Argentina

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I. INTRODUCTION

We devote our 2021 review to the Supreme Court, focusing on two developments. One concerns its internal convulsions and the attacks it once again received, not all of them unjustified. The other consists of an emerging trend in its decision making on federalism and regulatory issues, though we also review other areas.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

We have been highlighting in recent reports the internal squabbles at a fractured Court, which went on during 2021. A Court's President—a figure who has the power to set the agenda and other matters—is selected among the justices for three years by themselves. A president had to be elected in 2021 and Justice Horacio Rosatti was chosen after a messy process. Two of the five justices were not present at the time of selection—likely to protest the denial of a request to briefly postpone it—and the remaining three chose among themselves a president and vice-president.[1] The dispute is not necessarily ideological in the conventional sense. The Court frequently produces unanimous *dispositions* if not opinions. And, except for Justice Carlos Rosenkrantz, its members seem close to each other substantively. The wrangles are instead personal disputes concerning the justices' power at the Court and—perhaps—their relationship with incoming and outgoing administrations. In any case, the selecting process was an odd one and it did not do anything to either promote congeniality in such a small institution or to legitimize the Court in the context of wide criticism.[2]

The Court sorely needs to strengthen its legitimacy. It has fallen in the crosshairs of voiceful critics within President Alberto Fernández's administration. As we noted in our previous report, the Court has often been accused by members of the ruling coalition of having played a role in a "lawfare" process against some of its members under investigation for corruption. In early February 2022, a demonstration against it was organized by some of these critics. The criticism was partisan and overbroad. Yet some of it resonated well with the reality of a Court at the head of a sluggish and endogamic judiciary, whose independence from political groups and business conglomerates is not assured and which still has a long way to go to open itself to scrutiny. For the time being, the Court appears as relatively sheltered from political backlash since the midterm election of 2021 left the government without much leeway for retaliation or other maneuvers. But polls consistently show that citizens are anything but satisfied with the service of justice.[3]

Last year was also marked by the departure of Justice Elena Highton with 78 years of age, after serving 17 at the Court and becoming the first woman to sit on it in a democracy. Since 1994, the Constitution requires that federal judges receive a new Senate confirmation when turning 75. She attempted to circumvent this mandate by suing and seeking shelter in a Court case that had benefited former Justice Carlos Fayt. The rationale in that case (from 1999) was that the constitutional convention had not been authorized (by the statute setting it up) to introduce that requirement.[4] In February 2017, after a first

instance decision siding with Highton, the national government, the case's defendant, declined to appeal, in what some viewed as a manifestation of the alleged closeness between the Justice and the then sitting M. Macri administration. One month later, the Court changed the criterion in *Fayt* in a decision that did not feature Highton.[5]

Informal pressure against Justice Highton's permanence mounted under the incoming Fernández administration and she eventually yielded. Apart from her often wavering legal views, her presence at the Court was instrumental in bringing women's issues to the forefront. She created an enormously valuable gender violence office at the Court and led a training center on gender perspectives within the judiciary. Her departure leaves a body with four male members - a remarkable step backwards. A divided Senate will probably slow down a new confirmation process, and the executive has failed to show---at least publicly---any interest in filling the position

III. CONSTITUTIONAL CASES

A thread links many of the Supreme Court cases we deemed important from our review of last year's docket: they either advance or affirm a certain vision of the proper distribution of territorial powers within Argentina's federal structure. Although still at a nascent stage, this case law would seem to propose a new federal equilibrium, less tilted towards the center and more inclined to support provincial and municipal claims of autonomy. (Since cases potentially pitting a municipality against the province in which it is located will rarely make it to the Court, it is unclear which power claim the latter would underscore.) Justices Rosatti (from the province of Santa Fe) and Carlos Maqueda (from Córdoba), and to a lesser extent Justice Ricardo Lorenzetti, also from Santa Fe, are the ones leading this shift. However preliminary this trend may be, 2021 showed signs of it.

