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# The Judiciary and Delegative Democracy in Argentina

*Christopher Larkins*

In 1983 Argentina began a promising transition from authoritarian rule toward democracy with the election of President Raúl Alfonsín. Since then, much progress has been made: large-scale human rights violations are a thing of the past, several smooth elections for various offices have been held, and a competitive political system operates fairly well.<sup>1</sup> Nevertheless, Argentina's experience has demonstrated that the road to effective democratic governance is not smooth or direct.<sup>2</sup> Instead, one might argue that over the past several years a variant type of democratic regime, what Guillermo O'Donnell calls a delegative democracy, has emerged and begun to consolidate.<sup>3</sup>

Under this system, current Argentine president Carlos Menem has been freely elected but has governed the country "as he sees fit," without significant political impediments, checks and balances, or other regulatory supervision. In fact, since Menem's election in 1989 power has been greatly centralized in the hands of the executive, whose decrees have often replaced legislation as the basis of important public policy.<sup>4</sup> The trend toward presidential dominance has been so strong that renowned Argentine scholar Carlos Nino was able to claim in 1992 that, "apart from the case of Mexico, the current system in Argentina is possibly the most extreme form of presidentialism in the world."<sup>5</sup> Today, political power in Argentina is not so much exercised in a representative fashion as it is wholly delegated to the president, to be wielded as he deems most appropriate.

This essay will examine how Argentina's judiciary "fits in" to the emergence and daily operation of Argentina's delegative form of democracy, with particular emphasis on the 1989–1996 period. First, it will note how President Menem's actions to rein in the independence of the courts eliminated an institutional check that had at times frustrated his predecessor's key policies. Judicial independence in Argentina will be evaluated in reference to three specific concepts: judges' impartiality, judges' insulation from political pressures, and the institutional scope of the judiciary's authority.<sup>6</sup> Second, it will show through these examples how the supreme court, which was somewhat partial to the president's interests, used its authority to strengthen the executive and weaken further the separation of powers.

The Argentine experience has some important implications for the comparative

study of judicial institutions in democratizing regimes. Primarily, it reinforces what I call the "judiciary/democracy paradox": the relationship between the stability of democratization and the promotion of judicial independence is interdependent, not linear.<sup>7</sup> It may also suggest that delegative democracies benefit from nonindependent judiciaries differently than authoritarian regimes. Recent scholarship suggests that supreme courts in authoritarian regimes tend to be comprised of rather impartial judges but are deprived of a broad institutional scope of authority to regulate the legality of state behavior.<sup>8</sup> By contrast, the supreme court in Argentina's delegative democracy appears to lack an impartial majority but has retained a broad institutional scope of authority.

### **Delegative Democracy and Argentine Politics**

Delegative democracy is a term first developed by Guillermo O'Donnell to describe a variant form of democratic regime that emerged in countries of the "third wave." It differs from the more representative democracies of western Europe, North America, and the Commonwealth in a number of key respects. One is an inordinate emphasis on presidentialism. According to O'Donnell, delegative democracies operate in reference to one basic rule: he "who wins a presidential election is enabled to govern the country as he sees fit . . . for the term to which he has been elected."<sup>9</sup> The definition of the national interest and the direction of the government emanate directly from the president, and his decrees often replace legislation as the principal source of public policy.<sup>10</sup>

Delegative democracies are democratic because "vertical" accountability exists between the country's leader and voters at the ballot box. They comply in many ways with Robert Dahl's definition of polyarchy: free and competitive elections are held, important political rights are respected, and political parties are able to articulate diverse views.<sup>11</sup> However, "horizontal" forms of accountability, defined by O'Donnell as the "controls that state agencies exercise over other state agencies," are generally weak or nonexistent.<sup>12</sup> "Other institutions—such as Congress and the Judiciary—are nuisances that come attached to the domestic and international advantages of being a democratically elected President. The idea of accountability to these institutions . . . appears as an unnecessary impediment to the full authority that the President has been delegated to exercise."<sup>13</sup> Consequently, the separation of powers, checks and balances, and other regulatory mechanisms are subordinated to the policy preferences of the president.

Another characteristic common to many delegative democracies is the existence of some crisis which confers an aura of "savior" upon the president.<sup>14</sup> This crisis tends to justify the increased centralization of authority in the president's hands and further validates his efforts to surmount constitutional and horizontal controls. The

president will invariably argue that he needs all effective tools of the state at his disposal to respond to the people's clamoring for relief from economic or social insecurity. Emergencies demand a dynamic policy response from the president which circumvents the bureaucratic trappings of formal constitutionalism.

Delegative democracy in Argentina originated in the economic crisis of the late 1980s, when unemployment rose rapidly and annual inflation topped 1,000 percent.<sup>15</sup> The economic emergency was generally met with gridlock and ineffective responses from the administration of President Alfonsín, who was nearing the end of his six-year term.<sup>16</sup> At the height of the crisis, Carlos Saúl Menem ascended to the presidency.

It is important to note that Argentina's government differs in several ways from an authoritarian regime. Although the president has immense power and authority, the government remains responsible to the public, and criticism is tolerated. Elections are smooth and regular, and Menem's Justicialist (Peronist) party has suffered some humiliating defeats. For instance, when the city of Buenos Aires elected its mayor for the first time in history in June 1996, Menem's candidate, Jorge Domínguez, was thoroughly thrashed at the polls, with a meager 18 percent of the vote.<sup>17</sup> Public participation in the campaign was robust, and political propaganda (even that which ridiculed the president) circulated freely.<sup>18</sup> Moreover, popular displeasure can have an impact. For example, minister of justice Rodolfo Barra (also a former supreme court justice) was forced to resign in July 1996 when the discovery that he had belonged to a neo-Nazi youth group as a teenager caused a public furor.<sup>19</sup>

Nonetheless, President Menem's excessive discretionary authority, unchecked by other institutions, differentiates the Argentine political system from more representative democracies elsewhere in the world. Particularly important are the frequency and type of so-called decrees of necessity and urgency. Formally, these decrees were not listed in the constitution of 1853 (in effect until 1994) as powers granted to the president. In practice, though, the executive occasionally relied upon them to respond to emergencies. According to a report completed by Mateo Goretti and Delia Ferreira Rubio in 1993, eight decrees were issued by the country's various constitutional presidents from 1853 to 1983.<sup>20</sup> President Alfonsín resorted to them more frequently during his six-year term, issuing a total of twenty-two. However, only three years into his first term President Menem had already issued 244 decrees of necessity and urgency, eight times more than all former constitutional presidents combined!<sup>21</sup>

