

HEALTH V. INDIVIDUAL FREEDOM: IS THAT THE QUESTION? (A RE-EXAMINATION OF REASONABLE SCRUTINY DURING COVID-19)

Alberto B. Bianchi* & Estela B. Sacristán**

I.	INTRODUCTION.....	227
II.	THE FLAWS OF REASONABLE SCRUTINY IN THE ARGENTINE SUPREME COURT’S CASE LAW	232
III.	THE MATTER IN COMPARATIVE LAW.....	240
	A. <i>United States</i>	241
	B. <i>Germany</i>	244
IV.	THE CURRENT SITUATION IN ARGENTINA	246
	A. <i>Before COVID-19</i>	246
	B. <i>After COVID-19</i>	250
V.	CONCLUSION.....	252

I. INTRODUCTION

The most sensitive aspect of the imperfection of our earthly life, as opposed to the perfection that we believe our spiritual life will involve, lies in the fact that, while we can enjoy every possible right, we cannot exercise them all in an absolute fashion. We need to give up or sacrifice certain rights in order to be able to exercise others either fully or partially.

Certainly, there is a crucial difference between voluntarily giving up a right and having its exercise forbidden by others. When the prohibition arises

* Doctor in Laws, Universidad de Buenos Aires; Titular member of the National Academy of Law and Social Sciences of Buenos Aires and of the National Academy of Sciences of Buenos Aires; Professor, Argentine Catholic University and Universidad Austral, Argentina.

** Doctor in Laws, Universidad de Buenos Aires; Member of the Administrative Law Institute and member of the Constitutional Law Institute, National Academy of Law and Social Sciences of Buenos Aires; Professor, Argentine Catholic University and Universidad Austral, Argentina.

from an emergency and our personal freedom is adversely affected, we are bound to become alarmed, and a conflict will probably emerge that is to be finally determined by the courts of law. It should be remembered here that personal freedom, as Linares Quintana points out, is enshrined in the Preamble to the Argentine Constitution, which pledges to secure “the blessings of liberty.”¹

As a result, despite their intrinsic worth, certain values may become opposites in real life, due to juridical reasons. In fact, all Western democracies have been built on the basis of the opposition between liberty (in the sense of civil or political liberty) and authority. Both are necessary for the common good, but they need to be reasonably limited so that neither will suppress or obliterate the other. Life is not a binary dialectic, with mutually exclusive pairs of options.

Maybe there is nothing new in all of this. However, in certain exceptional circumstances, the aforementioned suppression or obliteration takes on a dramatic quality (or at least, we perceive it as such). It would seem as if, in order to preserve one value or asset, it becomes necessary to stifle the other.

That is the case with COVID-19, a pandemic that has brought humankind face to face with a dilemma where, in the absence of an antidote or vaccine, individual freedom has become subject to extraordinary sacrifices in the altar of health.

Argentina has certainly not been spared. Rather, our personal freedom has been severely restricted by certain decisions unilaterally and discretionally adopted by the Executive branch of government in an environment characterized by lack of information due to insufficient testing for the virus.²

1. 4 SEGUNDO V. LINARES QUINTANA, *TRATADO DE LA CIENCIA DEL DERECHO CONSTITUCIONAL ARGENTINE Y COMPARADO* 104 (2d ed. 1978) (discussing the institutionalization of liberty in the Argentine Constitution); see also Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641 (1949).

2. *Compare Argentina: Cuántos test de coronavirus se realizaron hasta el momento?*, IMPULSO (Jan. 31, 2021), <https://www.impulsonegocios.com/argentina-cuantos-test-de-coronavirus-se-realizaron-hasta-el-momento/>, and Fabiola Czubaj, *Covid-19. Muchas muertes y pocos tests: la Argentina, cada vez peor en los rankings*, LA NACION (Oct. 10, 2020), <https://www.lanacion.com.ar/sociedad/covid-19-muchas-muertes-pocos-tests-argentina-cada-nid2473798>, and Nora Bär, *González García: “Quizás, tendríamos que haber empezado antes con el rastreo,”* LA NACION, June 14, 2020, at 15, with *Germany to expand coronavirus testing for people without symptoms*, THE LOCAL (June 10, 2020, 12:19 CEST), <https://www.thelocal.de/20200610/germany-to-expand-coronavirus-testing-for-people-without-symptoms>.

These decisions were inaugurated, in March 2020, by an urgent and necessary executive order³ that established a temporary suspension of international flights to prevent any passenger from returning from the so-called “affected zones,” thus creating myriads of stranded Argentines in the European Union (EU), United Kingdom, United States, China, or Iran, among other countries, and in some cases, it took them months to return to their homeland. There were many other restrictions via executive order, such as the one issued at the beginning of the mandatory preventive social isolation⁴ that kept us all, for approximately eight weeks, confined to our homes, unauthorized to step on the sidewalk or street and exceptionally authorized to do so only in order to purchase food, cleaning articles or medicines. Restrictions were also adopted by local governments, such as the one of the Autonomous City of Buenos Aires. It is worth mentioning that, in April 2020, the government of City of Buenos Aires made it compulsory, for those above seventy years old, to make a phone call to a “citizen care hotline” to furnish the local authorities with the “reasons” for their need to leave their home or site of confinement to fulfill some errand and to listen to advice given by the operator (who had been instructed, under the resolution in force, to convince the elderly person of the cons involved in leaving home and to offer the assistance of local volunteers).⁵ This severe measure was almost immediately declared unconstitutional by the local courts of law due to its discriminatory finality as compared to the situation of the other inhabitants,⁶ and subsequently abrogated. Within the federal organization of the country, some provinces, boasting their constitutionally long-recognized autonomy,⁷

3. Decree No. 260/2020, Mar. 12, 2020, [34327] B.O. 1 (Arg.).

4. Decree No. 297/2020, Mar. 20, 2020, [34334] B.O. 3 (Arg.).

5. See Joint Resolution No. 16/MJGGC/20, B.A., Apr. 19, 2020, [5851] B.O., https://documentosboletinoficial.buenosaires.gob.ar/publico/ck_PE-RES-MJGGC-MSGC-MJGGC-16-20-5851.pdf.

6. Juzgado de Primera Instancia en lo Contencioso Administrativo y Tributario Nro. 14 [First Instance Administrative and Taxing Judgeship No. 14], 20/4/2020, “Lanzieri, Silvia c. GCBA,” / amparo, <http://www.sajj.gob.ar/juzgado-contencioso-administrativo-tributario-nro-14-local-ciudad-autonoma-buenos-aires-lanzieri-silvano-gcba-amparo-fa20370011-2020-04-20/123456789-110-0730-2ots-eupmocsollaf?> (select “Ver archivo adjunto”); see also *Declaran inconstitucional el permiso para circular a los mayores de 70 años que dispuso el gobierno de Horacio Rodríguez Larreta*, CLARÍN (Apr. 21, 2020, 8:03 AM), https://www.clarin.com/sociedad/piden-declare-inconstitucional-resolucion-mayores-70-anos-capital-federal_0_zMHY_29cm.html.

7. See arts. 121-29, CONSTITUCIÓN NACIONAL [CONST. NAC.] (The Argentine juridical system differentiates between sovereignty (an attribute of the Argentine Republic, especially before other countries), and autonomy (an attribute of the provinces ever since the Constitution was signed, in 1853, and of the municipalities since the 1994 constitutional amendment)). The main differences between (national) sovereignty and (provincial) autonomy can be inferred from the Argentine Constitution, art. 126, CONSTITUCIÓN NACIONAL [CONST. NAC.], and the municipal autonomy is established in the Argentine Constitution, *id.* art. 123).

have even endeavored to isolate themselves, banning incomers, a restriction that, in some cases, has hindered patients from accessing medical treatment.⁸

These measures, among others, have put us all to the test on every imaginable front. One of them is obviously the legal front, where one of many matters to be considered is the constitutionality of confinement-related restrictions. As usual, we can count on the reasonable scrutiny enshrined in Article 28 of the Argentine Constitution, which has been analyzed in depth by Juan Francisco Linares, a scholar who has found an equivalence between reasonableness and due process.⁹

This is a time-proven tool used by the courts of law to examine the proportionality between the ends sought and the means chosen to achieve those ends.¹⁰ We must ask ourselves, however, if that theoretically simple tool¹¹ is sufficient when it comes to assessing the extraordinary restrictions currently imposed on individual freedom.

