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## THE POSITION OF THE JUDICIARY IN THE POLITICAL SYSTEMS OF ARGENTINA AND MEXICO

ROBERT E. BILES\*

A striking feature of the North American literature on Latin American law and politics is the virtual absence of systematic consideration of the judiciary. Legal scholars have tended to concentrate on analysis and exposition of legal codes, while those historians and political scientists concerned with formal institutions have focused their studies largely on the Executive Branch, with only passing reference to the subordinate position of the judiciary. Moreover, the literature on the Latin American judiciary has been severely hampered by the lack of data on judicial behavior; hence, it has dealt primarily with the formal, legal rules which may affect but do not necessarily determine actual performance. Scattered through the literature, however, is sufficient information to make preliminary statements about the position of the judiciary and to suggest areas needing further research. That is the purpose of this article.

Specifically, this analysis seeks to examine and define more precisely the position of the judiciary in the political systems of two of the leading nations of Latin America—Argentina and Mexico. The concern is not with the political role played by the courts but with the limits imposed by the political environment upon the courts' function of administering justice. Consequently, the paper analyzes a series of constitutional and legal principles affecting the judiciary in terms of the political constraints on their application and their consequences for actual judicial behavior. Examined in the paper are two problem areas common to developed and developing systems alike—judicial independence and judicial review—and a problem of particular importance to developing nations—*de facto* government and states of siege. Analysis centers on the federal supreme courts, for they have set the general tone of judicial practice for both federal and provincial courts in Argentina and Mexico.

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## BACKGROUND

Argentina's Constitution of 1853 is the oldest Latin American constitution still in effect. With the exception of only a few years, it has been in effect since its approval in 1860. The most important recent exception to its long life was the Perón Constitution in effect from 1949 to 1956.<sup>1</sup> Because it is the Latin American Constitution most closely resembling that of the United States, American constitutional law has had its greatest impact there.<sup>2</sup> In fact, extensive reliance was consciously placed on the principles and terminology of the United States Constitution in order to obtain a body of interpretations and precedents that could guide the Argentine courts. Hence, Argentine constitutional law depends heavily upon United States Supreme Court decisions and recognized American commentators, particularly Cooley and Story.<sup>3</sup> By contrast, Argentina's legal system shows little trace of American or English influence. Argentine legal theories, reflected in well developed codes, come principally from France, Italy, Spain, and Germany.<sup>4</sup> Argentina, along with Mexico, is generally considered a leader among the Latin American nations in the development of legal theory and philosophy.<sup>5</sup>

The 1917 Constitution of the United Mexican States was an outgrowth of Mexican Revolution.<sup>6</sup> Unlike the relatively short Argentine Constitution, which followed the United States in providing a mere framework to be filled out with legislation, the Mexican Constitution followed the Latin American tradition of detailed provisions. Its chapter on the Judicial Branch, for example, is eight times longer than the comparable section in the Argentine Constitution. Nevertheless, in its broad outline it, too, is similar to the United States Constitution, although American precedents and commentary play a far lesser role than in Argentina.<sup>7</sup> Mexico, like Argentina, belongs to the civil law system; her statute law is largely in the form of codes. Federal codes govern the Federal District and the territories, and they are widely copied in the states.<sup>8</sup> The organization of the federal judiciary in both Mexico and Argentina is similar to that of the United States—a hierarchy consisting of a supreme court, circuit courts, and district courts.

While the basic structure of both judicial systems is quite similar, the political environments within which they operate are significantly different. There appear to be two political factors of prime importance to the independence and effectiveness of the judiciary in Argentina and Mexico. The first, dominance by the Executive, has had a similar impact

in both countries. The second, differences in levels of national political stability, appears to account for a major divergence in the position of the judiciary in the two systems.

The first factor, executive domination of virtually the entire political system, is a traditional Latin American pattern. The tradition manifests itself both in informal norms of deference to presidential wishes and in formal constitutional provisions. The framers of Argentina's Constitution, for example, were impressed with the need for a strong executive.<sup>9</sup> They provided in Art. 86, Clause 1, that the president is "the supreme head of the Nation and has in his charge the general administration of the country."<sup>10</sup> Through this and other, more specific, provisions, the president began with more power than either of the other two supposedly co-equal branches, and over a century of political practice has enhanced his pre-eminence.<sup>11</sup> Today, he is more powerful than the other two branches combined.<sup>12</sup> The one major restraint on the power of the president is the political role of the military, but this is a restraint which adversely affects the courts as well as the president. In Mexico, the 1917 Constitution replaced the legislative supremacy of the little used Constitution of 1857 with the political reality of executive supremacy.<sup>13</sup> As one authority has commented, "The constitution, like everything else in Mexico, revolves around the president."<sup>14</sup> Moreover, the constitutional strength of the Mexican president is buttressed by the dominance of a single party, the Party of Institutional Revolution (PRI), which the president ordinarily controls.

Given the dominance of the president in both countries, the factor bringing a divergence in practice between the two nations would appear to be their degree of political stability. While Mexico has become increasingly more stable and in many respects more democratic since the 1910 revolution, Argentina has become less stable. Recent Mexican history may be divided into three periods. From 1910 to 1917, the country was racked by a bloody social revolution. The second period, running through 1940, was a time of consolidation. It saw the elimination or buying off of potential armed threats to national stability, the bringing of the military under civilian control, the creation of a dominant political party which encompasses most of the major organized interests of the society, and the development of patterns of peaceful settlement of disputes within the elite that had emerged from the revolution. The third period begins after the 1940 presidential elections and continues to the present. With stability and the consequent lack of threat to the government, many of the democratic principles of the revolution are now receiving more than formal lip service. The rigidly adhered to principle of no presidential self-succession

and the increasing institutionalization of the presidency and the revolutionary party are gradually transferring sanctity from the man to the office. With the de-personalization of Mexican politics, the courts are gradually gaining more independence.<sup>15</sup>

In Argentina, on the other hand, the last forty years have been a period of political turmoil marked by frequent military interventions and only brief periods of constitutional government. Since 1930, the military has been a major factor in Argentine politics, and in the years 1930, 1955-57, and 1966-73 the military was the effective government. Six of the nine presidents to leave office between 1946 and 1973 were deposed by the military. The following table, based on the period 1946-66, is indicative of the differences in levels of stability between Argentina and Mexico.

Instances of Political Instability in Argentina and Mexico, 1946-66.

	Argentina	Mexico
Popular Turmoil		
General strikes	21	3
Guerrilla warfare	18	6
Riots	32	28
Governmental Instability		
Government crises	25	0
Purges	43	5
Revolutions	17	0

Source: Arthur S. Banks, *Cross-Polity Time Series Data* (Cambridge: M.I.T. Press, 1971), pp. 283 and 290.

Political instability in Argentina has had a triple deleterious effect on the position of the judiciary. First, the lack of a sustained constitutional period has given little time for constitutional governments to develop confidence in the courts and a respect for an independent role of the courts in the political system. The problem is accentuated by the tendency to suspect the judiciary appointed under the previous regime. This suspicion has produced a second problem: high judicial turnover. In 1946, for example, the Peronist-controlled Congress impeached four of the five Supreme Court justices. Three years later, the new Peronist constitution provided in section 4 of the transitory dispositions that during the first session of Congress following ratification, the approval of the senate would be newly requested for members of the federal judiciary, including those

who had been confirmed years earlier. More than seventy federal judges considered unfriendly to the Peronists were thus removed from office.<sup>16</sup>

When Perón fell in 1955, his appointees . . . were swept out of office; the provisional government appointed new judges, but the Constitution requires that all judges be approved by the Senate, and there was no Congress. Thus, in 1958 President Frondizi was permitted to select a new judiciary when he took office. When Frondizi was removed in 1962, the entering President Guido dissolved the Congress, so that his appointments were also temporary.<sup>17</sup>

In 1966 the Supreme Court was again ousted by Executive decree of General Onganía.

Although it has not undergone the major shake-ups seen in Argentina, the Supreme Court of Mexico has experienced more turnover in membership than has been the case in the United States. In the period 1953-72, for example, there was a new member appointed to the nine-man Supreme Court of the United States on the average of every 22.8 months. The average time between appointments to the twenty-one man Supreme Court of Mexico was 5.6 months. The comparable figure for Argentina's much smaller five to seven man high court was 10.4 months.<sup>18</sup> Stability can also be measured in terms of the length of time judges remain on the court. Average (mean) tenure on the Mexican Supreme Court during the 1953-72 period was 7.0 years compared to 4.1 years for the Argentine Court and 9.8 years for the United States.<sup>19</sup> While Mexico's Supreme Court, thus, shows slightly more stability in personnel than does the Argentine Supreme Court, the differences are not great. The more important difference appears to be that turnover in the Argentine Supreme Court is sudden, substantial, and associated with changes in the regime, whereas personnel changes in the Mexican high court are more regular and generally less traumatic.

