

Argentina: Rights Missing From the Courts

I. IN SHORT . . . WHAT WE FOUND

A. Opportunities

1. PETITION FOR *AMPARO* AS A STRATEGIC TOOL

The federal constitution as well as the civil and commercial procedural codes establish the petition for *amparo* (*see infra* human rights instruments) in such a manner that it represents a **useful tool** for the **protection of human rights**. The only institutional restriction is the requirement that it be brought before a **judge** who **regularly hears petitions on the same subject**.

2. DIRECT INCORPORATION OF INTERNATIONAL TREATIES

Despite the fact that the federal constitution is lacking explicit protection of rights, the **direct incorporation into the constitution** of the most important human rights treaties guarantees at least minimum protection of internationally recognized rights by Argentine courts.

3. PROVINCIAL CONSTITUTIONS AND LEGISLATION

Provincial legal instruments, including constitutions, can be used as a tool to fill the vacuum in the Argentine legal system due to the lack of a federal bill of rights. The leadership exerted by the Autonomous City of Buenos Aires on the other provinces, and even the federal government, has been decisive in the recognition of fundamental rights and their legislative development. This is evident in the constitutional establishment and legislative development in Buenos Aires of a specific list of rights that are similar to the most progressive interpretations of international treaties and conventions. One example is the Reproductive Health and Responsible Procreation Law.⁶

4. SOURCES OF INTERNATIONAL LAW

The use of sources of international law should be exploited by activists and promoted by academics. In accordance with the jurisprudence of the Argentine Supreme Court, principles of international human rights law and decisions of international bodies are a foundation for interpretation of national laws.⁷ The court has even affirmed that the jurisprudence interpreting the Interamerican Commission for Human Rights is obligatory for Argentine courts.⁸

5. VICTORIES

The jurisprudence of the Argentine Supreme Court of Justice has protected the correct application of the law that **guarantees women the right to run as candidates** for congress, as well as the **right of women to enroll in the professional association of their choice**, and the **right of permanent domestic partners** to be treated equally by the social security system and other special systems. It has been equally important in the recognition of the **separation of church and state** in decisions on the constitutionality of **divorce**.

B. Limitations

1. PASSIVITY IN THE SUPREME COURT OF JUSTICE

The Supreme Court of Justice had **very few decisions relevant to this report** during the period under study, showing the lack of emphasis on incorporating human rights language in the constitutional discourse. To this is added the **formalistic** interpretation of legal and constitutional provisions and **deference to legislators**. In effect, the court has not only resisted adopting expansive interpretations of the constitution and legislation, but it has also in various cases, such as the coverage of permanent domestic partners by the social security administration, protected rights only in the manner and to the extent outlined by the legislator.

2. CONSTITUTIONAL DEFICIENCIES

In spite of the fact that the Constitution of Argentina directly incorporates the most important international treaties, **these treaties are almost never the basis of judicial decisions.** Thus, a document that could adequately guarantee rights is diminished by the lack of judicial initiative. It is important to promote the court's direct incorporation of these treaties in their decisions.

3. IGNORANCE OF THE JURISPRUDENCE OF THE INTER-AMERICAN SYSTEM

Although the Supreme Court of Justice itself declared the human rights jurisprudence of the Inter-American System to be binding on Argentine courts, not one of the decisions studied invokes precedents of the regional system. On the contrary, in one case of abortion for reason of anencephaly,⁹ the Supreme Court of Buenos Aires completely failed to acknowledge a decision of the Inter-American Commission on Human Rights that clarifies a provision of the American Convention establishing that the protection of life from the moment of conception cannot be understood as an absolute ban on abortion.¹⁰

C. The Road Still Ahead

In Argentina, at least at the federal level, it seems essential to **revive the use of the petition of *amparo***, forcing the **Supreme Court of Justice to decide** many more cases than it has up until now. In these cases it is important to promote the vigorous **expansion of the constitutional language** to include the rights protected by international treaties and to diminish the exclusivity of the legislator in the decision making process, which can affect the rights of marginalized or unprotected groups.

