

2006

Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs

Horacio Javier Etchichury

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Etchichury, Horacio Javier. "Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs." *American University International Law Review* 22, no.1 (2006): 101-125.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

ARGENTINA: SOCIAL RIGHTS, THORNY COUNTRY

JUDICIAL REVIEW OF ECONOMIC POLICIES SPONSORED BY THE IFIS

HORACIO JAVIER ETCHICHURY*

I. SOCIAL RIGHTS IN ARGENTINA'S CONSTITUTION.....	102
A. CONSTITUTIONAL LANGUAGE ON SOCIAL RIGHTS.....	102
B. TRADITIONAL APPROACHES TO SOCIAL RIGHTS	105
C. SOCIAL RIGHTS AS CONSTITUTIONAL RIGHTS.....	107
D. SOME RECENT JUDICIAL DEVELOPMENTS.....	110
E. A MIXED RECORD	115
II. CONTRADICTIONS WITH PROGRAMS SPONSORED BY IFIS.....	116
A. REASONS FOR THE CONTRADICTION.....	119
III. THE JUDICIARY AND THE CONTRADICTIONS.....	120
A. JUDICIAL REVIEW AND POLITICAL DISCRETION.....	120
B. REASON, RATIONALITY, AND MINIMUM CORE.....	121
C. EQUALITY AND SCARCITY.....	124
D. JUDICIAL REVIEW AND IFIS	125

Argentina's judiciary may review policies sponsored by international financial institutions ("IFIs") in light of constitutional

* LL. M., Yale Law School. Doctoral candidate, National University of Córdoba (Argentina). Abogado (law degree) and Licenciado en Comunicación Social (degree in Social Communication), National University of Córdoba. Faculty, Constitutional Law (Law School) and Epistemology of Social Sciences (Social Communication School), National University of Córdoba. Legal staff, Servicio Paz y Justicia (human rights NGO), Córdoba (Argentina). Comments to: etchichury@hotmail.com. I would like to thank Professor Jonathan Miller for encouraging me to participate in the 2006 Human Rights Award competition, and also for his inspiring mentorship during my 2001 stay as a Visiting Scholar at Southwestern University, in Los Angeles.

social rights. Judges have the power to strike down any act of government that affects constitutional rights. Since policies advanced by the IFIs may have an impact on social rights, these policies could be subject to judicial review.

In this article, I will first describe the status of social rights in Argentina's constitution. I will then turn to the possible contradictions between these rights and IFI-sponsored policies. Finally, I will describe what the judiciary is entitled to do about these contradictions under Argentina's constitutional design.

I. SOCIAL RIGHTS IN ARGENTINA'S CONSTITUTION

In the wake of a decade-long neoliberal experiment, Argentina found itself in an unprecedented social crisis.¹ In 2002, more than a half of Argentines lived in poverty and one out of four was indigent. Three million people remained unemployed, while half a million children under 14 worked in the worst conditions. A third of senior citizens had no income of their own. Eighteen million people lacked medical insurance.

A. CONSTITUTIONAL LANGUAGE ON SOCIAL RIGHTS

The original 1853 Argentinean Constitution did not include social rights.² In 1949, a far-reaching reform incorporated several social

1. See DEFENSOR DEL PUEBLO DE LA NACIÓN-OMBUDSMAN NACIONAL [PEOPLE'S DEFENDER], 2002 *NOVENO INFORME ANUAL* [2002 NINTH ANNUAL REPORT] 4-7, 154-55 (2002) *abridged version available at* <http://www.defensor.gov.ar/informes/ianual2002.pdf> (attributing the cause of turmoil to government inaction during economic and social crisis in Argentina); see also *Día Clave Para Financiar El Plan Nacional*, LA NACION, Dec. 10, 2002, at 18, *available at* http://www.lanacion.com.ar/herramientas/printfriendly/printfriendly.asp?nota_id=457371 (announcing the passage of emergency legislation to provide food not only for children but also for pregnant woman, disabled people with mental or physical conditions, and people older than seventy years as evidence of the severity of the economic crisis).

2. See ARG. CONST. (1853). The 1853 Constitution, however, included a provision that today might be classified as a social right. Article 5 established tuition-free elementary education as a duty of provincial governments. Yet a constitutional reform in 1860 eliminated the reference to tuitions. See ARG. CONST. (1957). See also Elina S. Mecle Armiñana, *Los Derechos Sociales en la*

rights under Peronist rule, but a subsequent military government restored the original text a few years later.³ In 1957, a modest reform included a set of social rights, usually regarded as non-self-executing.⁴

In 1994, a broad constitutional reform included a wider range of social rights through two mechanisms.⁵ First, the reform added some social rights and guarantees. Second, it endowed a group of human rights international treaties with constitutional rank.

Through the first method, the Constitutional Convention added some social rights, such as consumers' rights,⁶ and the right to a healthy environment.⁷ Other guarantees, for instance, included instructions to Congress in order to preserve tuition-free public education.⁸

In the most interesting development, the Convention endowed nine human rights treaties with constitutional rank.⁹ The treaties are to be harmonized with the rest of the Constitution, as parts of a single document. Therefore, Argentina grants some human right treaties

Constitución Argentina y su Vinculación con la Política y las Políticas Sociales, in POBREZA, DESIGUALDAD SOCIAL Y CIUDADANÍA: LOS LÍMITES DE LAS POLÍTICAS SOCIALES EN AMÉRICA LATINA 37 (Alicia Ziccardi ed., 2001) (compiled by CLACSO (Consejo Latinoamericano de Ciencias Sociales [Latin American Council on Social Sciences]) (noting that the 1853 Constitution does not explicitly include social rights and the effect this has had on Argentinean society).

3. See Susana N. Vittadini Andres, *First Amendment Influence in Argentine Republic Law and Jurisprudence*, 4 COMM. L. & POL'Y 149, 161 (1999) (describing the 1955 military government's abolition of the 1949 reforms).

4. See ARG. CONST. (1957) art. 14 bis (granting the workers' right to "protection against arbitrary dismissal," "equal pay for equal work," "participation in the profits of enterprises, with control of production and collaboration in the management," the unions' right to strike, and every citizen's right to social security benefits and the right to family protection, among others).

5. See, e.g., ARG. CONST. (1994) arts. 41, 42, 75 (providing increased social rights to citizens such as consumer rights, health and environment rights, education rights, and incorporating internationally recognized human rights).

6. *Id.* art. 42.

7. *Id.* art. 41.

8. *Id.* art. 75, § 19.

