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The Buenos Aires City Bar Association is a civil, independent and voluntary non-for-profit association.

Founded back in 1913, its main objectives include:

Promoting the improvement of the Judiciary and ensuring its independence as a separate branch of Government;

- Furthering the administration of justice and the development of legislation, and ensuring compliance with the rules of professional conduct ;
Promoting the rights of lawyers in their practice of law;
Encouraging the resolution of disputes through mediation, reconciliation and arbitration;
Conducting research activities;
(Buenos Aires City Bar Association – Bylaws, Section 1)

Ever since its creation the Association has advocated for the consolidation of the rule of law in Argentina, as well as for the full enforcement of the division of powers and the respect for the independence of the Judiciary.



Presentation by the Buenos Aires City Bar Association to the Office of the United Nations High Commissioner for Human Rights (OHCHR) in relation to its Universal Periodic Review (UPR)

The Buenos Aires City Bar Association, created in 1913 as a civil, independent and voluntary association of attorneys, hereby files this document to express its deepest concern about a situation which has developed over the past eight years: The ever more undermined independence of the Argentine Judiciary. This presentation, made in furtherance of our Association's objective to advocate for improving the Legal System, intends to warn the UN Commission on Human Rights so that it will urge the Argentinean authorities to immediately cure this anomaly.

INTRODUCTION

- 1.** The independence of the Argentine Judiciary has been constantly undermined since Nestor Kirchner won the presidential elections back in 2003. Cristina Kirchner's administration, which started in 2007, has not done anything to revert this. Despite the progress made in the punishment of crimes against humanity committed during the last military rule, other areas have been marked by a significant backward step. This becomes particularly sensitive considering the Argentine constitutional system, presidential by nature and which for several years now has become "hyper-presidential".
- 2.** Rather than attempting to cure this situation, the Executive takes advantage of the uncertainty in general and the lack of legal certainty in particular resulting from it to continue enforcing overtly arbitrary measures against private companies, social groups and individuals. As a result, both individuals and companies that are not to the Government's liking (namely YPF, the Spanish-capital oil company and the Clarín holding group) (and sometimes judges themselves), are subject to systematic persecution.
- 3.** Democracy was restored in Argentina in 1983. Though initially everything led to believe the country would move towards improved judicial independence, there were two turning points that proved the contrary: The first one was the curtailment of the Judiciary's independence during former president Carlos Menem's administration (1989-1999), and the second started in 2003, when the situation became ever more worrying.
- 4.** In the past few years the Judiciary has failed to investigate events of corruption and to prosecute and convict current government officials. The country was



slow to pass the AML-CTF law reform demanded by the FATF, which only mildly started to emerge in 2011. Most criminal complaints about serious corruption events either became unenforceable or were archived. The reform of the law governing the *Consejo de la Magistratura* (Judicial Council) (the agency involved in the selection and removal of judges) resulted in this agency becoming exclusively controlled by the Executive. The Supreme Court of Justice of the Argentine Republic, which exercises constitutional review, has failed to resolve several major cases on the excesses on the part of the Executive, while the latter overtly disregarded the few decisions passed by this court in this regard. In addition to generating a situation of legal and political uncertainty, the Government also decided to use complacent justices to bring accusations against companies, businessmen and individuals (including many journalists).

THE REASONS UNDERLYING THE IMPAIRMENT OF JUDICIAL INDEPENDENCE

A. The Supreme Court of Justice

1. In 2003 the Argentine Executive, then led by Néstor Kirchner, started to replace the members of the Supreme Court of Justice, the highest Court in the Argentine legal system, vested with constitutional powers. The Government instituted impeachment proceedings, removed most members of the Court (who hold office for life in our system) and substituted them with far better reputed Justices. This did not result in any substantial improvement in the Court's independence, however.
2. Although numerous claims were filed by individuals and organizations to challenge different laws, political decisions, government actions and rulings, the Supreme Court has failed to resolve them and, in most cases, it thus far has not issued any court rulings.
3. This is the case with the *acción de amparo* (action to protect constitutional rights) brought by the Buenos Aires City Bar Association, requesting that law No. 26,080 (which changed the membership of the *Consejo de la Magistratura*, now predominantly dominated by pro-government members) be declared unconstitutional; the action brought against law No. 26,122, governing the passing of emergency executive orders (*decretos de necesidad y urgencia*) or the one demanding the banning of the so called "placeholder candidates" (*candidaturas testimoniales*) during the 2009 elections, whereby several candidates run for elective positions which they openly represented would actually never accept in case they were elected.



4. In those instances where the Supreme Court was brave enough to pass judgments that displeased the Argentine Executive, the latter decided directly to ignore them by either preventing or protracting their enforcement for several years, even if this caused serious damage to many citizens.