In short, **the position of the courts** on the subjects of sexual violence, eugenic abortion and the right to equality of homosexuals **is disturbing.** In the area of **sexual violence**, the preoccupation of the court seems to center

almost exclusively on the well-being of the defendant, his mental health and the protection of his family, and not on that of the victim of the crime. In a **case of child abuse**, when determining the penalty to impose on the assailant, the judges considered the following:

[...]it is excessive to apply the maximum penalty for the crime of child abuse of an eight year-old minor, when it is a young man, a father, who would suffer grave consequences in the area of family and work, and also socially, if he did not cause physical damages to the minor and the only fact alleged - the insertion of the virile member in her mouth - took place in the dark, reducing the harmful effects of the unfavorable experience for the minor, and [because] without a doubt, oral penetration is not painful.¹¹

The protection of the right to life at all costs, in decisions on the interruption of pregnancies of anencephalic fetuses, completely fails to recognize the rights of the woman and advances the notion that women are merely a vessel for breeding. One decision establishes the following:

[...] even profoundly valuing the interior drama that compromises the mother and all of the family, and the undoubted effect on her psychological health, my concept of the right to life prevails [...] the inviolability of the human being, as an end in itself, means its legal primacy as an absolute value.¹²

Finally, the decision of the judges on the creation of legal personhood for *Comunidad Homosexual de Argentina* (Homosexual Community of Argentina), maintaining that the public defense of homosexuality as a way of life is incompatible with the common good, is a violation of the right to be free from discrimination on the basis of sexual orientation.

[...] any defense of homosexuality offends public morals and the common good, whose guardianship the constitution delegates to the powers of the State and of this Court, to guarantee the dignity of human beings created in the image of God, source of all reason and justice.¹³

Likewise, it is important to highlight the courts' **silence** on subjects related to **sexual and reproductive health and privacy**. Promoting litigation on these matters compels judges to develop jurisprudence in these areas.

II. TENDENCIES IN JUDICIAL INTERPRETATION

A. The Judicial System

1. THE JUDICIAL BRANCH

The highest body of the **judicial branch is the Supreme Court of Justice**.¹⁴ The lower levels of the branch are composed of a system of federal and provincial courts.

2. SOURCES OF LAW

The legal system recognizes the **primacy of the federal constitution**,¹⁵ which is the **principal source of law**. Because Argentina has a federal system, federal and provincial laws coexist. The jurisdiction of federal legislation, by express mandate of the constitution, is limited to the following areas: civil, commercial, penal, mining, labor and social security codes, customs, direct taxes, and international relations.¹⁶ The provincial governments have the power to legislate in all other areas.

International treaties, by general rule, are superior to other laws but are inferior to the constitution.¹⁷ Since the constitutional reform of 1994, ten international treaties on **human rights** ratified by Argentina have been incorporated into the constitution.¹⁸ Other human rights treaties can be incorporated if they are ratified by two-thirds of the members of each legislative house.¹⁹

Generally, **judicial decisions** only affect the parties bringing the lawsuit. However, when it is a **plenary sentence**, the decision is also binding on the chambers of the court that previously decided on it and on lower courts. Courts of appeal issue plenary sentences in order to unify jurisprudence on a specific subject, whether on their own initiative or on solicitation by an individual.²⁰

Custom is a source of law when the law expressly refers to it as well as when a legal provision directly applicable to the case is not available.²¹

3. CONSTITUTIONAL REVIEW

The Supreme Court of Justice is charged with assuring the supremacy of the Federal Constitution. To this end it can declare laws, decree laws, issue decrees or regulations, and even deem actions of individuals unconstitutional if they are brought before the court.²² Its decision in such a case may not be appealed.

4. MECHANISMS FOR THE PROTECTION OF RIGHTS

In addition to the usual actions outlined by the law, the Constitution establishes petitions for *amparo*, *habeas corpus* and *habeas data* for the protection of human rights. *Amparo* is a speedy recourse²³ of a subsidiary nature and can only be invoked when no other appropriate remedy exists.²⁴ It addresses the protection of constitutional rights in general, particularly when these rights are violated, restricted, altered, or threatened, in actuality or imminently, by a public authority.²⁵ *Amparo* can be presented by any person, through a lawyer or in person,²⁶ before a lower-level court with competence in the subject.²⁷ The petition should be written and should include, in addition to the name and domicile of the applicant, an identification of the defendant, the facts that form the violation or threat to a right, and the claim in “clear and precise terminology.”²⁸ *Habeas corpus* is a recourse specifically addressing the protection of personal liberty and should be resolved “immediately” by the judge.²⁹ *Habeas data* is a special recourse that addresses obtaining protection of that person’s personal information.³⁰

B. Decisions on Sexual and Reproductive Rights

1. THE RIGHT TO HEALTH AND TO REPRODUCTIVE HEALTH

There is no constitutional provision that directly refers to the right to health.

See: Law 23,798 on HIV/AIDS; Penal Code, art. 202; Constitution of the Autonomous City of Buenos Aires, articles 20 and 21.

