

CONSTITUTIONAL COURTS AS “POSITIVE LEGISLATORS” LES COURS CONSTITUTIONNELLES EN TANT QUE LÉGISLATEURS POSITIVE

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The Argentine Constitution was enacted in 1853, and our Founding Fathers drafted it essentially along the lines of the American Constitution. Like its model, it provides for a strict separation of powers between the three branches of government, the Executive, Congress and the Judiciary. In the matter at stake it vests the legislative power of the Nation in a bicameral Congress¹, while it grants to the Judiciary, formed by a Supreme Court and those

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¹ Argentine Constitution, Section 44.

inferior tribunals as Congress may establish², the power to “to hear and decide all cases arising under the Constitution and the laws of the Nation”³. Based on this clause, it has been held that courts are not allowed to render any decision or opinion outside the boundaries of a specific case.

According to the Constitution, the Argentine Supreme Court has a limited original jurisdiction in cases involving the Provinces, foreign ministers and other diplomats, while its appellate jurisdiction is regulated by law within the constitutional boundaries of federal jurisdiction⁴.

Since its inception in 1862, the Argentine Supreme Court, following U.S. Supreme Court Justice John Marshall’s reasoning in *Marbury v. Madison*⁵, has adopted the American model of judicial review, according to which all courts, federal or provincial and of all levels, have the right to declare an act of Congress, or an action of the Executive, unconstitutional, and therefore making it inapplicable at the case at stake⁶.

One of the oldest acts still in effect, law 48, enacted in 1863, sets down the requirements for access to Supreme Court’s review. A more recent reform to the National Procedural Code in 1990 grants the Supreme Court ultimate discretionary decision as to whether to hear or not a case⁷.

² Id., Section 108.

³ Id., Section 116.

⁴ Argentine Constitution, Sect. 117.

⁵ 5 US 137 (1803).

⁶ *Ramón Ríos*, Fallos 1:32 (1863); *Domingo Mendoza*, Fallos 3:131 (1865); *Sojo* Fallos 32:120 (1887); *Di Mascio*, Fallos 311:2478 (1988), Belluscio, J. concurring. On judicial review in Argentina, in general, see SOLA, Juan V., *El Control Judicial de Constitucionalidad*, Abeledo Perrot, Buenos Aires, 2001, BIANCHI, Alberto B., *Control Judicial de Constitucionalidad*, 2nd. Edition, Abaco, Buenos Aires, 2002; FAYT, Carlos S. J., *Supremacía constitucional e independencia de los jueces*, Depalma, Buenos Aires, 1994.

⁷ National Code of Federal Civil and Commercial Procedure, Sect. 280.

Do Argentine courts legislate? Such question poses a dilemma which goes beyond the countermajoritarian difficulty. There is no doubt that when a judge decides a case, the decision, by confronting the action being judged with the law, gives some room for the judicial creation of –at least– rules of individual application by means of construction or by filling the gaps in the statute being considered.

To the extent Argentine judges do have the power to annul (with *inter parte* effects) unconstitutional laws, they behave to a certain extent as negative legislators –although in a much more limited role than European constitutional courts– and exercise political power, since their decision is imposed to the will of the political branches of government, which has prompted some scholars to consider that judicial review in Argentina is, essentially, political⁸.

However, in our opinion, equating this judicial role of the Argentine courts to the Congressional power to make the law with general effect applicable to everyone, in the absence of a clear constitutional mandate in that sense; that is to say that Argentine courts (or even the Argentine Supreme Court) are positive legislators is somewhat different.

It should be pointed out that in our country, judicial decisions, in principle⁹, only have *inter parte* effects, since no constitutionally-mandated *stare decisis* principle exist. Judges in Argentina do not consider themselves bound to follow Supreme Court's precedents¹⁰. As a consequence, law schools in Argentina do not generally train prospective lawyers in identifying the holding and various *dicta* of a

⁸ SANTIAGO (h.), Alfonso, "Los modelos institucionales de la Corte Suprema", in the collective book *Función política de la Corte Suprema*, Abaco-Austral, Buenos Aires, 2000.

⁹ See below, p. 351.