In many cases, these decrees replaced congressional action as the source of public policy on important matters. Goretti and Rubio's analysis shows that forty-nine of Menem's decrees (22 percent) covered tax issues, twenty-seven (11 percent) concerned the regulation and payment of the public debt, and twenty-three (9 percent) pertained to the operation of government organs.<sup>22</sup> Other decrees dealt generally

with federal-provincial relations, the exercise of political rights, and lawsuits against the government for the recovery of debt.<sup>23</sup> The vast majority of decrees retained the force of law without ever being formally codified by congress, and in more than one-fourth of the cases the president neglected to inform the legislature officially of his decrees.<sup>24</sup>

Furthermore, President Menem has enjoyed the virtual absence of any checks and balances capable of frustrating his policies for most of his term. His Peronist party and its allies have dominated both houses of congress; they have either loyally approved his chief programs or sat idly by while he exercised legislative functions. As will be illustrated in the next section, Menem took action to free himself from judicial oversight and directed similar efforts to disarm independent regulatory organs. The public's quiet acceptance of or indifference to the president's moves has likewise allowed him to function with a great deal of latitude. The belief that "if Menem does it, it must be OK" was common in the early years of his administration.<sup>25</sup>

Menem also succeeded in surmounting his most daunting obstacle: the constitutional prohibition against presidential reelection. As his six-year term neared its end, Menem and his allies began to work to lift the ban, often masking their true intentions behind calls for more general reform of the country's 1853 constitution.<sup>26</sup> The opposition Radical party at first resisted; with more than one-third of the seats in Congress it could defeat any constitutional amendments. Menem then threatened to call a plebiscite on presidential reelection, as permitted by the constitution. The Radicals ultimately assented to a new constitution endorsing presidential reelection, provided that it would include certain measures which they had long advocated.<sup>27</sup> Their plan was to circumscribe the power of the president to make Menem's second term more innocuous. Menem won reelection in 1995.

Among the changes aimed at reducing the power of the presidency in the constitution of 1994 was the creation of the office of chief of the cabinet, charged with day-to-day operation of the government. It was hoped that splitting the executive between two offices would reduce Menem's influence on the inner workings of state. A second modification sought to regulate more closely the president's decree power. Unlike the 1853 constitution, the new constitution formally authorized decrees of necessity and urgency but declared that they had to be reviewed by a special panel before taking effect. Decrees of necessity and urgency were also limited to a duration of ninety days unless officially enacted by congress.

These formal changes have not fulfilled their authors' expectations. The chief of the cabinet has been completely dependent on the president, and it is widely believed that the chief of the cabinet is simply a stand-in or proxy for Menem.<sup>28</sup> Also, the special panel charged with supervision of decrees of necessity and urgency has not yet been established by the Peronist controlled congress, some two years after the new constitution's proclamation.<sup>29</sup> The presidency is therefore no weaker

than it was before 1994, and it remains the center of the political system. In effect, not only did Menem overcome all obstacles to his reelection, but he also prevailed over the additional checks and balances intended to limit his power during his second term.

### **Reining in the Argentine Judiciary**

Though not all-powerful, the Argentine judiciary that operated between 1983 and 1989 enjoyed notable degrees of impartiality and insularity and possessed fairly broad authority to regulate the legality of official acts.<sup>30</sup> The supreme court was comprised of justices with diverse ideological and party backgrounds; having a homogeneous court was not a top priority for President Alfonsín.<sup>31</sup> Lower court judges displayed remarkable indifference to the government's strategy of tightly controlling trials against former military officials and caused more than one headache for the young administration.<sup>32</sup> While the supreme court ultimately validated Alfonsín's policy regarding these trials,<sup>33</sup> the president evidently did nothing to rally a unanimous opinion from the court, which might have given legitimacy to his extremely unpopular decision to grant amnesty to some of the accused. Justice Jorge Bacqué, the only dissenting vote in the ruling which upheld the grants of amnesty, commented:

It was widely known that one justice was definitely opposed to the law. The logical thing to do, if the executive wanted to intervene, would have been to make gestures to that justice . . . . But no one ever made such gestures to me. . . . I was on good personal terms with Alfonsín and his team, so it would have been no problem for him to come to me and say: "Look, this issue is very serious; we're under the gun; the military's going to topple our government." It wouldn't have been difficult at all.<sup>34</sup>

Moreover, the supreme court rendered controversial decisions on various issues. It liberalized society's laws on divorce, drugs, and other issues much farther than one would expect in a traditionally Catholic country.<sup>35</sup> It also frustrated several of Alfonsín's important policies. In one case, it soundly rejected the government's claims that "economic emergency" authorized it to reduce the stipends owed to retirees without congressional approval.<sup>36</sup>

These conditions changed soon after Carlos Menem assumed power in 1989. Perhaps because he saw how the judiciary was sometimes able to frustrate the policy aims of his predecessor, he took quick action to corral the independence of the courts and make them more receptive to his concerns.<sup>37</sup>

While the judicial branch was affected at all levels, the brunt of the president's efforts was directed at the supreme court. Shortly before he took office, members of

Menem's inner circle reportedly offered ambassadorships and other prestigious posts to various justices in order to induce their resignations, thereby giving the new president a few vacancies to fill.<sup>38</sup> Jorge Luis Manzano, leader of the president's Peronist party in the chamber of deputies, also supposedly threatened particular justices with impeachment should they refuse to resign.<sup>39</sup> While these pressures succeeded in securing the resignation of Chief Justice Caballero, none of the other justices budged.

Unable to secure additional appointments through resignations, Menem broke a key campaign pledge and submitted a proposal to congress that would increase the size of the supreme court from five to nine.<sup>40</sup> With Caballero's resignation, this proposal was intended to give the president a majority of five nominations to the court. In actuality, he was able to name six, as Justice Bacqué resigned in protest after the law was passed. Harsh criticism of Menem's proposal by the supreme court, conveyed in its widely publicized resolution *Acordada 44*, was not enough to energize public opinion against the plan.<sup>41</sup>

Though he publicly claimed otherwise, the political character of Menem's proposal was difficult to conceal.<sup>42</sup> When Mariano Grondona, host of the popular Argentine political show *Hora Clave*, suggested to Menem that he drop the expansion plan, he replied: "Why should I be the only president in fifty years who hasn't had his own court?"<sup>43</sup> Prominent members of his cabinet suggested publicly that a court "out of line" with the desires of the executive branch would result in inefficient government and unstable policy.<sup>44</sup> When on the day of the vote the chamber of deputies failed to achieve a quorum due to the absence of a few of the Peronists' own members, Jorge Luis Manzano declared from the floor: "The president needs the enlargement of the court, and some of our companions seem to have forgotten this."<sup>45</sup> After the proposal finally passed the chamber of deputies, the Peronist block erupted in celebration and sang the party's official anthem.