We begin with a case involving one response to the Covid-19 crisis—last year we reported on another one. In-person schooling had been suspended at the beginning of the pandemic. After a year of (tiresome) remote learning, schools reopened in February 2021. Yet a few weeks later, upon the emergence of a second wave, the national government paused the reopening for eleven days in an area comprising Buenos Aires City and its populous surroundings because of the spiraling number of infections therein. The City brought the national government to the Court's original jurisdiction; since the 1994 amendment, the City's constitutional status is akin to the other provinces' status, including the power to be a party in an original jurisdiction case. Via three similar opinions, a four-member Court (all but Justice Highton, still presiding) promptly agreed that the rule violated arrangements concerning federalism.[6] The Court accepted that the national government could regulate health-related issues, but said that, in so doing, it could not trespass the subnational governments' autonomy to define the way a school class is conducted. Specifically, the government had not provided a compelling justification of the measure's need apart from generically asserting that the increased demand on the public transport system would drive the spread of the virus. Since the national government and the City are governed by different parties, the reaction to the decision was divided, as expected, according to political leanings, although it was well received by countless exhausted parents.

In *Shi, Jinchui*, an immigrant who owned a market in the small city of Arroyito, in the Córdoba Province, questioned a local ordinance that banned supermarkets from opening on Sundays; the claim was grounded on both the prevalence of federal authority on the matter and economic freedom. The Court dismissed it by resorting to a view of federalism that enshrines the municipality as a central, autonomous player within the scope of territorial powers allocated by the Constitution. The view is grounded in the constitutional text emerging from the 1994 amending convention ensuring the "autonomy" of municipalities. Indeed, its main espousers—Justices Rosatti and Maqueda—played a part in that convention as delegates. Despite this text, municipalities are still legally, politically, and financially dependent on both the province in which they are lodged and the national government, and decisions underscoring their power against one of these actors are not entirely common.

The plurality opinion of Justices Rosatti and Maqueda (Justice Lorenzetti joined them in the outcome) was anything but narrow. It embraced an ideal communitarian vision of small cities or towns, such as Arroyito, in which "neighborly relations are intense" and form a kind of "social coexistence in which the prevailing associative type is 'communitarian'".[7] The opinion emphasized the deliberative and participatory process that led to the questioned ordinance.[8] And, addressing the economic freedom argument, it said that the idea that commerce is affected by the restriction in a constitutionally impermissible manner was "unreasonable". The municipality's regulation allowed "neighbors to channel and develop, over the weekend, their family and community life…", and, in doing so, did not contradict the national government's regulation—prominently including Section 14 bis of the Constitution recognizing "paid rest and vacations", "limited working hours", and "full family protection".[9] In short, for the plurality, the ordinance was the outcome of a democratic procedure that sought to shape how the community should strike the right balance between work and leisure based on municipal autonomy. The dissent by Justices Rosenkrantz and Highton literally interpreted the local ordinance as enforcing a mandatory rule of Sunday rest that both Congress and the national executive had made optional for employers, thus violating federal prerogatives. They added that the challenged ordinance exceeded the municipality's "police power."

While we share with others a sympathetic view of decisions validating the use of local power, we also share a reluctance to praise the Court.[10] The decision evokes discussions at the Court from almost a century ago, where labor regulations were emerging, and local authorities disputed with the national Congress the authority to enact such rules. The majority decision in *Shi* seems to have departed from the prevailing criterion that Congress (and the national government) have the final say on working time regulation. Like Arballo has claimed, a consistent application by the Court of the solution in this case to other spheres would have potentially enormous implications. And we presently believe it is unlikely to happen, which leaves *Shi* in an uncertain place.[11] It will be

of special interest to observe how much consideration the Court will assign in future cases to the local "participatory gymnastics" the plurality underscored in *Shi*.[12]

