: COVID-19 (June 1, 2021), https://lexatlas-c19.org/legal-battle-over-the-closure-of-schools-in-the-city-of-buenos-aires.

[285] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/4/2022, "Colegio de Abogados de la Ciudad de Buenos Aires y otro c. EN - ley 26.080 - dto. 816/99 y otros s/ proceso de conocimiento," Fallos (2021-344-3636) (Arg.). The 2006 reform was different from the already mentioned 2013 statute struck down in *Consejo de la Magistratura* (2013).

clout in the decision making process, in contradiction with the constitutional mandate for balance with lawyers, judges, and academics. While all actions taken since 2006 were deemed legitimate for legal stability, the Council had to be restored to twenty members, and led by the Chief Justice, as stipulated by the original 1997 statute—or a new one to be approved—within 120 days.[286] Failure to comply would result in a nullification of the Council's decisions.[287] The previous law was eventually reinstated when Congress did not reach a consensus on a new statute in time. These two rulings offer an adequate illustration of the Court's confrontational stance, aimed at setting clear limits to the Executive and its Congressional allies, while retaining a decisive role in highly visible political conflicts. Inside the Court, the period ended with an increasing internal rift, particularly after 2018, when Lorenzetti's tenure as Chief Justice ended. In October 2021, Justice Horacio Rosatti, joined by Justices Maqueda and Rosenkrantz, voted himself as the new Chief Justice. Their other two colleagues, Highton and Maqueda, were absent. Justice Highton resigned in protest, leaving Rosatti presiding over an all-male four-member Court. This marked the end of a five-year period of institutional normalcy. As of August 2024, Highton's seat remains vacant.

B. After Supremacy, Time for Detachment

In the last decade, the CSJN has gradually returned to a detached role in the area of social rights, applying mostly a deferential review. First, the scope of judicial enforcement of social rights narrowed as the Court set certain conditions for admitting claims based on social rights. It also upheld legislation or policy against constitutional challenges. Deference also extended to contractual agreements, which prevailed in the face of constitutional objections. Furthermore, the Court denied certain individuals or groups the entitlement to specific rights, excluding the opportunity to perform a constitutional review of challenged legislation, decisions, or policies.

In reducing the scope of judicial review and excluding groups or individuals as rights holders, the Court performed a restrictive construction of constitutional clauses. In Argentine constitutional scholarship, a "restrictive" interpretation is a form of non-literal

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[286] *See Supreme Court Rules 2006 Reform of Magistrates Council was 'Unconstitutional'*, BUENOS AIRES HERALD (Dec. 17, 2021), https://www.batimes.com.ar/news/argentina/supreme-court-rules-2006-reform-of-magistrates-council-was-unconstitutional.phtml.

[287] *Id.*

interpretation, in other words, a legal interpretation that diverges from the textual plain meaning that emerges from common word usage. In an alternate reading of any clause or term, a *restrictive interpretation* narrows the scope of application compared to the literal construct. Simply put, restrictive interpretation excludes situations that would otherwise be encompassed under a plain reading of the textual terminology from a rule's reach. It can be contrasted to the extensive interpretation the Court applied in certain social rights rulings from the previous period. Whereas literal interpretation construes legal dictates per conventional lexical understandings, restrictive construction denies coverage for specific cases under a statute or provision that linguistic conventions would normally include.[288] This section outlines how the Court evolved toward a detached role, highlighting the legal arguments provided in the challenging political context to justify this change and to protect the SC's own legal legitimacy, as described in a previous section of this article.

By playing a detached role, the Justices kept the Court out of direct confrontation with the elected branches over social rights and out of detailed management or oversight of thorny social issues. While running the risk of judicial abdication, the Court never completely ruled out the possibility of exercising a more demanding review, provided that certain conditions or circumstances are met. During this period, the Court, in general, did not return to conversational review in social rights. Its detached role rested on a deferential stance, built without formally overturning its previous holdings about judicial enforceability of social rights. The first step took place in 2012: a high-profile case provided the opportunity to adopt a narrower reading of judicial review.[289]

[288] *See* Sagüés, *supra* note 158, at 166–67; Hernández, *supra* note 158, at 73; BADENI, *supra* note 158, at 102–03.

