PART II

The Mosaic of Constitutional Reasoning in Latin America and the Caribbean

3

The Supreme Court of Argentina

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I. Introduction

This chapter seeks to identify and account for some of the main traits of the constitutional reasoning of the Argentine Supreme Court.[1] Argentina constitutes an interesting case study insofar as it presents a legal system which combines the institutional design heavily influenced by the American Constitution, with strong Continental European influences on its substantive law and doctrine. It is also characterised by a convoluted history of democratisation, military coups, political instability, and gross human rights violations, which have evidently transpired to the Court and its work. Furthermore, the Supreme Court has played a significant role in the political life of the country, insofar as the Court transplanted early on the doctrine of judicial review on the Argentine judiciary.[2] Examining the main features of the style, materials, and strategies of its judicial reasoning will shed light not only on Argentina's legal culture, main political, economic, and social challenges, but also on the behaviour of justices in conditions of instability.

Perhaps most significantly, this chapter explores constitutional reasoning across almost 150 years and under both conditions of stability and prosperity and of severe institutional fragility and deep economic and political crises. We have selected our 40 cases taking into consideration the different Supreme Courts that have operated in Argentina. As it is often stated, Argentina is somewhat an outlier in Latin America. During the late nineteenth century and early twentieth century it was famously among the most prosperous countries in the world, with a higher GNP per capita than Austria, Japan, and even Spain. At the peak of its deep economic and political crisis in 2001, the GNP per capita had reached a level similar to that of other countries in the region, such as Brazil, Colombia and Peru. Between these two periods Argentina suffered five coups, electoral fraud, the proscription of the majoritarian party for 18 years, a period of state

[1] In this chapter we follow as closely as possible the main sections and subsections identified by the editors. However, due to the particularities of the Argentine case, we combined some subsections to present the analysis in a more consistent and cohesive way.

[2] See *Sojo, Eduardo c/Cámara de Diputados de la Nación*, Fallos 32:120 (1867).

terrorism, and cyclical economic crises. The Argentine Supreme Court was immersed in and was a relevant part of this process. This context can provide some insights to better understand different traits in the constitutional reasoning of courts.

The chapter proceeds as follows. Section II(A) presents the context in which the Argentine Supreme Court operates, including its main institutional and legal features. Section II(B), in turn, addresses the institutional instability at the Argentine Supreme Court. Section II(C) presents an overview of the prevailing legal culture in Argentina. Centrally, Section III identifies and critically examines the different type of constitutional arguments employed by the Court. Section IV situates the court in the broader regional context. Section V briefly concludes.

II. Legal, Political, Institutional and Academic Context

A. The Context of Constitutional Reasoning and Constitutional Litigation

In order to understand the particularities of constitutional reasoning in the Argentine Supreme Court we need to briefly consider the political, institutional, and legal context in which the Court operates. This section provides a brief introduction to Argentina's legal system and the institutional role the Supreme Court plays in it. It includes the regulation of access to the Court, its internal organisation, its relationship with other branches of government over the course of Argentina's constitutional history, and the legal culture in which it is immersed. Each of these elements will inform the quantitative analysis which is the substantive contribution of this study.

After a few failed attempts,[3] Argentina became constitutionally organised in 1853–60.[4] The resulting Constitution, which although the object of several reforms has survived with significantly minor changes, provides a bill of negative and positive rights – the latter added through reforms in the twentieth century – and creates a system of checks and balances based on a tripartite national government and a federal structure.[5] The federal model was partly geared – in the origins of the republic – to amalgamate the different provincial centres without concentrating power in an authoritarian figure. As in other parts of the region, the prevailing constitutional arrangement is the result of an alliance between conservative and liberal groups, often at the expense of other more radical sectors.[6] National authorities comprise an executive, a bicameral congress, and

[3] See Dirección Nacional del Sistema Argentino de Información Jurídica (ed), *Constituciones Argentinas. Compilación histórica y análisis doctrinario* (Ministerio de Justicia y Derechos Humanos, 2015) www.saij.gob.ar/docs-f/ediciones/libros/Constituciones_argentinas.pdf. A similar failed attempt also existed in the United States with the Articles of Confederation and Perpetual Union (1778).

[4] See FN Barrancos and Vedia, *La Corte Suprema de Justicia en la Historia Constitucional Argentina* (Academia Nacional de Ciencias Morales y Políticas, 2000) 202.

[5] See MJ Garcia-Mansilla, 'Separation of powers crisis: the case of Argentina' (2004) 32 *Georgia Journal of International and Comparative Law* 307.

[6] See R Gargarella, *La sala de máquinas de la Constitución: dos siglos de constitucionalismo en América Latina (1810–2010)* (Katz, 2015).

the judiciary. The latter is exercised by the Supreme Court -instituted in 1863 – and other inferior tribunals established by Congress.[7]

The Supreme Court's role centrally involves being the final interpreter of the Constitution – rather than making law – and performing judicial review of the legislation and other acts emanated from the legislative and executive branches.[8] Nevertheless the Court has expanded its role often interpreting substantive law and revising decisions of lower courts through a mechanism the same court sanctioned concerning possible 'arbitrary' decisions.[9] Its balancing role has been vividly present since the court's inception, as President Mitre called it – in 1863 – a moderating power, to be especially useful when political passions lead other branches of government to reach beyond the constitutional limit of their powers.[10]

The Court intervenes both through its original jurisdiction (that is, first instance court in very specific matters) and as the appellate court of last resort.[11] Its original jurisdiction is used for cases related to foreign ambassadors, ministers or consuls, or cases between provinces or a province and a foreign state.[12] The appellate jurisdiction,[13] in turn, includes cases decided by courts of federal, national (ie, local courts of the city of Buenos Aires),[14] federal/national (ie, criminal cases from federal or national standing that reach the Federal Criminal Cassation Court), or provincial jurisdiction.