A third consequence of Argentine political instability is the necessity for the courts to accommodate themselves to unconstitutional *de facto* regimes. Lacking the power to disavow the actions of presidents who come to office by force and facing the need to continue the normal judicial process, the Argentine courts have usually accepted the legitimacy of *de facto* governments and sanctioned their official acts. While this accommodation has allowed the courts to provide continuity in periods of instability, the price has been reduced respect and stature for the courts.<sup>20</sup>

## JUDICIAL INDEPENDENCE

A basic assumption of the Western political tradition which Argentina and Mexico share, at least formally, is that the ends of justice are best served by a judiciary, independent of immediate, direct political influence.<sup>21</sup> The constitutions of both nations implicitly recognize this concept through provision for the separation of powers and articles designed to make the judiciary independent in fact. While the broad formal provisions for separation of powers have largely succumbed to the historical tradition tively successful in modifying, if not stemming, the executive tide. The of executive dominance, several of the specific provisions have been re- differences in their relative success are important to the nature of justice in the two nations.

The constitutions of both Mexico and Argentina provide for the separation of powers among the three branches of the federal government. Article 49 of the Mexican Constitution declares "the supreme power of the Federation is divided, for its exercise, into legislative, executive, and judicial branches." The Argentine Constitution, on the other hand, simply lists the three branches and their powers as the three sections of Part 2, Title I, "Federal Government." As one of the three co-equal branches of government, the judiciary should enjoy an independence of authority and function within its constitutionally allotted sphere; yet, under both constitutions the president is given so much power that the Supreme Court can erect few impediments to his encroachments on its power. In performing his constitutional duties, the president exercises many powers which have a direct and vital bearing on the independence and integrity of the courts. Aside from his great decree granting powers and the authority to declare a state of siege, the president's powers affect appointment, tenure, internal procedures, economic independence, enforcement, pardons, and administrative tribunals. Beyond the direct interaction of the executive and the courts, the president's public statements and actions may strongly affect public attitudes toward the courts.

Constitutional and legislative provisions may enhance or impede judicial independence. Selection on the basis of professional qualifications rather than political partisanship, for example, tends to increase the independence and quality of the judiciary by making it a professional career rather than the bailiwick of favorites or hacks. Article 97 of the Argentine Constitution provides that "no one may be a member of the Supreme Court of Justice unless he is a lawyer of the Nation, with eight years of practice." The only other pertinent constitutional qualifications are that a

member have attained the age of thirty years, be a citizen of the nation six years, and have an annual income of two thousand pesos.<sup>22</sup> Article 95 of the Mexican Constitution provides that to be elected minister (justice) of the Supreme Court, it is necessary to have held, on the day of the election, the professional degree of lawyer for a minimum of five years; to be a Mexican citizen by birth, in full exercise of political and civil rights; not to be over sixty-five nor less than thirty-five years of age on the day of the election; to enjoy a good reputation and not to have been convicted of a crime punishable by imprisonment of more than one year; and to have resided in the country during the last five years, except in the case of absence in the service of the Republic for a period of less than six months. Priests may not sit on the high court. Although both constitutions leave considerable leeway for political appointment, the constitutional and public stress on professionalism has generally led to the selection of highly competent Supreme Court justices.

The method of appointment also bears on the independence of the judiciary. In Argentina, Art. 86, Clause 5, of the constitution provides that the president "appoints, with the consent of the Senate, the magistrates of the Supreme Court and of the other, lower federal courts." While the provision for senate approval may moderate the Argentine president's appointive power in those instances in which he does not control the Legislature, the provisions of the Mexican Constitution guarantee almost complete presidential dominance in the selection of Supreme Court justices. Article 96 of the Constitution of 1917 provides:

Appointments of the ministers of the Supreme Court shall be made by the President of the Republic and submitted to the approval of the Chamber of Senators, which shall grant or deny approval within the unalterable period of ten days. If the Chamber fails to decide within that time, the appointments shall be considered as approved. Without the approval of the Senate, the magistrates of the Supreme Court named by the President of the Republic cannot take office. In the event that the Chamber of Senators does not approve two successive nominations for the same vacancy, the President of the Republic shall make a third appointment, which shall become effective at once as provisional, and which shall be submitted to the said Chamber at the following regular period of sessions. At such period of sessions, within the first ten days, the Senate must approve or disapprove the appointment, and if it approves it, or takes no decision, the magistrate appointed provisionally shall continue in office permanently. If the



Senate rejects the appointment, the provisional minister shall cease to act and the President of the Republic shall submit a new appointment to the approval of the Senate, in the manner indicated.

In practice, the president so controls the Congress that neither House has rejected a presidential nominee for the courts.<sup>23</sup> While appointments to the Supreme Court are constitutionally and politically in the hands of the president, Art. 97 of the Constitution attempts to remove selection of lower court justices from the hands of the Executive and to create a system of judicial career. It provides that "the circuit magistrates and district judges shall be appointed by the Supreme Court." Although this provision has contributed to a reduction in political influence in the appointment of federal judges, it is nevertheless clear that the Party of Institutional Revolution (PRI) and the Executive branch still play a decisive role in the selection process.<sup>24</sup>

Permanence of tenure is likewise of considerable importance to the independence of the judiciary. The judge who must consider what the effect of his decision will be on his chances for reappointment may too frequently find a conflict between his self-interest and his duty to impartiality. Both countries have attempted to avoid this pitfall. Article 96 of the Argentine Constitution provides that "the Justices of the Supreme Court and of the lower courts shall hold office during their good behavior." A judge may be removed only for failure to perform his duty, immoral conduct, or commission of a crime. Under constitutional governments, the tenure of Argentine judges has been reasonably secure. However, as indicated above, tenure under *de facto* regimes has frequently been tenuous, and even *de jure* governments have had, on occasion, the opportunity to make major changes in court personnel.

In Mexico, federal judges also supposedly enjoy permanence of tenure. During the time of President Cárdenas, the term of Supreme Court judges was made to correspond with that of the president; however, in 1944 under President Avila Camacho, tenure on good behavior was restored.<sup>25</sup> With respect to lower court justices, Art. 97 of the Constitution provides that they "shall hold office for four years, at the expiration of which, if they are reelected or elevated to a higher position, they may be removed from office only if guilty of bad conduct." Since their reelection and promotion are in the hands of the Supreme Court, the tenure of competent judges should be secure. However, it appears that the benefits of life tenure have been attenuated by the ease with which federal judges may be removed. Article 111 of the Constitution provides that:

The President of the Republic may request from the Chamber of Deputies the removal, for bad conduct, of any ministers of the Supreme Court of Justice, of circuit magistrates, of district judges. . . . In these cases, if the Chamber of Deputies first and the Senators thereafter decide by an absolute majority of votes that the request is justified, the accused official shall be removed from office immediately.

Many have concluded that because of this unusual system of removal by majority vote of Congress, the Court has been timid in holding the political branches to strict constitutional accountability. The threat has been so strong, in fact, that there has been little call for its actual use.<sup>26</sup>

The degree of control which the judiciary has over its own internal leadership, organization, and procedure is important to the courts in their daily operation. Argentine court procedure has generally been independent of executive influence. Article 99 of the 1853 Constitution provides that "the Supreme Court shall adopt its own internal and fiscal regulations and appoint all its subordinate employees." The law which organized the Supreme Court provided that it should have the power to make rules and regulations not only for its own internal administration but also for the lower federal courts. In practice, the Supreme Court has superintendency over all other federal courts. Its supervisory authority includes (1) the power to see that its regulations are fulfilled and to impose disciplinary penalties, including fines, in case of infraction; (2) the power to demand annual reports from lower courts concerning judicial acts of whatever kind; and (3) the power to grant leaves of absence to members of lower courts. In case of recurrent abuses or of serious negligence in the performance of duty by judges of lower courts, the Supreme Court will inform the Chamber of Deputies for possible impeachment proceedings. In case prosecutors or other court officials fail to perform their duties, the Court may suspend them and inform the president.<sup>27</sup>

Similarly, in Mexico, Executive influence in the internal workings of the courts has been greatly reduced, in part through constitutional provisions but probably more importantly because the courts have not interfered greatly with basic presidential policies.<sup>28</sup> The Constitution contains detailed articles concerning the duties of supernumerary judges, resignations, leaves of absence, the holding of other offices by judges, and the function of the attorney general.<sup>29</sup> Article 97 specifies that "the Supreme Court of Justice shall designate each year one of its members as president, with the right of reelection." The same article gives the Supreme Court

the power to change the seat of the district judges, transferring them from one district to another. The same may be done with respect to circuit magistrates. Moreover, the high court may

. . . appoint supernumerary circuit magistrates and district judges to assist in the work of the courts. . . . The circuit courts and district courts shall be distributed among the ministers of the Supreme Court, who shall visit them periodically, observe the conduct of the magistrates and judges presiding over them, hear complaints presented against such officials, and perform any other duties prescribed by law. The Supreme Court of Justice may freely appoint and remove its clerk and any other employees serving it, with strict observance of the appropriate law. In the same way, the circuit magistrates and district judges shall appoint and remove their respective clerks and employees.

