

Javier Milei's Omnibus Executive Order

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The Year of the Defense of Life, Liberty and Property

On December 10, economist Javier Milei was inaugurated as the new President of Argentina. Argentina is currently experiencing significant transformations, accompanied by a climate of considerable uncertainty. Milei's inaugural speech, notably delivered outside the parliamentary precinct in a move reminiscent of the American presidential inauguration, laid out what are likely to become the slogans of his administration "There is no money". He repeatedly emphasized that Argentina is facing financial constraints, indicating that the population should prepare for a period of significant economic sacrifices. His primary goal is to reduce the size and expenses of the state and to deregulate productive activities. With this aim, within ten days of taking office, President Milei issued Executive Order (DNU) 70/23, titled "Bases for the Economic Reconstruction of the Argentine Republic." This executive order is unprecedented in Argentina's history for its ambitious scope, addressing a wide range of issues in a single directive. In this blogpost, we map some constitutional questions that arise with Milei's choice of implementing his governmental agenda via Executive Order, including their status in Argentina's constitutional system and available mechanisms for congressional and judicial control.

An Omnibus Executive Order

Termed an "omnibus" executive order, it encompasses various topics that, on the surface, appear unrelated. The order's preamble claims these measures, whether directly connected or not, are essential and urgent in response to Argentina's severe economic crisis. However, it lacks a detailed explanation of the specific needs and urgencies that justify such comprehensive action. This omission leaves the justification of its exceptional nature to the interpretation of the Argentine judiciary, particularly whether the urgent need to prevent a social and economic disaster can legitimize such sweeping changes. To grasp the extent of DNU 70/23, consider that it repeals or amends over 300 laws, most of which were enacted by Argentina's Congress—representing the population's deputies and the provinces'

senators—and some from dictatorial periods. The decree, with 366 articles, touches on an array of subjects including state deregulation, tourism, sports, culture, foreign land sales, pharmacy operations, credit card regulations, the National Yerba Mate Institute, labour laws, amendments to the Civil and Commercial Code, and the repeal of the rental law, among others.

Executive Decrees (DNUs) are not only constitutionally entrenched in Argentina but have also been accepted in constitutional practice, though their use is intended to be exceptional. Article 99 of the Argentine Constitution establishes the powers of the President and, within its third section, specifies exceptional circumstances under which it becomes impracticable to follow the standard legislative process through Congress, necessitating urgent executive action. However, it explicitly prohibits such decrees from covering criminal, tax, electoral, or political party regime matters. This limitation is logical, given the sensitive nature of topics like criminal and tax law, and the potential for bypassing parliamentary debate to shift a democratic regime towards authoritarianism or to consolidate power within the executive branch. DNU 70/23 adheres to these constraints, avoiding the excluded subjects.

Congressional Oversight of DNUs

Before 2006, there was no specific legislation governing the legislative control of the legitimacy of Executive Decrees (DNUs) in Argentina, leaving the only recourse against them claims of unconstitutionality before the judiciary. However, in 2006, Act 26,122 was enacted, introducing a framework for congressional oversight of DNUs. Congress's control does not extend to evaluating the effectiveness or outcomes of the decisions made within a DNU. For example, Congress is not empowered to assess whether the repeal of the rental law will lead to lower rental prices or increase the availability of rental properties. Instead, Congress's purview is to ascertain whether the preconditions for issuing a DNU are met concerning its subject matter. Essentially, Congress examines whether an urgency exists so critical that it warrants bypassing the standard parliamentary process, as in the case of the rental law. A DNU remains in effect unless both chambers of Congress explicitly reject it.

Determining the necessity and urgency of an Executive Decree (DNU) becomes exceedingly complex when it addresses not just a single high-impact issue like the rental law, which has significant repercussions for the Argentine population but also encompasses dozens of other topics, each embedded within its unique context. This complexity turns the question of the DNU's legitimacy into a veritable labyrinth, presenting an already challenging task that becomes even more daunting due to the breadth and depth of issues it covers.

Sidestepping Bicameral Consent

The complexity of evaluating an Executive Decree (DNU) under Act 26,122 is further amplified by the procedural requirements it establishes. The law mandates the creation of a Bicameral Commission tasked with examining the DNU and providing a non-binding opinion

to both legislative chambers—the lower house and the upper house. These chambers are then responsible for deciding whether to approve or reject the DNU based on an absolute majority vote of the members present (half plus one of those present, not of the total membership). However, a significant and somewhat problematic aspect of the law is that there is no specified deadline for the chambers to make this decision. This loophole has led to many DNUs languishing in limbo, effectively in force indefinitely, as they sit unaddressed, sometimes for years, due to the lack of an explicit rejection (see p. 29). Given the significance of certain DNUs, it's unlikely they would be overlooked in this manner, but the question remains whether they will be approved or rejected. In the case of highly impactful DNUs, they would probably find approval, especially in the upper house, where the government may have sufficient allies to secure an absolute majority, thus ensuring the DNU's enactment. This scenario underscores the complexities and potential for strategic maneuvering within Argentina's legislative process regarding the approval and enforcement of executive decrees.