The Supreme Court of Justice determined that the transfer of a prisoner who has AIDS to a penitentiary center far from the home of his family, where he would not receive the same quality of medical attention, was not a violation of his rights since it does not imply an aggravation of his condition of incarceration.³¹

2. THE RIGHT TO PHYSICAL INTEGRITY AND TO BE FREE FROM VIOLENCE

See: Penal Code, book II, title III; Laws on Protection from Domestic Violence: 24,417 of the City of Buenos Aires, 4943 of Catamarca, 7871 of Córdoba, 5019 of Corrientes, 4175 of Chaco, 4118 and 4405 of Chubut, 9188 and 9198 of Entre Ríos, 5107 of Jujuy, 1081 of La Pampa, 6580 of La Rioja, 6672 of Mendoza, 3325 of Misiones, 2212 of Neuquén, 3040 of Río Negro, 6542 of San Juan, 5142 of San Luis, 6308 of Santiago del Estero, 11529 of Santa Fé, 6346 of Tucumán, 39 of Tierra del Fuego.

Evidentiary Management of Sex Crimes

The Supreme Court of Justice has ruled that the testimony of minors who are victims of sexual crimes must be evaluated in context and therefore can serve as evidence even if it contains contradictions, which are explained away as the result of pressure possibly exercised by the aggressor.³² The court has also established that the personality of the defendant is an important **indication in proving the crime.**³³

An important step forward is the judicial recognition that lack of consent in unwanted sexual behavior need not be proven by physical resistance. The court has said that “it is not necessary that the victim fight to the utmost against someone who is coercing her, which could provoke her death, much less be ‘dirty’, ‘disheveled’ and ‘injured’ after having submitted in private.”³⁴ Nevertheless, there are decisions that blame the victim for provoking aggression or for putting herself in a risky situation.³⁵

Assessment of Penalties

The **National Court** has established that the personality of the defendant must be taken into account when a penalty is assessed, in part because if the defendant has “a character defect,” punishment will only accentuate it.³⁶ The perception that sexual violence does not imply a serious violation of rights is reflected in decisions such as one that maintained that the damage to the family of the person convicted can far exceed the damage caused by the crime.³⁷

3. THE RIGHT TO EQUALITY AND TO BE FREE FROM DISCRIMINATION

Federal Constitution: “Art. 16. The State of Argentina does not admit prerogatives of blood, nor of birth: there are no privileges of birth or titles of nobility. All inhabitants are equal before the law, and admissible for employment without other conditions than that of competence. Equality is the basis of taxes and of public duties.”

“Art. 37, Par. 2. Actual equality of opportunity between men and women to elective and party offices is guaranteed by positive actions in the regulation of political parties and the electoral system.”

See also: Law 23,592, anti discrimination law; Constitution of the Autonomous City of Buenos Aires, arts. 11, 36-8; Quota Laws: 11,733 of the City of Buenos Aires, 4916 of Catamarca, 8365 of Córdoba, 4673 of Corrientes, 3747 of Chaco, 1155 of Formosa, 1593 of La

Pampa, 5705 of La Rioja, 5888 of Mendoza, 3011 of Misiones, 2161 of Neuquén, 2642 of Río Negro, 6515 of San Juan, 5105 of San Luis, 2302 of Santa Cruz, 6286 of Santiago del Estero, 10,802 of Santa Fé, 6592 of Tucumán, 406 and 408 of Tierra del Fuego.

Equality of Women and of Political Participation

The Supreme Court of Justice has established that it is a **violation of the right to equality** to fall short of the 30% gender quota required by law, where only one slot was reserved for a woman in an election composed of five running candidates.³⁸

Equality of HIVPositive Persons

The court has also established that it **violates the right to equality** of HIV positive persons when their right to work is restricted or limited for the sole reason of their HIV status, without taking into account their ability to work and the lack of risk to the health of third parties.³⁹

Equality of Homosexuals

The court has considered, however, that **it is not a violation of the right to equality** when legal status is denied to an Argentine association that works for the elimination of discrimination against **homosexuals**. It considers such an association not to be in the interests of the common good.⁴⁰ In effect, the court attempted to justify discriminatory treatment by alleging that the state can decide not to support the public defense of homosexuality.

4. THE RIGHT TO CONSENT TO MARRIAGE AND TO FORM A FAMILY

Federal Constitution: “Art. 14 bis. [...] the law will establish [...] the full protection of the family.”

See also: Civil Code, modified by law 23,515; law 23,226, and law 23,746.