The standard appellate jurisdiction is known as Extraordinary Appeal '*Recurso Extraordinario Federal*' and it has three different sources. First, when a case questions the validity of a treaty, federal law or action undertaken under federal authority and the local court holds against the validity of the treaty, law, or the federal authority. A second alternative arises when the validity of a provincial law, decree or act has been questioned as unconstitutional or contrary to a treaty or federal law, and the provincial court decides in favour of the validity of the provincial measure. Finally, the Supreme Court may intervene when a party invokes a constitutional clause, treaty, law, or grant of federal authority and the provincial court decides against the norm or privilege invoked.[15] Under exceptional circumstances, an appeal may be granted on the grounds that the decision of the lower court was arbitrary '*Recurso Extrarodinario por sentencia arbitraria*' (hereinafter '*Arbitrariedad*').[16]

[7] See Art 91 of the 1853 Argentine Constitution (current Art 108).

[8] See at www.csjn.gov.ar/institucional.

[9] See the seminal G Carrió, *Recurso extraordinario por sentencia arbitraria: en la jurisprudencia de la Corte Suprema* (Abeledo Perrot, 1967).

[10] See President's Mitre circular to the governors sent on 16 January, 1863 and cited by Barrancos and Vedia (n 4) 202.

[11] When the Argentine Parliament established the Supreme Court appellate jurisdiction, it followed closely the US Judiciary Act of 1789.

[12] Art 117, Constitution of Argentina. Art 1, Act 48 (*Organización y Competencia de los Tribunales Nacionales*).

[13] In most of these cases, the Supreme Court possesses appellate jurisdiction, save for those cases concerning foreign ambassadors, ministers and consuls, and in those cases in which a province shall be a party, where the Court has original and exclusive jurisdiction. Art 117, Constitution of Argentina., 2018). See, accordingly, Art 1 of Law No 48.

[14] Art 4, Law No 48.

[15] Art 14, Law No 48. There is a separate kind of mandatory appellate jurisdiction known as ordinary appeals, which are reserved for cases in which the state is a party, and the amount of the claim exceeds a certain figure. This latter form of appellate jurisdiction is subjected to different rules. It is not addressed in this study.

[16] See, eg Supreme Court decisions in *Sanatorio Otamendy Miroli Ltda. c/ Recúpero, Alfredo*, Fallos 302:1191 (1980), and *Menendez, Carlos N. c/ Giovannoni, Nélida Fallos* 300:535 (1978).

The Court has a large and complex professional bureaucracy, which has grown and diversified over the years. At the time of writing, it is composed by seven judicial departments organised around areas of the law,[17] an Office of Original Cases, and one of Environmental cases, each headed by an official with a rank equivalent to a judge in any federal appeals court in the country. Each justice at the Court is assisted by personnel in an office '*Vocalía*' with a significant number of legal clerks of different internal ranks and levels of seniority. The Court also has a large bureaucracy that covers both administrative, technical and legal matters, including a Direction in charge of communications and protocol, an economic analysis of law unit, a Direction of Case-Law, and other Units including Institutional Development, Administration, and an Office for Women, an Office of information concerning minors, and an office in support of domestic violence cases.[18] Until the creation of the Council of the Magistracy '*Consejo de la Magistratura*' through the 1994 Constitutional Reform, the Court was also the administrative head of the federal judiciary.

When an appeal reaches the Supreme Court, it is distributed to the Judicial Department specialised in the specific area of the appeal.[19] The relevant Judicial Department conducts a preliminary assessment and may keep the file for internal drafting before circulating it among the justices. In other cases, it distributes it across the justices, often starting with one with particular specialisation in an area (before going to the others).[20] In addition, files will typically be sent to the office of the Attorney General '*Procurador General de la Nación*' for a non-binding opinion.[21]

When cases are distributed to the Justices '*vocalías*', an initial majority draft is written in the office of the first Justice in the circulation. If a Justice down the line proposes a different solution, that second opinion is added to the circulating file. Eventually, the latter opinion may become the majority opinion. Each Justice will usually make a decision on the petition after reviewing the appeal file by issuing (or joining in) a reasoned or boilerplate opinion, or by reference to a previous case decision or the non-binding opinion of the Attorney General.[22] Referencing in this context means that a decision or vote will merely invoke a previous decision or opinion as the grounds for the present ruling, without explaining how or why it applies to the particular circumstances. Justices' opinions may come in the form of a majority vote, a separate concurring vote (classified by the Supreme Court as '*por su voto*'), a dissenting vote (partial or total) (classified by Supreme Court as either '*en disidencia*' or '*en disidencia parcial*') or even a no vote.[23] Formally, the decisions are taken on Tuesdays when Justices officially get

[17] See S Muro et al, 'Testing Representational Advantage in the Argentine Supreme Court' (2018) 6 *Journal of Law and Courts* 1–23.

[18] See at www.csjn.gov.ar/institucional/organigrama.

[19] A description of the thematic area of specialisation of each Judicial Department is provided in ibid.

[20] Tax law appeals are always analysed by the relevant Judicial Department (Secretaría Judicial N° 7). Interview A-3.

[21] The *Procurador General* is often equated to the figure of the Attorney General in the US. It formally sits outside the structure of the executive and judicial power and is charged with the protection of the general interests of society and the defence of the constitution (see Art 120, Constitution of Argentina). The *Procurador General* is nominated by the president and is confirmed by two thirds of the members of the Senate.

[22] It should be noted that there is no rule mandating a minimal amount for circulation of each file or that each Justice should receive the file through the circulation process.

[23] Not voting on a case is a fairly widespread practice in Argentine collegial courts, commonly attributed to the large docket sizes those courts handle.

together to sign the opinions they have made on the different cases. Such meetings may also serve to discuss other cases in the pipeline.[24] Formal hearings are extremely rare.[25]

The fact that the Supreme Court has jurisdiction over a case does not guarantee that the Court will arrive at a decision on the merits. In effect, the Court has had to adopt different strategies to deal with the ever-growing number of appeals it receives each year. For instance, the Court sometimes rejects appeals on the grounds that they were insufficiently grounded '*rechazo por falta de fundamentación autónoma*', because there is no proper constitutional issue '*sin cuestión federal*', or because the constitutional issue was raised extemporaneously. In 1990, Congress reformed the Code of Civil and Commercial Procedure, giving the Supreme Court discretion to dispose of appeals based on a lack of substantive importance.[26] This type of decision is referred to as Article 280, which provides the legal basis for these types of dismissals. Since then, the Supreme Court has routinely made use of the discretionary power to reject appeals on the grounds that the matters raised by the appellant are either insignificant or inconsequential. In 2007 the Court introduced substantial formal requirements to all appeals and routinely rejects appeals for failing to comply with them.[27]

