



IUSGOBIERNO

Notes on Law and Governance

TOMÁS BRUSCO

Originally published as *Iusgobierno: notas sobre derecho y gobernanza* (Ciudad Autónoma de Buenos Aires: Ediciones Arce, 2025). ISBN 978-631-90827-3-9.

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This work received the Calvez Prize for Civic Responsibility (“Young Scholar”) of the Foro Ecuménico Social (2024).

For all those
devoted to achieving fairer societies
through consensus and peace.

In South America, what passes for the reform of a country is the reform of a piece of paper. Instead of changing the education of its people, they change the words of their laws, and believe they have carried out a revolution, a reform.

— Juan Bautista Alberdi, *Peregrinación de Luz del Día* (1874)

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A NOTE ON THE ENGLISH EDITION

Argentine institutions are named here by function rather than by analogy. A *decreto* is a decree, not an executive order; the *Poder Ejecutivo* is the executive, not an “Executive Power”; *doctrina* is scholarship and *jurisprudencia* is case law. Where an institution has no counterpart in English, the functional name appears first and the official Spanish name follows in parentheses on first mention: Supreme Court of Argentina (Corte Suprema de Justicia de la Nación, CSJN), Chamber of Deputies (Honorable Cámara de Diputados de la Nación, HCDN), Access to Public Information Agency (Agencia de Acceso a la Información Pública, AAIP). Two words are left in the original because translating them would dissolve what they name: the *amparo*, an expedited constitutional action for the protection of rights, and the two terms the author coins in these pages, *iusgobierno*, which gives the book its title, and *iuspoética*, rendered as “iuspoetics.”

The footnote apparatus follows the original in full. The essays are arranged here in four parts rather than in the sequence of the Spanish edition, and the notes are numbered accordingly, in the order in which they are read. The reference apparatus follows them as Part V. Citations have been recast in Bluebook form. Titles of Spanish-language sources are not translated; Argentine statutes and decrees are cited by number, with the Spanish short title and an English gloss in brackets, and Argentine judgments carry the *Fallos* citation given in the original. Where a docket or reporter citation could not be verified, the citation gives the court, the document and the date and nothing more. That apparatus is divided into a bibliography, a table of cases and a table of statutes, treaties and other authorities, as the Spanish edition divides it, followed by the websites consulted and the abbreviations. Quotations from the Argentine Constitution, from Argentine statutes and from Spanish-language scholarship are the author’s translations; where an instrument has an authentic English text (the Vienna Convention on the Law of Treaties, the American Convention on Human Rights, the European Convention, the Rome Statute), that text is used. Passages the author quoted in English are restored to their originals.

FOREWORD

Legal thought is in crisis. A great many scholars still work the classical themes, and a certain number—with philosophical airs—believe they are rewriting the law itself; but fewer and fewer take on the harder commitment, which is to analyze and to write about the concrete problems that trouble and damage contemporary democracies.

In Argentina we have now marked forty years since the recovery of democracy and thirty since the last constitutional reform, and yet legal scholarship cannot seem to leave the same standing debates behind. It speaks and writes, one begins to suspect, largely to itself.

Two factors have encouraged that reductive enclosure. The first is the bureaucratization of the university, which well into the twenty-first century still answers to the canons of the High Middle Ages and of the eighteenth-century Enlightenment. The second is a funding system that pushes professors and academics to organize their work and their publications around the demands of certain NGOs, generally foreign-funded, or of private organizations with interests and motives of their own, leaving local realities and local challenges aside.

Together, the two factors corrupt style and communication. They produce jurists who write in coded, nearly hermetic language, inaccessible to the general public, because they are writing for themselves and their colleagues—or to keep their grants—rather than for public opinion at large.

The result is the familiar flood of books and articles that contribute nothing of value or novelty to the discipline, and that serve only to consolidate the narcissism of their authors, degrading Argentine legal and political thought a little further with each cycle.

Against that pathologizing of the law, the arrival of new thinkers, and of books like the one I have the pleasure and the honor of introducing here, is always cause for celebration.

Tomás Brusco's work, with all the brilliance of his youth, supplies the intelligence the field needs: the kind that takes responsibility for the central questions of political law and of modern constitutionalism, and ties them to Argentine reality and to how our institutions actually work.

In the pages the reader now holds are the basic tools of political law: what they are for is understanding models of governance, and understanding what those models do to social and economic development and to the consolidation of democracy.

That is not the author's only merit. Line by line and paragraph by paragraph, the reader will also enjoy a style suited to the times we live in, in which clear language is essential if one is to get past the walls of baroque academicism and contribute to the larger public conversation.

So Brusco, overcoming the bureaucratic and inbred tendencies of the scientific literature, challenging old concepts and theories and proposing concrete alternatives, achieves what few authors do: he addresses the reader directly, and expects an answer.

Beyond the principal theses and lines of argument in law and political philosophy, moreover, the book takes up the teaching of these subjects and the role of the public university in the twenty-first century, binding sovereignty to education and gaining a further originality by leading us into an aspect that the specialized literature has forgotten.

For all of this—and for what readers will find on their own as they make their way through these pages—it is a pleasure to introduce, and to invite readers to, work by intellectuals of Tomás Brusco's quality.

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Buenos Aires, October 30, 2024

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INTRODUCTION

This is a collection of explorations: searches for the concepts, the criteria and the definitions that the subjects taken up here require. The preferences run toward the practices of public law, toward national governance, and toward questions bound up with university education, along with theoretical work on the state and on inclusion.

The notes could have been called notes of *political law*: transparency, elections, access to information, congressional procedure, and the rest. Today we add international law to classical political law in order to see the legal framework whole. I have nonetheless done without the term, so that the edges opened up here would not be contained within one specific legal category.

I hope these notes will encourage interest in their subjects, and above all in the everyday effects those subjects have on social and technological development. My thanks, without further preamble, to those who gave their help generously in correcting and sharpening the pages that follow, and in particular to Santiago Poznansky and Bautista Orol.

T. B.

Buenos Aires, June 20, 2024

P A R T I

**Foundations: The State and Its
Theory**

CONTRACTARIANISM, CIVIL LIBERTY AND LAW

Wherever law ends, tyranny begins (...).

— John Locke, *Second Treatise of Civil Government* (1690)

The end of law is not to abolish or restrain, but to preserve and enlarge freedom (...).

— John Locke, *Second Treatise of Civil Government* (1690)

Peace comes by no road but the road of law. The Constitution is the most powerful means of pacification and of internal order. Dictatorship is a standing provocation to conflict; it is a sarcasm, an insult to those who obey without reservation or limit. Dictatorship is anarchy constituted and turned into a permanent institution.

— Juan Bautista Alberdi, *La República Argentina 37 años después de la Revolución de Mayo* (1886)

Contractarianism, modern constitutionalism and liberalism were born together in political theory and compose a conceptual fabric that has been used to sustain legal positions, particularly in the eighteenth and nineteenth centuries.² Classical liberalism can hardly be severed from the emergence of the modern republics;³ and those republics were in turn shaped by contractarianism and constitutionalism.⁴ Constitutionalism is in part a practical consequence of the postulates of the contractarian theory elaborated by Thomas Hobbes and John Locke,⁵ and in part an

² J. F. Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. POL. 985 (1996).

³ J. C. Isaac, *Republicanism Vs. Liberalism? A Reconsideration*, 9 HIST. POL. THOUGHT 349 (1988).

⁴ J. Belchem, *Republicanism, Popular Constitutionalism and the Radical Platform in Early Nineteenth-Century England*, 6 SOC. HIST. 1 (1981).

⁵ F. Pollock, *Hobbes and Locke: The Social Contract in English Political Philosophy*, 9 J. SOC'Y COMP. LEGIS. 107 (1908).

answer to the needs and desires of societies such as those of South America.⁶ Locke, moreover, was the principal theoretical founder of classical liberalism, granting how hard it is to pin liberalism down as a single doctrine: the liberalism the nineteenth-century constitutions defend to this day, in which the rights to hold opinions, to trade, to study and to act are established, with a public space and a private space regulated by legal rules.⁷

Historically, liberalism disputed through its action the appropriation of personal spaces and of individual or family privacy by the monarchical states of Europe, where a monarch could invade life, liberty and estate without clear legal limits.⁸ In broad terms, classical liberalism in its first version argued against tyranny and promoted happiness as a legal end.⁹ Life, liberty and estate are the basic rights Locke set out in *Two Treatises of Government* (1689).¹⁰ In the seventeenth century, the meaning of that statement differed from what we understand by the same terms today.¹¹ Locke wrote:

Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it. But because no political society can be, nor subsist, without having

⁶ R. Gargarella, *El período fundacional del constitucionalismo sudamericano (1810–1860)*, 43 DESARROLLO ECONÓMICO 305 (2003).

⁷ M. Cranston, *Locke and Liberty*, 10 WILSON Q. 82 (1986).

⁸ A. Kokkonen & A. Sundell, *Delivering Stability—Primogeniture and Autocratic Survival in European Monarchies 1000–1800*, 108 AM. POL. SCI. REV. 438 (2014).

⁹ A. Shaw, *Liberty and Happiness*, 14 AUSTL. Q. 86 (1942).

¹⁰ J. LOCKE, *TWO TREATISES OF GOVERNMENT* (McMaster University Archive of the History of Economic Thought 1823).

¹¹ J. Richards et al., “Property” and “People”: Political Usages of Locke and Some Contemporaries, 42 J. HIST. IDEAS 29 (1981).

in itself the power to preserve the property, and in order thereunto punish the offences of all those of that society, there, and there only, is political society where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire, and by understanding indifferent rules and men authorised by the community for their execution, decides all the differences that may happen between any members of that society concerning any matter of right, and punishes those offences which any member hath committed against the society with such penalties as the law has established; whereby it is easy to discern who are, and are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society one with another; but those who have no such common appeal, I mean on earth, are still in the state of Nature, each being where there is no other, judge for himself and executioner; which is, as I have before showed it, the perfect state of Nature. (pp. 141–142)

This passage of Locke's was presumably the basis and inspiration for the drafting committee of the United States Declaration of Independence: Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert Livingston.¹² The American founders replaced *estate* with *happiness*, though that change too can be traced to Locke's thought: he took the pursuit of happiness to be a key function of intelligence.¹³

Locke also posited certain inalienable rights, on a natural-law logic similar to the one some scholars used in the twentieth century in defense of human rights.¹⁴ As to political organization, he argued in that same passage that contractarianism and the defense of those rights are what divide civil society from the state of nature. In the theoretical emergence

¹² M. W. Janis, *The Declaration of Independence, the Declaration of the Rights of Man and Citizen, and the Bill of Rights*, 14 HUM. RTS. Q. 478 (1992).

¹³ J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690).

¹⁴ W. von Leyden, *John Locke and Natural Law*, 31 PHIL. 23 (1956).

of liberalism, that is, contractarianism was born alongside it. Classical liberalism was the theoretical foundation for a contractarian state, which leads us, historically, toward the concepts of constitutionalism and republicanism.¹⁵

Under these concepts, in a republican analysis of social decision,¹⁶ the decision may in broad terms fall to private persons or to a state, given the distinction between private and public.¹⁷ Locke proposed removing from persons the power to decide about the life, liberty and estate of others, and he called this set of rights “property,” not merely the estate as we understand it legally today.¹⁸ “Property,” for Locke, is what allows the pursuit of happiness in community, taken whole: life, liberty, estate and health. There is, that is, a theoretical limit set by the state on the individual acting alone, since autonomous decision over the life, liberty and estate of others does not govern. The stronger could not thereby impose himself on the weaker without a community to resolve the conflict. Locke, Hobbes and Rousseau called this the state of nature.^{19 20}

On a contractarian analysis, civil liberty would be possible only in a civil society, because we are a gregarious species. A human being cannot live in solitude: alone on an island he would quickly die, or his quality of life would deteriorate.²¹ The construction of education, health, the

¹⁵ G. Gerson, *Deliberative Households: Republicans, Liberals, and the Public-Private Split*, 57 POL. RSCH. Q. 653 (2004).

¹⁶ G. A. Akerlof, *Social Distance and Social Decisions*, 65 ECONOMETRICA 1005 (1997).

¹⁷ M. J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

¹⁸ H. Moulds, *Private Property in John Locke’s State of Nature*, 23 AM. J. ECON. SOCIO. 179 (1964).

¹⁹ A. J. Simmons, *Locke’s State of Nature*, 17 POL. THEORY 449 (1989).

²⁰ G. S. Kavka, *Hobbes’s War of All Against All*, 93 ETHICS 291 (1983).

²¹ M. M. Ahern et al., *The Importance of Sense of Community on People’s Perceptions of Their Health-Care Experiences*, 34 MEDICAL CARE 911 (1996).

environment and institutions belongs within a contractarianism that involves legal rules agreed through perfectible republican systems.²²

Liberal theories fostered the concept of “negative rights,” attributed to Jeremy Bentham, which understands a private party’s right as a power to demand inaction.²³ Complementing it, we find a private party’s right as a power to request an action, generally from executive state bodies.²⁴ The first, the negative ones, are usually those called classical civil rights, political rights, or first-generation human rights in Karel Vasak’s scheme: they operate to protect the individual against tyranny, and their

²² Max Stirner theorized a free anarchic man who, without social organization, could impose his will. Stirner’s concept of the Verein von Egoisten (“union of egoists”) refers to a union or syndication of individual interests that would replace state organization. The difficulty with the concept may be that only the individual who accepts it falls within the category. Were such an association to prosper, it would over the years constitute a new state — a peculiar one, but close to the classical category of *lo stato* in Machiavelli’s usage. State organization, understood in that way, is not merely a theoretical or legal construction; it is a description of how society is organized. Law without a state, another anarchist proposition, is a methodologically interesting exercise to investigate; it leads quickly to natural law theory, of which Locke is again one of the principal modern references, and from which the human rights that the United Nations took in the twentieth century as one of its fundamental pillars emerge with force. Customary law, likewise, is a form of law whose source is born of society itself rather than of the force of a state. Here again, however, we meet the problem of its organization and of its application or enforcement: who generates consensus about what natural law or customary law says? Would it be tautological for custom to say what custom is, so that custom defines itself? How can we secure rights socially without a state or public organization that regulates and provides certainty?

²³ Y. Elazar, *The American Debate and the Invention of Negative Liberty*, AM. POL. SCI. ASS’N (2010).

²⁴ A. Melnyk, *Is There a Formal Argument against Positive Rights?*, 55 PHILOSOPHICAL STUD. INT’L J. PHIL. ANALYTIC TRADITION 205 (1989).

ideological basis has been, in part, liberalism.^{25 26} They are usually defined in opposition to the rights that oblige states to fund activities: second-generation rights, or economic, social and cultural rights, also called positive rights.²⁷

Yet in a sale, if someone hands over money in exchange for a piece of real property, the owner is obliged to give: he binds himself to an act of delivery, and a court may forcibly remove the property from his estate because he contracted. He has privately contracted, by an agreement of wills, an obligation to give. The private estate of persons does not manifest itself legally only in an obligation not to act. Another example of a positive right in the civil and political sphere is citizens' power to demand that the government hold elections or remove officials whose terms have expired. The connection between negative rights and civil or property rights thus becomes blurred, which damages the usefulness of these concepts for normative analysis.^{28 29}

Locke's historical and economic themes are likewise relevant for understanding the politics: man's struggle for the republic against tyranny, and the value of labor.³⁰ It is no contradiction that economics should tend toward divergent proposals, since part of economics is to propose public policy, what is called normative economics, as against

²⁵ M. Y. A. Zieck, *The Concept of "Generations" of Human Rights and the Right to Benefit from the Common Heritage of Mankind with Reference to Extraterrestrial Realms*, 25 VERFASSUNG UND RECHT IN ÜBERSEE 161 (1992).

²⁶ K. Vasak, *La larga lucha por los derechos humanos*, 30 EL CORREO DE LA UNESCO 28 (1977).

²⁷ M. F. Tinta, *Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions*, 29 HUM. RTS. Q. 431 (2007).

²⁸ P. Marshall, *Two Types of Rights*, 25 CAN. J. POL. SCI. / REVUE CANADIENNE DE SCI. POLITIQUE 661 (1992).

²⁹ A. Blau, *Against Positive and Negative Freedom*, 32 POL. THEORY 547 (2004).

³⁰ D. Russell, *Locke on Land and Labor*, 117 PHILOSOPHICAL STUD. INT'L J. PHIL. ANALYTIC TRADITION 303 (2004).

descriptive or positive economics.³¹ Classical liberalism, with Locke and Smith as its theorists, promulgated the labor theory of value.³² ³³ Locke argued for a justification of property rights, through the working of the land, in the enclosures, the social process of converting common land into land held by private parties or by the bourgeoisie; Smith held that manufactures gain their value through the direct labor of workers.³⁴ ³⁵ Locke, that is, vindicates republicanism, contractarianism and the labor theory of value.

Moving into the eighteenth century, the Genevan philosopher Rousseau³⁶ was one of the continuators of the classical contractarianism of Locke and Hobbes.³⁷ He altered Locke's concept of property and Hobbes's concept of the representation of citizens,³⁸ arguing for a republicanism of direct democracy without private property. In the *Discourse on the Origin and Foundations of Inequality among Men* (1755) he worried over themes we might call contemporary: the crisis of

³¹ B. Caplan & S. C. Miller, *Positive Versus Normative Economics: What's the Connection? Evidence from the "Survey of Americans and Economists on the Economy" and the "General Social Survey"*, 150 PUB. CHOICE 241 (2012).

³² J. F. Henry, *John Locke, Property Rights, and Economic Theory*, 33 J. ECON. ISSUES 609 (1999).

³³ D. Dillard, *The Status of the Labor Theory of Value*, 11 S. ECON. J. 345 (1945).

³⁴ This classical liberal theory would later be developed and sustained by David Ricardo and Karl Marx. Liberalism and Marxism alike held that the value of manufactures depended on the hours of labor performed on them. Today the labor theory of value has largely been relegated by academic economics to a marginal or minority position.

³⁵ P. H. Douglas, *Smith's Theory of Value and Distribution*, 5 U. J. BUS. 53 (1927).

³⁶ C. BERTRAM, JEAN JACQUES ROUSSEAU (The Stanford Encyclopedia of Philosophy 2024).

³⁷ J. B. Noone, *The Social Contract and the Idea of Sovereignty in Rousseau*, 32 J. POL. 696 (1970).

³⁸ H. Pitkin, *Hobbes's Concept of Representation I*, 58 AM. POL. SCI. REV. 328 (1964).

representation, inequality, and the abuse of power by those who had accumulated wealth.^{39 40} He reflected in another period and another region, where the city-states had achieved stability and were commanded by an incipient bourgeoisie.⁴¹ His proposal was to form confederations of cities operating by direct democracy; he thought it difficult for large states to exercise democracy of that kind.⁴² He also acknowledged that no democratic state such as he proposed had ever existed, and that probably none ever would, a certain ideological pessimism, following from his strict definition of “democracy.”⁴³ He promoted political participation⁴⁴ and criticized commerce as a promoter of public affairs.⁴⁵ Here, then, is a republican and contractarian philosopher criticizing liberal individualism without moving away from republicanism, contractarianism or democracy, and serving as a conceptual antecedent for international organizations such as the United Nations.^{46 47}

³⁹ A. O. Lovejoy, *The Supposed Primitivism of Rousseau's "Discourse on Inequality"*, 21 MOD. PHILOLOGY 165 (1923).

⁴⁰ J.-J. Rousseau, *A Discourse Upon the Origin and the Foundation of the Inequality Among Mankind*, PROJECT GUTENBERG (2020).

⁴¹ P. J. Jones, *Communes and Despots: The City State in Late-Medieval Italy*, 15 TRANSACTIONS ROYAL HIST. SOC'Y 71 (1965).

⁴² R. Douglass, *Rousseau's Critique of Representative Sovereignty: Principled or Pragmatic?*, 57 AM. J. POL. SCI. 735 (2013).

⁴³ P. Abellán Artacho, *Rousseau, democracia y sus intenciones ideológicas: arreglos conceptuales como instrumentos políticos*, 186 REVISTA DE ESTUDIOS POLÍTICOS 45 (2019).

⁴⁴ A. B. Karadaş, *An Essay on Political Participation of Citizens, Legislation, and Government in Rousseau's the Social Contract and Considerations on the Government of Poland*, 5 TÜRKİYE İNSAN HAKLARI VE EŞİTLİK KURUMU AKADEMİK DERGİSİ 157 (2022).

⁴⁵ M. D. Mendham, *Enlightened gentleness as soft indifference: rousseau's critique of cultural modernization*, 31 HIST. POL. THOUGHT 605 (2010).

⁴⁶ R. Humphris, *The Relevance of Jean-Jacques Rousseau 300 Years After His Birth*, UNHCR (2012).

⁴⁷ G. Blanchet, *Jean-Jacques Rousseau's Contribution to International Relations Theory*, 2 GLENDON J. INT'L STUD. 15 (2012).

Turning to the Americas, Mariano Moreno and Juan Bautista Alberdi are two unavoidable references. Both were, in different periods, intellectual founders of Argentina: Moreno through the founding of the first newspaper of Buenos Aires and his translation of *The Social Contract* (1810),⁴⁸ Alberdi through the *Bases* and the *Fragmento preliminar* (1914). Moreno wrote:

(...) if peoples are not enlightened, if their rights are not made common knowledge, if each man does not know what he is worth, what he can do and what is owed to him, new illusions will succeed the old ones; and after wavering for a time among a thousand uncertainties, our lot may be to change tyrants without destroying tyranny. (p. 2)⁴⁹

Moreno's concerns, set out in this prologue to *The Social Contract*, coincide with Rousseau's. They concern building a solid democracy grounded in man's independence, in his self-knowledge and in law, against the possibility that an authoritarian order will simply continue. This belongs to a process of independence and nation-building strongly marked by the Enlightenment, the intellectual and social movement from which Moreno and Alberdi drew inspiration and formation, and which served as the basis for the French and American revolutions.⁵⁰ These thinkers used contractarianism as a theoretical framework for reflecting on social agreements and for justifying order and law. Contractarianism, that is, was among the most significant theoretical proposals for the enlightened law of the nineteenth century.

The entitlement theory⁵¹ advanced by Robert Nozick in *Anarchy, State and Utopia* (1974) develops, for titles of property, the principle of

⁴⁸ G. BEKENSTEIN, "EL CONTRATO SOCIAL" DE J.-J. ROUSSEAU EN LA TRADUCCIÓN DE MARIANO MORENO (1810) (Biblioteca Virtual Miguel de Cervantes 2012).

⁴⁹ M. MORENO, PRÓLOGO A LA TRADUCCIÓN DE EL CONTRATO SOCIAL (Biblioteca Virtual Universal 1810).

⁵⁰ E. M. Wait, *Mariano Moreno: Promoter of Enlightenment*, 45 HISP. AM. HIST. REV. 359 (1965).

⁵¹ M. Davis, *Necessity and Nozick's Theory of Entitlement*, 5 POL. THEORY 219 (1977).

rectification of injustice.⁵² The principle establishes the need to alter the status quo where an estate has been acquired in violation of another person's life, liberty or estate, contravening the fundamental rights posited by Locke's classical liberalism.⁵³ Nozick later addressed, in *The Examined Life* (1989), a book of reflection, the need for an inheritance tax.⁵⁴

Without government, the only person able to hold property, even without a right to it, would be the one with the force to make that property respected. Hence the distinction in property law between possession and dominion over a thing: what matters is not only having something but holding title to it. This is why government and government agencies control both contracts and titles in order to resolve disputes over property rights. Without government agencies to control property and disputes it would be impossible to define property rights at all, since those rights are defended in their positive facet, by government action.

The concept of "positive liberty" was made current by Isaiah Berlin in *Two Concepts of Liberty* (1958).⁵⁵ There Berlin developed the distinction between positive and negative liberty. Negative liberty is the absence of coercion or of impediments on the will. Positive liberty is the capacity to acquire the elements needed to carry the will out.⁵⁶ It is on the second that Berlin innovated. The concept can nonetheless be traced back to Rousseau, who spoke of how man, in order to develop fully, requires a context in which to do so, and not merely the absence of impediments imposed by other men. There would be higher and lower degrees of freedom, then, in a person's realization as well, according to how that person is inserted in society. The concept of positive liberty allows us to

⁵² R. E. Litan, *On Rectification in Nozick's Minimal State*, 5 POL. THEORY 233 (1977).

⁵³ T. Scanlon, *Nozick on Rights, Liberty, and Property*, 6 PHIL. & PUB. AFF. 3 (1976).

⁵⁴ D. Halliday, *Is Inheritance Morally Distinctive?*, 32 L. PHIL. 619 (2013).

⁵⁵ T. L. Putterman, *Berlin's Two Concepts of Liberty: A Reassessment and Revision*, 38 POLITY 416 (2006).

⁵⁶ G. F. Reed, *Berlin and the Division of Liberty*, 8 POL. THEORY 365 (1980).

recognize theoretically the effects social inequality has on people's decisions. A person is more or less free, for Berlin, according to their conditions of life: there will be societies, for instance, in which being of a certain kind conditions one's freedom to contract, to trade, to study. Looking back over history we find groups that have been discriminated against, set apart or segregated, with their access to opportunity narrowed. To deny positive liberty as a concept is, in some measure, to assume that each person's abilities will be rewarded blindly in society, whoever they come from. History and sociology show the proposition to be false.

To deny positive liberty, then, is in a way to deny civil liberty as well, since what is proposed is a society with no regulations beyond those that guarantee negative liberty: removing the obstacles for those who can, but building no bridges for those who cannot. An asphalt highway with no speed limit and no toll, for those who have cars and equally for those on foot. The argument from positive liberty gains further force when, turning to political practice, we find people with inherited wealth or a family history of ties to government occupying positions of wealth or of government. The inheritance of social position or of estate demonstrates how effective the concept of positive liberty is for coloring in the contours of negative liberty, and for observing the incomplete wills of those who could not act for want of means rather than for want of permission.

In conclusion, civil liberty, positive and negative, republican regulation and constitutional democracy can find their modern theoretical foundations in the contractarianism developed by the authors cited here, among others. Contractarianism can also be regarded as a justification of the state from a classically liberal starting point for the analysis of political conduct. Consensus and respect for people's rights in governance is one of the central bases of contractarianism, as it is of liberalism. Both currents can be regarded as founding the modern republics; certain tensions have nonetheless been sustained between the defenders of each. Contractarianism has placed more emphasis on building state capacities, making positive liberty effective, while liberalism has focused on discerning the limits of agreements of that kind,

making negative liberty effective, even against democratic consensus. Contractarianism and liberalism, then, can meet peacefully; but they may also raise specific contradictions when it comes to legislating within a constitutional republic, though without the potential to call an affirmation of the state into question.⁵⁷

⁵⁷ Historically, suppositions and claims are made about ideologies that in practice have proved not to operate as posited. This leads to a division of the study of ideologies into two branches: their theoretical aspects, analyzed here in broad terms (political theory), and their practical aspects, or how they actually operate socially (political sociology). The practical effects matter considerably, so that qualitative and quantitative research is desirable when discerning how effectively the theoretical premises are applied.

DEMOCRACY AND ARGENTINE GOVERNMENT IN THE TWENTY-FIRST CENTURY

Schools teach that Argentina is a democracy.⁵⁸ The National Constitution of 1853,⁵⁹ however, does not use the term “democracy,” and the 1994 reform⁶⁰ did not add the word to the text either, though it did include the democratic system as a guarantee tied to political parties in Articles 36, 38 and 75.⁶¹ That simple fact can prompt reflection on the present state of democracy in Argentina and a question about its future in legal terms. Argentina as a state organization passed through several stages; defining them categorically, though, can lead to reductive conclusions, given the wide and sometimes contradictory range of municipal, provincial and national events that occur across the country’s territory.⁶² Each stage was nonetheless shaped by its global surroundings, which in the nineteenth and twentieth centuries meant drastic changes in social life.⁶³ When we speak of transitional governments, though strictly

⁵⁸ P. Gleijeses, *The Decay of Democracy in Argentina*, 87 CURRENT HIST. 5 (1988).

⁵⁹ CONSTITUCIÓN NACIONAL [CONST. NAC.] (1853) (Arg.).

⁶⁰ Ley No. 24.430, *Constitución de la Nación Argentina* [Publication of the National Constitution] (1995) (Arg.).

⁶¹ Earlier, the reform of 1949 had established in its Article 15 that the Constitution was inspired by the democratic system — the first historical constitutional mention of democracy. It also provided that agents of the Argentine government would cease to be such if they took part in another, non-democratic state. The 1949 Constitution was “repealed” by a de facto government on taking power in 1955 and was never put into practice again, not even by the government of 1973, which was governed by the unconstitutional reform of 1972.

⁶² W. A. Green, *Periodizing World History*, 34 HIST. THEORY 99 (1995).

every government is one, some see substantial changes that alter the customs or the institutions of the state more than others do.⁶⁴

Analyzing government by government, we would find it hard to identify periods of detailed stability, without changes in the rules of the political or electoral game.⁶⁵ The first interparty presidential transition,⁶⁶ from Santiago Derqui and Juan Esteban Pedernera (1860–1861) to Bartolomé Mitre (1861–1868), came with an “unconstitutional” constitutional reform in 1860, the so-called ad hoc reform, in order to include Buenos Aires: that reform was prohibited by Article 30 of the 1853 text itself.⁶⁷

Before the Sáenz Peña Act (No. 8871) of 1912, then, not only was the Argentine legal framework different in character; presidential elections were regarded as more ceremonial or formal⁶⁸ than as the act of popular will they are considered today.⁶⁹ Not until 1916 was a national president voted for openly and popularly, with an electoral roll amounting to roughly ten percent of the Argentine population of the day, since women, children and non-nationals were excluded.⁷⁰ That contrasts with the 2019

⁶³ W. Fischer, *Social Tensions at Early Stages of Industrialization*, 9 COMP. STUD. SOC'Y & HIST. 64 (1966).

⁶⁴ G. W. Wynia, *Readjusting to Democracy in Argentina*, 86 CURRENT HIST. 5 (1987).

⁶⁵ L. de Riz, *El debate sobre la reforma electoral en la Argentina*, 32 DESARROLLO ECONÓMICO 163 (1992).

⁶⁶ J. R. Scobie, *An Uneasy Triumvirate: Derqui, Mitre and Urquiza*, 38 HISP. AM. HIST. REV. 327 (1958).

⁶⁷ J. R. Scobie, *The Aftermath of Pavón*, 35 HISP. AM. HIST. REV. 153 (1955).

⁶⁸ One sign of this is that both Justo José de Urquiza and Bartolomé Mitre served as de facto provisional presidents and, once in office, held the elections.

⁶⁹ G. F. Wolfenson, *Argentina: Democracy and International Relations*, 20 PS 679 (1987).

⁷⁰ L. A. ROMERO & J. P. BRENNAN, *A HISTORY OF ARGENTINA IN THE TWENTIETH CENTURY* (Penn State University Press 2002).

election, in which approximately seventy-six percent of the population was eligible to vote.

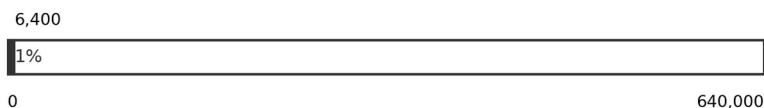


Table 1. Presidential elections of 1854: voters as a share of population.



Table 2. Presidential elections of 2019: the electoral roll as a share of population.

Taking the two tables together, Argentina has indeed grown more democratic over the decades.⁷¹ It could grow more democratic each year,⁷² through various mechanisms of government and active transparency.⁷³ To that end, citizen participation in decision-making at the governmental level could be encouraged.⁷⁴

In constitutional terms, the 1994 reform gave the Argentine legal framework a series of new rights and guarantees, in an international context favorable to reforms of that kind, which were proliferating.⁷⁵ The organic legal framework of 1853, however, remains broadly intact: power as conceived on paper, and the form of government we see in Table 1. One might also argue that the organic part is more immediately perceptible to

⁷¹ J. Adair, *Democratic Utopias: The Argentine Transition to Democracy through Letters, 1983–1989*, 72 AMERICAS 221 (2015).

⁷² R. B. Chavez, *The Construction of the Rule of Law in Argentina: A Tale of Two Provinces*, 35 COMP. POL. 417 (2003).

⁷³ H. Brooke, *Inside the Digital Revolution*, 70 J. INT'L AFF. 29 (2016).

⁷⁴ J. V. Cunningham, *Citizen Participation in Public Affairs*, 32 PUB. ADMIN. REV. 589 (1972).

⁷⁵ M. P. Jones, *Assessing the Public's Understanding of Constitutional Reform: Evidence from Argentina*, 18 POL. BEHAV. 25 (1996).

citizens than rights enforceable only through the courts, because it affects the public administration and electoral processes.⁷⁶ The organic part also affects how decisions are taken on legislative matters, which will then bear indirectly on judicial decisions about those new rights.⁷⁷

The administrations, national, provincial and municipal, operate on top-down dynamics, whoever exercises representation.⁷⁸ The official of the moment is the one who decides for everyone. At the national level, it might be thought understandable that a president should take decisions for six hundred forty thousand (640,000) people in 1853, in a historical setting without firm institutions or clear rules. Today the context is different: the same president, within the same constitutional organic structure, goes on taking decisions in the same way, but now for approximately forty-seven million (47,000,000) people. The same legal model as in the nineteenth century, that is, is being used to decide.

In human conduct as it bears on state affairs, moreover, it is not easy to distinguish what officials want from what they can actually do. Analyzing an official's conduct would require taking into account the effective limits of leadership and interaction attaching to the position.⁷⁹ In the twenty-first century, analysis of these variables has grown more complex through neuropolitics, the neuroscientific study of politics.⁸⁰ It is in part the study of human conduct with new technologies, and it will

⁷⁶ Á. J. G. Montoro, *Una concepción integrada e integradora de la Constitución*, 124 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 371 (2022) (reviewing J. J. S. ECHAVARRÍA, DERECHOS FUNDAMENTALES Y FORMA POLÍTICA).

⁷⁷ H. C. Mansfield, *The Modern Doctrine of Executive Power*, 17 PRESIDENTIAL STUD. Q. 237 (1987).

⁷⁸ O. Oszlak, *El mito del estado mínimo: una década de reforma estatal en la Argentina*, 42 DESARROLLO ECONÓMICO 519 (2003).

⁷⁹ J. Galaskiewicz, *The Structure of Community Organizational Networks*, 57 SOC. FORCES 1346 (1979).