¹⁰ See, generally, LEGARRE, Santiago and RIVERA (h.), Julio César, "Naturaleza y dimensiones del "stare decisis"", *La Ley* 2005-F, 850; Alberto B. BIANCHI, "De la obligatoriedad de los fallos de la Corte Suprema (una reflexión sobre la aplicación del stare decisis)", *EDCO*, 2000/2001, p. 335.

case. However, Argentine courts, in deciding cases, tend to follow the reasoning of other tribunals (even of their same level) in similar cases, and particularly those decisions of the Supreme Court, as a support tool –not as a mandatory rule– together with other sources of law, for interpretation of legal and constitutional provisions. Nowadays, it is almost impossible to find a judicial decision in our country which does not cite other cases in support of its ruling. Distinguishing is also customary. It can be said, using common-law terms, that Argentine courts, in general, consider other courts' decisions as pure *dictum*.

Notwithstanding the lack of binding effect of judicial decisions over other cases, the Argentine Supreme Court (whose members –as well as the whole federal judiciary– are life tenured), since its early decisions has leaned towards establishing a *de facto stare decisis* rule as regards its interpretation of the Constitution and of federal laws, aiming to provide litigants with some degree of certainty as to how the law will be interpreted, a requirement the Court finds embedded in the due process clause of our Constitution. In *García Aguilera*, a case decided in 1870, barely eight years after the court's establishment, the Supreme Court held in a since then oft-repeated statement, that “lower courts are required to adjust their proceedings and decisions to those of the Supreme Court in similar cases”.¹¹ Moreover, the Supreme Court frequently denies its discretionary review (equivalent to the US denial of certiorary) in those cases that deal with long established matters, unless petitioner raises new arguments; while it revokes –considering them to be without sufficient basis– those decisions that contradict prior Supreme Court rulings without giving new reasons to distinguish the ruling. It should be pointed out, however, that the Supreme Court has not considered itself obligated to this principle, and has not hesitated in overruling its prior precedent without giving much reasons, and solely because of a change in the Court's majorities.

By this power, the Argentine Supreme Court, through its

¹¹ Fallos 9:53 (1870).

original and appellate jurisdiction (both ordinary and extraordinary), has risen to become the final interpreter of the Constitution in all cases that come for its review. Although the Argentine Supreme Court powers are formally different from that of European constitutional courts, as one of the most prominent Argentine Constitutional Law scholars has said: “the Supreme Court is frequently called ‘Court of Constitutional Guaranties’ since it has been granted the power to defend the Constitution in its entirety, but essentially in those parts where it touches the intimate essence of the human dignity, of its freedom, of its rights”.¹²

In interpreting the Constitution and defining its role *vis-à-vis* the other branches of government, the Supreme Court in its different compositions has traditionally navigated between being overly activist, and exercising self restraint on constitutional matters. This swinging path is due to the frequent change in the composition of the Court and its perceived independence from the national Executive, an unfortunate frequent situation since the mid 1940s, as a consequence of the political instability of the country.

Since the mid-twentieth century, and particularly after the return to democracy in 1983, in most matters the Argentine Supreme Court has adopted an activist role. The increase of the judicial review power over matters previously considered to be political questions; the judicial recognition of certain constitutionally-guaranteed procedural safeguards in the absence of implementing legislation; the expansion of the standing to sue on constitutional matters (which expansion was helped by the Constitutional reform of 1994); and a “living constitution” approach to constitutional interpretation, particularly in light of the international treaties on human rights, among other issues, have made the judiciary, and specifically the Supreme Court, a key player in the political arena, not only through the declaration of unconstitutionality of laws and executive actions, but prompting or restraining the enactment of legislation in several matters, and indicating the path Congress

¹² BIDART CAMPOS, Germán J., *La Corte Suprema. Tribunal de Garantías Constitucionales*, 13.

should take regarding the regulation of certain affairs. Moreover, in recent years, the Supreme Court has strengthened its powers by accepting *sua sponte* constitutional review and by pretending to expand the effect of its decisions beyond the scope of the case being decided. When the matter at stake is of interest to the Supreme Court, it is ready to forget its long established precedent that constitutional review should be the last resort and applicable only if the case cannot be solved on other grounds.¹³