In *Farmacity*, the Court—formed in the case by two sitting justices and two replacing ones, for two of the remaining justices had business ties with the plaintiff—had to dwell with a 1987 statute from the Buenos Aires Province that regulated who could own pharmacies and under which corporate form. In particular, the statute prevented limited liability companies from controlling a privately-owned pharmacy, which could only be owned by a pharmacist or a group of them. The law was challenged by Farmacity, a limited liability company which had started operations in Buenos Aires City and which managed to take a substantial share of the market therein. In seeking to move into the neighboring province of Buenos Aires, the statute stood as an obstacle. Like the plaintiff in the previous case had done, Farmacity questioned the province's authority to enact such a law as well as its reasonableness in its limitation of economic freedom. It failed on both grounds.

In their plurality opinion, Justices Lorenzetti and Highton wrote that the statute was within the provincial power of health regulation (*police power)* and did not infringe on exclusive prerogatives of the national government. They considered that federal and provincial regulations were complementary in their protection of the "especially vulnerable group" of "consumers of pharmaceutical products."[13] They next subjected the law to a loosely structured *reasonableness analysis, that, as we noted before, mixes elements of American-style rational-basis review and European-style proportionality analysis. To pass the test, laws must have a legitimate goal and must choose proportional and efficient means to achieve them.*[14] Yet the Court adopted a highly deferential standpoint: it sided with the province in considering that limited liability companies were less likely to secure the right to health involved in the activity of selling medicines and that the province was justified in excluding them from this specific market under public health reasons. Unlike a limited liability company, whose *only goal was to maximize profit, pharmacists also had professional motivations that mitigated their private interest. Finally, the Court swiftly dismissed the plaintiff's economic freedom arguments by saying that the company regularly did business elsewhere through its over "two hundred" pharmacies.*

In *Esso*, another case underscoring local authority, the Court rejected a suit brought by an oil company operating gas stations against a fee imposed by the Municipality of Quilmes, where two stations were located, for hygiene and security services. The company claimed that the Municipality calculated the fee based on Esso's operations in other municipalities, through the value associated to the gross income tax it pays in the province of Buenos Aires. The company claimed that the fee went well beyond the actual services provided to its Quilmes operation, which made it disproportionate. Supporting municipal autonomy, the Court rejected the claim. The main argument developed by the plurality vote of Justices Rosatti and Maqueda (Justices Highton and Lorenzetti each joined them in the outcome) was that the municipality was authorized to use the *contributive capacity* of the company as a *key factor* to set the value of the fee, unless it was proven that the resulting fee was unreasonable—which, for the Court, the plaintiff had failed to do.[15] Critics argued that the Court's requirement to prove the disproportionality of the fee was next to impossible, for a company cannot ascertain the precise cost of a public service provided by a municipality.[16] The Court's criterion also may give an untimely incentive for municipalities—always hungry for funds—to claim that the costs of their services have increased in order to justify higher fees.

This case law concerning federalism poses somewhat of an enigma to us. A first look would suggest that the Court is seeking to become a central agent in the re-shuffling of powers from the center to the provinces and municipalities in Argentina's unbalanced federal structure. But this is an ambitious undertaking that requires both consensus within the Court and consistency from one case to the next, and both factors have been in scarce supply in recent years.

In any case, one important though highly technical decision (in *Price*[17]) escaped this trend of centrifugal redistribution of power. Departing from the U.S. model, the Constitution has always established that the national Congress has exclusive authority to enact uniform legislation including civil, criminal, and commercial codes, and that the provinces retain the power to enact codes of procedure for non-federal litigation in their territory. The southern province of Chubut passed a statute establishing a short time limit—six months plus brief extensions—to regulate the duration of the early stage of a criminal investigation (the so-called "preparatory stage"), which usually takes much longer. If an investigation was carried beyond that period, it was to be closed without the possibility of reopening it. The statute thus aimed to regulate the American Convention on Human Rights' standard (in Section 8.1) that proceedings are conducted "within a reasonable time"; since 1994, the Convention is on par with the Constitution.