⁸⁰ P. K. Hatemi & R. McDermott, *The Political Psychology of Biology, Genetics, and Behavior*, 33 POL. PSYCH. 307 (2012).

open thematic explorations with the capacity to affect our understanding of political and legal processes generally.⁸¹

Technology is not what it was when the constitutional theory was written, which opens the question of how new technologies are to be applied under nineteenth-century constitutional law.⁸² We can be connected over the internet with unprecedented speed, and that makes direct consultation of the population easier.⁸³ Would the Argentine constitutional legislator have promoted the search for mechanisms to channel it? One debate to settle here is why we have entrusted our finances to the internet and its speed, accelerating markets and transactions since at least the 1990s,⁸⁴ with the intangibility that bank-held virtual currency in domestic or foreign denominations and debit or credit cards imply, while none of those systems has been used at scale to consult citizens on matters of greater consequence than a municipal participatory budget. Digital consultation procedures have in some measure gone unregulated.⁸⁵

The banking and financial system decided decades ago to implement technology in order to communicate and interact with its clients, with the endorsement of the Central Bank of Argentina. Public administrators, by contrast, have implemented almost none of these technologies for consulting citizens about how to conduct themselves.⁸⁶ To date there are no applications for interacting with one's representatives. Does this follow

⁸¹ J. T. Jost et al., *Political Neuroscience: The Beginning of a Beautiful Friendship*, 35 POL. PSYCH. 3 (2014).

⁸² P. Gewirtz, *Constitutional Law and New Technology*, 64 SOC. RSCH. 1191 (1997).

⁸³ M. R. Nelson, *The Cloud, the Crowd, and Public Policy*, 25 ISSUES SCI. TECH. 71 (2009).

⁸⁴ M. Suzman, *Digital Financial Services: A Powerful Lever to Reduce Poverty and Achieve the SDGs*, 6 HORIZONS: J. INT'L REL. SUSTAINABLE DEV. 70 (2016).

⁸⁵ S. Kim & J. Lee, *E-Participation, Transparency, and Trust in Local Government*, 72 PUB. ADMIN. REV. 819 (2012).

⁸⁶ A. Shleifer, *State versus Private Ownership*, 12 J. ECON. PERSP. 133 (1998).

from economic obstacles, resistance to change, a lack of technological training, or other factors?

Can we assume, further, that institutions carry with them conflicts inherent in the people who occupy public office? A tentative definition of the legal efficacy of a constitutional organic structure might run as follows: if a functional position sets off a series of acts, understood according to a defined criterion, those acts would be attributable to the organic structure and not to the official's will alone. Governmental conduct, that is, would not escape what the organic structure has fixed in advance, even allowing a margin of discretion. If the conduct, administrative, legislative or judicial, arose instead from an autonomous will of the official, outside the possibilities the organic structure foresaw, then the legal system has proved ineffective, or its conceptualization or normative structuring is mistaken relative to what was sought.⁸⁷ This could be complemented by an economic analysis of the normative structure.⁸⁸ In terms of republicanism or federalism, it is difficult to argue whether the institutions corresponding to these concepts have failed in their representation, where they did, because of constitutional organic implementation, because of a "democratic deficit,"⁸⁹ or because of non-application.

Institutional reform, in conclusion, is complex and slow. But one way to begin the process would be to listen to those who have information to offer, in pursuit of an inclusive Nation that takes in a range of criteria: to the scientists, on advances in the understanding of human conduct, and above all to people themselves, on what they want in order to guide their own lives.

⁸⁷ M. J. Gelfand et al., *The Strength of Social Norms Across Human Groups*, 12 PERSP. PSYCHOLOGICAL SCI. 800 (2017).

⁸⁸ R. A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997).

⁸⁹ G. Katrougalos, *The Democratic Deficit*, 110 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 126 (2016).

THE POLITICAL SPECTRUM AND GOVERNANCE

One of the best-known definitions of the left–right dichotomy came from Norberto Bobbio (1909–2004), the Italian political scientist and philosopher. Bobbio held that equality is the patrimony of the left, while the right favors liberty against the use of state resources to promote equality, seeing such use as counterproductive economically or politically. In broad terms: for the left there are inequalities to be dissolved; for the right there are liberties to be advanced.⁹⁰

The dichotomy varies by setting and by period.⁹¹ It also has limits when we want to apply the categories in fine detail to practical politics.⁹² The first is that the left could equally claim to defend liberty, and the right to defend equality. An electoral campaign is unlikely to declare itself openly against either value.^{93 94}

It would be a complicated business to analyze the administrative acts that put public policies into practice in order to discern whether they favor equality or liberty, except for those carrying a strong ideological stamp, such as wealth redistribution or tax reduction.⁹⁵ Some public

⁹⁰ H. Drochon, *From Dusk till Dawn: Bobbio on the Left/Right Dichotomy*, 27 J. POL. IDEOLOGIES 330 (2022).

⁹¹ S. Lukes, *Socialism and Capitalism, Left and Right*, 57 SOC. RSCH. 571 (1990).

⁹² B. J. Cook, *Politics, Political Leadership, and Public Management*, 58 PUB. ADMIN. REV. 225 (1998).

⁹³ M. Just, *A Theme of Equality in Campaigns and Elections*, 8 PS: POL. SCI. & POL. 158 (2005).

⁹⁴ A. Waytz et al., *Ideological Differences in the Expanse of the Moral Circle*, 10 NATURE COMM'NS 4389 (2019).

⁹⁵ H. F. Bienfait & W. E. A. van Beek, *Right and Left as Political Categories. An Exercise in "Not-so-Primitive" Classification*, 96 ANTHROPOS 169 (2001).

policies are strictly neither of the right nor of the left on the conventional axis, which narrows the reach of those categories for political analysis. Signing human rights treaties, or constituting a new court for a city, are political measures that nonetheless seem to resist the traditional analysis of that spectrum. Hence the variants that have emerged, with two axes instead of one (squares rather than lines), such as those proposed by Hans Eysenck (radical-conservative; democratic-authoritarian),⁹⁶ Jeff Greenberg (left-right; rigidity-flexibility)⁹⁷ and David Nolan (economic freedom; personal freedom).⁹⁸

Using these concepts could help untangle certain colloquial uses of language and suggest solutions that unite rather than divide: solutions that are assertive and serviceable to social and technological development. Societies tend to be refractory toward extremes, because their ideological center is what defines which extremes those are.⁹⁹ Political extremes are the edges of the axes, presumed to generate, in their execution by the state, consequences understood as undesirable by those on the opposite side. Certain policies neutral in spectrum terms, or outside the traditional spectrum altogether (redesigning the municipal structure of a province, say), could benefit from the deliberate exclusion of symbolic content tied ideologically to a sector within the spectrum.¹⁰⁰ That would avoid controversy and shift the focus from ideology to the evidence of the policy's application and to the study of its effectiveness. One of this century's challenges may be to go on investigating the possibility of

⁹⁶ H. J. EYSENCK, *THE PSYCHOLOGY OF POLITICS*. FREDERICK A. PRAEGER, INC. (1955).

⁹⁷ J. Greenberg & E. Jonas, *Psychological Motives and Political Orientation — the Left, the Right, and the Rigid: Comment on Jost et al.* (2003), 129 *PSYCHOLOGICAL BULL.* 376 (2003).

⁹⁸ D. Nolan, *Classifying and Analyzing Politico-Economic Systems*, 3 *INDIVIDUALIST* 5 (1971).

⁹⁹ G. Simonovits, *Centrist by Comparison: Extremism and the Expansion of the Political Spectrum*, 39 *POL. BEHAV.* 157 (2017).

¹⁰⁰ J. S. Rouseck, *A History of the Concept of Ideology*, 5 *J. HIST. IDEAS* 479 (1944).

applying policies outside the spectrum, or of reducing the ideological spectrum's appropriation of functional concepts.

An overload of signifiers may benefit a group or a party through the greater effusiveness and participation it can provoke. But it also diverts attention, in some measure, from results, once administration and activism are confounded by the combination of the two practices.¹⁰¹ This induced confusion subordinates technical work to the preference of a political chief or leader, generally someone who holds or has held a superior position within the state administration, who may place his particular interest above the rules and above the bureaucracy, arguing that his interest coincides with the public interest.¹⁰² Party positions in electoral contexts may likewise endorse extralegal mechanisms for advancing their ends, on the argument that those ends matter more than the legally legitimated bureaucratic mechanisms of the state.¹⁰³ In cases of presidential leadership, tensions come into play among what the population demands, what the public administration demands and what the party demands.¹⁰⁴

Juan Bautista Alberdi¹⁰⁵ famously wrote in *Bases* (1852) that to govern is to populate.¹⁰⁶ Today we might add that to govern is to integrate: to reach the assertive syntheses needed for growth and for favorable results.

¹⁰¹ P. Gardner & B. Abrams, *Contentious Politics and Symbolic Objects*, in SYMBOLIC OBJECTS IN CONTENTIOUS POLITICS 13 (P. Gardner & B. Abrams ed. University of Michigan Press 2023).

¹⁰² G. Scherlis, *The Contours of Party Patronage in Argentina*, 48 LATIN AM. RSCH. REV. 63 (2013).

¹⁰³ D. Nelken & M. Levi, *The Corruption of Politics and the Politics of Corruption: An Overview*, 23 J.L. & SOC'Y 1 (1996).

¹⁰⁴ E. A. Posner, *Presidential Leadership & the Separation of Powers*, 145 DAEDALUS 35 (2016).

¹⁰⁵ H. E. Davis, *Juan Bautista Alberdi, Americanist*, 4 J. INTER-AM. STUD. 53 (1962).

¹⁰⁶ J. B. ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA DE ARGENTINA (La Cultura Argentina 1915).

In Argentina, one possible criterion of integration was advanced in the context of efforts to strengthen MERCOSUR and to create the MERCOSUR Parliament (PARLASUR), which Argentina, Brazil, Uruguay and Paraguay brought into being in 2005.¹⁰⁷ It has been said, however, that MERCOSUR's will to integrate is limited by the absence of economic integration or of any consonance of economic-policy interests.¹⁰⁸ Lacking ideological support, evidence-based integration, of policies and of states alike, would have to be effective in practical or technical terms in order to justify itself.¹⁰⁹

This position on results-based integration, outside party interests, has been criticized as technocratic,¹¹⁰ at the expense of pursuing substantive political objectives, generally associated with specific ideologies.¹¹¹ The criticism can be answered by noting that unity of electoral political action does not necessarily coincide with unity of governing objectives; parties and party alliances therefore do not unify a practical course either. The position has also been criticized as falsely transcendent, on the view that it is simply one more proposal located within the ideological spectrum.¹¹² That second criticism rests on the premise that politics admits only the left-right axis, the "them or us" or the friend-enemy distinction that constrains conversation and exchange. For anyone who takes agreement to be a disvalue, his own intransigence will set him apart from the whole, whether or not he is part of a governing majority.¹¹³ Put another way: integration used as a means of concealing political objectives, or an

¹⁰⁷ Constitutive Protocol of the MERCOSUR Parliament, Dec. 9, 2005.

¹⁰⁸ K. Kaltenthaler & F. O. Mora, *Explaining Latin American Economic Integration: The Case of Mercosur*, 9 REV. INT'L POL. ECON. 72 (2002).

¹⁰⁹ W. Stevens, *Mercosur a Latin American Regional Integration of the Second Generation*, 48 STUDIA DIPLOMATICA 49 (1995).

¹¹⁰ J. G. Gunnell, *The Technocratic Image and the Theory of Technocracy*, 23 TECH. CULTURE 392 (1982).

¹¹¹ T. M. Andersen, *International Integration, Risk and the Welfare State*, 104 SCANDINAVIAN J. ECON. 343 (2002).

¹¹² H. P. Greenwald, *Scientists and Technocratic Ideology*, 58 SOC. FORCES 630 (1979).

¹¹³ B. W. Heineman, *Law and Leadership*, 56 J. LEGAL EDUC. 596 (2006).

ideology, would not be integration as the result of an institutional search but an international political alliance instrumented through integration as a practice.

Regional integration in South America has been damaged both by the ideologization or partisanization of multilateral instruments and by withdrawal from those instruments on grounds opposed to that ideologization: UNASUR and PROSUR are the illustrative examples.^{114 115} To affirm or to deny the act of integrating for reasons of political spectrum, within a democratic context, weakens the act, because the debate loses sight of the fact that what is being integrated is states, not parties or ideologies. States are historically prior to the classic left-right axis, and will probably outlast it, though there will always be those who weigh equality above liberty and the reverse.¹¹⁶ Internationally, the European Union has been the deepest case of integration among different sovereignties, and is therefore a model worth analyzing for effective practices of parliamentary, judicial, monetary and customs unification.¹¹⁷

State structures can serve their populations. In the present regional fragmentation, South America serves in part some state structures of debatable efficacy, marked over the last century by democratic interruptions and unconstitutional repression on the political side¹¹⁸ and by unjustified devaluations, inflation and foreign debt on the economic one.¹¹⁹ What will be decisive is the capacity to propose a transformation that lets regional leaders talk to one another and take decisions that

¹¹⁴ Á. Díaz Navarro, *Prosur y las lecciones aprendidas de Unasur*, FOREIGN AFFAIRS LATINOAMÉRICA (2019).

¹¹⁵ S. Insignares Cera, *La UNASUR: ¿integración regional o cooperación política?*, 40 REVISTA DE DERECHO 167 (2013).

¹¹⁶ O. Oszlak, *The Historical Formation of the State in Latin America: Some Theoretical and Methodological Guidelines for Its Study*, 16 LATIN AM. RSCH. REV. 3 (1981).

¹¹⁷ G. Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995).

¹¹⁸ D. Kruijt, *Low Intensity Democracies: Latin America in the Post-Dictatorial Era*, 20 BULL. LATIN AM. RSCH. 409 (2001).

benefit the whole. Better practices could then be found, with particular attention to health, the environment and education: the programmatic keys of the twenty-first century.¹²⁰

¹¹⁹ I. MacLachlan, Book Review, 24 CAN. J. LATIN AM. & CARIBBEAN STUD. 297 (1999) (reviewing V. E. TOKMAN & G. O'DONNELL, POVERTY AND INEQUALITY IN LATIN AMERICA: ISSUES AND CHALLENGES).

¹²⁰ A. Keselman et al., *Educating Young People about Environmental Health for Informed Social Action*, 4 UMWELT UND GESUNDHEIT ONLINE 1 (2011).

ECONOMICS IN PUBLIC ADMINISTRATION

The systems of economic policy that existed in the twentieth century and continue into ours can be catalogued in three broad branches: planned economies (socialism, fascism, autocracy), unplanned or market economies (economic liberalism, anarchism), and mixed economies (social democracy, interventionism, *dirigisme*). The classifications have their difficulties, but in broad terms they let us recognize the role public administration assumes, in law, with respect to the national and international economy.

Paul Samuelson¹²¹ said that economics answers what is produced, how, and for whom.¹²² Planned economies seek to administer production and commerce, and to that end use state agencies that blur the line between personal and state economy.¹²³ Unplanned or market economies come in two strands. One seeks to permit commerce among private parties, the physiocrats' traditional *laissez faire*, *laissez passer*, dividing public and private sharply, with the administration as guarantor of private property. The other seeks to abolish private property and the market as a form of social interaction.¹²⁴ ¹²⁵ Mixed economies seek to give the administration an active role in the market, so that a market economy has a regulator.¹²⁶

¹²¹ A. Lindbeck, *Paul Anthony Samuelson's Contribution to Economics*, 72 SWEDISH J. ECON. 342 (1970).

¹²² P. Samuelson et al., *Economía con aplicaciones a Latinoamérica*, MCGRAW-HILL INTERAMERICANA (2010).

¹²³ W. Röpke, *Fascist Economics*, 2 ECONOMICA 85 (1935).

¹²⁴ W. Waller, *The Political Economy of Laissez-Faire*, 40 J. ECON. ISSUES 59 (2006).

¹²⁵ D. Novak, *The Place of Anarchism in the History of Political Thought*, 20 REV. POL. 307 (1958).

¹²⁶ S. Hyman, *The Theory of the Mixed Economy*, 18 MGMT. INT'L REV. 59 (1978).

These three models of economic policy grow more complicated once we consider that they can operate in an authoritarian society or a democratic one. Historically, though this is the predominant conceptualization, it would be rash to assume that directed economies have been tied to authoritarian political processes and undirected ones to democratic processes, because that has not been the case every time.¹²⁷ Chile in the second half of the twentieth century offers us a view of a democratic socialism and of an autocratic economic liberalism.^{128 129} Are these contradictions?

Latin America offers an abundant panorama, hard to elucidate with the traditional academic categories. The Latin American twentieth century has been tied historically to processes of democratic *dirigisme* and to processes of authoritarian economic liberalism, so that the political doctrines that generally defend and underpin these economic doctrines in the West have been dissociated, to some degree, from political practice.

In Argentina, democratic processes have not necessarily been tied to liberal economic policies. The Argentine nineteenth century, of unusual economic prosperity, did not deliver prosperity in terms of distributive justice.¹³⁰ Political liberalism and economic liberalism could be placed on opposite sides of the left–right axis, which would bring political liberalism ideologically close to socialism and economic liberalism close to conservatism, on the assumption that liberalism is a centrist position. Parties of the left are generally taken to be more favorable to sustaining economic resources in the social sphere in order to organize supply and demand, while parties of the right leave that role to the private sector.¹³¹ But models are abstractions, and economic policy could, technically, be

¹²⁷ G. O'Donnell, *Reflections on Contemporary South American Democracies*, 33 J. LATIN AM. STUD. 599 (2001).

¹²⁸ E. Ortiz, *Chilean Socialism and Transition*, 28 ECON. & POL. WKLY. 2124 (1993).

¹²⁹ R. E. Ratcliff, *Capitalists in Crisis: The Chilean Upper Class and the September 11 Coup*, 1 LATIN AM. PERSP. 78 (1974).

¹³⁰ L. Llach, *Rica, pero no tan moderna: Argentina antes de la Depresión*, 60 DESARROLLO ECONÓMICO 153 (2020).

independent of the main doctrinal line of a government in terms of political analysis.^{132 133}

On these considerations, we find that economics in its bond with public administration might be independent in some respect, if not of the state form or of the governing party, then of the democratic or antidemocratic quality of the administration.¹³⁴ Democracy is the system of rules that legitimates the administration in terms of the popular will. That does not per se make the administration one of a directed, undirected or mixed economy, since factors besides the system of government influence the way it administers.¹³⁵

Political liberalism and economic liberalism, in other words, need not go together in a government's action. An analysis of the history of Latin American governments shows that they have not. The birth of Argentine liberal democracy in 1916, for instance, shows an increase in economic interventionism, or in the mixed economy.¹³⁶

An argument against this proposition would hold that economic liberalism and political liberalism inevitably imply one another. But to slight history through sociological or political speculation after the fact, however well aimed, would be to forget what happened. We would be obstructing the analysis of the present or the past by superimposing on it

¹³¹ C. Boix, *Political Parties and the Supply Side of the Economy: The Provision of Physical and Human Capital in Advanced Economies, 1960-90*, 41 AM. J. POL. SCI. 814 (1997).

¹³² A. Matthews & A. Mathews, *Economics and Ideology*, 9 CRANE BAG 52 (1985).

¹³³ H. van B. Cleveland, *Economics as Theory and Ideology*, 6 WORLD POL. 289 (1954).

¹³⁴ D. A. Hibbs, *Political Parties and Macroeconomic Policies and Outcomes in the United States*, 76 AM. ECON. REV. 66 (1986).

¹³⁵ D. A. Levy, *Does an Independent Central Bank Violate Democracy?*, 18 J. POST KEYNESIAN ECON. 189 (1995).

¹³⁶ C. Solberg, *The Tariff and Politics in Argentina 1916-1930*, 53 HISP. AM. HIST. REV. 260 (1973).

a hypothesis that did not come to pass, even where both analyses turn out to be true. We would fall into the absurdity of saying that because food will rot, it is already rotten; or that because a tree will flower, it already has flowers. These are valid poetic expressions for public policy, but not for political, economic or historical analysis.

Samuelson makes a defense of the mixed economy, equally removed from the extremes of economic *laissez faire* and of socialism.^{137 138} That position also supposes, explicitly or not, the virtue of assuming that no extreme far from the classical Aristotelian mean will supply the critical capacity needed to increase general welfare. The reason is that denying the other's position impoverishes public debate or scientific inquiry.¹³⁹ To remove the humanist character from political economy, in turn, would be to dissociate it from the social interests economic science answers to: what to produce, how to produce it, and to whom to give the product.¹⁴⁰ The predictive character of macroeconomics shows, for its part, the practical social significance it carries.¹⁴¹

In conclusion, economics in public administration combines political aspects with strictly technical ones that interlace and, in some measure, blur together. For law, moreover, economics can help to elucidate or to investigate in ways or by methods law does not possess, and so to develop more definite considerations.¹⁴² It is also hard to argue for extremisms in a globalized society in which the social sciences advance by leaps, immersed as we are in this understanding of ourselves, on the assumption

¹³⁷ P. A. Samuelson, *My Life Philosophy*, 27 AM. ECONOMIST 5 (1983).

¹³⁸ P. A. Samuelson et al., *Samuelson's "Economics" at Fifty: Remarks on the Occasion of the Anniversary of Publication*, 30 J. ECON. EDUC. 352 (1999).

¹³⁹ N. RESCHER, ARISTOTLE'S GOLDEN MEAN, IN A JOURNEY THROUGH PHILOSOPHY IN 101 ANECDOTES (University of Pittsburgh Press 2015).

¹⁴⁰ R. E. Backhouse & S. G. Medema, *Retrospectives: On the Definition of Economics*, 23 J. ECON. PERSP. 221 (2009).

¹⁴¹ R. F. Gleisner, *Economic Determinants of Presidential Elections: The Fair Model*, 14 POL. BEHAV. 383 (1992).

¹⁴² R. L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719 (1998).

that no person is to direct peoples by himself, but that peoples determine themselves.¹⁴³ The twentieth century showed us that one extremism leads to another, in a dynamic that is complex to arrest, and that violence provokes violence. Only dialogue and sustained peace have delivered sustained prosperity. The path is obvious, and yet it seems difficult. Our mission, surely, is to make it seem a little easier each time.¹⁴⁴

¹⁴³ R. B. Smith, *Political Extremism: Left, Center, and Right*, 34 AM. SOCIOLOGIST 70 (2003).

¹⁴⁴ G. W. Seidman, *Blurred Lines: Nonviolence in South Africa*, 33 PS: POL. SCI. & POL. 161 (2000).

P A R T I I

Institutions and Participation

THE INFLUENCE OF POLITICAL AND ELECTORAL LAW ON ARGENTINE INSTITUTIONS

Introduction

To enter electoral law is, in some measure, to enter the machinery of democracy. A republican state under the rule of law that functions democratically will carry in its rules of political organization an expression of its foundations as a national political entity. Among the nations that make up the state persons affiliated with the United Nations, we find different types of state organization. Modern political science¹⁴⁵ divides states into unitary and federal according to how they organize the power of public officials.¹⁴⁶ Today, alongside the traditional classification by the level of authority the central government holds over subnational entities, countries can also be catalogued by their index of democracy or of transparency.¹⁴⁷ These concepts are interconnected but not identical, and not every state has, or legally seeks, the same level of democratic representativeness in its institutions.

Western states, even those that are legally constitutional monarchies (Sweden, for instance) generally claim the term “democracy” for themselves. Democracy is intimately bound to electoral law; one might say that electoral law is the most widespread legal means of giving democratic organization a form. The definition could be objected to by demonstrating, or constructing, a non-democratic electoral law. That

¹⁴⁵ G. Sartori, *What is “Politics”*, 1 POL. THEORY 5 (1973).

¹⁴⁶ D. J. Elazar, *Contrasting Unitary and Federal Systems*, 18 INT’L POL. SCI. REV. / REVUE INTERNATIONALE DE SCI. POLITIQUE 237 (1997).

¹⁴⁷ M. Escobar, *La calidad democrática. Una propuesta para su medición por expertos / Democratic Quality. A Proposal for its Measurement by Experts*, 133 REIS 59 (2011).

object of analysis will be set aside here, though technically, following Kelsen's positivist tradition, we might eventually find one.¹⁴⁸ What follows takes up Argentine electoral law in particular, the legal expression in Argentina of the democratic form consolidated in 1983.¹⁴⁹

A brief historical review of the Argentine system of government

History shows that the formation of the Argentine Republic (1853) preceded effective democracy. In the nineteenth and twentieth centuries there were elected authorities, a Constitution, and presidents who obtained neither their mandates nor their legitimacy through participatory elections. This was the case with the first congresses and with the "historic presidencies" of Mitre, Sarmiento and Avellaneda,¹⁵⁰ when a minute share of the Argentine people voted.¹⁵¹ Today the picture is different: at the municipal, provincial and national levels, every Argentine authority holds office by having won, more or less in accordance with law, the corresponding elections. Even so, the representativeness of the twenty-first-century electoral system is questioned, in terms of participation in electoral contests and in the decisions successive governments make. Various vicissitudes lead the people, in one way or another, to withdraw from self-government: institutional or cultural

¹⁴⁸ H. Janzen, *Kelsen's Theory of Law*, 31 AM. POL. SCI. REV. 205 (1937).

¹⁴⁹ G. W. Wynia, *Democracy in Argentina*, 84 CURRENT HIST. 53 (1985).

¹⁵⁰ R. A. Potash, Book Review, 43 HISP. AM. HIST. REV. 139 (1963) (reviewing G. G. LEVENE, *PRESIDENTES ARGENTINOS*).

¹⁵¹ S. Ablin et al., *Historia política y construcción del Estado argentino, 1862 a 1955*, in *MINISTROS Y MINISTERIOS EN LOS COMIENZOS DEL ESTADO ARGENTINO* 17 (Prometeo Editorial 2022).

democratic shortfalls, the crisis of executive and legislative representation, the crisis of the political parties.^{152 153 154}

A series of factors, in other words, would appear to hold the consolidation of Argentine democracy in check: democracy not merely as a form of government but as a form of state. It is possible that during the “democratic spring” of 1983 to 1985 a large social discourse was assembled, effective and forward-looking, which fixed December 10, 1983 as a recovery of democracy without adequately reckoning either with the capacity to regress or with the effective denial of certain conditions of political realization.¹⁵⁵ That discourse, held by the public and by its leaders, presented 1983 as a great beacon in Argentine history set against the preceding dictatorship, and it can at times bias debates about democratic quality, since the view it offers is in some cases insufficiently qualified. Where could we go, after all, if there was already “democracy” and not “dictatorship”? How could there be more democracy, if democracy works like a switch that goes on and off depending on whether a popularly elected president or a dictator occupies the executive? Extreme positions can lead us to deny what is missing: to see only the forest as a concept, without knowing the trees in their particulars. Here the forest is the system, and the trees are the specific acts of citizen participation that make the system up. Without trees the ecosystem collapses, as democracy does without effective participation and an active practice of belonging.

¹⁵² G. L. Munck, *Gobernabilidad democrática a comienzos del siglo XXI: una perspectiva latinoamericana (Democratic Governance at the Beginning of the 21st Century: A Latin American Perspective)*, 65 REVISTA MEXICANA DE SOCIOLOGÍA 565 (2003).

¹⁵³ J. M. Herrera & M. D. O. Sala, *¿Qué pasa con la democracia?*, 41 EL CIERVO 19 (1992).

¹⁵⁴ D. Nieto, *Democracia y conflicto: las contribuciones del pluralismo agonista*, in DESAFÍOS PARA LA DEMOCRACIA Y LA CIUDADANÍA 103 (J. P. Milanese R. S. Vega & V. Rouvinski ed. Editorial Universidad Icesi 2012).

¹⁵⁵ I. Cheresky, *Argentina. Un paso en la consolidación democrática: elecciones presidenciales con alternancia política*, 52 REVISTA MEXICANA DE SOCIOLOGÍA 49 (1990).

The forty years of Argentine democracy completed on December 10, 2023 allow us to appreciate, from a greater distance, a certain gradual dynamic in which democracy can increase or diminish according to whether social, political and governmental practices are democratic or not. The social and economic organization of a state is affected by converging factors that yield results and that sometimes produce ruptures or changes of regime, once the situation has spilled over toward one end of the spectrum.¹⁵⁶

In Argentina, with a party system that has never quite consolidated but that appears in the 1994 Constitution as the basis of the democratic system, there is a crossroads: political law obliges people to organize in parties, while in practice the society generally does not vote for parties but for movements or for persons. This is plain from the national figures who have built their own party apparatus in order to win the presidency.¹⁵⁷

The general condition of the parties would suggest, then, that Argentine political leaders do not regard party structures as structural or determinative for the development or definition of public policy. Their view is more likely the one taken of a legal instrument, or of a means to an end.¹⁵⁸ The traditional Western democratic model of majority parties, common in other countries, has had certain difficulties in Argentina in translating into effective citizen participation in internal party debates.¹⁵⁹

¹⁵⁶ V. N. Pandey, *State, Society and Organisation Discourse: Post-Welfare Regime And Sociological Imagination*, 50 SOCIOLOGICAL BULL. 252 (2001).

¹⁵⁷ In the case of Argentina's largest twentieth-century party by membership, its role has diminished, as provincial parties have found more strength in figures or leaders than in the party structure itself.

¹⁵⁸ J. Zelaznik, *El sistema de partidos en Argentina a principios del siglo XXI*, 8 IBEROAMERICANA 170 (2008).

¹⁵⁹ R. A. Potash, *Argentine Political Parties: 1957-1958*, 1 J. INTER-AM. STUD. 515 (1959).

The republic of parties and sovereignty

Argentine electoral law changed over the second half of the twentieth century, as a product of the successive dictatorial governments,¹⁶⁰ until the Political Parties Act now in force was enacted.¹⁶¹ Part of the electoral scheme is also attributable, in part, to the 1994 constitutional reform and to the statutory reforms that followed. The Constitution provides:

Article 37. This Constitution guarantees the full exercise of political rights, in accordance with the principle of popular sovereignty and with the laws enacted in consequence thereof. Suffrage is universal, equal, secret and compulsory. Real equality of opportunity between men and women for access to elective and party office shall be guaranteed through affirmative action in the regulation of political parties and in the electoral regime.

Article 38. Political parties are fundamental institutions of the democratic system. Their creation and the exercise of their activities are free within the respect owed to this Constitution, which guarantees their democratic organization and functioning, the representation of minorities, the ability to nominate candidates for elective public office, access to public information and the dissemination of their ideas. The state contributes to the economic support of their activities and of the training of their leaders. Political parties must give publicity to the origin and destination of their funds and assets.¹⁶²

The republican concept can be traced back to Plato, who in the *Republic* laid down his foundations for the virtuous government of a city-state, in which the private affairs of men could be discerned in common, turned into public affairs so as to establish an order and a better government, or simply to organize the society, prior to any political

¹⁶⁰ E. Kvaternik, *Sobre partidos y democracia en la Argentina entre 1955 y 1966*, 18 DESARROLLO ECONÓMICO 409 (1978).

¹⁶¹ Ley No. 23.298, *Ley Orgánica de los Partidos Políticos* [Organic Act on Political Parties] (1985) (Arg.).

¹⁶² CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.) (sanctioned 1853; amended 1860, 1866, 1898, 1957 and 1994), promulgated as Ley No. 24.430 (1994).

distinction between public and private.¹⁶³ Argentina can find its theoretical foundations, in short, as far back as the Hellenic republics. Yet once past the first constitutional article, and granting that we have a republican system, Article 37 presents us with a historically later concept: “popular sovereignty.” The sovereign would be all of us at once.¹⁶⁴

The modern concept of sovereignty is attributed to Jean Bodin, a member of the Parlement of Paris in the sixteenth century. Bodin gave conceptual shape to the emerging power of the European monarchies that, after the conquest of America and Europe’s military and commercial expansion across the world, dethroned the feudal aristocracies, dismantled feudalism and made way for concentrated national governments.¹⁶⁵ He was also one of the theoretical architects of the modern states that spread from the end of feudalism to the twentieth century. Each of those states was a unit governing itself independently and able to impose within its borders whatever it deemed fit, with a public international law limited to intergovernmental agreements. As the influence of international law grew with globalization, with the internationalization of commerce and with human rights as a global reference in the twenty-first century, it has been argued that this modern state paradigm is in decline.^{166 167} It was nonetheless in force when the Constitution of 1853 was enacted, and it remains influential, as a theory of the state, in the decisions and reasoning of Argentine judges today.

“Popular sovereignty,” however, and hence the concept of sovereignty itself as the Constitution understands it, cannot be attributed to Bodin

¹⁶³ J. Neu, *Plato’s Analogy of State and Individual: “The Republic” and the Organic Theory of the State*, 46 PHIL. 238 (1971).

¹⁶⁴ G. Risso, *Análisis sobre constitucionalismo y democracia*, in EPÍTOME DISRUPTIVO EN EL DERECHO CONTEMPORÁNEO: POLÍTICA CRIMINAL, TEORÍA, DOGMÁTICA Y PROCESO. J.M BOSCH 479 (J. L. C. Alanoca ed. 2023).

¹⁶⁵ C. I. Smith, *Jean Bodin and Comparative Law*, 25 J. HIST. IDEAS 417 (1964).

¹⁶⁶ J. Hutchinson, *The Past, Present, and the Future of the Nation-State*, 4 GEO. J. INT’L AFF. 5 (2003).

¹⁶⁷ S. Churchill, *The Decline of the Nation-State and the Education of National Minorities*, 42 INT’L REV. EDUC. 265 (1996).

alone. Authors before and after him, but prior to 1853, reflected on the state's capacities of jurisdiction and administration. Bodin is generally accepted as the principal theorist of Westphalian sovereignty (1648); but as with most legal concepts, a ruler's legal capacity to impose himself as authority over the other inhabitants of the state can be traced to ancient Rome, and to the Roman Republic in particular.¹⁶⁸ It can be seen in writings such as Ulpian's, known chiefly through Justinian's *Digest*,¹⁶⁹ in the term *imperium*, which refers to power as the capacity to dominate or to decide, in law, over the actions of others.¹⁷⁰ Some scholars also find sketches of the concept of sovereignty in the Middle Ages, particularly in the work of Marsilius of Padua and his *Defensor pacis*.^{171 172}

Article 37 refers to this principle of popular sovereignty, later developed by Rousseau,¹⁷³ which concerns the people's capacity for self-government. The instrument the Constitution gives the people for governing themselves is the political parties, named in the same article. Since the people deliberate through their representatives, the mediation between people and government is at the constitutional level the work of the parties. That mediation has significant social and political implications, and legal ones too, since the party component is a key gear in the machinery of the state. A simple comparison between governments mediated by political parties and non-party governments shows that in this region the latter have mostly been dictatorships. Parties, meanwhile, have made elections possible by bringing a leadership sector of the

¹⁶⁸ A. Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678 (1952).

¹⁶⁹ F. Millar, *A New Approach to the Roman Jurists*, 76 J. ROMAN STUD. 272 (1986) (reviewing T. HONORÉ, *EMPERORS AND LAWYERS*, and T. HONORÉ, *ULPIAN*).

¹⁷⁰ F. K. Drogula, *Imperium, Potestas, and the Pomerium in the Roman Republic*, 56 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 419 (2007).

¹⁷¹ A. LATHAM, *MEDIEVAL SOVEREIGNTY* (Arc Humanities Press 2022).

¹⁷² F. MAIOLO, *MEDIEVAL SOVEREIGNTY: MARSILIUS OF PADUA AND BARTOLUS OF SAXOFERRATO* (Eburon Academic Publishers 2007).