In keeping with these provisions, many of the important rules of the internal work of the courts are enacted by the judiciary as regulations. The Supreme Court submits its annual budget to Congress, grants vacations to the district and circuit judges and the officers of the courts, and establishes its own rules of discipline.<sup>30</sup> In both Argentina and Mexico, these provisions for internal supervision have contributed substantially toward making the judiciary a career profession and reducing political influence. In Mexico,

. . . the tendency now is to name District Court judges from the J.P. courts, the so-called Public Ministry (prosecuting attorneys), and especially from among the clerks of the courts, and to appoint Circuit Court judges from the District Courts. Within the past few years, visitations by Supreme Court justices to District and Circuit Courts and much more careful scrutiny of inferior court activities have resulted in a notable improvement in judicial administration.<sup>31</sup>

Both Mexico and Argentina have provided for the economic independence of federal judges. Article 94 of Mexico's Constitution reads in part, "the remuneration received for their services by the ministers of the Supreme Court, by the circuit magistrates and by the district judges may not be reduced during their term in office." Neither may the salaries of Supreme Court members be raised during their term of office.<sup>32</sup> Article 96 of the Argentine Constitution states that federal judges "shall receive for their services a compensation that shall be determined by law and that cannot be decreased in any way during their continuance of office." In

*Fisco Nacional v. Medina*, the Supreme Court upheld the refusal of a lower federal court judge to pay a federal income tax which had been passed during his tenure, on the ground that it constituted a diminution of his compensation. The court ruled that Art. 96, although modeled on a similar provision of the United States Constitution, was more specific, for it provided that the compensation could not be diminished "in any way." The Court added that the provision had been placed in the constitution to guarantee the economic independence of judges from the Executive and the Legislature.<sup>33</sup> In both nations, judicial salaries have generally been free from political manipulation.

A more serious threat to the stature of the courts comes from the Executive Power to pardon. In both Mexico and Argentina the President grants pardons. "He can exercise this power with restraint, as the Constitution no doubt intends, or he can use it vindictively, to free convicted offenders wholesale and to undermine the prestige and very *raison d'être* of the courts."<sup>34</sup> Article 89, Section XIV, of Mexico's Constitution empowers the president "to grant, according to law, pardons to criminals convicted of crimes within the jurisdiction of the federal courts." Mexican presidents have used this right freely, especially in political matters. They have traditionally been generous to minor figures involved in plots against the government, after making certain of the death of the leaders. The act of pardon does not necessarily remove the stigma of crime; instead it merely shows the President's benevolence. Guilt is considered a judicial question and has already been determined officially by the courts before a pardon is issued.<sup>35</sup> In Argentina, Art. 86, Clause 6, of the Constitution empowers the President to "grant pardons or commute punishment for crimes subject to the federal jurisdiction, based on a report by the appropriate court, except in cases of impeachment by the Chamber of Deputies." Although he must first consult the court that imposed sentence in order to be certain that he understands all the fact involved, the President is under no obligation to follow the court's recommendation. The question of granting or withholding pardon is solely within his discretion. In practice, the courts have permitted the President to grant amnesty to persons in advance of trial.<sup>36</sup> Such practices have tended to reduce the independence and stature of the courts in both nations.

Although the President may defeat the purpose of the courts through his use of the pardon, executives in Mexico and Argentina have generally avoided assuming the judicial function. In other Latin American countries, however, many important matters are tried before administrative panels, which are frequently more subject to political influence than the regular

court system.<sup>37</sup> Mexico long opposed all special courts in spite of the advantages of specialized knowledge, speedier handling of disputes, and less formal procedures which they may provide.<sup>38</sup> But recently she has been forced to adopt them in order to relieve the overburdened courts. Today, both Argentina and Mexico have special administrative tribunals, such as tax, labor, and election courts; however, neither country has a complete, independent administrative court system. Unfortunately, while in Mexico the writ of *amparo* is available for appeal of administrative decisions to the regular judiciary, authorities do not consider the procedures fully adequate for judicial control.<sup>39</sup> In Argentina, there has been considerable criticism of the difficulty in gaining judicial review of administrative decisions.

The power of the judiciary may be further diminished through manipulation of the jurisdiction of the courts. Under *de jure* governments, however, this does not appear to have been a major problem in either Mexico or Argentina. The jurisdiction of the courts in both nations appears reasonably broad, and in neither country has the judiciary faced consistent manipulation of its jurisdiction to prevent cases from being considered. The jurisdiction of Argentina's federal sectional (district) courts and chambers of appeal (circuit courts) is subject to congressional regulation, as is the appellate jurisdiction of the Supreme Court. Article 101 of the Argentine Constitution, with reference to the federal jurisdiction outlined in Art. 100, provides that "in these cases the Supreme Court shall exercise appellate jurisdiction, according to the rules and exceptions prescribed by the Congress." The Supreme Court has recognized the authority of the Legislature in matters respecting its appellate jurisdiction and expressly relies upon the United States example.<sup>40</sup> With respect to its original jurisdiction, however, the Supreme Court has ruled that Congress has no power to make alterations.<sup>41</sup> The jurisdiction of Mexico's courts is spelled out in greater detail in the Constitution, but the differences in the jurisdiction of the courts in the two nations does not appear to be great. The one major difference between the two court systems is a question of practice rather than formal restriction. Both Argentina and Mexico provide for ordinary jurisdiction concerning non-constitutional matters and extraordinary jurisdiction over constitutional questions. The majority of Argentine litigation is of an ordinary nature, while the great bulk of Mexican litigation is based on the extraordinary writ of *amparo*. The difference arises because the Argentine Supreme Court has attempted to avoid constitutional questions, while in Mexico the extraordinary writ has been transformed into the normal means of appealing official actions. In both nations, the prac-

tice of the courts appears to be dictated by the prevailing view of the proper role of the courts and considerations of political reality than by formal legal restraints on the jurisdiction of the courts.

The general power of the Executive over the Judiciary may be wholly or partially offset by strong public support of the courts. One possible method of gaining this support is to involve the public through the use of juries. Neither Argentina nor Mexico, however, makes extensive use of the jury system. Article 24 of Argentina's Constitution provides that "the Congress shall promote . . . the establishment of trials by juries," while Art. 67, Clause 11, empowers Congress to enact codes "that may be required to establish trial by jury." The Congress though has not exercised its discretion to create a jury system. Juries are used only in the Provinces of Buenos Aires and Córdoba—and there are only occasionally. Only slightly more use is made of juries in Mexico, although Mexico, along with Brazil, is reputed to have the most highly developed jury system in Latin America.<sup>42</sup> Article 20, Section VI, of Mexico's 1917 Constitution guarantees that in every criminal trial the accused shall

be entitled to a public trial by a *judge or jury* of citizens who can read and write and are also residents of the place and district where the offense was committed, provided the penalty for such offense exceeds one year's imprisonment. The accused shall *always* be entitled to a *trial by jury* for all offenses committed by means of the press against the public peace or against the domestic or foreign policy of the nation. (Emphasis added.)

In addition, juries hear cases of crimes committed in office by public functionaries. A minor exception is found in Art. 130, which states that its provisions dealing with separation of church and state "shall never be heard before a jury." Implementing these provisions, Mexico has instituted a popular jury court, *jurado popular*, at the district court level. It is composed of seven persons, whose names are drawn by lot from lists submitted from all parts of the country every two years.<sup>43</sup> In practice, however, except for cases involving freedom of the press, little use is now made of juries.<sup>44</sup> In general, the jury system has not distinguished itself in Mexico or the rest of Latin America. Among other problems, Latin American juries are said to be reluctant to convict, perhaps because of traditional attitudes toward authority.<sup>45</sup>

The fairness and efficiency of court procedures in speeding equitable justice are important in gaining public support for the courts. Mexican court procedure is similar to that of the United States. Testimony and

cross-examination of witnesses are used regularly. However, judges, in keeping with the European civil law tradition, have greater power to guide the conduct of the trial than do judges in the United States. In Mexico, judges are much more than umpires enforcing the rules of the game. Most authorities appear to feel that the procedures have proved generally satisfactory in protecting the rights of the accused and have not been unduly cumbersome.<sup>46</sup>

By contrast, Argentina's court procedure appears hopelessly antiquated. Perhaps its outstanding characteristic to the North American mind is its reliance on written forms. Everything is put on paper—an arrangement that leads to great expense because testimony and attorneys' opinions must be submitted on stamped paper. In criminal cases, the preliminary hearing is generally secret, and the accused is denied counsel. In theory, this is the realm of the judge; however, in practice the police play the leading role at this stage. The prisoner may be held incommunicado for several days. The trial itself is conducted behind closed doors. While the judge may preside over part of the proceedings, seldom does he attend the entire trial. His judgment is based on the book of evidence compiled by the secretary. Frequently, it is argued, the transcript of the trial is in long hand and illegible; yet, the judge has no other guide. Appeal from his decision may be taken not only by the accused, but also by the public prosecutor. A person found innocent in the lower court may be declared guilty in the court of appeals or the penalty may be increased.<sup>47</sup>

