

REVIEW

## Some considerations on the Judicial Review in Argentina

### Algunas consideraciones sobre la Revisión Judicial en Argentina

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#### ABSTRACT

Constitutional review is a critical mechanism for safeguarding constitutional supremacy in modern legal systems. Argentina adopted a system of judicial review based on the original U.S. model. This system, established through the Supreme Court's decisions, has defined the judiciary's role in the nation's constitutional democracy. This paper, aims to identify and describe the core elements and characteristics of Argentina's system of constitutional review. It analyzes how this system has been shaped by key jurisprudential precedents from the Supreme Court of Justice of the Nation (CSJN), exploring the unique tension between its origins in a Common Law model and its implementation in a Civil Law tradition. The research methodology is a qualitative analysis of historical legal documents and key judicial rulings. The study focuses on landmark precedents from the CSJN to trace the historical development and define the essential characteristics of constitutional review in Argentina. The paper demonstrates that Argentina's system of constitutional control is a diffuse model, where all judges can exercise review. A key finding is the absence of a strict *stare decisis* rule, which creates a paradox where Supreme Court decisions are not formally binding but are treated as a "moral duty" for lower courts to follow for reasons of procedural economy and legal certainty. The analysis reveals that the system's development was primarily "praetorian," driven by the CSJN's rulings rather than explicit legislative or constitutional mandates. The Argentine system of judicial review remains one of the few worldwide that closely follows the original U.S. model, yet it has unique features that reflect its Civil Law context. While not formally binding, the practical application of the CSJN's precedents creates a *de facto* obligation for lower courts. This tension is central to understanding the system's functionality and its implications for the protection of constitutional rights.

**Keywords:** Judicial Review; Constitutionality; Jurisprudential Precedents; Supreme Court of Justice of the Nation; Constitutional Justice.

#### RESUMEN

El control de constitucionalidad es un mecanismo fundamental para salvaguardar la supremacía constitucional en los sistemas jurídicos modernos. Argentina adoptó un sistema de control judicial basado en el modelo original estadounidense. Este sistema, establecido a través de las decisiones de la Corte Suprema, ha definido el papel del poder judicial en la democracia constitucional de la nación. El presente trabajo tiene por objeto identificar y describir los elementos y características fundamentales del sistema de control de constitucionalidad argentino; Analiza cómo este sistema ha sido configurado por precedentes jurisprudenciales clave de la Corte Suprema de Justicia de la Nación (CSJN), explorando la tensión única entre sus orígenes en un modelo de *Common Law* y su implementación en una tradición de *Derecho Civil*. La metodología de investigación consiste en un análisis cualitativo de documentos jurídicos históricos y sentencias judiciales clave. El estudio se centra en los precedentes históricos de la CSJN para trazar el desarrollo histórico y

definir las características esenciales del control constitucional en Argentina. El documento demuestra que el sistema de control constitucional argentino es un modelo difuso, en el que todos los jueces pueden ejercer el control. Una conclusión clave es la ausencia de una norma estricta de *stare decisis*, lo que crea una paradoja en la que las decisiones del Tribunal Supremo no son formalmente vinculantes, pero se consideran un “deber moral” que los tribunales inferiores deben cumplir por razones de economía procesal y seguridad jurídica. El análisis revela que el desarrollo del sistema fue principalmente “pretoriano”, impulsado por las sentencias de la CSJN más que por mandatos legislativos o constitucionales explícitos. El sistema argentino de control de constitucionalidad judicial sigue siendo uno de los pocos en el mundo que sigue de cerca el modelo original estadounidense, pero tiene características únicas que reflejan su contexto de derecho civil. Aunque no son formalmente vinculantes, la aplicación práctica de los precedentes de la CSJN crea una obligación de facto para los tribunales inferiores. Esta tensión es fundamental para comprender el funcionamiento del sistema y sus implicaciones para la protección de los derechos constitucionales.

**Palabras clave:** Revisión Judicial; Constitucionalidad; Precedentes jurisprudenciales; Corte Suprema de Justicia de la Nación; Justicia Constitucional.