A four-member Court (all but Justice Rosatti) unanimous in the disposition refuted the province's stance that the subject of regulation was merely procedural and hence under its purview, siding with the private accuser. The Court said that, according to the Constitution, the power to "extinguish" a criminal investigation and the regulation of the statute of limitations (or "prescription") were substantive legal issues and hence rested with the national Congress. Justice Lorenzetti added that the brief timeframe set by the statute "distorted" the application of the national legislation and could lead to impunity.[18]

The decision was rightly criticized by several commentators for impeding provincial reforms to shorten procedures in line with the American Convention's requirement.[19] The issue is admittedly debatable, since such decisions have usually been deemed under the aegis of the national Congress and the Convention also guarantees the private accuser's right to a fair trial. Yet, criminal procedures often go on for many years (sometimes over a decade) without a final decision, and this situation required vigorous and novel solutions. As we reported on previously, the Court is aware of the problem. Indeed, the same day it announced the decision in *Price*, it heard a criminal appeal from the province of Buenos Aires within the context of a case initiated 18 years before; half of that time had been spent on appeal.[20] The Court concluded that this duration was in violation

of the "reasonable time" standard and again reprimanded the province, although it did not acquit the defendant.

Other relevant decisions did not present federalism considerations. In *Etcheverry*,[21] a Court unanimous on the disposition sided with petitioners of a suit to demand the executive to solve a regulatory omission. The work contract law from 1974 required that workplaces offer day care provided they had a minimum number of female workers to be set by the executive. The executive never fixed that minimum, thus blocking in practice the requirement. Justices Highton and Rosenkrantz concisely said that this hindered workers' right to a service to support them in their caregiving duties. In their longer opinions, both Justices Maqueda, Lorenzetti *and* Justice Rosatti delved into the nature of regulatory omissions and cited the state's international duties under treaties on par with the Constitution pertaining to the rights of women and children. The three justices added that the government must consider both female and male workers with caregiving responsibilities, arguing that the rule's original language was based on inadmissible gender stereotypes. All justices but Rosatti, silent on the issue, said that the omission was to be solved within a reasonable timeframe.

In *Comunidad*,[22] the Court decided a case involving the prior consultation and participation of indigenous peoples, recognized since 1994 in the Constitution as well as binding international instruments such as the ILO's Convention 169. The southern Neuquén Province had created a municipality ten years before the Court's decision without consulting the local Mapuche community, represented as petitioner in the case. A divided Court met the parties halfway. The majority opinion of Justices Maqueda, Highton, and Lorenzetti rightly sided with the petitioner in that the consultation requirement had been ignored. (Justice Rosatti agreed on the outcome.) Prior consultation was mandatory because, in Convention 169's terms, the creation of a municipality could "affect [the community] directly". The Court added that the community's rights had also been violated because the municipality's structure did not ensure for proper participation in local governance. Yet, because of the negative implications that the stronger remedy of invalidating the rule creating the municipality would have, the Court chose a laxer solution, involving the parties in the design of a participatory framework. Justice Rosenkrantz dissented through a long opinion, saying that the creation of a municipality as such was "a general rule that did not directly affect" the community's rights.[23] He wrote that ILO's Convention did not assign communities a right to political self-determination. If, in the future, the municipality were to adopt a decision that directly affected the community's interests, it should establish a prior consultation. But it was the petitioner's "mistake to claim that the municipality's existence must be a matter of prior consultation".[24]