Argentine scholars and publicists sharply criticize the judicial system. Their chief suggestion is oral justice. This involves not only changing or abandoning the written procedure, together with a corresponding reduction in the high court costs, but also full publicity in all cases.<sup>48</sup> Another criticism frequently voiced against both Argentine and Mexican courts is the delay in justice.<sup>49</sup> In 1950, the Mexican Supreme Court was falling so far behind with its work that although it handled 33,957 matters of judicial business, it still had a backlog of 27,026 cases, almost all concerning writs of *amparo*. Even with the establishment of six collegiate circuit courts for *amparo* cases and the promulgation of stricter rules for obtaining the writ of *amparo*, the Circuit and Supreme Courts still face a serious backlog.<sup>50</sup> A final public criticism of the Judiciary relates to the judges themselves. There is much evidence that corruption still takes a heavy toll of Mexican justice.<sup>51</sup> Fortunately, genuine steps have been taken in recent years to divorce the judicial procedure from graft. One sign of the striving toward improvement is the drive toward the "moralizing" of the judiciary, which has led to the removal of some judges since 1952. In Argentina,

bribery of judges is virtually unknown; however, even in the highest courts, judges are more subject to the influence of friendship than in the United States.<sup>52</sup>

On balance, it appears that the courts of Argentina and Mexico have not achieved the public admiration and support which have generally aided the independence of the Brazilian and Venezuelan courts.<sup>53</sup> Nevertheless, the administration of justice has been generally satisfactory in Mexico. Thanks in large measure to the writ of *amparo*, the people, aside from the clergy, enjoy a very real freedom of speech and assembly, although less can be said for freedom of the press.<sup>54</sup> In Argentina the civil and commercial law cases long suffered from excessive delays and prohibitive court costs, with the result that justice could seldom be obtained unless the amount involved was sufficient to warrant protracted litigation. New civil and commercial procedures which went into effect in 1968 appear to have improved the situation somewhat. In criminal cases, however, the results have long compared favorably with those obtained in more developed nations. The judges of the criminal courts are students of penology, and their sentences are generally imposed to fit the needs of the convicted persons and the society.<sup>55</sup> Moreover, despite the preponderance of undemocratic governments in recent years, the tradition of protection of freedom of speech has remained relatively strong.<sup>56</sup>

It is clear whether one examines the relations of the courts with the president or with the public that they lack the stature and independence of the Judiciary in the United States. The president dominates the courts in Argentina and Mexico not only through his political strength but through the exercise of his constitutional functions as well. This does not mean, however, that the courts are mere appendages of the other two branches. In both countries, in fact, the courts generally enjoy more freedom of action than does the Congress.<sup>57</sup> In Mexico, the law-making function of the Congress "has been assumed by the presidency almost *in toto*."<sup>58</sup> With only a few token opposition members, the PRI-dominated Congress seldom challenges the President, who generally heads the party and has a determining voice in the political future of members of Congress. In Argentina, on the other hand, the Congress has often shown independence of the Executive. This has worked to the advantage of the courts, for when the Congress has attempted to assert itself, the resultant struggle has generally left the courts free to pursue a relatively independent course.

In Mexico, when the courts have been assertive and the emphasis on legality has been strong, the courts have been able to defy the Executive,



at least for short periods. Even during the hectic early days of the modern government's attempt to put its land reform program into effect through expropriation, the courts were not only functioning but greatly obstructed the government's program of reform.<sup>59</sup> By the end of 1928 the courts had rendered 2,000 decisions in cases asking for protection (*amparos*) against government authorities granting or restoring land to communal villages (*ejidos*). In 1,800 of the cases, the decision was favorable to the landlords. However,

During the first part of 1929, soon after Portes Gil became president, for reasons unknown (but not difficult to guess), the Supreme Court of the Nation suffered a sudden change of heart with reference to matters agrarian and in five decisions handed down in rapid fire order during the last days of January and the first days of February, the *hacendados* were dealt a severe blow. For these five decisions in Mexican practice established what in the United States would be termed a precedent and in effect served notice that *amparos* would no longer be granted by the Supreme Court in *ejido* cases.<sup>60</sup>

Nevertheless, by 1931 the Supreme Court was again granting *amparo* requests in *ejido* cases. The result was a decree passed by Congress in December 1931 which denied landowners legal recourse to the writ of *amparo* in *ejido* cases.<sup>61</sup>

To determine the degree to which the Mexican courts conflict with the Executive, Pablo González Casanova analyzed the decisions of the Supreme Court in which the President was expressly mentioned as being sued during the period 1917-1960.<sup>62</sup> Of the 3,700 rulings in that period, the court ruled against the Executive in 34% of the cases. This led González to conclude that "the Supreme Court of Justice operates with a certain degree of independence with respect to the Executive Power, sometimes exercising a controlling action over the President or his assistants."<sup>63</sup> His data also shows, however, that it is primarily the economically powerful who have benefitted from these decisions. He concludes that "there is no doubt that the Supreme Court of Justice is endowed with power; yet it does generally follow the policy of the Executive."<sup>64</sup>

The view of the courts held by most commentators on Mexican politics is expressed by Robert Scott: "As long as their acts or decisions do not run too strongly counter to the broad policy lines laid out by the Executive, . . . judges . . . may carry on their duties with reasonable independence and self-respect."<sup>65</sup> No data on Argentina comparable to the González

data for Mexico is available, but most observers agree that the courts have generally been reluctant to challenge the Executive in recent years.<sup>66</sup> One major exception was the period 1943-1945, which ended with the impeachment of four members of the Supreme Court. In short, judicial independence appears to be increasing in Mexico, while Argentina apparently must await a period of greater stability in order to gain a more independent judiciary.

A word of caution is perhaps in order. To say that the Judiciary in Mexico and Argentina are reluctant to challenge measures considered important to the President is not to say that a more independent Judiciary would necessarily have the power to prevent the implementation of major presidential policies. In his study of the eighty-five cases in which the United States Supreme Court has declared federal laws unconstitutional, for example, Robert Dahl found that the high court was generally successful in preventing the application of only those policies which could be considered relatively minor from the point of view of the law-making majority. In cases involving major policies, the best the Court has usually been able to do is to delay implementation. Dahl found twenty-three cases in which major acts were declared unconstitutional within four years of their enactment—a period within which the coalition which enacted the law might still exist. Of the twenty-three cases, Congress reversed the policy impact of the decision (although not necessarily the constitutional interpretation) in seventeen instances. In two cases, the court's actions stood, and in four cases the results are too difficult to classify. Moreover, Dahl notes that the presidential appointment of new Supreme Court judges as old ones die and retire guarantees that the policy views dominant on the court will seldom be long out of line with the dominant views of the law-making majority in the nation.<sup>67</sup> Hence, one must not overestimate the power of even a highly independent court to prevent the implementation of policy by the political majority. Moreover, the courts must, quite clearly, be viewed in the broader context of the political system within which they function.

On balance, the relative stability and growing democracy in Mexico are developing constitutional practices of respect for judicial integrity and independence which have been seriously undermined in Argentina. Today, Mexico's Supreme Court is free of local influence, and the federal courts are relatively successful in protecting the individual against arbitrary action by lower officials.<sup>68</sup> The courts do still tend to defer to the President, members of the official family, and leading officials of the PRI. But if the present trends continue, the influence of these extra-legal consid-

erations should diminish. Having seen these limits on judicial independence, let us now turn to a discussion of how they have affected the work of the courts.

### JUDICIAL REVIEW

In both Mexico and Argentina, the Supreme Court acts, to some degree, as the guardian and interpreter of the Constitution. In both instances, however, the role of the courts is limited by the fact of executive dominance and by the civil law tradition that the judge should simply apply the law as written by the Legislature rather than sit in judgement of its validity. The courts, it is felt, should not interfere in the sphere of the Legislative and Executive Powers.<sup>69</sup> In Mexico, this tradition has been quite strong and the role of the court as an interpreter of the Constitution is limited to a narrow scope. Nevertheless, within that range the Court is extremely active and effective. By contrast, the Argentine courts theoretically exercise a much wider scope of review but in practice make fewer decisions of a constitutional nature.

In Mexico, the supremacy of the Constitution is stipulated in Art. 133 of the Constitution. And Art. 103 provides that "The federal courts shall decide all controversies that arise: . . . Out of law or acts of the authorities that violate individual guarantees" and out of federal-state conflicts. The power of judicial review in Mexico is basically limited to these two areas. In one of them—conflicts between federal and state authority—the courts have been relatively ineffectual. The judiciary has provided no serious obstacles to the progressive centralization of the federal system. In the other area—protection of individual liberties—judicial review has been quite effective, although it has taken a special character. It has become less a defense of the Constitution than a defense of the individual against the state.<sup>70</sup>

The constitutionality of laws and official actions in Mexico is tested by the suit of *amparo*. In its inception, the prime purpose of *amparo* was the preservation of freedom from unjustified imprisonment and the protection of private property against arbitrary acts of government. The key principle in protecting freedom was the *garantía de legalidad* (civil right of legality), which stems from the traditional fear of local authorities and the resultant desire to control them.<sup>71</sup> It provides the constitutional guarantee that the rulings and acts of all authorities must be legally correct.