## INTRODUCTION

Constitutional review is a foundational principle in modern legal systems, serving as the primary safeguard of constitutional supremacy. In contemporary democracies, the judiciary’s power to assess the constitutionality of legislative and executive acts is a central element of the system of checks and balances. The debate over the design and implementation of this power is particularly relevant in Latin America, where a variety of models exist.

The concept of constitutional review originated with the U.S. Supreme Court’s landmark ruling in *Marbury v. Madison*, which established the “diffuse” model where all judges can exercise constitutional control. This model stands in contrast to the “concentrated” model proposed by Hans Kelsen, where a single constitutional court holds a monopoly on this power. While many Latin American nations have adopted mixed systems, Argentina, like the United States, has largely maintained the diffuse control system.

However, the superficial similarity between the U.S. and Argentine models masks a deeper tension. While both are federal republics, the U.S. operates under a Common Law tradition, which naturally embraces judicial precedent, while Argentina largely adheres to a Civil Law tradition, which historically does not. This article argues that Argentina’s system of constitutional review is a unique product of this tension, having been developed as an implicit power within a legal tradition that did not explicitly provide for it. We will explore how this foundational contradiction has shaped the system’s core features, particularly the paradoxical role of jurisprudential precedent.

This paper’s specific contribution is to analyze the historical development and key characteristics of Argentina’s judicial review through the lens of its central paradox: the adoption of a Common Law mechanism within a Civil Law framework. We will examine how this tension, and the subsequent “praetorian” development by the Supreme Court, has created a system that is at once deferential to its U.S. predecessor yet fundamentally distinct. By engaging with the relevant scholarly literature, we aim to provide a more nuanced understanding of the Argentine model and its implications for the separation of powers and the protection of constitutional rights.

## Origin of Constitutional Review in Argentina

Argentina’s constitutional review system reflects the country’s institutional consolidation, heavily influenced by the U.S. model. Although the 1853 Constitution was drafted fifty years after *Marbury v. Madison*, it implicitly laid the groundwork for this mechanism by adopting a tripartite division of powers (Legislative, Executive, Judicial). Central to this system are constitutional supremacy, balance of powers, and checks and balances. The Constitution stands above all three powers, ensuring the rule of law.

The U.S. *Marbury v. Madison* precedent is recognized as establishing judicial review as an implicit power of the courts. Argentina’s adoption of this model meant that constitutional review emerged as a necessary consequence of constitutional supremacy. An independent judiciary, tasked with interpreting and applying laws, inherently needed a mechanism to ensure the primacy of the Constitution. The concept of “implied powers” further supported the judiciary’s role in guaranteeing constitutional supremacy, even without an explicit clause, as it was considered intrinsic to its function as the ultimate interpreter of law.

The supremacy declared in Article 31 of the Constitution was not a mere formality; it demanded a functional mechanism for its effective application. The rigid nature of the Constitution, difficult to modify, also necessitated judicial control to prevent ordinary laws from contravening fundamental principles.

Notably, neither Juan Bautista Alberdi<sup>(1)</sup> nor Domingo Faustino Sarmiento<sup>(2)</sup> explicitly referred to constitutional review in their foundational works. The 1853 Constitutional Convention also did not dedicate significant explicit debates to the judiciary's specific power to exercise constitutional review over national laws. Even the 1860 constitutional reform did not include anything related to it. Later doctrine also gave it little attention, with a brief reference in Joaquín V. González's *Manual de Derecho Constitucional*, where he stated that the national justice, through the Supreme Court, could declare laws or acts null if they conflicted with the Constitution.<sup>(3,4,5)</sup>

A crucial legislative milestone in formalizing constitutional review was Law 48, enacted on August 26, 1863. This law established the "extraordinary appeal," the procedural mechanism allowing constitutional issues to reach the CSJN. Articles 14, 15, and 16 of Law 48 defined the conditions for this appeal, empowering the Supreme Court as the ultimate interpreter of the Constitution and ensuring uniformity in constitutional interpretation. Law 48 did not create a specialized constitutional court or an abstract control mechanism; instead, it formalized a diffuse and incidental control system. The extraordinary appeal allows the CSJN to act as the final interpreter, but only when a constitutional question arises within a specific legal dispute. This design prioritized case-by-case adjudication over abstract declarations. Law 48 thus bridged the theoretical supremacy of the 1853 Constitution and its practical application.<sup>(6,7)</sup>