Chief Justice Lorenzetti, in his concurring opinion in *Itzcovich*¹⁴, in *dictum*, provided some guidelines as to when a law will be declared unconstitutional, in order to “contribute to judicial certainty”: “It is necessary to differentiate among three different possibilities: “constitutional interpretation” (*interpretación adaptativa*), “subsequent unconstitutionality” (*inconstitucionalidad sobreviniente*) and the disqualification of the law as a result of its effects”. He explained that to the extent constitutional interpretation consists in ascribing a meaning to a rule, when it comes to indefinite legal concepts, there are ways to interpret the rule considering the historical and social condition, without having to expel the rule from the legal system, indicating that only exceptionally the Court should declare the law unconstitutional. That *dictum* reaffirmed the Chief Justice’s view of the Supreme Court as acting as a truly Constitutional Court acting as negative legislator and with the final word as to the proper interpretation of legislative action.

1. Reduction of the scope of the “Political Questions” doctrine

The “political questions” doctrine was expounded for the first time by the Supreme Court in 1893 in *Cullen c. Llerena*¹⁵. In such decision, the Court, in refusing to hear a case concerning the scope

¹³ See BIANCHI, Alberto B., *Una Corte liberal: la Corte de Alfonsín*, Abaco, Buenos Aires, 2007.

¹⁴ Fallos: 328:566 (2005).

¹⁵ Fallos 53:431.

of Congress' lawmaking power, held: "It is a basic rule of our public law that each of the high powers that constitute the government of the Nation has the right to apply and interpret the Constitution when it exercises the powers that it grants to each of them", a rule that has been followed many times since then. Traditionally, the Court has resorted to this doctrine to exercise its self restraint when dealing with political sensitive matters¹⁶.

However, this extremely deferential view as regards the powers of the different branches of government seems to have changed in recent years.

In 1986, contrary to prior settled rulings that have considered the matter non-justiciable¹⁷, a unanimous Court recognized in *dictum* that the decision of provincial legislatures in impeachment process may be subject to judicial review if such decision violated the individual's right to due process of law¹⁸, which *dictum* was, less than six months later, elevated to holding in *Magín Suárez*¹⁹, while later in *Nicosia*, it was extended to cover impeachment process of federal judges²⁰.

In 1999, the Court decided in *Fayt*²¹ that it was empowered to decide upon the constitutionality of a constitutional amendment, overruling prior case law in which it had held that such matters were outside the realm of judicial review²².

More recently, the Supreme Court expanded even further its powers over the other branches of government, when it held that it had the right to review the constitutionality of congressional decisions in exercising its role as judge of the elections, returns and

¹⁶ OYHANARTE, Julio, "El caso Bonfante y la autolimitación de los jueces", *ED*, 57:805.

¹⁷ *Joaquín Castellanos*, 136:147 (1922).

¹⁸ *Graffigna Latino*, Fallos 308:961 (1986).

¹⁹ Fallos 308:2609 (1986).

²⁰ Fallos 316:2940 (1993).

²¹ Fallos 322:1609 (1999).

²² *Soria de Guerrero*, Fallos 256:556 (1963).

qualifications of its own members²³, and even of internal congressional proceedings within Congress' law-making process²⁴.

2. Recognition of procedural guarantees in the absence of legislation

The Argentine Constitution, being one of the oldest in the world, and like most of its time, did not provide for specific procedural guarantees, other than general references to the individual's right to due process of law, leaving the implementing details to Congress and –to the extent Argentina is a federal country– to provincial legislatures.

However, in 1957 in *Siri*²⁵, the Supreme Court created –in the absence of legislation– the *acción de amparo*, a summary constitutional proceeding for any judge to review the validity of governmental action that allegedly violates constitutional rights, whenever the resort to ordinary proceedings would prove useless. In its decision, which one year later was expanded to cover violations of constitutional rights by private parties²⁶ the Supreme Court held that “individual guarantees exist and protect individuals solely by reason of them being established in the Constitution, without regard to implementing legislation”. These two cases prompted the government (at such time a *de facto* one) to enact legislation essentially along the guidelines developed by the Supreme Court²⁷. Notwithstanding, the act tried to limit *amparo* jurisdiction by declaring it inadmissible in the event petitioner requirement demands the declaration of the unconstitutionality of an act of Congress or of a Presidential decree.