Menem proceeded to name justices of questionable impartiality to the fill the vacancies created by the law and the two resignations.<sup>46</sup> One nominee, Julio Nazareno, was a former partner in the president's law office and a justice on the supreme court of La Rioja province, where Menem served as governor from 1973 to 1976 and from 1983 to 1989. Mariano Cavagna Martínez, a close friend of "first-brother" Senator Eduardo Menem and a member of the president's inner circle, reportedly declared "I am and always will be a Peronist" upon receiving word of his nomination.<sup>47</sup> Similarly, Horacio Verbitsky recounts that Rodolfo Barra, briefly a minister in Menem's cabinet before joining the court, greeted word of his appointment with the thankful quip: "My only two bosses are Perón and Menem."<sup>48</sup> Also named were Antonio Boggiano, an advisor of the president and a critic of the jurisprudence of the 1983–1989 supreme court, Julio Oyhanarte, author of the government's official response to *Acordada 44*, and Eduardo Moliné O'Connor, the brother-in-law of two of Menem's closest advisors, Hugo and José Anzorreguy, and reportedly the president's favorite tennis doubles partner.

Several of Menem's new appointments also had legal philosophies that were curiously compatible with a president who desired a humble or compliant court. For example, Ricardo Levene and Julio Oyhanarte held some of the most conservative beliefs among scholars about the law and the role of the judiciary.<sup>49</sup> The opinions of Justice Barra displayed a strong tendency toward delegative democracy and deference to the executive. In an article written while he was still on the court, Barra contended that representation was not the only valid basis by which to gauge the caliber of a democracy. "A democratic government promotes development and production, the just distribution of wealth, and the expansion of education. A democratic government has the tools of public administration which are absolutely necessary for efficient policy implementation."<sup>50</sup> Moreover, when asked his personal views on the role of the supreme court in Argentina's political system, Barra replied that it was to "to go along with the politics of the president." "I can not have an interpretation which is contrary to the government; I must have one which is favorable to its decisions, because it was elected by the people."<sup>51</sup>

The expansion and appointments created a supreme court that was extremely partial toward the government. This impression is especially strong among leading scholars, journalists, and political analysts. Dr. Germán Bidart Campos, widely considered one of the country's leading jurists, comments that "in cases that do not interest the government, the supreme court has handed down rather acceptable decisions. In the other cases, however, the court does not leave one with an impression of impartiality and independence."<sup>52</sup> Horacio Verbitsky adds:

It suffices to count the decisions in which Belluscio, Fayt, and Petracchi [appointed by Alfonsín] are alone in the minority to obtain an unambiguous map of the advances of the government against the legislature, independent regulators, the judiciary, the autonomy of the provinces, municipalities, and universities, the rights of workers, and the right of property.<sup>53</sup>

Even Dr. Rosendo Fraga, who tends to be less critical of the president than other scholars and analysts, agrees that the supreme court appointed by Menem is "*adicta*" (addicted).<sup>54</sup>

Moreover, this view appears to be strongly shared by the general public. In a 1994 Gallup Poll, 72 percent of respondents said that judges were too "influenced by the government," and 69 percent believed that the decisions of the supreme court were either "extremely politicized" or "very politicized."<sup>55</sup> A more recent poll conducted by Graciela Römer shows that 64 percent of Argentines considered the supreme court either "very corrupt" or "corrupt" and that 47 percent of respondents thought it was "obsolete."<sup>56</sup> Overall, some 87 percent of those polled indicated that they were wholly unsatisfied with the state of justice in Argentina.<sup>57</sup>

To a large extent, the partiality of the newly comprised supreme court toward the government can be gleaned from the backgrounds of Menem's appointees as well as



the case analyses in the next section. However, it would be useful to cite a few examples here to further illustrate the point. The new court immediately set out to reverse a number of precedents established by the previous court (some of them handed down just months earlier) when they were found to clash with the new government's policy goals.<sup>58</sup> In a case involving a labor suit against Pepsi-Cola (a company courted by Menem to revive the country's ailing economy), the court overturned an appeals court ruling against the firm and then chastised the lower court for jeopardizing the economic recovery pursued by the government, due to the "repercussions that this decision could have on investments of this type."<sup>59</sup> By a six to three vote, it also permitted the president to fire without cause the national attorney of administrative investigations (similar to the post of independent counsel in the U.S.), basing its decision on the president's supremacy over the country's public ministries.<sup>60</sup> The attorney, Ricardo Molinas, had reportedly been investigating allegations of abuse of authority and influence by executive branch officials.

A rather extreme example of some justices' partiality toward the government is the 1993 case *Banco Patagónico*.<sup>61</sup> Shortly after the court ruled on this case, it was discovered that the original decision (already redacted and signed by the justices) was removed from the court's official register and substituted with an altered opinion that was more favorable to the government's economic policy.<sup>62</sup> The original ruling subsequently disappeared. While no charges were ever brought against anyone, strong evidence uncovered by Justices Petracchi and Belluscio and the statements of then Minister of the Economy Domingo Cavallo implicated Chief Justice Boggiano and Associate Chief Justice Barra in the scandal.<sup>63</sup>

Interestingly, Justice Barra's reaction to his implication in the scandal suggests that the Menem-appointed justices may see their personal and institutional roles in partisan terms, that is, as a part of a struggle between Radicals and Peronists. After Petracchi (a Peronist appointed by Alfonsín) and Belluscio (associated with a rival faction of Alfonsín's Radical party) went public with their evidence incriminating Barra in the substitution of the original decision, Barra reportedly accosted Petracchi with the following statement.

You are my worst enemy, and I am going to destroy you. I will persecute you inside and outside the court—you and Belluscio. Against Belluscio I will use the suicide of his mistress in Paris; and with you I will use the truth or lies, because all's good in war. You are worse than him, because he's a Radical.<sup>64</sup>

In other words, Barra was suggesting that he might expect such a betrayal from the opposition, but not from a "true" Peronist.