[289] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2012, "Q. C., S. Y. c. Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos (2012-335-452) (Arg.).

i. Reducing the Scope of Social Rights Justiciability

The Court reduced the scope of judicial enforcement of social rights by excluding—in principle—cases requiring positive State action with budgetary impact. In *Q. C.* (2012),[290] the first significant housing rights case to reach the Court, the majority of Justices introduced a distinction among constitutional rights regarding their justiciability. According to this new position, the judiciary should not directly enforce rights that require positive State action and the use of public resources. In those cases, courts should defer to the elected branches' regulations, except if they are unreasonable. Both the SC and lower courts could skip cases with budgetary implications, a usual point of conflict in applying a stricter review, such as a peremptory stance, or a managerial one, as the Court did in the preceding years.[291]

The new rule seemed to offer the Court an elegant way out of a difficult crossroad embodied in this right to housing case. A homeless woman and her son, a severely disabled infant, filed an *amparo* against the City of Buenos Aires requiring a place to live, based on their constitutional and human right to housing.[292] After holding a public hearing on the case,[293] the dilemma became clearer. If the SC followed the logic of its previous decisions on social rights, the plaintiffs could expect a favorable answer, either under a peremptory or a conversational orientation. The former would result in ordering the city to provide at least a basic housing solution, with no significant budgetary impact. A conversational approach, on the other hand, would prompt the local government to start a dialogue about feasible alternatives for the mother and her son. Yet both solutions, while consistent with the preceding positions of the Court, elicited serious questions. Since widespread housing problems existed throughout Argentina, a positive response to this case would surely inspire hundreds of similar cases in both the city of Buenos Aires and the rest of the country,

[290] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2012, "Q. C., S. Y. c. Gobierno de la Ciudad de Buenos Aires s/ amparo," Fallos (2012-335-452) (Arg.).

[291] *See generally* Pereira, *supra* note 10 (examples of a managerial approach can be found in the large-scale environmental case and in the system-wide habeas corpus for prisoners described in the previous section).

[292] *See La Corte Suprema realizó audiencia pública en un caso por el derecho a una vivienda digna,* CENTRO DE INFORMACIÓN JUDICIAL (Sept. 15, 2011), https://www.cij.gov.ar/nota-7670-La-Corte-Suprema-realiz--audiencia-p-blica-en-un-caso-por-el-derecho-a-una-vi-vienda-digna.html.

[293] *See id.* For a detailed study of public hearings as an innovative procedure by the Supreme Court, *see* MIGUEL ÁNGEL BENEDETTI & MARÍA JIMENA SÁENZ, LAS AUDIENCIAS PÚBLICAS DE LA CORTE SUPREMA (Siglo Veintiuno Editores, ed., 2016).

giving rise to a backlash from the elected authorities. Preserving technical legitimacy and legal consistency would come at a substantial cost to the political stability of the Court.

On the other hand, a flat rejection of the claim would raise a different set of issues. First, it would contradict a discernible, decade-long trend in the Court's jurisprudence on social rights. Although technically the Court is not bound by its earlier rulings, modifying this course of action would demand a comprehensive legal rationale, necessary to safeguard the Court's technical authority. Additionally, a negative response would reflect poorly on the judges, as no sympathetic court would disregard a disabled child and his mother's suffering just to avoid political turbulence. Under these pressing circumstances, even a conversational approach would amount to judicial abdication. This would not only harm the technical record of the Court, but also its image in the larger public.

Caught between a rock and a hard place, the Court needed to devise a legal answer to provide rights-based relief to these specific petitioners and, at the same time, to prevent a storm of similar cases. A new, narrower scope for judicial enforcement appeared to be an adequate solution. The Court should be able to decide on this petition while remarking on its exceptional character.

Quoting article 11 of the ICESCR and the General Comment (GC) No. 5 (1994),[294] issued by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the majority vote admitted that the right to housing is a constitutional and human right, yet not always judicially enforceable. Since it demands positive State action and involves the use of public funds, Congress and the Executive are entitled to fulfill the right to adequate housing through their informed, reasonable regulations.[295]

The Court offers an explanation to differentiate this case from prior legal decisions. Although all constitutional rights are "operative," in a sense traditionally recognized by Argentine constitutional scholars, the Court notes that some are not "directly" operative and only become so through administrative or legislative regulation.[296] The Court calls these rights "derivatively operative."[297] In other words, instead of abandoning

[294] Comm. on Econ., Soc., & Cultural Rts. [CESCR] Gen. Comment No. 5: Persons with Disabilities, U.N. Doc E/1995/22 (Dec. 9, 1994) (stating that "[t]he obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities").

[295] CSJN, 24/4/2012, "Q. C., S. Y.," Fallos (2012-335-470) (Arg.).

[296] *Id.*, para 11.