From that perspective, it is our understanding that there are two sides to reasonableness and the related scrutiny that should be analyzed here: (a) the need for the relevant regulations to be enacted in accordance with the “due

8. See Corte Suprema de Justicia de la Nación [CSNJ] [National Supreme Court of Justice], 10/9/2020, “Maggi, Mariano c. Corrientes, Provincia de / medida autosatisfactiva,” Fallos (2020-343-930) (Arg.); see also Leonel Rodríguez, *Murió Abigail, la niña de 12 años que no habían dejado cruzar a Santiago del Estero*, LA NACION (Jan. 31, 2021), <https://www.lanacion.com.ar/sociedad/murio-abigail-la-nina-de-12-anos-que-no-habian-dejado-cruzar-a-santiago-nid31012021/> (In this decision, the Argentine Supreme Court ordered the Province of Corrientes to develop the necessary measures to allow the plaintiff to enter the province on a daily basis in order to assist his mother as long as her oncological treatment lasted. In another case that never reached the courts, a girl, aged 12, from the province of Tucumán was inexplicably delayed at the border of province of Santiago del Estero, a province she was trying to enter on foot, together with her father, to access oncological treatment in November 2020).

9. See generally, JUAN FRANCISCO LINARES, RAZONABILIDAD DE LAS LEYES: EL “DEBIDO PROCESO” COMO GARANTÍA INNOMINADA EN LA CONSTITUCIÓN ARGENTINA (1970); see also Estela B. Sacristán, *El virus de Wuhan y la libertad religiosa. El aporte de dos decisiones jurisprudenciales extranjeras*, 130 DERECHO ADMINISTRATIVO—REVISTA DE DOCTRINA, JURISPRUDENCIA, LEGISLACIÓN Y PRÁCTICA 250, 254-57 (2020) (From the methodological perspective, equating between reasonableness and substantive due process, as posed by Linares, allows for the consideration of recent COVID-19 pandemic judgements, such as the one rendered by the Supreme Court of the United States in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), not in the light of the free exercise of religion—as any U.S. law student would do—but mainly within the requirements of substantive due process. Following the equivalence between reasonableness and due process in the field of religious celebrations).

10. See generally JUAN CIANCIARDO, EL CONFLICTIVISMO EN LOS DERECHOS FUNDAMENTALES 300 (2000) (The Supreme Court of Argentina “has carefully avoided to give a precise definition of reasonableness; rather, in most cases the Supreme Court has chosen to state generally that this principle calls for an adequate or reasonable relation between the means used and the ends sought by a legislator.”)

11. *Id.*

process of substantive law,”¹² in order to enable a more stringent and effective scrutiny than the mere adequacy of means and ends, and (b) the matter of the burden of proof in connection with the reasonableness of any given restriction.¹³

It should be borne in mind that reasonable scrutiny starts with a heavily restrictive premise; namely, according to a number of legal precedents, the courts of law should not look into the timing, merit, or convenience of the law¹⁴ or its effectiveness.¹⁵ In other words, when conducting reasonable scrutiny (as the process of checking the means used against the ends sought), the courts of law will not check whether the ends sought by the legislator are lawful, or whether the means selected are convenient. They will just verify the adequate proportionality between means and ends.

In our opinion, that approach is insufficient, for there are at least three sides to reasonable scrutiny: (1) determining who is to bear the burden of proof; (2) the fact that it serves as a mandate addressed to government agencies; and (3) the fact that it is inseparably linked to the notion of proportionality.¹⁶ As far as proportionality is concerned, legal scholars have stated that proportionality can be arithmetic or substantive and that, in its substantive version, it involves three determinations: adequacy or indispensableness, necessity, and proportionality *strictu sensu*.¹⁷

As a result, whenever the courts of law carry out that very limited scrutiny into a given regulation’s adequacy, it turns out that: (a) in order to act reasonably, the legislators simply need to enunciate a theoretical lofty goal so that any means will be found to be proportional and adequate, and (b) the burden of proof regarding the unreasonable nature of a regulation will

12. JUAN CARLOS CASSAGNE, DERECHO ADMINISTRATIVO Y DERECHO PÚBLICO GENERAL 681-82 (2020).

13. *Id.*

14. *See generally* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/7/2012, “Minera del Altiplano SA c. Estado Nacional–PEN / amparo,” Fallos (2012-335-1315) (Arg.).

15. *See generally* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/10/2013, “Grupo Clarín S.A. c. Poder Ejecutivo Nacional / acción meramente declarativa,” Fallos (2013-336-1774) (Arg.).

16. Estela B. Sacristán, *Control de razonabilidad en Argentina (en especial, en la jurisprudencia de la Corte Suprema de Justicia de la Nación)*, 485 REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACIÓN PÚBLICA 43, 52-55 (2019).

17. *See* CIANCIARDO, *supra* note 10, at 322-52; JUAN CIANCIARDO, EL EJERCICIO REGULAR DE LOS DERECHOS 283-87 (2007); JUAN CIANCIARDO, PRINCIPIO DE PROPORCIONALIDAD Y CONCEPTO DE DERECHO 59-71 (2009); JUAN CARLOS CASSAGNE, EL PRINCIPIO DE LEGALIDAD Y EL CONTROL JUDICIAL DE LA DISCRECIONALIDAD ADMINISTRATIVA 23 (2009).

always lie with the party alleging that the regulation is unreasonable;¹⁸ as a result, the State will generally be relieved from any obligation to prove that any such regulation is reasonable, except in the case of the so-called “suspicious categories,” which are quite exceptional in nature.¹⁹

In summary, reasonable scrutiny, in its traditional definition and outside the limited field of suspicious categories, has always been more formal than real.

In light of the above, can reasonable scrutiny be regarded as an effective tool when the end sought is to preserve people’s health in the face of COVID-19 and the means selected to do that is by suffocating individual freedom?

We believe that it cannot, and we intend to look into the matter below.

II. THE FLAWS OF REASONABLE SCRUTINY IN THE ARGENTINE SUPREME COURT’S CASE LAW

Article 28 of the Argentine Constitution provides that “[t]he principles, guaranties and rights acknowledged in the preceding articles shall not be altered by the laws that regulate their exercise,”²⁰ This general principle must be implemented by means of some control system designed to check whether or not a constitutional right is “altered” by a general law or regulation.

For that purpose, the Supreme Court has established the so-called “reasonable scrutiny,” that was first expressly mentioned in the case *Avico c/ De la Pesa*²¹ in the field of the judicial review of a mortgage moratorium law

18. See David Kenny, *Proportionality, the Burden of Proof, and Some Signs of Reconsideration*, 52 IRISH JURIST 141 (2014) (discussing the Canadian rules regarding the burden of proof of reasonableness, which is borne by the State, and the Irish system, where the burden of proof is borne by the party alleging unreasonableness of the law).

19. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/12/2017, “Castillo, Carina Viviana c. Provincia de Salta Ministerio de Educación de la Prov. de Salta / amparo,” Fallos (2017-340-1795) (Arg.) (the so-called “suspicious categories” are comprised of certain laws that operate to generally restrict equality before the law and require the “defendant [to] prove that a different treatment is warranted in the case at hand, because it is the least restrictive means to achieve a substantive end); see also MARIANA SÁNCHEZ CAPARRÓS, CATEGORÍAS SOSPECHOSAS (2020).