Nevertheless, in order for the Supreme Court to reject an appeal it must deliver a decision,[28] typically of the boilerplate type (a short, formulaic decision that is repeated with almost no variations). Rulings on an appeal's admissibility and, eventually, on the substance of the case are included in the same decision. As a result, some admitted appeals carry Article 280 dissents and some rejected appeals have dissents admitting the appeal and analysing the merits. Decisions are reached through a simple majority. Yet, the Argentine legal system does not have an explicit rule mandating Justices to vote in a particular case. Given the history of institutional instability it is not surprising that at some point during the second part of the twentieth century, CSJN justices started considering it acceptable and, in fact, unproblematic to simply abstain from voting. Abstentions are currently common not only on decisions to dismiss appeals but also on appeals decided on the merits.[29]

B. Judges and Institutional Instability in the Supreme Court

The Argentine Constitution does not establish the number of Justices that integrate the Court but, as in the US System, this is decided by Congress. Supreme Court Justices (locally known as '*Ministros*') are appointed by the president with the confirmation of a two-thirds majority of the Senate (before 1994, this required a simple majority). The original text of the National Constitution of 1853 (Article 19) established a fixed

[24] When discussing cases, Justices may question officers leading the relevant specialised Judicial Departments on the details of the case. Informal meetings where Justices (or their clerks) discuss cases are somewhat frequent.

[25] On this, see MA Benedetti and MJ Sáenz, *Las audiencias públicas de la Corte Suprema. Apertura y límites de la participación ciudadana en la justicia* (Siglo XXI Editorial, 2016).

[26] Arts 280 and 285, *Código de Procedimiento Civil y Comercial de la Nación, Ley 23.774*.

[27] On the appeal document's formal requirement, see Muro et al (n 17).

[28] Notably, this type of decision has the same majority requirements as a decision on the merits.

[29] Muro et al (n 17). It is also noteworthy that lower courts justices do not have this prerogative under Argentine federal law.

number of nine sitting Justices for the Supreme Court, but the reform of 1860 eliminated that Article and since then there has been no specific regulation. Therefore, it is up to Congress to decide the actual number of sitting Justices in the Court. Even though the Court had been traditionally composed by five Justices, there were some periods in time in which that number fluctuated.[30] During Frondizi's government (1960) the Congress issued a bill to increase the number of Justices to seven[31] and six years later the de facto Onganía regime took them back to five.[32] During the first Menem presidency (1990), the court was packed by increasing its number from five to nine Justices. This led to the creation of the so-called 'automatic majority' – a reference to the commonality of decisions in favour of Menem's government by a group of Justices.[33] In 2006, and after a political crisis in the Court that created many vacancies, a bill was passed to reduce to five the number of Justices in the court.[34] Until 1990 the Attorney General was considered to be 'part' of the Court, at least for purposes of protocol and image.

One striking historical fact about the Supreme Court is that, despite Justices being appointed for life, since 1947 presidents have had a significant power to manipulate the composition of the high court.[35] Before 1947 Justices remained in office for 10.6 years on average, while afterwards the average tenure was reduced to 5.7 years; many scholars consider that year as a critical juncture in executive-court relations. The accession of Perón to the presidency in 1946 and the ensuing purges of the court by military and civilian administrations reinforced the pattern of the instability of Justices in office associated with an unstable political context. This pattern of judicial instability associated with the political context of the country exceeds the Argentine case since it is also present in other Latin American countries.[36] Moreover, if one concentrates only on the last democratic period (1983–2009), the average tenure for a Justice has been 6.5 years, not that different from the average for the entire period 1947–2009 which is 5.7 years. This high rate of instability of Justices, even after the return of democracy, indicates that both civilian and military executives have manipulated the Court.[37]

Preliminary descriptive analysis of judicial turnover in the country reveals that on several occasions more than half of the sitting Justices have simultaneously departed from the bench in a given year, mainly as a result of changes in the type of regime (from democracy to military and vice versa). The Court has been abruptly reshuffled[38] on seven different occasions, starting in 1947 with Perón and ending in 1983 with the return of democracy. Three of those reshuffles happened as the result of a military

[30] Art 6, Act 27.

[31] Art 21, Act 15.271.

[32] Art 1, Act 16.985.

[33] G Helmke, *Courts under Constraints. Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2005).

[34] Art 32, Act 26.183.

[35] A Castagnola, *Manipulating courts in new democracies. Forcing judges off the bench in Argentina* (Routledge, 2018).

[36] A Pérez Liñán and A Castagnola, 'Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America' (2016) 46(2) *British Journal of Political Science* 395.

[37] A similar pattern of political manipulation of the courts takes place in the provincial Supreme Courts, since the alternations between military and democratic regimes have also affected the composition of the local courts, producing reshuffles in most provinces, see A Castagnola, '*I Want It All, and I Want It Now*: The Political Manipulation of Argentina's Provincial High Courts' (2012) 4(2) *Journal of Politics in Latin America* 39–62.

[38] This happens when more than half of the sitting justices depart from the bench in a given year.

coup (1955, 1966, and 1976), while the other four occurred as the result of the return of democracy to the country (1947 and 1973 under the Perón administration, 1958 under Frondizi, and 1983 under Alfonsín). Evidently, the ultimate goal of these abrupt reshuffles has likely been to remove unfriendly justices from the bench. From the total 86 Justices that served the Court between 1900 and 2014, 37 per cent of them departed due to natural causes and 63 per cent due to political causes. Departures in the Argentine Supreme Court are not a rare event as happens in established democracies but rather the consequences of changes in the political realignment of the forces in government. The manipulation of high courts in the country has ended up producing a self-reinforcing process that still takes place, in other words it ended up producing a long-lasting political manipulation of the judiciary.