[297] *Id.*

the ample notion of "operative rights," the majority vote chooses to distinguish a subset of those rights that will receive a different judicial treatment.[298]

Having established this deferential approach as a general rule for "derivatively operative" rights, the majority vote introduced a crucial exception: judicial intervention proceeds only when regulation by the elected branches fails to ensure a "minimum guarantee." This happened in the case at stake, where there was "a grave threat to the very existence of the person," who was in a "desperate" situation.[299] As an exceptional measure, the Court could judicially enforce this right and require the local Government to produce a solution for mother and child, in addition to counseling and other social support provisions.

To sum up, *Q. C.* (2012) set a narrower scope for judicial review: a deferential approach applies to costly rights, unless the other branches do not ensure a "minimum guarantee" construed merely as survival conditions. Social rights would be judicially enforceable only when they become context-dependent instances of the right to life, impacted by inattentive, life-threatening regulations or their absence. In an important passage, the Court also recognized the CESCR as the "authorized interpreter" of the ICESCR, confirming the relevance of international sources in local constitutional interpretation. Yet the Justices did not consider GC No. 3 (1990)[300] or GC No. 9 (1998)[301] to discuss the "minimum guarantee" content. This case shows an early selective approach to materials from the CESCR: while a GC provides the basis for a rights framework, other relevant GC on a crucial concept such as "minimum core" are not part of the legal justification of the ruling.[302]

By devising this new position, the Court could defend its deferential turn in light of its prior jurisprudence while sending a friendly signal to the elected branches and leaving open an avenue to enforce even onerous rights in exceptionally relevant or urgent cases, like the one at stake in *Q. C*.

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[298] Laura Clérico, *Sobre la Insuficiencia desde el Prisma de la Igualdad Real: Pistas para Evaluar una Violación del derecho a la Vivienda*, 11 PAPELES DE TRABAJO 10, 16 (2013) (describing this distinction as "confusing").

[299] CSJN, 24/4/2012, "Q. C., S. Y.," Fallos (2012-335-470) (Arg.).

[300] CESCR Gen. Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990).

[301] CESCR Gen. Comment No. 9: The domestic application of the Covenant, U.N. Doc. E/C. 12/1998/24 (Dec. 3, 1998).

[302] CESCR Gen. Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990).

In the only social rights-related case of conversational approach, the SC suspended income tax collection from an individual pensioner until Congress adopted a new scheme with a differentiated treatment for groups that could be described as "vulnerable." The plaintiff in *García* (2019),[303] a seventy-nine years old pensioner, challenged the constitutionality of income taxes that claimed over one-quarter of her pension payments.[304] A majority of Justices sided with her, reasoning that the tax code failed to adequately account for pensioners' "condition of vulnerability due to old age or illness" as required by the Argentine Constitution since 1994.[305] The Court ordered the Administration to stop requiring payment from the plaintiff until Congress devised a new tax scheme, considering special factors apart from income amount. Justice Rosenkrantz dissented since Congress had set a high threshold for pensioners to pay income tax, and the plaintiff had not shown proof of financial hardship. The majority boldly struck down a portion of the tax code, but the ruling had only the usual individual effect. When sending the question back to Congress, the financial impact remained scarce. Since the Court provided no clear criteria to define "vulnerability," potential new cases would be subject to a discretionary, individual examination by lower courts before reaching the Court's bench again. This would prevent the risk of flooding the SC with similar cases, a risk present at the right to housing case. This conversational solution, undoubtedly, may not necessarily be inconsistent with the highly deferential approach in *Q. C.* (2012). While income tax exemptions have a budgetary impact, the plaintiff in *García* (2019) did not request positive action from the State. Instead of requiring the pensioner's situation to be "desperate" or under survival risk to hear the case, the Court turned to a conversational approach, as it had done before in *Badaro* (2006), yet this time as part of a generally detached role, not as a steppingstone to a supremacist position.

[303] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/3/2019, "García, María Isabel c. AFIP s/ acción meramente declarativa de inconstitucionalidad," Fallos (2019-342-411) (Arg.).

[304] Juan F. González Bertomeu & Ramiro Álvarez Ugarte, *Argentina*, *in* 2019 GLOBAL REVIEW OF CONSTITUTIONAL LAW 13, 14 (Richard Albert et al., eds., 2020).

[305] Art. 75(23), CONST. NAC., (Arg.). (explaining this article allows Congress to take "positive" or proactive measures to benefit groups hit by social discrimination, explicitly including older persons and persons with disabilities).

ii. Confirming Legislation and Policies Against Rights-Based Claims

The deferential stance made an early appearance in right-to-health cases, which were usually treated under a peremptory approach in the previous period. Now, the Court has skipped the constitutional review of statutes and regulations on state-funded medical care, even for people with disabilities.