9. *Id.* art. 75, § 22. The same provision includes a Congressional procedure for the removal of these treaties from the constitutional framework, and for the incorporation of new human rights treaties. Both operations require supermajority votes in both houses of Congress. *Id.*

constitutional standing,¹⁰ apart from Argentina's commitment at the international level.¹¹

The incorporated treaties include several provisions on social rights. The most relevant treaty, of course, is the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR").¹² However, other social rights come from other incorporated treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the Convention on the Rights of the Child ("CRC"), and the Universal Declaration of Human Rights ("UDHR").¹³

Argentinean legal culture is still starting to assess the whole impact of this reform. The crucial task of interpreting these rights is still starting,¹⁴ and the judiciary seems to be undertaking contradictory steps.¹⁵ In general, social rights have not been developed or studied to the same extent as civil and political rights.¹⁶

10. See Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 292-301 (1999) (describing Argentina's unique strategy of incorporating "verbatim replica" of human rights treaties into its Constitution, and contrasting it with other South American countries' incorporation of the "spirit" or "textures and nuances" of those treaties).

11. See generally Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1873-80 (2003) (explaining how the dual protection of fundamental rights by an international human rights regime and a national constitutional regime creates the possibility of dissonance due to divergent or conflicting interpretations of those rights).

12. International Covenant on Economic, Social, and Cultural Rights arts. 6-14, Dec. 16, 1966, 999 U.N.T.S. 3, 6-9 [hereinafter ICESCR].

13. Convention on the Elimination of All Forms of Discrimination Against Women arts. 10-14, Dec. 18, 1979, 1249 U.N.T.S. 13, 17-20 [hereinafter CEDAW]; Convention on the Rights of the Child arts. 23-29, 32, Nov. 20, 1989, 1577 U.N.T.S. 43, 51-55 [hereinafter CRC]; Universal Declaration of Human Rights arts. 22-26, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

14. See Levit, *supra* note 10, at 313, 327 (asserting that the internalization strategy has not yet produced results, largely due to the courts' passivity when interpreting and analyzing the incorporated rights).

15. See *id.* at 325-27 (discussing the Argentinean Supreme Court's manipulation of Article 75(22) by noting how the court "twisted international law against individual petitioners, hindering rather than helping compliance efforts" in one case and used the constitutional provision to justify its decision to elevate domestic law over international law in another).

16. See Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights*, in GIVING

However, the vagueness of social rights language usually provides an explanation for its undervaluation.¹⁷

B. TRADITIONAL APPROACHES TO SOCIAL RIGHTS

Historically, social rights in Argentina were not considered binding. Judges took these rights as “programmatic” in nature. In other words, they were little more than general policy goals, long-term promises enshrined in a constitutional text.¹⁸ Under this approach, social rights needed specific regulation by Congress to become effective. This classical distinction between “operative” and “programmatic” provisions was not explicit in the Constitution.¹⁹

Yet this distinction seems to be losing ground. It seems to be inconsistent with the notion of a human right. At first sight, a “programmatic” definition appears to give the government more leeway in choosing how and when, if ever, to honor social rights.

Some also underscore the differences between social and political rights, to grant binding force only to the latter. Again, such a distinction is not explicit in the Argentinean Constitution,²⁰ though it still can be found in the relevant literature. According to this view, social rights imply that the state must act: therefore, they are

MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 39, 43 (Isfahan Merali & Valerie Oosterveld eds., 2001) (noting that the international community’s failure to analyze and elaborate upon the content of social rights has perpetuated the idea that these rights are less important than civil or political rights).

17. See Rajesh Swaminathan, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 COLUM. J. TRANSNAT’L L. 161, 162 (1998) (emphasizing that the vague definition of social rights causes policymakers to “misperceive and understate” the “social costs of stupefying magnitude” that result from stabilization and structural adjustment programs in developing countries).

18. See, e.g., AGUSTÍN GORDILLO ET AL., *DERECHOS HUMANOS* VI-34 (2d ed. 1997) (exemplifying the policy-oriented attitude toward constitutional human rights found throughout mainstream Argentinean legal literature).

19. Leading Argentinean constitutional law scholars still use this pair of concepts quite often. See, e.g., 1 GERMÁN BIDART CAMPOS, *MANUAL DE LA CONSTITUCIÓN REFORMADA* 299-300 (1998) (centering the distinction in the “nature and framing” of the norm, with no other explicit criteria).

20. ARG. CONST. (1994) art. 75, § 22. The distinction appears only with the mention of both U.N. International Covenants, but the context seems to underscore the unity and equal standing of all treaties. *Id.* Moreover, delegates at the 1993 United Nations Human Rights Conference in Vienna stressed the indivisibility of human rights. See Puta-Chekwe & Flood, *supra* note 16, at 50.

“positive” rights. On the other hand, civil and political rights mean that the state must refrain from acting: hence, they are considered “negative” rights. Under this scheme, only “negative” rights are justiciable.

The distinction between state action and inaction does not entirely help to draw a clear line.²¹ Several “negative” rights may also imply state action.²² In fact, any legally enforced right is a positive right, as it demands some kind of action by the state.²³ However, even rights usually considered “negative” require the state to act, and not only to refrain from interfering.²⁴ The right to vote²⁵ means that the state must organize elections, establish vote-counting systems, and fund the control of all due formalities of the process, among many other tasks. The right to a legal defense,²⁶ in turn, sometimes includes the state duty to provide a lawyer free of charge, and, more generally, due process implies creating and sustaining a complete judiciary system.

Social rights and civil rights always imply state duties, though in diverse degrees.²⁷ These rights do not differ in essence. On the contrary, all of them compose a *continuum*. Both “positive” and “negative” rights always impose certain positive and negative

21. For an insightful critique of the distinction between positive and negative rights, see STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 35-48 (1999) (discussing the inadequacy of the distinction between positive and negative rights and its basis in theoretical and empirical confusion).

22. See *id.* at 44 (arguing that rights are not simply “immunities from public interference” because a disabled state cannot protect negative rights, such as the right against being tortured by police officers and prison guards).

23. See *id.* at 43 (explaining that individuals have rights “only if the wrongs they suffer are fairly and predictably redressed by their government”).

24. See *id.* at 44 (stressing that negative rights imply both the state’s affirmative grant of right and a legitimate request for assistance addressed to an agent of the state).

25. See ARG. CONST. (1994) art. 37 (stating that “suffrage shall be universal, equal, secret and compulsory”).

26. See *id.* art. 18 (mandating that “the defense by trial of persons and rights may not be violated”).

27. See Víctor E. Abramovich, *Los Derechos Económicos, Sociales y Culturales en la Denuncia Ante la Comisión Interamericana de Derechos Humanos* 3, 5 (Instituto Interamericano de Derechos Humanos ed., 1997), available at <http://www.iidh.ed.cr/documentos/herrped/PedagogicasEspecializado/02.pdf>.

obligations on the state.²⁸ The state has the positive duty to give citizens the means to exercise a right, and it also has the negative duty to not interfere in the exercise of it.²⁹

Sometimes, social rights are confused with social policies³⁰ or statutes, because the distinction is considered irrelevant. Some scholars see no difference between a social right written in the Constitution, or left to public policy.³¹

C. SOCIAL RIGHTS AS CONSTITUTIONAL RIGHTS

Constitutional social rights are different. Under the 1994 Constitution, social rights in Argentina enjoy a supremacy status over any other legal act in the country.³² This has important consequences.