C. Legal Culture and Constitutional Reasoning in Argentina

In order to conduct our study concerning the dominant forms of reasoning in the Court, we must say a few words on the prevailing legal culture in the country. Admittedly, legal systems are seldom if ever reducible to a single source of inspiration.[39] Argentina is not the exception. In its case, natural law theories[40] and legal positivism[41] together with the Madisonian influence have contributed to create the singular texture of the legal system. The codification movement started after the enactment of the constitution – borrowing specially from the French legal tradition – and highlights the eclectic foundations of Argentine Law where the political organisation followed Anglo-Saxon models and the civil laws were anchored in continental Europe's traditions.[42] The impact of the latter and of legal positivism on the legal system were especially felt. They led to a strong practical inclination towards abstraction, whereby Argentine lawyers and judges are often skilful in handling statutes and deducing solutions from general propositions.[43] The same inclination towards abstraction has led to a somewhat loose sourcing of judicial precedents, often insufficiently grounded in legal propositions.[44] This general attitude of receiving foreign legal institutions has also influenced the great importance often attributed to foreign scholarly work.

The many sources that have inspired the development of the Argentine legal system have also influenced the theories of interpretation used by tribunals.[45] In the case of

[39] For instance, Madison wasn't merely influenced by Scottish thinkers, but also by the French enlightenment. See CA Sheehan, 'Madison and the French Enlightenment: The Authority of Public Opinion' (2002) 59 *The William and Mary Quarterly* 925.

[40] See V Tau Anzoátegui, *Las ideas jurídicas en la Argentina (siglos XIX – XX)* (Editorial Perrot, 1977).

[41] See NG Wenzel, 'Matching Constitutional Culture and Parchment: Post-Colonial Constitutional Adoption in Mexico and Argentina' (2010) *Historia Constitucional* 11.

[42] See Tau Anzoátegui (n 40) 83; J Reinaldo Vanossi, 'Breves Reflexiones Sobre Forma y Estilo en la Interpretación Judicial de la Constitución Histórica' (Comunicación en sesión privada de la Academia Nacional de Ciencias Morales y Políticas, 2003) at www.ancmyp.org.ar/user/FILES/Forma_y_estilo-Vanossi-2003.pdf.

[43] See H Spector, 'Constitutional Transplants and the Mutation Effect' (2008) 83 *Chicago-Kent Law Review* 129. cf GR Carrió, *Recurso de Amparo y Técnica Judicial* (Abeledo-Perrot, 1987) 174.

[44] ibid.

[45] Interpretation is a complex issue that has been studied extensively in Argentina. See eg CS Nino, *Fundamentos de derecho constitucional. Análisis filosófico, jurídico y politológico de la práctica constitucional* (Astrea, 1992).

the Supreme Court, it has employed many different interpretative criteria throughout its history to provide meaning to the legal texts under review.[46] These criteria include identifying the literal, popular, specialised, realist, systematic, dynamic, teleological, external, constructive or intentional meaning of the text to be interpreted. In addition, other Supreme Court decisions have sought to use the legislator's will, fairness or what an ideal legislator would have had in mind to arrive at a solution.[47] The variety of interpreting methods has led to a degree of unpredictability, with some authors highlighting the lack of a concerted effort to find a solution to this problem.[48] It has been further reinforced by a strong adherence to the principle of *iura novit curia* (the justices know the law) throughout the legal system. It is also accompanied by a very weak understanding of the doctrine of precedent, even in the Argentine Supreme Court.

The seeming multitude of judicial answers which may arise from different interpretation methods increases concerns related to the constitutional limits of judicial decision-making.[49] Indeed, the plurality of potential legal answers to a given question brings about an element of judicial discretion.[50] And it is this discretion that gives rise to the criticism of judicial activism, that is 'judges inject[ing] their substantive preferences and decid[ing] questions that ought to be left to political determination.'[51] There have been many decisions by the Supreme Court that could be labelled as instances of activism[52] – eg the judicial recognition of the '*acción de amparo*', creating new constitutionally recognised rights or incorporating the per saltum appeal,[53] nevertheless many authors consider that restraint – in the form of judicial acquiescence to the executive – has been the court's norm.[54] This view has received some empirical support as Helmke and Sanders find that most Argentine judges are motivated by

[46] N Sagüés, *Interpretación constitucional y alquimia interpretativa. (El arsenal argumentativo de los tribunales supremos)* (Lexis Nexis, 2004).

[47] ibid.

[48] See R Gargarella, 'De la alquimia interpretativa al maltrato constitucional. La interpretación del derecho en manos de la Corte Suprema Argentina' in R Gargarella (coord), *Teoría y Crítica del Derecho Constitucional* (Abeledo Perrot, 2008).

[49] See F Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism' (2000) 73 *University of Colorado Law Review* 1401; FM Racimo, 'El Activismo Judicial. Sus Orígenes y su Recepción en la Doctrina Nacional' (2015) 2 *Revista Jurídica de la Universidad de San Andres* 89.

[50] See Gargarella (n 48).

[51] See JS Schacter, 'Putting the Politics of "Judicial Activism" in Historical Perspective' (2017) *The Supreme Court Review* 209.

[52] The definition of judicial activism is subject to some debate. See C Rayburn Yung, 'Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts' (2011) 105 *Northwestern University Law Review* 1. ('From those perspectives and definitions, the following elements emerge as signs of judicial activism: overruling actions by other federal branches or state governments, failing to follow textual meaning, departing from history or tradition, issuing maximalist and not minimalist holdings, using broad remedial powers, basing decisions upon partisan preferences, failing to follow an originalist view of the Constitution, issuing an opinion inconsistent with prior precedent, exercising power beyond a court's jurisdiction, creating new rights or theories, altering prior doctrines or interpretations, establishing substantive policy, and failing to use an accepted interpretative methodology.').

[53] See Racimo (n 49); PA Maraniello, 'El Activismo Judicial, una Herramienta de Protección Constitucional' (2012) 5(32) *Tla-Melaua. Revista de Ciencias Sociales* 46.

[54] See AB Bianchi, 'Una meditación acerca de la función institucional de la Corte Suprema' (1994) 1997-B *La Ley* 994; Barrancos and Vedia (n 4). An early example of the restraint shown by the court can be seen in the decision in the case *Cullen v Llerena*, Fallos 53:420 (1893) where the Supreme Court accepted the notion of non-justiciability of political matters.

career survival[55] – something which, as previously discussed, may be traced to the history of judges' removal.

III. Arguments in Constitutional Reasoning – Descriptive Statistics

This section presents the descriptive statistics on constitutional reasoning at the Argentine Supreme Court. Our dataset contains a total of 40 Supreme Court cases, the first one decided in 1879 and the last one in 2017.[56] We aim to capture the fundamental traits, as well as the variances of judicial reasoning at the Argentine Supreme Court. Due to this long period of time and the significant changes in the political stability of the country and its effects on the judiciary, we shall divide the analysis into three periods.