20. Art. 28, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

21. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/12/1934, “Avico c. De la Pesa,” Fallos (1934-172-21) (Arg.) (the court used “reasonable scrutiny” to examine the events that gave rise to the law, not whether the ends sought by the law were lawful, but whether the law itself was reasonable and fair, and they found “that the Act was amply justified by the seriousness and scope of the economic crisis; that all the provisions of the Act sought to safeguard a lawful purpose, namely, the public interest compromised by the crisis; and that the means used—a three-year moratorium for payment of principal, and a six-month moratorium for payment of interest, as well as a 6% cap on interest rates—[were] fair and reasonable as a regulation of contractual rights”); see also Jonathan Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century*

enacted under emergency powers and was further developed in *Pedro Inchauspe Hnos. c/ Junta Nacional de Carnes*,²² relating to emergency powers aimed at the creation of a regulatory entity to control the beef business, in the following terms:

By means of Act No. 11.747, Congress sought to prevent monopolies and arbitrary maneuvers or proceedings by industrial companies when buying livestock; create an instrument to fight the organization that dominated beef sales at the time; increase domestic and international beef sales; lower domestic prices by closing the distance between farmers and consumers and enhancing the quality of beef sold. . . . the actions taken consisted of allowing farmers to be directly involved in the control of beef sales, by means of a Board established as an autonomous entity an analysis of the effectiveness of the means selected in order to reach the goals sought, and the matter of whether those or other procedures should have been chosen, escape the jurisdiction and competence of this Supreme Court. The Supreme Court should only find on the matter of the reasonableness of the means chosen by Congress; that is to say, whether those means were proportional to the goals sought by the legislators, and accordingly the Court should decide whether or not the resulting restrictions on individual rights are admissible. [T]his Supreme Court has never believed that its own notions of economic or social convenience or effectiveness should replace the criteria used by Congress in order to decide upon the constitutional validity or invalidity of the law . . . the Supreme Court's analysis and findings should be based on whether or not the laws are in line with constitutional provisions, as provided by Articles 26 and 31 of the Constitution. [I]n actual fact, it does not seem, and plaintiff has not proved, that the means used by the Executive branch and Congress are out of proportion with the purposes sought by them in defending domestic production of beef. On the contrary, the reasons alleged by members from both Chambers of Congress; the heated defense of the law publicly made by all associations of beef producers of Argentina; the fact that no other lawsuits have been filed and no other voices have been heard, except in defense of the law and in repudiation of the actions taken by a few dissenting farmers, and the increase in beef prices that came in the wake of application of the law . . . all

Argentina and the Argentine Elite's Leap of Faith, 46 AM. U.L. REV. 1483, 1568 (1997) (the *Avico* decision followed a similar basis as *Home Building v. Blaisdell*, 290 U.S. 398 (1934)).

22. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/9/1944, "Inchauspe Hnos., Pedro c. Junta Nacional de Carnes / recurso extraordinario," Fallos (1944-199-483) (citations omitted) (Arg.).

these circumstances have convinced this Supreme Court about the reasonableness of the actions implemented by the law in question.²³

This lengthy transcription contains two notions that are necessary for purposes of this analysis: (1) reasonable scrutiny consists of examining whether the “means” chosen by law are proportional to the goals sought by the law; and (2) an analysis of the “effectiveness” of the means used to achieve those goals goes beyond the scope of judicial scrutiny, for the courts of law cannot replace Congress’ “economic or social convenience or effectiveness” criteria in order to make a determination regarding the constitutional validity or invalidity of the laws.

As a result of those principles—regardless of how elevated they may seem, reasonable scrutiny became actually useless and ineffective from the very onset and was reduced to a merely formal verification of the proportionality between means and ends, a test that will always give a favorable result, as it will suffice for a law to declare a very lofty “goal,” which cannot be scrutinized by the courts of law, in order to render any “means” proportional to that goal. This in turn will only allow the courts of law to look partially into the matter, as they are not allowed to look into the means selected, even though both means and ends are factors that need to be jointly analyzed.²⁴

The above notwithstanding, *Inchauspe* findings were replicated by the Supreme Court in a number of subsequent cases, with the monotony that arises from invoking an already established principle. One such example is *Cine Callao*,²⁵ relating to the compulsory hiring of actors by movie theaters to provide live shows between the first and the second movie show, in which the Supreme Court stated that:

[B]y application of the precedent set in Fallos, book 199, page 483, an analysis of the merit or effectiveness of the means selected in order to reach the goals sought, and the matter of whether the means selected by Act No. 14.226 or other means should have been chosen, go beyond the competence of this Court. The Supreme Court should only find on the matter of the reasonableness of the means chosen by Congress; that is to say, whether those means were proportional to the goals sought by the legislators, and accordingly the Court should decide whether or not the resulting restrictions on individual rights are admissible. [T]his Supreme Court has never believed that its own

23. *Id.* at 529-31.

24. See Jake Jabes, *Individual Decision Making* (1978), as reprinted in, *DECISION MAKING APPROACHES AND ANALYSIS* 53 (Anthony G. McGrew & Michael J. Wilson eds., Manchester Univ. Press, 1982).

25. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/6/1960, “Cine Callao,” Fallos (1960-247-122).

notions of economic or social convenience or effectiveness should replace the criteria used by Congress in order to decide upon the constitutional validity or invalidity of the law [T]he Supreme Court's analysis and findings should be based on whether or not the laws are in line with constitutional provisions, as provided by Articles 26 and 31 of the Constitution.²⁶

Thirty years later, in *Peralta c/ Estado Nacional*,²⁷ the Supreme Court resorted to the same principles in order to justify the measures adopted in the context of the so-called "Bonex Plan," an emergency measure (Executive Order 36/1990) which converted time deposits into public bonds (the 1989 Bonos Externos de la República Argentina or BONEX).²⁸ The Supreme Court did that by elevating the goals sought by that restrictive regulation to the level of "preserving the life itself of the Nation and the State,"²⁹ In other words, no matter how stringent and restrictive the means, they will always be adequate and proportional in the light of such any lofty goal. The Supreme Court in fact pointed out that any means resorted to will always be subordinated to that paramount goal; otherwise, according to the Supreme Court, "the State would be deprived of the ability to take measures regarded as useful to bring relief to the community."³⁰ The Supreme Court insisted that

26. *Id.* at 131-32 (citations omitted).

27. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1990, "Peralta, Luis Arcenio c. Estado Nacional (Mrio. de Economía – B.C.R.A.) / amparo," Fallos (1990-313-1513); Miller, *supra* note 21, at 1568 n.603; *see also* Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 291 n.103 (2003).

28. Decree No. 36/1990, Jan. 5, 1990, [26795] B.O. 9 (Arg.); *see generally* Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 136 (2008) (The measure did not imply the conversion of all the time deposit; only any amount above USD 1.000 was converted into bonds. Albeit its effects, the measure was aimed at "reducing the burden of the increasing internal public debt.").

29. CSJN, 27/12/1990, "Peralta, Luis A.," Fallos (1990-313-1540) ("The transparency of governmental decisions, which makes part of the republican form of 'government' may thus be confronted with the need to preserve the life itself of the Nation and the State. This does not mean to say that the goals should be subordinated to the means, an axiological preference that is admittedly a source of the worst evils that may befall society; but it does mean that the timing of transparency needs to be adjusted; otherwise, any other remedy could prove ineffective.").

30. *Id.* at 1545-46 ("In principle, Congress has the power to enact any and all laws and regulations as convenient to exercise the powers vested on the Federal Government. In line with the principles established in the Preamble to the Constitution, Congress has the necessary constitutional powers so as to meet society's requirements, put an end to emergency situations, and deal with any threats against the survival of the State. Whenever a crisis or a situation of public need demands that action be taken in order to safeguard the common interest, Congress may 'postpone, within reasonable limits, performance of obligations arising from vested rights, without violating or eliminating the guaranties that protect property rights.' It is not a matter of making Congress all-powerful or excluding Congress from constitutionality checks; rather, it is a

“[i]t is not up to the courts of law to determine which measures should have been taken; all the courts of law can do is verify that the actions actually taken were necessary and reasonable. The former has been sufficiently proved; the latter is evidenced by the fact that the means selected do not seem excessive in the light of the goals sought.”³¹

Even if it is merely anecdotal, it is worth mentioning that, in the last recital, the Supreme Court referred to the economic crisis prevailing at the time by using a phrase that still rings true today, thirty years later: “[A]rgentine society displays certain features that have been regarded as pathologic, such as the constant deterioration of the economy, which has been going on for decades and is known by all, plus a stubborn state of denial on the part of Argentine society, which clings on to systems that were once viable, to the point of breaking the most basic ties of solidarity that are required in order to maintain the community’s indispensable cohesion.”³² Among those “once viable systems” denounced by the Supreme Court, we can mention unbridled government spending, the resulting need to issue additional banknotes, and a lack of fiscal discipline, three endemic evils of Argentine economic and financial public policies.