¹⁷³ F. Marini, *Popular Sovereignty but Representative Government: The Other Rousseau*, 11 MIDWEST J. POL. SCI. 451 (1967).

population into government (the party leaders) with the endorsement of a majority, or first-minority, sector of the population, the voters. This has come with the vicissitude of non-competitive elections.¹⁷⁴

Article 38 continues in the ethos of the preceding one, holding internal party democracy to be a requirement of the system's validity as a whole. Not only must the machinery of the state be democratic; the instruments for taking part in that machinery, the parties, must be democratic too. Without democratic parties the electoral system would be a mere façade, without equality of opportunity in access to public office. There could be a democratic state form in the daily workings of the bureaucracy, that is, with one basic difficulty: no democracy in access to the state. Even with a technical and democratic state bureaucracy, if the parties are not democratic that state structure will finally yield on this point and be administered by one or more groups not popularly elected. Put another way: at the national level the workings of the bureaucracy are beside the point if politics is settled undemocratically, because the bureaucracy will answer to whatever authority is legally competent.¹⁷⁵

In Argentina since 1983 we have had governments that were elected and that, from the start of their terms, increased or reduced citizen participation in decisions. In general terms, though, popular participation in government decisions is slight or practically nil, with the exception of the biennial national elections. This has been addressed under the concept of a "crisis of democracy," on the argument that collective discontent with democratic governments is a result of that crisis. The people are confined to choosing among slates of candidates who, once elected, offer no guarantee of carrying out their program and cannot be compelled to do so.¹⁷⁶ On this view, constitutional popular sovereignty has not yet found the legal

¹⁷⁴ C. Huneeus, *Elecciones no-competitivas en las dictaduras burocrático-autoritarias en América Latina*, 13 REIS 101 (1981).

¹⁷⁵ K. L. Remmer & G. W. Merckx, *Bureaucratic-Authoritarianism Revisited*, 17 LATIN AM. RSCH. REV. 3 (1982).

¹⁷⁶ P. Sagel, *Una conversación entre iguales para la radicalización de la democracia: una revisión del trabajo de Roberto Gargarella*, REPÚBLICA Y DERECHO (2022).

mechanisms for its implementation, and the rules in force limit the exercise of the constitutional text still further.¹⁷⁷ For Roberto Gargarella, the problem lies in the Constitution's "engine room," his nickname for its organic part.¹⁷⁸

The republic of presidents and authoritarianism

Beyond what it establishes about parties, electoral law also contains rules that give elections their shape, set deadlines and procedures, and interlock with the most fundamental questions of national organization as regards the choice of authorities and, through them, of public policy.¹⁷⁹ As noted, one feature of the disconnection between Argentine parties and political leaders is that leaders, once elected, are under no legal obligation to answer to their party structure. Given the pronounced presidentialism, the absence of party controls makes the Argentine electorate's choice of an occupant for the executive an act of enormous influence over national administration. Once the president is elected, the population has no general controls over the government's actions, and the parties in turn have no capacity to control the members who hold office. The phenomenon repeats itself, in broad terms, across the other Latin American democracies.¹⁸⁰ Republics formed in the nineteenth century answer to dated schemes of political representation, from a time without the rapid connections that technology now affords for learning what people want.¹⁸¹

¹⁷⁷ R. Gargarella, *Constitución y Democracia: Entre la desconfianza y la disonancia democrática*, in CONSTITUCIÓN Y DEMOCRACIA: ENTRE LA DESCONFIANZA Y LA DISONANCIA DEMOCRÁTICA 11 (Sello Editorial Universidad de Caldas 2023).

¹⁷⁸ R. Gargarella, *El constitucionalismo contemporáneo II. La sala de máquinas de la Constitución*, in LA SALA DE MÁQUINAS DE LA CONSTITUCIÓN 309 (Katz Editores 2014).

¹⁷⁹ K. Milita, *Election Laws and Agenda Setting: How Election Law Restrictiveness Shapes the Complexity of State Ballot Measures*, 15 STATE POL. & POL'Y Q. 119 (2015).

¹⁸⁰ M. Serrafero, *Presidencialismo y parlamentarismo en América Latina: un debate abierto*, 60 REVISTA MEXICANA DE SOCIOLOGÍA 165 (1998).

The president's dominion over his own party is as old in Buenos Aires as Juan Manuel de Rosas's control (he acted as a de facto pre-constitutional president by controlling commerce and foreign relations)¹⁸² over the Federal Party, an institution built to maintain provincial autonomy yet commanded authoritatively from the local political center.¹⁸³ The condition persisted. Julio Argentino Roca, of the National Autonomist Party, governed from Buenos Aires with a generational renewal of the dominant local groups but with the same authoritarian character,¹⁸⁴ to the point of reimplanting features of slavery in Argentine society at the end of the nineteenth century.¹⁸⁵ ¹⁸⁶ Removing a person from an indigenous group and taking that person to Buenos Aires could not constitute citizenship; it was an undemocratic practice for putting the other at the service of a stipulated social order.¹⁸⁷

The Sáenz Peña Act, which ended the conservative model of government until that tendency returned with the coup of 1930, was enacted by the government of the president of the same name in 1912, though with decisive influence from political actors outside the government who pushed the

¹⁸¹ N. Kersting, *The Future of Electronic Democracy*, in ELECTRONIC DEMOCRACY 11 (M. Stein N. Kersting & J. Trent ed. Verlag Barbara Budrich 2012).

¹⁸² E. M. Barba, *Cómo llegó al poder don Juan Manuel de Rosas*, 32 REVISTA DE HISTORIA DE AMÉRICA 83 (1951).

¹⁸³ Iain A. D. Stewart, *Living with Dictator Rosas: Argentina Through Scottish Eyes*, 29 J. LATIN AM. STUD. 23 (1997).

¹⁸⁴ L. F. Anderson, *Of Wild and Cultivated Politics: Conflict and Democracy in Argentina*, 16 INT'L J. POL. CULTURE SOC'Y 99 (2002).

¹⁸⁵ A. Hasbrouck, *The Conquest of the Desert*, 15 HISP. AM. HIST. REV. 195 (1935).

¹⁸⁶ J. E. Hodge, *Julio Roca and Carlos Pellegrini: An Expedient Partnership*, 32 AMERICAS 327 (1976).

¹⁸⁷ D. I. Lenton, *De centauros a protegidos: la construcción del sujeto de la política indigenista argentina desde los debates parlamentarios (1880–1970)*, 4 CORPUS (2014).

agenda forward.¹⁸⁸ The fraudulently elected governments of 1932 to 1943 then set the image, the style and the form of Argentine electoral politics.¹⁸⁹

The dictatorships that followed damaged the democratic possibilities of Argentine society: they rolled back citizen participation, limited the capacity for expression and suppressed political differences. After the two elections of 1973, it was not until 1983 that the people could again determine who the constitutional president would be. The new actors in Argentine party life would early on define a constitutional reform that marks the party character of the republic to this day, in an attempt—partly successful—to alter the authoritarian culture of dictatorships without parties or controls.

The constitutional reform of 1994 and elections

The reformed Constitution of 1994 set out to limit presidential power. One example of the failure to attenuate it, however, is the regulation of necessity-and-urgency decrees, which before 1994 were extraconstitutional.¹⁹⁰

After the reform the president can legislate as a matter of routine, and Congress, by its own silence, can validate any kind of decree-law. The result was to give constitutional standing to an emergency legal instrument that in practice has been used at will, and whose historical origin lay in the dictatorships that governed with Congress shut down. The constitutional convention, that is, allowed the executive to bypass Congress through “acts with the force of law” (a decree is a regulatory administrative act), which the dictatorships and the scholarship alike called decree-laws. Because Argentina has a unified system of substantive law at the national level, this

¹⁸⁸ R. Forte, *La transición al liberalismo y el sistema electoral en Argentina: de la doctrina de Juan Bautista Alberdi a la reforma Sáenz Peña*, 15 ESTUDIOS SOCIOLÓGICOS 371 (1997).

¹⁸⁹ C. P. IÑIGUEZ, *ALVEARISMO Y JUSTISMO: LA FRACTURA POLÍTICA EN LOS AÑOS '30* (Prometeo Editorial 2021).

¹⁹⁰ G. L. Negretto, *Negociando los poderes del presidente: reforma y cambio constitucional en la Argentina*, 41 DESARROLLO ECONÓMICO 411 (2001).

technicality lets any president amend, without consultation and with binding force, any substantive statute: civil, administrative, financial, customs, commercial, corporate, environmental, and so on, subject to certain constitutional limits (tax, criminal, electoral and party legislation).¹⁹¹

The criterion by which the constitutional convention gave the Constitution its shape in matters of citizen control and of the branches of government was a deliberation among delegates, and the result is the current national organic structure. It continued to place the vote as the preferred instrument for expressing the popular will. The vote, that is, is practically the citizen's only direct instrument for influencing state affairs, since the legislature offers few tools of participation and the judiciary is expensive, difficult and closed to general participation without counsel.

Among the changes made in 1994 were the elevation of human rights to constitutional rank, the grant of local voting rights to the citizens of the City of Buenos Aires, and the shortening of the presidential term from six years to four.¹⁹² The inclusion of the environment and of consumer rights in the dogmatic part, moreover, placed Argentina at the forefront of third-generation constitutionalism, of collective or diffuse rights in their standing to sue.¹⁹³ Another important democratic item was the direct vote, which abolished the electoral college that had given some voters more quantitative weight than others on the basis of where they lived, a federal criterion. The claim to the Malvinas was also included, and judicial service was limited to the age of seventy-five (a limit not observed until recently, partly because of *Fayt* in 1999, in which a Supreme Court justice obtained a declaration that the 1994 Constitution was void in the retirement provision that affected him).¹⁹⁴

¹⁹¹ G. Ducatenzeiler & P. Oxhorn, *Democracia, autoritarismo y el problema de la gobernabilidad en América Latina*, 34 DESARROLLO ECONÓMICO 31 (1994).

¹⁹² A. M. Garro, *Reforma Constitucional en América Latina. La propuesta argentina*, 27 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 127 (1989).

¹⁹³ H. A. Mairal, *Argentina*, 622 ANNALS AM. ACAD. POL. SOC. SCI. 54 (2009).

Of the elections held since that reform, it is worth noting that, in broad terms, the transparency of the balloting has not been questioned, and no candidate has challenged the legality of national results. The pattern has had exceptions at the municipal and provincial levels, where transparency has nonetheless also prevailed. It is possible that the constitutional reform, among other measures, by generating a degree of control over the judiciary through the Council of the Judiciary, instituted greater citizen control over electoral judges so that they would foster the transparency and legitimacy of elections.¹⁹⁵ ¹⁹⁶ The abolition of compulsory military service also helped reduce the intervention of military agents in national civilian life. The election of the members of the Council of the Judiciary, however, remains in dispute; its composition and method of selection are a recurring contest of interests and of the need for agreements that the constitutional text did not resolve.¹⁹⁷

The national electoral statutes: Law 140 and the Sáenz Peña system

Before the national state took its current shape, the first elected president was Bernardino Rivadavia, on February 27, 1826. He was a president of little representativeness, supported not by the United Provinces in general but principally by Buenos Aires, at a time of fragile national unity.¹⁹⁸ Rivadavia's resignation in 1827 would later demonstrate

¹⁹⁴ I. Gomez, *Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead*, 31 U. MIAMI INTER-AM. L. REV. 93 (2000).

¹⁹⁵ Á. Herrero, *Poder Judicial, transparencia y participación ciudadana: reformas recientes en Argentina*, 8 IBEROAMERICANA 175 (2008).

¹⁹⁶ G. Helmke, *Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s*, 35 COMP. POL. 213 (2003).

¹⁹⁷ R. B. Chavez, *The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System*, 36 J. LATIN AM. STUD. 451 (2004).

¹⁹⁸ G. J. Bidart Campos, *El proceso político-constitucional de la República Argentina desde 1810 a la actualidad*, 8 AYER 163 (1992).

the scant legitimacy and weak popular support of his government.¹⁹⁹ After an attempt at unitarian constitutionalism, a civil war broke out that would last until the battles of Caseros and Pavón.²⁰⁰ There would be no other president of a united Argentina until 1862, when Bartolomé Mitre formally took command on October 12 of that year.²⁰¹

The first national electoral regime under the 1853 Constitution was Law 140, passed by the Congress of Paraná on September 16, 1857.²⁰² Given the weakness of the federal government at that time, each province defined its own system of voting. The general criterion, however, was the spoken or non-secret vote, and the only voters were adult males tied to the economic elites, a condition linked to the ownership of real property. Lists were closed, with no possibility of splitting a ticket, and since there was no space for minorities the winning parties tended to control the state without opposition. Publicity about who voted for whom, in turn, produced pressure on voters and intimidation of them. Polling places were therefore tightly controlled, and who would win was frequently suspected before the election was held, the presidential election of 1868 excepted.²⁰³

Popular participation under Law 140 ran to around 1 percent of the population; today participation runs to around 60 percent, since minors and non-attenders are excluded. That nineteenth-century regime was not widely accepted, and the provinces retained their autonomy in electoral matters through the century.²⁰⁴

¹⁹⁹ J. C. Chiaramonte, *La cuestión regional en el proceso de gestación del estado nacional argentino: algunos problemas de interpretación*, in *LA UNIDAD NACIONAL EN AMÉRICA LATINA: DEL REGIONALISMO A LA NACIONALIDAD* 51 (M. Palacios ed. 1983).

²⁰⁰ J. R. Scobie, *The Aftermath of Pavón*, 35 *HISP. AM. HIST. REV.* 153 (1955).

²⁰¹ A. R. Lettieri, *¿Qué hacer con la victoria? La dirigencia porteña frente al desafío de organización nacional (1861–1862)*, 43 *DESARROLLO ECONÓMICO* 469 (2003).

²⁰² Ley No. 140, *Régimen electoral* [Electoral Regime] (1857) (Arg.).

²⁰³ F. J. McLynn, *The Argentine Presidential Election of 1868*, 11 *J. LATIN AM. STUD.* 303 (1979).

The so-called Sáenz Peña Act (formally Law 8871 on National Elections, published in the Official Gazette on March 26, 1912) established the right to a secret and compulsory vote for male citizens, native and naturalized, over the age of eighteen.²⁰⁵ Women's suffrage was not prohibited, but by custom it was not practiced, and the electoral roll did not include women. Members of the military and the police were likewise off the roll.²⁰⁶ The Sáenz Peña reform put an end to the old conservative *caudillo* system in which whoever could impose himself by police or economic force prevailed. The "dark rooms" appeared, where citizens could choose their authorities without direct pressure, because the vote had become secret. From the dictatorship of 1930 onward, the reform was suspended and the old antidemocratic practices returned, with electoral fraud the salient fact.²⁰⁷ Between 1930 and 1973 the bulk of Argentina's twentieth-century electoral legislation took shape, and it exerts its influence still.

Law 19,277 of October 1, 1971, signed by a dictator as a decree, transformed the electoral chamber of the Federal Administrative Court of Appeals of the Federal Capital into the National Electoral Chamber, composed of a single panel.²⁰⁸ Law 19,945, the National Electoral Code, is the statute that codifies national elections on their procedural side.²⁰⁹

As for representation in the Chamber of Deputies, a *de facto* rule remains in force, subsequently legitimated by Congress: Law 22,847, a

²⁰⁴ D. Cantón, *El Parlamento Argentino en Épocas de Cambio: 1889, 1916 y 1946*, 4 DESARROLLO ECONÓMICO 21 (1964).

²⁰⁵ Ley No. 8.871, *de Elecciones Nacionales* [National Elections Act (Sáenz Peña Act)] (1912) (Arg.).

²⁰⁶ D. Rock, *Machine Politics in Buenos Aires and the Argentine Radical Party, 1912–1930*, 4 J. LATIN AM. STUD. 233 (1972).

²⁰⁷ A. Hasbrouck, *The Argentine Revolution of 1930*, 15 HISP. AM. HIST. REV. 195 (1938).

²⁰⁸ Ley No. 19.277, *Modificatoria de la Ley N° 19.108* [Amendment to Law No. 19.108] (1971) (Arg.).

²⁰⁹ Ley No. 19.945, *Código Electoral Nacional* [National Electoral Code] (1972) (Arg.).

decree issued by the dictatorship.²¹⁰ That rule called the national elections of 1983 and, at the same time, fixed how many members of the Chamber correspond to each province on the basis of the 1980 census. As of 2024, more than forty years later, it remains in force and determines the composition of Congress, with proportions favoring the less populous provinces at the expense of the more populous ones, Buenos Aires above all. The rule also assigns each province a minimum of five deputies.²¹¹

The composition of the Senate is established constitutionally and was altered neither by the de facto governments nor by the elected ones (Article 54).

The National Electoral Chamber

The National Electoral Chamber is Argentina's highest electoral body below the Supreme Court, with jurisdiction over national elections, and it is therefore also the body responsible for evaluating and announcing electoral results. The Chamber describes its own history as follows:

In the Argentine Republic, cognizance of electoral matters has been entrusted to the national judiciary. Before the creation of the National Electoral Chamber in 1962, Decree 11,976/45 was issued under the de facto government, approving the "Organic Statute of Political Parties" and providing for the creation of a "Federal Electoral Court." That Statute was repealed, however, and the Federal Electoral Court—whose members had resigned en masse two days earlier—was dissolved. In 1962, Decree 7,163/62 created the National Electoral Chamber. That rule placed particular emphasis on the "advisability that a specialized jurisdiction be charged with resolving the questions that arise from the application of the electoral and party statutes." In this way, and still with some differences from the current regime, the National Electoral Chamber came into being. At that time the Tribunal was composed of five judges and an attorney

²¹⁰ Ley No. 22.847, *Número de Diputados Nacionales a Elegir* [Electoral Convocation Act] (1983) (Arg.).

²¹¹ E. Cabrera, *La cuestión de la proporcionalidad y las elecciones legislativas en la República Argentina*, 54 REVISTA MEXICANA DE SOCIOLOGÍA 153 (1992).

general, and its presidency was permanent. The following year, Decree-Law 6,407/63 provided that the National Electoral Judiciary “form part of the national judiciary, as a jurisdiction specialized in legal-political and electoral matters.” It was likewise established that the National Electoral Chamber would act as the “appellate tribunal in respect of the national electoral judges.” The creation of the electoral jurisdiction was subsequently ratified by Law 16,478, which provided that the decrees issued with the force of law by the de facto government between March 29, 1962 and October 12, 1963 remain in force, and, fundamentally, by the enactment of Law 16,652. That 1964 statute provided for the intervention of the National Electoral Judiciary in everything relating to the organization, recognition, functioning and expiry of political parties, as well as in all contentious questions arising from the application of that statute. It should be recalled that, by virtue of the coup d’état of June 28, 1966, the dissolution of the political parties was decreed. Months later, Law 17,014 legally abolished the National Electoral Chamber. Its magistrates went on to serve as judges of the National Chamber of Appeals in Peace Matters and of the National Chamber of Appeals in Economic Criminal Matters. The electoral secretariats were renamed “Secretariats of the Registries of Enrollees,” and the then National Registry of Enrollees, along with the Registry of Citizenship Papers, was placed under National Federal Criminal and Correctional Trial Court No. 1 of the Federal Capital. In 1971, Law 19,108 was enacted, creating an “Electoral Panel” within the National Federal and Administrative Chamber of Appeals of the Federal Capital. Subsequently, by virtue of Law 19,277, and before its members had been appointed, the “Electoral Panel” was transformed into the National Electoral Chamber, with its current structure of three judges forming a single panel.

In its compendium of electoral rules, the Chamber lists thirty statutes that it considers most relevant to an understanding of the national electoral system.²¹²

²¹² COMPENDIO ELECTORAL, CÁMARA NACIONAL ELECTORAL DE LA REPÚBLICA ARGENTINA (2024).

Conclusions

Political and legal factors have been the main lens for analyzing Argentine elections here. We find that Argentina was not initially conceived by its first jurists as a democratic state organization but as an aristocratic society, in which a small share of the population concentrated decision-making. That model is reflected in the Constitution of 1853, which lays out an organic scheme concentrating state powers in one person, the national president. The executive can determine who the ministers are, who heads the Central Bank, who directs the public enterprises, and dozens of other decentralized bodies that shape the public and private life of the country.

There are grey areas in the dictatorships, during which the society perceived a president as such even though he had won no election. This confusion arose in the twentieth century, probably because before the Sáenz Peña Act there had been no mass popular elections or party organization either. After 1916 elections were massive, and the country lived through periods of fraud, of limited democracy, and of dictatorships in which civil society at large had no capacity to intervene in the state.

The analysis carried out here lacks what a parallel economic and financial analysis, and one of international politics, could contribute. Those factors have altered and will alter the Argentine social configuration, and much of the social change experienced from the nineteenth century to today is explained more by the technological revolution and by the development of the global financial system than by the Argentine electoral system.²¹³ Social configuration alters normative configuration: legal rules are a delayed and extended reflection of accumulated social orders, which overwrite, complement and cancel one another. State bureaucracies, in turn, are the residue of political projects laid one atop another, so that at times a bureaucracy reflects the scheme of a demolished project, staffed by people who no longer perform the task they were hired for.²¹⁴

²¹³ J. Viner, *Political Aspects of International Finance*, 1 J. BUS. U. CHI. 141 (1928).

²¹⁴ O. Oszlak, *Notas críticas para una teoría de la burocracia estatal*, 19 DESARROLLO ECONÓMICO 211 (1979).

Elections are merely one instrument of democratic systems, by which citizens choose political projects; within the present framework they do not replace the bureaucracy, the parties, firms, workers or decision-makers. Under Argentina's contemporary legal configuration, the executive carries remnants of the colonial era. Alberdi proposed granting powers to the executive, and regulating it permissively, so that it would serve the law in the social and political context of the nineteenth century. His doctrine was limited, however, in matters of oversight, of checks and balances, and of citizen participation.²¹⁵ The electoral difference, the factor that distinguishes an election in which the people confer plebiscitary legitimacy on a state authority, matters for political development, but it remains slight as a means of democratic control over that authority.

Rosas is understood as the counterface of viceregal government. Alberdi's *Bases*, Sarmiento's *Facundo* and the Constitution of 1853 are understood as the counterface of Rosas's government. Rosas was a local successor to his forebears, who were colonial leaders under the Spanish crown. Mitre was, in his own way, a successor to Rosas: the first president of national unification, governing from Buenos Aires. In none of these governments did elections play a fundamental role. And yet the state we live in was being built. The conservative era becomes intelligible only if we first analyze what had happened in terms of national organization.

The twentieth century repeats the nineteenth in this respect: a series of continuities explains the course of events. Just as there were elections in 1916, there could fail to be any in 1930, because civil society was not accustomed to them and there were no strong political parties to sustain a role of control over public affairs. Argentine society in the twentieth century was still little developed in institutional terms and in democratic governance, with weak institutions, strong *caudillos*, and a marked propensity toward the violation of fundamental rights and toward corruption.²¹⁶

²¹⁵ G. L. Negretto, *Diseño constitucional y separación de poderes en América Latina*, 65 REVISTA MEXICANA DE SOCIOLOGÍA 41 (2003).

²¹⁶ A. Ciria, *La vida política en Buenos Aires (1930–1980): Notas para su análisis*, 6 NS, NORTHSOUTH 37 (1981).

The Argentine political and economic framework has been said to resemble corporatism.²¹⁷ Under corporatism, decisions are made by the leaders of corporate groups who distribute competences among themselves in private negotiations, to the detriment of the organization of citizens at large. In the private sphere the possible corporations are principally business associations and unions; there are also corporations of trades, such as the professional associations. This form of organization yields the influence exercised by labor federations and business chambers. In a corporatist system these groups may shape public policy even more than the political parties do. Argentina's corporatist status goes back to the colonial era, if one analyzes it closely and defines corporate government as government decisively influenced by such decision-making groups, groups that may operate on criteria that are not necessarily transparent or republican, such as personal ties or private economic interests.

Finally, since 1983 Argentina has been in a process of integration and democratization.²¹⁸ Citizens are increasingly able to claim and to exercise their rights. The era of the digitalization of social life brings difficulties, but also tools for confronting regionally a series of challenges that could damage collective decision-making. Some questions remain open. Is Argentina today a successful case of democratic coexistence? How significant is the critical notion of democracy? What social or technical requirements must be met for law to be democracy's optimal method of realization? And within that method, does electoral law play the prominent role its own conceptual structure proposes for it? We would surely run into questions of representativeness and organic structure, and into inquiries requiring more specific descriptions of how democracy and elections work, which would allow these questions to be answered with greater precision.

²¹⁷ J. V. Sola, *Pluralismo y Corporativismo. El freno a la Economía dinámica*, REAL ACADEMIA EUROPEA DE DOCTORES (2018).

²¹⁸ E. Reficco, *Política exterior y cultura política: el caso de la democracia argentina (1983–1995)*, 32 REVISTA CIDOB D'AFERS INTERNACIONALS 65 (1996).

WHAT IS PARLIAMENTARY SPEECH?

Parliamentary speech is a kind of political speech that presents itself in the records, videos and news reports citizens see, in language that is sometimes specialized and sometimes colloquial, and that tends to approach the problems taken up in everyday politics.²¹⁹ One of the first things to note is the difference between the legislative language proper (the language of norms, which tends to be technical and specific)²²⁰ and the language of national legislators, which is closer to ordinary speech. It is worth asking, too, whether parliamentary speech is a genre in its own right, as medical, historiographical or mathematical discourse may be. At first sight, and we shall see whether these pages confirm it, one can hear a jargon particular to a chamber of deputies, but not a complete thematic discourse. That may be because legislators have no common formation, coming as they do from different conceptual or professional educations. No homogeneous discourse can be made out in the speeches before a vote; there are certain procedural words and terms that recur, but they do not unify anything semantically. This duality, between the normative and the colloquial, is what defines it.²²¹

In the debate over a statute, political speech—its specificity being a separate question—becomes charged with meaning and intention, as if a series of adjectives filled it or tinted it: institutional, legal, partisan, congressional, representational, provincial, municipal. Even when a

²¹⁹ F. Randour et al., *Twenty Years of Research on Political Discourse: A Systematic Review and Directions for Future Research*, 31 DISCOURSE & Soc'y 428 (2020).

²²⁰ One may take as examples the Civil and Commercial Code of the Nation or the General Environment Act, two national statutes with a particular language that serve as a guide for their respective areas of law.

²²¹ J. Wilson & K. Stapleton, *Discourse in the Shadows: Discursive Construction and the Northern Ireland Assembly*, 23 DISCOURSE & Soc'y 69 (2012).

legislator repeats what he said in private, what is said does not mean precisely the same thing, since the context alters it: he speaks in the name of the state, as one of the voices authorized to direct legislative policy. Interruptions, likewise, perform a political role of public dissent.²²² Statutes are not only norms a judge applies to a particular case; they are also a guide for Argentina's executives, which ought to promote policies adequate to what those national statutes seek.²²³

One notable aspect of debate on the floor of Congress is its argumentative polarization, divided among the blocs to which each legislator belongs. Speeches are generally qualified, limited or shaped in favor of the group's position, set out by a political leadership, without which the discourse would probably be more various. Speaking in defense of a bill from within a party framework, though that is not strictly what the National Constitution provides for, produces the partisanization of speech.²²⁴ Whether it is desirable for a legislator's reasoning to answer to his own argumentative capacity and his own way of representing his province, or whether he should seek a line consistent with the orientation of the party he belongs to (or of the alliance on whose ticket he was elected), is a fair question. The rules appear to endorse the former, but the debate remains open. The oxymoron of the "politicization" of political speech belongs, tangentially, to this discussion.²²⁵

Warren Bennis, the professor and organizational consultant, wrote in *Managing People Is Like Herding Cats* (1997)²²⁶ about the formation of

²²² T. Carbó, *Towards an Interpretation of Interruptions in Mexican Parliamentary Discourse (1920–60)*, 3 DISCOURSE & SOC'Y 25 (1992).

²²³ The new virtuality that 2020 brought to legislative work deserves separate treatment, since one could also discuss how the "remote session" alters the semantics of congressional speech.

²²⁴ S. Harris, *Being Politically Impolite: Extending Politeness Theory to Adversarial Political Discourse*, 12 DISCOURSE & SOC'Y 451 (2001).

²²⁵ K. Palonen, *Four Times of Politics: Policy, Polity, Politicking, and Politicization*, 28 ALTERNATIVES: GLOBAL, LOCAL, POL. 171 (2003).

²²⁶ W. BENNIS, *MANAGING PEOPLE IS LIKE HERDING CATS: WARREN BENNIS ON LEADERSHIP* (Executive Excellence Publishing 1997).

leaders and the roles technique and vision play. Vision without technique is blinded; technique without vision leads nowhere. Applied to legislation, and to speech in Congress, which is a normative form of leadership, both elements would have to be combined to produce a satisfactory result and to open a path toward an answer for an active citizenry. It would do us no good to apply prefabricated ideological models to new problems without the specific knowledge that shows how to improve the particular case; nor could we expect results from techniques stripped of governing objectives. If we set out to protect our environment, for instance, we could not ignore what biologists and environmental scientists can tell us about the best way to do it. Neither could those biologists and scientists ignore how Congress works, what majorities are required, what the budgetary questions are, and what role local governments play in implementing environmental policy, since either element without the other would hardly lead where we wanted to go.

Speech thus becomes partly technical, without forgetting that it derives from a popular electoral mandate, which reduces its technicality, in a dynamic of contradictory tensions.²²⁷ In the courts, the language of Congress is habitually reproduced: lawyers study the statutes, lawyers teach the statutes, law faculties repeat the legal concepts, lawyers become judges and then apply what they learned in the law faculties.²²⁸ In judicial decisions we see the normative content, and when that content is hard to understand or technically ill-suited, the deficiency is transmitted to the parties to the proceedings, making it harder to resolve the problem the statute was—one supposes—meant to solve. Along that route, the language of Congress can find its way into a dispute about a mortgage, about the financial independence of an autarkic body, or about what a mandatory medical plan should cover. The impact of congressional speech, that is, reaches further than what follows from commentary on a

²²⁷ A. Spirling, *Democratization and Linguistic Complexity: The Effect of Franchise Extension on Parliamentary Discourse, 1832–1915*, 78 J. POL. 120 (2016).

²²⁸ M. A. R. Latorre, *El lenguaje claro como herramienta para la participación e inclusión social*, in *POR EL DERECHO COMPRENDER: LENGUAJE CLARO* 91 (B. P. Liévano ed. 2021).

session or from what legislators do.²²⁹ For that reason it would be worth giving it an adequate frame.

Statutes are generally the most enduring acts of government: we still use laws such as Law 48 of 1863, which organizes the national judiciary and is invoked practically every day in the courts to permit the federal extraordinary appeal.²³⁰ That is another measure of the significance of congressional speech.²³¹ Analyzing the parliamentary scene can show us in more detail how legislative debate affects citizens in general, and how changing the rules yields different results according to what is debated on the floor.

Two aspects can be distinguished here. First, the political effect debates have on society and on officials' careers. Second, the effect of debates on legislation and on the application of the amended law to the problems that lawyers and parties bring before the courts. In the first case, when national officials speak their words have no legal effect and change no rule directly; yet on many occasions such addresses have produced political results, and with more resonance in the media than agreements or the enactment of statutes little remembered or used.²³² In these contexts congressional speech becomes technical and takes on a more immediate social significance, since an executive announcement frequently has faster impact than a legislative one, whose effects are generally long-term.

²²⁹ M. A. Manzo, *La influencia de la educación jurídica en la formación valorativa de los abogados*, 6 ACADEMIA, REVISTA SOBRE ENSEÑANZA DEL DERECHO 149 (2008).

²³⁰ Ley No. 48, *Jurisdicción y Competencia de los Tribunales Nacionales* [Jurisdiction and Competence of the National Courts] (1863) (Arg.).

²³¹ The role of advisers should also be stressed: they form opinion within the chambers and assist with the technical questions of legislation.

²³² By way of example, what is particularly remembered from the case of Julio Cobos, former Vice President of the Nation, is neither his vote nor the bill but the phrase "My vote is not affirmative" (17 July 2008).

In the dialogue *De Legibus* (52 BCE), Marcus Tullius Cicero wrote his maxim *Ollis salus populi suprema lex esto*,²³³ which may be rendered in contemporary terms as: the highest-ranking law must be the one that secures the health and prosperity of the people.^{234 235} The phrase has been used by different political currents in the twentieth century and given theoretical form in rules ranging from the protection of fundamental rights to the provision of roads, sanitation and security. The central problem lies in the divergent interpretations the phrase receives. Where do we place the emphasis in protecting and guaranteeing general well-being? How is the concept to be given normative form? To this day there appear to be no agreed answers, since for each people, as it changes, the answers and the premises for securing what Cicero preferred change as well. In a country that rapidly shifts the focus of its economy, for example, should the regulatory frameworks be modified to favor novel proposals, or should protection first be guaranteed to the traditional producers who have given their work for generations? And is that a valid dichotomy on which to build a national normative system?

One recurring question in the human rights debates of the twenty-first century is the economic one about the state's capacity to meet the obligations it has imposed on itself through parliamentary speech given normative form: the constitutionalization of human rights treaties in the 1994 reform, for instance.²³⁶ A political necessity led to a parliamentary debate, in that case a constituent one, which led to the drafting of what is now Article 75(22) and to its subsequent application. Congress has plainly not yet found an adequate way to guarantee a minimum standard of operability for human rights in their social or positive-action facet, as distinct from their facet of abstention, in part because their effective

²³³ M. T. CICERÓN, *DE LAS LEYES* (Universidad Nacional Autónoma de México 2016).

²³⁴ B. Straumann, *Constitutional Thought in the Late Roman Republic*, 32 HIST. POL. THOUGHT 280 (2011).

²³⁵ C. W. Keyes, *Original Elements in Cicero's Ideal Constitution*, 42 AM. J. PHILOLOGY 309 (1921).

²³⁶ M. G. Kaladharan Nayar, *Human Rights and Economic Development: The Legal Foundations*, 2 UNIVERSAL HUM. RIGHTS 55 (1980).

fulfillment is also delivered and guaranteed by the administrations and the judiciaries. Congress is nonetheless also capable of being the voice that names the failures to comply with the rules the legislature itself has imposed.

By way of example, Article 11 of the International Covenant on Economic, Social and Cultural Rights, which has constitutional rank in Argentina, guarantees the right to housing. Before the courts, however, this is enforceable only through a “housing *amparo*” that, if the litigation succeeds, will secure subsidies or rent payments for a period. The judiciary of the City of Buenos Aires has denied this right to an unemployed man for failing to demonstrate incapacity for work, even against a background of stable unemployment as a macroeconomic variable.^{237 238} In legal practice, that is, parliamentary speech, laden with utopia, sometimes comes apart and meets everyday difficulties, which is foreseeable, and improvable. The courts often have to limit themselves in their protection of rights on the basis of the treasury’s economic constraints, which opens a gap between legislative speech and judicial speech.