The definitive consecration of judicial review in Argentina came with the jurisprudential precedents of Sojo and Elortondo. In Sojo, a journalist imprisoned for contempt by the Chamber of Deputies filed a habeas corpus directly with the Supreme Court, arguing the unconstitutionality of the legislative order. The central question was the Court's original jurisdiction and its implicit power to review the constitutionality of a legislative act. The CSJN declared itself incompetent to hear the case in its original jurisdiction, asserting that its original jurisdiction was strictly limited by the Constitution (Arts. 116 and 117, CN) and could not be expanded by Congress. The Court stated that while it could not review the merits of the legislative act, it could investigate the origin of the detention and determine if it was ordered by a competent authority. This distinction, though subtle, was crucial, as it implied a power of review over the competence of other branches. The Court did not deny judicial review but carefully delineated its power, affirming its ability to review if an act emanated from a "competent authority". This was a fundamental step towards judicial review of legislative acts.

A year later, in Elortondo, the Court "inaugurated" constitutional control by declaring a norm unconstitutional for the first time. The case involved Law N° 1.583, enacted by Congress, which mandated expropriation of land in Buenos Aires for the widening of Avenida de Mayo. The law aimed to expropriate not only land directly needed for the avenue but also adjacent properties that would benefit from the development. Isabel A. de Elortondo challenged the expropriation of the portion of her property not directly necessary for the avenue, arguing it violated her property right under Article 17 of the National Constitution. The CSJN ruled in favor of Elortondo, declaring the law partially unconstitutional. The Court held that expropriation for public utility must be strictly limited to what is indispensable and cannot be used for speculative purposes or to enrich the public treasury at the expense of individual property rights. This ruling, explicitly linked to *Marbury v. Madison*, marked the first time the Argentine Supreme Court directly declared a law unconstitutional. It consolidated the CSJN's role as the guardian of the Constitution, transforming the theoretical principle of supremacy into a practical and enforceable reality.

The development of constitutional review in Argentina has predominantly been through the pretorian action of the Supreme Court, rather than through legislation, with the notable exception of Law 48. The 1853 Constitution and its reforms (1860, 1866, 1898, 1957) made no explicit reference to constitutional review or the judiciary's power to exercise it. Only with the 1994 reform, specifically in relation to the amparo action (Article 43), was the phrase "the judge may declare the unconstitutionality of the norm on which the damaging act or omission is founded" introduced, again implying diffuse judicial review.<sup>(8,9)</sup>

### **Essential Characteristics of Constitutional Review in Argentina's Federal Sphere**

Constitutional review in Argentina's federal sphere closely mirrors the U.S. model, being one of the few countries worldwide to maintain this original dual system. Key characteristics include:

#### ***(A) Diffuse or Decentralized Control***

In Argentina, constitutional control is diffuse, meaning any judge, regardless of instance, jurisdiction, or competence, can exercise it. The CSJN stated in *Ministerio Fiscal c/ Calvete, Benjamin* that "All judges of any hierarchy and jurisdiction can interpret and apply the Constitution and laws of the Nation in the cases whose knowledge corresponds to them, without prejudice to the appeal of article 14 of law 48 in the appropriate cases". The CSJN, as the "constitutional guarantees tribunal" and ultimate interpreter of the National Constitution, exercises this control particularly. Given Argentina's federal structure, both federal and provincial judges, as well as federal and local judges in the Autonomous City of Buenos Aires, and even justices of the peace and misdemeanor judges at the municipal level, can exercise this control. Each province also has its own distinct system of constitutional control, exercising broad autonomy in its design.<sup>(10,11)</sup>