This aspect of *amparo* has had two important effects. First, the Federal Supreme Court has become the final interpreter of all state and federal laws,<sup>72</sup> which has insured the subordination of the state administration of justice to the federal judiciary. While this concentration of interpretation has given Mexico's system greater clarity in its overall structure, it has had its inconveniences. During the trial of an ordinary action before a local court, for example, the need may arise for applying a law which the judge or one of the parties considers unconstitutional. In such a case, the judge may refuse to apply the statute, but he cannot justify his decision by declaring the law to be unconstitutional. Only a federal court may make such a determination. Moreover, a final ruling on the constitutionality of a law can only be handed down by a plenary session of the Supreme Court. Since virtually all of the court's work is done in specialized chambers, this results in great delay. A partial exception is that the chambers may make such a determination when the question has already been settled in *jurisprudencia* (obligatory precedent) by the plenum. The procedure, thus, places a tremendous burden on the Supreme Court. Second, by means of this legality *amparo*, all violations and mistaken interpretation of federal or state law become violations of the constitution. Realistically, however, the legality *amparo* does not test constitutionality. Rather, it has become the channel for ordinary interpretations of state and federal laws.<sup>73</sup>

The *amparo* against laws (*amparo contra leyes*) deals with suits in which the plaintiff alleges that he has been injured through the mere existence of a law rather than through any administrative or judicial act of application. As a result of the restrictions on it, however, it is generally impossible in practice for the Supreme Court to make what might be called constitutional interpretations of the statutes, that is, interpretations which tend to mold the text of the law to the requirements of the Constitution, instead of simple decisions of unconstitutionality. This is particularly true in administrative matters, which make up the bulk of constitutional questions raised.<sup>74</sup> In reaching a decision on constitutionality, the court usually gives the law a literal and abstract interpretation, and its decision is not binding on the chambers of the court or on lower courts. Neither is the decision necessarily influential in later cases. Thus, the Mexican system of judicial review is basically a system of abstract declarations of unconstitutionality supported by logical argument.<sup>75</sup> This attitude stems from prejudice against creative and broad interpretations on the part of judges; for, in keeping with civil law and Latin American traditions, it is thought that the function of judges is strictly to apply the law, not to shape it through interpretation.

In *amparo* cases, the declaration of unconstitutionality is limited in its effect to the case at bar and those effects described as "relative." If an act is found to violate the Constitution, the official is ordered to cease and desist; if he disobeys, he is liable to penalties. When the injury is caused by a law, the individual is excused from compliance. The judgment prevents the law from being applied to the plaintiff not only in regard to the specific application that gave rise to the action but for all future acts under the law that might be attempted against him as well. Only the persons bringing suit, however, are covered—not the general population. Since the decision is binding only upon the parties in litigation, the decision does not alter or invalidate the law. The law is applied with the same force after the declaration of unconstitutionality as before.<sup>76</sup>

A limited form of *stare decisis*, called *jurisprudencia* or ruling body of court decisions, is created by five final consecutive decisions of the Supreme Court concurred in by a special majority of the justices. *Jurisprudencia* is binding on lower federal courts, courts of the federal district, and state courts, though not on administrative bodies.<sup>77</sup> Because of the large number of constitutional cases, it is not difficult to establish *jurisprudencia*; however, because it does not bind administrative bodies, each individual is obliged to file an *amparo* to gain protection. This has, of course, resulted in a large number of *amparos* being filed. The situation would be far worse were it not for the tacit duty felt by many administrators to respect judicial interpretations and the general cooperation of the Legislative Power in repealing unconstitutional measures.

In spite of the obvious problems created by the use of *amparo*, the majority of Mexico's legal writers feel that its application has been generally satisfactory.<sup>78</sup> It should be remembered that from its inception, *amparo* was a protection of individual rights. Mexican writers have held that to allow the judiciary to make decisions on constitutionality binding on all government organs would be to give the judiciary power to interfere with the Legislative and Executive branches.<sup>79</sup> Nevertheless, these limiting rules appear to subordinate the safeguarding of the Constitution proper to the reparation of damage to the individual, making it appear as if the injury to the supreme law were relatively unimportant in comparison.<sup>80</sup> In this light, it is not surprising that judicial review has not been effective in issues concerning the expansion of powers by legislative and executive organs or in those conflicts between them. To summarize in the words of Felipe Tena Ramírez, former associate justice of Mexico's Supreme Court,

The practice of the *amparo* has made that institution, not a defense of the paramount law, but a means of protecting the individual rights recognized by the Constitution; the comparative lack of effectiveness of the *amparo* as a direct and authentic defense of constitutionality has been compensated for by its extraordinary effectiveness as a safeguard of human rights.<sup>81</sup>

Although judicial review is not specifically authorized by the Argentine Constitution, there is strong historical evidence that the framers of the Constitution intended the Supreme Court to exercise the power. From its very inception, in 1863, the Federal Supreme Court asserted its right to declare laws and executive acts unconstitutional. Today, it is recognized that all courts, both provincial and federal, can pass upon constitutional questions. The constitutions of the provinces expressly authorize their state Supreme Courts to declare laws unconstitutional, and in *Chaparrone v. Juez de la Capital*, it was held that even a justice of the peace has the power to pass on constitutional questions.<sup>82</sup> In the exercise of this power, the federal courts may declare void any executive, legislative or judicial act which is in conflict with the Constitution. The court exercises its extraordinary appellate jurisdiction by means of the writ of error. Through this writ are brought to the Supreme Court the records of final judgments rendered by the Supreme Courts of the provinces and the lower federal courts which are challenged as contrary either to the Constitution, the laws of Congress, or treaties. However, citing U.S. authorities, the Supreme Court held in 1934 that it had "no power to review the decisions of the provincial courts interpreting the provincial constitutions and statutes when their interpretation did not conflict with the national constitution, laws, or treaties."<sup>83</sup> Thus, it may be said the Federal Supreme Court maintains its position as the federal court of last instance and has not become a general court of appeals for the country.

Prior to 1957, there existed no generalized remedy in the nature of injunctive relief against unconstitutional official action. The writ of habeas corpus gave fairly rapid protection against illegal or arbitrary deprivations of physical liberty, but there was no comparable protection for other constitutional rights. Beginning with the *Siri* case in 1957, however, the Supreme Court created a new remedy similar to the Mexican *amparo*.<sup>84</sup> As elaborated in subsequent cases, the Argentine *amparo* became a protection against both official and private acts which violated basic individual rights guaranteed by the Constitution. In the words of the Supreme Court,

Whenever it is clear and obvious that any restriction of basic human rights is illegal and also that submitting the question to the

ordinary administrative or judicial procedures would cause serious and irreparable harm, it is proper for the judges immediately to restore the restricted right through the swift method of the recourse of amparo.<sup>85</sup>

The Argentine *amparo* has not been as widely used as the Mexican *amparo*, in part because of the insistence of the Argentine courts that for the writ to be available other legal means of defending a right must not be available or that other available remedies be ineffective in avoiding a serious and irreparable harm.<sup>86</sup> The court has also been reluctant to apply the writ of *amparo* in cases involving political questions, conflicts between the other two branches, and decrees by *de facto* governments. Hence, while the Argentine *amparo* is an important protection of individual rights against official actions, it does not approach the stature of the Mexican *amparo*.

In the process of constitutional interpretation, the Argentine Supreme Court has established several principles governing suits in questions of constitutionality.<sup>87</sup> Only parties adversely affected by the alleged unconstitutional statutes or acts of the Executive can question their constitutionality.<sup>88</sup> When a statute is declared unconstitutional, the Court does not invalidate it but merely refuses to apply it. Once a constitutional issue has been settled by the Supreme Court, the lower courts, as well as the Supreme Court itself, are generally bound by such decisions. With rare exceptions, the Supreme Court has maintained that its decisions carry special weight and that they must be taken into account by the lower courts in deciding similar cases. On occasion the Court has categorically declared their binding force. The position of the Court is well stated in *Baretta v. Provinica de Córdoba*:

[I]t does not mean that the authority of the precedents is decisive in all cases or that the principle of *stare decisis* can be applied in constitutional matters without reservation. . . . It is nonetheless true that, when error and impropriety are not clearly apparent in the decisions already rendered on the legal question which is the subject matter of the suit, the solution should be sought in the doctrine contained in the precedent referred to.<sup>89</sup>

In summary, Argentina has attempted to follow the model of the United States in judicial review and has built an impressive body of constitutional interpretations similar to the pattern in the United States. Certainly the importance which the Court has had in Argentine constitutional history has been extraordinary. Its interpretations are necessary to an understanding of the law. But often the Court has seemed rather

like a superior tribunal, with functions similar to those of other justice tribunals. Only on exceptional occasions does it assume the exercise of its great power to establish the constitutional interpretations which are within its theoretic power. The Court tends to evade the examination of any constitutional question which might compromise it before public opinion. It generally neither challenges the Executive on any important issue nor declares unconstitutional a major law enacted by the Congress. Its judgments sometimes indicate that all solutions must be extracted from the express or implied intent of the Legislature as opposed to the principle of constitutional interpretation employed in the United States.<sup>90</sup> In contrast to this timid approach, the courts of Mexico have generally been vigorous in the application of the writ of *amparo* as a constitutional protection against the actions of public officials below the level of the president.