President Menem moved to alter the composition and behavior of other judicial branch officials. He issued a decree to fire and replace Procurator General Andrés D'Alessio, the official charged with supervising the investigative and trial functions

of the judiciary. As one practical effect of this action, President Menem was able to achieve what his predecessor could not, to control and ultimately restrict trials against the military, even before the supreme court had ruled on the constitutionality of Menem's pardons of the accused.<sup>65</sup> Prosecutors who persisted with such trials were simply removed from the case by the new procurator general.<sup>66</sup>

President Menem insisted upon and secured the resignation of four of the five members of the *Tribunal de Cuentas* (charged with overseeing the legality of government expenditures) after it questioned the government's economic policies and investigated accusations against key administration officials. The Peronists' domination of the senate also allowed Menem to secure the appointment of allies to courts at different levels of the judiciary.<sup>67</sup> The president's proposed nominees to the court of cassation were evidently so biased toward the government that Menem's own minister of justice, Carlos Arslanián, resigned in protest.<sup>68</sup>

The 1994 *Pacto Olivos* between the Peronists and Radicals secured agreement on two matters intended to improve the independence of the judiciary and reduce its susceptibility to political influence. The first was the resignation of Justices Barra and Cavagna Martínez, widely considered the most "pliable" to the president's concerns.<sup>69</sup> The second was the creation of a *Consejo de la Magistratura* (council of the magistrature) in the new constitution. The *Consejo* would oversee the administration of the judicial branch and nominate all lower level judges, taking this last responsibility out of the hands of the executive (supreme court justices would continue to be appointed by the president, but with the two-thirds approval of the senate rather than the previously required simple majority).

Though these reforms seemed promising at first, their significance soon diminished. To fill one of the vacancies on the court, Menem appointed Adolfo Vázquez, a self-admitted "close friend" of the president.<sup>70</sup> Though it is still too early to tell for sure, the perception is that President Menem has therefore retained a safe majority in favor of his policies.<sup>71</sup> Moreover, the proposed integration of the *Consejo* has been strongly tilted toward the president and his Peronist party and has engendered a number of partisan struggles which are widely seen as having contributed to the further politicization of justice in Argentina.<sup>72</sup>

Menem's intervention in the judiciary and his appointment of relatively safe judges were very clear affronts against the impartiality and insularity of the Argentine courts. Consequently, the judicial branch became open to the entreaties of the executive and strongly disposed to favor its interests. Most forms of judicial checks and balances against the executive were eliminated, thereby aiding the development of delegative democracy.

However, the constricted impartiality and insularity of the Argentine courts were evidently not accompanied by a reduced institutional scope of authority. The supreme court has continued to review cases on a wide array of issues and resolve them on the merits, without reference to the political question doctrine. Particularly,

the court has set solid precedents on the extent of the president's decree authority, civil-military and federal-provincial relations, the validity of decrees issued by de facto governments, and the validity of government contracts.<sup>73</sup> The key difference, of course, is that on virtually all of these occasions the supreme court's decisions either directly supported or strongly favored the president's policies.<sup>74</sup>

This combination of factors, low impartiality and broad institutional authority, created a court that uses its authority to strengthen the institution of the presidency and to weaken other actors who might provide checks and balances against the executive's actions. The cases examined in the section below are therefore significant not only because they defer to Menem's policy aims, but also because the precise precedents they set and the language they used help considerably in consolidating a delegative form of democracy.

### The Supreme Court and Delegative Democracy

The first case involved a conflict over the proposed sale of the country's official airline, Aerolíneas Argentinas. Almost immediately after taking office, President Menem embarked on an ambitious program of privatizations with the aims of rejuvenating the ailing economy and shrinking the size of the state. One of the crown jewels of these efforts was the planned sale of Aerolíneas Argentinas to a group of Spanish investors affiliated with Iberia Airlines.

The success of the sale was placed in jeopardy, however, by a last minute legal challenge to the airline's purchase by a foreign company. The lawsuit was filed one day before the beginning of a two week judicial vacation period and would have delayed privatization for at least that long. This delay could have scuttled the sale if it discouraged the Spanish investors from navigating through the Argentine legal system.

The issue was settled, however, when a majority of the supreme court voted to give itself a controversial legal device known as the *per saltum*. Stemming from the Anglo-American legal tradition, this tool allows a country's high court to assume immediate jurisdiction from a lower court of a case whose urgent issues require instant attention. Despite the strong influence of American law on Argentina's judicial system, Argentine law did not formally grant this power to the court. Nonetheless, Menem's new justices (joined by Petracchi, who had long lobbied congress for a law authorizing the *per saltum*) voted to grant itself the *per saltum*, to take control of the case, and to affirm the legality of Aerolíneas Argentinas' privatization.<sup>75</sup> At the prodding of Menem's cabinet, the court convened in emergency session to resolve the dispute, less than one day before the threatened delay materialized.<sup>76</sup>

The rapid manner in which the court acted to take control of the case and thus save one of the government's cherished programs itself strongly suggests the partial-

ity or pliability of many of its members toward the executive's politics. Likewise, allusions in the opinion to the benefits of the sale may indicate that justices were more interested in the merits of privatization than in its constitutionality.<sup>77</sup> More significantly, though, the language used to affirm the legality of the sale was strongly supportive of some of the underlying concepts of delegative democracy. Parting from the precedent set by the previous court in the retirees' case,<sup>78</sup> the majority argued that the seriousness of the nation's economy justified the president's otherwise questionable policies, including the privatization of the airline. In particular, it claimed that "the gravity of the situation privileges the defense [by the President] of the interests of the nation as a whole . . . over any obstacles originating from partial interests."<sup>79</sup> Accordingly, the court advised that judges should not "invade" the executive's sphere of authority by questioning these types of acts.<sup>80</sup>

A 1991 case involving university autonomy further demonstrates the role of the judiciary in consolidating delegative democracy in Argentina. For many years, the country's public universities (including the prestigious University of Buenos Aires) had technically enjoyed independence in their administration, finances, and day-to-day operations. This right was severely restricted during years of military dictatorship but was reestablished after the transition to democracy. A 1984 law accorded universities with self-rule in virtually all matters.<sup>81</sup>

Two of the cardinal rules of instituting a delegative democracy are the subordination of competing domains of authority and the curbing of potential checks and balances, whatever their source. Soon after assuming the presidency, Menem signed Decree 1111/89, which directly subordinated the nation's universities to the ministry of education, granting the executive ultimate administrative and financial control. Because universities are often a hotbed of political opposition in Latin America, the new policy was seen as politically motivated.<sup>82</sup> The decree was immediately rejected by the University of Buenos Aires, though its protests were dismissed by the government. In response, the university filed suit.