*(B) Absence of Stare Decisis*

Unlike the U.S. and other Anglo-Saxon countries, Argentina does not adhere to the stare decisis system or the doctrine of precedent. The stare decisis principle (“to stand by things decided and not to disturb the calm”) mandates respect for previous decisions on similar issues, making them legally binding in Common Law systems. In Civil Law systems, where the judiciary’s role has been different, this system has not existed. While judicial decisions gain importance when repeated over time and become jurisprudence, recognized as a source of law in “continental” systems, they are not strictly binding precedents. The decisions of the CSJN are not technically binding, which is an anomaly within the classical U.S. judicial review system and the sole aspect where it differs from the American model.<sup>(12)</sup>

Despite this, the Supreme Court has attempted to establish a “moral duty” or “institutional duty” for lower courts to follow its pronouncements. This doctrine was first articulated in *Bernardo Pastorino*, where the Court stated that its resolutions only decide the specific case and are not legally binding beyond it. However, it noted a “moral duty” for lower judges to conform their decisions to the CSJN’s rulings, based on the presumption of truth and justice in its doctrines, and to avoid useless appeals. Crucially, the Court also acknowledged the judges’ faculty to deviate from these resolutions if, in their judgment, they are not in accordance with clear legal precepts, as “no court is infallible”. This established a form of “attenuated obligatoriness”.

In *Santín*, the Court added another argument for adherence, stating that the CSJN’s interpretation of the National Constitution holds definitive authority for the entire Republic’s justice system. It further emphasized that deviating from this jurisprudence without controverting its foundations constitutes a deliberate disregard of the Court’s authority. This doctrine has been reiterated in recent significant rulings, such as *Cerámica San Lorenzo*, where the Court revoked a lower court’s sentence for applying a different criterion without justification, asserting that lower court sentences lacking new arguments to modify the Supreme Court’s position, as the supreme interpreter, are unfounded. Minister Fayt added that rulings must be “founded” by reflecting the values supporting current doctrine and jurisprudence.<sup>(13,14)</sup>

In *González, Herminia*, the Court added “celerity and procedural economy” as further arguments for following its precedents. It emphasized that even without a specific norm, lower courts have a duty to align their decisions with the CSJN’s rulings in similar cases. Although Law 24.463 explicitly mandated lower judges to follow CSJN rulings in analogous cases, the Court in *González, Herminia* validated this norm but went further, asserting that the moral duty of adherence exists “even in the absence of such a norm”. However, Law 24.463’s ordinary appeal was later declared unconstitutional by the CSJN in *Itzcovich*, as it affected retirees’ constitutional rights and hindered the Court’s institutional tasks.

In summary, the CSJN, as the “final interpreter” and “supreme guardian” of individual guarantees, imposes a “moral duty” on lower judges to follow its precedents. Nevertheless, judges can deviate if they provide sufficient grounds, if their departure does not signify a deliberate disregard for the high court’s authority, and if they offer new justifications for modifying the established position.

*(C) Controlled Matter: All Types of Norms, Interpretations, Acts, and Omissions*

Constitutional review applies to all types of norms (individual or general), including laws, decrees, ordinances, ministerial resolutions, provincial constitutions, and local norms. It also extends to specific acts, facts (private or state), omissions, and even interpretations of laws. The Court frequently declares interpretations of norms unconstitutional, rather than the norms themselves, when they conflict with a constitutional precept. Regarding acts, the Court has declared religious practices in public schools unconstitutional for violating religious freedom provisions. As for omissions, this refers to the unconstitutionality arising when a legislator (national Congress, provincial legislature, president, governor) fails to comply with a clear and precise constitutional mandate, resulting in a concrete detriment to a subjective right. The Court has used these cases to induce constitutionally obligated entities to fulfill their duties through “exhortative sentences,” as seen in *Verbitsky*, where the Court demanded the adaptation of penal procedural norms to constitutional and international standards without explicitly declaring them unconstitutional.<sup>(15)</sup>

The Court has consistently upheld the principle of separation of powers, asserting that without the limitation of a judicial dispute, the Supreme Court could wield unchecked authority. Thus, there is no abstract control of constitutionality over executive or legislative norms. In *Causa III*, the Court refused to provide a consultative opinion on the validity of norms, stating it could only intervene in a dispute between parties. Similarly, in *Don Silverio Bejarano*, it declared itself incompetent to issue a general declaration of unconstitutionality without a concrete contentious case. However, the Court has ruled that in situations of “institutional gravity,” it may resolve a case even if it has become abstract, to establish a future stance for legal certainty.