In academic terms, law school curricula seldom include parliamentary speech except as a way of reviewing a statute in its less clear fragments, which reflects the hierarchy of sources for practical study: statute, custom, judicial decisions, and so on. This reveals the place the academy has assigned to parliamentary speech that did not make it into the legal text: low priority, in contrast with scholarship, what jurists say, which is generally cited as a source complementary to the statute. That may not correspond to the richness that reading the stenographic records brings to the study of law. Returning to the last constitutional reform: we can read

²³⁷ A. Roncaglia, *Tasa de desempleo y tasas de empleo: ¿categorías estadísticas o construcciones teóricas?*, 65 INVESTIGACIÓN ECONÓMICA 45 (2006).

²³⁸ REDACCIÓN IJUDICIAL, PARA HOMBRE EN CONDICIONES DE TRABAJAR NO PROSPERA AMPARO HABITACIONAL (Consejo de la Magistratura de la Ciudad Autónoma de Buenos Aires 2014).

the reasons for including the Chief of Cabinet (Article 100)²³⁹ or the right to a healthy environment (Article 41), how they were debated and what positions were in play. This also gives us a fresh view of what another version of the reform might have been, had the popular vote gone otherwise, and it illustrates how much certain speakers matter in legislative practice.

Audiovisual media today help make parliamentary speech known, and in consequence give it greater importance for the society, since the debate preceding the enactment of a statute becomes visible. That was formerly very difficult, since one had to obtain the stenographic records on paper.²⁴⁰ This new way of learning and of reporting what happens on the floor underscores the importance of the speeches, which are broadcast live and for which the number of viewers can be measured.

By way of conclusion, parliamentary speeches can be categorized generically as a subgenre within political discourse, one in which institutional responsibility predominates, along with an ingredient of public or republican representation that alters the tone in which the word is addressed, since the speaker frames his message within the rules of the collegial body to which he belongs.

²³⁹ It was included in art. 2 of Ley No. 24.309 (Arg.).

²⁴⁰ R. Schroeder, *Media Systems, Digital Media and Politics*, in SOCIAL THEORY AFTER THE INTERNET: MEDIA, TECHNOLOGY, AND GLOBALIZATION 28 (UCL Press 2018).

BILLS SUBMITTED BY PRIVATE CITIZENS TO THE NATIONAL CONGRESS

Introduction

Do citizens take an active part in the legislative side of the state? Are we fully represented by legislators? And even if we are represented, does that deprive us of an individual right to act politically, within the Argentine legal framework, on the legislative side?²⁴¹

Article 22 of the National Constitution provides:

The people neither deliberate nor govern except through their representatives and the authorities created by this Constitution. Any armed force or assembly of persons that arrogates to itself the rights of the people and petitions in their name commits the crime of sedition.²⁴²

Like any legal text, however, it must be read in the context that qualifies it, and the Constitution also gives us Article 14:

All the inhabitants of the Nation enjoy the following rights in accordance with the laws that regulate their exercise, namely: to work and to engage in any lawful industry; to navigate and to trade; to petition the authorities; to enter, remain in, travel through and leave Argentine territory; to publish their ideas in the press without prior censorship; to use and dispose of their property; to associate for useful purposes; to profess their faith freely; to teach and to learn.²⁴³

Any inhabitant of the Nation, then, may petition the authorities. That includes all three branches of the state: executive, legislative and judicial.

²⁴¹ R. H. Salisbury, *Research on Political Participation*, 19 AM. J. POL. SCI. 323 (1975).

²⁴² CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), as published by Ley No. 24.430 (1995).

²⁴³ Id.

What concerns us here is how the inhabitants of the Nation may initiate proposals (may petition) before the National Congress, what the reach of that practice is, and what has historically become of these requests. For brevity, the analysis is confined to the national level.

A preliminary state of the art

An initiative brought before Congress by a private individual resembles a petition in the legal sense, in that it is not binding: the citizen generally lacks the constitutionally conferred power to submit bills to committees. In legal scholarship, analysis of the “right to petition” is focused on several distinct aspects.

A. The right to petition judicial authorities. Those who produce legal scholarship, lawyers or holders of law degrees generally, tend to concentrate on the judicial protection of rights, which is the method of their ordinary work and therefore what most readily draws their attention. This aspect, in its connection with a jurisdiction exercised according to law (together termed “judicial protection”), has been recognized as elementary to the rule of law by the judges of the Inter-American Court of Human Rights and by the American Convention on Human Rights.^{244 245}

B. The right to petition in public spaces. In Argentina, blocking public roads in metropolitan and rural areas alike is an established political method of requesting or demanding something from the authorities, generally over matters of public order (security, justice, education, the economy), public services (electricity, water), or commercial companies regulated by the Nation (banks, agricultural firms, oil companies). These petitions may or may not be tied to political parties, unions or social movements.

²⁴⁴ D. Freedman & S. Rojas, *Artículo 25, Protección Judicial en E. M. Alonso Regueira (Coord), La Convención Americana de Derechos Humanos y su proyección en el Derecho Argentino* (pp. 446-462), FEYDE (2013).

²⁴⁵ Inter-Am. Ct. H.R., CUADERNILLO DE JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS No. 13: PROTECCIÓN JUDICIAL (2021).

C. The right to petition the executive authorities or the national, provincial or municipal public administration. This is the administrative aspect of petition, directed at the centralized or decentralized public administration. It bears directly on requests made by private individuals to Congress, since the procedure before the executive administration is equivalent to the act performed before the National Congress. At the national level, *Bongianino, Marcela Andrea v. UBA—Faculty of Law and Social Sciences—on amparo for administrative delay* established the following:

The public administration has a legal duty to rule expressly on petitions brought by private individuals. That duty follows plainly from Article 7(c) of National Administrative Procedure Act No. 19,549, which provides “that all petitions submitted must be decided,” since the right of petition guaranteed by Article 14 of the National Constitution is matched by the public administration’s obligation to resolve them.²⁴⁶

These categories are alike, and it is worth stressing that the proposal here is not to distinguish the initiative, as a legal act, from other legal acts a citizen performs before the Argentine national state: the petition (administrative) or the claim (judicial). It is to explore and define the legislative petition, or private legislative initiative.

What is a private legislative initiative?

Svetaz (2006) defines it this way: “An individual citizen may submit a bill to a legislative body. That bill will be referred to the competent committees as background material to be considered when a bill by a legislator on the same subject is taken up” (pp. 11–12).²⁴⁷

Whether the bills private individuals file at the Filing Office of the Chamber of Deputies can properly be called an “initiative” is open to

²⁴⁶ Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal. (1995) *Bongianino, Marcela Andrea c/ Universidad de Buenos Aires (Facultad de Derecho y Ciencias Sociales) s/ amparo por mora*.

²⁴⁷ Ley No. , *Programa de Valores Democráticos y Gerencia Política de la OEA* (2006) (Arg.).

debate. Svetaz says they can; the Chamber, however, treats these bills as submissions foreign to it and handles them accordingly. If they were not counted as initiatives, the applicable legal concepts would be “petition” or “request” addressed to the legislative authorities. The first criterion is the one used here, on the understanding that citizens hold a limited capacity for private legislative initiative in doctrinal terms.

It is common knowledge that citizens make requests in their own name to judicial bodies (claims, complaints) or to administrative ones (applications for subsidies, for pensions, for administrative mediation, for licenses). No academic legal training is needed to know that certain procedures may be brought before the state, and that some of them are judicial and others administrative.²⁴⁸ Before the legislature, though, this ordinary practice seems to evaporate; what was routine suddenly becomes unheard of. We find it harder, in general, to imagine that someone might file something with the National Congress, precisely because the practice is not there.²⁴⁹

Why private legislative initiative is unpopular in the National Congress

That is a confusing state of affairs, since Congress is the organ that ought to represent citizens most plurally (by its representative function and by the plurality of its composition), and that most directly—one supposes—takes up their demands and turns them into formal national law, to the point of being able to give those precepts constitutional standing. That private legislative initiative in Argentina is neither widespread nor widely known has social causes of several kinds.

1. Geographic. The National Congress is centralized in the Autonomous City of Buenos Aires and has no offices in the provinces, as the executive and the judiciary (the federal courts) do. This makes access

²⁴⁸ C. W. Stenberg, *Citizens and the Administrative State: From Participation to Power*, 32 PUB. ADMIN. REV. 190 (1972).

²⁴⁹ D. D. SCHMIDT, *CITIZEN LAWMAKERS* (Temple University Press 1989).

difficult for anyone who does not live near Buenos Aires or cannot reach it.

2. Cultural. Historically, through the twentieth century, the National Congress was not a place where popular demands were debated participatively, or where one petitioned or made suggestions openly. The principal causes were probably the military dictatorships that curtailed Congress or shut it down outright, opening a distance between citizens and their political leaders.²⁵⁰ This has been changing in the twenty-first century.

3. Organizational. Citizens' habits coincide with the ambition of professional politicians in one respect: both lean toward executive or judicial office as the place where decisions are made. Complaints to national legislators were thereby implicitly discouraged, since it seemed more effective to bring the same complaint to an executive or judicial office. The necessity-and-urgency decree confirms this: among the president's powers is that of enacting a statute subject to congressional review, with certain constitutional limits.

4. Leadership. Drawing up the candidate lists on the ballot is commonly regarded as a prerogative of the leaders of political parties who aspire to executive office. The result is that citizens go directly to where decisions are made in the first instance: to the political leader, or to advisers in executive posts.²⁵¹

5. Doctrinal and constitutional. Argentine legal scholarship, the academic writing of Argentine law teachers, has carried a certain bias toward judicial practice, since the function of teaching law and the function of practicing it (as an attorney or a judge) have historically coincided. Instruction in the rules that govern us in Argentina has thus been given by lawyers, with a view usually centered on judicial work, that

²⁵⁰ L. A. ROMERO & L. DE PRIVITELLIO, GRANDES DISCURSOS DE LA HISTORIA ARGENTINA (Aguilar 2000).

²⁵¹ N. Cherny et al., *¿Quién nombra a los legisladores? La conformación de las listas de candidatos para la Cámara de Diputados en Argentina*, 12 REVISTA SAAP 215 (2018).

being their practice and their source of income, and social, economic and biological explanations of law have been left aside.

6. Constitutional. A private initiative does not bind anyone to take it up in committee. That discourages private individuals from using it when concrete and rapid results are what they want.

These are some of the factors that keep private legislative initiative before Congress from being popular. The concentrated distribution of prerogatives that has marked Argentine political and legal culture remains, in some fashion, present in the current structure of the state. With that caveat entered, the private petition can nevertheless be made, and what follows takes up how Congress handles the possibility.

Similar terms

Legally, the Constitution offers two terms whose participatory intent resembles the private petition, both introduced in the 1994 constitutional reform. They should not be confused with it, however, since they serve a different function and are different things: the “popular initiative” (Article 39) and the “popular consultation” (Article 40).

A third concept bears comparison as well: the request for public information.

Popular initiative

The Constitution provides:

Article 39. Citizens have the right of initiative to submit bills in the Chamber of Deputies. Congress must give them express consideration within a term of twelve months. Congress, by the vote of an absolute majority of the full membership of each Chamber, shall enact implementing legislation, which may not require more than three percent of the national electoral roll and must provide within that figure for an adequate territorial distribution of the signatures supporting the initiative. Bills concerning constitutional reform, international treaties, taxation, the budget and criminal matters may not be the object of a popular initiative.

Implementing legislation was thus mandated, and it was enacted two years after the reform, in 1996: Law No. 24,747.²⁵² Subject to the exceptions noted (the same as those for necessity-and-urgency decrees, with treaties added), citizens may submit legislative initiatives.

Popular initiative differs from petition in that the initiative confers parliamentary standing on the proposal and the petition does not: a petition can acquire that standing only through the signature of a national legislator or by being taken up in committee.²⁵³

Popular consultation

The Constitution provides:

Article 40. Congress, at the initiative of the Chamber of Deputies, may submit a bill to popular consultation. The convening statute may not be vetoed. An affirmative vote on the bill by the people of the Nation shall convert it into law, and its promulgation shall be automatic. Congress or the President of the Nation, within their respective competences, may call a non-binding popular consultation. In that case the vote shall not be compulsory. Congress, by the vote of an absolute majority of the full membership of each Chamber, shall regulate the subject matter, the procedures and the timing of the popular consultation.

This is another mechanism of citizen participation, one that asks citizens for a yes or a no on a statute or a set of statutes. It may be binding or not. To this day it has not been used in the manner the 1994 Constitution establishes. It was implemented in 2001 by Law No. 25,432.²⁵⁴

²⁵² Ley No. 24.747, *Iniciativa Legislativa Popular* [Popular Legislative Initiative] (1996) (Arg.).

²⁵³ W. H. Brown, *The Popular Initiative as a Method of Legislation and Political Control*, 10 AM. J. SOCIO. 713 (1905).

²⁵⁴ Ley No. 25.432, *Consulta Popular Vinculante y No Vinculante* [Binding and Non-Binding Popular Consultation] (2001) (Arg.).

It has also been called a “plebiscite” or a “referendum.”²⁵⁵ ²⁵⁶ Popular consultation differs from petition in that citizens have no control over what the statute says.

Argentina has two precedents for popular consultation. The better remembered is the 1984 vote to settle the sovereignty dispute with Chile over the Beagle Channel, which was non-binding and in which voting was optional.²⁵⁷ The other historical precedent, though confined to a specific population, was the plebiscite of the Valle 16 de Octubre in 1902, which determined that the Welsh colonies of western Chubut belonged to Argentina, again with Chile²⁵⁸ as part of the process of drawing the political boundary between the two countries.²⁵⁹

Requests for public information

Requests for information are citizen participation of another kind: they propose nothing, but ask, administratively and ad hoc, for information that the administration of the legislative branch has not actively published.²⁶⁰ They fall under the right of access to public information, implemented by Law No. 27,275 of 2016.²⁶¹

²⁵⁵ G. Smith, *The Referendum and Political Change*, 10 GOV'T & OPPOSITION 294 (1975).

²⁵⁶ W. A. B. Coolidge, *The Early History of the Referendum*, 6 ENGLISH HIST. REV. 674 (1891).

²⁵⁷ J. L. Garrett, *The Beagle Channel Dispute: Confrontation and Negotiation in the Southern Cone*, 27 J. INTER-AM. STUD. & WORLD AFF. 81 (1985).

²⁵⁸ G. Lublin, *Conclusion*, in MEMOIR AND IDENTITY IN WELSH PATAGONIA: VOICES FROM A SETTLER COMMUNITY IN ARGENTINA 183 (University of Wales Press 2017).

²⁵⁹ A. E. Evans, *International Arbitration*, 61 AM. J. INT'L L. 1071 (1967).

²⁶⁰ J. R. L. R. Calderón, *Acceso a la información pública: una incógnita para especialistas en rendición de cuentas en las democracias*, 7 IBEROAMERICANA 183 (2007).

²⁶¹ Ley No. 27.275, *Derecho de acceso a la información pública* [Right of Access to Public Information] (2016) (Arg.).

The term *particular* in the rules of the two Chambers

In the standing rules of the Chamber of Deputies and the Senate,^{262 263} the term *particular* is generally used in a sense different from the one practice gives to private submissions through the Bulletin of Incoming Business. It refers to voting within sessions, when each article is debated or voted on *en particular*, separately, article by article. This procedural use, then, is not what the concept analyzed here refers to, and has nothing to do with submissions by private individuals.

The standing rules of the Chamber of Deputies

Put another way: the analytical index to the Chamber's rules glosses *particular* as "discussion article by article," which has nothing to do with private legislative initiative and everything to do with work on the floor. "Voting article by article" appears in several articles as well. "Initiative" does not appear in the index at all. The Chamber's rules, that is, make no explicit reference either to legislative initiative by private individuals or to private submissions in the Bulletin of Incoming Business (BAE).

Article 165 does refer to private business in the Bulletin:

The president shall then inform the Chamber, through the secretary, of any messages received from the executive. Other incoming business, further official communications, committee reports, petitions or private business, and bills submitted by deputies shall be reported to the Chamber by the president's referral of them to the BAE. The Bulletin shall include the list of everything received by the Secretariat up to 10 a.m. on the day before the session. It shall likewise include requests for leave submitted by deputies and the list of matters granted priority. Business received after that deadline shall be reported at the following session, unless otherwise decided.

²⁶² REGLAMENTO DE LA CÁMARA DE DIPUTADOS DE LA NACIÓN
[Standing Rules of the Chamber of Deputies] (2024) (Arg.).

²⁶³ REGLAMENTO DE LA CÁMARA DE SENADORES DE LA NACIÓN
[Standing Rules of the Senate] (2024) (Arg.).

The BAE shall be distributed to deputies and to the press in advance of each session.

Private legislative initiatives are one kind of private business among others: requests for impeachment, expressions of support or rejection, and so on. This is the only article in the Chamber's rules that refers to private business in these terms. Other articles nonetheless set out how the Chamber handles incoming business in the Bulletin generally; in the analytical index they appear under the headings "bulletin of incoming business" and "order of a session" (arts. 39, 50, 109, 165, 167 and 175).

The standing rules of the Senate

The Senate's rules similarly address incoming business in Article 187, which mentions private business in subsection (c).

How to submit a bill to the Chamber of Deputies as a private citizen

Bills, as documents to be filed, are usually drafted like any bill produced by a national legislator, with their normative part, their supporting reasons and their objectives, what they are being submitted for.

Private bills are sent by e-mail to the Filing Office of the Chamber of Deputies. They are accompanied by a cover letter addressed to the presidency of the Chamber, with the filer's personal details, contact information, and the bill drafted in statutory form.

Once the submission has been sent, the Chamber must reply with a file number by which the status of the filing can be tracked. The filing is published in the Chamber's Bulletin of Incoming Business under the heading "private parties" (subsection 10).²⁶⁴

The Chamber defines the Bulletin of Incoming Business as follows:

²⁶⁴ Parliamentary Secretariat, Chamber of Deputies of Argentina.

A weekly publication required by the rules, reporting the business that comes before the Chamber each day. It includes all business received by the Secretariat and the Filing Office before 10:00 a.m. on Tuesday (bills submitted by the executive, by deputies and by the Senate; requests for leave submitted by them; official communications; committee reports; petitions or private business; and motions for priority requested by legislators at earlier sessions).²⁶⁵

The Bulletin is divided into parliamentary terms corresponding to each year. Depending on its subject matter, a bill is referred to one committee or to several, exactly as with any bill submitted by a national legislator.

Not every private filing at the Chamber's Filing Office is a private legislative initiative. Private individuals may also file comments, documentation, clarifications, requests for impeachment, requests that public vacancies be filled, expressions of support for or opposition to other statutes, requests that a statute be drafted, and so on. Both natural and legal persons may file. A filing may carry the signature of one person or of several.

Private legislative initiatives, 2013–2022

The Chamber's website carries Bulletin data from 2005 through 2022. From it we can extract how many legislative initiatives were submitted by private individuals from that year through the year before this study was written. Excluded from the count are expressions by private individuals about bills, and requests that did not include a written proposal in the form of a bill.

The terms used in the Bulletin, and taken as the basis for this quantitative search, were:

1. *Remite proyecto de ley* (submits a bill).
2. *Remiten proyecto de ley* (submit a bill).

²⁶⁵ REGLAMENTO DE LA CÁMARA DE DIPUTADOS DE LA NACIÓN
[Standing Rules of the Chamber of Deputies] (2024) (Arg.).

3. *Eleva proyecto de ley* (files a bill).
4. *Elevan proyecto de ley* (file a bill).
5. *Eleva proyecto de reforma de la ley* (files a bill to amend a statute).

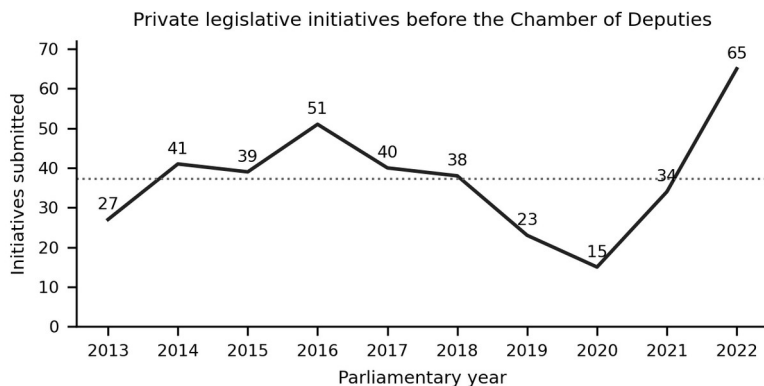
A. Private legislative initiatives submitted each year²⁶⁶

Year	Initiatives
2013	27
2014	41
2015	39
2016	51
2017	40
2018	38
2019	23
2020	15
2021	34
2022	65

B. Private legislative initiatives, charted²⁶⁷

²⁶⁶ Bulletin of Incoming Business, Chamber of Deputies (Arg.).

²⁶⁷ Bulletin of Incoming Business, Chamber of Deputies (Arg.).

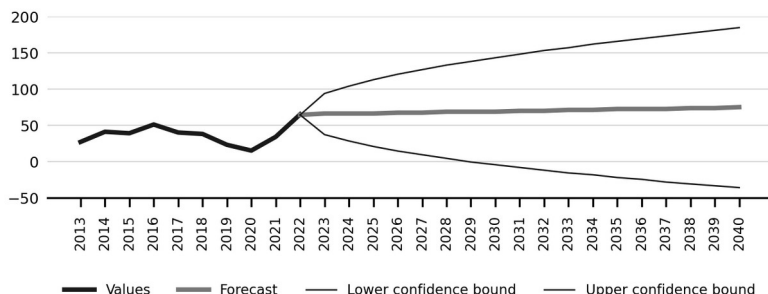


Private legislative initiatives before the Chamber of Deputies, 2013–2022. Vertical axis: number of initiatives submitted. Horizontal axis: parliamentary year. The dotted line marks the mean.

Chart A shows that the number of private legislative initiatives submitted is not significant. In no case does it exceed one hundred (100) filings a year. Chart B shows, however, that the linear trend has been slightly upward in recent years, and that 2022 was the year with the largest number of initiatives. The arithmetic mean over these years is 37.3 bills submitted by private individuals per year, while the median is 38.5, on a total of 373 bills submitted. The distribution has no mode, since no result repeats in any year.

C. Projection of cases to 2040²⁶⁸

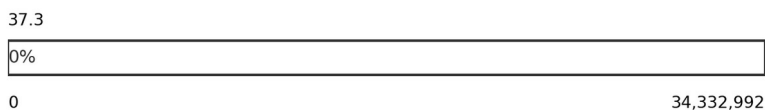
²⁶⁸ Bulletin of Incoming Business, Chamber of Deputies (Arg.).



Projection of private legislative initiatives to 2040. Series shown: values, forecast, lower confidence bound, upper confidence bound.

If the factors behind this scant participation do not change, the upward trend will probably continue, driven by Argentine population growth, without altering political practice in any substantial way: the instrument will remain an almost anonymous form of citizen participation, despite what it carries with it.

If we take the 2021 electoral roll as the measure for quantifying what share of the population takes part in this kind of public activity, the calculation runs from the arithmetic mean of initiatives (37.3), multiplied by one hundred, divided by thirty-four million three hundred thirty-two thousand nine hundred ninety-two (34,332,992). The result is a minute share of the electoral roll taking part in private legislative initiative: 0.0001086419 percent.²⁶⁹



37.3 against an electoral roll of 34,332,992: 0 percent at any legible scale.

²⁶⁹ PORCENTAJE DE ELECTORES POR PROVINCIA, OBSERVATORIO POLÍTICO ELECTORAL (2023).

Conclusions

Despite the greater democratic participation encouraged over the last four decades (1983–2023) under the current electoral system, citizen participation in the affairs of the state remains low, with notable exceptions such as national elections, in which the majority takes part.

The legal and political instrument of private legislative initiative could, if the mass media gave it currency, encourage citizens to involve themselves directly in national legislative work. More information would become available if the level of participation rose.

Among the things that could be learned:

- the particular interests of citizens or of civil associations;
- the interest of national legislators in actually attending to the direct interests of citizens.

Part of the so-called “crisis of representation”^{270 271} consists in the fact that legislators, once elected, hold no predetermined social mandate and are not necessarily or legally bound to a party’s political platform. They are elected in a personal capacity: the nineteenth-century model of “parties of notables,”²⁷² the *Honoratiorenparteien*²⁷³ Max Weber mentions in *Politics as a Vocation*.^{274 275}

²⁷⁰ A. M. Mustapic, *Argentina: la crisis de representación y los partidos políticos*, 32 AMÉRICA LATINA HOY 163 (2002).

²⁷¹ K. Hochstetler & E. J. Friedman, *Can Civil Society Organizations Solve the Crisis of Partisan Representation in Latin America?*, 50 LATIN AM. POL. SOC’Y 1 (2008).

²⁷² M. WEBER, *POLITIK ALS BERUF* (Duncker & Humblot 1919).

²⁷³ V. R. Berghahn, *Parties and Elections in a Period of Dynamic Change*, in *IMPERIAL GERMANY 1871–1918: ECONOMY, SOCIETY, CULTURE AND POLITICS* 189 (Berghahn Books 2005).

²⁷⁴ M. Bonaudo, *El partido de notables en el juego cruzado de “influencias legítimas” e “intercambios calculados” (1853–1900)*, 118 AYER, REVISTA DE HISTORIA CONTEMPORÁNEA 17 (2020).

That missing political representation, manifest for instance in the Argentine socioeconomic crisis of 2001,²⁷⁶ coexists with the persistence of a society of notables in which the media play a crucial role.²⁷⁷ The media cut across the territory of the Republic and promote general public policies with more influence, perhaps, than most national officials, who have at their disposal ministries that are sectorized, bureaucratized, and constrained by the scant fiscal resources of the twenty-first-century Argentine state.²⁷⁸

One possible criticism should be noted. The interests displayed in private legislative initiatives would be those of the sectors already closest to politics, with the bias that entails, leaving aside a “silent majority”: an unspecified group of people who do not take part in public affairs but hold legitimate interests, which those legislators would represent, without necessarily attending to claims filed by private individuals, through a “direct” bond with “the people.” Leaders of various kinds have made this argument, and it has to be weighed by anyone who wants to analyze greater citizen participation in the opportunities for direct intervention in the state.²⁷⁹

²⁷⁵ L. D. HIRSCH, *LOS PARTIDOS POLÍTICOS DE LA PROVINCIA DE BUENOS AIRES EN LA SEGUNDA MITAD DEL SIGLO XIX: UNA INTERPRETACIÓN SOBRE LA METAMORFOSIS DE LA* (2018).

²⁷⁶ I. Cheresky, *Las elecciones nacionales de 1999 y 2001: Fluctuación del voto, debilitamiento de la cohesión partidaria y crisis de representación*, in *SOBERANÍA CIUDADANA Y PRESIDENTES EN BUSCA DE HEGEMONÍA* 29 (Prometeo Editorial 2021).

²⁷⁷ L. Helms, *Governing in the Media Age: The Impact of the Mass Media on Executive Leadership in Contemporary Democracies*, 43 *GOV'T & OPPOSITION* 26 (2008).

²⁷⁸ J. Wagner, *Media Do Make a Difference: The Differential Impact of Mass Media in the 1976 Presidential Race*, 27 *AM. J. POL. SCI.* 407 (1983).

²⁷⁹ S. CARASSAI, *THE ARGENTINE SILENT MAJORITY: MIDDLE CLASSES, POLITICS, VIOLENCE, AND MEMORY IN THE SEVENTIES* (Duke University Press 2014).

THE RIGHT OF ACCESS TO PUBLIC INFORMATION

Introduction

The first article of the Constitution of the Argentine Nation establishes the republican principle of government by which the state is governed, and from which it follows that the acts of the three branches (executive, legislative and judicial) are public at every level of the state: national, provincial, municipal and autarkic. As the matter has been regulated, and subject to exceptions, access to public information²⁸⁰ must therefore be unrestricted,²⁸¹ free of charge, informal, equal and expeditious, so that any inhabitant of the Nation can know the affairs of the state across its several branches. Natural and legal persons alike may request this information, without showing a legitimate interest, and it must be delivered adequately and in full.²⁸²

Argentine constitutional law protects equality among citizens and inhabitants, and at the same time guarantees access to public information through several of its provisions: as a right to petition the authorities, as a right derived from republican government, as a right of access to public information for the functioning of political parties, and as a *habeas data* action (Articles 14, 33, 38²⁸³ and 43 of the Constitution, respectively).²⁸⁴ The

²⁸⁰ M. M. Semwal & S. Khosla, *Right to information and the judiciary*, 69 INDIAN J. POL. SCI. 853 (2008).

²⁸¹ The exceptions are limited: defense, personal data, and confidential industrial or scientific information, among others.

²⁸² M. Riegner, *Access to Information as a Human Right and Constitutional Guarantee. A Comparative Perspective*, 50 VERFASSUNG UND RECHT IN ÜBERSEE 332 (2017).

²⁸³ The Organic Act on Political Parties (23,298) requires the publication of certain party information, implementing this constitutional article.

1994 reform added access to environmental information and to information for consumers (Articles 41 and 42) as specific cases.

All three branches are large producers of public information: administrative acts, decrees, resolutions, statutes, ordinances, judgments, declarations. In practice, however, most of what the state does day to day is unknown even to specialists, since the volume of information produced is more than any one professional can take in. It would be a difficult task for a single lawyer to list every judgment in which a norm of constitutional rank has been challenged. This is why publicity of official acts is the key to making work and oversight effective.²⁸⁵

Before the twenty-first century, the Supreme Court's case law understood information largely in terms of press freedom or of jurisdictional questions, as a review of the volumes for 1990 shows. What follows reviews the rules that have emerged in Argentina since then and their connection with environmental law, and develops a brief analysis of environmental impact assessments, with the aim of establishing where the relation between the right of access to public information and the

²⁸⁴ The National Constitution provides, in art. 38, paragraph 2: "Their creation and the exercise of their activities are free within the respect owed to this Constitution, which guarantees their democratic organization and functioning, the representation of minorities, the ability to nominate candidates for elective public office, access to public information and the dissemination of their ideas." And in art. 43, paragraph 3: "Any person may bring this action in order to learn the data referring to him or her, and the purpose of those data, held in public registers or databases, or in private ones intended to supply reports; and, in the case of falsity or discrimination, to demand their suppression, rectification, confidentiality or updating. The confidentiality of journalistic sources may not be affected."

²⁸⁵ Access to public information is distinguished here from access to private information, a separate right regulated, for instance, in consumer legal relations, which is not treated in this work. As a general rule, where the state produces information or uses it in taking decisions, the information is public.

right to the environment now stands in Argentina, particularly as the *Salas* case shows it.²⁸⁶

The Access to Public Information Act (27,275) and Decree 1172/2003

Among the national legislation in force, Law 27,275²⁸⁷ (Right of Access to Public Information) was enacted on September 14, 2016, and regulates the substance and the form of access to public information, giving effect to the constitutional rights. Article 3 defines the concept: “Public information: any kind of data contained in documents of any format that the entities listed in Article 7 of this Act generate, obtain, transform, control or hold in custody.”²⁸⁸ The entities covered are principally the three branches of the Nation, the Public Prosecutor’s Office, the Council of the Judiciary, state-owned companies, non-state public entities, political parties, unions and the Central Bank of Argentina (Article 7).

The Act created a central, autarkic enforcement authority within the national executive:²⁸⁹ the Access to Public Information Agency.²⁹⁰ The Agency works as an independent administrative oversight body, verifying compliance with the statute and holding the power to order legal persons

²⁸⁶ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “*Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo*,” Fallos (2009-332-663) (Arg.).

²⁸⁷ Ley No. 27.275, *Derecho de acceso a la información pública* [Right of Access to Public Information] (2016) (Arg.).

²⁸⁸ One influence on the Act as regards standards was the Inter-American Model Law on Access to Public Information of 2008, drawn up by the OAS, together with the 2010 recommendations for its implementation.

²⁸⁹ Each branch of the state must create its own “body with functional autonomy,” equivalent to the Access to Public Information Agency, in order to coordinate the application of the statute with the constitutional independence of the branches.

²⁹⁰ AGENCIA DE ACCESO A LA INFORMACIÓN PÚBLICA, JEFATURA DE GABINETE DE MINISTROS DE LA REPÚBLICA ARGENTINA (2024).

to meet their obligation to supply information within the time allowed. Faced with a complaint, the Agency must decide between issuing such an order and rejecting the request on one of the grounds the Act provides. It must also promote “active transparency”²⁹¹ under Article 19:²⁹² the obligation of state bodies, subject to exceptions, to publish their acts.²⁹³ Within that scheme, budgets and organizational charts are essential items.²⁹⁴

These processes of transparency are bound up with the objectives of the UN’s 2030 Agenda for sustainable development²⁹⁵ and with the “acting locally” that international law proposes,²⁹⁶ on the premise that better knowledge of public affairs is what makes change possible.²⁹⁷ Among the Sustainable Development Goals, access to public information belongs under Goal 16: “Promote just, peaceful and inclusive societies.”²⁹⁸

²⁹¹ Activity in transparency is the counterpart of passivity, which is transparency at the citizen’s request.

²⁹² Access to Public Information Act, “ARTICLE 19. — Access to Public Information Agency. The Access to Public Information Agency is hereby created as an autarkic entity operating with functional autonomy within the national executive. The Agency shall ensure compliance with the principles and procedures established in this Act, guarantee the effective exercise of the right of access to public information, and promote measures of active transparency.”

²⁹³ Public officials and employees habitually practice, for pragmatic reasons and out of custom, the inverse program: not to disclose information unless a citizen requests it. The legislation runs against these practices. One of the problems is non-compliance by the state and the difficulty of reaching the corresponding court to enforce the right.

²⁹⁴ The Supreme Court adopted the provisions of the Act through Acordada 42/2017.

²⁹⁵ OBJETIVOS DE DESARROLLO SOSTENIBLE, NACIONES UNIDAS (2024).

²⁹⁶ J. B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2007).

²⁹⁷ S. Morris & H. S. Shin, *Social Value of Public Information*, 92 AM. ECON. REV. 1521 (2002).

Article 28 of the Act adds an obligation for every national government entity to have an internal oversight body complementing the work of the Agency.²⁹⁹ Together with provincial legislation and that of the City of Buenos Aires, Argentina thus has several systems of transparency oversight for the development of the right of access to information, coordinated at the federal level through the Federal Council for Transparency, created by Article 29 of the national statute.³⁰⁰ In this relation between private persons and the state, clear language is decisive.³⁰¹

Before the Act, Decree 1172 of 2003 provided the General Regulation on Access to Public Information for the national executive, among other annexes.³⁰² By its own terms it implements the right of access established “through Article 1 [of the Constitution], Articles 33, 41, 42 and related provisions of Chapter Two—which establishes new Rights and

²⁹⁸ The objectives of the UN’s 2030 Agenda have also been received in environmental scholarship, so that this is another point of connection between access to public information and the right to the environment.