²³ Argentine Constitution, Sec. 64, *Bussi*, Fallos 324:3358 (2001); *Patti*, Fallos 331:549 (2008).

²⁴ *Binotti*, Fallos 330:2222 (2007); *Halabi*, Fallos 332:___ (2009).

²⁵ Fallos 239:459 (1957).

²⁶ *Samuel Kot S.R.L.*, Fallos 241:291 (1958).

²⁷ Law 16,986.

The Supreme Court in 1990 declared such disposition unconstitutional²⁸, and in 1994, the *acción de amparo* was granted express constitutional status²⁹, following the lines of the Court's guidelines. Since then it has become the main avenue for the activism of courts and, especially, of the Supreme Court.

In *Comunidad Indígena Eben Ezer c/ Provincia de Salta*³⁰, decided in 2008, the Supreme Court revoked a provincial High Court ruling which denied an *amparo* claim by a native community to prevent the sale of lands in which they have traditionally lived and worked. Plaintiff had stated that the Community's own survival depended on the natural resources that existed in those areas, which lands were deeply bonded to their traditions, customs and rituals, which values the members of the native community transmit from generation to generation. The provincial High Court's denial had been based in that the claim was time-barred at the time of its filing.

According to the Supreme Court's criteria, Salta's ruling was incompatible with the judicial duty to –by means of *amparo* jurisdiction– give “immediate protection to those human rights included in the National Constitution”, indicating that, when laws, decrees or local rules are clearly contrary to those rights (such as in the case at stake, the time-barring provision), “the existence of the rule should not result in an obstacle to the immediate re-establishment of the affected liberty”. The Court considered this ruling should lead the way to future rulings concerning the scope of the right to judicial protection as defined by the American Convention of Human Rights.

3. Standing

Constitutional standing is the aptitude or capacity required to access to constitutional jurisdiction. In the Argentine system, in

²⁸ *Peralta*, Fallos 313:1513 (1990).

²⁹ Argentine Constitution, Sec. 43.

³⁰ Fallos 331:2119 (2008).

principle, the individual entitled to urge judicial review requires proving actual injury, since courts are prevented to render advisory opinions or act outside the boundaries of a specific case³¹. The Supreme Court has always stated that a petition demanding the unconstitutionality of a particular act or statute without actual injury (the so called *acción abstracta de inconstitucionalidad*) falls outside the sphere of judicial power³².

The constitutional reform of 1994 has expressly recognized some “new” rights, such as the right to a clean environment³³, and consumers’ rights³⁴. As regards those rights, any form of discrimination and those other rights of general public interest” (*derechos de incidencia colectiva*) the Constitution expanded *amparo* standing beyond the injured party to the Federal Ombudsman (*Defensor del Pueblo*) and to non-governmental organizations.

This constitutionally-mandated expansion of standing has served the Supreme Court to expand it even further through its rulings, notwithstanding the absence of legislation.

Prior to the constitutional amendment, in *Ekmekdjian c. Sofovich*³⁵, the Supreme Court recognized petitioner’s standing to require from a TV station the exercise of the right to reply, recognized in Article 14.1 of the American Convention on Human Rights to anyone “injured by inaccurate or offensive statements or ideas”, against a defamatory statement made by a guest in a TV show against Virgin Mary, considering that there is sufficient “actual injury” to allow standing if the contested statements offend the substantive beliefs of petitioner, even if not made directly

³¹ Argentine Constitution, Sec. 116: “The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation...” See, in general, SOLA, Juan V. *Derecho Constitucional*, Lexis Nexis, Buenos Aires, 2006. Chapters X and XI.

³² *Polino*, Fallos: 317:335 (1994); *Mosquera*, Fallos 326:1007 (2003).

³³ Argentine Constitution, Sec. 41.

³⁴ *Id.* Sec. 42.

³⁵ Fallos 315:1492 (1992).

against the offended person.

When individual freedom is at stake, the *Habeas Corpus Act*, now expressly recognized by the Constitution in the new article 43, allows any person –besides the affected person– to file an *habeas corpus* petition on behalf of any individual who has been illegally deprived of his or her freedom.