During the course of the following economic crisis, which broke out in 2001/2002, the Supreme Court heard and determined the case of *Smith c/ Poder Ejecutivo Nacional*,³³ brought as a result of certain banking restrictions (“*corralito bancario*”) established by Executive Order No. 1570/2001 and related provisions.³⁴ Without disregarding the existing principles, the Supreme Court was more decisive in its application of reasonable scrutiny this time, even though the measure involved was an injunction.

So much can be seen in the relevant portion of the decision’s recitals transcribed below:

It is necessary to remember here the traditional position of this Court in the sense that the reasons of timing, merit or convenience taken into account by the other branches of government when making their own decisions are not subject to judicial scrutiny . . . in principle, all matters associated with the exercise of governmental powers are

matter of not depriving the State of the ability to take measures regarded as useful in order to bring relief to the community.”).

31. *Id.* at 1552.

32. *Id.* at 1556.

33. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/2/2002, “Banco de Galicia y Buenos Aires / solicita intervención urgente en autos: ‘Smith, Carlos Antonio c. Poder Ejecutivo Nacional o Estado Nacional / sumarísimo,’” Fallos (2002-325-43).

34. Decree No. 1570/2001, Dec. 3, 2001 [29787] B.O. 1.

excluded from judicial review. The courts of law, however, will vigorously exercise their constitutional scrutiny into the reasonableness of the laws and administrative acts³⁵ . . . it is not for the court of laws to question the correctness or convenience of the measures implemented by the State. But that does not mean that the courts will simply admit the reasonableness of each and every action taken in order to mitigate the impact of the crisis . . . The restrictions imposed by the State on individuals' ability to exercise their property rights should be reasonable and limited in their duration; those restrictions should be a remedy and not a mutation of the substance or essence of the rights vested under a judgment or contract; and they should be subject to judicial review in terms of their constitutionality, as an emergency—unlike the martial law—does not operate to suspend constitutional guaranties³⁶ . . . while it is true that extraordinary situations authorize the use of extraordinary remedies, the mechanisms designed to overcome an emergency are subject to a limit, namely, the limit of their reasonableness, and accordingly may not alter or lessen the economic value of individual rights. The limitations established by the laws and regulations referred to above constitute an unreasonable exercise of the regulatory powers designed to mitigate the crisis³⁷ . . . a person's right to freely dispose of their funds invested or deposited in a banking or financial institution, irrespective of any legal provisions whereby that right is acknowledged, is based on Constitutional principles; there can be no doubt that, when that right is conditioned or limited, property rights are adversely affected and so is the goal of establishing justice. When those constitutional principles are adversely affected as explained above, given the seriousness of the matter and the absence of decisive reasons to justify the legal need to do so, the related laws and regulations cannot possibly be regarded as reasonable, and accordingly are not supported by the provisions of Article 28 of the Constitution.³⁸

At the time, we had our hopes up when we read the phrase “that does not mean that the courts will simply admit the reasonableness of each and every action taken.” We believed that the Supreme Court was about to overcome the self-limitations created in *Inchauspe* and would move on to an in-depth scrutiny into the proportionality between means and ends. However, in *Smith*—where the Supreme Court ratified the lower court's judgment, which had granted injunctive relief as sought by plaintiff, in a clear property

35. CSJN, 1/2/2002, “Banco de Galicia y Buenos Aires” Fallos (2002-325-36).

36. *Id.* at 37-38.

37. *Id.* at 38.

38. *Id.*

rights protection attitude³⁹—the Supreme Court did not specifically consider the matter of the lack of proportion or the unreasonableness of the means used in the light of the ends sought.⁴⁰

As a result, all the judicial energy deployed in *Smith* did not operate to change the standards of reasonable scrutiny originally established in *Inchauspe*. Those standards have been repeatedly used in recent cases, such as *Asociación Francesa Filantrópica y de Beneficencia / quiebra*,⁴¹ where the Supreme Court held that:

[I]n line with the principle of separation of powers enshrined in the Argentine Constitution, it is not up to the courts of law to determine how a juridical institution should be actually realized, as that is a prerogative of political powers. Judicial review should be substantially limited to checking that the exercise of the powers of the other branches of government stays within the confines of reasonableness and does not breach the specific prohibitions established in the Constitution or, where applicable, in the law. The courts of law are not competent to judge the correctness or convenience of the means used by the other branches of government, within the scope of their own prerogatives, to reach the goals sought.⁴²

This confirms that the courts of law in Argentina will not look into the goals sought or the means selected in order to reach those goals. The courts of law will determine whether the means are proportional to the goals established in the law. In those conditions, reasonable scrutiny is a weak and fragile tool used by the Supreme Court in the discretionary manner permitted by its own legal precedents. Within those limitations, reasonable scrutiny conducted by the Supreme Court is often purely formal, for the means selected are always subordinated to a public interest need that is often established by the Supreme Court itself. For example, by alleging “times of

39. Spector, *supra* note 28, at 140 (quoting Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/2/2002, “Smith, Carlos Antonio c. Poder Ejecutivo Nacional / medidas cautelares,” Fallos (2002-325-28) (pointing out how that *Smith* represents “a curious return to *Lochner*-type jurisprudence”).

40. See generally Juan Cianciardo, *Una aplicación cuestionable del principio de razonabilidad*, LA LEY (Mar. 14, 2020), <http://www.saij.gob.ar/juan-cianciardo-una-aplicacion-cuestionable-principio-razonabilidad-dacf020011-2002-03-14/123456789-0abc-defg1100-20fcanirtcod>.

41. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/11/2018/ “Asociación Francesa Filantrópica y de Beneficencia / quiebra / incidente de verificación de crédito por L.A.R.,” Fallos (2018-341-1511) (Arg.).

42. *Id.*

dramatic institutional and social crisis in the life of the Republic.”⁴³ As a result, even though the Supreme Court claims to be responsible for verifying the existence of a “direct, actual and substantial relationship between the means used and the goals sought,”⁴⁴ the room for reasonable scrutiny is extremely small.

The reasonableness of arrests ordered by the Executive branch of government under the *état de siege* (“*estado de sitio*”) has weakened as well, even though the related precedents were established by a Supreme Court whose members were different from the Justices currently in office. In this field, Supreme Court case law had made major strides in the cases of *Jacobo Timerman*⁴⁵ and *Benito Moya*,⁴⁶ but the case of *Jorge H. Granada*⁴⁷—at the legislative stage—was a step back, even though the then recently enacted Habeas Corpus Act (Act No. 23.098)⁴⁸ authorized an enhanced judicial scrutiny.⁴⁹ In hearing the case, the Supreme Court understood that Act No. 23.098 had not intended to stray from the traditional standard of the courts’ inability to look into the decision to instate the martial law.⁵⁰ As far as the

43. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/8/2016, “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería,” Fallos (2016-339-1077) (Arg.).

44. *Id.*

45. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería,” Fallos (1978-300-816) (Arg.).

46. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/8/2016, “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería,” Fallos (1981-303-696) (Arg.).

47. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/12/1985, “Granada, Jorge Horacio / recurso de hábeas Corpus,” Fallos (1985-307-2284) (Arg.).

48. Law No. 23098, Oct. 25, 1984, [25528] B.O. 1 (Arg.).

49. Estela B. Sacristán, *Control judicial del estado de sitio y de la intervención federal*, 1 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS (2014), §§ 3.2-3.4 (Habeas Corpus Act No. 23098 was enacted in 1984. Pursuant to the provisions of Section 4 of the Act, the courts of law were authorized, among other things, to look into the legitimacy of a decision to instate the martial law, *id.* art. 4.1, and the correlation between an arrest warrant and the state of affairs that gave rise to the martial law in the first place, *id.* § 4.2. Thus, Congress expanded the scope of judicial powers, by allowing the courts of law to review not only the acts of application of the martial law, but the very instatement of the martial law in terms of its legitimacy.).