A. Main Features: Structure, Framing, Type of Argument, and Length

The first period encompasses the first decades of the Supreme Court until 1929, the year before the first military coup took place in the country. This period can be conceived as the foundational years of the court, basically a court free from political manipulation. The second period encompasses all the oscillations between military and democratic regimes that the country experienced between 1930 to 1983. Within this timeframe there were six military coups (1930, 1943, 1955, 1962, 1966 and 1976) and the Supreme Court was constantly purged after every regime change. Even though this second period can become an interlude within the historical analysis of the Supreme Court rulings, it also sheds light on how the justices were able (or not) to guarantee the rule of law and the respect for individual rights. Finally, the third period runs from 1984 until present day and it represents the return of democracy in the country. Based on this periodisation 20 per cent of the cases fall within the foundational years, 32 per cent within the years of political instability, and 48 per cent after the return of democracy. Throughout this whole period of time there was substantial agreement within the Court (on average 78 per cent of the decisions were unanimous). This is hardly surprising given the pervasive instability in the Court and the recurrent purges it suffered. The average length of the judgment of 41 pages, ranging from 2 to 259 pages, indicates a Court prone to extensive treatment of the legal issues, but also relying on an extensive and very sophisticated judicial bureaucracy. In half of the docket of cases analysed the court made a ruling considering a particular legal provision to be unconstitutional. 88 per cent of the cases were bottom up initiated.[57]

[55] See G Helmke and MS Sanders, 'Modelling Motivations: A Method for Inferring Judicial Goals from Behavior' (2006) 68(4) *The Journal of Politics* 867.

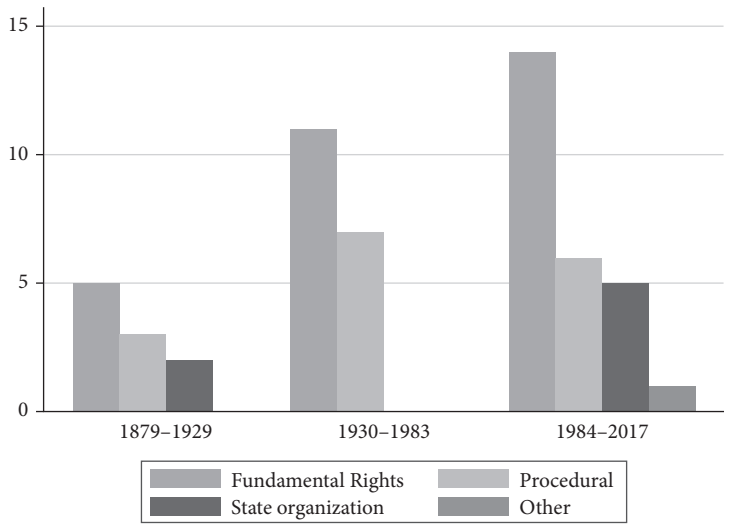
[56] See Fröhlich, Umpierrez De Reguero and Meléndez (ch 1).

[57] The Argentine legal system, as most civil law countries, is deeply influenced by the principle of *jura novit curia*. Nevertheless, given that the Argentine Supreme Court does not provide access to the appeals, it is not possible to determine the extent to which it relies upon, or takes into consideration, the arguments expounded by the parties in a case, or by other legal materials such as *amici curiae*. The empirical research on public

The appeals reaching the Argentine Supreme Court are based on cases based on a myriad of substantive legal topics. Graph 1 below shows the incidence of different types of constitutional cases in our sample, divided into fundamental rights, state organisation, or procedural cases (in addition to a catch all category of 'other'). Throughout the years, the cases in our sample referred to fundamental rights issues in at least 50 per cent of the events in each of the studied periods of time. The peak incidence of fundamental rights cases arises unsurprisingly during the 1930–1983 period – perhaps the darkest of the Argentine Republic – where violations of basic human rights became unfortunately common. In this period, fundamental rights cases included milestone judicial decisions recognising a constitutional writ going beyond the *habeas corpus* protection against illegal detentions.[58] In Siri, for instance, the Court used *habeas corpus* to protect the right to freedom of expression when facing the administrative closure of a local newspaper. It explicitly stated that Constitutional rights 'exist and protect individuals by their sole inclusion in the Constitution' and that 'judges must apply them in their full scope, without altering or debilitating them with vague interpretations or ambiguities concerning the express meaning of their text.'[59]

State organisation cases, by contrast, were less frequent occurrences – that is, if we were to omit the single occurrence of the 'other' category.[60] The incidence of the State Organisation category was 0 per cent among the landmark cases in our sample during the 1930–1983 period. This is perhaps unsurprising given the dictatorial nature of several of the regimes in power during this period and the fact that each new government basically appointed most of the members of the Court.

Graph 1 Common topics among the selected rulings (Q5)



hearings, however, suggests that the Court has been quite reluctant to rely on arguments made by the parties in them. See Benedetti and Sáenz (n 25).

[58] Decisions of the Supreme Court: in *Siri, Angel S. s/ acción de amparo*, Fallos 239:459 (1957); *KOT, Samuel S.R.L. s/ Acción de amparo. Acto de particulares* (5-958), Fallos 241:291 (1958).

[59] Siri, ibid 463.

[60] Others refer in some cases to emergency powers (*Peralta, Luis Arcenio y otro c/ Estado Nacional (Mrio. de Economía – BCRA.) s/ amparo*, Fallos 313:1513 (1990)).

A key element of this study is to help identify the types of arguments frequently used by the Argentine Supreme Court while deciding landmark cases. At a formal level, legal arguments are constructed following a logical form. This part uses the categories developed in Jakab to determine the different logical form a legal argument can adopt.[61] Under this analysis there are three prototypical structures of legal arguments: (i) conclusive arguments, inclusive of a chain of arguments in a linear sequence; (ii) parallel arguments, each independently supporting the same conclusion; and (iii) cumulative arguments, where each individual argument is inconclusive but all of them together become conclusive.