Argentina's fragmented healthcare system includes private, public, and union-based options that vary in coverage, costs, and quality for individuals, depending on their employment and income level.[306] This section analyzes claims filed against the state-run system. In *P., A.*, a decision from 2015 mentioned earlier, the Court upheld the Government's denial of disability-related health services to a plaintiff who required full medical coverage to improve her condition.[307] In a strict construction of the applicable 1997 statute,[308] the Court unanimously ruled that persons with disability must prove both lack of health insurance and personal inability to afford healthcare costs as a condition to require medical services financed by the Government. In a departure from *Campodónico* (2000),[309] the Justices considered that evidence of the breach of the right to health did not suffice to hold the Federal Government responsible.[310] Statutory conditions determine the access to State-funded healthcare. The opinion also fails to address the United Nations Convention on the Rights of Persons with Disabilities (CRPD), a key constitutional-rank treaty. None of the Justices felt it necessary to evaluate the 1997 statute in light of the superior international convention, which has held constitutional rank since 2014. Moreover, the unanimous decision does not refer to the CESCR's GC No. 14 (2000),[311] further illustrating the Court's selective incorporation of GC.

Yet there is a mention of international human rights law: in reversing the lower court's decision favorable to the plaintiff, SC judges underscored all judicial resolutions must provide "consistent, rationally sustainable

[306] *See* Leticia Vita, *Modelos de Estado y derecho a la salud en Argentina: descubriendo los presupuestos políticos de un sistema estructuralmente desigualitario*, *in* 1 TRATADO DE DERECHO A LA SALUD 17 (Laura Clérico et al., eds., 2013).

[307] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488).

[308] Law No. 24901, Dec. 2, 1997, B.O. (Arg.).

[309] CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina," Fallos (2000-323-3237, 3238).

[310] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488).

[311] CESCR Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C. 12/2000/4 (Aug. 11, 2000).

foundations," according to the ACHR.[312] Since the lower court had set aside a clear statute in order to grant the petitioner's claim, that decision did not respect the Government agency's right to defense on trial and to effective judicial protection included in the Convention.[313] International human rights law here provided a basis for a deferential approach and for protecting the state agencies instead of patients. The right to a fair trial implied that courts should stick to the application of statutes and regulations, while constitutional review did not explicitly appear as part of the right of the plaintiff to a legally reasoned decision.

Politically sensitive cases also received deferential treatment. In *Sindicato Policial* (2017),[314] the Court by a 3-2 majority, and after holding a public hearing on the case,[315] upheld a provincial Governor's decree that prevented local police officers from taking part in "union activities," and the local decision to deny official recognition of a police union. The officers' claim involved no positive action from the State, so the deference based on the *Q. C.* (2012) framework did not apply. The right to form and join a union is included in the Constitution[316] and at least in three constitutional-rank international human rights treaties.[317] Since the Constitution did not formally exclude the police from the right to unionize, the Court turned to the 1957 Constitutional Convention debates, where some speeches made it clear that police members should not have the right to strike.[318] According to the Court, this limitation, though absent in the approved version of the Constitution, provided a safe legal basis for distinguishing police officers from other workers in trade union rights at large.[319] As striking is one of the main competences of unions, a total restriction of the right to strike expressed in some Convention speeches can be considered as an implicit prohibition of unionization.

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[312] CSJN, 16/6/2015, "P., A," Fallos (2015-338-488, 492).

[313] Organization of American States, American Convention on Human Rights, arts. 8 & 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[314] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/4/2017, "Sindicato Policial Buenos Aires c. Ministerio de Trabajo s/ ley de asociaciones sindicales," Fallos (2017-340-437) (Arg.).

[315] *See La Corte realizó una audiencia pública en una causa por la inscripción gremial de un sindicato policial*, CENTRO DE INFORMACIÓN JUDICIAL (Aug. 13, 2015), https://www.cij.gov.ar/nota-17295-La-Corte-realiz--una-audiencia-p-blica-en-una-causa-por-la-inscripci-n-gremial-de-un-sindicato-policial.html.

[316] Art. 14 *bis*, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (stating that "[l]abor in its diverse forms shall enjoy the protection of the law, which shall ensure to workers . . . free and democratic organization of labor unions, recognized simply by inscription in a special register" (author's translation)).

