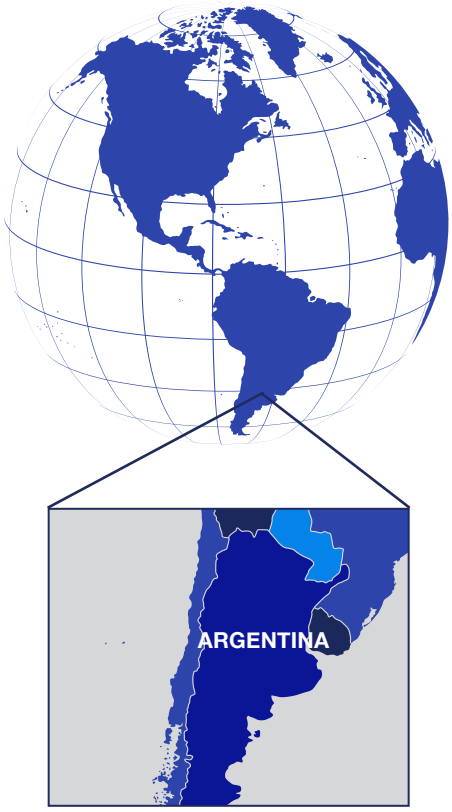

Argentina

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I. INTRODUCTION

The most important development of 2020 peaked with the year's last breath. On December 30, Congress passed a statute decriminalizing abortion, culminating an extraordinary process of women's mobilization. Other than this, the Supreme Court found itself pressed by opposing forces to settle politically intractable questions. The outcome was bad constitutional law—the kind only a country perpetually in crisis can produce. We devote most of this report to the existing dispute between the two main political factions regarding the legitimacy of judicial inquiries into previous administrations. The controversy has put extra strain on a flawed and manipulated judiciary.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year ended on an extremely high note, crowned as it was by Congress' enactment, on December 30, of a statute legalizing abortion during the first fourteen weeks of a pregnancy.[1] The legislative debate was as intense as in 2018 but shorter. This time, the law had the explicit support of the President, who used his power of legislative initiative to send the bill himself. This unequivocal political endorsement may partially explain why the Senate flipped in just two years. (The 2018 bill cleared the House but was narrowly defeated in the Senate.) But the indefatigable women's movement is the main reason that the law saw the light, a necessary step to end clandestine abortions and give women a voice regarding their body and choices. Its awe-inspiring achievement deserved a first mention.

As everywhere else around the globe, 2020 was defined by the Covid-19 pandemic. By March, Argentina had gone into a strict lockdown established by an executive order with the support of all provinces' governors. The decision restricted the constitutionally protected freedom of movement under public health grounds. The initial measure was to last eleven days[2] but it was eventually renewed seven times.[3] On July, the President issued a more comprehensive regulation of the emergency measures, including a set of criteria to manage rights' restrictions and the stringency of social distancing measures.[4] Perhaps predictably, Congress was slow to react. It spent weeks discussing changes to its procedures to allow for virtual sessions, including an unusual legal action by Vice President Cristina Fernández de Kirchner who, as the Senate's President, asked the Supreme Court to clarify whether virtual sessions would be deemed valid.[5] The Court ducked the question by saying that there was no actual "case or controversy". While we cannot describe in detail the complex and somewhat flimsy legal architecture of the emergency measures, which otherwise seem intelligible to us substantively, the nation's reaction followed the familiar pattern

[1] Ley 27.610 [statute], published 15 January 2021.

[2] Decreto 297/2020 [executive order], 20 March 2020.

[3] Decretos 325/20, 355/20, 408/20, 459/20 y 493/20, 520/20 and 576/20 [executive orders].

[4] Decreto 605/2020, 18 July 2020 [executive order].

[5] Fernández de Kirchner, "Cristina en carácter de Presidenta del Honorable Senado de la Nación", CSJ 000353/2020/CS001, (2020).

of concentration of power on the executive at the federal and provincial levels and fairly weak legislative and judicial oversight.

One dominant and vehement dispute during the year concerned the open judicial inquiries into the previous Kirchnerist administrations (2003-2015). For the Peronist-Kirchnerist coalition that in 2019 placed President Alberto Fernández and former President and current Vice President Cristina Fernández de Kirchner in office (no relation between them), a set of ongoing indictments on corruption charges are nothing but "lawfare," the politically motivated use of the judiciary as a witch hunt of the opposition. For *Juntos por el Cambio*, the coalition that governed from 2015 to 2019, the inquiries are both sound and under attack by an administration that features some its members—including the Vice President herself—among those being investigated.