At first glance, one would expect that autonomy meant that a given organ is free of most regulation and supervision by others. It does not grant permission to be above the law, but autonomous bodies should at the very least be free from the intervention or oversight of other agencies. The supreme court disagreed. By a 6-2-1 majority, the court curiously argued that a grant of "autonomy to a university does not prohibit other organs from controlling the legitimacy of its acts."<sup>83</sup>

Besides making the subordination of university autonomy to the will of the executive a matter of the court's jurisprudence, the majority opinion also lent support to the underlying concepts of delegative democracy. It officially mentioned the president's constitutional position as "supreme chief of the nation" (*jefe supremo de la nación*) and thus control over the "general administration of the country."<sup>84</sup> Not only did this position justify the executive branch's assumption of supremacy over the University of Buenos Aires, but it also evidently deprived the latter of the right to

challenge the executive's regulations. Specifically, the court argued that universities' status as "administrative entities" prohibited them from seeking judicial recourse to question the acceptability of policies emanating from the "central administrative authority," that is, the president.<sup>85</sup>

Perhaps the most extreme example in which the court validated questionable acts of the executive and promoted a delegative vision of democracy is the 1990 decision *Peralta*, concerning a constitutional challenge to part of the president's economic program.<sup>86</sup> As one means to combat the country's economic crisis, the president issued Decree 36/90, instituting his Plan Bonex.<sup>87</sup> According to this plan, all private bank accounts were ordered frozen above the sum of one million *australes*, then equivalent to about US\$610. Funds above this level were converted into ten year government bonds, which in turn were used temporarily to cover the country's internal debt. In effect, the government gave itself a low interest loan from the coffers of millions of Argentine citizens. Though the text of Decree 36/90 admitted that the executive was taking on powers specifically reserved to the legislative branch, it argued that the situation of economic emergency required quick, drastic measures.<sup>88</sup>

The constitutional basis on which the president's argument rested was tenuous at best. As mentioned earlier, the Argentine constitution of 1853, then in effect, did not formally authorize the president to issue such decrees. Baglini and D'Ambrosio point out that the congress had been more than accommodating in rapidly approving other parts of the president's economic and political programs,<sup>89</sup> suggesting that "quick, drastic measures" could have come from the legislature.<sup>90</sup> Moreover, while the right of property (like other rights) may not be absolute, its restriction even by an act of congress, not to mention by presidential decree, would raise strong suspicion.<sup>91</sup> In sum, the decree represented an extremely questionable grant of power to the executive to take on legislative functions and suspend certain constitutional rights.

However, the court upheld the legality of Decree 36/90 as well as the merits of the Plan Bonex. It argued that the origin of the plan as a decree did not automatically render it unconstitutional. Specifically, it argued that "no proof was necessary" to support "the competence of the president to proclaim so-called decrees of necessity and urgency."<sup>92</sup> Though it acknowledged that the constitution did not explicitly grant such power, it stated that "the greatest value of the constitution is not in its written text" and that at any rate the constitution should be interpreted in way that "preserves and makes effective the sovereign will of the nation."<sup>93</sup>

The supreme court similarly downplayed the role of the Argentine congress in the country's political system. The opinion justified the president's assumption of legislative powers, nonchalantly stating that the "separation of powers should not be construed in such a manner to equal the dismemberment of the state."<sup>94</sup> Furthermore, it found that the specific policies implemented by the Plan Bonex were to be deemed acceptable because "congress, in the exercise of its own constitutional

powers, did not adopt contrary decisions" on the matter.<sup>95</sup> As Verbitsky has pointed out, the court seemed to establish a doctrine of "tacit approval," by which the president could dictate norms which would have the force of law provided that congress did not act to counter them.<sup>96</sup> Needless to say, such a conceptualization places the constitutional system on its head, granting the president legislative and congress veto power.

Like the *per saltum* case, the supreme court based its conclusions on "economic emergency" and used other language which strongly supported delegative democracy. Dismissing arguments that Decree 36/90 represented an abuse of power, the court held that "in moments of social and economic disturbance, and in other similar situations of emergency—given the urgency of attending to the problems created by such situations—it is reasonable that the state exercise its power in a more energetic manner than during periods of peace and normalcy."<sup>97</sup> Although the decree invaded the legislative sphere and violated certain constitutional rights, the court said that the president's actions were valid insofar as they were directed toward "securing the survival of Argentine society."<sup>98</sup>

While the court's argument that crises provide a basis for exceptional government responses may be logical in a theoretical sense, it is nonetheless disconcerting for at least two reasons. First, the need for more "energetic" use of state power is eerily similar to claims of past authoritarian regimes, which used situations of emergency and economic weakness as an excuse to take on extraordinary powers. Second, given the fact that most transitional regimes, including Argentina's, have almost perennially found themselves in "social and economic disturbance," the court's decision may represent a blank check to bypass representative institutions in nascent democracies. Indeed, since the text of the *Peralta* decision specifically states that "the emergency lasts for as long as the factors that caused it last," one might conclude that the court has therefore sanctioned increased executive authority for an indefinite period of time.

The impartial supreme court with a broad scope of authority has clearly benefited President Menem's extraordinary exercise of power by substantiating the underlying values of delegative democracy. It is important to note that in supporting the president's position the supreme court did not duck the issue or avoid handing down a firm sentence by reference to the political question doctrine. In the Plan Bonex decision, for instance, it did not rule that economic emergency prohibited it from second-guessing the president's policy choices. Instead, it decided cases on their merits, specifically approved the constitutionality of the president's actions, and furthermore encapsulated these principles into the jurisprudence of the nation. President Menem can now rely on very powerful precedents to overcome further obstacles in the future. As a result of the *Peralta* and *per saltum* decisions, even the new regulations on the president's decree authority in the 1994 constitution could be completely ineffective should Menem wish to exert himself.

### **Conclusion: The Judiciary, the Rule of Law, and (Delegative) Democracy**

When the Argentine transition to democracy began in 1983, there was much hope that the development of an independent judiciary would help bring justice and democracy to a society that had long lived without either.<sup>99</sup> This public trust empowered the courts, giving them the moral authority to regulate the legality of various issues. Six years later, the judicial branch, particularly the supreme court, was transformed into a willing pawn in the development of a form of democracy which was far from what Argentines originally desired. In a strange twist of irony, the institution in which many had placed so much faith ultimately used its newfound scope of authority to facilitate Argentina's diversion from the road toward effective democratic governance.