#### *DE FACTO* GOVERNMENT AND STATES OF SIEGE

On this point, the discussion has centered primarily on the situation of the courts under constitutional, *de jure* governments. This has been the normal case in Mexico since the adoption of the 1917 Constitution, and indications are that stability and legitimacy will continue to increase. In Argentina, on the other hand, *golpes de estado* have frequently brought *de facto* governments to power. In recent years, *de facto* government has often seemed the norm. Since the *de facto* governments in Argentina normally do not abolish the court system or ordinary and administrative legislation, the Argentine courts have been forced to develop a *de facto* doctrine to regularize their relations with governments which come to power by extra-constitutional means.<sup>91</sup> After the revolution of 1861, the Supreme Court ruled in *Baldomero Martínez y Manuel Otero* that General Mitre was competent to make executive decisions since it was he who provisionally exercised all national power by virtue of his victory in the revolution.<sup>92</sup> Similar rulings were made after coups in 1930 and 1943. Particularly illustrative is the 1930 accord of the Supreme Court in reply to a note from General Uriburu, who had just assumed power:

This government is in possession of the military and police forces necessary to insure the peace and order of the Nation and therefore to protect the liberty, life, and property of persons, and has declared, moreover, in public acts, that it will, in exercising power, maintain the supremacy of the Constitution and other laws of the country. Such antecedents characterize, without a doubt, a *de facto* government . . .



with all the consequences of the doctrine of *de facto* governments with respect to the possibility of accomplishing validly the acts necessary to carry out the purposes that it has in mind. . . . [The provisional government is] a *de facto* government whose title cannot be judicially questioned with success by anyone, insofar as it exercises administrative and political functions derived from its possession of force as a measure of order and social security.<sup>93</sup>

It was originally held that the *de facto* government's acts were subject to judicial review, but in recent years the force of this doctrine has diminished. Decree laws of the *de facto* government are considered valid by reason of their origin. The title to office of the *de facto* government cannot be questioned in court by a private person, and acts of state are not reviewable by the courts. Judicial review is allowed, however, when the question involved goes to the substance or content of decree laws which affect constitutional rights and guarantees; for, as one court held in *In re Arlandini*, "As long as the Constitution is in effect, it is the supreme law with respect to the laws of *de facto* governments as well as laws of those governments legally constituted."<sup>94</sup> In keeping with this, the *de facto* government may not exercise judicial functions.

It should be borne in mind that although these doctrines were developed in actual practice rather than in theory, they are valid only to the degree that the particular *de facto* government in power will accept them. With glaring exceptions, *de facto* governments have frequently treated the courts with relative circumspection. Individual judges may be removed, or, as under Perón, the court may be completely reorganized, but *de facto* governments have generally tried to avoid the appearance of tampering with the judiciary.<sup>95</sup> This is in part because the courts are too weak to successfully challenge the government and in part because of the necessity for continued legal stability. Under a *de facto* government, the limited power of the judiciary functions best in the protection of citizens from the acts performed by lower public officials in the discharge of their ordinary functions, administrative acts, or acts of a common contractual nature without political or discretionary elements. In several instances, however, the Argentine Supreme Court has successfully challenged the president and prevented the removal of lower court justices and the creation of new tribunals.<sup>96</sup>

Problems somewhat similar to those raised by *de facto* governments arise as a result of an officially declared state of siege, during which the Executive assumes extraordinary powers. It is quite common for constitu-

tions to provide for special powers in times of emergency. However, in Latin America the state of siege has become a particular problem because of the frequency of its use. In the period 1950-60, for example, a state of siege was declared or extended 100 times by Latin American governments. The state of siege has been a problem in Argentina. As in the case of *de facto* governments, the Argentine courts have attempted to develop a doctrine for dealing with decrees issued during states of emergency. In essence, the courts have held that the decision to declare a state of siege is a political question not susceptible to judicial review but that the courts may review particular acts of the Executive to determine their reasonableness. While the courts appear to have generally been circumspect in questioning the thrust of executive actions taken during states of siege, they nevertheless have sought to protect individual rights on a case by case basis.<sup>97</sup>

## CONCLUSION

This examination of the position, independence, and stature of the judiciary within the political systems of Argentina and Mexico reveals a continued domination of the judiciary by the president. This dominance has arisen from both constitutional and political factors, and it has taken different form within the two countries. Although the presidents of Mexico and Argentina exercise more constitutional powers than does the President of the United States, they do not have a great deal more constitutional power directly relative to the judiciary than does the American president. However, because of the greater acceptance of the political dominance of the Latin American president, he has been more inclined to make full use of all of his constitutional powers.

The most important factor in the political environment contributing to a divergence in practice between Argentina and Mexico appears to have been the greater political stability of Mexico relative to Argentina. In Mexico, power has become more institutionalized and somewhat less personal. Today, Mexico's Supreme Court is free of local influence, and the federal courts are relatively successful in protecting the individual against arbitrary action by lower government officials. Although the courts hesitate to strike down programs considered important by the president, progress is being made. By contrast, in Argentina political instability appears to have reduced respect for judicial independence, caused periodic major turnovers in judicial personnel, and created the necessity for accommoda-

tion to unconstitutional regimes. Nevertheless, Argentine criminal justice has been on a relatively high plane, and the nation continues to be one of Latin America's leaders in the development of legal philosophy.

In matters of jurisdiction, both nations, but particularly Argentina, have followed the example of the United States. No great problems have arisen to threaten the stature of the judiciary in this area. In the sphere of judicial review, Mexico has been a Latin American leader with the development of the writ of *amparo*. The legality *amparo*, in fact, has become the normal means of appeal against actions by the government. In Argentina, the courts theoretically exercise a much wider scope of judicial review. In practice, however, they make far fewer constitutional decisions. The Mexican writ of *amparo* has proven to be a generally effective protection of individual rights in spite of its ineffectiveness in protecting the Constitution itself. The Argentine courts have had great influence on the development of Argentine constitutional law; yet, often the courts have avoided constitutional issues. In the last forty years, the predominance of *de facto* governments has kept the courts relatively weak and fearful of their position. Nevertheless, the Argentine courts have developed a *de facto* doctrine for regularizing their relationships with such governments. Moreover, they have been reasonably effective in protecting individual rights against the actions of lower officials. On occasion the courts have even successfully challenged the president.

## NOTES

<sup>1</sup>Under the military government, 1966-73, the 1853 Constitution remained in effect insofar as it did not conflict with the statutes of the Revolutionary Government.

<sup>2</sup>Forty-four sections of the two Constitutions are practically identical, twenty-two are similar, forty-one are different, and sixty sections of the Argentine Constitution are not found in the United States' charter. Segundo V. Linares Quintana, "Comparison of the Constitutional Basis of the United States and Argentine Political Systems," *University of Pennsylvania Law Review*, XCVII (April 1949), 644. J.A.C. Grant, *El control jurisdiccional de las leyes* (Mexico: Universidad Nacional Autónoma de México, Facultad de Derecho, 1963), p. 51. W.J. Wagner, "Appellate Jurisdiction of the Supreme Courts of Federal States," *Notre Dame Lawyer*, XXXIV (Dec. 1958), 28-29.

<sup>3</sup>Austin F. Macdonald, *Government of the Argentine Republic* (New York: Thomas Y. Crowell Co., 1942), p. 267.

<sup>4</sup>*Ibid.*, pp. 267-69.

<sup>5</sup>Joseph L. Kunz, "Contemporary Latin American Philosophy of Law," *American Journal of Comparative Law*, III (Spring 1954) 221, 225, 228-32.

<sup>6</sup>W. Raymond Duncan, "The Mexican Constitution of 1917," *Inter-American Law Review*, V (July-Dec. 1963), 277-309.

<sup>7</sup>Lucio Cabrera A., "History of the Mexican Judiciary," in *Mexico: A Symposium on Law and Government*, ed. by Enrique Helguera, Guillermo Gallardo Vázquez, and David Casares Nicolín (Coral Gables, Fla.; University of Miami Press, 1958), p. 23.

<sup>8</sup>William P. Tucker, *The Mexican Government Today* (Minneapolis: University of Minnesota Press, 1957), p. 73.

<sup>9</sup>Austin F. Macdonald, *Latin American Politics and Government* (2nd ed.; New York: Thomas Y. Crowell Co., 1954), p. 100.

<sup>10</sup>Compare with the language of Art. 2, Section 1 of the U.S. Constitution: "The Executive Power shall be vested in a President of the United States of America." All quotations from the Argentine and Mexican Constitutions are based on *Constitution of the Republic of Argentina*, 1853, trans. by Pan American Union (Washington: Pan American Union, 1963), and *Constitution of Mexico, 1917*, trans. by Pan American Union (Washington: Pan American Union, 1968).

<sup>11</sup>Linares Quintana, *op. cit.*, 654.

<sup>12</sup>Macdonald, *Argentine Republic*, p. 190. K.H. Silvert, "The Costs of Anti-Nationalism: Argentina, Expectant Peoples," ed. by Silvert (New York: Random House, 1963), p. 357-58. Marvin Goldwert, *Democracy, Militarism, and Nationalism in Argentina, 1930-1966* (Austin: University of Texas Press, 1972), pp. xv, 1962. Richard P. Stebbins and Alba Amoia, *Political Handbook and Atlas of the World, 1970* (New York: Simon and Schuster, 1970), p. 12. Boris Kozolchyk, "Law and Social Change in Latin America," *Hispanic American Historical Review*, XCIV (Nov. 1964), 494.

<sup>13</sup>Cabrera A., *op. cit.*, 26-29.