5. Several particularly emblematic decisions passed by the Supreme Court were never obeyed. Among them, five paradigmatic cases are worth noting: 1) Back in 1985, Néstor Kirchner, then Governor of Santa Cruz Province, promoted a legal reform to remove Eduardo Sosa, the Attorney General then in office. In 2009 the Supreme Court ordered the current Governor (who is in favor of the “kirchnerista” movement, to reinstate him, while in 2010 it brought a complaint for non-observance of the Court decision. Nevertheless, Sosa has to this day been unable to resume his duties, and the decision remains unenforced.

2) In early 2010 the Argentine Supreme Court instructed the Argentine Government to restore Perfil, a publishing house, the media buy it had been arbitrarily deprived of as punishment for its editorial policy. The Executive still ignores this Court decision.

3) In 2008 the Supreme Court ordered the environmental rehabilitation of the Matanza-Riachuelo River Basin, ranking amongst the most polluted in the world. The justice in charge had to fine the government officials responsible for observing the decision, but no significant progress has been seen to date.

4) In the Badaro decision (2006) the court instructed the Executive and the Argentine Congress to adjust the pension benefits by certain indices the Court had decided to apply. The Social Security agency (ANSES, as per its Spanish acronym) incurred in contempt of court, with the result that at least 500,000 retirees brought actions in court seeking enforcement of the court ruling. In December 2009 the Inter-American Commission on Human Rights of the Organization of American States and the Argentine Government entered into an agreement to fast-track social security-related cases, but the Government still fails to observe it and continues appealing any ruling favoring the retirees, further contributing to the case backlog.

5) In 2010 a trial judge banned the blockade against the printing plants of Clarín and La Nación, two independent newspapers that do not ascribe to the editorial policy that the Government intends to impose. The Executive not only tolerated such situation, but it also indulgently endorsed this action taken by the union and turned a blind eye to the lack of involvement of the Argentine Federal Police, which reports to the Presidency. The Court has also failed to



resolve the disputes between the Government and these newspapers, which own *Papel Prensa*, the largest paper and pulp mill in Argentina.

6. In view of these situations, Justice Carmen Argibay, one of the Court members, publicly said that “court decisions are made to be observed (...) if we want to be a democratic country.”

7. The Executive’s decision not to abide by many court rulings, including those issued by the Supreme Court, act as a deterrent among many lower court judges against ruling in favor of petitioners for fear that they will be subject to persecution, reprimand and criticism. In view of this being such a sensitive issue, off the record many judges recognize they prefer not to enter adverse judgment to avoid being personally affected by the consequences.

Chief Justice Ricardo Lorenzetti has publicly demanded that the Argentine Congress acknowledge the Judiciary’s budgetary self sufficiency on several occasions. This demand is based on the fact that whenever it needs to dispose of funds, even those included in the budget, it has to refer to the Chief of Cabinet’s Office for approval.

B. Government Threats, Criticism and Intimidation against Judges

1. Several judges who dared rule against the Executive were the target of disqualification and strong criticism from government officials or pro-government individuals. The following are several examples:

2. In December 2011 President Cristina Kirchner publicly asked the Judiciary to enforce the audiovisual media law, the constitutionality of which is being questioned at different levels. Two months earlier, on 1 October 2011, Gabriel Mariotto (another government official) said that Judge Eduardo Carbone – who had stayed application of one section in the Media Law, had to be removed from office. The same happened in September 2010 with Elvio Sagarna, a judge understanding in civil matters, when the President harshly criticized him for entering a similar decision.

3. At the request of Chile, in October 2010 the Supreme Court extradited Sergio Galvarino Apablaza, a Chilean terrorist who had assassinated a Chilean senator and who had taken refuge in Argentina. But President Cristina Kirchner



closely questioned this ruling via Twitter and granted Apablaza [political] asylum.

4. Yet another favorable ruling for the Clarín media holding resulted in a complaint being filed by Julio Piumato, pro-government legislator and union member, against Graciela Medina and Ricardo Recondo, judges of the Federal Appellate Court understanding in Civil and Commercial Matters.

5. In January 2010 judge María José Sarmiento of the Federal Administrative Court entered a preliminary injunction against an Executive order that intended to use the Argentine Central Bank reserves, and ordered the reinstatement of its then Governor Martín Redrado, removed from office by President C. Kirchner. This judge was the target of close questioning by the President and by many government officials. The Treasury's Attorney General filed a complaint against her before the *Consejo de la Magistratura* and the *Administración Federal de Ingresos Públicos* (Argentine Internal Revenue Office) with no cause, and removed her husband from his position in the tax collection agency.

6. In March 2010 Federal Judge Claudia Rodríguez Vidal also stayed Executive Order 298/10, thus forbidding the use of Central Bank reserves to honor debts. During her Congress address on March 1 that year, the President accused judges of "releasing prisoners in exchange for money". Three days later, at a public event broadcast to the whole country, she announced she would not abide by judge Vidal's decision and declared there were judges who were "hired" to pass certain decisions.