Why did the existence of a relatively independent judiciary from 1983 to 1989 not lead to the consolidation of a stable democratic regime? There may be several empirical responses to this question, but in this case a theoretical one is just as important. Often we tend to think of the relationship between the judiciary, the rule of law, and democracy in linear and direct terms. That is, the judiciary (vested with independence) enforces "the rule of law," which in turn leads to the secure functioning of constitutional democracy. As a result, we postulate that the stability and viability of democratization hinges on the establishment of an independent judiciary. Certainly this is true, but it is only half the story. The independence of the judiciary also depends greatly on the stability and viability of the transition to democracy. The two values are interdependent and rely on each other's strength during the institution-building stage of democratization. The retention of authoritarian-minded judges can make the introduction of democratic norms more difficult. Similarly, precarious political, economic, or social conditions make it extremely difficult for the courts to justify their operation as an influential body. I call these problems the judiciary/democracy paradox.

The Argentine case confirms this analysis. The shakiness of the economy, the emphasis that solutions to it placed on the president, and Menem's own ambitions combined to make an independent judiciary either incompatible with or irrelevant to contemporary political conditions.<sup>100</sup> The emerging norms of delegative democracy changed the context of Argentine politics and required a different type of judiciary than would have existed in a more genuine democratic regime.

Interestingly, the type of judiciary which has emerged from this delegative democracy is distinct from the kind which tends to exist in other regimes that exercise extraconstitutional powers. For instance, authoritarian and semiauthoritarian governments often go to great lengths to respect the impartiality of their judges in order to attach a bit of legitimacy to their rule. Of course, to avoid paying the political costs of a neutral referee that can second-guess their policies these regimes restrict the institutional authority of the judicial branch through direct political pres-

sure or statute. The result is prestigious judges who lack the workspace to exercise their personal autonomy in any meaningful way, making them "safe" from the government's viewpoint. Courts under these conditions invariably apply the political question doctrine to avoid considering issues which the regime has placed beyond their reach.<sup>101</sup>

Such judiciaries were routine in the past military regimes of Latin America, especially in Argentina, Chile, and Brazil.<sup>102</sup> Argentina's supreme court under the 1976–1983 dictatorship was comprised of some notable jurists but was nonetheless forced to turn a blind eye to the regime's horrendous human rights record.<sup>103</sup> The same was apparently true during the rule of General Francisco Franco in Spain.<sup>104</sup> Likewise, a 1994 study by C. Neal Tate of three Asian case studies found validity for the claim that a "more likely route for a crisis regime to follow in trying to bring its judiciary under control is to restrict the scope and depth of the courts' decision making."<sup>105</sup>

As this paper has shown, however, the opposite has occurred in Argentina. Here, partial judges sit on courts with a broad institutional scope of authority. Though there are not enough comparative studies to know for sure, it may be that this kind of judicial system is the one most compatible with delegative democracy. Why should delegative democracies be different in this respect? The likely answer is that presidents in delegative democracies can point to a stronger source of legitimacy, popular mandate through the institution of elections. Authoritarian governments, by contrast, can not claim electoral support and therefore must respect the integrity of the judiciary (at least superficially) in order to retain some legitimacy for the regime.

We may be left with a somewhat pessimistic conclusion. If such courts are compatible with delegative democracies and more genuine judicial independence relies on the existence of a different type of regime, then the realization of an independent judiciary may seem quite unlikely in the short term. It would, in effect, depend on the emergence of political conditions that are more conducive to an objective judicialization of politics. This conclusion is not completely certain, as the concepts related to delegative democracy have not been fully developed. At the very least, however, this study demonstrates that the courts are worthy of study even in those countries where their enjoyment of independence is thought unlikely.

The possibility that judicial independence and more effective democratic governance are attainable in Argentina and elsewhere justifies continued efforts to foster them in democratizing countries across the world. In this regard, there is an important lesson to learn from the Argentine experience. Reforms aimed at strengthening the judiciary and extending horizontal accountability must go beyond measures to improve the efficiency and political insularity of the administration of justice. Instead, more comprehensive constitutional revisions will be necessary to place the judiciary on stronger footing within the polity and society. So long as the president remains the center of the political system, the courts (by definition) are on the periphery, and their functional independence will likely be of secondary importance.



## NOTES

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1. For a good review of the Argentine transition, see Alejandro M. Garro, "Nine Years Transition to Democracy in Argentina: Partial Failure or Qualified Success?," *Columbia Journal of Transnational Law*, 31 (1993), 1-102.

2. This realization is the thrust of a whole new literature on democratization. See Jorge I. Domínguez and Abraham F. Lowenthal, eds., *Constructing Democratic Governance: Latin America and the Caribbean in the 1990s* (Baltimore: The Johns Hopkins University Press, 1996); Guillermo O'Donnell, "Illusions about Consolidation," *Journal of Democracy*, 9 (April 1996), 34-52; and Philippe C. Schmitter, "Transitology: The Science or Art of Democratization?," in Joseph S. Tulchin and Bernice Romero, eds., *The Consolidation of Democracy in Latin America* (Boulder: Lynne Rienner Publishers, 1995), pp. 11-41.

3. Guillermo O'Donnell, "Delegative Democracy?" (Notre Dame: University of Notre Dame, Helen Kellogg Institute for International Studies, Working Paper #172, March 1992).

4. For a historical review of Argentine presidentialism, see Liliana de Riz and Catalina Smulovitz, "Instituciones y dinámica política: El presidencialismo argentino," in Dieter Nohlen and Liliana de Riz, eds., *Reforma institucional y cambio político* (Buenos Aires: CEDES, 1991), pp. 121-76.

5. Carlos Santiago Nino, "The Debate over Judicial Reform in Latin America," *Fordham International Law Journal*, 16 (1992-1993), 643.

6. See Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *American Journal of Comparative Law*, 44 (Fall 1996), 605-26.

7. Ibid.

8. See Martin Feinrider, "Judicial Review and the Protection of Human Rights under Military Governments in Brazil and Argentina," *Suffolk Transnational Law Journal*, 5 (Winter 1981), 176-201; Alejandro M. Garro, "The Role of the Argentine Judiciary in Controlling Governmental Action under a State of Siege," *Human Rights Law Journal*, 4 (Summer 1983), 311-37; C. Neal Tate, "Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies," *Political Research Quarterly*, 46 (June 1993), 311-38; and C. Neal Tate and Stacia Haynie, "Authoritarianism and the Function of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987," *Law and Society Review*, 27 (1993), 707-39.