[317] ICESCR, *supra* note 107, at 993 U.N.T.S. 15,S. EXEC. DOC. NO. D, 95-2, 5; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at 22(2) (Dec. 16, 1966); American Convention on Human Rights, *supra* note 313, at 1144 U.N.T.S. 149.

[318] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 452).

[319] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 459).

The Court also needed to justify its deferential approach, in light of union rights granted in international human rights treaties endowed with constitutional rank. Article 8.2 of the ICESCR allows any State party to establish "lawful restrictions," but not to eliminate the right to form a union.[320] Yet the Court based its reasoning on article 16.3 of the ACHR, which not only allows "legal restrictions" but also a formal "deprivation" of the right of association in the case of police officers or members of the armed forces.[321] The Convention requires such a prohibition to be "legal;" the Court held that in the absence of a statute approved by the local Legislature, a provincial Governor's decree satisfied that requirement.[322] In doing so, the Argentinean Court explicitly refused to consider the Inter-American Court of Human Rights advisory opinion OC 6/86.[323] According to that opinion, the majority vote admitted, "the word 'law' must be understood as formal law."[324] This, in principle, excluded Executive decrees as a valid instrument to forbid unionization. However, the majority added: "*Regardless of the relevance assigned to such opinion* [OC 6/86], the fact remains that the requirement of 'formal law' is satisfied if a regulatory decree merely clarifies a provision already contained in the law"—emphasis added. While the Court based its decision on the ACHR because it allows for a more restrictive regulation of the right at stake, it did not rely on the regional tribunal's advisory opinion on the matter. This stance toward the Inter-American body should be read in the context of the contemporary stand-off started by the Argentinean apex court in the already mentioned *Ministerio de Relaciones Exteriores* (2017), issued a few weeks earlier. Beyond this important development, this selective use of international law exemplifies a more general trend. In 2020, a similar decision by a four to one vote upheld a provincial ban on correction officers from forming a union.[325]

iii. Giving Contracts Priority Over Rights-Based Claims in Health-Related Cases

[320] ICESCR, *supra* note 107, at 993 U.N.T.S. 15, S. EXEC. DOC. NO. D, 95-2, 5.

[321] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 456-57).

[322] *Id.*, Fallos (2017-340-437, 458-59).

[323] The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986).

[324] CSJN, 11/4/2017, "Sindicato Policial Buenos Aires," Fallos (2017-340-437, 458).

[325] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/8/2020, "Rearte, Adriana Sandra y otro c. Superior Gobierno de la Provincia de Córdoba s/ amparo—recurso de apelación," Fallos (2020-343-767) (Arg.).

Deference was also extended to private law contracts related to healthcare provisions. As mentioned earlier, many Argentines have private health insurance plans allowing them to access private clinics and hospitals. In addition to this profit-driven sector, large groups of workers get their healthcare coverage through non-profit *obras sociales*, which are insurance plans backed by labor unions from all sectors of the economy. Despite their differences, both groups of healthcare providers can be considered non-state actors, although their activities are subject to state regulation.

In *S., D.* (2016),[326] the Court confirmed that for-profit entities are not obliged to cover health practices indicated by medical professionals not included in their official list of selected providers. The SC did not subject this agreement between a patient and a private company to a constitutional analysis based on the right to health.[327] In turn, *V., D.* (2019)[328] reversed a lower court decision ordering a private insurance company to provide a disabled child educational services not explicitly required by the contract or the applicable statutes.

Obras sociales also benefited from this deferential approach. In *P., V. E* (2017)[329] and in *V. I., R.* (2017),[330] the Court upheld the maximum expenditure limits imposed by these non-profit providers in their internal regulations on home care services afforded to disabled patients. The Court declined to engage in further substantive constitutional review regarding the limits. In *L. S., M. T.* (2020),[331] the Court exempted the non-profit entity from covering health practices indicated by physicians not on its official list of selected providers. This judicial restraint avoided questions about the appropriate calibration of cost considerations by *obras sociales*

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[326] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/3/2016, "S., D. c. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno s/ sumarísimo," Fallos (2016-339-290) (Arg.).

[327] *Id.*, Fallos (2016-339-290).

[328] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/7/2019, "V., D. c. Centro de Educación Médica e Investigaciones Clínicas Norberto Quirno s/ amparo," Fallos (2019-342-1261) (Arg.).

[329] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/11/2017, "P., V. E. c. Obra Social del Poder Judicial de la Nación s/ amparo de salud," Fallos (2017-340-1600) (Arg.).

[330] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/9/2017, "V. I., R. c. Obra Social del Poder Judicial de la Nación s/ ordinario," Fallos (2017-340-1269) (Arg.).

