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Contributions to a Coherent and Consistent Judges' Appointment Process of a Constitutional Court: The Case of the Supreme Court of Argentina

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INTRODUCTION

The removal and appointment of judges of the Argentinean Supreme Court that took place after the Argentinean crisis of 2001-2002 have provoked some controversy. The decree No. 222 of the former President Kichner in June 20, 2003 - *"Procedure for the exercise of the power that paragraph 4 of section 99 of the Constitution of Argentina gives the President's Office for the appointment of judges of the Supreme Court's Office. Regulatory framework for the selection of candidates to fill vacancies"* - raises questions about the factors to be taken into consideration when appointing justices to the court.

Section 3 of the decree specifies that the *"diversity of gender, specialty and regional origin"* be pursued to address the serious crisis of legitimacy of the Court in the framework of the institutional and economic crisis that Argentina has suffered since December 2001. Thus, judges have been appointed for their criminal law expertise (Zaffaroni and Argibay); civil law background (Highton and Lorenzetti); gender (Argibay and Highton); for being provincial (Lorenzetti); for having center-left wing views (Zaffaroni, Argibay); for having center-right wing views, for being apolitical, or for not having any known political or ideological party linkages (Highton).

Within this range of criteria, other factors could have been considered, like socioeconomic background, or labour, tax and constitutional expertise. In any event, it seems that there is a "catch all court"[1] in which judges arrive for very different reasons and justifications, in some cases contradictory and exclusionary ones. Evidently, it is held that the diversity of cleavages plays some positive role in the work of the court. But the lack of coordination and coherence in the court's output belies this notion.

Of course the minimum threshold of selection is beyond question: technical ability, honesty and sufficient professional and academic background. All appointments mentioned above respond satisfactorily to such requirements.
But what is sought by appointing judges for such qualities as born in Buenos Aires or in the provinces, gender, "public law experts" or "civil law experts"? Is there a coherent and consistent approach that meshes with the assignment of a specific institutional role that is expected of the Supreme Court? Do any of these cleavages of selection affect the work of the Court? Is there any evidence that the criteria used produce mixed results?

On December 15, 2006, Act 26,183 came into force. It prescribes the gradual reduction, as vacancies occur, of the number of judges on the court to five members - historically, the Court has always had five members except for a brief interregnum. The drop in membership means a loss of representation and democracy proposed by Decree 222/03. How can five members reflect gender concerns, federalism issues, socio-economic considerations and the various socio-legal ideologies?

Why is the same government that pushed the decree 222/03 now driving the decrease in the number of judges? In other countries, constitutional courts are up to 35 members, but if we prefer a Court of 5, then the Decree 222/03 was logically inconsistent and unenforceable according to what is stated in its preamble, and what is being looked for institutionally from the Court is another type of operation. I am not arguing about the appropriate number of justices for the court.

[1] To paraphrase Otto Kircheimer and his "catch all party", or "everybody party", idea that he conceived in his paper "The road to the everybody party" in *Critical theory and sociology of political parties*, Lenk and Neumann, Anagrama, Barcelona, 1989. The name coined by Kirchheimer refers to a type of political parties, the catch-all party, which is not directed to a particular social class, but is intended to reach as many people as possible, thus comprising a heterogeneous mass audience , trying to meet as many demands as possible.

Rather, I limit myself to noting the inconsistencies and/or the opportunism of strategic decisions for institutional design.

This paper uses empirical-quantitative evidence and analysis to demonstrate the inconsistencies just described. The statistical database produced for a broader research project on the Supreme Court of Argentina that I have already developed is used here.[2] (Currently, I am applying the same methodology to research on the Canadian Supreme Court.)

VARIOUS JUSTIFICATIONS

1. Technical characteristics

The option of the appointment of judges for technical expertise looks to their training or academic and scientific expertise. Such matters are verifiable by the record of research, publications, the teaching prowess and postgraduate specialization studies.