9. O'Donnell, "Delegative Democracy," p. 6.

10. Ibid., pp. 6-7.

11. Ibid., pp. 1-3. See also Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971).

12. See particularly O'Donnell, "Illusions about Consolidation," pp. 42-46.

13. O'Donnell, "Delegative Democracy," p. 7.

14. Ibid., pp. 12-16.

15. See Inter-American Development Bank, "Annual Report 1995."

16. See Thomas E. Skidmore and Peter H. Smith, *Modern Latin America* (Oxford: Oxford University Press, 1992), pp. 106-10.

17. See the Argentine daily *Clarín*, July 1, 1996. Since 1853 the mayor (*intendente*) of Buenos Aires had been appointed by the president. The city was granted a greater degree of self-rule (including the right to elect the *Intendente*) in the constitution of 1994.

18. Based on author's observations in Buenos Aires, Argentina, June 1996. One poster from winning Radical party candidate Fernando de la Rúa showed a doctored photograph of President Menem wearing a glove with razor-tipped fingers, mimicking the character "Freddy Krueger" in the popular horror movie series *Nightmare on Elm Street*. The caption read "The Nightmare ends June 30."

19. See *Clarín Digital*, World Wide Web, July 24, 1996. His membership in the group was the lead story of the June issue of the Argentine critical magazine, *Noticias*. It included a cover photo of the young Barra raising his hand in a Nazi salute, with the caption, "Is justice safe in his hands?"

20. Mateo Goretti and Delia Ferreira Rubio, "La emergencia y la relación entre el Ejecutivo y el Congreso durante la administración del Presidente Menem: Uso y abuso de los decretos de necesidad y urgencia," presented to the Annual Congress of the International Political Science Association, Paris, France, May 26–28, 1993. Cf. Raúl Baglini and Andrés D'Ambrosio, *Juicio a la Corte* (Buenos Aires: 1993), pp. 112–25.

21. Goretti and Rubio, "La emergencia y la relación entre el Ejecutivo y el Congreso"; and Baglini and D'Ambrosio, p. 114.

22. *Ibid.*, p. 116.

23. *Ibid.*

24. *Ibid.*, p. 115.

25. Interview with Dra. Liliana de Riz, June 25, 1996, in Buenos Aires.

26. Liliana de Riz, "Argentina: Democracy in Turmoil," in Jorge I. Domínguez and Abraham F. Lowenthal, eds., *Constructing Democratic Governance: South America in the 1990s* (Baltimore: The Johns Hopkins University Press, 1996), pp. 147–64; and Nino, p. 638.

27. De Riz, "Argentina: Democracy in Turmoil," pp. 151–59. See also Consejo para la Consolidación de la Democracia, *Reforma Constitucional: Segundo Dictamen* (Buenos Aires: CCD, 1987).

28. Impression based on interviews conducted by the author June 2–July 1, 1996, in Buenos Aires.

29. Interview with de Riz. Meanwhile, President Menem has not refrained from issuing more decrees. See Ministry of Justice, Republic of Argentina, *Sistema Argentina de Informática Jurídica*, on the World Wide Web, <http://www.saj.jus.gov.ar>.

30. Interview with Dr. Germán Bidart Campos, June 20, 1996, in Buenos Aires; interview with de Riz.

31. Interview with Bidart Campos and with Dr. Héctor Tanzi, June 12, 1996, in Buenos Aires. The president originally offered the chief justice position to the Peronist candidate he defeated for president in 1983, but the appointment was declined. Alfonsín named one Socialist (Carlos Fayt), one Peronist (Enrique Petracchi), one independent (Genaro Carrió), and two people affiliated with a rival faction of his own Radical party (Arturo Caballero and Augusto Belluscio) to the court. See Horacio Verbitsky, *Hacer la Corte: La construcción de un poder absoluto sin justicia ni control* (Buenos Aires: Planeta, 1993), p. 22. Dr. Tanzi has also compiled a biography of all supreme court justices during the twentieth century.

32. For Argentine human rights trials, see Carlos Santiago Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina," *The Yale Law Journal*, 100 (June 1991), 2619–40; Alejandro M. Garro and Henry Dahl, "Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Back," *Human Rights Law Journal*, 8 (1987), 283–344; Jaime Malamud-Goti, "Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina," in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995), pp. 160–70; and David Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone," *Human Rights Quarterly*, 16 (1994), 105–30.

33. See Garro and Dahl, pp. 329–43.

34. Interview with Dr. Jorge Bacqué (Supreme Court Justice, 1985–1989), July 1, 1996, in Buenos Aires.

35. Interview with Bacqué.
36. *Victor Rolón Zappa v. Estado Nacional*, Corte Suprema de Justicia de la Nación, September 30, 1986. See also Germán Bidart Campos, "Comentario," *El Derecho*, pp. 120, 562. Professor Jonathan Miller disputes the importance of this decision, noting that the supreme court failed to act on subsequent challenges to Alfonsín's social security policy (correspondence with the author). Nonetheless, the decision in *Rolón Zappa* was a significant blow to the government during an economic downturn.
37. See Baglini and D'Ambrosio, pp. 53–180; Verbitsky, pp. 33–77; also, César Domingo Yáñez, "La Nueva Corte Suprema de Justicia de la Nación," *La Ley* (1990–C), 123.
38. See Verbitsky, pp. 33–38. Verbitsky reports that when Justice Carlos Fayt was offered the position of ambassador to Colombia, he responded by sending the executive a copy of his book, *Derecho y Ética* (Law and Ethics), with the inscription, "Be aware that I wrote this."
39. *Ibid.*
40. Dr. Jorge Bacqué, on the court from 1985 to 1990, claims that as a presidential candidate Menem reportedly visited the members of the supreme court and promised them: "Rest assured that I will not even touch the judicial branch." Interview with Bacqué. Menem supposedly repeated the assurance shortly after his election. Verbitsky, p. 36.
41. Mariano Grondona, "La Justicia y los políticos," in Francisco Diez, ed., *La Justicia en Crisis* (Buenos Aires: Poder Ciudadano, 1994), p. 136.
42. See Verbitsky, pp. 30–50. Interestingly, the president made reference to Franklin D. Roosevelt's proposed expansion of the U.S. supreme court to justify his own attempt.
43. Grondona, p. 136. The president was referring to the recomposition of the supreme court which had occurred eight times since 1946, the last time in 1983 when the badly discredited supreme court named by the former military regime resigned *en masse* to make way for a "democratic" court.
44. Baglini and D'Ambrosio, pp. 41–76.
45. *Ibid.*, p. 47.
46. See Verbitsky, pp. 52–68; Baglini and D'Ambrosio, pp. 77–103.
47. Verbitsky, p. 54.
48. *Ibid.*, p. 56.
49. Verbitsky, pp. 52–68.
50. Rodolfo Barra, "Democracia y administración pública," in Rodolfo Barra et al., eds., *En torno a la democracia* (Buenos Aires: Belgrano, 1991), p. 11.
51. See the daily newspaper *Página/12*, Apr. 27, 1993; also Baglini and D'Ambrosio, p. 102.
52. Interview with Dr. Bidart Campos.
53. Verbitsky, p. 135.
54. Interview with Dr. Rosendo Fraga, June 25, 1996, in Buenos Aires.
55. Instituto Gallup de la Argentina, "Estudio de opinión acerca de la justicia en Argentina," March 1994, conducted for *Fundación Poder Ciudadano*, Buenos Aires.
56. Data presented by Graciela Römer at the debate, "La Justicia en Crisis," at the University of Buenos Aires Law School, June 4, 1996 (attended by the author).
57. *Ibid.*
58. Interview with Bacqué.
59. *Juan Ramón Rodríguez v. Compañía Embotelladora Argentina*, Corte Suprema de Justicia de la Nación, April 15, 1993. See Verbitsky, pp. 183–85.
60. *Ricardo Molinas v. Poder Ejecutivo*, Corte Suprema de Justicia de la Nación, September 24, 1991.
61. *Banco Patagónico, S.A. v. Metalúrgica Skay*, Corte Suprema de Justicia de la Nación, September 16, 1993.
62. See Baglini and D'Ambrosio, pp. 187–201.
63. *Ibid.*, pp. 181–204.
64. *Ibid.*, pp. 186–87. It was also widely reported in the news media, for example, *La Nación*, Oct. 1,