On the one hand, these rights seem to impose limits on the economic policy choices for the Government, including its ability to commit to certain economic reforms. On the other hand, social rights impose on the state some obligations, usually with deep financial implications.

28. See CÉCILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* 65-66 (2000) (reiterating that states have both a positive obligation to provide the people with, and a negative obligation not to deprive them of, the minimum resources needed to live decently); see also Puta-Chekwe & Flood, *supra* note 16, at 48 (observing that the Maastricht Guidelines' characterization of the ICESCR as "encompassing duties to respect, protect and fulfill minimum core entitlements emphasizes the fact that ICESCR obligations are not solely positive obligations").

29. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 28-29 (1995) (noting that the right to housing encompasses the right to be free from arbitrary eviction).

30. See HOLMES & SUNSTEIN, *supra* note 21, at 198-199 (identifying "welfare rights" with a "sensibly designed welfare program," and therefore confusing social rights with social policies).

31. See *id.* at 209 (arguing that whether social rights are written into the constitution or left to public policy does not make a difference for the "perceived value of the modern exchange of property rights for welfare entitlements").

32. ARG. CONST. (1994) art. 31. This clause is similar to the Supremacy Clause of the United States Constitution, though the 1994 reform made clear that human rights treaties enjoy the same status as the Constitution itself. Compare U.S. CONST. art. VI, cl. 2, with ARG. CONST. (1994) art. 31.

First, social rights imply that economic policies are not completely open to the political powers' discretion. Congressional majorities, plebiscites or exceptional situations would not allow the government to adopt unconstitutional economic policies. This may prevent self-exploitation policies. In other words, the Constitution prevents the people from sacrificing health or education in order to achieve a certain economic result. Labor law provides an example. In order to achieve external competitiveness for its products, a country may be tempted to slash labor costs to the point of risking the health of the labor force. Constitutional social rights would impede an irrational "race to the bottom" of regressive labor reform legislation.³³

An important limit on discretionary political power comes from the progression principle included in the ICESCR.³⁴ The principle can be construed as a restriction on possible reductions on the protection of a right. For instance, since Argentina grants free primary education to its residents, it cannot start charging a fee—even nominal—for the same service.³⁵ The progression principle, however, leaves some room for exceptions. The U.N. Committee on Economic, Social and Cultural Rights ("CESCR") permits certain retrogressive measures if they are fully justified with regard to the whole set of social rights, and if the state has really used all its available resources.³⁶

33. See, e.g., Act of Sept. 1, 1916, Pub. L. No. 64-249, 39 Stat. 675, c. 432 (enacting United States federal legislation in the early 20th century, banning child labor which was designed to curb the "race to the bottom" in states facing competitiveness problems). The objective was, essentially, to prevent self-exploitation and ensure fair trade among the states. *Id.* See also *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding that the Act of Sept. 1, 1916 "not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend").

34. ICESCR, *supra* note 12, art. 2, 999 U.N.T.S. at 5; see also American Convention on Human Rights, art. 26 Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 144 [hereinafter ACHR]. Both treaties are included in the Argentinean Constitution, but Swaminathan's analysis does not include this element. Swaminathan, *supra* note 17.

35. Tuition-free education is granted in ARG. CONST. (1994) art. 75, § 19. See MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 254 (2003) (observing that a state's membership in international financial institutions cannot conflict with the state's treaty obligation to provide free education).

36. See CRAVEN, *supra* note 29, at 131 (acknowledging that the strength of the

Second, social rights imply certain duties for the state. Although the extent of these duties remains unclear, the CESCR has developed certain principles on the duties of States Parties to the ICESCR.³⁷ States are required to take “immediate, deliberate, concrete, and targeted steps towards the realization of the rights.”³⁸ While the states would be granted some degree of discretion in choosing the appropriate steps, an essential minimum must always be ensured.³⁹ Adopting relevant legislation, although desirable, is not enough; the ICESCR emphasizes the need for judicial remedies.⁴⁰

Given the inclusion of social rights in the Argentinean Constitution, social spending may enjoy a privileged status over other expenses. According to the ICESCR, for instance, the state should use “the maximum of its available resources.”⁴¹ The Argentinean Supreme Court has interpreted these words as a way to restrict the scope of social rights.⁴² These rights appear to depend on the availability of resources.⁴³ Of course, social rights advocates

ICESCR lies in states’ commitment to adopt the rights promoted by the treaty while granting flexibility to states when problems arise).

37. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties Obligations*, ¶¶ 2, 8, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990) (decreeing that all steps taken by states should be, as much as possible, clearly aimed at meeting their obligations under the ICESCR).

38. See CRAVEN, *supra* note 29, at 151.

39. See *id.* at 140-41, 151 (emphasizing that in times of economic hardship, the state first should secure the rights of the most disadvantaged populations).

40. See *id.* at 151 (opining that judicial review at the national level is necessary for the implementation of treaty obligations).

41. ICESCR, *supra* note 12, art. 2, 999 U.N.T.S. at 5; *accord* UDHR, *supra* note 13, art. 22 (expanding the means for countries to adopt rights with both internal efforts of the state and external assistance from international entities); ACHR, *supra* note 34, art. 26, 1144 U.N.T.S. at 152 (establishing member states’ obligation to progressively achieve rights in economic, social, educational, scientific, and cultural spheres provided by the Charter of the Organization of American States).

42. See Corte Suprema de Justicia [CSJN][Supreme Court of Justice], 27/12/1996, “Chocobar, Sixto C. c. Caja Nac. De Previsión para el Personal del Estado y Servicios Públicos,” La Ley [L.L.] (1997-B-240) (Arg.), § 11, *available at* www.garridocordobera.com.ar/chocobar.htm (stressing the progressive principle enshrined in Article 26 of the Inter-American Convention on Human Rights which states that in order to achieve the maximum effectiveness of benefits granted by the economic, social and cultural rights, states should adopt provisions in a particular order so as to progressively accomplish them).

43. See FABRE, *supra* note 28, at 166-67 (noting that these resources not only

would object to taking this provision as a discretionary clause, which would impede any meaningful reading of these rights. The ICESCR seems to not refer to the resources the state decides to use, but to every available—existing—resource.

Even in the context of an economic crisis, these rights maintain a binding status. Some scholars consider state obligations based on social rights to be “qualified, but not erased,” by a situation of deep economic crisis.⁴⁴ In addition, the ICESCR does not include any provision for derogation of social rights under times of economic hardship.⁴⁵ Moreover, the CESCR has emphasized that states should ensure the widest possible enjoyment of these rights even in times of economic crisis.⁴⁶ Therefore, the state cannot simply declare an “economic emergency” to forsake these rights.⁴⁷

D. SOME RECENT JUDICIAL DEVELOPMENTS

The “justiciability” (*i.e.*, judicial enforceability) of a social right comes from its binding status. A judicial trend to favor the recognition of social rights is becoming more definite. In Argentina, judges can also exercise their constitutional review powers to enforce social rights.⁴⁸

Argentina’s judicial review clearly resembles the system adopted by the United States Supreme Court since 1803.⁴⁹ Any court, even

include financial resources, but also human, technological, and informational resources).