50. *Id.*; CSJN, 3/12/1985, “Granada, Jorge Horacio,” Fallos (1985-307-2308) (“This Court does not believe that Congress intended to stray from the Supreme Court’s long-standing precedents, according to which the legislative and executive branches of government have the exclusive power to assess the factual circumstances that make it advisable to instate the martial law. . . The Court’s decision regarding legitimacy, referred to in Section 4 of Act No. 23.098, is not about the nature of the situation in which the martial law is instated, but about other elements that are really associated with the notion of legitimacy.”).

substantive matter is concerned, the majority of Justices⁵¹ rejected the habeas corpus by using a water-downed reasonable scrutiny. This weak scrutiny meant, in fact, that the Supreme Court missed a “persuasive opportunity,” granting the government “substantial latitude,” as Miller has affirmed.⁵² While the Supreme Court admitted that such scrutiny existed in the terms of the *Timerman* case as later ratified by Section 4(2) of Act No. 23.098,⁵³ the Court failed to look deeply into the facts of the case in order to determine whether the governmental decision involved was proportional to the ends sought by instating the martial law. The Supreme Court in short alleged that the arrest was not free from an actual connection between the cause of arrest and the causes for instating the *état de siege*.⁵⁴

III. THE MATTER IN COMPARATIVE LAW

It is worth considering, albeit briefly, the state of the matter in comparative law. For that purpose, we have selected two foreign legal systems which have been resorted to by Argentine case law and in which reasonable scrutiny appears to be more effective than it is in Argentina.

The first such system is the U.S. legal system, where substantive due process involves three instances of judicial scrutiny, one of which can be linked to the balancing test, which in certain aspects resembles the proportionality scrutiny.⁵⁵

The second legal system considered here is the German legal system, where: (i) proportionality is regarded as a protection against the power of the State;⁵⁶ (ii) it is taken for granted that certain means are categorically forbidden, and that the end sought is lawful;⁵⁷ (iii) the abovementioned scrutiny involves three steps (adequacy, necessity, and balance or

51. See CSJN, 3/12/1985, “Granada, Jorge Horacio,” Fallos (1985-307-2312) (Fayt, J. disagreed with the court’s rationale).

52. Johnathan M. Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983-1999)*, 7 SW. J.L. & TRADE AM. 369, 390 (2000).

53. Law No. 23098, Oct. 25, 1984, [25528] B.O. 1 (Arg.).

54. CFed, 28/10/1985, “Granada, Jorge Horacio,” Fallos (1985-307-2308) (Belluscio, J. dissenting) (reasoning the report submitted by the Ministry of Homeland Security was not enough to determine the cause of arrest, and accordingly a reasonableness scrutiny was impossible and demanding that notice be served on the President of Argentina, asking him to provide additional information).

55. See Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT’L J. CONST. L. 263, 265 (2010).

56. THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718-37 (Michel Rosenfeld & Andras Sajó eds., 2012).

57. Compare *id.*, with Gertrude Lubbe-Wolff, *The Principles of Proportionality in the Case-Law of the German Federal Constitutional Court*, 34 HUM. RTS. L.J. 1, 1-6, 13-14 (2014).

proportionality in strict sense),⁵⁸ which must be taken in that order;⁵⁹ (iv) the problem created by the burden of proof is solved on a case-by-case basis,⁶⁰ or else, the State is burdened with the obligation to prove the existence of proportionality.⁶¹ On the other hand, the principle of reasonableness, which is applicable to all government branches, encourages legislators to be reasonable.⁶²

It should be noted, however, that the German system starts from completely different constitutional principles, for the scrutiny entrusted to the Federal Constitutional Tribunal is not the same scrutiny utilized by the Argentinian Supreme Court and judges. As a result, the reference to the German system made here is merely aimed at understanding the intensity that reasonable scrutiny has in other legal systems. The U.S. system, on the other hand, is a different story, as their constitutional model has been generally followed by Argentina, even though both constitutions are not identical.⁶³

A. *United States*

Due process of law is guaranteed by the Fifth⁶⁴ and Fourteenth Amendments to the Constitution;⁶⁵ where the former is binding on the federal government, the latter is applicable to state governments. Using similar language, both Amendments provide that no person shall be deprived of life, liberty or property without due process of law. This resulted in development of procedural due process and substantive due process. As the name suggests, the former guaranties that any deprivation of life, property, or liberty will take place under legally established proceedings.⁶⁶ This applies not only to

58. Jan Sieckmann, *Legislation as Implementation of Constitutional Law*, in THE RATIONALITY AND JUSTIFICATION OF LEGISLATION, ESSAYS IN JURISPRUDENCE 107, 112 (Luc J. Wintgens & A. Daniel Oliver-Lalana eds., 2013).

59. Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 TORONTO U.L.J. 383, 397 (2007).

60. See THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 56, at 733-34.

61. Cohen-Eliya & Porat, *supra* note 55, at 267.

62. See Sieckmann, *supra* note 58, at 118 (“[I]mplementation of constitutional law is bound together by the principle of proportionality, which is nothing by a demand for rationality in the decisions made and the rules enacted, phrased in legal terminology”).

63. *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, *supra* note 1, at 645; see also Franklin D. Rogers, Jr., *Similarities and Differences in Letter and Spirit Between the Constitutions of the United States and Argentina*, 40 GEO. L.J. 582, 607 (1952).

64. U.S. CONST. amend. V.

65. U.S. CONST. amend. XIV, § 1.

66. Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J. L. & PUB. POL’Y 283, 330 (2012).

the judicial and administrative authorities, but also to the legislative authorities. The latter in turn demands, from both the federal and state governments, that any such deprivation have a rational basis, that is to say, it must be reasonable. In summary, the substantive due process looks into the “substance” of the law, in terms of its consistency with the Constitution.⁶⁷

Historically, that rational basis scrutiny is clearly divided into two different stages. Until 1937, it was intensely exercised on laws that restricted rights of an economic nature. The most emblematic case of that period was probably *Lochner v. New York*,⁶⁸ where a state law (the Bakeshop Act) that limited working hours at bakeries up to a maximum of sixty hours a week or ten hours per day was found to be unconstitutional. The Supreme Court found that the Bakeshop Act violated the freedom to contract; a decision that contributes to the so-called “formalism” a context of which the courts of law protected individual natural rights (the right to life, liberty and property).

In 1937 the Supreme Court changed course and ceased to look into laws of an economic nature, focusing instead on laws that operated to restrict non-economic rights. While this trend was already present in cases such as *Adkins v. Children’s Hospital*⁶⁹ and *West Coast Hotel v. Parrish*,⁷⁰ where the Supreme Court ratified certain laws that imposed payment of minimum wages, this new stage formally began with *United States v. Carolene Products Company*,⁷¹ where the Supreme Court declared the constitutionality of a federal law that prohibited interstate sales of a certain type of milk (filled milk). More specifically, footnote 4 to Justice Harlan Fiske Stone’s vote provides that, from then onwards, the presumption of constitutionality of any law that operates to limit personal rights, such as religious rights, or laws affecting racial minorities, was to be much more limited in scope.⁷²

67. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE §15.4(a), (Thompson-Reuters-West ed., 5th ed. 2012).

68. 198 U.S. 45 (1905).

69. 261 U.S. 525 (1923).

70. 300 U.S. 379 (1937).

71. 304 U.S. 144 (1938).

72. *Id.* at 152 n.4 (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”) (citations omitted).

Under those principles, scrutiny of the law takes place at three levels of intensity. The first such level is the notion of “rational basis,” according to which a law is constitutional if it is “rationally related to a legitimate government purpose.”⁷³ In this case, it is not necessary for the law to have that goal specifically; what matters is that the means employed should be reasonable. The “rational basis” test requires the challenger to prove the unconstitutionality of the law. In other words, a law will be found to be constitutional, unless the challenger proves otherwise.