Despite this principle, the Court has ruled that in situations presenting “institutional gravity,” and to establish a future stance for similar cases in the interest of legal certainty, it can resolve a case even if it has become abstract. For example, in *Santiago del Estero*, the Court resolved a case that had become abstract due to a candidate’s resignation, after accepting a precautionary measure. The Argentine system of diffuse judicial



review of constitutionality, deeply influenced by the U.S. model, has been primarily shaped by the Supreme Court of Justice of the Nation (CSJN) through its jurisprudence. This report identifies and describes the essential characteristics of this control, its historical origins, and the key precedents that defined its contours.

## CONCLUSIONS

The evolution of constitutional review in Argentina reveals a system that has faithfully adhered to the U.S. diffuse model, yet its implementation within a Civil Law tradition has created a set of unique and paradoxical characteristics. While the model is often described as “pure,” this claim is inaccurate, as it has adapted and incorporated elements from other traditions, such as the collective *amparo* action and the use of “exhortative sentences”, the expansive or de facto derogatory effect of legal norms (an effect which in principle would not exist in the diffuse system, unlike the concentrated system), the class action, as well as other more vernacular creations, such as the “resurrection” of norms.<sup>(15)</sup>

The central paradox of the Argentine system lies in the tension between the absence of a formal *stare decisis* doctrine and the de facto obligation that the CSJN has imposed on lower courts. What does this mean for the protection of rights and the judicial system? It creates a system that is simultaneously flexible and hierarchical. While judges technically have the autonomy to deviate from Supreme Court precedents, the “moral duty” to conform, reinforced by arguments of procedural economy and legal certainty, means that the Court’s jurisprudence is a powerful guiding force. This creates a more dynamic and nuanced judicial dialogue than a strict binding precedent system, but it also places a significant burden on lower judges to justify their deviations. This nuanced system, while maintaining its diffuse character, has developed its own set of “vernacular creations” that reflect the country’s specific legal and political context.

On the other hand, the fact that the constitutional review system is regulated almost exclusively by the Court’s jurisprudence has important implications for its philosophical justification, as Nino rightly pointed out. Indeed, lacking a constitutional or legal basis, constitutional review is defined almost exclusively by the Court, without the participation of the other branches of government, creating a counter-majoritarian difficulty. This “counter-majoritarian difficulty,” questions why an unelected judiciary should have the final say on important issues of individual rights and democratic procedures over elected officials.<sup>(16)</sup>

This is especially important when we consider certain advances in the Court’s constitutional jurisdiction, for example, the ex officio review (“control de constitucionalidad de oficio”), supported by Bidart Campos, among other scholars, arguing that judges not only have the power but also the duty to declare a law unconstitutional, even if the parties in a case have not specifically raised the issue,<sup>(7,17)</sup> or the so-called of “sentencias manipulativas” (manipulative sentences) or “sentencias atípicas” (atypical sentences), which are rulings that do not simply annul a norm but modify or interpret it in a way that makes it compatible with the Constitution, allowing the Court to act as a “positive legislator.”<sup>(18)</sup>

In this regard, however, in recent decades the Court has moved toward “dialogical” practices in its jurisdiction, through various mechanisms that generate dialogue with the other branches of government (through the formula of exhortative rulings, or the control of constitutional omissions) or directly with society (such as public hearings, or *Amicus Curiae*).

In essence, the Argentine system of constitutional review is a compelling example of legal transplantation, where a foreign model was not simply adopted but adapted and redefined by the nation’s highest court. The ongoing tension between its Common Law origins and its Civil Law reality is not a flaw but its defining feature, making it a valuable case study in comparative constitutional law.

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