²⁹⁹ Access to Public Information Act, “ARTICLE 28. — Bodies for access to public information in the legislature, the judiciary and the public prosecutorial offices. Within a maximum of ninety (90) days from the publication of this Act in the Official Gazette, the legislature, the national judiciary, the Federal Public Prosecutor’s Office, the Public Defender’s Office and the Council of the Judiciary shall each create a body with functional autonomy and with competences and functions identical to those of the Access to Public Information Agency provided for in Article 24 of this Act, which shall operate within the body in which it is created.”

³⁰⁰ Access to Public Information Act, ARTICLE 29. — Federal Council for Transparency. The Federal Council for Transparency is hereby created as a permanent interjurisdictional body, whose object shall be technical cooperation and the coordination of policy on transparency and access to public information.

³⁰¹ G. A. Porumbescu et al., *Can Transparency Foster More Understanding and Compliant Citizens?*, 77 PUB. ADMIN. REV. 840 (2017).

³⁰² Decreto No. 1172/2003, *Acceso a la Información Pública* [Access to Public Information] (2003) (Arg.).

Guarantees—and Article 75(22), which incorporates various international treaties with constitutional rank.” That decree also contains the following:

- General Regulation on Public Hearings for the National Executive.
- General Regulation on the Publicity of Interest Representation within the National Executive.
- General Regulation on the Participatory Drafting of Rules.
- General Regulation on Open Meetings of Public Utility Regulators.
- The right of free access via the internet to the daily edition of all sections of the Official Gazette of the Argentine Republic.

The administrative request for public information

Requesting public information is a predominantly administrative procedure where there is no open or active disclosure of the data, whether because the statute requires it or because the state has acted proactively. When transparency is passive and we must ask for the information, in other words, an administrative request is the usual first step rather than judicial proceedings, though exhausting it is not a precondition of applying to the courts for information.³⁰³ Scholarship accordingly tends to urge that the administration disclose information on its own initiative. The Single Registry of Interest Representation Meetings is one such case.³⁰⁴

The Act sets the period for supplying information at fifteen days, extendable by a further fifteen in exceptional cases (Article 11). Any public or private person has standing to make a request without legal representation (Article 4). In Argentina, requests can be made over the web, a procedure governed by the rules on Electronic Document Management.³⁰⁵ The Digital Signature Act (25,506) is a relevant statute

³⁰³ Ley No. 27.275, art. 14 (Arg.).

³⁰⁴ REGISTRO ÚNICO DE AUDIENCIAS DE GESTIÓN DE INTERESES, SECRETARÍA DE ASUNTOS POLÍTICOS, MINISTERIO DEL INTERIOR, ARGENTINA (2024).

here.³⁰⁶ These updates have made remote filing possible, which improves connection and at times simplifies the relation between the state and the citizen.

Rights advanced by their connection with access to public information

Just as better access to public information helps citizens take part in public affairs, it also advances other rights by supplying reliable statistics and resources.³⁰⁷ The rights so advanced include the right to education, the right to a healthy environment, the right to freedom of expression and the right to health, through data usable in administrative or judicial settings.³⁰⁸ The analysis and application of the tools those data provide will contribute to civic cooperation and to social development in the twenty-first century, encouraging citizen participation and serving as a key to other rights.³⁰⁹ With that in view, what follows analyzes environmental law, the *Salas* litigation and, through it, environmental impact assessments, and then reviews the scholarly currents and the applicable legislation before proposing an amendment to the legislation on access to public environmental information.

The right of access finds its limits in other, potentially opposing rights (privacy, public health, security), and is therefore weighed by the courts case by case.

³⁰⁵ Normativa del Sistema de Gestión Documental Electrónica (GDE) [Electronic Document Management System Rules] (2024) (Arg.).

³⁰⁶ Ley No. 25.506, *Honorable Congreso De La Nación Argentina* [Digital Signature] (2001) (Arg.).

³⁰⁷ C. R. Rao, *Statistics, Statisticians and Public Policy Making*, 45 SANKHYĀ: INDIAN J. STATISTICS, SERIES B 151 (1983).

³⁰⁸ R. E. Bowen, *Judicial Autonomy in Central America: A Typological Approach*, 66 POL. RSCH. Q. 831 (2013).

³⁰⁹ M. Mora y Araujo, *Conflicto y desarrollo: un análisis comparativo*, 7 DESARROLLO ECONÓMICO 467 (1968).

The right to the environment and its connection with access to public information

Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 4 of the American Declaration of the Rights and Duties of Man and Article 13 of the American Convention on Human Rights, all of constitutional rank in Argentina, establish that every Argentine has the right to receive and to impart information.³¹⁰ This right supplies an international public framework for the application of local rules, together with the principle of maximum disclosure and access to state information. A healthy environment is a right protected in part by its link to efficient access to public information. In environmental matters, as we shall see, access to information is marked by interjurisdictionality and by the local character of ownership of natural resources under Article 124 of the Constitution (original dominion).

Access to information is a fundamental part of democratic control over public affairs and over the environment.³¹¹ In *Asociación Derechos Civiles v. National State—PAMI (Decree 1172/03) on amparo under Law 16,986*, where the reach of that decree was at issue, the Supreme Court quoted paragraph 92 of *Claude Reyes*: “In a democratic society it is essential that state authorities be governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a restricted system of exceptions.”³¹² ³¹³ Environmental case law

³¹⁰ This can be read in *CIPPEC v. National State — Ministry of Social Development — Decree 1172/03, on amparo under Law 16,986*, Supreme Court of Argentina, 26 March 2014, Fallos: 337:256.

³¹¹ M. Gavouneli, *Access to Environmental Information: Delimitation of a Right*, 13 *TULANE ENVTL. L. J.* 303 (2000).

³¹² *Claude Reyes v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

³¹³ *Claude Reyes* is particularly notable within the frame of this study for its singular character: a recognized case on access to information, cited by the Supreme Court of Argentina, in which the claim was to be informed

should generally take up what the Inter-American Court says here, since environmental proceedings, where judgments give effect to the right to a healthy environment, are the cornerstone of the social protection of a community's shared resources. Access to knowledge is the key to it, and that is how the international tribunal has understood the matter.

Claude Reyes is relevant for a further reason: the Inter-American Court explains there that the right of access to public information is not limited to information the state produces or controls, but reaches information arising from state concessions, among other sources.

Argentina has developed its environmental legal frameworks federally. Each province is sovereign over its natural resources, and national environmental regulation is still at an early stage; only in recent decades have environmental questions been taken more seriously at the federal level, in cases such as *Salas*.³¹⁴ In broad terms, the right to a healthy environment appears in Article 41 of the Constitution,³¹⁵ whose text also contains the right to public environmental information. These rights are implemented in national legislation by the General Environment Act

about an environmental impact assessment carried out in order to approve a project connected with a Chilean economic activity.

³¹⁴ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “*Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo*,” Fallos (2009-332-663) (Arg.).

³¹⁵ National Constitution, “Article 41: All inhabitants enjoy the right to a healthy, balanced environment, fit for human development, and such that productive activities satisfy present needs without compromising those of future generations; and they have a duty to preserve it. Environmental harm shall generate, as a matter of priority, the obligation to restore, as the law provides. The authorities shall provide for the protection of this right, for the rational use of natural resources, for the preservation of the natural and cultural patrimony and of biological diversity, and for environmental information and education. It falls to the Nation to enact the rules containing the minimum standards of protection, and to the provinces those necessary to complement them, without the former altering local jurisdictions. (...)”

(25,675),³¹⁶ which provides, as regards public information, that the environmental policy of the Nation must “organize and integrate environmental information and ensure the public’s free access to it.”

This principle, that environmental information is available on request with no justification required, is underscored in the Free Access to Public Environmental Information Act (25,831),³¹⁷ whose Article 3 provides:

Access to information. Access to environmental information shall be free of charge for any natural or legal person, except for costs associated with the resources used to deliver the information requested. No reasons or particular interest need be shown in order to obtain environmental information. A formal request must be filed with the appropriate authority, stating the information sought and identifying the requesting party or parties resident in the country, except under agreements with countries or international organizations on a reciprocal basis.

The free-of-charge principle of access to public information is thus guaranteed. This statute was used, for example, in *Giustiniani, Rubén Héctor v. YPF* (2015),³¹⁸ to request public information in contentious proceedings.³¹⁹ It also supplies a definition of environmental information:

Environmental information means all information in any form of expression or medium relating to the environment, natural or

³¹⁶ Ley No. 25.675, *Política Ambiental Nacional* [National Environmental Policy (General Environment Act)] (2002) (Arg.).

³¹⁷ Ley No. 25.831, *Régimen de libre acceso a la información pública ambiental* [Free Access to Public Environmental Information] (2004) (Arg.).

³¹⁸ Corte Suprema de Justicia de la Nación [CSJN], 10/11/2015, “Giustiniani, Rubén Héctor c/ Y.P.F. S.A. s/ amparo por mora,” Fallos (2015-338-1258) (Arg.).

³¹⁹ In this particular case the Supreme Court held that the right of access to public information is of constitutional and conventional rank, and that compliance with it cannot be suspended, nor a person excluded from the entities bound by it through a statute (here, art. 15 of Law 26,741), where practice plainly shows that the person holds information relevant to the functioning of the state (recitals 19 and 20).

cultural resources and sustainable development. In particular: (a) the state of the environment or of any of its natural or cultural components, including their reciprocal interactions, as well as the activities and works that affect them or may significantly affect them; (b) the policies, plans, programs and actions concerning environmental management (Article 2).

Encouraging citizen participation in environmental matters is consistent with what the Social Volunteering Act provides.³²⁰ In short, the right to the environment is advanced by the right of access to public information; and within that same dynamic, protecting the environment gives a healthier setting in which information can be produced and circulated in keeping with the sustainable development of the society. As the level of information among the parties rises, the risks attending decisions fall in general and interests become explicit, whether the setting is legislative, administrative or judicial. Understood as a public and social good, then, information reduces conflict and cuts off futile debates about questions a shared database would settle at once.³²¹

The role of the national executive in access to information

In environmental law, an area thick with specialists where technical language is the norm, difficulty of access to information would be one more barrier for the citizen to clear, were it present. This is why the development of access matters.

³²⁰ Ley No. 25.855, *Voluntariado social* [Social Volunteering] (2004) (Arg.).

³²¹ Some significant subjects have proved difficult for public debate, since the actors have not agreed on which indices are the most reliable for measuring them. Debates then turn on measurement technique or on sources rather than on the substance of the problems to be solved. Setting procedural questions aside, in other words, consensus is lacking. In environmental matters this can be damaging when legislating, or when taking decisions that bear on matters not easily reversed.

The national executive maintains a platform called the Environmental Information Center, which supplies citizens with data on a range of subjects within its competence.³²² Among them: monitoring, waste, climate change, forests and soils, biodiversity, national parks, and waters, glaciers and aquatic ecosystems. The data are supplied by the Federal Environmental Monitoring Network, which works in coordination with the provincial ministries.³²³

Access to environmental impact assessments and their particular character as generators of public information

The focus now turns to the right of access to information from environmental impact assessments, and to the effect these have as an institution on the protection of the Argentine environment and, in consequence, on the sustainable development of the society.³²⁴ Better access to public information could in particular yield a better application of Article 11 of the General Environment Act.³²⁵ And better regulation of that Act on the definition of environmental impact assessments would in turn bring it into closer conformity with the constitutional articles reviewed above, Article 41 above all.

Public information is generally produced or administered by the state, as the Access to Public Information Act describes it. In environmental law

³²² CENTRO DE INFORMACIÓN AMBIENTAL, JEFATURA DE GABINETE DE MINISTROS DE LA REPÚBLICA ARGENTINA (2024).

³²³ MONITOREO AMBIENTAL, MINISTERIO DE AMBIENTE Y DESARROLLO SOSTENIBLE (2024).

³²⁴ J. Castrilli & E. Block, *Environmental Impact Assessment*, 4 ALTERNATIVES 28 (1975).

³²⁵ General Environment Act, “ARTICLE 11. — Any work or activity within the territory of the Nation capable of degrading the environment, any of its components, or of significantly affecting the population’s quality of life, shall be subject to an environmental impact assessment procedure prior to its execution.”

there is a further edge to this. Private information, constitutionally rooted in the right to engage in a lawful industry, takes on a public function because of the protection the law grants the environment, given the risk an activity is capable of generating.³²⁶ The economic and technical information about an activity that private parties supply in environmental matters thus becomes public information in the hands of the provincial administration. The mechanism by which this private information is given to the state and to the citizenry is the environmental impact assessment (EIA).³²⁷

Within the assessment, the environmental impact study is the central report and carries the most relevant information.³²⁸ The other side of assessment is administrative authorization. Since private parties are capable of affecting the environment, legislation requires the publication of information on the impact of human economic activity on it.^{329 330}

Argentina, like other countries, requires the identification and evaluation of these effects in the form of an assessment, and it is through the assessment that the information becomes accessible. Assessments are an important tool: they help local governments and the Nation understand a project's potential impact and mitigate harm before it occurs. To be effective, however, an assessment must include certain elements, among them an evaluation of the current state of the environment (the baseline), which is needed as the basis for evaluating the harm the project might

³²⁶ T. O'Riordan, *The Scope of Environmental Risk Management*, 8 *AMBIO* 260 (1979).

³²⁷ This procedure exemplifies the connection between the right to public information and environmental law, since the right to a healthy environment is protected here through a procedure designed to supply information to the state and to the citizen.

³²⁸ J. H. Marean, *Environmental Impact Studies*, 40 *SCI. TEACHER* 24 (1973).

³²⁹ H. Prechel & A. Istvan, *Disproportionality of Corporations' Environmental Pollution in the Electrical Energy Industry*, 59 *SOCIOLOGICAL PERSP.* 505 (2016).

³³⁰ D. Sicotte, *Power, Profit and Pollution: The Persistence of Environmental Injustice in a Company Town*, 16 *HUM. ECOLOGY REV.* 141 (2009).

cause.³³¹ If a country does not ensure that assessments are effective, an impact may go unnoticed and affect not only the environment but health, safety and socioeconomic well-being as well.³³²

The legal term “environmental impact assessment,” and the publicity attaching to it, lets citizens know not only which public or private economic projects are being or will be carried out on Argentine territory, but also what potential impacts those projects will have. Assessments are the instrument through which the state and citizens alike can know the state of the environment and the changes, actual or potential, that human work has produced in it. They are public information, but of particular interest to officials and to the inhabitants of the regions involved. They are therefore a matter of great and legitimate public and private interest, in which the constitutional right of access to public information meets the private law of damages, through the interest in compensation that persons may have on account of environmental harm (civil liability). Environmental harm is sketched in Article 14 of the Civil and Commercial Code,³³³ but it is regulated for the most part by the General Environment Act, which also provides, in Article 16:

Article 16. Natural and legal persons, public or private, shall supply information relating to environmental quality and referring to the activities they carry out. Every inhabitant may obtain from the authorities the environmental information they administer and that is not legally classified as restricted.

Environmental harm and access to environmental information are legislated in the same statute, sometimes regarded as a prototype of a national environmental code, since it covers principles, impact assessments, minimum standards, public policy, compensation for harm, oversight

³³¹ M. Fulton et al., *A Simplified Environmental Assessment Methodology for Research Projects as an Alternative to Life-Cycle Assessment*, 28 J. ENV'T & DEV. 339 (2019).

³³² The problem of pollution, for instance, has social, health, economic and tourism-related edges.

³³³ Ley No. 26.994, *Código Civil y Comercial de la Nación* [Civil and Commercial Code of the Nation] (2014) (Arg.).

bodies and procedural questions. The reason is that the right to environmental information held by an authority is public, and it is the instrument citizens have for preventing harm, and also for explaining or defending themselves against harm already under way.

Assessments conclude with the environmental impact declaration, the final stage in which the administration publicly states whether it approves the project, or whether the project must proceed subject to the reduction or limitation of certain components.

Cumulative environmental impact and the absence of information

A cumulative environmental impact study is a detailed account of how far the potential harm from an economic or productive activity extends in a given area, but taking into account the multiplicity of harms that the accumulated effects of that activity, repeated, will produce. It is an ordinary assessment with the accumulation of various impacts on the environment brought into play.³³⁴ This last concept is what the *Salas* case is about, and it is taken up next.

It is worth noting the possibility of introducing standards for carrying out cumulative impact assessments. Canada, for instance, has an Impact Assessment Cooperation Plan designed to satisfy the principle of “one project, one assessment.”³³⁵ Such plans must satisfy the obligations both of the legislation and of the cooperating jurisdiction or jurisdictions.³³⁶ Cooperation can take several forms: coordinated impact assessments (including the exchange of information and analysis), substitution (relying

³³⁴ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “*Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo*,” Fallos (2009-332-663) (Arg.).

³³⁵ *Better Rules for Major Project Reviews to Protect Canada's Environment and Grow the Economy*, GOV'T OF CAN. (2018).

³³⁶ B. Mitchell, *Environmental Impact Assessment: Canadian Approaches*, 8 AREA 127 (1976).

on one jurisdiction's assessment process for the project), or review panels.³³⁷ The content of a cooperation plan includes the scope of the project, the approach to cooperation, the collection and review of the proponent's information, the exchange of information, and the decision statement: plans for coordinating the development of the conditions of approval.³³⁸

The Escazú Agreement and environmental impact assessments

The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, the Escazú Agreement,³³⁹ is the most significant international treaty in Latin America for the right of access to environmental information. Article 2 provides:

(...) “environmental information” means any information that is written, visual, audio, and electronic, or recorded in any other format, regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management (...).

Access may extend to “the information on environmental impact assessment processes and on other environmental management instruments, where applicable, and environmental licences or permits granted by the public authorities” (Article 6.3(h)). The treaty further provides:

Each Party shall guarantee mechanisms for the participation of the public in decision-making processes, revisions, re-examinations or updates with respect to projects and activities, and in other processes

³³⁷ C. D. Hunt, *A Note On Environmental Impact Assessment In Canada*, 20 ENVTL. L. 789 (1990).

³³⁸ Impact Assessment Agency of Canada, *Cooperation Plan, Practitioner's Guide to Federal Impact Assessments*, GOV'T CANADA (2024).

³³⁹ REPOSITORIO DIGITAL, COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE, NACIONES UNIDAS (2024).

for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health. (Article 7.2)

Impact assessment and citizen participation would in this way be linked within Argentine law, the latter becoming a condition of efficiency in the design of environmental decisions.

On assessments specifically, the Agreement provides:

The dissemination of the decisions resulting from environmental impact assessments and other environmental decision-making processes in which the public has participated shall be carried out through appropriate means, which may include written, electronic or oral means and customary methods, in an effective and prompt manner. The information disseminated shall include the established procedure to allow the public to take the relevant administrative and judicial actions. (Article 7.9)

Cumulative environmental impacts are then addressed as follows:

With respect to the environmental decision-making processes referred to in paragraph 2 of the present article, at least the following information shall be made public: (...) (b) a description of the environmental impacts of the project or activity and, as applicable, the cumulative environmental impact; (...). (Article 7.17(b))

Argentina has ratified the Agreement, and it is therefore binding.³⁴⁰

Access to public environmental information in *Salas* before the Supreme Court

To examine access to public information through impact assessments in particular, we turn to *Salas*,³⁴¹ whose proceedings before the Supreme Court

³⁴⁰ Ley No. 27.566, *Acuerdo Regional Sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe* [Escazú Agreement (Access to Information, Public Participation and Justice in Environmental Matters)] (2014) (Arg.).

³⁴¹ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “*Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo*,” Fallos (2009-332-663)

have concluded. The Court intervened on five occasions with different decisions, and the proceedings included a public hearing, at which speakers for both parties and *amici curiae* were heard.^{342 343} The case reached federal jurisdiction after the Salta judiciary declared itself incompetent.

The plaintiffs sought a preliminary injunction and, in consequence, a judgment suspending or prohibiting the felling or clearing of the native forests of Salta province in the departments of San Martín, Orán, Rivadavia and Santa Victoria. They further asked that the court

(...) declare the unconstitutionality and absolute and incurable nullity of the authorizations granted for those purposes and prohibit their being granted in the future; impose on the defendants the duty to restore the environment to its state prior to the production of the harm and, should that not prove technically feasible, set substitute compensation in favor of the indigenous communities and creole groups of the area, without prejudice to what may be owed to other affected parties and to the Environmental Compensation Fund created by Law 25,675.³⁴⁴

What the action sought to prevent was deforestation and indiscriminate felling harmful to the ecosystem of the Salta forests. The legal argument rested principally on the need of the flora, the local fauna and the inhabitants of Argentina for forested areas in the country, for the sake of the sustainability of social activity and of production. The claim, brought as a collective *amparo* action by communities of original inhabitants, was for the cessation of economic activity in the area. Before the Supreme Court, the

(Arg.).

³⁴² *Amici curiae* are a growing form of citizen participation in collective-impact proceedings before the Supreme Court, regulated by *Acordadas* 4/2004 and 7/2013.

³⁴³ Public hearings in these cases usually include friends of the court from both sides, which serves the purpose of generating an institutional space in which arguments can be confronted, promoting transparency in decision-making.

³⁴⁴ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo,” *Fallos* (2009-332-663) (Arg.).

plaintiffs argued that no environmental impact studies had been carried out for the projects to deforest the native forests of Salta. The central problem in the case was the failure to recognize impacts cumulatively: the studies had been conducted independently of one another, without considering the possible harms fully and relationally.³⁴⁵ The Court held that the administration's lack of information about the risk made it necessary to halt the clearing permits until cumulative environmental impact assessments had been carried out.

The point can be sharpened by distinguishing individual clearing from collective clearing. Analyzed one by one, the clearing operations in *Salas* revealed only a limited part of the environmental harm, since a baseline was taken as of a given date on the assumption that the impact under study would be isolated, without regard to correlative or contemporaneous impacts.³⁴⁶ The Court therefore ordered assessments based on collective action across the territory of Salta, so that the harms could be quantified correctly and the potential impacts, which interrelate once they are under way, could be evaluated collectively.

Here one of the axial problems of the absence of access to public information is worked out in practice: absence for citizens, for the provincial administration, and for the judges, who decide by applying legal criteria to the information the parties supply. A provincial administrative deficit in transparency and in responding to information requests obliged the Supreme Court to step in and protect native forests whose oversight would—as a rule—be local. In the Court's own account, the absence of public environmental information in *Salas* was treated as a point in the plaintiffs' favor, since it established both a likelihood of success on the merits and the danger in delay: "That the measure adopted by this Court is founded on the precautionary principle contemplated in General Environment Act 25,675."³⁴⁷

³⁴⁵ Protection was also sought for the lands of the original peoples, whose pre-existence is constitutionally recognized (art. 75(17)).

³⁴⁶ P. Roudgarmi, *Cumulative Effects Assessment (CEA), A Review*, 20 J. ENVTL. ASSESSMENT POL'Y MGMT. 1 (2018).

The precautionary principle and access to public information in *Salas*

The precautionary principle^{348 349} is what stands at the center of this litigation. It holds that in environmental matters the Argentine state must, in the absence of public information, tend toward prevention and anticipate possible harms rather than repair them once they have

³⁴⁷ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo,” Fallos (2009-332-663) (Arg.).

³⁴⁸ General Environment Act, “ARTICLE 4. — The interpretation and application of this Act, and of every other rule through which environmental policy is executed, shall be subject to compliance with the following principles: Precautionary principle: where there is a danger of grave or irreversible harm, the absence of information or scientific certainty shall not be used as a reason for postponing the adoption of effective measures, in terms of cost, to prevent the degradation of the environment.” Internationally, the principle was sketched in the World Charter for Nature of 1982 and expressly stated in the Rio Declaration on Environment and Development, signed at the Rio Conference of 1992. Principle 15 of that Declaration reads: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Besides *Salas*, the principle has been treated by the Supreme Court in cases such as *Vargas, Ricardo Marcelo v. San Juan, Province of, and Others*, on environmental harm: “By virtue of the precautionary and cooperation principles provided for in the General Environment Act, and given the binational character of the mining undertaking, the judicial decisions adopted by the foreign country ordering the halt of its construction must be taken into account; and, within the judge’s investigative powers in environmental proceedings, it is appropriate to request reports on the state of monitoring and harm-prevention work, without prejudice to what may finally be decided as to jurisdiction.”

occurred: “where there is a danger of grave or irreversible harm, the absence of information or scientific certainty shall not be used as a reason for postponing the adoption of effective measures, in terms of cost, to prevent the degradation of the environment.”³⁵⁰

One paragraph of *Salas* is worth setting out:

The precautionary principle produces an extended and anticipatory duty of foresight on the part of the public official. The law is therefore not satisfied if authorizations are granted without knowing the effect, on the understanding that one will act once the harms manifest themselves. On the contrary, the administrator faced with two options grounded in risk must act with precaution, and must first obtain sufficient information in order to reach a decision based on an adequate balance of risks and benefits. (p. 2)

A note published by the International Union for Conservation of Nature, which holds consultative status at the United Nations, cited this passage in discussing the application of the principle in Argentina.³⁵¹

The Supreme Court affirmed that the terms on which Argentine law has been constituted leave the general care of their respective environments to the provinces, save in interjurisdictional cases. The concept of harm, however, drawn from the Civil and Commercial Code, supported by the Civil and Commercial Procedure Code and by the constitutional duty of restoration in Article 41, authorizes the Court to exercise precautionary review over the administrative procedures that permit persons to carry out potentially harmful economic activities. That

³⁴⁹ E. Costa Cordella, *Principio de Precaución y Regulación Ambiental en Chile: Operando sin instrucciones, pero operando*, 6 JUSTICIA AMBIENTAL 159 (2014).

³⁵⁰ Corte Suprema de Justicia de la Nación [CSJN], 26/3/2009, “*Salas, Dino y otros c/ Salta, Provincia de y otros s/ amparo*,” Fallos (2009-332-663) (Arg.).

³⁵¹ P. Lorenzetti & N. Cafferatta, *Jurisprudencia ambiental de la Corte Suprema de Justicia Argentina*, INT’L UNION FOR CONSERVATION OF NATURE (2018).

review rests on the absence of public information, which triggers the state's duty of precaution.

The General Environment Act links the concept of environmental harm and the precautionary principle to access to public information, and the Court reads it that way. The precautionary principle applies where the risk is uncertain, unlike the preventive principle, which applies where the risk is certain and the harm uncertain, the latter being the classical concept in civil liability. Its application gains weight where there is no scientific knowledge of an activity's risk but there are grounds for suspicion. The precautionary principle also reverses the burden of proof, so that the party who proposes to affect the environment must show that its conduct would not cause harm.³⁵²

Actions directed at economic production or at exploiting a given environment's natural and social resources could not be undertaken without the corresponding environmental impact studies having been carried out cumulatively. This reading rests on facts to be proved before a court if a preliminary injunction is to issue. The Court nonetheless declared that the case before it did not fall within its competence, despite the text of Article 117 of the Constitution, which provides that suits against a province are heard in the Supreme Court's original jurisdiction.

Minimum standards in environmental impact assessments? The lesson of *Salas*: better information, better decisions

Since the stage of preparing and applying minimum environmental standards opened, authorized by the 1994 constitutional reform and driven forward by the General Environment Act in 2002, the possibility of a national statute of minimum standards has been under discussion. Such a statute would cover not only characterizations of protection but also procedures specifying what information the state will require in order to

³⁵² M. DEL PILAR GARCÍA PACHÓN ET AL., PRINCIPIOS E INSTRUMENTOS DE EVITACIÓN DEL DAÑO AMBIENTAL (Universidad del Externado 2015).

approve an impact study. At the national level, those requirements today come only from the General Environment Act.³⁵³

Among the items a minimum-standards statute in this area ought to develop, in order to widen the reach of the right to public environmental information, several proposals stand out:

- citizen access to the information that assessments supply to the state;
- citizen participation in the procedures through meetings;
- systems of public hearings;
- an enumeration of the cases in which an assessment must be carried out;
- the inclusion of the concepts of screening and scoping;
- the development of a national registry of assessments by province and by sector;
- the requirements for an impact study and who may carry one out;
- ways of communicating the stages of the procedure to citizens;
- rules for the assessment of cumulative impacts;
- rules for the assessment of interjurisdictional impacts.

Assessments are the instrument through which the state requires that private information about environmental risks be moved into the sphere of public information, where the legislation enacted for the purpose will then govern it. The more comprehensive the minimum standard binding on every administration as to the items an assessment must take into account, therefore, the better the information citizens receive in return for having raised the duty to inform. The right of access to environmental information will then find a complete and adequate answer, and citizens will be able to take part in these procedures properly.

³⁵³ L. Langbehn et al., *Arenas públicas, modelos de desarrollo y políticas de protección del ambiente: la ley de bosques entre “conservación” y “producción”*, in CARTOGRAFÍAS DEL CONFLICTO AMBIENTAL EN ARGENTINA II 141 (G. Merlinsky ed. CLACSO 2016).

A proposal for an oversight authority for the informational side of a possible minimum-standards statute on environmental impact assessments

A minimum-standards statute might include among its specifications, for the better dissemination of the information assessments contain, a national agency overseeing the provincial agencies, in keeping with what the Access to Public Information Act provides. Such an agency could work jointly with the Access to Public Information Agency. An analogous possibility would be to designate that Agency by statute as the administrative body overseeing compliance with what a hypothetical minimum-standards statute on assessments would require as to the publication of information, on the ground that an assessment is basically the transmission of information from a private person to the state.

Neither proposal would be free of criticism grounded in Article 124 of the Constitution. The Nation may impose minimum standards (Article 41); but could it verify compliance with them and issue reports on the publication and treatment of public environmental information outside the judicial sphere? So long as the Nation does not enter into the administration of natural resources, whose original dominion is provincial, it might consider creating a digital system into which the various assessments, authorized or not, are uploaded, so that all citizens, and specialists, could easily review the criteria each provincial agency is applying in approving or rejecting economic projects. The proposal would also make an accurate review of cumulative impacts possible, since specialists could draw on a unified, current platform to compare impacts and see whether they affect the same areas. That would require digitizing the files of the provinces and of the City of Buenos Aires, so that the impact studies can be reached.

Law 26,639, the Regime of Minimum Standards for the Preservation of Glaciers and the Periglacial Environment, offers a precedent: it established the National Glacier Inventory as a minimum standard for the

protection of glaciers. “Inventory. The National Glacier Inventory is hereby created, in which all glaciers and periglacial landforms that act as water reserves existing in the national territory shall be individually recorded, with all the information necessary for their adequate protection, control and monitoring” (Article 3).³⁵⁴ The article exemplifies a minimum standard imposed by Congress in answer to the mandate of Article 41, by authorizing a new national entity to supervise information concerning provincial natural resources. Legislators, that is, have not taken the requirement of environmental information, its examination and its oversight to be an intrusion by the Nation into the original competences of the provinces. They have taken it as one more means of protecting the environment and of complying with the rules on access to public information. Minimum standards, in other words, encompass the statutory requirement of provincial information for national supervision of natural resources.

Conclusions

Argentina still has a long road ahead in the matter of access to public environmental information, though the first steps were taken in the twenty-first century. To begin with, the Access to Public Information Act and its criteria could be weighed carefully by judges deciding the questions discussed here. That would yield more promising solutions to the problems raised in cases like *Salas*, where the information is scant and the question to be decided is urgent.

Expanding public databases that are free and simple to reach will be one of the keys by which state transparency is graded in the near term, and transparency will in turn make citizen participation in environmental matters easier—or, in its absence, harder. The precautionary principle reviewed above is the instrument the legislation provides for seeking injunctive relief where public information is lacking. Encouraging access to public environmental information will probably

³⁵⁴ Ley No. 26.639, *Régimen de Presupuestos Mínimos para la Preservación de los Glaciares y del Ambiente Periglacial* [Minimum Standards for the Preservation of Glaciers and the Periglacial Environment] (2010) (Arg.).

improve participation; blocking information, meanwhile, opens a route for demanding that a possibly risky activity cease, on the argument that the information is scarce. Public information in environmental law, as we can see, bears on the concept of environmental harm and gives it its shape.

For public information to serve in fact as the catalyst of claims and of better environmental administration, however, citizens would have to understand how these intricate legal mechanisms work, and to know their other functions and rights. The Access to Public Information Act will therefore remain the key to Argentines' being able to hold an open debate on the questions that arise on the agenda. Cumulative environmental impact assessments, and access to the information they produce, will shape how we understand the environment in the years ahead. Or both will be conspicuous by their absence, the study of impacts and the possibility of reaching information about the medium we live in alike, with data parceled out to present a picture of harmlessness inside a scheme of apparent sustainable development. The Trojans have already given us the example; whether we follow it is up to us.

P A R T I I I

Rights and the Legal Order

IUS COGENS IN INTERNATIONAL CASE LAW

This note is about the norms of *ius cogens*: the peremptory, non-derogable norms of public international law,³⁵⁵ as against the norms of *ius dispositivum*, which the full subjects of that law may dispose of by agreement.³⁵⁶ *Cogere*, the Latin verb “to compel,” is itself built from *co* (“together”) and *ago* (“to move”). Combined and read figuratively, the two might be rendered as “to drive together.”

The 1969 Vienna Convention on the Law of Treaties was the first international instrument to refer explicitly to peremptory norms.³⁵⁷ Article 53 provides:

Article 53. Treaties conflicting with a peremptory norm of general international law (“*jus cogens*”). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Jurists accept this article as the generic definition. It defines peremptory norms by contrast with ordinary or dispositive law, the law that may be contracted around, ignored, or altered by a later ordinary rule.³⁵⁸ It also invites a question the article itself leaves open. Since the text

³⁵⁵ J. BARBOZA, *DERECHO INTERNACIONAL PÚBLICO* (Zavalía Editor 2008).

³⁵⁶ P. A. F. Sanchis, *Los conceptos “ius cogens” y “ius dispositivum” y la labor de la Comisión de Derecho Internacional*, 21 *REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL* 763 (1968).

³⁵⁷ Ley No. 19.865, *Convención de Viena sobre el derecho de los tratados* [Vienna Convention on the Law of Treaties] (1972) (Arg.).

³⁵⁸ J. S. Stanford, *The Vienna Convention on the Law of Treaties*, 20 *U. TORONTO L.J.* 18 (1970).

speaks of “a peremptory norm of *general* international law,” are there peremptory norms of special, regional, or particular international law? Is there, in other words, a regional *ius cogens*?³⁵⁹

Given the fragmentation that characterizes the contemporary international legal order,³⁶⁰ *ius cogens* norms are applied and expressed in different degrees, at different intensities, and across subject matters that vary with the jurisdiction at issue.³⁶¹ Each international court will be taken up in turn; it is worth noting in advance that tribunals of a primarily commercial character are less inclined to invoke these norms, given the character of the rights their jurisdiction reaches. Human rights courts and criminal tribunals, by contrast, tend to name them explicitly.