The second level of scrutiny is the so-called intermediate scrutiny. This test demands that a law be “substantially related to an important government purpose.”⁷⁴ Let us consider the differences between the first and second level of scrutiny. At the first level, the law needs to be “rationally” related to a “legitimate” government purpose. At the second level, it must be “substantially” related to an “important” government purpose. As can be seen, the relation between the means used and the ends sought by a law is much closer under the second test than it is under the first. Under this test, the government or whoever seeks to uphold a law needs to prove that the law is in fact constitutional.⁷⁵ The “intermediate scrutiny” has been used in cases involving discrimination⁷⁶ or restrictions against freedom of speech.⁷⁷

Finally, the most intense form of scrutiny is “strict scrutiny,” under which a law will be deemed constitutional only if it is necessary to further a “compelling government purpose.” Accordingly, the Supreme Court must verify that the purpose sought by the government when imposing a restriction

73. See *Pennell v. City of San José*, 485 U.S. 1 (1988); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

74. *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 317 (2d Cir. 2003) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976))

75. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (The Supreme Court stated: “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.”).

76. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (discrimination based on gender); *Plyler v. Doe*, 457 U.S. 202, 248 (1983) (discrimination against foreign children in connection with education); *Lehr v. Robertson*, 463 U.S. 248, 266 (1988) (discrimination against children born out of wedlock).

77. *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001) and freedom of speech in public fora, *United States v. Virginia*, 518 U.S. 515, 529 (1996).

is imperative and crucial.⁷⁸ It is up to the government to prove as much;⁷⁹ also, the government must prove that the law is “necessary” as a means to achieve that goal.⁸⁰ In this case, the burden of proof is more demanding, as the government needs to prove that the least restrictive means or alternative has been selected; otherwise, it would not be “necessary.”⁸¹ Accordingly, under this test, the Supreme Court will consider not only the purpose, or goal, sought but also the means used. It has been said that, once “strict scrutiny” is mentioned, a law is unlikely to escape a judicial finding of invalidity; when a judge embarks on a search for a compelling government purpose, they have probably made up their mind already.⁸²

B. *Germany*

In Germany, the proportionality scrutiny has a rich history that, after the Second World War, eventually led to the constitutional status of the respective principle (not because it is actually enshrined in the Constitution, but rather, because it can be implicitly derived from the Constitutional principle of *Rechtsstaat*).⁸³ The proportionality test is used to check the imposition of limitations on rights, and not only to promote them as it happened in the past; and the Federal Constitutional Tribunal has shifted attention from the two first subtests (adequacy and necessity) to the third one (proportionality in a strict sense).⁸⁴

Additionally, the Federal Constitutional Tribunal has developed a rather stringent doctrine that allows judicial review of what could be regarded as the substantive procedural aspects of the law (as opposed to the merely formal procedural aspects). The matter has been exhaustively analyzed in

78. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Sherbert v. Verner*, 374 U.S. 398 (1963).

79. *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest”) (citing *Shaw v. Reno*, 509 U.S. 630, 653-57 (1993)).

80. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”).

81. *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 106 (1991).

82. Kenneth L. Karst, *Compelling State Interest*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 477 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

83. Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union* 23-31 (NYU School of L. Jean Monnet Working Paper Series, Working Papers No. 04/09, 2009), <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf>.

84. Cohen-Eliya & Porat, *supra* note 55, at 263-86.

Argentina by Rodolfo Barra,⁸⁵ Santiago Carrillo and Mariano L. Cordeiro.⁸⁶ In a few words, according to these authors, through that doctrine the Constitutional Tribunal demands (a) public justification of the laws that regulate fundamental individual rights, (b) that any such laws be supported by the facts or evidence considered, and (c) an assessment of their impact. In accordance with those standards, a law may be found to be unconstitutional where its rationality cannot be proven, to the extent that any such law is contrary to the Constitution. The basic notion behind this doctrine is that legislators' discretionary powers do not operate to release them from the obligation to act rationally. This doctrine seeks to overcome the dichotomy between judicial review based on the contents or substance of the law, and judicial review based solely on the procedural aspects of the law.

One instance of judicial scrutiny under this standard can be seen in the case *Hartz IV* determined in 2010,⁸⁷ where the parties disagreed as to the constitutionality of an unemployment benefit scheme known as “*Arbeitslosengeld II, ALG II* or *Hartz IV*.” The German Constitutional Tribunal found that, under the *Hartz IV* law, the amount of the unemployment benefit had not been determined in accordance with the Constitution, for its calculation had deviated from the statistical model “with no factual justification.”⁸⁸

In other words, the Court did not reject the calculation method used, but concluded that the formula used in order to update the benefit over time was not rationally related to the cost of living for people close to the poverty line, while the formula employed to calculate benefits per child lacked any methodological justification. The law was invalidated on the grounds that it was based on an inadequate data collection process that failed to ensure due transparency. It should be noted, however, that Barra expressed some

85. See generally 2 RODOLFO CARLOS BARRA, *DERECHO ADMINISTRATIVO: ACTO ADMINISTRATIVO Y REGLAMENTOS* 174-82 (2018).

86. See generally SANTIAGO R. CARRILLO & MARIANO L. CORDEIRO, *Foundations for the Development of Rational Lawmaking in Argentina*, in 4 *THE THEORY AND PRACTICE OF LEGISLATION* 237 (2016), <https://www.tandfonline.com/eprint/nBgN2s35iFMV97AHZ7a5/full>; SANTIAGO R. CARRILLO, *La racionalidad del proceso legislativo como estándar de control judicial (legisprudence)*, *LA LEY*, at 635-47 (2016); SANTIAGO R. CARRILLO, *La racionalidad del proceso legislativo como estándar de control judicial (legisprudence)*, 483 *REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACIÓN PÚBLICA*, 21-38 (2018).

87. zum Urteil des Ersten Senats vom 9. Februar 2010 [*Hartz IV* GFCC, Judgment of the first senate dated Feb. 9, 2010] 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, https://www.escri-net.org/sites/default/files/caselaw/hartz_iv_judgment_german_1s20100209_1bv1000109.pdf (last visited Dec. 27, 2021); *SOZIALGESETZBUCH [SGB] [SOCIAL CODE]*, § 12, http://www.gesetze-im-internet.de/sgeb_2/_12.html.

88. *Id.*

reservations regarding judicial review of the economic issues considered by Congress, based on the notion of separation of powers.⁸⁹

IV. THE CURRENT SITUATION IN ARGENTINA

A. Before COVID-19

While COVID-19 has monopolized everyone's attention, we should not forget that, in December 2019, as soon as the new president-elect had taken oath of office, a new emergency law delegated every imaginable power unto the Executive branch of government, except for the powers associated with a sanitary emergency arising from the coronavirus, a pandemic which was, at the time, completely unknown.

As soon as the new administration took office, the Argentine Congress handed all legislative powers over to the Executive branch, by declaring a state of emergency that exceeded any prior declaration in that regard, both in terms of its scope and its intensity.

By adding and building on all previous experiences—which were numerous⁹⁰—the so-called “Ley de Solidaridad Social y Reactivación Productiva en el Marco de la Emergencia Pública,” declared a state of economic, financial, fiscal, administrative, social security, public-utility-rate, energy, sanitation and social emergency, and delegated unto the Executive branch “all the powers covered in this Act.”⁹¹

89. BARRA, *supra* note 85, at 181-82. (In his opinion, “The proportionality scrutiny, if taken to the extreme of assessing the economic issues considered (or not considered) by Congress when enacting a law, can put legislative powers in the hands of judges that are not elected (in their origin and responsibility) and accordingly are not direct representatives of the people, and who are not involved in the play of political forces of any truly democratic system. The danger here is to delegate ultimate governing powers unto a group of toga-wearing aristocrats, who in the case of Argentina remain in office for life . . . and may only be held liable and removed if they commit a crime or other equally serious wrongdoing. Naturally, this criticism will not apply where judicial review is limited to the merely administrative activities of either Congress or the public administration, as those activities as ‘sublegal’ in nature, that is to say, they are subject to the sovereignty of the law, which the courts of law have an obligation to guaranty.”).

90. We have to bear in mind that, at least ever since democracy was reinstated in Argentina, i.e., ever since 1983, the following (mainly economic) emergency measures were adopted: Decree No. 1096/1985, June 17, 1985, [25699] B.O. 1 (Arg.) instating the “Austral” currency; Law No. 23696, Aug. 23, 1989, [26702] B.O. 2 (Arg.); Law No. 23697, Sep. 25, 1989, [26725] B.O. 1 (Arg.) declaring the economic and administrative emergencies; Law No. 25344, Nov. 21, 2000, [29530] B.O. 1 (Arg.) declaring the emergency of the public sector (except for the Law 23696, *supra*, privatization contracts, i.e., public services concessions and licenses); Law No. 25561, Jan. 7, 2002, [29810] B.O. 1 (Arg.) declaring the public emergency in social, economic, administrative, financial and exchange matters.