This dispute presents a challenging issue from a constitutional standpoint, one with potential long-lasting effects. (And, as we shall note, the most important case of the year is closely tied with it.) The controversy builds upon the country's traditionally murky relationship between politics and the judiciary and is a thorn in the side of President A. Fernandez's judicial politics. On March 1, the President inaugurated the legislative year by announcing in Congress an ambitious judicial reform agenda that, among other things, would dilute the power of the twelve federal judges based in Buenos Aires City in charge of handling corruption cases. For the President, it was imperative to stop both the "fabrication of indictments" and "arbitrary pre-trial detentions" and to prevent judges' discretion from overriding legal rules. He also linked his judicial agenda to the much-needed reform of the nation's intelligence agency. The latter's improper connections with the judiciary (which space constraints prevent us from expounding) constitutes an inadmissible institutional trait in a democracy to which all administrations have contributed to since the 1990s.

The President established a commission of experts to study ways to "strengthen" the judiciary, including analyzing how the Supreme Court could be made more effective. The commission came into existence in July and was populated by eleven mostly prestigious jurists including—significantly—Mr. Carlos Beraldi, one of the attorneys representing Vice President C. Fernández. (Critical media unkindly called this commission the "Beraldi Commission.") After three months, the commission issued a useful but inconclusive report that reads like a seriatim opinion since its members failed to agree on a shared proposal.

In parallel, President Fernández sent to Congress a draft bill aimed at restructuring the federal judiciary, creating dozens of new courts to achieve among other things the previously mentioned diluting effect. The bill was swiftly discussed and approved in the Senate, but it faced more obstacles in the House. As of February 2021, there were not clear signs that it was moving forward, although political pressure against the judiciary was fast simmering. The lagging judicial reform agenda was seemingly a source of dispute within the ruling coalition. In August, Vice President Fernández stated that this judicial reform was not the (arguably more aggressive) one the country needed. In October, she said that there were "officials who do not work"[6] (*funcionarios y funcionarias que no funcionan*), a criticism that observers considered was leveled at the Minister of Justice, allegedly one of the President's trusted advisors. And, in December, she accused the Court of "directing" and "coordinating" the "lawfare" efforts targeted at her, her family, and some members of her former administration. According to the Vice President, these efforts were part of a media and judicial conspiracy to "hunt and imprison members of the opposition" that had started when former President Macri reached the presidency in 2015, though some of the investigations had initiated before this date. This accusation underscores the seriousness of the political controversy and the tough spot in which the President–a part-time law lecturer who has said to be committed to judicial independence–finds himself in as the minority partner in a ruling coalition that demands from him a belligerent condemnation of the judiciary.

What to make of these attacks? The credibility of the federal judges in charge of corruption cases is fantastically low. Political pressure of these and other judges is a sad reality and part of a flirting game judges themselves often play eagerly in exchange for favors. While there are few doubts that the Macri administration was keen on aggressively pushing those prosecutions–which does not mean that some of them were weightless–it looks like the current administration focused on a still picture instead of a slow-evolving movie, since the previous is part of a trend that is not the product of a single administration. The selective prosecution of politicians once they lose power is rather common and has often been supported by the incoming administration.

The judiciary in the country is generally inefficient, corporativist, conservative, and weakly transparent, so some type of reform is indeed much needed. Nevertheless, the reform should not be in the direction of enhanced political control and aim instead for improvements in efficiency, accountability, and independence from all powerful actors–the administration, the opposition, and, not least, any economic interests. Achieving this is a hard task that demands both strong political will and a plural consensus.

III. CONSTITUTIONAL CASES

Bertuzzi and *Bruglia:* Transferring Judges

The most politically fraught decision of the year found a Court largely split in the way noted in previous reports. The case concerned the transfer of criminal law judges, including those intervening in corruption cases. In 1994, a constitutional amendment established the *Consejo de la Magistratura*, a body that compiles a list of candidates based

[6] 'Cristina Kirchner cuestionó al Gabinete de Alberto: "Hay funcionarios y funcionarias que no funcionan"' (*iProfesional*, 26 October 2020) <https://www.iprofesional.com/politica/326323-cristina-kirchner-hay-funcionarios-que-no-funcionan> accessed 11 February 2021.

on exams and other qualifications to fill each vacancy (other than Supreme Court vacancies) in the federal and national judiciaries.[7] From this list, the country's President selects one candidate and sends it to the Senate for confirmation. Although undoubtedly superior to the more politicized system it replaced of appointment and confirmation, the new system, in operation since 1998, preserved some problems and aggravated others.