In *Verbitsky*³⁶, the Supreme Court expanded *habeas corpus* standing, by admitting for the first time a a pluri-individual corrective *habeas corpus* writ petitioned by a non-governmental organization in favor of all inmates of federal prisons, extending the individuality requirement that has traditionally characterized this writ.

In *Halabi*³⁷, the Supreme Court extended *amparo* standing under Section 43 of the Constitution to those situations where the matter at stake is not a collective good, since individual rights clearly divisible have been encumbered, but a sole, unique and continuous event has affected a large number of individuals and thus it is identified as a homogeneous event. The Court considered that besides the individual damage, which differs in each case, the claimants' motives are the same for all potential plaintiffs. In the Court's reasoning, the existence of a same factual and legal scenario makes it reasonable to conduct only one judicial process with expansive effects of its decision. The Court, however, has not established the rules nor provided guidelines for this new type of judicially-created class actions.

4. *Acción Declarativa de certeza* (declaratory judgments) as a direct form of exercise of constitutional review

The Supreme Court in several recent decisions has expanded the scope of declaratory judgments (*acción declarativa de certeza*),

³⁶ Fallos 328:1146 (2005).

³⁷ *Halabi*, Fallos 332:___ (2009).

broadly construing the “cases or controversies” constitutional requirement to assert jurisdiction. The proceeding, regulated by Section 322 of the National Code of Federal Civil and Commercial Procedure³⁸ has been established as a tool to protect a substantial, concrete and defined interest, with limited *inter-partes* effects.

While traditionally the Supreme Court has required that petitioner proves that the challenged action affects a legitimate direct interest of petitioner, and that the activity has sufficient concretion³⁹, a criteria similar to the “ripeness” requirement set out by the US Supreme Court, recent decisions show that in those cases where highly controversial matters are at stake, it is open to relax the standard to allow the Court to have its saying.

In *Rios*⁴⁰, decided in 1987, a case in which petitioner challenged the constitutionality of an act providing that only political parties can present candidates to federal elections, considering such requirement to be an unreasonable regulation of the right to elect and be elected for public office, the Supreme Court accepted to hear the case even though the election had passed, in order to establish precedent that settle the matter for future cases, reaffirming its role as final interpreter of the Constitution and its pretense to expand the effect of its rulings beyond the case being heard.

More recently, in *Halabi*⁴¹, the Court accepted to hear a case in which it was questioned the constitutionality of law 25,873 and its implementing decree authorizing judicial monitoring of phone calls and internet traffic on the grounds of vagueness contrary to privacy rights recognized in the Argentine Constitution, despite the fact that

³⁸ National Code of Federal Civil and Commercial Procedure, Sec. 322: “*It may be presented an action that intends to obtain a merely declarative ruling, in order to urge to stop a state of uncertainty concerning the existence, reach or manners of a legal relationship, in the case that the lack of certainty could result in an actual attack or damage to the plaintiff provided there is no legal alternative to immediately put an end to such uncertainty*”.

³⁹ *Provincia de Santiago del Estero c/ Nación Argentina*, Fallos 307:1379 (1985); *Elyen S.A. c. La Pampa*, Fallos 328:502 (2005).

⁴⁰ Fallos, 310:819 (1987).

⁴¹ *Halabi*, Fallos 332:____ (2009).

the entry into force of the law had been suspended and, therefore, no actual injury existed.

5. *Sua sponte* constitutional review

The Supreme Court traditionally (and despite some scattered dissents) refused to rule on the constitutionality of a law unless there was a clear petition of the parties in that sense⁴². This requirement was considered to be a cornerstone in the separation of powers doctrine, in order to avoid that the courts –being essentially counter-majoritarian– become a superpower controlling on its own decision other government branches' actions.

However, in 2001, the Court accepted *sua sponte* constitutional review. In *Mill de Pereyra*⁴³, and later in *Banco Comercial Finanzas*⁴⁴, the Supreme Court considered such type of review not only acceptable, but constitutionally required, following Marshall's reasoning in *Marbury* that the courts must conform their decisions to the Constitution.

The possibility to declare *sua sponte* (although always within the boundaries of a case brought to the Courts attention) the unconstitutionality of laws and executive actions has contributed –particularly when coupled together with the other new mechanisms already discussed– to strengthen the courts' powers *vis-à-vis* Congress and the Executive.