91. Law No. 27541, art. 1, Dec. 23, 2019, [34268] B.O. 1 (Arg.).

While the Act pretended to meet the requirements set forth in Article 76 of the Argentine Constitution by setting the “conditions” or grounds for this delegation of powers, that was a mere formality.⁹² The powers delegated were so numerous and the “conditions” established in the law were so vague that the separation between Congress and the Executive branch of government was actually reduced to an imaginary line. Every substantial power vested on Congress by the Constitution has been handed over to the Executive branch ever since December 2019.

For example, as the only “condition” for all the powers delegated in connection with tax matters, the Act asked the Executive branch to “generate the conditions to achieve fiscal sustainability.”⁹³ That extremely broad goal has the power to invalidate the principle of tax legality (no taxation without representation) and, at the same time, wipes out the constitutional prohibition to issue Executive Orders in tax matters.⁹⁴ From now on, the Executive branch of government will be amply authorized by Congress to issue any sort of tax regulations designed to achieve “fiscal sustainability,” that is to say, to capture as many resources as the Executive sees fit in order to spend as much as they believe to be necessary. This wide delegation scenario may have implicitly allowed the Federal Taxing Administration to discretionary demand, from taxpayers’ accountants, a disclosure of the formers’ tax

92. Art. 76, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (“The legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress.”).

93. Law No. 27541, § 2(d), Dec. 23, 2019, [34268] B.O. 2 (Arg.).

94. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/10/2003, “Selcro S.A. c. Jefatura Gabinete Ministros / amparo,” Fallos (2003-326-4251) (Arg.) (holding that the constitutional prohibition to issue Urgent and Necessary Executive Orders on tax matters is also applicable to Delegated Decrees); Art. 99, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), regulating Urgent and Necessary Executive Orders (“The President of the Nation has the following powers: . . . 3. The Executive Power shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void. Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, he shall issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet. Within the term of ten days, the Chief of the Ministerial Cabinet shall personally submit the decision to the consideration of the Joint Standing Committee of Congress, which shall be composed according to the proportion of the political representation of the parties in each House. Within the term of ten days, this committee shall submit its report to the plenary meeting of each House for its specific consideration and it shall be immediately discussed by both Houses. A special law enacted with the absolute majority of all the members of each House shall regulate the procedure and scope of Congress participation.”).

avoidance schemes,⁹⁵ a measure that clearly affects the confidentiality between client and accountant.⁹⁶

Additionally, rather than limiting fiscal indiscipline—an endemic problem that has long plagued Argentina—the Law 27.541 tends to increase it, as the extraordinary tax burden imposed by said Law has fallen on productive sectors that are already heavily taxed. These are the same sectors that systematically move the economy forward and bear the cost of Argentina’s extraordinary government spending—yet another endemic problem. Instead, a priority for any emergency law should include taking steps to ensure a fair distribution of the tax burden and reduce government spending. However, Congress has chosen to ignore the problem, as nothing in the Act is designed to reach that very crucial goal.

The same can be said about the remaining grounds for the delegation of powers established in Law 27.541, all of which involve a vague notion of “sustainability,” for instance, in the case of public indebtedness (Section 2 (a)) or “productive sustainability,” in the case of public utility rates (Section 2 (b)).

On the other hand, we must not be deceived by the limited term of validity of the Law 27.541 (until December 31, 2020);⁹⁷ experience has shown that a single provision, added right before a law is enacted by Congress or hidden somewhere in the Budget Act, is enough to extend the term of validity of an emergency law for an indefinite period of time.⁹⁸

While the wording of the Act is quite detailed in some respects—a detailed analysis certainly exceeds the scope of this article—what is most important is not what the Act expressly provides, but rather, the extraordinary

95. Resolución General No. 4839/2020, Oct. 23, 2020, [34504] B.O. 66 (Arg.).

96. Juzgado Federal [Juzg. Fed.] 20/1/2021, “Consejo Profesional de Ciencias Económicas de la Provincia de Santa Cruz c. Administración Federal de Ingresos Públicos - Dirección General Impositiva / medida cautelar autónoma,” <http://www.saij.gob.ar/juzgado-federal-federal-santa-cruz-consejo-profesional-ciencias-economicas-provincia-santa-cruz-administracion-federal-ingresos-publicos-direccion-general-impositiva-medida-cautelar-autonoma-fa21840000-2021-01-20/123456789-000-0481-2ots-eupmocsollaf?&o=2&f=Total%7CFecha/2021/01%7CEstado%20de%20Vigencia%5B%2C1%5D%7CTema%5B%2C1%5D%7COrganismo%5B%2C1%5D%7CAutor%5B%2C1%5D%7CJurisdicci%F3n/Federal/Santa%20Cruz%7CTribunal%5B%2C1%5D%7CPublicaci%F3n%5B%2C1%5D%7CColecci%F3n%20tem%Elitica%5B%2C1%5D%7CTipo%20de%20Documento/Jurisprudencia&t=3> (select “Ver archivo adjunto”) (Courts have been receptive to the confidentiality grievance: see the injunction granted by the Juzgado Federal de Primera Instancia de Rio Gallegos [First Instance Federal Judgeship of Rio Gallegos]).

97. Law No. 27541, § 2(d), Dec. 23, 2019, [34268] B.O. 1 (Arg.).

98. The social emergency declared by Law No. 25561, Jan. 7, 2002, [29810] B.O. 1 (Arg.), was in force until December 31, 2019, creating an overlapping with the social emergency declared in Law No. 27541, § 2(d), Dec. 23, 2019, [34268] B.O. 1 (Arg.).

accumulation of implicit powers handed over to the Executive branch of government, to the detriment of the principle of separation of powers.

Thanks to this Act, there is no limit on the Executive's power to handle the Nation's foreign debt, regulate all public utility rates, fix the amount of salaries and pensions, handle distribution of medicines, and generally do anything as the Executive in its sole discretion may deem necessary in order to "foster economic reactivation"⁹⁹ which is a way of delegating the "Clause of Progress" fully unto the President and his Ministers.¹⁰⁰

We must not be misled: this is no emergency law. It is an elaborate scheme designed to transfer all Congressional power to the Executive branch in one single move, with the excuse of an emergency that, in any case, should have been tackled from the opposite side: by cutting down on government spending and creating economic incentives that this Act in actual practice has eliminated, as it has created broad areas of Presidential discretion, which is absolutely unpredictable.

While it is true that "hyper-presidentialism" is one of Argentina's long-standing problems, which in fact was targeted in the context of the 1994 Constitutional reform to no avail,¹⁰¹ Law 27.541 only aggravates the problem exponentially. Once again, the President has been conferred extraordinary legislative powers by an Act of Congress that will be the "law of all laws" and will prevail for an indefinite period of time, as the Constitution is sacrificed on the altar of emergency.

On top of it all, before the COVID-19 pandemic broke out, the President of Argentina had issued twelve "Urgent and Necessary" Executive Orders ("Decretos de Necesidad y Urgencia" or DNUs) in less than three months in office. The first such Executive Order was DNU No. 7/2019,¹⁰² signed on the very same date when the President took office, which operated to amend the Ministries Act. There was also DNU No. 214/2020,¹⁰³ which operated to amend the Federal Intelligence Act. Considering that Congress had held ordinary sessions only a few days earlier, that particular matter could not possibly be regarded as so necessary or urgent that Congress could not attend to it.

We cannot and should not forget any of this, for it will remain a permanent question during the health emergency and once Argentina's "aislamiento social" or "social distancing" is over.

99. Law No. 27541, § 2(c), Dec. 23, 2019, [34268] B.O. 1 (Arg.).

100. *See generally id.*

101. *Id.* § 2(d).