<sup>14</sup>Macdonald, *Latin American Politics*, p. 260. All sources examined in this study who commented on judicial independence concluded that the President of Mexico dominates the courts. See, e.g., Miguel Lanz Duret, *Derecho Constitucional Mexicano* (5th ed.; Mexico: Norgis Editores, S.A., 1959), pp. 112, 266; Robert E. Scott, *Mexican Government in Transition* (rev. ed.; Urbana: University of Illinois Press, 1964), pp. 266-72; L. Vincent Padgett, *The Mexican Political System* (Boston: Houghton Mifflin Co., 1976), p. 202; Tucker, *op. cit.*, pp. 102, 111; James L. Busey, *Latin America: Political Institutions and Processes* (New York: Random House, 1964), p. 39; and Pablo González Casanova, *Democracy in Mexico*, trans. by Danielle Salti (New York: Oxford University Press, 1970), pp. 21-24.

<sup>15</sup>It is, of course difficult to measure exactly the level of democracy in a polity. Banks, however, provides data on certain indicators of democracy which give some basis of comparison. Combining such factors as effectiveness of the Legislature, openness of the nominating process, and the exclusion of parties and groups from open political participation, Banks created an "aggregate competition index" for each of the years 1946-66. On this index, Mexico made a partially competitive score of 8 for each of the twenty-one years. Argentina, reflecting her greater instability, made a noncompetitive score of 0 for five of the years, a partially competitive score of 8 for six of the years, and scores of 4 to 7 for the remaining ten years. By comparison, the United States scored 11 and Chile 9 or 10, for all years. Haiti scored 1 in each of the years 1957-66. Arthur S. Banks, *Cross-Polity Time Series Data* (Cambridge: M.I.T. Press, 1971), pp. 283, 290. Another indication of the level of democracy is given by Russell H. Fitzgibbon's periodic survey of the judgment of leading Latin Americanists. Respondents were asked to rank the Latin American nations on a number of factors. Kenneth Johnson then selected five of the items which appeared to best reflect the level of democracy (free speech, free elections, free party organization, independent judiciary, and civilian supremacy). The following table shows the resulting rank of Mexico and Argentina in comparison to the other twenty Latin American nations during the period 1945-70.

Rank Order of Reputation for Democracy Among the Twenty  
Latin American Nations by Year

	1945	1950	1955	1960	1965	1970
Mexico	7	9	5	7	6	6
Argentina	9	15	15	4	7	14

Kenneth F. Johnson, "Measuring the Scholarly Image of Latin American Democracy, 1945-1970. *Methodology in Quantitative Latin American Studies*, ed. by J. W. Wilkie and Kenneth Ruddle (Los Angeles: UCLA Latin American Center, forthcoming).

<sup>16</sup>Macdonald, *Latin American Politics*, pp. 83-85.

<sup>17</sup>Kenneth L. Karst, "The Study of Latin American Law and Legal Institutions," in *Social Science Research on Latin America*, ed. by Charles Wagley (New York: Columbia University Press, 1964), p. 297. Frondizi re-examined all federal judges but reportedly kept 80%. "The Affair of the Judges," *New Statesman*, LVI (July 26, 1958), 103.

<sup>18</sup>Calculated from data in *International Yearbook and Statesmen's Who's Who* (London: Burke's Peerage, 1953-72). Average time between appointments for the entire history of the U.S. Supreme Court is twenty-three months. Robert A. Dahl, *Pluralist Democracy in the United States* (Chicago: Rand McNally, 1967), p. 156.

<sup>19</sup>Median tenure for Mexico was five years, compared to four for Argentina and eight for the United States. Note that tenure is calculated only for the 1953-72 period; tenure before and after the period is not counted.

<sup>20</sup>See, e.g., Robert J. Alexander, *Latin-American Politics and Government* (New York: Harper & Row, 1965), p. 41.

<sup>21</sup>See, e.g., Alexander J. Groth, *Comparative Politics, A Distributive Approach* (New York: Macmillan Co., 1971), pp. 220-23. But see Theodore L. Becker, *Comparative Judicial Politics* (Chicago: Rand McNally & Co., 1970), pp. 161-68, and Richard J. Richardson and Kenneth N. Vines, *The Politics of Federal Courts* (Boston: Little, Brown, 1970), pp. 174-75. One may also argue that in developing nations, in which many values may be in flux, it is desirable that law and the courts adapt quickly to changing standards of what is right and proper. In such a situation, the executive, as a political agent, may be in a better position to perceive and to respond to changing values.

<sup>22</sup>Article 47.

<sup>23</sup>Macdonald *Latin American Politics*, p. 262. Scott notes that three of President Avila Camacho's Supreme Court nominees were once rejected in a closed session of the senate. However, "After a committee of senators waited upon the president to inform him of the action, they hurried back to set things right. The next day the Senate ratified the entire list, and the Senate president stated that the earlier press reports on the secret session had been in error. The Senate had never refused to ratify, it had merely kept action pending while more information was gathered on the three men." Scott, *op. cit.*, pp. 264-65. Presidential appointments to the superior courts of the federal district and the territories require the consent of the chamber of deputies. Art. 73, *Constitution of Mexico*.

<sup>24</sup>Busey, *Political Institutions*, p. 39.

<sup>25</sup>Felipe Tena Ramírez, *Derecho constitucional mexicano* (9th ed.; México: Editorial Porrúa, S.A., 1968), pp. 448-50.

<sup>26</sup>Lanz Duret, *op. cit.*, p. 271. William W. Pierson and Federico G. Gil, *Governments of Latin America* (New York: McGraw-Hill Book Co., 1957), p. 281. Busey,

*loc. cit.* Alexander T. Edelman, *Latin American Government and Politics* (2nd ed.; Homewood, Ill.: Dorsey Press, 1969), p. 479. The President so dominates Mexico's Congress that even a provision for a two-thirds majority could easily be met.

<sup>27</sup>Ley 13,998 (1950), Art. 12-19. *Decreto-ley* 1285/58 (1958) as modified, Art. 12-19. Santos P. Amadeo, *Argentine Constitutional Law* (New York: Columbia University Press, 1943), pp. 54-55. Pierson and Gil, *op. cit.*, p. 279.

<sup>28</sup>Scott, *op. cit.*, p. 269.

<sup>29</sup>Art. 97-102.

<sup>30</sup>Tena Ramírez, *op. cit.*, p. 452. Victor Manzanilla Schaffer, "Separation of Powers under Mexican Constitutions of 1857 and 1917," in *Mexico: A Symposium*, p. 19.

<sup>31</sup>Scott, *loc. cit.*

<sup>32</sup>Article 127, *Constitution of Mexico*. Salaries are fixed by law, and retirement with pay is voluntary after fifteen years' service or after ten years' service and attainment of the age of sixty. Tucker, *Mexican Government Today*, pp. 112-13.

<sup>33</sup>176 S.C.N. 73 (1936) cited by Amadeo, *op. cit.*, p. 51. In 1962 in *Arias v. Gobierno Nacional*, however, the Supreme Court, while holding that the delayed payment of judicial salaries was not consistent with Art. 96, refused an *amparo* to force immediate payment—in part on the grounds that the violation could not be attributed to the will of the government. The government was desperately short of funds at the time and had issued a decree in essence delaying the payment of salaries for all government employees for six months. The reasoning of the court suggests that its decision may have been motivated by non-doctrinal considerations. Kenneth L. Karst, *Latin American Legal Institutions* (Los Angeles: UCLA Latin American Center, 1966), pp. 698-99.

<sup>34</sup>Edelman, *op. cit.*, p. 478.

<sup>35</sup>Macdonald, *Latin American Politics*, p. 265.

<sup>36</sup>Macdonald, *Argentine Republic*, pp. 204-205.

<sup>37</sup>Martin C. Needler, *Latin American Politics in Perspective* (Princeton, N.J.: D. Van Nostrand Co., 1963), p. 155.

<sup>38</sup>Pierson and Gil, *op. cit.*, p. 286. Helen L. Clagett, *The Administration of Justice in Latin America* (New York: Oceana Publications, 1952), 56-58.

<sup>39</sup>Tucker, *op. cit.*, pp. 118-19. Cabrera, in *Mexico: A Symposium*, p. 29. Clagett, *op. cit.*, pp. 55-84, 92-94.

<sup>40</sup>See, e.g., *Gobierno Nacional v. Eiriz*, 137 S.C.N. 345 (1922), cited by Amadeo, *op. cit.*, p. 68. Wagner, *Notre Dame Lawyer*, XXXIV, 30.

<sup>41</sup>*Ex Parte Sojo*, 32 S.C.N. 120 (1887), cited by Amadeo, *op. cit.*, pp. 76-77.

<sup>42</sup>Clagett, *op. cit.*, p. 117.

<sup>43</sup>*Ibid.*, p. 120. Cabrera, *op. cit.*, p. 30.

<sup>44</sup>Tucker, *op. cit.*, p. 117. Macdonald, *Latin American Politics*, p. 273.

<sup>45</sup>Needler, *op. cit.*, p. 153. Pierson and Gil, *op. cit.*, p. 283. Clagett, *op. cit.*, pp. 117-18.

<sup>46</sup>Tucker, *op. cit.*, pp. 87, 117. Scott, *op. cit.*, p. 267.