[331] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2020, "L. S., M. T. c. Obra Social del Poder Judicial de la Nación s/ amparo de salud," Fallos (2020-343-1406) (Arg.).

against the right to healthcare in the disability area.[332] Unlike healthcare cases from the previous period, these decisions did not discuss international human rights treaties such as the CRPD, showcasing the new selective trend in utilizing international law sources.

In analyzing labor relations in the private health sector, the SC also applied its deferential approach to contracts. The SC held in *Rica* (2018) that the relationship between a private medical facility and affiliated health personnel is not inherently one of employment, but can be legitimately based on an independent, service-based contractual arrangement, thereby placing such personnel beyond the scope of constitutional and statutory employment protections.[333] In this specific case, the Court denied relief under employment statutes to a neurosurgeon after his seven-year affiliation with a medical center was terminated.[334] A salient aspect of the Court's reasoning was the lapse before the neurosurgeon first asserted statutory employment rights against the medical center.[335] This argument privileged procedural regularity and disregarded that substantive workplace entitlements often remain unclaimed out of economic constraints rather than consent with their deprivation. Here, a meaningful analysis of the real, material circumstances around the neurosurgeon's practice was set aside in favor of an emphasis on the timeliness of the claim to such status. *Pastore* (2019) reinforced this line a year later, holding that no employment relationship between a physician and a private entity exists unless there was an obligation to work exclusively for that institution.[336] The Court added that a disciplinary measure taken by the clinic against the professional did not suffice to prove a labor relationship, but it only indicated a supervisory role.[337] In these cases that centered around a labor relationship, contracts ultimately prevailed over the exercise of constitutional review.

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[332] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/2008, Acordada No. 5/2008 (Arg.). It should be noted that in these three cases the non-profit health provider was the *Obra Social del Poder Judicial de la Nación*, at the time organized as an autonomous entity with a Directorate appointed by the Supreme Court. CSJN, 7/4/2008, Acordada No. 5/2008, art. 16.

[333] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/4/2018, "Rica, Carlos Martín c. Hospital Alemán y otros s/ despido," Fallos (2018-341-427) (Arg.).

[334] *Id.*, Fallos (2018-341-427, 434).

[335] *Id.*, Fallos (2018-341-427, 437).

[336] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/4/2019, "Pastore, Adrián c. Sociedad Italiana de Beneficencia en Buenos Aires s/ despido," Fallos (2019-342-681) (Arg.).

[337] *Id.*, Fallos (2019-342-681, 683).

iv. Denying Individuals or Groups Their Entitlement to Certain Social Rights

A deferential approach also found a basis in excluding plaintiffs as holders of the right at stake. Judicial enforcement became inapplicable with no constitutional or human right involved in the case. Argentina's Supreme Court unanimously held in *Orellano* (2016) that the constitutional right to strike belongs exclusively to formally registered trade unions, not to individual workers acting in concert informally.[338] The Court affirmed the dismissal of an employee for participating at a workplace assembly voted for by employees but lacking formal trade union endorsement.[339]

Through this decision, the SC effectively established that individual employees, even in large groups are not entitled to the right to strike. While article 14 *bis* of the Argentine Constitution grants this right to unions only, international human rights treaties with constitutional rank provide otherwise. Article 8 of the ICESCR makes no distinction between individual workers and labor unions. In sections b and c, the article explicitly labels certain rights as rights "of trade unions," but section d simply recognizes an unqualified "right to strike," without explicitly designating it as a right of trade unions. Yet the Court's reading of article 8, section d, has restricted this right solely to unions, citing the CESCR's Concluding Observations on Burundi (2015) and the Concluding Observations on Kazakhstan (2010).[340] However, these two reports are inadequate in resolving the issue concerning the Argentinian case. The mere reference did not include any in-depth discussion of these Concluding Observations, reinforcing the selective use of international human rights materials.

Likewise, the Justices neither cited nor analyzed GC No. 23 (2016),[341] released forty-five days prior to the ruling, which does not define the right to strike as a trade union right. Thus, while domestic law reserves an explicit right to strike only for labor organizations, binding international commitments confer those same privileges upon informal employee groups.

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[338] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/6/2016, "Orellano, Francisco Daniel c. Correo Oficial de la República Argentina S.A. s/ juicio sumarísimo," Fallos (2016-339-760) (Arg.).

[339] *Id.*, Fallos (2016-339-760, 765).