One of these is the long time it takes to fill vacancies, around three and a half years from the opening of a selection procedure to a Senate confirmation.[8] To minimize the impact of delays, both the council and the country's president have engaged in the otherwise long-standing practice of transferring judges who are already confirmed for, and sitting in, a given court to another one, including in cases where a new court is established anew. One of the obvious dangers of the practice is that it allows for political maneuvering, not to rid of a judge perceived as 'hostile' since she must consent to the transfer, but to sit a 'friendlier' judge in a court. If these transfers are made permanent, they risk violating the constitutional appointment system since they circumvent the staggered participation of council, President, and Senate. Were delays due to objective constraints, transfers would be a bad solution to a product of circumstance. But a risk exists that there is endogeneity to the problem. When there is political alignment of both a majority at the council and the country's president, delays may be exacerbated to allow for a transfer instead of proceeding with a normal appointment.

In 2020, the Court said that the time had come to minimize if not end this system. Given the above, one would be very hard-pressed to dispute this conclusion. We join others who have expressed that "the best transfer system is one that does not exist"[9] or something to that effect. The problem is the rationale of this hotly political case. During President Macri's tenure (2015-2019), five national courts were transformed into federal ones, which many commentators rightly saw as setting a friendlier ground for the federal prosecution of outgoing President C. Fernández and related politicians. This is nothing much new–as noted, most administrations have regrettably messed with the judiciary. In an administrative decision (*Acordada*) from 2018, the Court by majority halted this move. Yet, responding to a consultation from the Macri administration, it refined its previous decision. It clearly underscored the exceptionality of, and the risks involved in, transfers but said that what was forbidden by the Constitution was the transfer of a national judge to a federal court or vice versa. A new appointment was not needed in the transfer of a judge serving in a national court to another *national* court and, similarly, of a judge serving in a *federal* court to another federal court if the hierarchy of both courts were analogous. The administration followed through, transferring several federal judges to vacant federal courts.

Things changed under the new administration of President A. Fernández and Vice President C. Fernández de Kirchner as the council (with a changed composition) retraced its steps. In July 2020, it declared that the standing of ten judges, including two who would have to decide appeals in cases involving Ms. C. Fernández in her previous capacity as President, was irregular since they had sidestepped the Constitution's appointment system. (The council also adopted a more stringent transfer system that still did not comply with the Constitution.) Those two judges brought a writ of *amparo* against the council decision which a first instance judge dismissed in August. In September, a Senate controlled by the administration's party predictably failed to confirm the transfers, which prompted the President to sign an order ending them.

That same month, the Court by unanimity invoked the seriousness of the institutional matters involved to hear the case before the appeals court (the "superior court") intervened, as it had done in a series of mostly infamous cases in previous decades. Although the seriousness of the matters was beyond dispute, the case was ripe for an arguably speedy decision by an appeals court, so the Court could have waited. The Court's willingness to hear the case caused an uproar in the administration and its followers, who heavily criticized the tribunal while bracing for the impact of what they saw as a sure decision siding with plaintiffs. Yet, when the Court announced a decision a month later, it was to dismiss the case. The same three justices who had penned the administrative decision seemingly consenting to the transfers signed the majority opinion (Justices Lorenzetti, Rosatti, and Maqueda; Justice Highton concurred, and Justice Rosenkrantz dissented), ruling that the judges' situation was irregular while declaring lawful their official performance thus far to satisfy legal certainty. It also struck down the transfer system in place and exhorted the council to speed up regular procedures. While the administration was doubtless pleasantly surprised by it, the decision did not completely mollify it since it ordered that a new procedure be opened to fill the vacancies of the two courts where the judges had sat by guaranteeing their participation if they so wished. The decision did not pleasantly surprise anybody else. When a court seeks to satisfy everyone, it risks satisfying no one.