Authorization to Contract Matrimony

Regarding the requirement that military personnel obtain authorization to enter into marriage, the court has found that the **right of military personnel to enter into marriage cannot be restricted**. Paradoxically, however, the court also found that it is reasonable to punish military personnel on the grounds of disobedience when they do not obtain proper authorization before marrying.⁴¹

Divorce

The court has found that the provisions establishing legal divorce do not violate the constitutional precepts of full protection of the family and of the affiliation of the federal government to the Catholic religion.⁴² Further, it has also found that provisions ordering that **any clause** attempting to reject divorce be found **null and void** and not violate these constitutional precepts.⁴³ The judges found that the constitutional character of the rights supposedly violated does not demonstrate that “the authors of the Constitution had contemplated an absolute agreement of the state with the postulations and systems of regulation of matrimony of the Catholic Church, to the point of prohibiting generically and absolutely all dissolution of the bonds of marriage by reason of divorce.” Additionally, for the court, “[t]he distinction between civil law and canonical law in reference to matrimony is in accordance with the protection of autonomy of conscience, individual liberty, and freedom of religion that constitute the founding principles of our constitutional democracy.”⁴⁴

Domestic Partnerships

The court has a rather negative view of the subject of domestic partnerships. The judges have said that “concubinage always, and in and of itself, is a dishonest life.”⁴⁵ However, they have recognized some minimal rights, establishing that the concubine⁴⁶ cannot initiate proceedings in the capacity of heir, but she can do so in her capacity as concubine under certain conditions set out by the law.⁴⁷

5. THE RIGHT TO DECIDE THE NUMBER AND SPACING OF CHILDREN

The constitution does not contain any explicit reference to the right to decide the number and spacing of children.

See: Penal Code, book II, title I, chapters I and II; Constitution of the Autonomous City of Buenos Aires, art. 37.

Eugenic Abortion

The Supreme Court of Justice has determined that **authorization can be given to induce premature delivery** of an anencephalic fetus when the pregnancy is sufficiently progressed that the fetus would survive premature delivery if it were in a normal state of health. For the court, the death of the fetus should not be the result of a human action (which would constitute an abortion) but of its illness. The court also found that inducing premature delivery protects the mental and physical health of the women.⁴⁸

In spite of the existence of this precedent, the complete lack of knowledge on the part of the Supreme Court of the Province of Buenos Aires of international criteria for the interpretation of the right to life was evident in the revocation of an authorization granted by a family court to interrupt a pregnancy of an anencephalic fetus.⁴⁹

In its decision, the court erroneously interpreted national law and international treaties to argue the supposed absolute character of the right to life from the moment of conception. It also completely ignored a decision of the Inter-American Commission on Human Rights, whose jurisprudence is recognized as obligatory for Argentine courts,⁵⁰ which clarified a provision of the American Convention establishing that the right to protection of life from the moment of conception cannot be understood as an absolute prohibition of abortion.⁵¹

Professional Confidentiality and Abortion

The Supreme Court of Justice has also established that **criminal abortion prosecutions** against the woman resulting from reports by hospital doctors, violating their **duty to confidentiality**, are **null and void**.⁵² In the same manner, the courts of Buenos Aires and San Martín found that said proceedings violate the principle that no one is obligated to **incriminate oneself**. Obliging women to choose between putting their lives and health at risk or searching out medical assistance and as a result turning themselves in to the authorities constitutes a violation of this right. They also found that it violated the right to **equality**, since the rules that require reporting only pertain to doctors at public hospitals.⁵³ In spite of the above, these courts have affirmed that doctors' reports can be utilized to initiate criminal proceedings against accomplices, coauthors or principals.

In **contrast**, the courts of Lomas de Zamora⁵⁴ and Morón⁵⁵ have maintained that abortion is a crime that the state has the obligation to prosecute—even without the existence of an individual desiring prosecution. They held that the duty of confidentiality is not sufficient justification for failure to fulfill the obligation to file a report.⁵⁶ The court of Santa Fé has adopted the same position,⁵⁷ adding that the superiority of value of the life of the fetus over the right to life and health of the mother constitutes just cause to violate professional confidentiality.⁵⁸

6. THE RIGHT TO EMPLOYMENT AND TO SOCIAL SECURITY

Federal Constitution: “Art. 14. All of the inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise; namely: the right to work and engage in all licit industry [...]”