Different argument structures have been prominent in landmark cases throughout the Argentine Supreme Court's history, as it is shown in Graph 2 below. While during the initial period all the studied structures were utilised with similar prominence, during the 1930–1983 period one-line conclusive arguments seem to have reigned supreme, as they appear in over 60 per cent of the cases in our sample. Later, parallel arguments clearly overtook the other remaining categories which jointly represent less than 40 per cent of the cases in our sample. While our data is insufficient to identify the reasons behind this change, it is possible to ponder whether the different institutional setting played a role in it. Specifically, during the latter period, the court was not serving merely at the whim of the new political or military leader in power (as was the case during the 1930–1983 period), at least not for the longest part of the period.[62] By contrast, it was largely a period in which judges from very different political parties coincided in the Court and, most importantly, a period of regained republican normalcy. As such, it could be speculated that the court placed additional value in making sure that the decisions made were robust in the eyes of not only different political actors but also the civil society (and the legal community) at large, particularly after the steep legitimacy crisis of the Court in 2001. A preference for this technical approach may have been used as a way of increasing the court's own reputation and social capital. In other words, if a decision made by the court could be supported by several different independent, yet individually conclusive arguments, the chances of a broader agreement with the achieved outcome tends to increase.

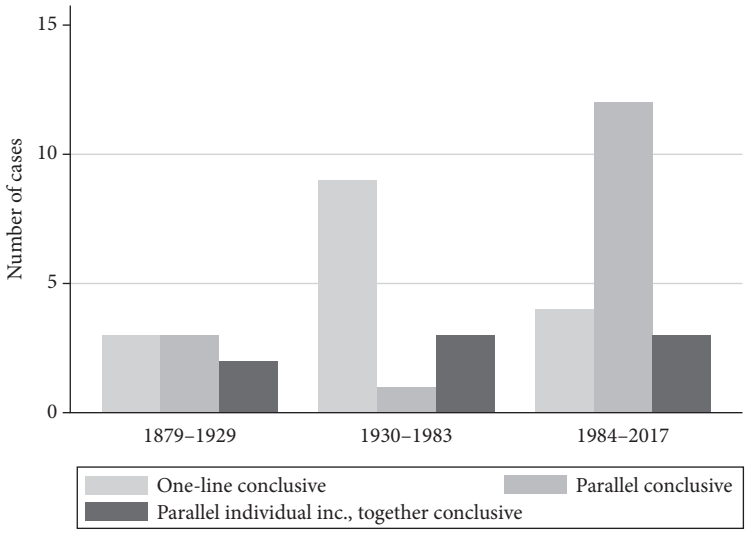
Other factors could have also played a role in explaining this shift towards favouring parallel conclusive arguments. For instance, the higher incidence of dissents in landmark decisions during this period (95 per cent during the 1983–2017 period, relative to 69 per cent during the 1930 to 1982 period) may have influenced the design of majority opinions. Dissents, especially reasoned ones, are known to alter the behaviour of the majority leading it to create longer opinions where a dissent is present.[63] Parallel conclusive arguments can be a way to make a majority opinion more robust in the face of a dissenting minority. Yet other factors, such as the development of technology – facilitating the identification of sources and arguments and

[61] See A Jakab, 'Judicial Reasoning in Constitutional Courts: A European Perspective' (2018) 14(8) *German Law Journal* 1215.

[62] A problematic period here was Menem's automatic majority. See Section II(B) above.

[63] See L Epstein et al, 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis' (2011) 3 *Journal of Legal Analysis* 101–37; S Muro et al 'Exploring Dissent in the Supreme Court of Argentina' (2020) 63 *International Review of Law and Economics* 105909.

Graph 2 The structure of the arguments among the selected rulings (Q9)



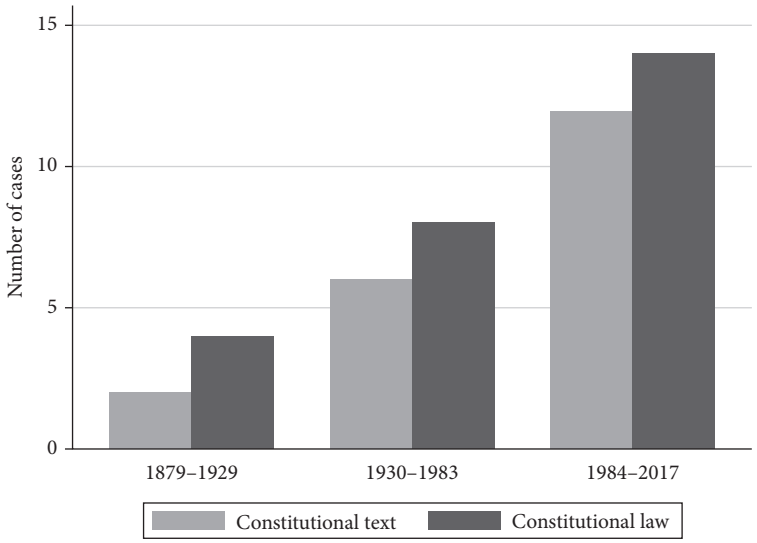
their restatement – may have also played a role in fostering a preference for parallel arguments. Ultimately, this is a positive aspect to highlight since parallel arguments reinforce the main features of democratic governments and deliberative aspects of the court.

Graph 3 shows that the Argentine Supreme Court is essentially a formalist court, significantly attached to the text of the Constitution. Indeed, the Court has significantly maintained a textual approach, which has even intensified in more recent times (see also Section III on the frequency with which the Court refers to the ordinary meaning of words). To illustrate, the Court in Sojo (1887) famously adopted the doctrine of constitutional review from the US Court without citing any provision of the Argentine constitutional text (only broad references of the similarities with the US Constitution and specific legal opinions of the US Supreme Court). In the Leandro N Alem case (1924), in turn, the Court considered it appropriate to 'logically deduce from this constitutional text that the central objective of the state of emergency "*estado de sitio*" was the defence of the Constitution and the national authorities that it creates'.[64] More recently, in Verbitsky (2005), the Court examined the situation in the prisons of the Province of Buenos Aires by centrally referring to the explicit terms of Article 18 of the Constitution, and its reference to prisons being 'healthy and clean, for the security and not for the punishment of the prisoners confined therein'.[65]

[64] See *Alem, Leandro N. y Candioti, Mariano N. (causa CCCLIII)*, Fallos 54:432 (1893) 455.