Peremptory international law is at present fertile ground for scholarly dispute, and the disputes show up in the motley quality of the decisions in the field. Different tribunals interpret the concept differently and give it divergent scope in matters of applicability and recognition.³⁶² To recognize a norm as *ius cogens* is to make its application a *sine qua non*: a decision that fails to apply it is contrary to law, and there is general agreement that peremptory norms are *erga omnes*.³⁶³ Declaring a norm of this character is therefore a weighty move for an international tribunal, because it sets a precedent that the rest of the legal order cannot then ignore.³⁶⁴

³⁵⁹ R. Puceiro Ripoll, *Las normas de jus cogens. ¿Fenómeno exclusivamente universal o también eventualmente regional?*, in CURSO DE DERECHO INTERNACIONAL 377 (Secretaría de Asuntos Jurídicos, Organización de los Estados Americanos (OEA) 2001).

³⁶⁰ A. Gourgourinis, *Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)*, 103 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 79 (2009).

³⁶¹ L. McGregor, *State Immunity and Jus Cogens*, INT'L & COMP. L.Q. (2006).

³⁶² M. G. Narasimhaswamy, *Jus cogens and International Law*, 14 J. INDIAN L. INST. 340 (1972).

³⁶³ Y. Dinstein, *The erga omnes Applicability of Human Rights*, 30 ARCHIV DES VÖLKERRECHTS 16 (1992).

Comparable to domestic public policy, peremptory norms prevail over state sovereignty and void treaties between subjects that fail to comply with what this body of law establishes. An involuntary limit on sovereignty collides with one of the basic principles of public international law, which is why the concept must be handled carefully.³⁶⁵ And it is worth asking whether *ius cogens* does not, after all, also originate in the will of states, through treaties such as the Vienna Convention on the Law of Treaties and the other instruments that have given the concept its momentum.

The research will have to continue if the findings are to yield what a prospective account of international law would require, and to show whether the problems taken up here (where does *ius cogens* come from? which norms are *ius cogens* norms?) have been resolved, and whether we are entering a new phase of case law. Whether the stated objectives can be reached, in short, remains to be settled, and reaching them will probably raise new problems of its own. Knowing exactly what *ius cogens* is would not be enough; its interpretation and its application to the concrete cases that may arise would still have to be worked out in a form that can be taught.

Stated briefly, the central problem is to discover which norms drive and bind the international community together. The working hypothesis is this: *ius cogens* norms are being codified, carried into treaties, so that what is non-derogable will fall outside custom, general principles and other sources, which will then ratify what the treaties have established.³⁶⁶

That hypothesis, whose crux is to identify which norms belong to *ius cogens*, brings derivative problems with it: the conflict between

³⁶⁴ M. Pinto, *El Ius cogens en la jurisprudencia internacional*, 37 REVISTA JURÍDICA DE BUENOS AIRES 3 (2012).

³⁶⁵ D. Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

³⁶⁶ A. CANÇADO TRINDADE, *JUS COGENS: THE DETERMINATION AND THE GRADUAL EXPANSION OF ITS MATERIAL CONTENT IN CONTEMPORARY INTERNATIONAL CASE-LAW* (Organization of American States 2008).

peremptory law and the principles of sovereignty and self-determination, and the question of hierarchy between peremptory and dispositive norms.³⁶⁷ Since there is no central authority in the matter, the case law of the various existing jurisdictions is the key to knowing how norms are classified and where the field now stands. In the end it is the judges who apply international law who define which norms are peremptory, and in doing so generate a kind of “international public policy.”³⁶⁸

A related hypothesis has been advanced: that *compétence de la compétence* is not wholly determined by the will of states, since the final decision falls to judges, who within each jurisdiction have the last word and whose decisions are not appealable, save through internal mechanisms in certain cases. The declaration of *ius cogens* norms, whose enumeration is one of the aims of this research, can be considered along the same lines. Declaring a norm to be *ius cogens* lies within the power of states, but states do not usually do it; the decision falls instead to the international tribunals, which apply the law by interpreting the states. A state that did not fully agree with the application of what the tribunal deems peremptory would have no practical option but to denounce the treaty that submits it to that jurisdiction.³⁶⁹

The path through the case law begins with the first modern international court and its application of norms binding on all states alike. In the scholarship, and in the case law above all, the term *ius cogens* is not often found attached explicitly to a specific norm, precisely because of the legal weight such a declaration carries. *Ius cogens* norms are therefore exceptional and elusive; at times they travel under the cover of neighboring concepts, such as *erga omnes* obligations, which share features with the concept at issue.

³⁶⁷ J. CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Oxford University Press 2012).

³⁶⁸ S. GONZÁLEZ NAPOLITANO, *LECCIONES DE DERECHO INTERNACIONAL PÚBLICO* (Erreius 2015).

³⁶⁹ L. R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

Analysis by jurisdiction

The Permanent Court of International Justice

The Permanent Court of International Justice, created in 1920, exercised jurisdiction from 1922 to 1946, bound up for the most part with the workings and the role the League of Nations had acquired by then.³⁷⁰ It was thus the direct predecessor of today's International Court of Justice, and its role was to settle disputes between states parties by strictly applying the norms of public international law. Regarded as the first modern international tribunal in history,³⁷¹ the Court explained its own competence in the judgments it handed down; it was a pioneer, and it gave the first indications of what would later develop as "international jurisdiction."³⁷²

In the *Lotus* case,³⁷³ the PCIJ established that state sovereignty cannot be undercut by international tribunals or by later legislation unless the state itself submits to that jurisdiction or positive norm.³⁷⁴ The will of each full subject, that is, is the foundation of international law, and from it follows the state's submission to jurisdiction over it and, consequently, over its nationals in the specific case.³⁷⁵ International law was thereby established as positive law as well, on a footing with national legal systems.

In *Oscar Chinn*, however, the same Court, through a judge writing separately, held that its jurisdiction could not apply a law contrary to

³⁷⁰ W. J. Curtis, *Permanent Court of International Justice*, 8 AM. BAR ASS'N J. 158 (1922).

³⁷¹ M. O. Hudson, *The Eighth Year of the Permanent Court of International Justice*, 24 AM. J. INT'L L. 20 (1930).

³⁷² P. B. Potter, *The Expansion of International Jurisdiction*, 41 POL. SCI. Q. 546 (1926).

³⁷³ *S.S. Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

³⁷⁴ *S.S. Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

³⁷⁵ *S.S. Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

“public morality,” modifying in this way the apparent rigidity of the *Lotus* precedent:

(...) I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even today, to create a *jus cogens* (...). The Court would never, for instance, apply a convention the terms of which were contrary to public morality.³⁷⁶

From the very beginning of international jurisdiction, then, we find in the first tribunal a reference to peremptory norms and to their capacity, through agreement among states and by way of public morality, to void provisions that do not belong to that category. Within the PCIJ’s own case law the existence and application of peremptory norms of international law was already contested, and the judges do not appear to have found common ground, at least in what the cases express, on how to read the relation between peremptory and dispositive norms through the rules then in force.

Its successor carried the debate forward.

The International Court of Justice

The International Court of Justice is perhaps the most widely recognized international tribunal in the world, since it belongs to the United Nations, an international organization to which most states belong.³⁷⁷ It is also the oldest of the international jurisdictions now in existence. Created in 1945 and operating from 1946 onward, its Statute is among the most frequently cited international instruments when the sources of law are at issue, given how the scholarship has received it.³⁷⁸

³⁷⁶ *Oscar Chinn* (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12).

³⁷⁷ E. Hambro, *The Jurisdiction of the International Court of Justice*, 34 TRANSACTIONS GROTIUS SOC’Y 127 (1948).

³⁷⁸ H. C. Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*, 38 TRANSACTIONS GROTIUS SOC’Y 125 (1952).

In *South West Africa*,³⁷⁹ the Court, in the separate opinion of Judge Kōtarō Tanaka, said:

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.³⁸⁰

This judge stated plainly that in his view human rights, with the international state responsibility that follows from them, are a constitutive part of *ius cogens*. They cannot be derogated from except by a later *ius cogens* norm, nor can they be blocked or voided by a dispositive one. Here is a precedent for reading human rights as peremptory norms, as members of international public policy.

In *Barcelona Traction*,³⁸¹ the ICJ said the following at paragraphs 33 and 34:

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

³⁷⁹ *South West Africa* (Eth. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6 (July 18).

³⁸⁰ *South West Africa* (Eth. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6 (July 18).

³⁸¹ *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), Second Phase, Judgment, 1970 I.C.J. 3 (Feb. 5).

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.³⁸²

In this judgment the ICJ recognizes the existence of *erga omnes* obligations: conduct to which states are bound by the fact of belonging to the international community, the community the Vienna Convention names. The requirement that such obligations derive from some particular instrument, or that they be tied to a specific multilateral or bilateral agreement as their source, falls away. They rest instead on the consensus essential to harmony among nations and to the maintenance of peace.³⁸³ As can be seen, the reasons offered to ground *erga omnes* obligations are shared with those used to ground peremptory norms.³⁸⁴

The scholarship has held that every peremptory norm generates *erga omnes* obligations for states, though not every *erga omnes* norm derives from *ius cogens*.³⁸⁵ A subsequent study might ask which *erga omnes* obligations do not in fact derive from *ius cogens*, if any do. That line of inquiry carries a risk, however: it may conceptually demote ordinary *erga*

³⁸² *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3 (Feb. 5).

³⁸³ P. Alston, *Peace as a Human Right*, 11 BULL. PEACE PROPOSALS 319 (1980).

³⁸⁴ E. A. Posner, *Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law*, 165 J. INSTITUTIONAL & THEORETICAL ECON. 5 (2009).

³⁸⁵ M. Longobardo, *The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes*, 23 J. CONFLICT & SEC. L. 383 (2018).

omnes obligations relative to those of the same character that flow from *ius cogens* norms.

Barcelona Traction settled, for the ICJ's jurisdiction, that certain obligations do not depend on bilateral or specific treaties. On this classification, the international obligations of states may run:

1. To one state (bilateral).
2. To two or more states (multilateral).
3. To the international community (*erga omnes*).

Among the rights enumerated in this judgment, understood under the third category of obligation, are:

1. The prohibition of the crime of aggression.
2. The prohibition of the crime of genocide.
3. The prohibition of racial discrimination.
4. The prohibition of slavery.
5. Human rights in general.

Reaffirming the link between peremptory norms and *erga omnes* obligations, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,³⁸⁶ the Court, in the separate opinion of Judge Hersch Lauterpacht, said:

100. The present case, however, cannot fall within the scope of the doctrine just enunciated. This is because the prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case to which the terms of Article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*. Even in 1951, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court affirmed that genocide was “contrary to moral law and to the spirit and aims of the United Nations” (a view repeated by the

³⁸⁶ M. Mennecke & C. J. Tams, *The Genocide Case Before the International Court of Justice*, 25 SICHERHEIT UND FRIEDEN (S+F) / SEC. & PEACE 71 (2007).

Court in paragraph 51 of today's Order) and that "the principles underlying the Convention are provisions which are recognized by civilized nations as binding on States even without any conventional obligation" (I.C.J. Reports 1951, p. 22).³⁸⁷

For the ICJ, then, the crime of genocide is not merely a *ius cogens* norm; it is the most complete example of one, and it generates an *erga omnes* obligation of prohibition binding the whole international community. Given the gravity of the prohibited conduct, it follows that the peremptory character here takes on a sharper and stronger stamp: this is an "undoubted" example. But the phrasing also reveals that there must be less definite examples: norms that belong to *ius cogens* yet are harder to elucidate, or are appraised differently across the fragmented tribunals international law provides. One such case, as we shall see, is the prohibition of discrimination on grounds of nationality.

In *Armed Activities on the Territory of the Congo*,³⁸⁸ Judge Bruno Simma returned to *erga omnes* obligations, adding a body of law not previously incorporated into the ICJ's case law:

39. As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, "[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable 'erga omnes', since they may be regarded as the codification of accepted principles."³⁸⁹

³⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.), Further Requests for the Indication of Provisional Measures, Order, 1993 I.C.J. 325 (Sept. 13).

³⁸⁸ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

³⁸⁹ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

To human rights, already recognized in earlier cases, international humanitarian law is now added: the branch of international law that governs armed conflict, the *ius in bello*. For the ICJ, the rules that regulate what happens during armed conflict are peremptory.³⁹⁰

The Inter-American Court of Human Rights

The Inter-American Court of Human Rights is a regional American body belonging to the Organization of American States.³⁹¹ The Court in turn belongs to the Inter-American Human Rights System, which also includes the Inter-American Commission on Human Rights. It began operating in 1979, with the task of applying and interpreting, as a jurisdiction, the 1969 American Convention on Human Rights, which entered into force after the eleventh ratification in 1978. It is composed of seven judges and decides cases brought against states parties for violations of the Convention, its protocols, *ius cogens*, and OAS norms.³⁹²

This tribunal has been among the most generous in reading the concept of *ius cogens* broadly, and it has recognized a variety of norms under it. In *Aloeboetoe*³⁹³ it ruled against slavery, rejected as contrary to international public policy:

57. The Court does not consider it necessary to inquire whether that agreement is an international treaty. It need only observe that if it were, the treaty would today be void, because it contradicts norms of *jus cogens superveniens*. Under that agreement the

³⁹⁰ C. Sommaruga, *Effective Implementation of International Humanitarian Law in Changing Circumstances*, 91 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 519 (1997).

³⁹¹ J. L. Cavallaro & S. E. Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768 (2008).

³⁹² A. A. C. Trindade, *El futuro del sistema interamericano de protección de los derechos humanos: algunas reflexiones*, 28 ESTUDIOS INTERNACIONALES 3 (1995).

³⁹³ *Aloeboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

Saramakas undertook, among other things, to capture any slaves who had deserted, to take them prisoner and to return them to the Governor of Suriname, who would pay between 10 and 50 florins for each one, depending on the distance of the place of capture. Another article authorized the Saramakas to sell to the Dutch, as slaves, any other prisoners they might capture. An agreement of this nature cannot be invoked before an international human rights court.³⁹⁴

For the Inter-American Court, by its own determination of competence, applying a treaty contrary to human rights would be impossible. In another matter, exercising its non-contentious jurisdiction, the Court held in an advisory opinion (2003):

109. This general obligation to respect and guarantee the exercise of rights has an *erga omnes* character. It is imposed on states for the benefit of the human beings within their respective jurisdictions, and irrespective of the migratory status of the persons protected. That obligation extends to all the rights contemplated by the American Convention and by the International Covenant on Civil and Political Rights, including the right to judicial guarantees. The right of all persons to have access to justice, understood as the right to effective judicial protection, is thereby preserved.³⁹⁵

The Court thus recognizes access to jurisdiction as a human right carrying an *erga omnes* obligation, whatever the person's status as a migrant or as someone in transit. To nationals and non-nationals alike, a state must guarantee access to effective judicial protection of their human rights. The invocation of these obligations does not stop at protection, however; later in the same opinion the Court makes the point explicit:

110. (...) The effects of the fundamental principle of equality and non-discrimination reach all states, precisely because that principle belongs to the domain of *jus cogens*. Clothed with peremptory

³⁹⁴ *Aloeboetoe v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

³⁹⁵ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

character, it entails *erga omnes* obligations of protection that bind all states and generate effects with regard to third parties, including private individuals.³⁹⁶

Equality and non-discrimination among human beings belong, the Court says, to the domain of peremptory norms, and that in turn gives an *erga omnes* character to the obligations flowing from these principles. The obligations are not owed by the state to private parties alone: in the Court's reading, the state bears international responsibility for guaranteeing that such discrimination does not occur among the private parties acting on its territory or under its control. The Court accordingly holds, in its decision:

5. That the fundamental principle of equality and non-discrimination, clothed with peremptory character, entails *erga omnes* obligations of protection that bind all states and generate effects with regard to third parties, including private individuals.³⁹⁷

Adding the principle of non-discrimination to the peremptory norms underscores that human rights belong to this non-derogable category of the international legal order. It also consolidates a general view of law shared by certain domestic systems, the Argentine one among them, which grants constitutional rank to international human rights treaties. The weight the Inter-American Court assigns to equality and non-discrimination casts the desired conduct as exactly that: an imperative, to which states parties must aspire and with which they must comply, on pain of sanction by the Court.

In *La Cantuta*,³⁹⁸ the Inter-American Court held that human rights violations, besides being subject to sanction and contrary to international

³⁹⁶ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

³⁹⁷ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

³⁹⁸ *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

human rights law, must be investigated and punished by each state's domestic legal order:

157. (...) the obligation to investigate and, where appropriate, to prosecute and punish acquires particular intensity and importance in view of the gravity of the crimes committed and the nature of the rights injured; all the more so because the prohibition of the forced disappearance of persons and the corresponding duty to investigate it and punish those responsible have attained the character of *jus cogens*. Impunity for such acts will not be eradicated without the consequent determination of general responsibility—that of the state—and particular responsibility—the criminal responsibility of its agents or of private individuals—which are complementary to one another. It is therefore enough to reiterate that the investigations and proceedings opened in respect of the facts of this case fall to the state, must be carried out by every legal means available, and must culminate in, or be directed toward, the determination of the whole truth and the pursuit and, where appropriate, the capture, prosecution and punishment of all those responsible for the acts, whether as masterminds or as perpetrators.³⁹⁹

The prohibition of forced disappearance is peremptory, but so is the duty to investigate that flagrant violation. What breaches public order, in consequence, is not only the crime itself but also the conduct a state adopts if it abandons or fails in the work of investigating, prosecuting and punishing those materially and intellectually responsible for violations of international human rights law and of the American Convention. The Court presses the point in the same case:

160. As has repeatedly been noted, the facts of the present case have infringed non-derogable norms of international law (*jus cogens*). Under Article 1(1) of the American Convention, states are obliged to investigate human rights violations and to prosecute and punish those responsible. Given the nature and gravity of the acts, all the more so in a context of systematic human rights

³⁹⁹ *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

violations, the need to eradicate impunity presents itself to the international community as a duty of interstate cooperation to that end. Access to justice constitutes a peremptory norm of international law and, as such, generates *erga omnes* obligations for states to adopt whatever measures are necessary so that such violations are not left in impunity, whether by exercising their jurisdiction to apply their domestic law and international law in order to prosecute and, where appropriate, punish those responsible for acts of this kind, or by cooperating with other states that do so or seek to do so. The Court recalls that, under the collective guarantee mechanism established in the American Convention, together with the regional and universal international obligations on the matter, the states parties to the Convention must cooperate with one another to that end.⁴⁰⁰

Here the Inter-American Court makes explicit that the peremptory right to jurisdiction complements the prohibition explained above. The duty to investigate and prosecute is not confined to the national or domestic sphere; it extends to interstate cooperation in resolving the matter. The *erga omnes* obligation to investigate, prosecute and punish human rights violations—cooperating with other states where necessary—derives, as a matter of norm, from *ius cogens*.

To summarize this section, then: to what the ICJ has identified as belonging to *ius cogens*, the Inter-American Court adds

1. the principle of equality and non-discrimination;
2. the prohibition of the forced disappearance of persons; and
3. the right to jurisdiction and to investigation for human rights violations.

Item by item, we are working out what international case law understands by “peremptory norms.”

⁴⁰⁰ *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

The European Court of Human Rights

The European Court of Human Rights was established in 1959 by the Council of Europe to investigate, adjudicate and sanction, within the European region, violations of obligations arising from human rights norms, with the aim of securing compliance with international human rights law in general, and with the European Convention on Human Rights (1950) by the states parties in particular.⁴⁰¹

In *Al-Adsani*,⁴⁰² paragraph 144 of the ICTY's judgment in *Furundžija*,⁴⁰³ among other authorities, was used to argue for the *ius cogens* character of the prohibition of torture:

57. (...) the applicant does not deny that the above provision reflects a generally accepted rule of international law. He asserts, however, that his claim related to torture, and contends that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.⁴⁰⁴

The majority disposed of the point tersely, but the dissenting judges wrote opinions that followed the cited precedent through. Positions clashed over whether state immunity, from jurisdiction and from execution alike, must yield to a norm of *ius cogens*.⁴⁰⁵ Judge Nicolas Bratza wrote:

A holding that immunity is incompatible with Article 6 of the Convention because of the *jus cogens* nature of the prohibition of torture would have made it difficult to take into account any

⁴⁰¹ M. E. Villiger, *The European Court of Human Rights*, 95 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 79 (2001).

⁴⁰² *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. (Nov. 21, 2001).

⁴⁰³ Judgment cited in the corresponding tribunal.

⁴⁰⁴ *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. (Nov. 21, 2001).

⁴⁰⁵ L. M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741 (2003).

considerations of this kind. In other words, in order not to contradict itself the Court would have been forced to hold that the prohibition of torture must also prevail over immunity of a foreign State's public property, such as bank accounts intended for public purposes, real estate used for a foreign State's cultural institutes and other establishments abroad (including even, it would appear, embassy buildings), etc., since it has not been suggested that immunity of such public property from execution belongs to the corps of *jus cogens*. Although giving absolute priority to the prohibition of torture may at first sight seem very "progressive", a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of "Pyrrhic victory". International cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations. Principles concerning State immunity belong to that regulatory framework, and I believe it is more conducive to orderly international cooperation to leave this framework intact than to follow another course.⁴⁰⁶

Here is the tension set out earlier: state sovereignty, and the immunity recognized on its basis, against peremptory norms. The Court adjusts its position, with some strain, so as not to disturb state immunity in order to widen the protection available to judicial actions against conduct that *ius cogens* prohibits. Judge Bratza's claim is that giving peremptory norms an expansive character over the rest of the international legal order produces a "Pyrrhic victory," in which states withdraw from the international jurisdictions because those jurisdictions have reached into their immunities. They would stop cooperating, on this view, if judgments applied *ius cogens* to its last consequences, or gave it absolute priority.

In a broad dissent, by contrast, Judge Luigi Ferrari Bravo opposed the majority, recording his view that the judgment was, unfortunately, a step backward in the protection of rights guaranteed by peremptory norms of the international order:

What a pity! The Court, whose task in this case was to rule whether there had been a violation of Article 6 § 1, had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. To do

⁴⁰⁶ *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. (Nov. 21, 2001).

so, it need only have upheld the thrust of the House of Lords' judgment in *Regina v. Bow Street Metropolitan Stipendiary and Others, ex parte Pinochet Ugarte* (No. 3) (judgment of 24 March 1999 [2000] Appeal Cases 147), to the effect that the prohibition of torture is now *jus cogens*, so that torture is a crime under international law. It follows that every State has a duty to contribute to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment.⁴⁰⁷

The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights is a regional, continental jurisdiction, signed in Burkina Faso in 1998 and in force since 2004, when it reached the fifteen ratifications the treaty required.⁴⁰⁸ It is composed of eleven judges from African states parties, who decide the human rights cases submitted to their competence on the basis of the Protocol that provides for it. The Court issued its first judgment in 2009.⁴⁰⁹

In one of its decisions the Court said:

It is also well-established in the jurisprudence of the Court that where allegations of violations of human rights relate to the manner in which domestic courts examine evidence, the Court has jurisdiction to assess whether such examination is consistent with international human rights standards.⁴¹⁰

The jurisdiction in question thereby affirms its membership in an international human rights standard, the one it shares with other bodies, such as the Inter-American Court, the UN International Law Commission and the ICJ. It does not say explicitly that the standard is one of *jus cogens*. Still, given its immersion in that standard, and given that it cites

⁴⁰⁷ *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. (Nov. 21, 2001).

⁴⁰⁸ M. Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342 (1999).

⁴⁰⁹ G. Bekker, *The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151 (2007).

⁴¹⁰ *Kijiji Isiaji v. Tanzania*, Judgment, Afr. Ct. H.P.R. (Mar. 21, 2018).

jurisdictions which have said so, the African Court may be taken to regard those norms as having that character.

The International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia arose at the initiative of the United Nations to try the crimes committed in that former territory in violation of human rights and international humanitarian law during the process of balkanization that began in 1991.⁴¹¹ It was an international criminal tribunal of ad hoc competence, operating within the UN framework from 1993 to 2017. Seated in The Hague, it could punish the international crimes and violations of humanitarian law committed during the Yugoslav wars (1991–2001).⁴¹² In 2018 it was succeeded by the International Residual Mechanism for Criminal Tribunals.⁴¹³

In *Furundžija*, the ICTY established that the prohibition of torture is *ius cogens*, and that it is comprehensive:

144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for

⁴¹¹ D. Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7 (2002).

⁴¹² A. Škrbić, *The legacy of the International Criminal Tribunal for the former Yugoslavia*, 18 SEER: J. LAB. SOC. AFF. E. EUROPE 241 (2015).

⁴¹³ V. Oosterveld, *International Law and the Closure of the International and Hybrid Criminal Tribunals*, 104 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 37 (2010).

believing that the person would be in danger of being subjected to torture.⁴¹⁴

The Tribunal underscored both the importance of human rights and the membership of the prohibition of torture among peremptory norms. To this it added that the prohibition extends, equivalently, to conduct by which states deport, extradite or send a person to another state where there is a presumed danger of torture on arrival.

In the same case the ICTY said: “(...) *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”⁴¹⁵

For this tribunal, then, the problem of hierarchy is settled. The question has been posed above: are *ius cogens* norms of higher rank than dispositive ones, or are they simply of the same rank, with one class displacing the other in a kind of horizontal public policy? The ICTY defines them, to the contrary, as hierarchically superior to dispositive norms. For this jurisdiction, at least in this case, the matter is closed.

The *erga omnes* obligation to prevent and punish a breach of the international order is reiterated as well, and the Tribunal delegitimizes any domestic rule of any state that fails to conform to this peremptory norm, a norm that ought to guide administrative, legislative and judicial acts alike:

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture.⁴¹⁶

⁴¹⁴ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (ICTY Dec. 10, 1998).

⁴¹⁵ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (ICTY Dec. 10, 1998).

⁴¹⁶ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (ICTY Dec. 10, 1998).

In *Kupreškić*,⁴¹⁷ the ICTY held that international humanitarian law falls within the domain of *ius cogens*:

520. Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.⁴¹⁸

The ICTY thus placed itself among the tribunals that have affirmed the membership of humanitarian law norms in the peremptory order of public international law.

The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda was created by the United Nations to try those responsible for the Rwandan genocide of 1994.⁴¹⁹ Established in that same year, it remained active until 2015. Composed of twenty-five judges, it had competence under its Statute over violations of international humanitarian law (common Article 3 of the Geneva Conventions) and the commission of international crimes. It exercised criminal jurisdiction, that is, trying, like the ICTY, the conduct of natural persons as subjects of public international law.⁴²⁰

By the very character of its competence, the charges brought by the Tribunal's prosecutor carry a strong imprint of *ius cogens* prohibitions accepted by the rest of the international community, by jurists and by the remaining jurisdictions: the prohibitions of international crimes and the prohibition of violations of humanitarian law.

⁴¹⁷ *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment (ICTY Jan. 14, 2000).

⁴¹⁸ *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment (ICTY Jan. 14, 2000).

⁴¹⁹ R. Boed, *The United Nations International Criminal Tribunal for Rwanda: Its Establishment, Work and Impact on International Criminal Justice*, 17 PERSP. 59 (2001).

⁴²⁰ M. D. Shenk et al., *International Criminal Tribunal for the Former Yugoslavia and for Rwanda*, 33 INT'L LAW. 549 (1999).

In *Rutaganda*, for instance, the Tribunal entered a conviction for what it regarded as violations of *ius cogens*: breaches of the norms prohibiting crimes against humanity and violations of common Article 3 of the Geneva Conventions.⁴²¹

The International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes is a quasi-jurisdictional arbitration system belonging to the World Bank. It was created in 1965 so that international investors from one state party could bring a claim against another state party over a particular dispute concerning property or commerce.⁴²² The system runs on bilateral investment treaties signed individually by the full subjects of international law, which refer disputes to ICSID.⁴²³

Although this is an arbitral system, the bilateral investment treaties states sign sometimes refer disputes to ICSID's quasi-jurisdiction on binding terms, which makes the award mandatory.⁴²⁴ Foreign investors are not, strictly speaking, subjects of international law; the system nonetheless lets them reach an arbitral decision *motu proprio*, by virtue of a capacity detached from the full subject that has delegated it.

Ius cogens is not widely applied in competences of a primarily commercial character. That is precisely because the problems at issue are monetary, and rarely reach the limit situations that arise before other tribunals, where the fundamental principles of public international law come into play. In *Aguas Argentinas*, however, Argentina defended itself

⁴²¹ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (ICTR Dec. 6, 1999).

⁴²² M. Kinnear, *Challenge of Arbitrators at ICSID—An Overview*, 108 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 412 (2014).

⁴²³ C. McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361 (2008).

⁴²⁴ One example is Ley No. 24.100, art. 8(5) (Arg.).

with an argument that invoked human rights, which belong holistically to *ius cogens*:

252. Argentina argues that it adopted the measures in order to safeguard the human right to water of the inhabitants of the country. Because of its importance to the life and health of the population, Argentina states that water cannot be treated as an ordinary commodity. Because of the fundamental role of water in sustaining life and health and the consequent human right to water, it maintains that in judging the conformity of governmental actions with treaty obligations this Tribunal must grant Argentina a broader margin of discretion in the present cases than in cases involving other commodities and services. In order to judge whether a treaty provision has been violated, for example the provision on fair and equitable treatment, Argentina argues that this Tribunal must take account of the context in which Argentina acted and that the human right to water informs that context.⁴²⁵

The human right to water, fundamental to human life, is what the argument turns on, and the passage shows how *erga omnes* obligations derived from peremptory norms find expression in commercial disputes. ICSID nonetheless rejected the argument, holding that Argentina could reconcile its obligations regarding the human right to water with the rights arising from the bilateral investment treaties, which would neither collide with them nor contradict them. For the treaties to be void, in other words, their application would have to run against human rights, and ICSID found no basis for that premise.⁴²⁶

⁴²⁵ *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010).

⁴²⁶ J. Echaide, *Demandas en el CIADI y el derecho humano al agua: ¿tratados de inversión vs. derechos humanos?*, 15 INT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 82 (2017).

The Permanent Review Tribunal of MERCOSUR

MERCOSUR (the Southern Common Market) is an international process of South American integration that has acquired the status of an imperfect customs union. It was created in 1991 by Argentina, Brazil, Paraguay and Uruguay.⁴²⁷ Initially conceived as a tariff union, political factors have progressively widened the organization through treaties assigning it broader functions and competences.⁴²⁸ One sign of this was the creation of the Permanent Review Tribunal in 2002, which reports to the organization.⁴²⁹

The Protocol of Olivos was signed that year, creating the Tribunal, which entered into force in 2004 with the purpose of reviewing the awards of the ad hoc tribunals and serving as a general legality check on the whole MERCOSUR system.⁴³⁰ Since the union was originally conceived as a commercial one, its jurisdiction resembles ICSID's quasi-jurisdiction in one respect: references to peremptory norms are infrequent, given the subject matter its decisions usually address.

In award 1/2012, the Tribunal addressed the suspension of Paraguay and the incorporation of Venezuela into MERCOSUR. The term "democratic order" was analyzed and used as the principal argument for the suspension of the former state in the organization's decisions:

32.

⁴²⁷ L. Manzetti, *The Political Economy of Mercosur*, 35 J. INTER-AM. STUD. & WORLD AFF. 101 (1993).

⁴²⁸ J. A. E. Vervaele, *Mercosur and Regional Integration in South America*, 54 INT'L & COMP. L.Q. 387 (2005).

⁴²⁹ A. L. Garín, Book Review, 37 ESTUDIOS INTERNACIONALES 149 (2004) (reviewing E. R. CARO, PROTOCOLO DE OLIVOS PARA LA SOLUCIÓN DE CONTROVERSIAS EN EL MERCOSUR).

⁴³⁰ C. M. Díaz Barrado, *Protocolo de Olivos para la solución de controversias en Mercosur adoptado el 18 February 2002: un paso adelante en la integración mercosureña*, 55 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 1097 (2003).

- c) The suspension of Paraguay from the right to participate in the organs of MERCOSUR, under Article 5 of the Protocol of Ushuaia, falls outside the application of the Protocol of Olivos and cannot be examined within the dispute settlement system, since it is an eminently political matter. Were the Tribunal to decide the question raised, it might invade the exclusive sphere of jurisdiction of the states parties to interpret what is to be understood by a rupture of the democratic order.⁴³¹

MERCOSUR's conception of "democratic order" is not directly associated with *ius cogens*, but it may be read as the Tribunal's closest approach to the concepts of international public policy, and as a case in which the determination of what democracy is is finally made democratically, by the vote of the states. In declining to consider the argument, the Tribunal held the definition to be political rather than legal, and therefore held that defining the question raised was not for it to do, since the question exceeds the purposes of the judicial sphere.

The democratic order resembles *ius cogens* through the notion of peremptory norms as a public order that cannot be disposed of. Yet the democratic order can be set aside without responsibility on the part of a state, on condition of being removed from MERCOSUR. Nothing analogous holds for peremptory norms.

The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea is a judicial body established in 1982, signed in Jamaica, through the United Nations Convention on the Law of the Sea, known as the "constitution of the oceans" for the breadth of its application and acceptance. This is a tribunal framed within the international system, with competence in the

⁴³¹ MERCOSUR Permanent Review Tribunal, Award No. 01/2012, *Procedimiento Excepcional de Urgencia solicitado por la República del Paraguay* (July 21, 2012).

law of the sea, that resolves questions arising in that field.⁴³² Its first case was referred to it in 1997.⁴³³

The Convention contains no explicit reference to peremptory norms or to *erga omnes* obligations, and it is understandable that the Tribunal has made no express reference to these questions, given the specific character of its jurisdiction. It does, however, invoke the principle of good faith, found in Article 300 of the Convention:

SECOND: that by knowingly and intentionally maintaining the arrest of the M/V “Norstar” and indefinitely exercising its criminal jurisdiction and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of right as set forth in article 300 of the Convention (...).⁴³⁴

The Tribunal treats this obligation of good faith as one of the principles of public international law, and a violation of its force as a breach of the international order. The principle does not acquire the character of *ius cogens* in this decision, but it resembles peremptory norms conceptually, in that it sets a minimum floor of respect for the legal order and for the community of nations that must not be broken. Within that zone of imprecision, however, it also carries a considerable measure of judicial discretion.⁴³⁵

⁴³² A. R. Carnegie, *The Law of the Sea Tribunal*, 28 INT’L & COMP. L.Q. 669 (1979).

⁴³³ R. Wolfrum, *The Legislative History of Articles 20 and 21 of the Statute of the International Tribunal for the Law of the Sea*, 63 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 342 (1999).

⁴³⁴ M/V “Norstar” (Pan. v. It.), Judgment, ITLOS Case No. 25 (Apr. 10, 2019).

⁴³⁵ V. Ibler, *Jus Cogens and the Law of the Sea*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW: LIBER AMICORUM LUCIUS CAFLISCH 747 (M. G. Kohen ed., Brill 2007).

The Appellate Body of the World Trade Organization

The World Trade Organization is an international organization whose principal aim is to create a link that facilitates international trade among all its member states.⁴³⁶ It was founded in 1994 as an update of the General Agreement on Tariffs and Trade (GATT),⁴³⁷ a multilateral treaty proposing the reduction and unification of tariffs.⁴³⁸ The WTO began operating in 1995 and is headquartered in Geneva, Switzerland.