It is obvious that for a family court it will be more appropriate to designate a specialist in that area. A tax court requires a fiscal tax expert, and so on. But for a court like the Supreme Court of Argentina, what should the recommended technical characteristics of its members be? In an interview published in a newspaper of Buenos Aires and when he had not yet joined the Court, Raúl Zaffaroni[3] defended his application stating that *"there has always been a criminal law expert on the court."* However, the cases in which criminal matters are heard and that have reached the High Court -at least for the exercise of judicial review - are relatively few and do not seem to justify a designation supported by the criminal law expertise of the proposed judge. I wish to clarify that in my opinion, Zaffaroni's contribution to the court stemmed not from his status as a criminal law expert but his academic background generally and his institutional and political experience, which make him a "public law expert".

The cases that have involved criminal matters are relatively few. Only 8% out of the total since 1936 and less than 10% since 1983 – the year since Argentina has had continuity of the democratic political system. Staying with criminal matters, for the period 1935-1983, there were only 24 judgments (9% out of the total) in which some rule was declared unconstitutional. Only 6 national criminal acts and 9 low-ranking national rules were declared unconstitutional, representing just over 6% of that species.[4]The statistics surveyed do not seem to justify an appointment for the reason of criminal law expertise. Even less do they justify two criminal law experts in Court (Zaffaroni and Argibay). In Canada, by contrast, the Supreme Court resolves a lot of criminal issues that arise out of the Charter of Rights and Freedoms.

Quantitative empirical data, in any case, justify the appointment of judges who are experts in tax, labor or public law rather than criminal law, if the option is to select them based on their technical characteristics. In short, it makes no sense to appoint excellent criminal lawyers if the Court decides few cases involving rules of that area.

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[2] *The independence of the Supreme Court through judicial review, regarding the other branches of the federal power (1935-1998),* Jorge Bercholc, Ediar, 2004, Buenos Aires, 276 pages. It is an empirical-quantitave statistical material and far-added analysis on the production of the Court in the exercise of constitutional review of legislative acts of the other branches of the federal state.

[3] Winner of the prize "Stockholm 2009 in Criminology" together with the Canadian scholar John Hagan.

[4] Source of statistical charts: own database, *The independence of the Supreme Court through judicial review, regarding the other branches of the federal power (1935-1998),* Jorge Bercholc, Ediar, 2004, Buenos Aires, pages 218/219, 225/226 and 228.

2. "Public law experts" or "civil law experts"? [5]

The categories of public law or civil law expertise are intended to define the profile of each judge and they can be useful variables to explain their behavior and their judgments. I consider "civil law expert" to mean the judge who has training and work history in the judicial and/or academic field in civil matters or private law and has not held political office. I consider a "public law expert" to be the judge who has received the training for his role in the judicial and/or academic field in public law matters and/or has served as a civil servant or held positions in public administration.

A judge with civil law expertise will naturally be more concerned with making strict technical judgments, and want to establish himself as a protector of individual subjective and substantive rights in opposition to administrative abuse. He is legitimized by his proximity to citizens through the exercise of jurisdiction. There is an element of unpredictability to his decisions that could be dangerous for the governability of the political system.

A "public-law-expert" judge, given his training and his familiarity with the world of politics, will be more inclined to favour predictability in his decisions, and to know in advance the political, economic and social implications of them. So he will be a judge who is more likely to protect the political system, to aim at the optimal functioning of the system and to that end he will interact harmoniously and functionally with the executive and legislative branches. His action will be focused on the protection of social and public rights and he will be responsive to the changes occurring in political and social processes. [6]

Authors such as Cappelleti have frequently stressed the idea that the experts in civil law are not prepared for the exercise of the constitutional jurisdiction.[7] Also the German jurist Otto Bachof, analyzing the role of constitutional judicial review and defending a special tribunal composed of specialized judges, stated: "... the work, full of responsibility, normative interpretation of the Constitution and protection of its system of values, needs a specialized instance in these matters, requires persons of recognized experience in matters of law and constitutional practice, an experience that no ordinary judge has, neither will have. This function also requires a body with a fully representative nature that can decide on its own with sufficient authority to such momentous political consequences. A special Constitutional Court is required for this... "[8]

From all the judges who served between 1935 and 2002 in the Court, 62% predominantly feature "public-law-expert" characteristics and 38% have predominantly "civil-law-expert" characteristics. Among the "public-law-expert" judges, 73% joined the court during democratic governments and 27% during military rule. From the "civil-law-expert" judges, 50% joined the court during democratic governments and 50% during military rule. During democratic governments, the court was composed of 71% of "public-law-expert" judges and 29% of "civil-law-expert" judges. During military rule, the court was composed of 42% of "public-law-expert" judges and 58% of "civil-law-expert" judges.[9]