6. *Erga omnes* effect of judicial decisions

As indicated above, the Argentine system of judicial review

⁴² *Ganadera Los Lagos*, Fallos 190:142 (1941).

⁴³ Fallos 324:3219 (2001).

⁴⁴ Fallos 327:3117 (2004).

entrusts all judges, federal and provincial⁴⁵, and of whatever level, to control the constitutionality of laws and governmental action. To the extent that they resolve “cases”, judicial decisions only have *inter parte* effects, despite their value as an auxiliary or secondary source for future decisions.

However, after the constitutional amendment of 1994, that expanded standing in those cases affecting rights of general public interest⁴⁶, scholars have debated as to the effects of decisions in such cases.

In *Halabi*⁴⁷, the Supreme Court tried to give a final word on the matter, and indicated for the first time that its decision in these types of cases should have *erga omnes* effect. However, it gave only slim reasons for its holding: “There is a legal and factual homogeneity in the matter at stake that makes it reasonable to render a single judgment with an expansive effect of the decision”. The importance of the holding would have required a more reasoned judgment, particularly since it potentially affects the right of defense and the due process of law of those other individuals that were not part to the case. What would have happened if the Court’s decision, contrary to the current outcome, would have ruled in favor of the act’s validity? Should that have barred other injured party’s claims?

7. “Activist” Jurisprudence

In the last few years Supreme Court decisions have intended to include some matters in the legislative agenda or, in other cases, to indicate the constitutional path Congress should take regarding certain affairs. Moreover, in some decisions it has changed the clear legislative intent, in order to –through judicial interpretation– square

⁴⁵ Even though provincial judges do not apply federal law, they are bound to apply the Constitution, which is directly enforceable against the provinces, and uphold its supremacy.

⁴⁶ See *supra*, page 347.

⁴⁷ *Halabi*, Fallos 332:____ (2009).

the law with the Court's interpretation of the Constitution. These actions show the Court's increasing involvement in realms previously left to the political branches of government.

7.1. A dialogue among powers

This new activist role of the Supreme Court is shown in different areas of the law.

- a) Back in 2004, in the cases *Castillo*⁴⁸ and *Aquino*⁴⁹, the Supreme Court declared the unconstitutionality of the Labor Risks Law, law 24.557 as regards its procedural contents (a matter constitutionally reserved to provincial legislation) and the limits of indemnification for labor injuries, considering its provisions deny workers their right to a complete restitution.

These cases, by invalidating the system created by law, even though with *inter partes* effects, implied a *de facto* annulment of the challenged legislation. In addition, the Court's rulings demanded congressional action in order to modify the system in accordance with court-established guidelines.

- b) In *Vizzoti*⁵⁰, the Supreme Court ruled that the limits to the base salary used to calculate termination compensation provided for in the Employment Law were unreasonable, in light of the constitutional obligation to protect workers against unjustified firings⁵¹.

The Court then provided Congress with guidelines as to valid limits, indicating that "the Court's decision does not

⁴⁸ Fallos, 327:3610 (2004).

⁴⁹ Fallos: 327: 3753 (2004).

⁵⁰ Fallos 327:3677 (2004).

⁵¹ Argentine Constitution, Sec. 14 Bis.

entail undue interference with congressional powers, nor a violation of the separation of powers, being only the duly exercise of the constitutionally-mandated judicial review over laws and governmental action”.

- c) In *Rosza*, decided in 2007⁵², the Supreme Court, in declaring the unconstitutionality of the regime concerning the appointment of interim federal judges, urged Congress to enact a new “constitutionally valid” regime, providing the guidelines that said new regime should follow, and granting Congress one year to implement the new system.
- d) The Constitution provides that Supreme Court’s appellate jurisdiction be exercised in accordance with the rules and exceptions provided for by Congress⁵³. Following such rule, Congress has enacted legislation providing that all cases ordering the government to pay social security benefits must be appealed to the Supreme Court, which appeals actually delays payment to elderly people. In *Itzcovich*⁵⁴, the Court declared that the appeal procedure has become unconstitutional; affecting petitioner’s right to a speedy trial, emphasizing that reasonableness requires that a law continues to be coherent with the constitution throughout the period of its enforcement:

“When a rule frustrates or detracts the purposes of the law in which it is inserted, so as to conflict with constitutional principles, it is the justices’ duty to desist from such rule and stop its enforcement in order to guarantee the Constitution’s supremacy, as this is the moderating function of the Judiciary Power and one of the main guarantees against potential abuse by the government”.