102. Decree No. 7/2019, Dec. 11, 2019, [34258] B.O. 6 (Arg.).

103. Decree No. 214/2020, Mar. 5, 2020, [34322] B.O. 3 (Arg.).

B. After COVID-19

In addition to all of the above, there is now the matter of COVID-19, which has resulted in a new, far more intensive and extensive wave of Urgent and Necessary Executive Orders, including a few that have severely restricted individual freedom by imposing the so-called “Mandatory Social and Preventive Confinement,” originally established by DNU 297/2020¹⁰⁴ and subsequently extended, as of the date of this article, until October 26, 2020 by DNU 814/2020.¹⁰⁵ This mandatory confinement, which has been in force for over 200 days now, currently intermingled with “Social, Preventive and Mandatory Distancing,” will probably be extended further, as a result of the development of the hospital (and especially intensive care unit) bed demand.

In summary, by October 2020, (a) we were indefinitely condemned to living a virtual life, allowed by the laws to travel interjurisdictionally to our law firm once a week, perhaps to return and pick up books;¹⁰⁶ (b) the Judiciary—a conservative surrounding in which the Electronic Filing System Law (“ley de expediente electrónico”)¹⁰⁷ was slowly being materialized—had to shift, by virtue of agile Supreme Court regulations (“acordadas”), from being on permanent leave since the confinement started on March 20, 2020, to a ban on paper filings and the implementation of mandatory judicial email addresses to initiate the process of remotely filing lawsuits and submitting other briefs and, in general, an enhancement of the file management system that homes thousands of cases across the different courts of appeals and their first instance judgeships,¹⁰⁸ and (c) the main legislative duties have been entrusted by Congress to the Executive branch of

104. Decree No. 297/2020, Mar. 20, 2020, [34334] B.O. 3 (Arg.).

105. Decree No. 814/2020, Oct. 26, 2020, [34505] B.O. 12 (Arg.).

106. Nevertheless, there is an injunction that has been granted in Cámara Nacional de Apelaciones en lo Federal y Contencioso Administrativo de la Capital Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation of the Federal Capital], 23/10/2020, “Incidente de Medida Cautelar en autos: Colegio Público de Abogados de la Capital Federal c. E.N. / amparo ley 16986,” (2020-10.068/2020/2) (Arg.). The Court of Appeals for Administrative Litigation found the one-day-per-week cap, depending on the last digit of the personal identification number (“document nacional de identidad”) “evidently insufficient.” *Id.*

107. Law No. 26685, July 7, 2011, [32186] B.O. 1 (Arg.).

108. The Public Lawyers’ Bar (“Colegio Público de Abogados de Capital Federal”) has published fifteen guides regarding the most varied aspects of electronic filings, such as how to electronically serve a notice; how to scan briefs and documents; how to submit a filing in portable document format (PDF); how to convert a Word document into a PDF; how to electronically submit a case to labor law mediation; how to obtain the lawyers’ authorization to circulate in the streets; how to electronically pay the filing fee; etc. See *Guías prácticas. Ejercicio profesional*, COLEGIO PÚBLICO DE ABOGADOS DE LA CAPITAL FEDERAL, <https://www.cpacf.org.ar/noticia.php?id=7704&sec=39> (last visited Dec. 27, 2021).

government, which now rules our destiny, in every area, as virtually the sole and paramount legislator. On top of it all, Congressional review of DNUs, initially established as an extremely weak tool by Act No. 26.122, has been statistically non-existent.¹⁰⁹

At the same time, amidst the pandemic, the Executive branch submitted a bill to reform the Judicial branch;¹¹⁰ is witnessing the occupation of private lands;¹¹¹ while the Central Bank of the Argentine Republic's reserves are nearing the exhaustion level, and the monetary expansion is notorious.¹¹² All these serious matters pose questions regarding their timing, not to mention their wisdom and coherence and, eventually, their ability to find their way to the judicial arena, an area in which, again, the loftiest aims may be validated by means of the lenient scrutiny test depicted in Part II.

Of course, a different course of events could be achieved if there was a vigorous control of DNUs on behalf of the respective Bicameral Committee and especially if the law established, instead of a House plus Senate rejection requirement to strike them down, a less demanding method, such as a House plus Senate requirement to allow them to enter into force. The Judicial branch, and especially the Supreme Court, could be reorganized by the Congress, but within the limitations set by the Constitution and the Supreme Court case law that interprets it. Property rights—already damaged by COVID-19 restrictions, like price-fixing and private production controls—demand a strong reaction, especially on behalf of the courts, not only for the sake of current property right holders but also for the establishment of the minimum necessary legal certainty that can enable the return of capital and investment. Finally, at the bottom of almost every right, in a country in which the volume of public employment and the amount of services to be provided on a gratuitous basis by the State—be it national, provincial or municipal—is outstanding, fiscal discipline in a corruption-free environment becomes a most vital goal that cannot, certainly, be achieved by increasing the fiscal

109. See ALFONSO SANTIAGO ET AL., *EL CONTROL DEL CONGRESO SOBRE LA ACTIVIDAD NORMATIVA DEL PODER EJECUTIVO* 100 (2019).

110. *Proyecto de Ley de Reforma Judicial*, SISTEMA ARGENTINO DE INFORMÁTICA JURÍDICA, (July 30, 2020) <http://www.saij.gob.ar/proyecto-ley-reforma-judicial-proyecto-ley-reforma-justicia-federal-nv25102-2020-07-30/123456789-0abc-201-52ti-lpsedadevon>; see also Decree No. 635/2020, July 30, 2020, [34437] B.O. 6 (Arg.), creating, in the Argentine Presidency, a consultation council for the strengthening of the Judiciary and of the Ministerio Público.

111. Gabriel Podestá, *Las 12 provincias donde hay ocupaciones ilegales de tierra*, LA NACION (Oct. 25, 2020), <https://www.lanacion.com.ar/politica/las-12-provincias-donde-hay-ocupaciones-ilegales-nid2488716>.

112. Compare the reserves on October 28, 2020 (39,886 million U.S. dollars) against the reserves on June 25, 2018 (63,313 million U.S. dollars). See *Reservas internacionales del BCRA en millones de dólares*, BANCO CENTRAL DE LA REPÚBLICA ARGENTINA, http://www.bcra.gov.ar/PublicacionesEstadisticas/Principales_variables_datos.asp (latest visited Dec. 23, 2021).

pressure or by means of new taxes—not even constitutionally dubious taxes aimed at overcoming the COVID-19 pandemic.

V. CONCLUSION

It seems obvious to us that the flaws of reasonable scrutiny referred to in Part II above render it completely ineffective when it comes to facing the challenges currently prevailing in Argentina. Suffice it to say that, if someone challenges any law or regulation enacted either before or after the COVID-19 pandemic, they will have to prove that any such law or regulation is unconstitutional, which is a tall order indeed, considering the irreproachable goals enunciated by those laws and regulations. Cases like the ones reviewed in Part II, above, could perhaps have been solved by the Supreme Court in a different way if the Argentine State, as defendant, had to prove, before the Judiciary, the reasonableness of the measure. The reader can mentally envisage the amounts of information that the State would have had to submit to the courts to make evident, in *Cine Callao*, the rationale for the declaration of the emergency in the specific actors' sector as well as the proportionality of their compulsory hiring in the light of the property rights of the movie theater owners, among other aspects. The same line of reasoning could be adopted in all the emergency cases, including the ones triggered by the COVID-19 restrictions. The verifiable data provided by the defendant as author of the restriction, would allow the court of law to see beyond—and perhaps pierce—the presumption of constitutionality that seems to bless laws and even executive orders alike,¹¹³ in order to perform a different level of scrutiny.

While the emergency continues to exist, if the Argentine courts of law really want to exercise the powers vested on them by the Constitution, they should never use reasonable scrutiny in the conditions currently in force. Rather, they should use “strict scrutiny,” where every rule that operates to deprive people of their individual freedom is deemed to generate a “suspicious category,” as the Supreme Court has maintained in certain cases,¹¹⁴ and where the burden of proving that any such rule is constitutional lies with the Executive branch of government. The Executive branch of government should be required to prove not only the compelling need for the actions taken, but also, as a minimum, that the least restrictive means have been chosen.

113. LINARES, *supra* note 9, at 213-15.

114. Kenny, *supra* note 18, at 141-52.