7. The same happened with the judges of courtroom C of the Court of Appeals in Commercial Matters in and for the city of Buenos Aires, who revoked the rulings of courts of original jurisdiction which favored the Argentine Executive and issued several rulings that favored Papel Prensa, which manufactures paper used for newspaper printing. All of them were brought before the *Consejo de la Magistratura*. In the case of Judge Juan Roberto Garibotto, the claim was brought before said *Consejo* by the Attorney General Esteban Righi. It is also worth noting that the Executive filed an extraordinary appeal against the ruling in favor of Papel Prensa, which, over a year later, is still pending a decision by the Supreme Court.

C. The *Consejo de la Magistratura*

1. The Federal Court system consists of approximately 900 judges throughout the country. With the involvement of the *Consejo de la Magistratura*, first, and



later the Senate (both in the hands of pro-government officials) the Executive appointed 431 judges between 2003 and 2010. Our election system generally allows the political majority in the senate to be held by the political party in power. Having an independent Council is therefore of utmost importance.

2. The *Consejo de la Magistratura*, created in 2008, reports to the Judiciary. Its responsibility is evaluating applications and appointing judges, and also promoting their removal from office.

3. However, at the instance of the Executive, in 2006 the Argentine Congress passed Law No. 26080, which modified the Council composition requirements, allowing for it to be composed of a majority of pro-government senators and representatives.

4. Yet another method that the Executive has resorted to in order to interfere with the Judiciary is to delay the appointment of judges. This allows the Executive to cover vacancies with alternate judges who are weaker than their regular counterparts (because they are in turn applying to be appointed). Additionally, after receiving the short listed candidates (three) from the Council, the President has a huge number of positions to which it may discretionally appoint them.

5. The party in power has won most elections since 2006, when the abovementioned law was passed. Six of the thirteen Council members are pro-government, while one of them (Judge Mario Fera) has proven to be an ally in most decisions, but for a few exceptions such as requesting a three-year statute of limitations for pending complaints against judges. Additionally, the party in government does not have the 2/3 representation required to submit short lists of three candidates to the Executive or to file impeachment proceedings, but it was good at establishing alliances that in most instances gave it the so much needed number of votes to impose its decision regarding key issues.

6. As noted, the system used to appoint judges is seriously flawed and it is extremely slow. Twenty-five per cent of the positions remain vacant and are held by other acting magistrates (judges, court clerks or attorneys who take over on a provisional basis). At present there are 208 positions still vacant at the federal level. Delays are incurred both by the *Consejo* (the selection committee of which has been and still is in the hands of pro-Kirchner officials) and by the Executive, which covered 80 vacancies at once last July after a period of eight months without any appointment. No vacancies have been covered again since then (another 7 months).



7. Chief Justice Ricardo Lorenzetti publicly called on the Executive to speed up the appointment of judges on several occasions, but to no avail.

D. Courts Fully Dominated by the Executive

1. There are courts (such as the federal administrative court or the federal criminal court) which hear public law claims brought against the State and criminal complaints filed against government officers, which have become the almost exclusive domain of the Executive and are merely an appendix of this Government branch.

2. Whenever the *Consejo* has to appoint judges to cover vacancies in these courts, it is the Executive and the *Consejo* itself which become actively involved to favor certain individuals over others, with a significant say in these appointments.

3. An example of this is the case of federal courts in criminal matters that investigate government officials: There are twelve courts of original jurisdiction in this area, but the request for applications has not been issued for six years now and only in November 2011 did it appear to be resumed again when Government reached an agreement with an opposition party whereby it may impose its own candidates.

F. Impunity: Corruption goes Unpunished

1. Federal judges understanding in criminal matters who hear the complaints involving civil servants do no progress in their investigations and fail to elucidate any of the corruption cases brought before them.

2. Neither the Executive branch nor the Congress appeared interested in implementing any mechanisms and policies that are of the essence in the fight against crime and corruption, especially in the civil service, which goes unpunished.

3. There are cases of serious corruption and material breach of individual and corporate rights that remain unsolved.

4. In 2010 the Trade Secretary Guillermo Moreno attended a Shareholders' Meeting of Papel Prensa wearing boxing gloves and he threatened the shareholders present. However, Federal Judge Julián Ercolini failed to take any action in this regard.



5. In June 2010 the former Argentine ambassador to Venezuela, Eduardo Sadous, reported that Argentina had some kind of "embassy in the shadows" or "parallel embassy" to favor the transaction of obscure business. Judge Julián Ercolini never elucidated the case. Even worse, another federal judge investigated Ambassador Sadous, who had brought the complaint.

6. National Judge Norberto Oyarbide dismissed a claim for unjust enrichment filed against President Cristina Kirchner and her husband, the former president, in a short, record-breaking period. He did nothing to look deeper into the case and just received a single expert's opinion, which was based on information supplied by the Kirchner's accountant. No prosecutor appealed his decision to dismiss the case. This is just one of dozens of similar examples.

7. All of the above explains why Argentina ranks No. 105 (out of 178 countries) in the Transparency International Corruption Index 2010.