We finally analyze one of the most important decisions of the year. In *Colegio de Abogados de la Ciudad de Buenos Aires*, the Court struck down a statue from 2006 (#26.080) that modified the structure of the federal Judicial Council. As we noted in previous reports, the Council is a body created by the 1994 constitutional convention in charge of selecting and disciplining judges, among other activities. Its structure was left largely unspecified in the Constitution. Section 114 established that its composition is to be plural, guaranteeing a balance or "equilibrium" between politicians, lawyers, judges, and scholars, but it did not set a precise allocation of members from each group. This decision to avoid detailing the Council's structure was the cause of recurrent controversy as well as political fights to control it. The Court had already vacated (in *Rizzo*) a 2013 law that pushed for the popular election of Council members.[25] In *Colegio*, via a majority vote signed by Justices Rosatti, Maqueda, and Rosenkrantz, the Court struck down the statute on different but related grounds. The legislation had increased the number of politicians on the Council. It now featured, out of its thirteen members, six legislators and one representative of the executive.

The Court considered that equilibrium meant "the outcome of the tension between opposing forces that counteract or annul each other".[26] For the Court, the different sectors within the Council must be in a type of relationship with each other in which one cannot "predominate"; i.e., exercise "hegemonic actions".[27] The Court considered that the political sector could deploy, by itself, such hegemonic actions (including ensuring a quorum and adopting many decisions), and that this was unconstitutional.[28] It did not matter to the Court that the politicians hardly ever coordinate their actions: because the six legislators were distributed between the two chambers of Congress and between majorities and minorities within each, the sector is often and effectively divided and it is judges—and, to a lesser extent, lawyers—the ones whose votes count on politically sensitive decisions. The Court dismissed this *as applied* defense. It considered that the fact that such concerted action is unlikely to happen does not save the law from constitutional scrutiny, which rendered the law unconstitutional *on its face*. It was the "mere possibility" of coordination that mattered.[29] The Court asked Congress to enact a new statute within a "reasonable timeframe." And it said that, until that point, the Council would have the organizational structure set up by the statute that the now invalidated legislation had amended. If the Council was not reorganized 120 days after the decision, its acts would be considered null and void.

In his partial dissent, Justice Lorenzetti disagreed with the Court's chosen remedy. He said that Congress had repealed the previous legislation when it passed the amendment under challenge in the case. He urged Congress to pass a new statute but without reinstating the amended law.

IV. LOOKING AHEAD TO 2022

We started penning these reviews in 2018 and this will be our fifth and last one. These years have been marked by turmoil and change at the Court, which places the period within the normal parameters of its convoluted history. While some decisions have been noteworthy, relevant, and produced solid constitutional law, we cannot summon much enthusiasm or hope in relation to the Court or its case law. The Court's justices are often caught up in personal disputes and calculations, depriving them of the opportunity to develop the kind of institutional legitimacy that is necessary for the body to play a meaningful and transformative role. Of course, this assumes that the justices want it to play that role in the first place, a point which is not straightforward.

In any case, the Court is mostly left in the position of an umpire calling balls and strikes, as in Chief-Justice Robert's unfortunate but famous phrase. This simple image of the Court, that many would deem the right role for judges in a constitutional democracy, is too bland and unambitious to us, and particularly ill-suited to address Argentina's pressing social, economic, and political challenges, which are usually fraught with constitutional connotations. But even under the prism of a simpler view of piecemeal intervention, the Court often performs its role erratically and does not always convey an image of rigor and institutional unity. It remains vague as to the standards it uses and frequently continues to fail to present its decisions in a clear, articulate fashion. While the justices are obviously not expected to reach consensus in every case, they surely are supposed to raise the burdens of argument and judgment, particularly considering that they sit in such a small body, presently featuring only four members. The situation of federal (and local) judiciaries in general is even more serious: key decisions that are seen as politically motivated and more mundane procedures that are arcane, lengthy, and costly. While some of the ailments affecting the service of justice require political action, there is much space for self-improvement and the Court should lead that process. Instead, the silence emerging from the judiciaries is almost deafening. It does nothing to prevent further deterioration of the judiciaries' already poor image and it invites partisan interference. The public deserve better.