44. Barbara von Tigerstrom, *Implementing Economic, Social, and Cultural Rights*, in *GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS*, *supra* note 16, at 139, 155.

45. *See* CRAVEN, *supra* note 29, at 22 (observing that the ICESCR does not make allowance for the derogation of rights during public emergencies).

46. *See id.* at 151 (emphasizing the ICESCR’s stance that, even in times of resource scarcity, states are obliged to strive for the broadest enjoyment of rights, particularly for vulnerable members of society).

47. *See id.* at 22 (describing periods of economic hardship that could qualify as a “public emergency”, but indicating that even those would not call for derogation of rights).

48. ARG. CONST. (1994) art. 14 bis (providing for constitutionally guaranteed social rights). With a few exceptions, the judiciary has authority to hear and decide all cases arising under the Constitution. *See id.* art. 116.

49. *See* Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 99-100 (1997) (discussing the difficulties facing a judicial

the lowest, can assess any law or any administrative act in force with regard to its consistency with the Constitution. This broad judicial power is exercised also by the Supreme Court as the final interpreter of Argentina's Constitution. Though formally non-binding,⁵⁰ the court's decisions have a definitive impact on constitutional issues,⁵¹ and are only limited by certain rulings issued by the Inter-American Court of Human Rights.

In addition, constitutional review may be exercised through a quick injunctive relief, the *amparo* action, applicable even to cases involving groups or classes of citizens for claims regarding rights of general public interest, the right to a healthy environment, or consumers' rights.⁵² The action in these cases may be brought even by nongovernmental organizations ("NGOs") or the Ombudsman.⁵³

Some recent decisions by the Argentinean Supreme Court have enforced social rights. In particular, the court has focused on state duties derived from the right to health care. In 2000, the Supreme Court confirmed in *Asociación Benghalensis* a lower court's decision that ordered the national government to grant timely and appropriate medical treatment, including the allocation of required drugs, to all patients affected by HIV/AIDS.⁵⁴ The court enforced the state duty as described in a national law and as framed in the right to health care, now included in the Constitution.⁵⁵ This put a limit on the political discretion of the executive.

system charged with providing checks and balances on the executive and legislative branches, a hallmark of the U.S system of government).

50. There is no formal *stare decisis* rule, since Argentina belongs to the Civil Law tradition.

51. See Laura Saldivia, *The Constitutional Protection of Sexual Minorities in Argentina*, 9 SW. J. L. & TRADE AM. 331, 334 (2002) (noting that although Argentina's Civil Law tradition does not recognize the principle of *stare decisis*, lower courts nonetheless defer to the Supreme Court's decisions).

52. ARG. CONST. (1994) art. 43 (providing for the expedited review of constitutional claims).

53. *Id.* (providing that "[a]ny person shall file a prompt and summary proceeding regarding constitutional guarantees").

54. See CSJN, 1/6/2000, "Asociación Benghalensis y otros c/ Ministerio de Salud y Acción Social – Estado Nacional s/ amparo ley 16.986," L.L. (2000-A-986, 13) (Arg.) (Moliné O'Connor, and Boggiano, JJ., concurring); see also VICTOR ABRAMOVICH & CHRISTIAN COURTIS, *LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES* 139-41 (2002).

55. *Asociación Benghalensis*, L.L. at 6, 13.; ARG. CONST. (1994) art. 42.

The decision came out as a somewhat surprising event. First, the court had been usually fairly conservative in moral issues,⁵⁶ and many felt that it was not likely to have sympathy for those affected/stigmatized by AIDS. Second, the decision went against the government's desire to have leeway in the administration of resources. Finally, the decision enforced a social right, usually considered not "real" rights, but just "programmatic" in nature. In the case of social rights, the court indeed offers a mixed record, as is explained below.

In addition, the court had always been extremely deferential to the resource management carried out by the political branches, the Executive in particular. The most striking concession to the executive, however, involved private assets. In the 1990 *Peralta* decision,⁵⁷ the Supreme Court upheld an emergency decree that, in the face of hyperinflation and the risk of financial collapse, converted most bank accounts in the country into long-term government bonds.⁵⁸ Therefore, it was somehow remarkable that a social right was upheld in *Benghalensis*.⁵⁹

Yet the decision can also be explained. First, even a conservative and politically insulated court needs to gather some degree of legitimacy and support. The Argentinean Court was by then in one of the lowest levels of public esteem. This case offered an opportunity to show concern and care for a vulnerable group in society.⁶⁰ The

56. In 1991, the court upheld the administrative denial of the right to establish a gay legal private association called "Comunidad Homosexual Argentina," aimed at fighting discrimination and to encourage debate of gay issues. The decision determined that homosexuality was immoral, and therefore opposed to the "public good." The decision is known as *Comunidad Homosexual Argentina*, and it is published in the official register of the Supreme Court, vol. 314, at 1531. See Saldivia, *supra* note 51, at 344-54. See also Jonathan Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983-1999)*, 7 SW. J.L. & TRADE AM. 369, at 423.

57. See CSJN, 27/12/1990, "Peralta Luis y otros c/ Estado Nacional," Fallos (1990-313-1513) (Arg.).

58. CSJN, 22/11/1991, "Comunidad Homosexual Argentina," Fallos (1991-314-1531) (Arg.). See Miller, *supra* note 56, at 400-03.

59. See *Asociación Benghalensis*, L.L. at 6, 15, 21 (analyzing the constitutional hierarchy of the right to health and its preeminence in Argentinean law and several international legal instruments).

60. *Comunidad Homosexual Argentina*, Fallos (1991-314-1531). See Miller, *supra* note 56, at 432 (admitting the need for the court to regain public acceptance).

decision came at the same time that a general strike protested against an agreement with the International Monetary Fund (“IMF”) that included the adoption of an austere budget.⁶¹ Finally, the court, packed with appointees from the previous administration, felt no particular ties to the new President, elected in 1999. Besides, AIDS treatment itself, unlike condom distribution or sexual education, did not pose any major challenge to conservative views.

Second, the applicable legal framework offered sound support for the decision, and made it not look like an undue intrusion in politics. In other words, the Supreme Court did not have to define the obligation, because it was already explicit in the law.⁶²

Third, some justices felt that they could use the case to advance their own agenda, namely, the “right to life” as a “natural” right, and they seized this opportunity. Three justices chose to write two separate opinions. Justices Boggiano and Moliné O’Connor, for instance, emphasized the state’s duty to protect public health, as part of the “right to life,” which they defined, quoting language from previous Supreme Court’s rulings, as “the first natural right of the human person, pre-existent to any positive legislation.”⁶³ In fact, the court, including Justices Boggiano, Moliné O’Connor and Vázquez (who also supported, in his separate opinion, the outcome in *Benghalensis*), used the same language in a 2002 decision banning the production and sale of an emergency contraception pill.⁶⁴

The right to health care has been sustained. Soon after *Benghalensis*, the court again upheld this right in *Campodónico*,⁶⁵

61. POLITICAL HANDBOOK OF THE WORLD 2000-2002 49 (2002).

62. See ABRAMOVICH & COURTIS, *supra* note 54, at 251.

63. *Asociación Benghalensis*, L.L. at § 9 (Boggiano & Moliné O’Connor, J.J., separate opinion).