The military governments worried about the court and appointed magistrates allegedly apolitical or without a political record, this being one of the considerations for the concept of

[5] This is going to be the translation of the Spanish words "civilista" (which means "expert in civil law") and "publicista" (which means "expert in public law").
[6] In the way of the idea of "dialogue"between courts and legislatures from Peter Hogg.
[7] Mauro Cappelleti, *Le contròle juridictionnel des lois*, page 314, Aix-en-Provence, 1986.
[8] Otto Bachof, *Judges and the Constitution*, page 55, Civitas Press, Madrid, 1985.
[9] Source of statistical charts: own database and *The independence of the Supreme Court through judicial review, regarding the other branches of the federal power (1935-1998)*, Jorge Bercholc, Ediar, 2004, Buenos Aires, page 99.

"public law expert." This "naive" attempt to depoliticize the judge covers only the politicization of it behind a veneer of the judicialization of politics.

During the appointment process of the current Chief Justice Lorenzetti, his "civil-law-expert" condition was downplayed precisely because the court already has two specialists in the area (Belluscio and Highton).[10] It could be argued that the designation of "civil law experts" is consistent with the increasing activity that has been required by the court in the judicial review of rules involving property. But if this is sustainable according to the quantitative empirical evidence, it contradicts the current beliefs of the majority of the specialists, according to whom the court should only deal with cases that involve important federal and constitutional questions that are raised in the protection of the political and democratic system.

From the national acts that were declared unconstitutional between 1935 and 1983, 80.65% dealt with economic issues and 19.35% non-economic issues. Since December 1983, 64% have dealt with economic issues and 36% with non-economic issues.[11] Hence, the appointment of "civil law experts" can be justified by the production of the court considering the variety of the economic rules declared unconstitutional. However, this shows a strengthening activist role by the court with an excess of cases to be resolved and with a permanent exhibition of economic and social conflicts that can cause damage to its institutional legitimacy.

If this is the predominant doctrinal position, the appointment of "civil-law-expert" judges, without prejudice to their qualities as such, is inconsistent and incongruous with the new role that is recommended for the court. This activism, especially generated by the incursion of the court into economic issues, and performed mostly by "civil-law-expert" judges, is confirmed by the increased activity in the exercise of judicial review - measuring that activism by the number of declarations of unconstitutionality - that has occurred during the military governments, in which the "civil-law-expert" judges have prevailed in the court.

3. The question of gender

Until the appointments of Argibay and Highton, only one woman had served on the Argentinean Supreme Court. Margarita Argúas was appointed on 7 October 1970 by the then military president General Levingston and she remained in office until May 24, 1973, when Campora assumed power as president-elect from the "Justicialismo" by replacing General Lanusse.

Argúas was the first woman who agreed to such a post in America. The first woman appointed to the U.S. Supreme Court was Sandra Day O'Connor, appointed by Reagan in 1981.[12] The historical record shows that the first female appointment was made in Turkey in 1934, in East Germany in 1949,in West Germany in 1951, and in Canada in 1982. In Israel in 1989 for the time two women were appointed to the Court.[13]

The data about the performance of Argúas on the court are not conclusive. She is a single case and she remained on the court for only a short period of time. Was it expected that she would perform differently by virtue of her womanhood?

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[10] Editorial in journal "La Nación", 21.12.04.
[11] Source of statistical charts: idem, page 219/220.
[12] **Arturo Pellet Lastra, *Political History of the Court (1930-1990)*, Ad Hoc, 2001, page 296.**
[13] Data extracted from Beverly Cook, "Women on Supreme courts. A Cross-national Analysis", paper presented at the XIII Congress of the International Political Science Association and Martin Edelman, "The judicial elite of Israel", International Political Science Review, Vol.13 No.3.