V. FURTHER READING

'Los 10 fallos más destacados de la Corte Suprema en el 2021', *Palabras del Derecho* (29 December 2021) <https://palabrasdelderecho.com.ar/articulo/3334/Los-10-fallos-mas-destacados-de-la-Corte-Suprema-en-el-2021>.

Florencia Saulino, 'La Corte reivindicó el federalismo', *La Nación* (6 May 2021) <https://www.lanacion.com.ar/opinion/la-corte-reivindico-el-federalismo-nid06052021/>.

1 Irina Hauser, 'La Corte Suprema Queda Fracturada Después de La Elección de Horacio Rosatti Como Presidente' *Página/12* (Buenos Aires, 24 September 2021) <https://www.pagina12.com.ar/370450-la-corte-suprema-queda-fracturada-despues-de-la-eleccion-de-> accessed 21 February 2022.
2 Ibid.
3 Hernán Capello, 'Tribunales En La Mira: La Mala Imagen Creció En El Último Año y Ocho de Cada Diez Argentinos No Confía En La Justicia' *La Nación* (Buenos Aires, 15 February 2021) <https://www.lanacion.com.ar/politica/ocho-cada-diez-argentinos-no-confia-justicia-nid2603178/> accessed 21 February 2022.
4 *Fayt, Carlos S.* 322 *Fallos* 1609 [1999].
5 *Schiffrin, Leopoldo* 340 *Fallos* 257 [2017]; see our contribution to the 2017 Review.
6 *Gobierno de la Ciudad de Buenos Aires* CSJ567/2021 [2021].
7 *Shi, Jinchui* CSJ 1751/2018/RH1 [2021], par. 10.
8 Ibid, par. 11.
9 Ibid, par. 15.
10 Gustavo Arballo, 'Federalismo potenciado: el caso de Arroyito', *Saber Leyes No Es Saber Derecho* (22 May 2021) <http://www.saberderecho.com/2021/05/federalismo-potenciado-el-caso-de.html> accessed 1 February 2022.
11 Ibid.
12 Ibid, par. 11.
13 Ibid, par. 11-2.
14 *Farmacity SA* CSJ 118/2017/RH1 [2021], par. 14. See also our contribution to the 2021 Review.
15 *Esso Petrolera Argentina SRL* CSJ 1533/2017/RH1 [2021], par. 12.
16 Gisela Hörisch and Harry Schurig, 'Fallo Preocupante. Novedades En Materia de Tasas Municipales' (*Colegio de Abogados de San Isidro*, 6 September 2021) <https://www.casi.com.ar/FALLOCOMENTADO1> accessed 21 February 2022.
17 *Price Brian Alan y otros* CSJ002646/2015/CS1 [2021].
18 Ibid, opinion of Justice Lorenzetti, par. 16.
19 'Aplazo al plazo razonable' (*Diario Judicial*, 18 August 2021) <https://www.diariojudicial.com/nota/89970> accessed 1 February 2022.
20 Gómez Carlos CSJ 2582/2018/RH1 [2021]; Gabriel Morini, 'La Corte Suprema vuelve a advertir sobre "plazos razonables" para juicios penales' (*Ámbito,* 16 August 2021), <https://www.ambito.com/politica/corte-suprema/la-vuelve-advertir-plazos-razonables-juicios-penales-n5252083> accessed 1 February 2022.
21 *Etcheverry Juan Bautista* CAF49220/2015/1/RH1 [2021].
22 *Comunidad Mapuche Catalán* CSJ1490/2011(47-C)/CS1 [2021].
23 Ibid, par. 9.
24 Ibid, par. 14.
25 *Rizzo, Jorge Gabriel* 336 *Fallos* 760 [2013].
26 *Colegio de Abogados de la Ciudad de Buenos Aires* CAF29053/2006/CA1-CS1 [2021], par 7.
27 Ibid, par 25.
28 Ibid, par 11.
29 Ibid, par 15.