The majority opinion is long, but its core is simple. Citing the study referenced above, the Court highlighted the delays involved in appointments. But it said that the Constitution establishes a single system for appointments of federal lower judges (the staggered participation of council, President, and Senate), and emphasized that transfers that do not comply with that system jeopardize judges' independence and the right to an impartial judge. Now, the key question was how the Court tried to square its conclusion in this case with

[7] National courts are non-federal courts under federal control in Buenos Aires City, the country's capital district.

[8] UNJCP, "Programa de Estudios Sobre Poder Judicial: Laboratorio de Estudios Sobre Administración Del Poder Judicial", 74, (2019).

[9] Gustavo Arballo, "El Único Reglamento de Traslados Permanentes Constitucionalmente Admisible Es El Que No Existe", Saber Derecho accessed from http://www.saberderecho.com/2020/10/el-unico-reglamento-de-traslados.html, (2020).

its 2018 administrative decision, and, in our view, it failed to do so satisfactorily. The Court's majority said that the 2018 decision had been exclusively referred to the question it had been asked concerning the legality of *transitory* transfers. When it said that a new confirmation procedure was not necessary, it was answering that it was not necessary *for those transfers.* The procedure was obviously necessary for *permanent* transfers, since concluding otherwise would mean equating transfers with regular appointments, thus creating a new appointment system.

Hard as we tried, we could not find in that previous decision any trace of that distinction. The majority said that plaintiffs' interpretation of the 2018 decision was unreasonable because it was tantamount to arguing that the Court had in practice amended the Constitution. Although we agree that this outcome was unreasonable, it was the one that most clearly stemmed from that decision and that the Court had accepted as part of a long-standing practice. The Court now distanced itself dramatically from that decision by negating that it had made it in the first place. Dissenting, Justice Rosenkrantz remarked among other things that the practice of transfers had been accepted for decades and that the Court in 2018 had not introduced any difference between temporary and permanent transfers.[10] Yet Rosenkrantz avoided criticizing the transfer system itself.

Assuming we are correct in saying that the Court in 2018 did not attempt to distinguish between a transitory transfer and a permanent one, how can the new decision be made sense of? One possibility is that the Court now genuinely realized that it had erred on constitutional grounds. True, such transfers were routine, but it was time to end them since they had become too pervasive and politically motivated. Also, the Senate's rejection of specific transfers in September could signal that the acquiescence by the political class upon which transfers were based had ceased to exist. While the Court should have banned transfers when it wrote about the issue in 2018, it would have been preferable that it openly acknowledged the mistake rather than equivocating the issue. The other possible reading of the new decision is that the Court simply realized that upholding the 2018 criterion would invite backlash in an already rarified environment. Perhaps the 2017-2018 saga concerning prison terms for those involved in massive human rights violations about which we informed in our 2018-2019 reports was fresh, and the Court wanted to shield itself this time. While we appreciate the general outcome—the extant transfer system is indefensible—we do not welcome the Court's reasoning. It is time for the Court to put an end to what the scholar A. Binder has labeled its "elusive and labyrinthine rhetoric."[11]

Pando: Upholding free speech

In *Pando*,[12] the Court had to decide whether a photomontage of pro-military activist María Cecilia Pando was off limits. Four of the five justices (Justice Highton did not participate) decided against the plaintiff and ratified its rather protective freedom of expression case-law. The case involved the satirical *Barcelona* magazine, which mocked a protest in which Pando participated, with several activists chaining themselves up at the gates of the Ministry of Defense to oppose prosecutions for past human rights abuses. Pando is the leader of a group that defends prosecuted officials and denies that those abuses ever took place; she is also the wife of a former military officer. The magazine photoshopped Pando's head on a scantily dressed female body that was bonded in S&M fashion. The Court rightly framed the publication as part of the right to critique others and said that what matters in those cases is to determine whether the critique was unjustifiably insulting. It did not consider that it was. We agree with the outcome and wonder whether the Court would also deem acceptable a similarly harsh critique against more popular or sympathetic plaintiffs.