[65] See *Recurso de hecho deducido por el centro de Estudios Legales y Sociales en la causa Verbitsky, Horacio s/ habeas corpus*, Fallos 328:1102 (2005).

Graph 3 Constitutional discussions within the selected judgments (Q10 & Q11)

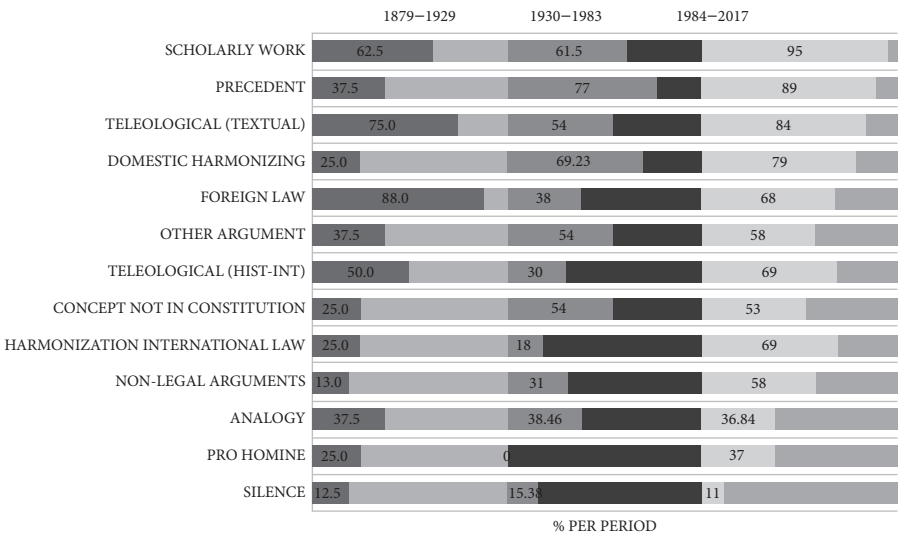


B. Argumentative Style and Key Concepts

There are two ways in which the argumentative style can be assessed, both of which are captured in Graph 4. The first one is absolute, as a feature of the relative weight of different materials at the basis of the Supreme Court's reasoning. During the first period examined, the Argentine Supreme Court had a marked preference for arguments based on foreign law (88 per cent), as well as on the purpose or aim of the provision in question (teleological textual, 75 per cent), and on scholarly work (62.5 per cent). This is probably unsurprising in a new Court trying to find its voice and authority within a new legal system. It is also compatible with the Creole elite in Argentina and Latin America looking to Europe and the US as sources of 'civilisation'. In the mid-period, characterised by institutional and political instability inside and outside the Court, the preferred argumentative strategy of the Court was relying on precedent (77 per cent), followed by an attempt to harmonise different Articles or provisions in the Argentine Constitution (domestic harmonising, 69.23 per cent), and scholarly work (61.5 per cent). The third period involved the return and consolidation of democracy, a greater sophistication of the legal profession and the expansion of the Court's areas of interest through the doctrine of '*arbitrariedad*'. This period, in turn, is perhaps most clearly characterised by the far larger array of relevant materials the Court utilised to ground its decisions, including scholarly work (95 per cent) and precedent (89 per cent), but also teleological textual arguments (84 per cent), harmonisation within the Argentine Constitution (79 per cent), and harmonisation with international legal instruments (69 per cent). The Court also used arguments considering the drafter's purpose or intention (teleological historical arguments, 69 per cent), foreign law (68 per cent), and even extensive use of non-legal (ie, explicitly moral, religious, economic, scientific, or sociological) and other arguments (58 per cent, respectively).

The second relevant analysis concerns the variances within each of the categories along with the history of the Court. Some changes are to be expected. Precedent evidently played a much smaller role during the first period of the operation of the Court than during the other two (37.5 per cent against 77 and 89 per cent, respectively). Scholarly work has always been influential although it has become the prevailing source of argumentation in line with changes in legal training that operated at a global level (going from 62.5 per cent up to 95 per cent in the third period). The influence of international law, by contrast, has grown significantly during the third period after slightly decreasing in the second one (25 per cent, 18 per cent and 69 per cent, respectively). This is most likely the result of the growing importance of international legal rules in domestic spheres, which in the case of Argentina even ended in a Constitutional reform incorporating human rights treaties within the Constitution.[66] Perhaps the most eloquent variation in the data is the evolution of pro persona arguments, which went from 25 per cent during the first period to 0 during the period of military coups and institutional instability, to 37 per cent since the return of democracy. Professionalisation of the legal profession may also explain the general increase and diversity of argumentative style in judgments, leading to a more sophisticated and rich legal practice.

Graph 4 Interpretive methods among the selected judgments



Graph 5, in turn, shows some of the key concepts used by the Court in its rulings. Again, we may consider the presence of these central concepts both in terms of their relative appearance in the overall case-law of the Court, as well as in terms of its variance across our three relevant periods. From the first perspective, the Court has referred most

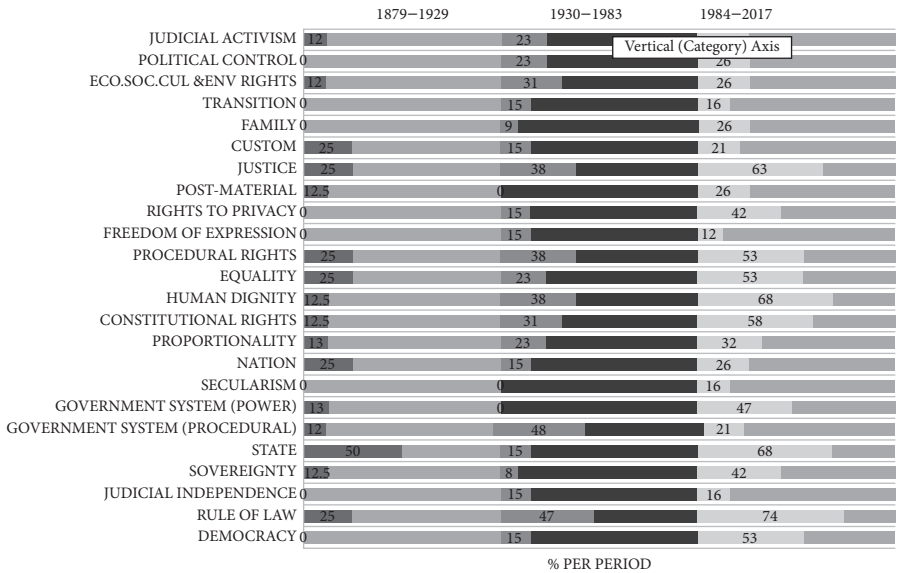
[66] See respectively, PH Verdier and M Versteeg, 'International Law in National Legal Systems: an Empirical Investigation' (2015) 109 *American Journal of International Law* 516; A Chehtman, 'Constitutions and International Law' in C Hubner Mendes et al (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press, 2022), for information on Argentina and Latin America more broadly.