1993, p. 20, Oct. 3, 1993, p. 18, and *Página/12*, Sept. 30, 1993, p. 13. No evidence that Barra disavowed the statement could be found.

65. For the supreme court's review of the pardons, see Verbitsky, pp. 142–49.

66. *Ibid.*

67. Interviews with Bidart Campos and de Riz.

68. See León Carlos Arslanián, “La Justicia y los políticos,” in Diez, ed., *La Justicia en Crisis*, p. 170; Verbitsky, pp. 391–95.

69. See Baglini and D’Ambrosio, pp. 77–102.

70. Interview with Bidart Campos.

71. Interviews with Bacqué and Bidart Campos. A Menem appointee, Ricardo Levene, has since resigned and was replaced by Justice Bossert. Bossert is considered a political independent, thus placing Menem’s “automatic majority” somewhat in doubt. Correspondence with Eduardo Barbarosch. However, with the court’s decisions extending the institutional power of the presidency, Menem may have already gotten all he needed. Continued outright dominance may no longer be necessary.

72. Interview with Dr. Raúl Zaffaroni, June 19, 1996, in Buenos Aires. See also Néstor Baragli, “Consejo de la Magistratura: Guía de debate,” *Fundación Poder Ciudadano* (February 1996); *Clarín*, June 3–6, 1996; *La Nación*, June 3, 1996.

73. *Peralta v. Estado Nacional*, December 27, 1990; *Mercedes Aquino*, October 14, 1992; *Mario Carlos Gabrielli v. Nación Argentina*, 1992; *José Antonio Romero Feris v. Estado Nacional*, September 8, 1992; *Oscar Godoy v. Universidad Nacional de La Plata*, December 27, 1990; *FOETRA Sindicato Buenos Aires v. Ministerio de Trabajo y Seguridad Social de la Nación y otros*, April 5, 1991.

74. Interviews with Bidart Campos and Bacqué.

75. *Dromi, José R. s/ Avocación*, Corte Suprema de Justicia de la Nación, September 6, 1990.

76. See Verbitsky, pp. 137–40; *Clarín*, July 12, 13, 1990.

77. *Dromi, José R. s/ Avocación*.

78. *Rolón Zappa v. Estado Nacional*.

79. *Ibid.*

80. *Ibid.*

81. Verbitsky, p. 227.

82. Interview with de Riz.

83. *Universidad de Buenos Aires v. Estado Nacional*, Corte Suprema de Justicia de la Nación, June 19, 1991. Six justices, all Menem appointees, wrote the majority decision on the merits. Two other justices, Petracchi and Belluscio, rejected the university’s appeal on principle, arguing that Decree 1111/89 had not yet ordered any particular regulations and the university therefore had no basis for a lawsuit. Only Justice Fayt disagreed both on the merits and on principle.

84. *Ibid.*

85. *Ibid.*

86. *Peralta v. Estado Nacional*.

87. Decreto de Necesidad y Urgencia 36/90, Presidente de la República, January 5, 1990.

88. *Ibid.*

89. Baglini and D’Ambrosio, pp. 114–15.

90. See Baglini and D’Ambrosio, p. 114. For a contrary perspective, see N. Guillermo Molinelli, “Las relaciones Presidente–Congreso en Argentina, ‘83–‘95,” *Post Data2* (November 1996), 59–90.

91. See Germán Bidart Campos, “El fallo de la Corte sobre el ‘Plan Bonex’ (El amparo: airoso; la propiedad: desprotegida; la constitución: entre paréntesis),” *El Derecho*, 141 (1991), 519.

92. *Peralta v. Estado Nacional*.

93. *Ibid.*

94. *Ibid.*

95. *Ibid.*

96. Verbitsky, p. 160. See also Bidart Campos, "El fallo de la Corte sobre el 'Plan Bonex'; and Roberto Saba, "Y . . . ¿para qué está el Congreso?," *No Hay Derecho*, 5 (1992), 3.
97. *Peralta v. Estado Nacional*.
98. *Ibid.*
99. See, for example, Verbitsky, pp. 15–32.
100. For Menem's views on political power, see Gabriela Cerruti, *El Jefe: Vida y obra de Carlos Saúl Menem* (Buenos Aires: Planeta, 1993).
101. See Garro, "The Role of the Argentine Judiciary."
102. See *ibid.*; Jorge Correa Sutil, "The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence during the Transition to Democracy," in Irwin P. Stotzky, ed., *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder: Westview Press, 1993), pp. 90–101, and Feinrider.
103. Interview with Bidart Campos.
104. José Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain," *Law and Society Review*, 9 (Spring 1975), 475–96.
105. Tate, "Courts and Crisis Regimes," p. 318.