Shortly after the ruling, Law 26,025 was passed and modifications were introduced to the system to comply with the decision.

⁵² Fallos 330:2361 (2007).

⁵³ Argentine Constitution, Sec. 117.

⁵⁴ Fallos: 328:566 (2005).

7.2. Reconciling internal legislation with Human Rights' treaties by means of interpretation

In several cases, the Supreme Court resorted to an “integrationist” interpretation in order to reconcile local legislation with Human Rights’ treaties.

In 1992, in *Ekmekdjian c. Sofovich*⁵⁵, the Supreme Court recognized that international treaties have precedence over internal legislation. The constitutional amendment of 1994 ratified this principle and even gave to a series of enumerated international documents “constitutional hierarchy”⁵⁶. Since then the Court has held that constitutional review includes as well confronting internal laws and regulations with international conventions, having the power to declare such laws “unconventional”⁵⁷.

Among those documents, the Constitution gave constitutional status to the American Convention on Human Rights which, among other rights, establishes the right of any person accused of a criminal offense, to appeal the judgment to a higher court⁵⁸.

The Argentine criminal legal system provided, for those cases tried before a three-judge panel in oral proceedings, only a limited review of the judgment before the *Corte Nacional de Casación Penal*. In *Casal*⁵⁹, decided in 2005, the Supreme Court held that the only way to square the requirement established in the American Convention with the Argentine criminal legal system, was to interpret Sec. 456 of the Criminal Procedural Code as permitting an ample review of the prior ruling.

In a similar path, in 2006, in *Cantos*⁶⁰, the Court demanded

⁵⁵ Fallos 315:1492 (1992).

⁵⁶ Argentine Constitution, Sec. 75 § 22.

⁵⁷ *Mazzeo*, Fallos 330:___ (2007).

⁵⁸ American Convention on Human Rights, Art. 8.2.h).

⁵⁹ Fallos, 328:3399 (2005).

⁶⁰ Fallos 326:2968 (2003).

Congress to pass legislation in order to comply with the binding rulings of the Inter American Court on Human Rights.

7.3. Amending political will / rewriting statutes

In other set of cases, the Supreme Court ruling did not only invalidate legislation, but replaced the unconstitutional rule with a different one.

- a) The Argentine Constitution recognizes the right to marriage. In regulating such right, Congress established that divorce did not entail the right to a new marriage, a clause whose constitutionality was upheld several times. However, in 1986, the Supreme Court applied a “dynamic” –living constitution– approach and in *Sejean*⁶¹ it considered that changes to societal perception requires giving a new scope to the right to human dignity, which led to the unconstitutionality of the statute that had been in force for almost a century. This decision was the prelude to a reform of the law of civil marriage, which new law, following the Supreme Court decision, admitted the possibility of a subsequent marriage⁶².
- b) In *Portillo*⁶³, decided three years later, the Court was required to rule on the constitutionality of mandatory military service. Petitioner claimed that to the extent military service might require the killing of other individuals, it affected petitioner’s deep religious beliefs in violation of the free exercise of religion clause of the

⁶¹ Fallos 308:2268 (1986).

⁶² In a similar case, at the time this paper is written, a local court in the city of Buenos Aires has resolved (decision which is not yet final) that a Civil Code provision, defining marriage as the union of a man and a woman is unconstitutional, since it violates the equal protection clause of the Constitution.

⁶³ Fallos 312:496 (1989).

Constitution. The Court held that in peace times, compliance with military service as established by Congress violated such clause, but notwithstanding, it required petitioner to serve his time doing alternative civil service, redefining the concept of “national defense” and despite the fact that Congress did not provide for such an alternative.

- c) The Supreme Court has as well reinterpreted political will when it needed to square the law with new realities.