[340] *Id.*, Fallos (2016-339-760, 778) (citing the UN Committee on Economic, Social and Cultural Rights Concluding Observations on Burundi, issued in 2015, and on Kazakhstan, issued in 2010).

[341] CESCR Gen. Comment No. 23 (2016) on the right to just and favourable conditions of work (Art. 7), U.N. Doc E/C.12/GC/23 (Apr. 27, 2016).

The Court also excluded certain workers on the public payroll from special constitutional protections. Since the 1957 constitutional reform, article 14 *bis* includes the right of public employees to "stability."[342] As the Court ruled in the previously cited in *Madorrán* (2007), after a few decades of interpretive disputes, these workers cannot be dismissed without good or just cause stemming from either misconduct or incompetence.[343] Procedural protections have to be followed before termination, including written notification, an opportunity for the workers to defend themselves, and administrative or judicial review. Yet a few years later, the Court introduced some distinctions among public employees, in order to exclude some groups from the right to stability without formally overturning the holding of *Madorrán*.[344]

The process started in the previous period, when the Court in *Ramos* (2010),[345] and also later in *Galeano Torres* (2016),[346] established that fixed-term public employees, despite their prolonged recurrent contracts, are not protected by stability and may be terminated without proper cause, equating them with private sector workers entitled only to severance pay. Additionally, in *Luque* (2015),[347] the Court determined that workers at state-owned enterprises lack protection against arbitrary discharge, similarly qualifying solely for severance. However, this distinction contrasts with the Court's majority holding in *Madorrán* (2007), discussed in a previous section, which did not differentiate fixed-contract direct government employees from the tenure rights article 14 *bis* grants to public sector workers as a class.[348]

In sum, a deferential review became dominant in the Court's return to a detached role. The rulings confirmed the elected branches' regulations, or private parties' contractual agreements, rejecting constitutional challenges to them. In other cases, the Court ruled plaintiffs

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[342] *See* Art. 14bis, CONST. NAC. (ensuring "stability of the civil servant").

[343] *Id.*, Fallos (2007-330-1989, 1995).

[344] *Id.*, Fallos (2007-330-1989).

[345] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/4/2010, "Ramos, José Luis c. Estado Nacional s/ indemnización por despido," Fallos (2010-333-311) (Arg.).

[346] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/4/2016, "Galeano Torres, Facundo Martín y otro c. Municipalidad de la Ciudad de Mendoza s/ varios," (2016) (Arg.), https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7295982.

[347] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/10/2015, "Luque, Rolando Baltazar c. Sociedad del Estado Casa de Moneda s/ despido," Fallos (2010-338-1104, 1109) (Arg.).

[348] CSJN, 3/5/2007, "Madorrán, Marta Cristina," Fallos (2007-330-1989).

were not entitled to the constitutional right supposedly at stake, or conditioned the judicial enforcement of the right to one or more conditions absent in the specific case. For any of these reasons, the Court ruled no constitutional question was at stake, and no judicial response was in order. The elected branches and private parties prevailed, while the Court did not flatly overturn its precedents from the previous period.

CONCLUSIONS

This article examined the Argentine Supreme Court's changing roles from 1994 to 2021 in social rights adjudication, building on Katharine Young's typologies of judicial review and court roles. In particular, the article focused on how the Court provides a set of legal arguments to justify its evolving position along the way, in order to preserve its technical and public legitimacy. Young's typologies provide insight into the Argentine court's shifting approaches to social rights in challenging contexts and with varying memberships. These concepts illuminate that changes in roles over time do not always align with electoral cycles or specific political events, which surely have an impact on the institution. However, Young identifies a different view, centered on the Court's self-conception within the broader political milieu. This article explored the Argentine case and distinguished three periods in the Argentine Court's recent history, based in Young's categories.

During the first one, from the 1994 reform until 2000, the Court maintained a *detached* role in regard to social rights adjudication, aligning with the Executive's neoliberal program. A shift towards a *supremacist* role began in 2000. This new stance prevailed until 2012, resulting in the Court gaining increasing authority over social rights issues as part of a legitimacy-building effort. The third period started in 2012 and marked a gradual return to a *detached* role without overturning the precedents set in the second period, to protect the credibility of the Court.

The article centered on the legal justification built by the Supreme Court to justify the roles assumed at every stage. Three elements incorporated through the 1994 reform appear as the main building blocks for that justification: the new social rights clauses, the explicit judicial attributions to enforce them, and the connection with international human rights law. While these three elements remained constant during the past three decades, the Court shifted its role. This required an effort on the part of the Court to combine all of them as parts of a legally persuasive argument.