Some doctrine holds that there is no reason to expect a particular performance because of the gender issue. However, that contradicts the assertions by the current vice president of the court, Elena Highton, who said in an interview: "... I think there is intuitively greater empathy for women, more imbued with the possibility of conflict in depth, different perspectives on the problems, which are clearly not being denied to men, but they allow women to tackle different issues differently, including aspects that are not only limited to law."[14]

While this impression and prejudice can be attractive as a hypothesis, there is no empirical support for it. In our country, given the limited experience of women on the court and the data on the performance of Argúas, it cannot be verified. Empirical data indicate that the performance of Argúas has some distinctive features compared to that of the male judges who were her contemporaries. It shows a higher percentage of declarations of unconstitutionality and minor votes for refusing appeals, which would mean a greater level of independence than her peers. However, this hypothesis requires additional qualitative corroboration.

The gender feature does not possess empirical verification sufficient to support the view that a woman will produce different judgments based on her empathy or her different look at the conflicts to be resolved, as has been suggested by Highton. The gender standard then is not sustainable by the different features that a woman can offer in court, but for reasons of true democratic representation of the composition by gender that society has. In that sense, there has existed and remain a serious representative deficit of women on the Argentinean Court, considering that 51% of the population consists of women.

The gender criterion, based on a representative sociological concept that stands for an accurate representation of society's composition that must be reflected at the institutional level, introduces us to another problem. There are other sociological representative cleavages that could claim the same treatment. Examples include the socioeconomic background of the judges, the class stratification of the society, religious tendencies, the ideological or partisan leanings, and place of birth and study. In this scenario, the "catch all Court", would have to count on a bigger number of judges than today. Note that, on the other hand, there are doctrinal opinions that suggest, for various reasons, a return to the court of five or at most seven members.

4. Socioeconomic background of Judges and social stratification

A study by sociologist Ana Kunz[15] shows that the social background of judges who served on the National Supreme Court of Justice of Argentina in the period 1930-1983 was highly elitist. Dividing the possible social stratification into four categories,[16] 17% of the judges belong to the category "Patricians" and considering that only 2% of society belongs to that stratum, there would be 750% of overrepresentation of that stratum on the court. The second category, called "Upper stratum", has 40% of judges on the court and represents 8% of society implying 395% of overrepresentation. The third category, the "Middle stratum", has stabilized rates of 39% and 30% respectively. Finally, the "Lower stratum" has 4% on the court and represents 60% of the population. These data confirm that the most advantaged classes of society in Argentina are

[14] Journal of the Bar Association of the Buenos Aires City, No. 77, page 39.

[15] Ana Kunz, "The judges of the Supreme Court of Justice of the Nation (1930-1983)" in *Studies in Sociology and Methodology*, pages 21/24, Study, 2000.

[16] This categorization is taken by Kunz from Juan Carlos Agulla in *The Promise of Sociology*, Editorial de Belgrano 1985. According to Agulla the composition of the levels of analysis would be the following: the category "*Patricians*" is formed by the patrician families who have been in the historical past participation in the power structure in the colonial era, independence and national organization; the category *Upper stratum* is formed by families of business and professional men economically and socially important; the category *Middle stratum* is made up of businessmen of medium capital, skilled workers and administrative employees; the category *Lower stratum* is composed of semi-skilled workers, unskilled workers and laborers.

overrepresented in the highest court and the lower class and the majority of the population are underrepresented.

According to Kunz, this reflects a trend also observed in the United States. As far back as 1956, Mills investigated the social background of the political class and concluded that 58% of high-ranking political positions (President and vice president of House of Representatives, Chief Justice, a member of Cabinet) belong to the upper and upper middle class (patricians and upper stratum according to Kunz), 38% to the middle class and lower middle class and only about 5% to the lower class.[17] In Germany, a study by Judge Walter Richter, 1959, on a database built with personal information of 856 judges, revealed that the majority comes from judges' or lawyers' families and generally tend to perform their jobs in the jurisdictions in which they were born and to marry persons of the same status. In addition, 60% belong to the upper stratum (free professionals, top state officials, businessmen) and 35% to the lower stratum (workers, artisans, small traders). It was also noted that judges belonging to the upper stratum move faster up the career ladder than those of lower grade.[18]

The great concern that Hamilton and Madison expressed in *The Federalist* seems to have been solved. If the legislatures were going to represent the majority, they argued, a system of checks and balances was needed to ensure that the minorities could participate in the system as well The court and the exercise of the judicial review seem to fulfill that purpose according to the social background of its members that makes them "reliable" from the standpoint of the advantaged classes in the society. [19]

5. Ideological orientation

The definition of this cleavage and the adaptation thereof to the ideological characteristics of the members of the court are highly complex and subjective tasks.