Lee: Emergency powers under Covid-19

The full implementation of lockdown measures established by the national government rested on the provinces.[13] Nowhere was the lockdown stricter than in the northern Formosa province, ruled since 1995 by the heavy hand of Governor G. Insfrán. The governor's handling of the lockdown was the target of serious criticism. One of the measures he implemented was to close the province's borders in April and establish a system of "orderly return" for citizens caught outside it. Stranded citizens would have to ask for permission to return and, if receiving it, would have to isolate for two weeks in government-run centers. According to the information given by the provincial government to the Court, the program had received over 13,000 requests by October 31st, of which around 6000 had been granted and nearly 7500 were pending authorization. (The province had 1455 beds available for the quarantine in government quarters and those willing to pay for hotels adapted for that purposes were able to do so.[14])

Although a full decision on the merits has not been announced yet, a unanimous Supreme Court preliminary found that the statute implementing the measures excessively limited the right to move freely within the country. Now, the justices reached that (arguably sensible) conclusion by saying that statutes can be struck down if, as in the case, they were "unreasonable–when the means do not match the ends pursued–or when they entail a clear iniquity".[15] As an adjudication tool,

[10] During Justice Rosenkrantz's confirmation process, González-Bertomeu submitted a letter of support.

[11] Alberto Binder, "El Arte de Agravar La Institucionalidad", Pagina12, retrieved from: https://www.pagina12.com.ar/303615-el-arte-de-agravar-la-institucionalidad, (2020).

[12] *Pando de Mercado, María Cecilia c Gente Grossa SRL s/ daños y perjuicios,* CIV63667/2012/CS1 [22 December 2020].

[13] Decreto 605/2020 [executive order], sections 21-22.

[14,15] CSJN, *Lee, Carlos Roberto y otro c/ Consejo de Atención Integral de la Emergencia Covid-19 Provincia de Formosa,* FRE002774/2020/CS001 (19 November 2020).

this has a ring of rational-basis review but exceeds it. Yet it also does not appear to be a European-style proportionality analysis or a U.S.-inspired categorical review. The Court should be more careful than it is in its articulation of a method to analyze rights limitations and balance rights and interests. Indeed, the case provided (and, since a merits decision is pending, it still provides) an excellent opportunity to develop a more structured proportionality approach, which the Court has hinted at in the recent past but never developed seriously. The Court relied on a vague finding of *unreasonableness*, aided for that purpose by the fact that the program was not "limited in time", but without considering its effectiveness, weighting the state interests and rights at stake, and/or analyzing less restrictive alternatives.

Ademus and *Ministerio de Trabajo:* Unions

In Ademus, the Court had to decide whether the law that assigns the right to collective bargaining to the "most representative" union in the relevant sector was constitutional. Partly addressing the International Labour Organization's (ILO) criticism of the domestic law of unions, a series of Court decisions in the recent past had found that the law unconstitutionally limited union pluralism in various respects, although the Court had not openly decided yet on the issue of collective bargaining. A set of unions that were not the "most representative" now claimed that the statute unduly restricted their power to sit with management in collective bargaining, a power exclusively reserved to those most representative unions. The Court considered the preference legitimate and within what the ILO experts themselves found acceptable,[16] thus failing to expand its previous case law. Justice Rosatti dissented. He viewed the limitation as violating the constitutional mandate to guarantee democratic, free, and non-bureaucratic unions.

In *Ministerio de Trabajo,* the Court ratified the line of a case we discussed in our 2017 report, according to which the state is entitled to restrict the right to join or form a union of members of the security forces. The case presented a slightly new scenario, as those seeking unionization were now police officers and prison guards. A majority found that the Entre Ríos province had implicitly restricted the right by including as a "serious offense" in the statutes regulating the conduct of both police officers and prison guards the making of "collective demands", since a union is nothing but an organization to fight for "collective interests".[17] Like in the 2017 case, Justices Rosatti and Maqueda dissented, the latter sensibly insisting that such a limitation must be explicit. A ban to join a union should not be construed from a rule whose goal was to maintain internal discipline.

This decision came weeks after a demonstration by police officers of the Buenos Aires Province forced the hand of the governor to provide a (otherwise) necessary salary raise. The protest included utterly objectionable actions such as the envelopment of the Presidential residency with patrol cars.

IV. LOOKING AHEAD

It will be key to critically follow the political crisis concerning the judiciary. By the time the reader sets her eyes on these pages, she will already have a type of information we currently lack. Any transformation of the judiciary should not aggravate current predicaments but instead address them.

[16] CSJN, "ADEMUS y otros c. Municipalidad de la Ciudad de Salta", FSA648/2015/CS1 (2020).
[17] CSJN, "Ministerio de Trabajo, Empleo y Seguridad Social c/ Asociación Profesional Policial y Penitenciaria de Entre Ríos", CNT044551/2015/CS001, (2020).