The WTO has an international dispute settlement system composed of the Dispute Settlement Body (made up of government representatives) and, at last instance, the permanent Appellate Body, constituted by seven members, which issues rulings on matters submitted to its jurisdiction.⁴³⁹ This tribunal handles commercial matters only, and it explicitly excludes every other topic of public international law not strictly related to trade, leaving that competence to other organizations or tribunals. It therefore does not address questions of peremptory norms.

That said, commercial matters do touch the principles of environmental protection, which one day might plausibly be regarded as *ius cogens* by some specialized tribunal.⁴⁴⁰ The Appellate Body has not taken that position. It has said expressly that the principle of environmental protection, while it does not discourage it, does not apply within its jurisdiction, because it does not fall within its competence. Thus, in *Import Prohibition of Certain Shrimp and Shrimp Products*, it said:

⁴³⁶ J. H. Jackson, *The Case of the World Trade Organization*, 84 INT'L AFF. (ROYAL INST. INT'L AFF. 1944-) 437 (2008).

⁴³⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁴³⁸ C. Torres Manzo, *El GATT o el Acuerdo General sobre Aranceles Aduaneros y Comercio*, 21 INVESTIGACIÓN ECONÓMICA 25 (1961).

⁴³⁹ M. M. Bechtel & T. Sattler, *What Is Litigation in the World Trade Organization Worth?*, 69 INT'L ORG. 375 (2015).

⁴⁴⁰ G. Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992).

186. What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX [that is, 20] of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States — Gasoline* [adopted 20 May 1996, WT/DS2/AB/R, p. 32], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.⁴⁴¹

For this tribunal, then, it is essential that states, in implementing regulations for their environment, not discriminate in trade among the various states whose external commerce they regulate or limit for the sake of that protection. This is not an *erga omnes* obligation. But one can imagine that some day a specialized tribunal will take up the principle and apply something similar in reverse for environmental protections: an obligation to protect the environment, while keeping equity in international trade in view.

The International Criminal Court

The International Criminal Court is an international organization and a jurisdiction seated in The Hague, the Netherlands, created by the Rome

⁴⁴¹ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

Statute, signed in 1998 and in force since 2002.⁴⁴² The treaty establishes the Court's competence, structure and reach.⁴⁴³ Its function is individual and criminal: it tries individuals as subjects of international law with limited capacity, charged with the commission of international crimes not subject to any statute of limitations.⁴⁴⁴ Those crimes are:

1. Genocide.
2. Crimes against humanity.
3. The crime of aggression.
4. War crimes.

The governing rule of this jurisdiction is that the Court may try cases only in a complementary capacity, when local courts fail, and only crimes committed on the territory of states parties or by nationals of one of those states. Today its membership is drawn principally from the Americas, Africa and Europe.

In *Ntaganda*, the Court referred to *ius cogens* and to the Vienna Convention as follows:

As the prohibition of slavery has *jus cogens* status under international law, the prohibition of sexual slavery has the same status, and as such, no derogation is permissible. The Chamber further notes that rape can constitute an underlying act of torture or of genocide and that the prohibitions of torture and genocide are indisputably *jus cogens* norms. It has further been argued, and the majority of the Chamber accepts, that the prohibition on rape itself has similarly attained *jus cogens* status under international law.⁴⁴⁵

⁴⁴² H. J. A. N. Mensa-Bonsu, *The ICC, International Criminal Justice and International Politics*, 40 AFRICA DEVELOPMENT 33 (2015).

⁴⁴³ K. P. Prakash, *International Criminal Court: A Review*, 37 ECON. & POL. WKLY. 4113 (2002).

⁴⁴⁴ B. J. Newquist, *The International Criminal Court*, 34 INT'L LAW. 691 (2000).

⁴⁴⁵ *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9 (ICC Jan. 4, 2017).

The Special Court for Sierra Leone

The Special Court for Sierra Leone was an internationalized tribunal constituted ad hoc to prosecute violations of international humanitarian law and of the laws of Sierra Leone committed from 1996 onward; it operated both in that country and in The Hague. Established in 2002, at the end of the Sierra Leone civil war, it closed in 2013.⁴⁴⁶ It also had competence over crimes against humanity, which fall within the *ius cogens* prohibitions.⁴⁴⁷

The Court brought charges for violations of common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II, for the commission of crimes against humanity.⁴⁴⁸

The Court of Justice of the European Union

The Court of Justice of the European Union is a regional international jurisdiction created in 1952 and seated in Luxembourg.⁴⁴⁹ It has advisory and contentious competence and accepts cases referred by private parties and by states alike. Its principal role is a general review of legality, testing the acts of European governments against the international rules of the European Union and of the European Parliament.⁴⁵⁰ It is, in other words, an embedded jurisdiction that applies EU law.⁴⁵¹ Its competence is compulsory for the states that belong to the Union.

⁴⁴⁶ B. K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT'L AFF. (ROYAL INST. INT'L AFF. 1944-) 311 (2004).

⁴⁴⁷ R. Cryer et al., *A "Special Court" for Sierra Leone?*, 50 INT'L & COMP. L.Q. 435 (2001).

⁴⁴⁸ *Prosecutor v. Norman*, Indictment (SCSL Feb. 4, 2004).

⁴⁴⁹ G. F. Mancini & D. T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175 (1994).

⁴⁵⁰ D. Starr-Deelen & B. Deelen, *The European Court of Justice as a Federator*, 26 PUBLIUS 81 (1996).

⁴⁵¹ R. D. Kelemen, *The Court of Justice of the European Union in the Twenty-First Century*, 79 L. & CONTEMP. PROBS. 117 (2016).

Given the particularities of EU law, this is a *sui generis* tribunal acting as a supranational entity, unlike most international jurisdictions, and on certain occasions it has exclusive competence. It also resolves disputes between states and EU bodies.

In *Kadi and Al Barakaat International Foundation*, the Court referred to *ius cogens* norms, holding that the activity of the European Union is subject to review against them and defining them as “a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.”⁴⁵²

Conclusions

Having surveyed the motley body of case law available on the matter, one can infer that certain *ius cogens* principles recur, most of them tied to the membership of human rights, humanitarian law and the prohibition of international crimes in this category. The interpretations and applications of that body nonetheless vary. Before commercial tribunals, the MERCOSUR Permanent Review Tribunal for example, the concept is rarely seen in use.

The fragmentation of public international law becomes plainer still when we take in the different treatment that the same concept receives from the judges of the tribunals the international community offers us.⁴⁵³ The hypothesis that peremptory norms are for the most part codified is only partly borne out. Most of them are indeed found in some widely ratified treaty, such as the Vienna Convention or the Geneva Conventions, but the same cannot be said of the specifics of each norm. To fill that shortage of multilateral treaties capable of unifying the field and giving it a concise, clear criterion, the tribunals turn, in a complementary way, to custom, case law, scholarship and general principles.

⁴⁵² Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int’l Found. v. Council & Commission*, 2008 E.C.R. I-6351 (Sept. 3, 2008).

⁴⁵³ E. Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT’L ORG. 669 (2007).

When it comes to identifying which norms are *ius cogens*, then, the tribunals agree in general terms, but their reaffirmation of membership has to be verified in each judgment or decision. Because some judicial decisions are not appealable, the judges hold the legal determination on this question for the cases submitted to their jurisdiction.⁴⁵⁴ Case law will therefore go on playing a fundamental role in fixing the concept, for now at least.⁴⁵⁵ One recommendation would be to seek normative consensus among the various tribunals with international jurisdiction, so as to lay the foundations of *ius cogens* in more definite terms.

⁴⁵⁴ K. J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547 (2014).

⁴⁵⁵ K. Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AM. J. INT'L L. 475 (2015).

THE EQUALITY AMPARO

As is widely known, Argentina passed through a period of health crisis, set by a global⁴⁵⁶ and regional⁴⁵⁷ context in which COVID-19 led the national executive to take ad hoc measures. These took legal form principally as decrees. They included the extension of the health emergency (Necessity and Urgency Decree 260/2020)⁴⁵⁸ and, more conspicuously, the necessity-and-urgency decree amending it, which imposed a prohibition on circulation, a quarantine, for the entire civilian population, excepting physicians, food suppliers and journalists, among others (Decree 297/2020).⁴⁵⁹ Another decree (287/2020) permitted the alteration of the regime governing administrative contracts,⁴⁶⁰ amending the first. The quarantine was then extended (Decree 325/2020).⁴⁶¹

The partial suspension of Argentine economic activity brought a macroeconomic conflict with it.⁴⁶² The executive answered with a decree prohibiting dismissals for two months (Decree 329/2020).⁴⁶³ The whole context produced a social environment unfavorable to vulnerable groups,

⁴⁵⁶ S. Brannen et al., *Covid-19 Reshapes the Future*, CENTER STRATEGIC INT'L STUD. (CSIS) (2020).

⁴⁵⁷ P. ØSTEBØ & V. BYE, COVID-19 IN LATIN AMERICA: CHALLENGES, RESPONSES, AND CONSEQUENCES (Norwegian Institute of International Affairs (NUPI) 2020).

⁴⁵⁸ Decreto No. 260/2020, *Aislamiento social preventivo y obligatorio* [Public Health Emergency] (2020) (Arg.).

⁴⁵⁹ Decreto No. 297/2020, *Aislamiento social preventivo y obligatorio* [Preventive and Compulsory Social Isolation] (2020) (Arg.).

⁴⁶⁰ Decreto No. 287/2020, *Aislamiento social preventivo y obligatorio* [Preventive and Compulsory Social Isolation] (2020) (Arg.).

⁴⁶¹ Decreto No. 325/2020, *Aislamiento social preventivo y obligatorio* [Preventive and Compulsory Social Isolation] (2020) (Arg.).

⁴⁶² J. Meester et al., *Economic impact of COVID-19*, in FINANCIAL DISRUPTION AND FRAGILE MARKETS: A POLITICAL-ECONOMIC PERS- (2021).

two of them in particular: people exposed to gender-based violence⁴⁶⁴ and older adults.⁴⁶⁵

These cases invite a question: whether legislative procedures might be undertaken to amend general or special legislation so as to strengthen the judicial mechanisms of protection.⁴⁶⁶ Something of the kind has happened in health matters, where the specific constitutional proceedings⁴⁶⁷ operate on short deadlines and are known as “health *amparos*.”⁴⁶⁸ Analogous proceedings could be considered for cases of extreme gravity in which an essential right of an older adult or of a victim of violence is endangered during an emergency and under isolation.

Proceedings for domestic violence do exist today in the national civil courts, but they tend to be slow and cumbersome, costly for the victim, and to end in a result that leaves the parties unsatisfied.⁴⁶⁹ At times the relationship is neither repaired nor finally dissolved, and a conflictual bond persists, mediated by public institutions. Older adults who stop receiving the pension legally owed to them, or who suffer economic violence at the hands of their own families or of third parties, are generally not in a position to bring the kind of claim that produces *amparo* proceedings. The proceedings available to them can take too long, exceeding any reasonable term, as in pension recalculation cases. It would

⁴⁶³ Decreto No. 329/2020, *Aislamiento social preventivo y obligatorio* [Prohibition of Dismissals] (2020) (Arg.).

⁴⁶⁴ S. Nanthini & T. Nair, *COVID-19 and the Impacts on Women*. S, RAJARATNAM SCHOOL INT’L STUD. (2020).

⁴⁶⁵ M. A. Garcia et al., *The COVID-19 Pandemic and Precarious Aging: The Importance of an Equity Response*, 45 GENERATIONS: J. AM. SOC’Y AGING 1 (2021).

⁴⁶⁶ Ley No. 1437, *de 2011* (pp. 11–32). Editorial Universidad del Rosario (2021) (Arg.).

⁴⁶⁷ R. Haro, *El constitucionalismo argentino en el último medio siglo*, 40 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 171 (1994).

⁴⁶⁸ Corte Suprema de Justicia de la Nación [CSJN], 25/10/2022, “G. P., E. N. c/ IOSPER s/ acción de amparo,” Fallos (2022-345-1174) (Arg.).

⁴⁶⁹ MINISTRY OF JUSTICE & HUMAN RIGHTS OF ARGENTINA, SEGUNDO ESTUDIO DE NECESIDADES JURÍDICAS INSATISFECHAS (2019).

therefore be worth setting out guidelines for a new draft national statute creating a general *amparo* of a new kind, one that protects the rights of older people and of victims of gender-based violence arising from inequality, along with those of any other vulnerable group whose constitutional right is not already framed by a specific proceeding (health, the environment, housing, and so on).

This new proceeding, called either the “vulnerability *amparo*” or the “equality *amparo*,” would rest on Article 75(23) of the Constitution, which directs Congress to legislate in favor of vulnerable groups through affirmative action, promoting equality for groups at a social disadvantage, such as those named above.⁴⁷⁰

The proposal also finds its foundation in international treaties: the American Convention on Human Rights⁴⁷¹ (Article 24) and CEDAW⁴⁷² (Article 3). The ground of the equality *amparo*, that is, lies at the summit of the legal order, and it defends that same order where no better or more suitable option exists for defending this constitutional right.

The Inter-American Convention on Protecting the Human Rights of Older Persons supplies a further legal framework for the protection of the elderly, as does Article 41 of the Constitution of the Autonomous City of Buenos Aires.⁴⁷³ Judicial action ought to be particularly expeditious where the health or the life of an older person is at risk.⁴⁷⁴

Proceedings of this kind have relevant judicial precedents. In *Sisnero*, the Supreme Court set a precedent against workplace discrimination toward women,⁴⁷⁵ relying on paragraph 140 of Advisory Opinion 18/2003 of the Inter-

⁴⁷⁰ CONSTITUCIÓN NACIONAL [CONST. NAC.] art. 75(23) (Arg.).

⁴⁷¹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁴⁷² Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁴⁷³ CONSTITUCIÓN DE LA CIUDAD AUTÓNOMA DE BUENOS AIRES art. 41 (1996) (Arg.).

⁴⁷⁴ Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, O.A.S.T.S. No. A-70.

American Court.⁴⁷⁶ That case was an *amparo* without further specification, and it therefore left the door open for scholarship to shape a new kind of *amparo*, as health *amparos* and environmental *amparos* began to emerge years ago, and as the *amparo* itself emerged as a proceeding longer ago still.^{477 478} Article 43 of the Constitution specifies that the *amparo* runs “against any form of discrimination,” so the legal possibility remains open for the courts to sanction conduct that violates equality among citizens, such as unjustified discrimination against older adults and against people subjected to violence on grounds of gender.

One possible criticism of this concept is that in cases of violence an equality *amparo* would overlap or conflict with domestic violence proceedings. But domestic violence is not in every case produced by elements that run against the principles of equality in the constitutional sense, whereas violence driven by gender inequality, or grounded in such questions, has a legal footing suited to the *amparo* action. Article 2 of Law 26,485 specifies these concepts.⁴⁷⁹ Here, then, is a statutory route for bringing a legal action over violence associated with discrimination, in the case of older adults and in the case of gender alike.

As a consequence of the 2020 quarantine, the judiciary of the City of Buenos Aires began to hold virtual hearings, which more people attended than would perhaps have attended in person.⁴⁸⁰ For decades Argentina’s courts have been

⁴⁷⁵ Corte Suprema de Justicia de la Nación [CSJN], 20/5/2014, “Sisnero, Mirtha Graciela y otros c/ Taldelva SRL y otros s/ amparo,” Fallos (2014-337-611) (Arg.).

⁴⁷⁶ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

⁴⁷⁷ P. P. Camargo, *The Right to Judicial Protection: “Amparo” and Other Latin American Remedies for the Protection of Human Rights*, 3 LAWYER AMS. 191 (1971).

⁴⁷⁸ R. González, *La acción de amparo: un caso práctico de la lucha por el derecho*, SISTEMA ARGENTINO DE INFORMACIÓN JURÍDICA (1999).

⁴⁷⁹ Ley No. 26.485, *Ley de Protección Integral a las Mujeres* [Comprehensive Protection of Women] (2009) (Arg.).

⁴⁸⁰ S. A. Mackie, *The Digital Law Practice: How Technology Has Transformed the Legal Profession*, 29 NEW ATLANTIS 157 (2010).

hermetic and hard to reach, particularly for those without professional training in the field. Difficult terms and formalities have driven off professionals from other disciplines who hold conceptual frameworks and experience of great value for improving the law. This too is part of equality: interdisciplinarity.

Anyone who cannot reach the language of law will have difficulty understanding what is happening in proceedings to which they are a party. This may look like a separate problem, but the judiciary also bears on vulnerable groups when it deprives them of their rights or obstructs their understanding. What makes the law hard for them to grasp is not ignorance; it is that vulnerable groups may not be at home in the idiom or the usages of the judicial sector.⁴⁸¹

Civil law gives us ample means to guarantee and protect the rights of Argentines. It is a useful branch for the protection of private rights, and its current legislative outlook could be brought into line with international human rights law and with the Civil and Commercial Code. Congress has a duty to legislate in consequence of the Constitution the framers made. A statute setting out a framework for applying the equality *amparo* is therefore a viable project. That Law 16,986, which regulates the *amparo* and is a source of protection for constitutional rights, should be a decree drafted by the national executive, prior to the constitutionalization of the remedy, remains a symbolic anachronism. It may be time for the society to give itself an updated framework for protecting and making effective the rights it seeks to exercise.

We already have the concepts of vulnerability and inequality at the level of law; what we lack is an instrument that lets us assert them in full, rather than as appendages to other commercial, labor or tax proceedings. The framework has been ratified, or agreed on, by the framers. What remains is for national legislators to formulate the equality *amparo*, so as to formalize the social path that runs from what the society seeks to what judicial proceedings guarantee. The claims, and the case law, will follow.⁴⁸²

⁴⁸¹ B. Black, *A Model Plain Language Law*, 33 STAN. L. REV. 255 (1981).

⁴⁸² The incentives for complying with equality rules remain to be investigated.

HUMAN RIGHTS AND LATIN AMERICAN POETRY

It is worth defining first what counts as “Latin American poetry” and what “human rights” are; we could hardly advance without knowing the terms that summon us. To establish a frame of reference for the analysis, let us posit that poetry is the art of creating with words either feelings in the reader or listener (enchantment, distraction, surprise, pride, persuasion) or reflections, with a particular regard for the musicality, the arrangement and the meter of its lines.⁴⁸³ And let us propose that human rights are the principles and norms that grant a dignified existential minimum for the development of human life, extending basic guarantees, powers and liberties to anyone of our species by the simple fact of belonging to it, independently of any further characterization.⁴⁸⁴

The argument explored here is that the apparent contradiction between the legal order and poetry is less sharply drawn than it appears: both are manifestations of culture through language, and both lead toward greater communication, interrelation and understanding with the other who shares our community.⁴⁸⁵ Poetry and law alike are manifestations of human language, though with different purposes in present-day society.⁴⁸⁶ One might raise a biologicistic objection here, proposing that the capacity to create ideas and give them form precedes the shapes civilization gave to languages, and citing animal language as evidence. The provisional answer is that poetry and law as we know them

⁴⁸³ B. Gicovate, *El Concepto de la poesía en la poesía de Juan Ramón Jiménez*, 8 COMP. LITERATURE 205 (1956).

⁴⁸⁴ T. Pogge, *The International Significance of Human Rights*, 4 J. ETHICS 45 (2000).

⁴⁸⁵ G. D. Crane, *The Path of Law and Literature*, 9 AM. LITERARY HIST. 758 (1997).

⁴⁸⁶ B. Christ & S. Mueller, *Towards a Legal Poetics*, 62 AMERIKASTUDIEN / AM. STUD. 149 (2017).

arose from humanity; that they will be referred to from here on in the strict rather than the loose sense; and that both are framed within what has been called human language. Which does not rule out the possibility that future work will find us inquiring into zoosemiotics, exploring the idea that animals may have, in their own particular and distinct way, poetry and law.⁴⁸⁷

Let us enter, then, into Latin America: a varied and fertile territory with an equivocal name, since the concept generally excludes francophone Canada, which does have a Latin root, and includes pre-conquest peoples whose languages have no Latin root at all: Guaraní, Aymara, Quechua, Mocoví, Mapuche, among others.⁴⁸⁸ A socially complex setting: Latin America, with a law and a poetry of its own making and with diverse cultures that have at times met each other harshly. With contradictions centuries old, in a context that frequently recalls certain paragraphs of *One Hundred Years of Solitude* (1967), which describes the idiosyncrasy of countries that combined citizens owning the latest microwave ovens with people who had never seen ice or the sea.⁴⁸⁹ The predominant language of the sources analyzed will be Spanish, and the span runs from the beginning of the twentieth century to its end with the arrival of the new millennium.⁴⁹⁰

The beginning of a century: a continuity

When we speak of the beginning of a century, we may take it that whatever we are transported to comes in turn from some earlier instance in which the conditions for arriving there were met. Temporal cuts therefore tend to be made reflectively or intuitively: the selection of historically relevant moments, though it can be reasoned about, carries a

⁴⁸⁷ J. D. Carthy, *Animal Language*, 115 J. ROYAL SOC'Y ARTS 296 (1967).

⁴⁸⁸ R. H. Valle, *¿Latinoamericanos o hispanoamericanos?*, 32 HISPANIA 496 (1949).

⁴⁸⁹ A. Cueva, *Para una interpretación sociológica de Cien años de soledad*, 5 REVISTA CHILENA DE LITERATURA 151 (1972).

⁴⁹⁰ An overly ambitious span, perhaps; but the aim is to offer glimpses of the panorama, in general rather than specific terms.

trace of emotion and of cultural reflection.⁴⁹¹ Eric Hobsbawm, for instance, argued that the twentieth century began in 1914 and ended in 1991, with the outbreak of the First World War and the fall of the Soviet Union.⁴⁹²

If that is so, and the boundaries are blurred, we might begin the Latin American poetic twentieth century, in its bond with law, with Rubén Darío, who in *Cantos de vida y esperanza* (1905) said of Don Quixote:

Noble pilgrim among pilgrims,
who sanctified every road
with the august stride of your heroism,
against certainties, against consciences,
and against the laws and against the sciences,
against the lie, against the truth...⁴⁹³

*Noble peregrino de los peregrinos,
que santificaste todos los caminos
con el paso augusto de tu heroicidad,
contra las certezas, contra las conciencias,
y contra las leyes y contra las ciencias,
contra la mentira, contra la verdad...*

One of the principal utterances of one of the most studied poets of the century's opening augurs, at first sight, a complex relation between law and poetry, the two coming into conflict over their social function: law is, conceptually, what is settled, and literature, embodied in Don Quixote, is what is revolutionary, what breaks the scheme. And so it has sometimes been, with art exercising resistance against governments that understood law not as an order of human rights but as the power of the authorities.

Leopoldo Lugones would later say, as though incarnating the very law Darío criticized through Cervantes:

⁴⁹¹ G. Boas, *Historical Periods*, 11 J. AESTHETICS ART CRITICISM 248 (1953).

⁴⁹² R. A. Palat, Book Review, 8 J. WORLD HIST. 179 (1997) (reviewing E. HOBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991*).

⁴⁹³ R. DARÍO, *LETANÍAS DE NUESTRO SEÑOR DON QUIJOTE, CANTOS DE VIDA Y ESPERANZA* (Edición digital a partir de la de Madrid, Tipografía de la Revista de Archivos, Bibliotecas y Museos 1905).

Pacifism, collectivism, democracy are synonyms of the same vacancy that destiny offers to the predestined chief, that is, to the man who commands by his right as the better man, with or without the law, since the law, as an expression of power, merges with his will. (...) The constitutional system of the nineteenth century is defunct. The army is the last aristocracy, which is to say the last possibility of hierarchical organization left to us amid demagogic dissolution. Only military virtue realizes, at this historical moment, the higher life that is beauty, hope and strength.⁴⁹⁴

This last is a criticism of the liberal constitutional system. With some exceptions, the Latin American political landscape of the early twentieth century was not especially fertile ground for the republican legal developments the nineteenth had aspired to. Yet law advanced in ways rare in its history, and global legal development was driven forward from public international law, the UN Charter and the case law on human rights. To reflect on these contradictions is probably also to reflect on what the twentieth century was and what happened in it in the matter of linguistic production.

Incipient Latin American law: just or not?

Custom is an accepted source under Article 1 of Argentina's current Civil and Commercial Code:

Usages, practices and customs are binding when the laws or the interested parties refer to them, or in situations not legally regulated, provided they are not contrary to law.⁴⁹⁵

They are part of the sources of law, that is. Customs cannot run contrary to any other positive norm of the legal order; if they could, it would be enough for a custom to become general in order to void the possibility of applying the statutes. Even so, it is curious that our civil order should propose to complete itself with the customs of a society as

⁴⁹⁴ L. LUGONES, *EL PAYADOR Y ANTOLOGÍA DE POESÍA Y PROSA* (Biblioteca Ayacucho 1979).

⁴⁹⁵ Ley No. 26.994, *Código Civil y Comercial de la Nación* [Civil and Commercial Code of the Nation] (2014) (Arg.).

changeable as ours, and above all with usages and practices in conflict with one another, as they are in Latin America.

This line of thought leads to the old question of whether unjust law is law, which the very formulation of the problem answers in the affirmative, since it is like asking whether an out-of-tune musician is a musician, or whether an amateur tennis player is a tennis player. To make the consequences of a negative answer applicable, we would have to accept a restricted sense of law and a specific conception of justice.

Latin American law is called incipient here because the century also consolidates a current of political and legal thought: social constitutionalism. On that view the state must provide citizens not only the liberal rights of security, liberty, property, public health, order, economic stability and clear rules of taxation, but also education, health care, social security, housing, work and food, among other rights that make up the social.⁴⁹⁶ The Constitution of the Province of Mendoza already guaranteed a Sunday rest day and an eight-hour day for state employees in 1916. In 1917 came the Constitution of Mexico, which established compulsory public education for that country and was the first constitution of this current in Latin America.⁴⁹⁷ In 1949 Argentina enacted its first Constitution with social rights.⁴⁹⁸ It would last barely six years: a government arising from a coup d'état declared it void, which suggests that the history of constitutions may not be the history of peoples.⁴⁹⁹

⁴⁹⁶ H. S. Klein, "Social Constitutionalism" in *Latin America: The Bolivian Experience of 1938*, 22 AMERICAS 258 (1966).

⁴⁹⁷ J. Garcíadiego, *¿Por qué, cuándo, cómo y quiénes hicieron la Constitución de 1917?*, 66 HISTORIA MEXICANA 1183 (2017).

⁴⁹⁸ L. L. Ilsley, *The Argentine Constitutional Revision of 1949*, 14 J. POL. 224 (1952).

⁴⁹⁹ R. H. Fitzgibbon, *The Process of Constitution Making in Latin America*, 3 COMP. STUD. SOC'Y & HIST. 1 (1960).

Democracy, poetry and human rights

In Latin America today, given our present conditions, it may be worth considering that Latin American democracies, and the world's, are a recently created form of political organization, and not a higher stage of some permanent evolution we have reached. Democracies advance and retreat, as human rights do. Human rights might be described as a minimum basis of mutual respect and of active and passive state duties, compliance with which secures the social floor for a real exercise of democracy, which, as we know, is a great deal more than equality before the law written on the legislator's paper.

In the Argentine Republic, before the enactment of Law 8871 on National Elections (the Sáenz Peña Act), the only people who could vote were the minority belonging to circles close to the country's leading families, since elections were little publicized, violent and exclusionary. It was a system of limited elections, of the spoken vote, and of difficult popular participation. Of this system, Jorge Luis Borges wrote in 1930:

That element operated in the province as well: the ward bosses went wherever the party needed them and brought their men. Eye and steel—worn paper *nacionales* and deep revolvers—cast their independent vote. The application of the Sáenz Peña Act, in nineteen twelve, scattered those militias.⁵⁰⁰

The political scenes between 1853 and 1912 showed little respect for the liberal guarantees that national law itself enumerated. Citizens—whom the Argentine legislator took to be all male—needed considerable courage to oppose the authoritarian regime Urquiza and Mitre had left behind. In that period there were still civic debts outstanding: the enactment of laws that would guarantee compliance with the Constitution of 1853, so that it would not be merely a text state authorities invoke when convenient in order to shield their privileges, and then forget once interpreting and applying it no longer suits the administration and the courts.

Human rights, as an integral part of the international legal order, are defended at all times, and they must not be a slogan of the judiciary alone

⁵⁰⁰ J. L. BORGES, EVARISTO CARRIEGO. M (Gleizer Editor 1930).

but of the legislature and the executive as well, if what is wanted is a constitutional state of human rights. The judiciary can hardly provide the poetic justice citizens appear to want. To live justly, to live with poetic justice, goes well beyond what any state can do, because what is at stake is a social relation, and turning to the state is on many occasions a last resort, used once every autonomous possibility of managing a just community has already failed.

Questions of language that concern us

Outside the law, my heart
leaps on in its distress.⁵⁰¹

*Fuera de ley, mi corazón
A saltos va en su desazón.*

If law and poetry are both linguistic phenomena, though not only linguistic, then it is worth asking where the two concepts diverge and where they converge. The supposed contradiction between them is plain, since each style has defined the other negatively, not only by its features but by its social function.⁵⁰² To define nineteenth-century Latin American law as a sealed compartment defending the status quo and the privileges of those who arrived first has its measure of truth; so does seeing poetry in Darío's creative sense, as an impulse that destroys the obsolete and a creative power bent on making a new world. But is this always so, or is it a cliché? Do we not conceive of conservative poetries, and of revolutionary legal systems? The answer is yes: there can be a progressive law and a reactionary poetry, which complicates the analysis and demolishes the tempting dichotomy of conservative law and progressive poetry.

Progressivism is what tends toward altering values and the relations between men and women, in pursuit of a supposed improvement in them. Conservatism means arresting the change of values and relations, limiting

⁵⁰¹ A. STORNI, *MUNDO DE SIETE POZOS* (Editorial Tor 1935).

⁵⁰² E. ROSEN, *The Lawyer in the Poet: Thoughts on Stevens' Use of Legal Terminology*, 19 WALLACE STEVENS J. 3 (1995).

it, or returning to an earlier state of things.⁵⁰³ Change, therefore, is neither progressive nor conservative; it is an ideal that every political force generally shares. One would be hard pressed to find anyone who says “let us stay as we are,” since human dissatisfaction, at least in a democratic system of human rights, sends votes in other directions willing to improve things. What “improvement” means will then depend on the side from which each person aspires to it, or takes it into account.

The reactionary phenomenon and the phenomenon of progress had poetic edges in the twentieth century as well. Vanguardism, Ultraism, Surrealism, social poetry, neo-Gongorism have been ways of pressing forward or backward along a timeline of particular points or connections that make up a poet’s ideology or conceptual framework, implicit or explicit. Enrique Banchs,⁵⁰⁴ in poetic terms, was perhaps a conservative, as was Miguel Hernández⁵⁰⁵ in his early poems, which resembled the baroque style of Luis de Góngora. This conservatism bears unexpected fruit, it being impossible not to be contemporary, and results in certain cases in a very beautiful combination of the new in old forms. In the same way, traditional content in a new line can yield results too, as in the poetry of Federico García Lorca⁵⁰⁶ or the experiments of Oliverio Girondo.⁵⁰⁷

Conserving and progressing, then, are not incompatible concepts. One may conserve certain customs and progress in others, and the reverse. Language plays a central role in this, since it is the facilitator, or the form of expression, of feelings and desires, whether poetic, legal, poetic-legal or legal-poetic. These political changes are not purely linguistic, therefore; but the word is an instrument that forges applicable and enduring expressions,

⁵⁰³ A. B. Wolfe, *Conservatism and Radicalism: Some Definitions and Distinctions*, 17 SCIENTIFIC MONTHLY 229 (1923).

⁵⁰⁴ B. Gicovate, *Sobre el soneto de Enrique Banchs*, 27 REVISTA HISPÁNICA MODERNA 120 (1961).

⁵⁰⁵ J. Guillén García, *La poesía social de Miguel Hernández*, 73 LITORAL 162 (1978).

⁵⁰⁶ W. C. Williams, *Federico García Lorca*, 1 KENYON REV. 148 (1939).

⁵⁰⁷ M. Grünfeld, *Oliverio Girondo y el viaje de la vanguardia*, 28 HISPAMÉRICA 21 (1999).

with due regard for the other forms of expression, such as film, music, dance, painting and theater.

The poetic-legal, or the legal-poetic

Up to this point the terms “poetic-legal” and “legal-poetic” have both been used. That suggests two paths, if we want to combine the concepts of poetry and law, perhaps only for this note and as a theoretical exercise: (a) use both terms interchangeably; or (b) create a new word or concept that refers more precisely to what we are trying to express. Why this approach? Because the starting point, as the introduction said, is the exploration of a concrete position: the two phenomena have more in common than not, and they have been separated historically, by practice and by scholarship, out of necessity.

What is substantial is that law and poetry are both expressions of the word, of the voice in its social aspect, and both tend, in greater or lesser measure, to modify society, not in a general or global sense, but within a local, realistic perspective, with concrete aspirations. The poet wants to be read correctly, and so does the legislator; the spirit of poetry wants to reach the spirit of the reader, as the spirit of the laws, in Montesquieu’s phrase, wants to reach the citizen. What a norm establishes is a prescription of conduct that seeks to envelop reality and make it resemble the norm, and the aim of a poem may not differ greatly. The earliest epic poetry tended to be instructive, legislative: Hesiod’s *Works and Days*. So did Ovid’s *Art of Love*.⁵⁰⁸ In a song, Silvio Rodríguez (1979) spoke of the role of the troubadour who utters his poetry, comparable to the legislator who proposes changes, asking, through a series of conditional lines, what the mallet would be without the quarry it comes from: without those who listen, without what hurts, without what remains, without what struggles, the instrument has no source and no meaning.⁵⁰⁹

⁵⁰⁸ A. R. Sharrock, *Ovid and the Politics of Reading*, 33 MATERIALI E DISCUSSIONI PER L’ANALISI DEI TESTI CLASSICI 97 (1994).

⁵⁰⁹ S. Rodríguez, *La maza*, on UNICORNIO (EGREM 1979).

A new concept: iuspoetics

The concept proposed here for what the legal and the poetic have in common is *iuspoetics*. This does not mean equating law and poetry and concealing all their dissimilarities; it means elucidating and stating a point of connection between the creative act of the legislator and the creative act of the poet.⁵¹⁰ The concept is far from new, though it is seldom treated in the legal field. That has several causes, which will not be pursued here: the aim is not to go deeply into the history of its treatment but to assess the sensibility of law, its rhetorical capacities for impact, and to analyze how the iuspoetic act is materialized and carried out in society.⁵¹¹

The iuspoetic act represents the *poiesis* that the two branches share, and it is a higher category for the subtypes it frames: poetry and law. What, then, do they have in common that would justify a concept uniting them? And what could such a concept contribute within the framework of Latin American human rights? To begin with, both are creative acts that tend toward a social relation among human beings, and both, through the written or spoken word, attempt to have some effect on whoever receives the message, in one case primarily aesthetic, in the other primarily regulatory, though with examples whose boundaries blur.