During the first period (1994–2000), the Court applied the traditional conception to the new social rights clauses, leaving enforcement to Congress and the Executive. Therefore, the ample judicial review powers

granted by the Constitution remained inapplicable to these rights, in light of a long-established distinction between “operative” and “programmatic” rights. Finally, international human rights law did not modify the model as the “available resources” language seemed to confirm the time-honored vision. As budget-dependent rights, only Congress or an emergency-empowered Executive had the authority to define their contours. In the context of a neoliberal project, the Court did not see a way to reconcile new social rights clauses with the unfolding economic reforms. A detached role appeared to be a technically appropriate option. However, the possible perception of judicial abdication did not help the Court to improve its image in a rapidly deteriorating socioeconomic reality.

In the second period (2000–2012), the three elements offered grounds for legally justifying the shift from a detached role to a supremacist one. In other words, a renewed consideration of the 1994 reform and its potential provided a sound basis for a change in role. Social rights clauses could be read extensively, and their fresh language called for a renewed approach. The clauses on judicial review powers, precisely, made no distinction between social rights or civil rights because all of them were justiciable. The notion of “programmatic rights” lost its weight since no constitutional language seemed to support it. Finally, international human rights law, rediscovered in the area of social rights, provided not only concepts, rulings, and materials, but also a sense of global obligation and of global connection, expressed in generous quotations from foreign and regional courts. The technical legitimacy of the Court's supremacist role contributed to its public esteem, but also carried with it the double risk of inter-branch confrontation over perceived judicial usurpation and overburdening of the Court's capacity. At the same time, the reliance on international human rights organs could curtail the Court’s autonomy in the future.

A narrowing of the judicial enforcement scope inaugurated the third period (2012–2021). Soon after, the Court went on to apply a restrictive reading of social rights clauses, even denying certain persons or groups the entitlement to these rights. This return to a detached role did not require overturning previous rulings since the Court distinguished the new cases in order to justify a different treatment. Finally, the third element, international human rights law, underwent a new construction which undermined its binding character. The global obligation weakened while the domestic “public law principles” grew stronger. This more distant approach to international human rights law affirmed the Court’s autonomy as a domestic high court, while attracting criticism from legal commentators. In certain areas of social rights, the Argentine Court did

not refer to relevant human rights treaties endowed with constitutional rank, while in other cases, it made a selective use of materials from international human rights monitoring bodies. At the same time, a detached model in social rights coexisted with a more supremacist role in confrontations in the realm of institutional design or federalism issues.

However, the Court's recent strategy could soon reach its limits. Even the most proficient legal scholars may struggle to distinguish a new case from previous ones. For example, if the government tries firing tenured employees without cause, the court will have to differentiate this from an earlier case protecting employee job stability, such as the ruling in *Madorrán* (2007). However, it may be hard to justify why these cases are truly different. Which employee's feature would validate these terminations without overturning the 2007 decision? At the same time, the basis for interpretation should remain consistent across cases. If a distinction is grounded in a literal construction of a clause, the next one cannot find its basis on an extensive reading. As the Justices try to make increasingly fine distinctions, they risk contradicting past rulings from the supremacist era or weakening their legitimacy by overturning past rulings.

In an alternative strategy, the Court could also account for its recent role shift by further distancing itself from international law materials. The Court has already paid a cost by prioritizing the local Constitution's "principles of public law" over rulings from the Inter-American Court of Human Rights. Following this logic, the Court may be able to justify revising some of its past decisions from the supremacist era if reliance on international law was integral to the original reasoning. By diminishing the importance of international law relative to domestic law, the Court gives itself more latitude to depart from precedents shaped by the former without losing legitimacy.

Katharine Young's work provides valuable insights into the shifting roles of the Argentine Supreme Court in adjudicating social rights since the 1994 constitutional reform. Her conceptual framework enables deeper analysis of national high courts while also facilitating comparison across different legal systems. Based on Young's typologies, this article distinguishes periods in the Argentine Court's recent history. It also explores how its roles shifted over time and how this Court justified these changes using legal concepts to maintain its technical legitimacy. In doing so, this article adds a longitudinal or diachronic perspective to Young's theoretical framework. The conclusions presented regarding the Argentine Supreme Court's evolving jurisprudence may constitute a useful addition to the growing body of comparative judicial research, showing how Young's typologies can be utilized to conduct diachronic analysis of high court decision-making and legitimacy. This article intends to contribute to a deeper understanding of the Argentine Court's present and future in

social rights: how it changes while remaining constant, and how it sheds its legal skin.