<sup>47</sup>Macdonald, *Argentine Republic*, pp. 270-73. Enrique Esteban Rivarola, "Procedural Problems in Argentine Law," *Journal of the Bar Association of the District of Columbia*, XXVIII (Jan. 1961), 38-43.

<sup>48</sup>Macdonald, *Argentine Republic*, p. 274. Rivarola, *op. cit.*, 39.

<sup>49</sup>Grant, *Control jurisdiccional*, pp. 66-69. Tucker, *op. cit.*, p. 118. Macdonald, *Argentine Republic*, p. 273. Rivarola, *loc. cit.*

<sup>50</sup>Scott, *op. cit.*, pp. 268-69. Pedro Pablo Camargo, "The Claim of 'Amparo' in Mexico," *California Western Law Review*, VI (Spring 1970), 203, 207. Phanor J. Eder, "Judicial Review in Latin America," *Ohio State Law Journal*, XXI (Autumn 1960), 602.

<sup>51</sup>Busey, *Political Institutions*, p. 39. Tucker, *op. cit.*, p. 87.

<sup>52</sup>Macdonald, *Argentine Republic*, p. 274.

<sup>53</sup>Lanz Duret, *Derecho Constitucional*, pp. 270-71. Pierson and Gil, *op. cit.*, p. 282. Silvert, *Expectant Peoples*, p. 357.

<sup>54</sup>Tucker, *op. cit.*, pp. 86-87. For data comparing the level of freedom of the press in Argentina and Mexico, see Charles L. Taylor and Michael C. Hudson, *World Handbook of Political and Social Indicators* (2nd ed.; New Haven: Yale University Press, 1972), pp. 51-52.

<sup>55</sup>Macdonald, *Argentine Republic*, pp. 274-75.

<sup>56</sup>Busey, *op. cit.*, p. 142.

<sup>57</sup>This is the general situation in Latin America. Needler, *Politics in Perspective*, p. 154. Pierson and Gil, *op. cit.*, p. 216. But see J. Lloyd Mecham, "Latin American Constitutions: Nominal and Real," *Journal of Politics*, XXI (May 1959), 269. The relatively greater independence of the judiciary in Mexico is noted by several authorities. Scott, *op. cit.*, p. 262; Padgett, *Mexican Political System*, pp. 200-201; and Tena Ramirez, *Derecho constitucional*, pp. 234-41. But see Ignacio Burgoa, *El juicio de amparo* (6th ed.; Mexico: Editorial Porrúa, S.A., 1968), pp. 252-53. For data comparing the effectiveness of the two congresses, see Banks, *Cross-Polity Time Series Data*, pp. 4, 34.

<sup>58</sup>Scott, *op. cit.*, p. 262.

<sup>59</sup>Edelmann, *Latin American Government*, p. 480.

<sup>60</sup>Eyler N. Simpson, *The Ejido: Mexico's Way Out* (Chapel Hill: University of North Carolina Press, 1937), p. 119.

<sup>61</sup>*Ibid.*, pp. 119-20.

<sup>62</sup>*Democracy in Mexico*, pp. 21-24. The results of this compilation provide more a measure of suits against the Executive Power than against the president as such; for, while the president is often made a party to *amparo* proceedings, it is normally only in a formal sense. It is generally understood that the ruling runs against lower officials. Karst, *Legal Institutions*, p. 646.

<sup>63</sup>*Op. cit.*, p. 23.

<sup>64</sup>*Ibid.*, p. 24.

<sup>65</sup>*Mexican Government*, p. 262.

<sup>66</sup>See, e.g., notes 11 and 12 above.

<sup>67</sup>*Pluralist Democracy*, pp. 154-63.

<sup>68</sup>Eder, *Ohio Law Journal*, XXI, 614.

<sup>69</sup>Tena Ramírez, *Derecho constitucional*, pp. 461, 464-65. Lanz Duret, *Derecho Constitucional*, p. 257. Clagett, *Administration of Justice*, pp. 123-24. Lucio Cabrera and William C. Headrick, "Notes on Judicial Review in Mexico and the United States," *Inter-American Law Review*, V (July-Dec. 1963), 265. Eder, *Ohio State Law Journal*, XXI, 572-75.

<sup>70</sup>Clagett, *op. cit.*, pp. 133-34. Felipe Tena Ramírez, "The International Expansion of the Mexican Amparo," *Inter-American Law Review*, I (Jan.-June, 1959), 163. Tena Ramírez, *Derecho constitucional*, p. 458. Macdonald, *Latin American Politics*, p. 274. Clagett goes so far as to say that "the Mexican courts have never been authorized to protect or champion the constitution as 'the supreme law of the land' as we understand it in the United States." Clagett, "Law and Court Systems," *Government and Politics in Latin America*, ed. by Harold E. Davis (New York: Ronald Press Co., 1958), p. 346. Pierson and Gil, *Governments of Latin America*, p. 290. But see Burgoa, *Juicio de amparo*, pp. 166, 168, 191.

<sup>71</sup>Eder, *op. cit.*, 600. Cabrera and Headrick, *op. cit.*, 255.

<sup>72</sup>Cabrera and Headrick, *op. cit.*, 259-60.

<sup>73</sup>*Ibid.*, 257, 260. Eder, *loc. cit.*

<sup>74</sup>Eder, *op. cit.*, 601. Camargo, *California Western Law Review*, VI, 209-10. Cabrera and Headrick, *op. cit.*, 260-61.

<sup>75</sup>Cabrera and Headrick, *op. cit.*, 260-63.

<sup>76</sup>*Ibid.*, 264-65. Clagett, *Administration of Justice*, p. 137. Camargo, *loc. cit.* Tena Ramírez, *Derecho constitucional*, p. 475.

<sup>77</sup>Tena Ramírez, *Derecho constitucional*, pp. 482-483. Burgoa, *op. cit.*, pp. 773-87. Clagett, *Administration of Justice*, p. 125. Cabrera and Headrick, *op. cit.*, 265. Eder, *A Comparative Survey of Anglo-American and Latin-American Law* (New York: New York University Press, 1950), p. 14.

<sup>78</sup>Clagett, *Administration of Justice*, pp. 138-39. But see Camargo, *op. cit.*, 202-203, 208.

<sup>79</sup>Cabrera and Headrick, *loc. cit.*

<sup>80</sup>Clagett, *Administration of Justice*, p. 138.

<sup>81</sup>*Inter-American Law Review*, I, 163.

<sup>82</sup>149 S.C.N. 122 (1927) cited by Amadeo, *Argentine Constitutional Law*, p. 73. Eder, *Ohio State Law Journal*, XXI, 576.

<sup>83</sup>*Sociedad Anónima Frigoríficos Anglo v. Buenos Aires*, 172 S.C.N. 149 (1934), cited by Wagner, *Notre Dame Lawyer*, XXXIV, 30-31. Amadeo, *op. cit.*, pp. 70-73.

<sup>84</sup>Karst, *Legal Institutions*, pp. 651-52 (for cases, 651-75). Grant, *Control jurisdiccional*, 51-52.

<sup>85</sup>*Samuel Kot, SRL*, 241 Fallos 291 (1958), quoted by Karst, *Legal Institutions*, p. 257.

<sup>86</sup>*Pampinella* (1959) cited *ibid.*, p. 664.

<sup>87</sup>The court will not declare a law unconstitutional unless such a declaration is necessary in order to decide the case. Neither will a law be declared unconstitutional unless there is a clear and undoubted opposition between the law and constitution. When examining whether or not a law is constitutional, the court will not consider the soundness of its economic or social basis but only whether the statute is in conflict with the constitution. Finally, the court will not entertain jurisdiction of cases where the subject matter is of a political nature. Amadeo, *op. cit.*, pp. 83-85.



<sup>88</sup>*Ibid.*, p. 83. Eder, *Ohio State Law Journal*, XXI, 576.

<sup>89</sup>183 *Fallos* 409 (1939) quoted by Henry P. de Vries and José Rodríguez-Novas, *The Law of the Americas* (New York: Oceana Publications and Dobbs Ferry, 1965), pp. 212-13.

<sup>90</sup>Linares Quintana, *University of Pennsylvania Law Review*, XCVII, 656-57. Edelmann, *Latin American Government*, pp. 482-83. Macdonald, *Latin American Politics*, p. 97. Pierson and Gil, *op. cit.*, pp. 292-93.

<sup>91</sup>Excellent treatments of the *de facto* doctrine are J. Irizarry y Puente, "The Nature and Powers of a 'De Facto' Government in Latin America," *Tulane Law Review*, XXX (Dec. 1955), 25-72, and Linares Quintana, *op. cit.*, 658-64. See also cases in Karst, *Legal Institutions*, pp. 675-90.

<sup>92</sup>S.C.N. 290 (1865) cited by Linares Quintana, *op. cit.*, 658.

<sup>93</sup>Quoted in Irizarry y Puente, *op. cit.*, 32-33.

<sup>94</sup>208 *Fallos* 184 (1947) quoted *ibid.*, 70.

<sup>95</sup>*Ibid.*, 49.

<sup>96</sup>Quintana, *op. cit.*, 659-60.

<sup>97</sup>See, e.g., cases in Karst, *Legal Institutions*, pp. 690-722.