The logic—or perhaps the illogic—behind Act 26,122 reveals a curious paradox in the governance of Executive Decrees (DNUs) in Argentina. A DNU has the power to repeal laws that have been deliberated and passed by both legislative chambers, and it can also introduce new laws or amend existing ones, which would typically require bicameral consent. However, the process for Congress to expressly revalidate a DNU simplifies this rigorous standard. To revalidate a DNU, only the approval of one chamber is necessary, or the inaction (silence) of either or both chambers suffices. It is only when both chambers explicitly reject the DNU that it loses its legislative status. This procedure becomes even more complex when dealing with an “omnibus” DNU, which covers a wide range of topics in a single decree. Given this broad scope, legislators might agree with some aspects of the DNU while disagreeing with others. Yet, the DNU must be accepted or rejected in its entirety as presented by the President, without any possibility of modification. This all-or-nothing approach complicates legislative decision-making, especially when an omnibus DNU includes provisions that elicit divided opinions among lawmakers.

Diffuse Judicial Control

This peculiar system of congressional “control” over Executive Decrees (DNUs) has invariably favoured their survival. Since the enactment of Act 26,122 in 2006, not a single DNU has been rejected, allowing them to consistently pass through this form of oversight unscathed. Consequently, the only recourse for challenging a DNU that Congress does not reject is through judicial review on grounds of constitutionality. In Argentina, such constitutional scrutiny is characterized by its diffuse nature; any judge, across any jurisdiction and at any level, has the authority to declare a law—or in this context, a DNU—unconstitutional. This approach contrasts with the “concentrated” models seen in other countries, where only a Constitutional Court or similar tribunal possesses the power to

conduct constitutional reviews. This feature of the Argentine system opens up a broader avenue for legal challenges against DNUs, allowing for preemptive injunctions even before Congress has decided their legitimacy.

In the diffuse approach to constitutional review, when a judge declares a law unconstitutional, such a ruling applies only to the specific case at hand, without setting a broader legal precedent. This means that a challenge to the constitutionality of a law or a DNU cannot be made in the abstract. Even if a judge rules in that a particular individual was negatively affected by the repeal of the rental law through a DNU, the judge's decision would apply solely to that dispute. The DNU would continue to apply to the general population, excluding those few who have successfully challenged it. This could create a patchwork legal landscape whereby the rental law remains generally in effect save those who could secure a judicial exemption. This poses significant challenges to "legal certainty," a principle deemed vital by the government for attracting investment and fostering productivity.

The Possibility of Collective Injunctions

An alternative approach is available through the mechanism of collective injunctions, as outlined in Article 43 of the National Constitution, which allows for legal action on behalf of a group of individuals affected by a common issue. Leveraging this constitutional provision, various organizations, have filed collective injunctions. The General Confederation of Labor, e.g., submitted a collective injunction on behalf of all workers impacted by the labour reforms introduced in the DNU, which is pending resolution.

Despite the numerous injunctions filed across various jurisdictions, particularly within labour and administrative courts, the focal point of the debate on the future of the DNU is centred on the unconstitutionality claim brought forth by the Province of La Rioja. This case is set to be directly addressed by the Supreme Court, as Article 117 of the Constitution stipulates that cases involving a province fall under the Court's original jurisdiction. The Supreme Court has indicated it will examine the case after the judicial recess in January. Notably, the Supreme Court has the authority to assess the DNU for both its constitutionality and potential partial unconstitutionality, unlike Congress. Therefore, it would not be surprising if the Court's verdict applied different criteria to various aspects of the DNU, distinguishing between those issues where it deems the government's claims of urgency and necessity insufficient to bypass Congressional oversight and those where it does not.

Why Such a Bold Strategy?

President Milei's vision for governance, particularly in the economic realm, is considered radical. The government asserts that a gradual implementation of this vision is unfeasible due to the lack of necessary financing options currently available to Argentina. As a supplementary measure to the previously discussed DNU, the government has introduced an Omnibus Bill to Congress for standard deliberation. The proposed bill encompasses over

300 articles aimed at modifying or annulling various laws that were not addressed in the DNU. This bill pertains to matters the government does not consider to be of immediate urgency, thereby granting legislators the latitude to approve it in parts. On February 2, the lower house passed the bill in general terms, with the intent to subsequently review and vote on each article individually. However, as the article-by-article discussion began to diverge from the original draft, President Milei instructed the withdrawal of the draft, resulting in its reversion to legislative committees for further consideration. The following day, representatives from Milei's party in the lower house introduced legislation seeking to overturn Argentina's law on free abortion, which was enacted in 2020. This new bill is notably more stringent, proposing to criminalize all abortions, including those resulting from rape. Many legislators who had either voted against the government's omnibus bill or suggested amendments to it were also advocates for repealing the decriminalization of abortion.

The future will reveal whether governing by decree will solidify as a lasting approach. In the meantime, President Milei has declared, through Executive Order 55/2024 dated January 19, that the year 2024 will be celebrated as the "Year of the Defense of Life, Liberty, and Property." The fate of this declaration rests in the hands of congress members, who, breaking from tradition, worked actively during the typically quiet month of January, and judges, set to return to their duties in February. Their decisions will determine whether the vision Milei has for the year will come to fruition.

Please note that the political landscape in Argentina is highly dynamic and subject to rapid change. The information and context provided here reflect a snapshot of ongoing political events, which can evolve or shift unexpectedly.

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