In *Petric*⁶⁴, decided in 1998, it reinterpreted the scope of the right to reply recognized by the American Convention of Human Rights. Despite the Convention recognized such right against statements made through a “legally regulated medium of communication”, the Court expanded its scope to statements made through printed press (which in Argentina is not, and cannot be legally regulated).

- d) The Supreme Court, through its decisions, has also lessened the effects of certain legislative political choices that, in the Court’s opinion, alter fundamental rights⁶⁵. In *Milone*⁶⁶, the Court mitigated the effects of a law concerning labor accidents that allowed labor insurance companies to pay the indemnification in monthly installments throughout the life of the individual. By declaring the mechanism unconstitutional, it obliged the insurance company to pay the indemnification in single, lump-sum payment.

- e) The Court’s ruling in the *Badaro* cases, concerning automatic adjustment of pensions ratifies this criterion. The Constitution provides for “mobile” pensions⁶⁷. In

⁶⁴ Fallos 321:885 (1998).

⁶⁵ The Argentine Constitution provides that Congress has the power to regulate constitutional rights without altering them (Argentine Constitution, Secs. 14 and 28).

⁶⁶ Fallos 327:4607 (2004).

⁶⁷ Argentine Constitution, Sec. 14 Bis.

*Badarol*⁶⁸, the Court considered that Congress' inaction as regards the increase of pensions, in light of them having been seriously reduced due to high inflation, was a violation of the constitutional mandate, and therefore it urged Congress to pass legislation within a reasonable time to solve that problem.

The Court emphasized that it is not only a power but a duty of Congress to give effect to the constitutional guarantee of pension mobility, for which it must legislate and adopt measures to guarantee the full enjoyment of the right.

In view of the lack of action by Congress, in *Badaro II*⁶⁹, the Court, while re-urging Congress to enact legislation, resolved to grant petitioner's request and adopted a criteria for readjusting pensions until Congress decides to act.

The financial crisis of the last months of 2001 gave occasion to numerous active rulings, first *Bustos*⁷⁰ and then *Massa*.⁷¹ In such cases, petitioners sought the unconstitutionality of Executive Emergency Decrees 1570/01 and 214/02 which required the conversion of all dollar-denominated debts into peso ones, establishing an inflation adjustment mechanism. In *Massa*, probable the most significant one, the Court in upholding the constitutionality of the Decrees, provided for an additional interest in favor of petitioner, not envisaged by Congress.

g) The Court's activist approach is shown as well in matters concerning the environment. In *Mendoza*⁷², the Supreme Court, in exercise of its original jurisdiction, received a complaint filed by a group of neighbors of a settlement known as *Villa Inflamable*, located in the outskirts of Buenos Aires, against the National Government, the

⁶⁸ Fallos, 329:3089 (2006).

⁶⁹ Fallos 330:4866 (2007).

⁷⁰ Fallos 327:4495 (2004).

⁷¹ Fallos 329:5913 (2006).

⁷² Fallos 329:2316 (2006) and Fallos 331: 1622 (2008).

province of Buenos Aires, the government of the City of Buenos Aires and forty-four private companies, alleging damages caused by multiple diseases that their children and themselves had suffered as a result of the pollution of the hydrologic basin “Matanza-Riachuelo”. In two landmark rulings the first in 2006 and the other in 2008, the Court ordered the defendants to present an environmental recovery program, entrusted the Matanza-Riachuelo Basin Authority its implementation and established detailed court-monitored guidelines as regards compliance in order to avoid inter-provincial conflicts, all of them matters traditionally within the realm of legislatures and the executive of both federal and provincial levels.

8. Conclusion

After this analysis, we cannot but concur with Jorge Vanossi’s words:

*“We believe our Supreme Court, has appropriately defined its role when it has characterized itself in a triple condition: as a court of constitutional guarantees, as final interpreter of the Constitution, and as palladium of freedom”*⁷³.

In a nutshell, although not reaching to “government by the judiciary”, or to its Courts acting as positive legislators, in Argentina the famous Marbury’s quote “it is emphatically the province and duty of the judicial department to say what the law is”⁷⁴ is a reality.

⁷³ VANOSSO, Jorge R., “La Corte Suprema de Justicia en su espacio y en su tiempo”, *Diario La Nación*.

⁷⁴ See note 5, *supra*.