The definition and analysis of the epistemic plausibility and validity of the ideological factor, as well as its scope, definitions and boundaries are not tasks that are faced in this paper. What matters is that it is a cleavage around which revolves controversy about appointments to the court. The media and those in power are sensitive to the subject. According to Kunz, the choice of categories "conservative" "liberal" and "independent" is to a large extent a concern about social stratification and social mobility. Members of senior levels bow towards conservative positions, accepting and upholding values of the traditional type.[20]

It is common in the literature, both in Argentina and the United States or Spain, to admit the existence of courts influenced in their judgments by the ideological "conservative" (center-right) or "liberal" (in its meaning if you like progressive or center- left) characteristics of its members.[21]

[17] Wright Mills, *The Power Elite*, Fondo de Cultura Economica, Mexico, 1956.
[18] Walter Richter, "Die Oberlandesgeristche der Richter der Bundesrepublik. Berufssozialstatistische. Eine Analyse", in *Hamburger Jahrbuch fur Wirtschafts und Gesellschaftspolitik*, 1960 pages 241-259. Cited by Renato Treves in *Sociology of Law*, pages 179/180, Taurus, 1978.
[19] See Roberto Gargarella, *Justice against the government*, pages 32 to 42, Ariel, 1996
[20] In this sense Karl Mannheim, *Ideology and Utopia*, Aguilar, Madrid, 1973.
[21] In this sense we can see in the argentinean literature, Julio Oyhanarte, *History of the Judiciary* and *Everything is history* 1972; Arturo Pellet Lastra, *Political History of the Court (1930-1990)*, Ad Hoc 2001; Jorge Bercholc, *The independence of the Supreme Court through judicial review, regarding the other branches of the federal power (1935-1998)*, Ediar, 2004, Buenos Aires. For the case of the USA, see Lawrence Baum, *The Supreme Court*, Congressional Quarterly Press, Washington, 1985. For Spain, Eduardo García de Enterría, *Democracy, judges and management control*, Civitas, Madrid, 2000.

In the study cited by Kunz, it has been determined for the period 1930-1983 that the ideological cast of the court was markedly conservative. [22]

6. Judges from Buenos Aires or from the provinces? The federal composition of the Court according to judges' place of birth

In terms of an effective federal representation, the regional origin of the judges of the court is one of the cleavages cited by the executive decree No. 222 and has been, according to the circulating comments, one of the arguments for promoting the nomination of Judge Lorenzetti. But taking into account the pretension of "the ideal of representation of a federal country," according to the decree, is appointment by the regional origin or place of birth plausible? What is sought by trying to answer to the category of "the ideal of representation of a federal country"?

Federalism will always have to aim at an optimal and effective political, social and economic integration of the member states, without losing sight of their particularities and non-delegable powers, but at the same time, contributing to a systemic and sufficiently centralized organization for the purposes of the effectiveness of the federal power. It seems plausible to understand that the "ideal of federal representation" tends to have provinces duly respected by the federal power. At the same time, the powers which are not delegated to the provinces must be balanced with the requirements of the federal central power for the purpose of union and the systemic effectiveness of public administration.

6.a. More decisions on national rules, more percentage of unconstitutionalities about provincial rules

Between 1936 and 1983, 62.55% of the cases before the court were about national rules, 31.41% about provincial rules and 6.04% about local ones. The court declared unconstitutionalities in 44.85% of the cases involving provincial rules and in 22.59% of the cases involving national rules.

From all the rules challenged between 1936 and 1983, 63% are national and 36.62% are provincial, but just 21.57% of the national rules were declared unconstitutional, as opposed to 44.93% of the provincial ones. With the exception of the refuse appeals variable, 28.55% of the national rules and 57.69% of the provincial ones were declared unconstitutional.

Since 1983, 73% of the rules challenged have been national and 27% provincial. In this period, 26% of the national rules challenged and 53% of the provincial ones have been declared unconstitutional. It is clear, considering the two units of analysis (judgments and rules), that inversely proportional to the larger number of cases in which national rules at issue are challenged, a higher percentage of provincial rules are declared unconstitutional.