“Art. 14 bis. Work in all of its diverse forms will enjoy the protection of the laws [...] The State offers the benefits of social security, of a complete and fundamental character. Specifically, the law will establish: obligatory social security, under the authority of the national and

provincial bodies with financial and economic autonomy, administered by the interested parties with the participation of the state, without which overlapping contributions could be possible; it further establishes retirement and mobile pensions; the full protection of the family; the defense of the well-being of the family; economic compensation for families; and access to a dignified domicile.”

See also: Work Contract Law; law 25,013, labor reform law; Decree 254 of 1998, plan for equality of opportunities in the work place.

Dismissal Due to Pregnancy and Marriage

The court has established that a woman should be compensated when she is fired due to pregnancy, if it is proven that the employer was aware of her condition and cannot demonstrate that she was fired due to other causes.⁵⁹ The National Labor Association of the Autonomous City of Buenos Aires has also established that when a man is fired for contracting marriage, and the above circumstances are true of the employer, he should also be compensated.⁶⁰

Social Security

In regards to **social security**, the court has established the right to **prenatal subsidies** payment when a worker’s permanent domestic partner is pregnant⁶¹ and the right to the **payment of subsidies for a child’s death** due to a miscarriage.⁶² However, divorced women⁶³ and permanent domestic partners⁶⁴ who are survived by legal wives **do not have the right to a replacement pension** if they are found at fault in a divorce proceeding. On the other hand, **widows of military personnel** who are newly married,⁶⁵ **mothers of military personnel** in domestic partnerships,⁶⁶ and **domestic partners** without surviving wives,⁶⁷ **do have the right to replacement pensions**. However, in a decision on the constitutionality of article 48 of law 6393 that did not include domestic partners as beneficiaries with rights to a pension, which was made when ruling on the issue at the College of Notaries, the court made it clear that **the legislator has the power to**

decide the cases in which it is opportune and convenient to grant the right of replacement pensions.⁶⁸

7. THE RIGHT TO BE FREE FROM SEXUAL EXPLOITATION

The constitution does not contain any explicit reference to the right to be free from sexual exploitation.

See: Penal Code, arts. 125-7; Constitution of the Autonomous City of Buenos Aires, art. 39.

No decisions on the trafficking of women, sex work, pandering, nor any other theme related to sexual exploitation were found during the time period studied. The lack of any judicial discourse on these subjects implies that they are not considered to be very important by the judicial branch.

8. THE RIGHT TO EDUCATION

Federal Constitution: “Art. 14. All of the inhabitants of the Nation enjoy the following rights in accordance with the laws that regulate their exercise [...] to teach and to learn.”

“Art. 75, no. 18 [on the functions of Congress] [...] To sanction organizational and fundamental education laws that consolidate national unity, while respecting provincial and local particularities, which assure the indelible responsibility of the state, the participation of the family and the society, the promotion of democratic values, and the equality of opportunities and possibilities without any discrimination; and that guarantee the principles of free and equitable public education on the part of the state and the autonomy and self-government of the national universities.”

See also: Law 24,195, Federal Education Law, Constitution of the Autonomous City of Buenos Aires, arts. 23 and 24.

Sex Discrimination in Education

The Supreme Court upheld the decision of the Superior Council of the National University of Córdoba that established that **enrollment** in the Montserrat National School should be **without distinction on the basis of sex**. The school only offered education to male students.⁶⁹

Discrimination against Pregnant Adolescents

The Supreme Court has not yet ruled on the right to education of pregnant students. Recently however, several cases have been made public in which pregnant adolescents were expelled from schools. The most important case involved the Saint Isabel Catholic School, in the province of Formosa, and its refusal in April 2000 to register a pregnant minor as a student. The situation generated enormous controversy at the provincial level. The Supreme Court of Justice of the province finally ordered the reinstatement of the minor.⁷⁰

9. THE RIGHT TO PRIVACY⁷¹

Federal Constitution: “Art. 18. [...] The home, as well as correspondence and private papers, are inviolable, and law will determine in what cases and with what justification search and seizure and occupation thereof can be allowed. [...]”

“Art. 19. The private actions of men that in no way offend the order and moral of the public, nor injure third parties, are reserved only to God, and outside the authority of the magistrates. No inhabitant of the Nation will be obligated to do what the law does not mandate, nor deprived of what it does not prohibit.”

See also: Constitution of the Autonomous City of Buenos Aires, art. 12, Par. 3.

The Supreme Court of Justice has affirmed that it **does not violate the right to privacy** to require a **member of the police force to undergo an**

HIV/AIDS test, in spite of the fact that this is not one of the cases specifically set out by the law on HIV/AIDS. In this case, according to the court, the interest of the court is to determine the fitness of the agent and to protect the health of third parties.⁷²