How many writings that call themselves legal have had less normative force in the lives of men and women than *Works and Days*? Can a legal text have no capacity whatever for beauty, for astonishment, for displeasure, or for other aesthetic possibilities? These questions raise more uncertainties than certainties: incipient concepts are dim lamps, tools that can help and confuse at once. Still, this concept posits, almost by the act of asserting itself as a category, the connection this note proposes.

Categories and human rights

It might seem trivial to want to understand human rights through merely legal categories, when the content they regulate, the global society

⁵¹⁰ A. Rich, *Legislators of the world*, 42 COMMUNITY DEV. J. 422 (2007).

⁵¹¹ O. Mandel, *Why Poetry?*, 25 ANTIOCH REV. 239 (1965).

they propose and the sources that gave them birth are not the results of strictly technical or scientific work. The creative activity of law, legislation, has to this day been principally political rather than scientific, however scientific the study of politics may be, and however much science may be used to supply evidence-based solutions politically. When the legislator creates, then, he is exercising his creative faculties: this is law's most poetic moment, because it is the instant in which text and idea take form and emerge from a prior inconsistency. It is the path *poiesis* travels.⁵¹²

Categories in the study of law arose partly from legislators' urge to classify the various branches of legal orders (a practice going back at least to the *Corpus iuris*),⁵¹³ and partly from the classifying zeal of nineteenth- and twentieth-century scientism, which extended concepts from biology that permeated other disciplines strongly, as can be seen in the effects of evolutionary theory and of positivism on criminology and criminal law at the beginning of the twentieth century. Various currents of thought and custom have thus shaped Latin American law over the years, and it carries a strong Romanist stamp.

In 1948, in Paris, human rights were declared universal in the Universal Declaration, adopted at a General Assembly of the United Nations: a non-binding instrument, since it is not a treaty, but of the greatest doctrinal significance for the international legal community. Forty-eight countries voted in favor, the United States among them, and eight abstained, the Soviet Union among them.⁵¹⁴ The Soviet Union gave human rights a degree

⁵¹² An analysis of this kind is not necessarily opposed to the possibility of a strict application of the law, in its positive semantic terms, by judicial officials. On the contrary: what it proposes is to understand that legal semantics in a defined way. This note, moreover, does not refer strictly to the definition of law but to the practice of human language.

⁵¹³ A. Lindesmith & Y. Levin, *The Lombrosian Myth in Criminology*, AM. J. SOCIO. (1937).

⁵¹⁴ The Soviet countries excused themselves from the vote on a variety of grounds: among them, the failure to include collective rights, the omission of the state's interest, and the individualist logic of the rights under consideration.

of academic reception only in 1975, and even then in a limited way, in the context of the Conference on Security and Cooperation in Europe.⁵¹⁵

Are human rights, then, a fruit of liberal ideology? Are they a fruit of twentieth-century capitalism, which in its individualism seeks to impose on every society its principles for the protection of private property? On an integrated analysis the answer is no: human dignity cannot be circumscribed within a handful of ideological currents generically called capitalist. First because the reductionism is obvious;⁵¹⁶ and second because people's quality of life and mutual respect among communities bear no logical necessity of connection to any economic or productive program. The will to respect, to love, to charity, to altruism is older than the twentieth century: in the scholarship, human rights are not only the international instruments that established them worldwide as positive norms. The idea of human rights, in other words, precedes capitalism, as dignity, the will to organize in peace and respect for another's life project also precede it.

Forms in iuspoetics

The forms the word takes play essential roles in the poetic and the legal alike. In art they establish the premise for a certain kind of aesthetic: in the Baroque, for instance, the sonnet represented an ideal of poetic beauty. In law, at least in Latin America, formalism would imply a certain respect for established institutions and for traditional social customs descending historically from the colonial era or the nineteenth century. Another way to think of form is as a routine mechanism that facilitates procedure, since it is easier for any worker to reread and interpret templates than to decipher each professional's rhetoric.

Forms are not restricted to what is written, however. Everyone knows the suit and shoes men wear in the courts and at ceremonial gatherings. The custom comes from Europe, and it was not foreign to poets of the

⁵¹⁵ J. Quigley, *Human Rights Study in Soviet Academia*, 11 HUM. RTS. Q. 452 (1989).

⁵¹⁶ F. Daftary, Book Review, 45 J. INT'L AFF. 290 (1991) (reviewing A. ROSAS & J. HELGESEN, *HUMAN RIGHTS IN A CHANGING EAST/WEST PERSPECTIVE*).

nineteenth and twentieth centuries either, that being the default dress. With the advent of contemporary consumer society this has been changing in favor of other clothes: T-shirts, sneakers. In solemn settings, imposing a different dress was until a few years ago regarded as a break with convention. Today it causes no great indignation and prompts little comment. An informal stance even follows the internal policy of certain multinational firms, which are not concerned to project a traditional image but seek the contemporary instead. A similar process has occurred in poetry, where what was at first a rupture is today simply popular or mainstream, which empties out the contextual content that novel forms could once carry.

The question behind this digression is whether form makes content. Suppose a group of legislators meet privately in a house and, exercising their freedom, draft a text, say “this is now law,” and then discard it: plainly this will not have satisfied the forms required to be positive legislation in the Argentine legal order. Can we say the same of poetry? Here is a substantial difference between the two forms of language. If a legal text has a vocation to be a norm and does not endure, it is harder to think of it as the consummation of anything; whereas it would be harder still to prove that an ephemeral poem was not a poem merely because it lasted a few seconds. And yet: is the same impetus not already present in the vocation to legislate as in the consummated work? Could we say that an attempt at a state is already a state? Or should we grant the concept only to what the United Nations recognizes?⁵¹⁷

The certainty of iuspoetic concepts

Since this is not a legal treatise, we can allow ourselves speculations at the border. Must a state be constituted as we now know it, on the definition of national states? An affirmative answer would exclude the Roman Empire. Let us widen the concept, then, and take in every entity that sociology recognizes as a state: the city-states of ancient Greece, for example. From there, a hypothesis: a city-state that lasted only a few weeks:

⁵¹⁷ D. Hammarskjöld, *The United Nations and the Political Scientist*, 47 AM. POL. SCI. REV. 975 (1953).

was it less a city-state than Athens? During those weeks it evidently held the same rank.

Now consider: was a norm that lasted a few weeks less than one that lasted ten years? And would those weeks not matter more if they were now, and more still, comparatively, if the ten years had been centuries ago? The duration of a thing cannot be the sole variable for establishing its categorical frame, much less for settling, without further ado, its importance relative to some range of items within a concept. It may therefore be possible to think of brief norms, or “micronorms,” belonging to micro social orders,⁵¹⁸ of which there are many: the ones that arise around tables, stripped of solemnity, as an impulse of the will to organize and to create that a group of people has at a particular moment. The iuspoetic vocation, not so far from art or from the state.⁵¹⁹

Exploring the union of the two concepts, art and law, would take decades of research and study, and the results would be motley, with the temptation to drift now and then toward more familiar academic treatments:⁵²⁰ literature about the legal profession, say, or the pragmatic use political leaders make of various artists’ work. Relations between works of art and works of government are nonetheless abundant.⁵²¹

Understanding the bond between social organization and art matters because, behind appearances and protocol, the ethical and aesthetic ground of life is something shared, something that fluctuates and is not the exclusive province of any one discipline or branch of study. Curricula vary, since discoveries abound each year and, in law, new work appears with

⁵¹⁸ E. J. Lawler, *Micro Social Orders*, 65 Soc. PSYCH. Q. 4 (2002).

⁵¹⁹ With the growing complexity of contemporary societies, in which activities have become hyperspecialized, this concept is harder to grasp than it would be in an analysis of a primitive society, or of one simpler in its interactions, where literary and legal work is not institutionalized.

⁵²⁰ Though probably more limited in their capacity for conceptual analysis.

⁵²¹ A poem by Baldomero Fernández Moreno is inscribed on the Obelisk of Buenos Aires.

renewed perspectives that illuminate unsuspected parts of the disciplines. New artistic creations appear as well. A history of Argentine literature in the sixteenth century would not have been possible.

These hypothetical micronorms, then, might be a way of interpreting the small, passing customs that arise and carry a binding emotional sense for a group, something not necessarily tied in abstract terms to morality, but not intelligible as law in the positive sense either.

Human rights and positivism

In broad strokes, simplifying obtusely but usefully, we can take there to be two large ways of interpreting human rights:

1. As a set of international and national norms defined as such by international scholarship (positive law).
2. As the guarantee that every human being will have the right to live according to his or her possibilities, within a framework of respect for that life and person, without being violated, diminished, tortured, enslaved, assaulted or constrained on grounds of sex, age, religion, nationality, ethnicity, political thought, and so on (moral right).

Where the two coincide, the problem is merely theoretical. Where they do not, it becomes material: do people have a moral right to demand their human rights when they do not live within a framework that recognizes them? The philosopher Julio Montero holds that natural law theory carries an implication that has not been sufficiently considered, if what we are trying to address is human rights in their doctrinal aspect.⁵²²

Suppose there is a state that has ratified no human rights treaty. A positivist would say that for that country such rights do not exist in the legal sense, which would not mean that for the positivist theorist they need

⁵²² J. Montero, *¿Pueden los derechos naturales hacer alguna contribución a la filosofía de los derechos humanos?*, 48 CRÍTICA: REVISTA HISPANOAMERICANA DE FILOSOFÍA 61 (2016).

not be obeyed morally, but simply that they do not belong to the state's domain.

Now, what happens when there is a flagrant violation of human rights that a national law permits? If a judge halted an outrageous act of torture, would that be malfeasance? Can judges abstain from the use of morality in all its forms? Is it not morality that is demanded of them in the first place in order to obtain judicial office? How is the contradiction to be understood? Can someone reach the bench as a moral person and, once installed, shed those values like an old coat? Who forbids a judge to change the law? These questions exceed what this piece can do. In the Argentine system, however, judges may not plead obscurity or insufficiency of the law in order to avoid deciding a case, which returns them to the non-application of "gaps in the law." That the law is consistent and complete is a premise, a legal fiction, from which it would follow that it must supply a single solution to every problem. That is another fiction, since case law in any field shows that judicial decisions change with the circumstances.

Interpreting iuspoetics

The path of reading has shown that words cannot be understood in isolation, and that external sources, people and other texts, must be brought in. If a simple text does not suffice to understand itself, we can hardly suppose that understanding a legal order is a matter of simply reading it, without understanding what the concepts of norm, person, hierarchy or human rights mean.

James Boyd White, in *The Legal Imagination* (1973),⁵²³ argued that literary sources are essential to understanding the semantics of legal texts, which do not refer solely to other legal texts, and it is for that same reason that experts are summoned to decipher matters outside lawyers' knowledge. The idea of "creating law" is relatively recent in human history, and it has produced frustration in those who see that what the norms prescribe is not fulfilled in practice. Yet it is also remarkable that there should exist any will at all to create norms and see them respected in order

⁵²³ J. B. WHITE, *THE LEGAL IMAGINATION* (Little, Brown & Co. 1973).

to produce a more just society. We might even think of two opposing impulses: juridicity and ajuridicity, civilization and barbarism.

Ronald Dworkin put it this way: “we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature.”⁵²⁴ What Dworkin meant is that the interpretation of law is not an isolated question but is directly related to the interpretation of other kinds of texts. Hence the importance of etymologies, which many attach to words of Latin or Roman origin in order to explain legal institutions that persist today, with more or fewer changes, in contemporary legal orders. Law may therefore not be merely a set of entirely logical, practical and directly applicable provisions; it may also include traces of desire, hope, humor, ethical depth and communal longing, as can be seen in the Preamble to the Argentine Constitution of 1853, by anyone able to read it with that historical charge.

A different judicial system?

If poetry is to be considered a factor influencing law, it would be well to distinguish it from the direct sources, since one republican legal aspiration is to limit the power of judges so that they cannot arbitrarily decide identical cases differently according to the day’s taste. What, then, would poetry’s role be in the practical, professional question? The procedural reforms one might imagine will not be taken up here, but the question is worth setting out in outline. Is the concept of justice for judges alone to interpret? Or is it the legislator who must do justice, judges being the replicators of the legislator’s will? And if we imagine a possible iuspoetics as a category of analysis, we would then have to imagine, in consequence, a discipline that interprets the concepts and applies them to concrete cases.

The answers will differ according to the conception of law one starts from, or according to the destiny the legislator wishes to give the norms, whether the substantive ones or the procedural ones that permit or foreclose the possibility of analogy, for instance, among the other

⁵²⁴ C. M. Cárcova, *Derecho, literatura y conocimiento*, SISTEMA ARGENTINO DE INFORMACIÓN JURÍDICA (2000).

mechanisms that in judicial matters set the field of play on which judicial interpretation can operate.

Conclusion

Latin America, in its literature and in its human rights, lets us see multiple gazes illuminating the different lives that inhabit and have inhabited this territory. The interpretation of *iuspoetics*, a concept developed here, turns out to be close at hand and unfamiliar at once. Perhaps it will let us interpret new paths, or invent them, tending toward the resolution of struggles still with us, for the greater flourishing of poetry and, in particular, of law as a peaceful way of resolving conflict.

To think through all these problems and possible solutions implies a certain commitment: to take up attitudes afterward that coincide and accord with the thought one has managed to build. The task is not easy. One fails often, and no one holds the measure of success or can pronounce the last word on who has best realized their ideals, since ideals change, even within the same person and the same course of political action. To persist in errors proved to be errors is a foolishness with little to commend it. Consistency might be a virtue only sometimes, if it constrains law, the heart and empathy.

Because it has no fixed content, poetry could arise in our society in any form. Just law could not. Part of our task is to help it along, principally through an interdisciplinary approach and through the building of consensus, so that the society we live in comes each day to resemble a little more the society we want to live in, and the society we think, with gladness, of leaving to those who come after us in this work, these lands, these ideas...

P A R T I V

Law, Education and Sovereignty

A DIGEST FOR THE TEACHING OF LAW

It seems worth pointing out a deficiency in the teaching of the rules and of Argentine law generally: the division, or the absence of organization, in classifying statutes by whether they remain in force. The Argentine Legal Digest set out to remedy this legislative disorder,⁵²⁵ a work called “monumental,”⁵²⁶ whose history begins in 1998⁵²⁷ but which was consolidated in 2014 as Law 26,939.⁵²⁸ The team that ordered the Argentine corpus worked from an office at the Faculty of Law of the University of Buenos Aires.

As Article 1 of Law 24,967 says, clarity in the law makes for greater republicanism and for better acceptance of the rules, or for a better context in which to change them. It is hard to see how to improve legislation we do not know. Put another way: we will not be able to discover how to change the law if we do not know what the law is. In the words of Antonio A. Martino, who directed the team that drafted the *Manual of Legislative Technique*:⁵²⁹ “The thing is that the system of statutes is the most important output of the political system, and if that system is contaminated or hard to determine, the consequences in institutional costs and in everyday life are enormous.”⁵³⁰

⁵²⁵ DIGESTO JURÍDICO ARGENTINO, SISTEMA ARGENTINO DE INFORMACIÓN JURÍDICA (2014).

⁵²⁶ A. Martino, *El Digesto jurídico argentino: una obra jurídica monumental*. DOXA, 28 CUADERNOS DE FILOSOFÍA DEL DERECHO 321 (2005).

⁵²⁷ Ley No. 24.967, *Digesto Jurídico Argentino* [Argentine Legal Digest] (1998) (Arg.).

⁵²⁸ Ley No. 26.939, *Digesto Jurídico Argentino* [Argentine Legal Digest] (2014) (Arg.).

⁵²⁹ A. Martino, *Manual de Técnica Legislativa*, COLEGIO PÚBLICO DE ABOGADOS DE LA CAPITAL FEDERAL (2001).

⁵³⁰ A. Martino, *El Digesto jurídico argentino: una obra jurídica monumental*. DOXA, 28 CUADERNOS DE FILOSOFÍA DEL DERECHO 321 (2005).

The problem is that knowing the statutes is not enough; one must know how they interact with one another, since some repeal or amend others. To know the law effectively, then, requires a study of internal law across statutes from different periods over nearly 170 years. There are also statutes whose object has already been fulfilled, and these raise a separate debate about whether they should count as in force in relation to the effects they still produce legally, such as the public ownership of certain assets resulting from them. Declaring in force, or not, those rules whose lapse is not clearly established is part of the legislative task.⁵³¹

In Argentine scholarship it would not be rash to say that certain rules are simply asserted to be in force: the Constitution, statutes, decrees, regulations. Within the statutes, no exhaustive survey of the legislation in force is undertaken; the most common rules are generally used to teach law. In civil law it will be the Civil and Commercial Code; in criminal law the Criminal Code; in civil procedure the Procedural Code; in labor law the Employment Contract Act. Each subject concentrates its general efforts on certain rules, and students are not required to review or to analyze logically the whole of the national legal order: statutes, decrees and regulations. What the professor says the law is, then, is accepted as the law, as if the professor played the judge's role in the classroom.

At the national level, the Digest project has been complemented by the Argentine Legal Information System, which lists the Argentine statutes in force.⁵³² That listing shows us a range of statutes in force from 1853 to today. A newer site, *Leyes Argentinas*, combines the InfoLEG and SAIJ databases.

Competence over whether statutes remain in force belongs constitutionally to the National Congress, however. An administrative opinion on the force of the rules could not be made binding, since it is the body that issues them that

⁵³¹ A. Martino, *Il digesto giuridico argentino: un tentativo di semplificazione normativa ormai in dirittura di arrivo*, FORO ITALIANO (2005).

⁵³² At the level of provincial law, digests or digest projects for provincial rules — binding or otherwise — have also been produced in the provinces.

verifies their force. Even so, which rules are in force is commonly agreed, and it was established previously by the national executive, at least through 2014.

One argument against the digest is that it could not be used at the legislative level, because a judge might declare it unconstitutional and go on to apply the statutes it excluded. One possible answer is that if a statute repealed the excluded rules at the same time as Congress enacted the digest, the position would be clear and judges could not apply repealed rules. If the digest is to be binding, that is, it would have to have that legislative character. Such a hypothetical repeal would involve no less authority than any other repeal Congress has enacted before.⁵³³ In any case, an administrative digest is also useful as an instrument of teaching, even if its effects are confined to the academic sphere and not the judicial one.

There remains the question of what becomes of statutes no longer in force, or of those a digest does not list. We might assume they are exactly that: statutes no longer in force, unlisted in a digest precisely because they have lapsed, so that exclusion would amount to tacit repeal. Someone might also argue that changing the numbers of the statutes, beginning the numbering afresh, could be counterproductive. The same argument was made when the articles of the Civil Code were reformed in 2014. Adjustment to the new numbering was rapid.

The digitalization of legal information gives us an opportunity as a society to understand the law better, and perhaps to begin assigning a new numbering suited to present needs. That could resolve legislative inconveniences such as duplicate numbering, statutes designated “and a half,” and decree-laws. Managing to structure the present legal order, and having Congress enact an updated national digest, would be a step toward a contemporary legal order, expressed with greater clarity for the society.

⁵³³ When the Civil Code and the Commercial Code were repealed, for instance, they were statutes that had been in use until the day before they ceased to be in force. If two statutes of that importance could be repealed, little-known statutes, clearly unused because their object has been fulfilled or which may already have been repealed, would presumably offer less resistance.

THE ROLE OF THE PUBLIC UNIVERSITY IN THE TWENTY-FIRST CENTURY

We live connected through devices with internet access, computers and mobile phones, that our near ancestors did not have. The change defines our days, because it gives us access to people and information in a new way and lets us interact more quickly with those who share our interests.⁵³⁴ In some cases it has damaged local senses of belonging, or of gathering with neighbors and friends, since what we do through a screen we may stop doing in person. As citizens of a “global village,” in Marshall McLuhan’s phrase,⁵³⁵ we hover between a passive citizenship and an active one.⁵³⁶ The pandemic of 2020, moreover, sharpened and accelerated the contemporary features of connectivity and disconnection.^{537 538}

This is the context in which the university sits in contemporary society. What, then, is the role of public universities? If it were argued that a student or researcher could find the same information online as at the university, without traveling to a building or attending a class, the argument would have to be granted at least in part. The difference probably lies in this: online, that person will not be able to connect with peers and form part of an academic community with the same intensity and ease. Communities today are as important as they have been since the dawn of humanity.^{539 540}

⁵³⁴ S. Greenstein, *The Basic Economics of Internet Infrastructure*, 34 J. ECON. PERSP. 192 (2020).

⁵³⁵ K. Wright, *The Road to the Global Village*, 262 SCIENTIFIC AM. 83 (1990).

⁵³⁶ A. J. Kearns, *Active Citizenship and Urban Governance*, 17 TRANSACTIONS INST. BRIT. GEOGRAPHERS 20 (1992).

⁵³⁷ Connectivity is mediated; disconnection is local.

⁵³⁸ M. L. M. Marañón, *El derecho a la desconexión digital en el ámbito de la Unión Europea*, in CUADERNOS DE JURISPRUDENCIA Y ACTUALIDAD INTERNACIONALES (B. A. Pérez F. J. García & E. C. D. Galán ed. 2023).

Can virtual courses replace in-person education?⁵⁴¹ Would anyone be treated by a doctor who had never been to a hospital, or advised by a lawyer who had never visited a courthouse? The two examples illustrate how hard in-person education is to replace. And the fatigue produced by virtual meetings, a separate but not minor point, has been studied and criticized in health terms.⁵⁴²

Public universities can be regarded as settings for exchange and encounter. They are social structures suited to sustainable state development, where citizens can gain access and find a specific role within the society. Reducing university systems budgetarily and programmatically, however, would make it harder to develop a program of that kind, one that distributes knowledge in the information age.⁵⁴³

Information and knowledge are similar, intertwined concepts that can nonetheless work at times as opposites, since an overabundance of information makes adequate formation harder.^{544 545} Here is another role universities might assume: attending to a detailed revision of their twentieth-century curricula so as to adapt them to the new technologies,

⁵³⁹ S. Mamonov et al., *The Role of the Sense of Community in the Sustainability of Social Network Sites*, 20 INT'L J. ELECTRONIC COM. 470 (2015).

⁵⁴⁰ I. Maya Jariego, *Sentido de comunidad y potenciación comunitaria*, 22 APUNTES DE PSICOLOGÍA 187 (2004).

⁵⁴¹ S. M. Natale & A. F. Libertella, *Online Education: Values Dilemma in Business and the Search for Empathic Engagement*, 138 J. BUS. ETHICS 175 (2016).

⁵⁴² J. N. Bailenson, *Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue*, TECH. MIND BEHAV. (2021).

⁵⁴³ R. Pettersson, *Learning in the Information Age*, 42 EDUC. TECH. RSCH. DEV. 91 (1994).

⁵⁴⁴ M. Ahmed et al., *False Information as a Threat to Modern Society: A Systematic Review of False Information, Its Impact on Society, and Current Remedies*, 21 J. INFO. WARFARE 105 (2022).

⁵⁴⁵ A. B. PAUR ET AL., LA EDUCACIÓN EN LA SOCIEDAD DEL CONOCIMIENTO (I Congreso de Tecnología en Educación y Educación en Tecnología 2006).

so that the professionals graduating in the years ahead are equipped to discuss and debate these questions. In the Argentine key, one significant feature of the public universities is the co-governance proposed in the reform of 1918, which carried through the democratization of the faculties, removing them in part from the orbit of the national executive's powers. Another significant event was the decree that abolished tuition, making university access free and doubling enrollment within a few years.^{546 547} The constitutional reform of 1994 also advanced the autonomy of the universities, so that no president could arbitrarily intervene in their internal political or economic affairs, though in a context of declining social mobility.⁵⁴⁸

What would the next step forward be? The national universities could promote settings for in-person participation and for connection among students, faculty and officials tied to the various areas of study. Improvements in outreach would remain to be pursued, applying an active citizenship within the institution. The institution itself could drive the bond between student and faculty, providing a participatory setting in which the faculty is encouraged to become a second home: a place where one can develop alongside others.

At present the Argentine university system is free not only for Argentines but for any inhabitant of the world. It depends in large part on public officials indirectly elected by popular vote.⁵⁴⁹ The National Congress also plays a key role, since it approves the national budget, within which the funding of the universities sits. As at the municipal level, the university budget could open a participatory stage in which every graduate and student could review it, intervene in the allocation, and verify its sustainable development.

⁵⁴⁶ D. Nasatir, *Education and Social Change: The Argentine Case*, 39 SOCIO. EDUC. 167 (1966).

⁵⁴⁷ Free tuition had its reversals under the later military dictatorships, until 1983.

⁵⁴⁸ M. J. Sole, *Education Reform in Argentina*, 19 J. EDUC. FIN. 155 (1994).

⁵⁴⁹ International agreements matter more each day for the sustainability of the university system.

University systems are among the most important assets for the twenty-first century and for the development of society in general. Including and developing the community, however, is not their only task. They also play the strategic role of forming professionals and citizens capable of leading in what the century brings and of guiding the Nation through the changes new technologies, ecological threats and the energy transition will impose, among other challenges. To take this up, it would be useful first to consider the role of the National Inter-University Council, which since 1983 has consolidated itself as an institution of inter-university dialogue with weight in national decision-making.⁵⁵⁰ One possibility is to empower the Council technically to lead a broader participation of the inter-university community, and in this way to draw out opinions on matters of public debate, so that Argentine society has a record of what its academic community thinks in general terms. Otherwise the debate is often guided by alternative forums, such as the committees of the Chamber of Deputies. A second point worth stressing is that university elections have been divided university by university, limiting interaction both internally and externally. Finally, greater political and argumentative articulation between the Council and the National Congress could be encouraged.

The Argentine university system could in this way contribute the best of itself to the development of society, through a model of open calls promoting a university academic offering adapted to the needs of the twenty-first century. Otherwise the university system will probably become a memory: institutions that promote information rather than community, without considering their real capacity to be a second home.

⁵⁵⁰ F. L. Erreguerena, *Los rectores y el Consejo Interuniversitario Nacional en la recuperación democrática argentina: el surgimiento del poder rectoral y la consolidación de una autonomía fragmentada*, 20 IBEROAMERICANA 181 (2020).

EDUCATION AND SOVEREIGNTY

Educational profiles and curricula shape teachers, and teachers in turn shape the curricula. At first glance the interaction could be virtuous or not, depending on how seriously the work is taken and on the concrete possibilities of improving those programs. Divergent outlooks bear on this educational back-and-forth, in which teachers are immersed. Even so, non-formal social educational processes⁵⁵¹ may matter more than formal ones in forming people, since in practice, beyond theory, they are what will define what is acceptable in a society and what is not.⁵⁵²

The “global village” now lets us reach educational content from other countries easily, which facilitates comparative curriculum design, as it does other branches of study, such as comparative economics or comparative law. On the formal side, Andrea Varela and Pablo Bilyk, in *Matriz soberana* (2023), advance a sovereigntist position on curricula: they stress the importance of sovereignty in education, against international programs and criteria.⁵⁵³

The position is complex, and it can produce dilemmas about how public decisions are taken. In the introduction to the edition cited they write: “sovereignty may be thought of as a key to reflection and intervention that promotes the recognition of othernesses as a way of expanding artistic vocations.” If we widen the borders of the word “sovereignty,” we may take the authors to mean that they seek a government that protects minorities and, in human rights terms, protects

⁵⁵¹ C. Strauss, *Beyond “Formal” versus “Informal” Education: Uses of Psychological Theory in Anthropological Research*, 12 ETHOS 195 (1984).

⁵⁵² D. Lonie & L. Dickens, *Becoming Musicians: Situating Young People’s Experiences of Musical Learning Between Formal, Informal and Non-Formal Spheres*, 23 CULTURAL GEOGRAPHIES 87 (2016).

⁵⁵³ A. M. VARELA ET AL., *MATRIZ SOBERANA* (Editorial de la Universidad Nacional de La Plata 2023).

them against the decisions of non-sovereign actors, in the key of popular sovereignty.

Even with that clarification, sovereignty is a concept from the dawn of modernity, probably invented, principally by Jean Bodin, to annul differences rather than to foster them.⁵⁵⁴ Sovereignty as *popular* sovereignty is a later concept, belonging mainly to romantic contractarianism: Rousseau, Mariano Moreno.⁵⁵⁵ ⁵⁵⁶ Sovereignty was the sovereign's power, chiefly a monarch's, to take decisions above the political will of any of his subjects. On that concept, it is hard to maintain that more sovereignty amounts to better curricula.

It was Robert Dahl who coined the term “polyarchy”⁵⁵⁷ to describe how contemporary societies work.⁵⁵⁸ We could apply the concept to Latin America. In educational terms, on Dahl's account, a set of local elites would be deciding how formal education is conducted. That would be a roughly accurate description of a Latin American polyarchy in action. Is a sovereign decision, then, the same as a “sovereign and popular” decision in Argentina? And if a people decided sovereignly not to educate itself, would the children not still have their right to education?

In an interview, Jorge Luis Borges (1985) distinguished the nationalism of oppressed societies as a way of persisting in an identity, against his

⁵⁵⁴ G. F. Schuppert & R. Barrett, *Sovereignty*, in A GLOBAL HISTORY OF IDEAS IN THE LANGUAGE OF LAW (Max Planck Institute for Legal History and Legal Theory 2021).

⁵⁵⁵ B. Yack, *Popular Sovereignty and Nationalism*, 29 POL. THEORY 517 (2001).

⁵⁵⁶ A. L. Palacios, *El genial joven Moreno y la estructuración del nuevo Estado*, 5 ACADEMIA, REVISTA SOBRE ENSEÑANZA DEL DERECHO 197 (2007).

⁵⁵⁷ R. A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, 120 POL. SCI. Q. 187 (2005).

⁵⁵⁸ B. Stinebrickner, *Robert A. Dahl and the Essentials of Modern Political Analysis: Politics, Influence, Power, and Polyarchy*, 8 J. POL. POWER 189 (2015).

own well-known opposition to nationalism.⁵⁵⁹ That is one possibility. Another is that sovereignty may take us away from human rights and from the standards elaborated by the committees that report to the United Nations. Strengthening educational sovereignty could in that way work against better criteria for future generations, if it means a regression in educational capacity. It is for this reason that the constitutional reform of 1994 sharply limited the state's sovereign capacity to decide which rights Argentines have: so that the sovereign would not hold the power to take them away, and so that a greater plurality of outlooks would be possible, as in the metaphor of Ulysses lashed to the mast so as not to follow the sirens.⁵⁶⁰

⁵⁵⁹ R. BORGES, J. L., MAJÍAN, ROSA MAJÍAN CONVERSANDO CON JORGE LUIS BORGES DE ARMENIA Y DE LOS ARMENIOS. R.M (Ediciones Culturales 1985).

⁵⁶⁰ Even so, it would be advisable to go deeper into the analysis of the bond between human rights and democracy.

P A R T V

**Annex: Bibliography and Tables of
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ABBREVIATIONS

The abbreviations used throughout are those of the Spanish original, since they are the forms under which these institutions and instruments circulate in the sources.

AAIP Agencia de Acceso a la Información Pública — Access to Public Information Agency

ANSES Administración Nacional de la Seguridad Social — National Social Security Administration

BAE Boletín de Asuntos Entrados — Bulletin of Incoming Business (Chamber of Deputies)

BCRA Banco Central de la República Argentina — Central Bank of Argentina

CABA Ciudad Autónoma de Buenos Aires — Autonomous City of Buenos Aires

CADH Convención Americana sobre Derechos Humanos — American Convention on Human Rights

CADHP Corte Africana de Derechos Humanos y de los Pueblos — African Court on Human and Peoples' Rights

CCCN Código Civil y Comercial de la Nación — Civil and Commercial Code of the Nation

CEDAW Convención Contra la Discriminación de la Mujer — Convention on the Elimination of All Forms of Discrimination against Women

CEDH Convención Europea de Derechos Humanos — European Convention on Human Rights

CIADI Centro Internacional de Arreglo de Diferencias Relativas a Inversiones — International Centre for Settlement of Investment Disputes (ICSID)

CIJ Corte Internacional de Justicia — International Court of Justice

CIN Consejo Interuniversitario Nacional — National Inter-University Council

CN Constitución de la Nación Argentina — Constitution of the Argentine Nation

CNE Cámara Nacional Electoral — National Electoral Chamber

CONICET Consejo Nacional de Investigaciones Científicas y Técnicas — National Scientific and Technical Research Council

CONVEMAR Convención de las Naciones Unidas sobre el Derecho del Mar — United Nations Convention on the Law of the Sea

Corte IDH Corte Interamericana de Derechos Humanos — Inter-American Court of Human Rights

CPI Corte Penal Internacional — International Criminal Court

CPJI Corte Permanente de Justicia Internacional — Permanent Court of International Justice

CSJN Corte Suprema de Justicia de la Nación — Supreme Court of Argentina

CVDT Convención de Viena sobre el Derecho de los Tratados — Vienna Convention on the Law of Treaties

DADH Declaración Americana de Derechos y Deberes del Hombre — American Declaration of the Rights and Duties of Man

DAIP Derecho de acceso a la información pública — right of access to public information

DDHH Derechos Humanos — human rights

DIDH Derecho Internacional de los Derechos Humanos — international human rights law

DIH Derecho Internacional Humanitario — international humanitarian law

DIP Derecho Internacional Público — public international law

DNU Decreto de Necesidad y Urgencia — necessity-and-urgency decree

EIA Evaluación de impacto ambiental — environmental impact assessment

EsIA Estudio de impacto ambiental — environmental impact study

GDE Gestión Documental Electrónica — Electronic Document Management

HCDN Honorable Cámara de Diputados de la Nación — Chamber of Deputies

HSN Honorable Senado de la Nación — Senate

LAIP Ley de Acceso a la Información Pública — Access to Public Information Act

LGA Ley General del Ambiente — General Environment Act

ODS Objetivos de Desarrollo Sustentable — Sustainable Development Goals

OEА Organización de Estados Americanos — Organization of American States

OMC Organización Mundial de Comercio — World Trade Organization

ONU Organización de las Naciones Unidas — United Nations

PEN Poder Ejecutivo Nacional — the national executive

PIDCP Pacto Internacional de Derechos Civiles y Políticos — International Covenant on Civil and Political Rights

PIDESC Pacto Internacional de Derechos Económicos, Sociales y Culturales — International Covenant on Economic, Social and Cultural Rights

PPMM Presupuestos mínimos — minimum standards of protection

RRNN Recursos naturales — natural resources

SAIJ Sistema Argentino de Información Jurídica — Argentine Legal Information System

SSN Superintendencia de Seguros de la Nación — National Insurance Superintendency

TBI Tratado Bilateral de Inversión — bilateral investment treaty

TEDH Tribunal Europeo de Derechos Humanos — European Court of Human Rights

TIDM Tribunal Internacional del Derecho del Mar — International Tribunal for the Law of the Sea

TPIR Tribunal Penal Internacional para Ruanda — International Criminal Tribunal for Rwanda

TPIY Tribunal Penal Internacional para la ex Yugoslavia — International Criminal Tribunal for the former Yugoslavia

TPR Tribunal Permanente de Revisión del Mercosur — Permanent Review Tribunal of MERCOSUR

UE Unión Europea — European Union