More disaggregated analysis shows that the unconstitutionalities on provincial rules have been equated with national ones from the early 1960s, although the issue of provincial taxes to income-generating activities was very contentious during the end of the 1960s.[23] It is also confirmed that the cases on provincial tax rules are the most numerous and result in more unconstitutionalities. In particular this has occurred from 1936 to 1958, when the provincial tax conflict was higher.

[22] Ana Kunz, "The judges of the Supreme Court of Justice of the Nation (1930-1983)" in *Studies in Sociology and Methodology*, pages 42, Studio, Buenos Aires, 2000.
[23] Idem pages 86/91 and 197 to 223.

The two previous findings lead us to another one: the court seems to have more courage declaring provincial rules unconstitutional than it does federal rules. If this is true, then we will have to note that in order to achieve an "ideal of representation of a federal country", there must be guaranteed a symmetric / an egalitarian / an equal judicial review for national and provincial rules and a necessary adaptation/adjustment of the provincial rules to the national ones. This last requirement/condition should happen without affecting the powers and the institutional efficiency of the provinces, in order to avoid permanent conflict between the states and the central federal power.

6.b. Judges from the provinces in the Court during the period of greatest conflicts about provincial rules

It remains to check yet another variable that adds more complexity to the issue of federal representation on the court, namely, the regional place of origin of its members. According to the claimed formula of regional origin, we will observe the paradoxical structure which the court had during times of increased conflict between the federal power and legislatures and provincial executives.

The Supreme Court, during the period 1935 - 1958, with a membership of 5 members, consisted of 20 different judges. Twelve of them were provincial (2 from the province of Buenos Aires), which represents 60%, and 8 from the City of Buenos Aires[24], which represents 40%. During that period, with mostly provincial judges and under different governments, the court dared more to contradict the decisions of the provincial executive powers and legislative branches. About 60% of rules that were declared unconstitutional were provincial.

During the period 1960-1966 (with a membership of 7 members), the Court had 11 different judges, including 5 from the City of Buenos Aires (45%) and 6 from the provinces (although 3 were from the province of Buenos Aires, 55%). During this period, in spite of having a higher percentage of judges from the City of Buenos Aires and half of them from the province of Buenos Aires, only 20% of the rules declared unconstitutional by the Court were of provincial jurisdiction.

During the 1966-1983 period (again with 5 members), 26 judges passed by the court, of whom 16 were from the City of Buenos Aires (62%) and 10 from the provinces (5 from the province of Buenos Aires, representing 38%). 30% of the rules declared unconstitutional were provincial.

From the restoration of democracy until 1998 (5 members until 1990 and then 9) 19 different judges were appointed, 12 from the City of Buenos Aires (63%) and 7 from the provinces (27%). From all the rules declared unconstitutional during this the period, 42% were provincial.[25]

The pattern observed through the statistical analysis tells us that, paradoxically, the larger the number of provincial judges on the court, the more it was prepared to antagonize provincial powers via the strict exercise of judicial review of the rules issued by the provinces, declaring them unconstitutional in a greater percentage. On the contrary, when the court was made up of a majority of judges from the City of Buenos Aires, there was a sharp decline in the declarations of unconstitutionality of provincial rules.

The mere fact of the regional origin or place of birth of the appointed judges reflects no predilection to defend provincial interests. When a territorial representative is sworn into office, it is assumed and expected from him to defend the interests of his region of origin. This is what

[24] Capital city of Argentina and federal district with special status as autonomous city.
[25] Statistics Source: idem, pages 86/91 and 197 to 223.

characterizes the action of a governor. It is also the *raison d'être* of the Senate and its members, representatives of member states irrespective of territorial size or number of inhabitants, which are guaranteed to the provinces as a final barrier against the feared subjugation of their autonomy by the central state or the member states (by size of their economies and their populations). That senatorial role was the great idea of James Madison that allowed the union of the 13 states in the first modern federal state, the United States of America. It is therefore consistent to argue that the the country's federal representation must relate to a system of rights for the effective division of powers between the member states and the federal state that includes, in particular, the interests of smaller members, according to their specific population and territorial and economic weight.