64. See CSJN, 5/3/2002, “Portal de Belén – Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/ amparo,” L.L. (2002-P-709, 12) (Arg.).

65. See CSJN, 24/10/2000, “Campodónico de Beviaqua, Ana Carina c/ Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas,” L.L. (2000-C-823) (Arg.), 3, 7; see also Christian Courtis, *La Aplicación de Tratados e Instrumentos Internacionales Sobre Derechos Humanos y la Protección jurisdiccional del Derecho a la Salud en la Argentina*, in JUSTICIABILIDAD DE LOS DESC EN AMÉRICA LATINA: EXPERIENCIAS COMPARADAS 28, 292, available at http://www.pdhumanos.org/libreria/libro6/13_courtis.pdf.

confirming the state's positive duties.⁶⁶ According to the decision, the government had to provide an expensive medication to a four-year-old child, after his union-owned health insurance announced its financial collapse. The state duty derives, the court ruled, from the language of international treaties on human rights included in the Constitution.⁶⁷ The court used again the "right to life" as an argument, but this time it did not describe it as the "first natural right".⁶⁸ Probably the more numerous majority in *Campodónico* did not share a unified theory of natural rights.

A different approach was followed later. In a March 2002 decision, the court used formal arguments to deny a single-parent impoverished family the provision of certain social services, including medical care.⁶⁹ This regressive result may be justified by the explicit imposition, through an act of Congress, of a state of "economic emergency". This emergency can be seen as a reason for the court to be more deferential, though the court did not use this argument and relied on formal grounds to dismiss the claim. In other words, unlike the *Benghalensis* and *Campodónico* cases, this new case involves an explicit expansion of discretionary powers by the political branches in the context of a legally declared emergency.⁷⁰

Lower courts have also taken similar steps in the recognition of social rights. In 1997, a court of appeals ordered a provincial government to provide drinkable water to an indigenous community,

66. See *Campodónico de Beviaqua*, L.L. 3, 7, 8, § 16; see also Courtis, *supra* note 65, at 292 (affirming the state's obligation to take actions to satisfy the right to health care).

67. See *id.*, L.L. § 17 (elaborating that the state's duty is an affirmative duty to implement the rights guaranteed in the international treaties); see also Courtis, *supra* note 65, at 292 (noting that the court's language in *Campodónico* was taken from Articles 23, 24, and 26 of the CRC).

68. Compare *Campodónico de Beviaqua*, L.L., § 15 (omitting discussion of the right to health care as a "natural right"), with *Asociación Benghalensis*, L.L. para. 9 (voicing the right to health care as the "first natural right").

69. CSJN, 12/3/2002, "Ramos, Marta Roxana y otros c/ Buenos Aires Provincia de y otros s/ amparo," L.L. (2002-R-1012) (Arg.), 6 (expressing the extraordinary character of the protection provided by the legal measure amparo that can only be invoked once previous procedures have been exhausted by the petitioner).

70. See Rodolfo Ariza Clerici, *El Derecho a la Salud en la Corte Suprema de Justicia de la Nación*, JURIDICE, undated, para. V-2 (2002), <http://www.juridice.com.ar/doctrina/salud.htm>.

to conduct studies on the health effects of existing water provisions at the site, and to provide treatment to those members of the community that required such assistance.⁷¹ In 1998, a court of appeals ordered the federal government to fulfill its commitment to produce a vaccine against an endemic disease, and also designated the Ombudsman office as the monitoring body for that obligation.⁷²

E. A MIXED RECORD

Yet other social rights received a narrower reading. In *Chocobar*,⁷³ the court discussed constitutional guarantees for retired workers. The court acknowledged Congress's broad discretionary powers to regulate these rights,⁷⁴ and to adapt these rights to new situations.⁷⁵ The Supreme Court also adopted a restricted understanding of the right to a free higher education. In a 1999 decision,⁷⁶ the court narrowed the scope of a constitutional provision which commanded Congress to "guarantee the principles of *free* and equitable State public education" in its legislation on the issue.⁷⁷ The right also comes from Article 13 of the ICESCR.⁷⁸ In its majority vote, the

71. Cámara de Apelaciones en lo Civil de Neuquén, Sala II, 19/5/1997, "Menores Comunidad Paynemil s/ acción de amparo" (*Comunidad Paynemil*), Expte. No. (311-CA-1997) (Arg.) (noting that the legal protection was granted in the case at hand, in order to safeguard the health of the indigenous children's community infected by water contaminated with mercury and lead); see also ABRAMOVICH & COURTIS, *supra* note 54, at 138-39 (highlighting the power of judicial review to emphasize the vulnerability and urgency caused by the state's failure to address a community's lack of access to potable water).

72. See Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, Sala IV, 2/6/1998, "Viceconte, María Cecilia c/ Estado Nacional – Ministerio de Salud y Acción Social- s/ amparo ley 16.986, (Arg.); see also ABRAMOVICH & COURTIS, *supra* note 54, at 146-54 (affirming positive obligation of states to provide vaccinations as a basic fundamental right).

73. See *Chocobar*, L.L. at 3.

74. See *id.* at 2-3, §§ 9, 17; see also Levit, *supra* note 10, at 326-27 (arguing that the court's indifference toward the importance of international treaties incorporated into the Argentinean Constitution undermines the treaties' force of law in Argentina and impedes the role of judicial review in the country's efforts to enforce the basic human rights guaranteed by such treaties).

75. See *Chocobar*, L.L. at 2-3, § 12.

76. See CSJN, 24/5/1999, "Estado Nacional (Ministerio de Cultura y Educación de la Nación) formula observación estatutos U.N.C. -art. 34 ley 24.521-" (*U.N.C.*), L.L. (1999-E-65, 20-21) (Arg.).

77. ARG. CONST. (1994) art. 75, § 19 (emphasis added).

78. ICESCR, *supra* note 12, art. 13, 999 U.N.T.S. at 1976 (recognizing that

court understood “free” education as restricted by the word “equitable,”⁷⁹ allowing some low fees to be imposed to those students “who may pay” or “who have more resources.”⁸⁰

Yet with regard to the concept of “emergency,” the judiciary seems to apply a more strict scrutiny. In a 2002 decision, the Supreme Court has established clear limits to the “emergency” powers of the executive or the legislature. The decision struck down the restrictions on bank accounts.⁸¹ In its reasoning, the court emphasized that economic emergencies cannot suspend the rule of law.⁸²

As a bottom line, however, some social rights, especially the right to health care, can have an impact on policymaking, through judicial review. This remains true even after the appointment of new justices with very different backgrounds in 2003 and 2004.