often to the 'rule of law', 'justice', 'state', and 'human dignity'. This seems paradoxical in a country which has suffered political violence, reiterated Coups d'État, and ultimately the perpetration of heinous human rights violations against part of its population. By contrast, the least mentioned concepts are 'secularism', 'judicial independence', 'transition', 'family' and, perhaps most notably, 'freedom of expression'.

The variance in the references to each of these terms is of particular interest. For instance, 'democracy' was not mentioned during the founding period, it appeared in 15 per cent of the decisions during the turbulent years which included fraud, political violence, Coups, and the proscription of one of the majoritarian parties and went up to 53 per cent since the return of democratic rule in 1983. The 'right to privacy' had a similar evolution from 0 per cent mentions in the first period, to 15 per cent in the second, and finally to 42 per cent. 'Secularism', although not very popular overall, became a more significant constitutional issue after 1983 (going from zero mentions in the first two periods to 16 per cent in the third). We also note a steady growth in the use of concepts such as 'human dignity', 'constitutional rights', but also a greater overall reference to these concepts.

The concept of 'state' played an important role during the founding period (referenced twice as much as the second most cited concept), significantly decreasing its importance both vis-à-vis the previous period and vis-à-vis the other concepts. It became largely relevant again in the third period. By contrast, the concept of 'nation' has maintained a consistently low presence overall. Curiously, we see more references to 'economic, social, cultural, and environmental rights' during the period of authoritarian and/or turbulent rules than even after the return of democracy and the constitutionalisation of human rights instruments in 1994. Similarly, 'rule of law' was mentioned in almost half of the cases in the middle period even though the period was inaugurated by a coup, and suffered continuous breaks to the constitutional order, and many affronts to democratic rule.

Graph 5 Key concepts among the selected judgments



IV. Comparative Perspective

Common trends can be observed when analysing the way in which the Argentine Supreme Court and its peer institutions in the region apply their reasoning. At its core, the cases analysed in this chapter focus mostly on fundamental rights (75 per cent), a figure that is similar to that of the cases analysed for peer countries (Brazil, Colombia, Mexico) and slightly higher to that of the regional average (68.5 per cent). Moreover, the structure of the arguments made by the Argentine Supreme Court are at par with those of other High Courts. Specifically, four-fifths of all arguments delivered by the Argentine Supreme Court were either one-line or parallel conclusive arguments, similar to the regional average (79 per cent). Nevertheless, it is unclear whether other courts in the region have also started to more frequently opt for parallel conclusive arguments.

When it comes to the types of arguments favoured by the Argentine Supreme Court and the concepts it tends to root those arguments in, several peculiarities make the court stand out. *Ordinary meaning of words* (ie grammatical-literal interpretation of the provisions of the constitution) and *textual teleological* (ie the purpose or aim of a provision based on the text) arguments are used at a much higher rate than the regional average (in each case the usage is almost one standard deviation higher than the regional mean). A similar pattern can be observed by the high rate of reference to scholarly work. The results are typically sophisticated legal opinions, that are nonetheless tightly anchored to the legal text. That is not to say that the High Court is starkly different in the types of arguments it uses to those of its peers. In fact, for both the Argentine Supreme Court and the regional average, precedent-based arguments sit among the top types of arguments used (75 per cent and 80 per cent, respectively).

As per the concepts the Argentine Supreme Court tends to root its arguments in, two distinctive characteristics appear to emerge. On the one hand, the court uses the concepts of sovereignty (ie state authority), state form (ie republic) and procedural structure (ie presidential system) much more frequently than its peers, on average.[67] In a way, the Argentine Supreme Court seems to frequently find a way to connect to the organisation of the state as a means to reach its conclusions. On the other hand, closely connected concepts such as human dignity, justice, basic procedural rights and core constitutional rights are cited much more frequently by the court than they are by its regional peers, on average. As with the case of state organisation, concepts that describe an individual's worth to themselves and in relation to others are used at least one standard deviation more than the regional average. The high prevalence of the two types of concepts described before (ie state organisation and an individual's worth) is consistent with an often textualist interpretation of the constitution, as they mirror its two structural elements.[68]

[67] In the case of state form, it is the court that makes the most use of this concept (applied in 47% of cases).

[68] The Argentine constitution is organised in two parts: a bill of rights section, and an authorities of the nation section.

V. Conclusion – Evaluation, Pathology and Criticism

This chapter seeks to capture the main traits of the legal reasoning at the Argentine Supreme Court. We decided to examine this both in absolute terms, as well as historically, following a standard periodisation of Argentina's constitutional history. A number of important findings may be highlighted. On the one hand, some of the variations can be attributed to global trends, such as the professionalisation of the legal profession (as captured by an increased recourse to doctrine and more sophisticated argumentative styles) and the growing salience of international law in domestic settings. On the other hand, several variations can be traced to Argentina's main political history. For instance, cases dealing with the organisation of the State were more frequent during the democratic years than during the most turbulent years of the country. During periods with military governments the key issues became procedural and concerning rights rather than regarding the organisation of the state. By contrast, the structure of judicial reasoning became more inclusive and complex during democratic periods vis-à-vis the years of military governments in which one-line conclusive arguments reigned. Finally, there are traits that arguably characterise the Argentine Supreme Court across time. For instance, the prevalence of unanimous decisions (particularly during turbulent times) eloquently shows a reaction of judges against instability and external threats. Similarly, the use of multiple argumentative styles and tools for reasoning reveals a collective effort of the justices in promoting more cohesive and legitimate decisions. Finally, the Court has largely focused on decisions on fundamental rights over other issues, most notably political organisation.