II. CONTRADICTIONS WITH PROGRAMS SPONSORED BY IFIS

The World Bank and the IMF, among other IFIs, have promoted policies with a visible impact on human rights,⁸³ and on social rights in particular, since many proposed spending cuts affect health care and education.⁸⁴ In recent years, a widely accepted set of economic

“[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”).

79. *U.N.C.*, L.L. at §§ 9, 10, 11.

80. *Id.*, L.L. at §§ 12, 13.

81. CSJN, 1/2/2002, “Banco de Galicia y Buenos Aires s/ solicita intervención urgente en autos: “Smith, Carlos Antonio c/ Poder Ejecutivo Nacional o Estado Nacional s/ sumarísimo” (*Smith*), L.L. (2002-B-32) (Arg.).

82. *Id.* at § 9.

83. See DARROW, *supra* note 35, at 69 (describing the findings of an independent expert from the U.N. Commission on Human Rights that structural adjustment programs have adversely affected human rights). The impact may even lead to lawsuits in Argentina against IFIs; claims filed regarding the World Bank’s activities in Argentina are also mentioned. *Id.* at 145.

84. See *id.* at 70 (explaining that spending cuts first harm politically vulnerable targets, such as health, education and small farming, while the interests of the elite are protected). In general, most programs designed by the IFIs involve a sharp reduction of government spending, which usually impacts government provision of education and health care; Swaminathan, *supra* note 17, at 174, 181-82 (predicting that the World Bank and IMF funded policies would be “likely to adversely affect

measures, labeled as “the Washington Consensus,” included fiscal discipline and trade liberalization, with an emphasis on protecting property rights, privatization, and market deregulation.⁸⁵ By promoting these measures, the institutions sometimes influence specific budgetary allocations.⁸⁶

Some privatization programs may affect social rights.⁸⁷ For instance, the World Bank has proposed to organize services for the poor according to “effective demand,”⁸⁸ and not the right to those services. A demand-based system might keep the poor in a disadvantaged situation, by reinforcing a pattern of underutilization of the services.

Privatizations in Argentina also affected workers’ social rights. For instance, the country unbundled its railway system and transferred some operational responsibilities to the private sector. As a consequence, the labor force was reduced by seventy percent, a measure with far-reaching social impact.⁸⁹

Access to some crucial social services may also be affected by privatization. The World Bank has advanced the elimination of

an individual’s right to education, and especially, to free primary education”); see also Margaret Conklin & Daphne Davidson, *The IMF and Economic and Social Rights: A Case Study of Argentina, 1958–1985*, 8 HUM. RTS. Q. 227 (1986) (describing the particular situation for Argentina).

85. See generally Moises Naim, *Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?*, (Oct. 26, 1999) (unpublished working draft of a paper prepared for the IMF Conference on Second Generation Reforms, Washington, D.C. available at <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/Naim.HTM>) (describing the core principles that defined the Washington Consensus).

86. See DARROW, *supra* note 35, at 59-60 (describing the case of Indonesia). Other examples can be found. In early 2002, the IFIs overtly promoted significant reforms in Argentinean criminal law. See also Swaminathan, *supra* note 17, at 169 (discussing the manner in which the IFIs operations have grown in “duration and ambitiousness of scope”).

87. See DARROW, *supra* note 35, at 277 (highlighting that, from a human rights perspective, sometimes privatizations may “severely undermin[e] governments’ capacities to honour their obligations under applicable human rights conventions”).

88. See WORLD BANK, WORLD BANK DEVELOPMENT REPORT 1994: INFRASTRUCTURE FOR DEVELOPMENT 32 (1994) [hereinafter WORLD BANK 1994] (observing that administrative decisions on investment and services based on assumptions about a “needs gap,” rather than “effective demand,” result in substandard services for the poor).

89. See *id.* at 55.

subsidies and the establishment of “suitable options” for which the poor “are willing to pay.”⁹⁰ It remains unclear how the social right to an adequate standard of living contained in Article 11 of the ICESCR, could be ensured under this paradigm.⁹¹ The Bank seems not to promote universal access to services, but “fair terms” of access,⁹² and emphasizes “self-help” solutions for infrastructure provision.⁹³

Other contradictions may arise on the right to housing enumerated in Article 11(1) of the ICESCR.⁹⁴ The World Bank, for instance, advances the concession of a “real right to use” instead of full individual freehold titles for inhabitants of Brazilian *favelas* or slums.⁹⁵

Reform programs in education also can pose difficult questions. The World Bank advanced “cost-sharing and other financial diversification measures” in public higher education.⁹⁶ The Bank advised Argentina to pass a Higher Education law that contradicted the constitutional principle of free public education,⁹⁷ also included

90. *See id.* at 31 (emphasizing the need to offer the poor “suitable options for the kinds of services of most value to them (and for which they are willing to pay)”); *see also* Sara Grusky, *Privatization Tidal Wave: IMF/World Bank Water Policies and the Price Paid by the Poor*, MULTINATIONAL MONITOR, Sept. 2001, at 14, 15 (explaining that the World Bank’s structural adjustment loans usually require privatization of water, and that “[i]ncreased consumer fees for water can make safe water unaffordable for poor and vulnerable populations”).

91. ICESCR, *supra* note 12, art. 11, 999 U.N.T.S. at 7 (recognizing universal rights to an adequate standard of living and to continuous improvement of living conditions).

92. *See* WORLD BANK 1994, *supra* note 88, at 52 (arguing that a hands-off approach would ensure fairer access to the market for the poor).

93. *See id.* at 35 (emphasizing the need to “consult” local communities, to “devolve responsibility for infrastructure provision to local governments, . . . and to foster self-help”). The self-help scheme arises in the context of the “community and user model,” one of the four main approaches to government regulation of infrastructure, together with public ownership and operation, public ownership and private operation, and private ownership and operation. *Id.* at 36.

94. ICESCR, *supra* note 12, art. 11(1), 999 U.N.T.S. at 7.

95. WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 15-17 (2003) (describing institutions that have utilized innovations, such as new land-use tactics, to improve trade and the economy).

96. World Bank, Higher Education Reform Project, *Staff Appraisal Report: Argentina*, Rep. No. 13935-A (June 12, 1995).

97. *See* ARG. CONST. (1994) art. 75, § 19 (empowering Congress to enact laws

in Article 13 of the ICESCR, and the non-retrogression principle enshrined in the ICESCR.⁹⁸ In particular, the World Bank could not advise the imposition of fees in countries with a free public school system.⁹⁹

A. REASONS FOR THE CONTRADICTION

The contradiction may increase since the IFIs do not consider human rights as binding limits in their policy-design process. The institutions consider human rights concerns as beyond their specialized, technical mandates.¹⁰⁰

Furthermore, the IFIs seem to underrate social rights even at a theoretical level. In a 2001 report before the CESCR, the IMF General Counsel, Mr. François Gianviti, described social rights as “somewhat removed from the realities of today’s internally and externally, open economy.”¹⁰¹

guaranteeing the principles of free and equitable public education, as well as the autonomy and autarky of national universities). The higher education law includes the possibility of imposing student fees in public universities. *See* Law No. 24.521, July 20, 1995, B.O. 10/8/95, art. 58.

98. *See* ICESCR, *supra* note 12, art. 2, 13, 999 U.N.T.S. at 5, 8 (requiring States Parties to undertake progressive realization of rights recognized in the ICESCR, and mandating that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”).

99. *See* DARROW, *supra* note 35, at 254 (observing that the imposition of school fees as part of structural adjustment programs will often conflict with Article 13 of the ICESR).

100. *See id.* at 19, 51, 149 (transcribing the relevant section of the World Bank’s charter); *see also* Katarina Tomasevski, *International Development Finance Agencies*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 403, 407 (Asbjorn Eide, Catarina Krause & Allan Rosas eds., 1995) (noting that the IMF has always inferred from its’ mandate a similar restriction against consideration of “political” issues; even some human rights scholars acknowledge that the financial nature of the institutions may require less strict human rights obligations from them).

101. François Gianviti, IMF General Counsel, *Economic Social and Cultural Rights and the International Monetary Fund*, ¶ 39 *in fine*, delivered to the Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2001/WP.5, 2001 (May 7, 2001).

III. THE JUDICIARY AND THE CONTRADICTIONS

An interpretive effort must make sense of the competing state duties, as party to the ICESCR, and as a client of international financial institutions.¹⁰² Any major discrepancy between reform programs and the Constitution may trigger an institutional crisis. The government may feel the need to agree to certain measures, while those affected may challenge them through judicial review.

In this context, there is a high chance of judicial review on specific economic reform proposals. Most cuts in social spending may fall under judicial scrutiny. The court has upheld workers' rights even in the context of economic crisis. In a 2002 decision,¹⁰³ the Supreme Court struck down a 2001 presidential decree¹⁰⁴ that cut wages of public employees by thirteen percent in light of scarcity and economic turbulences.

Argentina's judiciary, at any level, is entitled to review any contradiction between social rights and policies sponsored by the IFIs. On the other hand, this poses questions with regard to the legitimacy of that judicial intervention.

A. JUDICIAL REVIEW AND POLITICAL DISCRETION

Some scholars grant that given their non-elected nature, the judiciary is not the best prepared institution to adopt decisions on complex social policies,¹⁰⁵ and thus the judges usually defer to the political branches. The judicial process is limited in scope and probing powers, which hinders an adequate assessment of a social policy.¹⁰⁶ Some also argue that a judicial enforcement of social rights

102. See DARROW, *supra* note 35, at 204-05 (pointing out the possibility of a conciliation between both duties).

103. CSJN, 22/8/2002, "Tobar, Leónidas c/ E.N. Mro. Defensa Contaduría General del Ejército- Ley 25.453 s/ amparo -Ley 16.986," L.L. (2002-T-348) (Arg.) (stressing that the pertinent legislation crossed the reasonable boundaries imposed by the Constitution to any emergency situation that demanded the adoption of a specific legal framework to tackle the economic crisis).

104. Decree No. 896/01; *see also* Law No. 25.453, July 30, 2001.

105. See ABRAMOVICH & COURTIS, *supra* note 54, at 248-249.

106. *See id.* at 249.

would affect the separation of powers.¹⁰⁷ Others point out that the public debate is affected if “a small legal elite” has the final decision on social and economic issues.¹⁰⁸

Yet judicial enforcement of social rights can be described simply as the enforcement of fundamental policy choices included in the Constitution. The 1994 Constitutional Convention has imposed limits on the available policy choices, and judges have to enforce them.¹⁰⁹ Social rights do not need a confirmation through the political process: their inclusion in the Constitution aims precisely to keep them out of ordinary politics. The same argument usually sustains the application of civil and political rights. For instance, a judge must impede or stop torture on a defendant, and no prosecutor or official would accuse the judge of interfering with policy choices made by the Ministry of the Interior, or the Police. The judge would be only enforcing restrictions already set by the Framers.

Social rights, even if enforced by the judiciary, leave plenty of room for political discretion.¹¹⁰ The executive and the legislature may adopt one among many different alternatives to ensure the effectiveness of social rights. Following a previous example, determining the best means to stop tortures at police stations belongs to the realm of executive or congressional discretion. But the political branches cannot take torture as an unfortunate accident, or as a legitimate way to fight crime.

B. REASON, RATIONALITY, AND MINIMUM CORE

Many scholars highlight that the judiciary can play an important role, if it applies juridical standards, such as “reasonableness,”

107. See ERIKA DE WET, *THE CONSTITUTIONAL ENFORCEABILITY OF ECONOMIC AND SOCIAL RIGHTS: THE MEANING OF THE GERMAN CONSTITUTIONAL MODEL FOR SOUTH AFRICA* 40-42 (1996).

108. See Neuman, *supra* note 11, at 1893 (noting that vesting the judiciary with the final power of interpretation obstructs, rather than facilitates, the societal debate on human rights issues).

109. See ARG. CONST. (1994) art. 31 (establishing constitutional supremacy), and art. 43 (describing judicial review on constitutionality of laws in the context of amparo actions). On judicial review of constitutionality, see also Saldivia, *supra* note 51, at 333.

110. See FABRE, *supra* note 28, at 146-47 (noting that the Constitution may enumerate a right but leave it to the democratic majority to determine in what way to satisfy that right).

“adequacy,” “equality,” or a minimum core of contents for a right.¹¹¹ In other words, the judiciary does not have to design a public policy, but only to confront it with the applicable juridical standards, and, if necessary, to order the political branches to conform to those standards.¹¹²

There is a risk in adopting “reason” as the decisive concept. “Reason” may quickly become “rationality.” The “reasonableness” standard may be too weak if it does not include some clear references to a minimum core that should be taken as a baseline.¹¹³

On the other hand, defenders of this principle emphasize the importance of justification. The court can ask the government to “explain” how its choices would help to realize a social right.¹¹⁴ Some make the lexical leap and say this is a review for “sincerity and rationality.”¹¹⁵ Yet “rationality” may imply something different from “reasonableness.” The reduction of reason to rationality is one of the most criticized legacies of hard-line positivism.¹¹⁶ In this reduced view, “reason” relates to an instrumental justification: some action is rational/reasonable if it achieves a desired result. A broad concept of “reasonableness,” on the other hand, may include different elements: an action is reasonable if it is in accordance with moral norms, with the cultural world,¹¹⁷ even if it is not “rational.” However, the emphasis on justification by itself may lead to a series of “justified” violations of social rights, if there is no clear baseline, like the one provided by a minimum core.¹¹⁸

111. See ABRAMOVICH & COURTIS, *supra* note 54, at 250.

112. See *id.* at 250, 252.

113. See David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence*, 19 SAJHR 1, 10 (2003) (arguing that using a benchmark, rather than an amorphous standard, would clarify the state’s obligations imposed by socio-economic rights).

114. See Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 SAJHR 464, 471 (1992) (reasoning that a court’s questioning of government decisions improves the quality of government).

115. See *id.* at 474.

116. See generally Jürgen Habermas, *Remarks on the Concept of Communicative Action*, in SOCIAL ACTION 151, 175-78 (Gottfried Seebass & Raimo Tuomela, eds., Ruth Stanley, trans., 1985) (discussing the reduced concept of reason in relation to rationality).

117. See *id.* at 176-77.

118. For instance, any government may argue that if general welfare is the objective, social spending cuts may be justified if they “reasonably” or “rationally”

Yet the concept of “minimum core” also entails some risks. Under this approach, governments may adopt merely symbolic benchmarks, with little or no impact in daily life of real citizens. A similar problem has affected the “minimum wage” granted in Article 14 *bis* of the Argentinean Constitution: usually the figure was considered nothing more than a formalism, with no relevance for the labor market.¹¹⁹

Judges may combine and improve the concepts of “reasonableness” and “minimum core,” in light of their institutional mission, namely, to protect the citizens’ rights. First, “reasonableness” should not be reduced to “rationality.” Additionally, judges should analyze the resources *really* available, going beyond existing budget allocations, and requiring the state to demonstrate the impossibility of reaching the “minimum core.”¹²⁰ Finally, the concept of “minimum core” itself should be replaced by the idea of an “adequate core” or a “proportional core,”¹²¹ in light of the prevailing social and economic conditions of the country as a whole. Judges, in sum, should base their reasoning in the concept of life, not mere survival.

In some other instances, the judiciary only transforms a state policy into a legal obligation.¹²² In other words, the court declares that what the state did was not a policy choice, but rather a duty under a constitutional provision, a statute, or even an international law treaty or covenant. This is, to a great extent, the solution adopted in *Benghalensis*.

lead to that objective. In other words, social rights violations may be rationalized as a necessary step for the full enjoyment of these rights.

119. ARG. CONST. (1994) art. 14 *bis* (granting workers “minimum vital and adjustable wage”).

120. See Bilchitz, *supra* note 113, at 23 (finding that this form of jurisprudence recognizes the importance of socio-economic rights).

121. See generally Andrés Rossetti, The Right to Equal Redistribution of Wealth: An Argumentation to Find the Tools for Its Implementation Under the Individual Complaints 1, 9 (Feb. 2000) (unpublished thesis available at [http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/0/166A02D56E8E2A10C1256CF4003B36ED/\\$File/xsmall.pdf](http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/0/166A02D56E8E2A10C1256CF4003B36ED/$File/xsmall.pdf)) (discussing the idea of “proportion” in human rights and its superiority to the idea of providing minimum human rights).

122. See ABRAMOVICH & COURTIS, *supra* note 54, at 250.

In a third type of interventions, the courts must devise a measure to ensure the enjoyment of a social right,¹²³ because of the urgency of the situation, or because of a complete lack of assistance and cooperation from the political branches. In any of these situations, the judiciary should also design some form of control over the adequate compliance of its orders, or the proper enjoyment of the right at stake, especially for long periods.¹²⁴

C. EQUALITY AND SCARCITY

Even in the case of an absolute lack of resources, there is a constitutional answer. This general scarcity must be considered a *public burden*, a hardship to be shouldered by all citizens, according to the principle of equality before the law.¹²⁵ In other words: every inhabitant must bear an equitable and reasonable share of this brunt, according to the principles set in the Constitution.¹²⁶ The same has always applied to other emergencies, social or natural, such as war, famine or epidemics. The public nature of this burden comes from the principle of solidarity, a tie among all members of a political community.

The principle of equality before the law refers, in this context, to a law that includes explicit social rights, as phrased in the Constitution. Equality before the law implies now either an equitable enjoyment of social rights, or an evenhanded distribution of their deprivation.

Therefore, the judiciary, even in times of economic crisis, should adopt equality and social rights as guidelines. Retrogressive measures constitute an undesirable alternative. The lack of respect for social rights can endanger other human rights.¹²⁷ Once some human rights become subordinate, governments and scholars feel entitled to dismiss all of them for the sake of economic growth.¹²⁸

123. See ABRAMOVICH & COURTIS, *supra* note 54, at 252.

124. See *id.* at 253-54.

125. See ARG. CONST. (1994) art. 16 (providing that "Equality is the basis of taxation and public burdens").

126. See *id.* art. 16, §§ 4, 16, 28.

127. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 725 (2000) (arguing that the failure of judges to enforce positive rights may result in less protection of negative rights).

128. See, e.g., Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 9 (1998) (proposing a very

D. JUDICIAL REVIEW AND IFIs

Judicial review over economic policies seems more contestable when applied to policies sponsored by the IFIs. Each judicial decision has international consequences. If a judge rules a World Bank program unconstitutional, this would affect Argentina's foreign relations, and expose the country to international pressures.¹²⁹ Yet even foreign policy must be subject to constitutional principles,¹³⁰ which now include social rights.

On the other hand, judicial review offers an advantage against these pressures. At least in public, the IFIs avoid questioning the decisions issued by the highest constitutional court of a country. Respect for institutions, the judiciary in particular, is one of the most salient elements of the IFIs institutional recommendations. Therefore, there is certain room for judicial action in these matters, especially if it is based on constitutional foundations.¹³¹ Solid decisions by the Supreme Court may give the government political elements to be used in dealing with pressures from the IFIs.¹³²

narrow understanding of due process for criminal defendants in developing countries, as a way to protect property rights).

129. See MARIA ALEJANDRA CORBALAN, *EL BANCO MUNDIAL COMO AGENCIA DE FINANCIAMIENTO EN LA ARGENTINA* 70, 72 (2002) (describing pressures from the World Bank as "coactive" measures, with which the Bank intends to "discipline" member states).

130. See ARG. CONST. (1994) art. 27 (requiring the federal government to strengthen relations with foreign powers, "by means of treaties in accordance with the principles of public law laid down by this Constitution").

131. See generally Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)*, in *RETHINKING THE RULE OF LAW IN POST-COMMUNIST EUROPE: PAST LEGACIES, INSTITUTIONAL INNOVATIONS, AND CONSTITUTIONAL DISCOURSES*. (Wojciech Sadurski, Martin Krygier & Adam Czarota eds., 2005) (mimeo, on file with the author) (providing a detailed analysis of this advantage, with particular reference to the cases of social rights in Hungary).

132. See generally Kim Lane Scheppele, *Constitutional Courts in the Field of Power Politics: A Realpolitik Defense of Social Rights*, 82 *TEX. L. REV.* 1921, 1925-59 (2004) (discussing the value of court decisions to Russia and Hungary when those countries faced IFI pressure).