In this complex plot, there is no empirical corroboration, according to statistics analyzed in the history of the Argentinean court, which allows us to hold that the mere fact of birthplace or regional origin promotes the ideal of a federal state, which is understood as an efficient system of unity and security in the division of powers for the member states to save their peculiarities and differences. Rather, it notes the opposite paradox: the more provincial judges on the court, the more the court contradicted the wishes of the provincial institutional powers.

It therefore seems plausible to check what reasons can objectively compel a provincial representative to pursue the interests of his province in the ongoing bid for the division of powers with the central power. The periodic submission to the people's will as a legitimate tool of the conferred mandate, which is absent in the current scheme for appointing Supreme Court judges in Argentina, leaves the provincial judge unconnected (no delegation, no legitimacy) regarding the region from which he comes. What really matters is the willingness of the national executive to support a judge who is required to respond to any kind of public challenge of his decisions.

In the recent sequence of changes on the Court, the national executive supported all judges originally proposed, although some got hundreds and even thousands of objections.[26] Such mechanics can mean the judge in question comes to his office weakened and indebted to the president who appointed him even against thousands of objectors.

Turning to regional origin, it should be observed if the specific interests and objectives of the proposed provincial judge in fact are rooted in his place of birth. This would require establishing some sort of prior residence required to ensure that the candidate has been carrying out his judicial, professional, academic and business in his place of origin.

Another point to note is the university from which he graduated. For example a provincial judge who has completed his studies at the University of Buenos Aires and has not resided in his birthplace for a long time is unlikely to be an effective representative of his region or origin. For the latter question, the statistics show that 48% of the judges of the court were born in the City of Buenos Aires and that 60% graduated from the University of Buenos Aires (UBA). The percentages increase if we consider, on the one hand, the City of Buenos Aires and the Province

[26] According to an article by Adrian Ventura for the newspaper *La Nación*: "Lorenzetti is the only candidate which drew more positive than negative opinions: about 764 compared to 80 unfavorable to favorable considerations. At the other extreme, Argibay was the candidate who received more objections. After stating in an interview that she was an "activist atheist" and she was in favor of the decriminalization of abortion, the adverse opinions about her candidacy multiplied: she received 16,295 against and 2243 pro. Nor was it easy the period of objections to Elena Highton, who received 4444 negative opinions and 1402 positive. As in the case of Argibay,the "civil-law-expert" judge was challenged on his stance on abortion. Perhaps because of being the first time that the mechanism of objections was used, Zaffaroni suffered several weeks of heavy wear, to total 833 positive and 131 negative opinions. In this case the controversy revolved around his security liabilities and his liberal positions on procedural rights."

of Buenos Aires-born judges (59%) and, on the other hand, those graduated from the UBA and the University of La Plata (71%). [27]

CONCLUDING REMARKS

What will the work be of a court designed with no strategic vision of the institutional role it is expected to play? If what is sought is a "catch all court", an effective tribunal for that purpose will have to be formed. A court of this kind must supply all items that respond to a representative sociological concept, since it seeks an accurate and representative mirror of society's composition that must be reflected at the institutional level.

The "catch all court" needs a bigger number of judges than there are today. It would not be the first case of a multifaceted court that responds to a representative approach and that is composed of many judges. In Switzerland, the Federal Supreme Court has 41 members; in Venezuela the Supreme Court has 32 members divided into 6 halls; in Costa Rica the Supreme Court has 22 judges; Denmark has a Supreme Court composed of 19 judges; the Japanese Supreme Court has 15 members; the Italian Constitutional Court is also composed of 15 judges; and the Polish Constitutional Court has 15 judges.

On a larger court, the representative deficit could be overcome, giving the court a wealth of political legitimacy that will allow it to interact systemically with the other branches of the government from a position of greater effective power. This could be then combined with a mechanism of election more democratic than the current appointment by the Executive followed by the approval of the Senate.

Although this alchemy can be attractive from a democratic perspective, there is not, as we showed in this paper, empirical evidence that allows us to make judgments or plausible predictions about a conformation like that. Another way is to form a technically homogeneous court, considering the institutional role to be assigned to the constitutional court, removing appeals of annulment and clearly defining its roles as State political power.

For this kind of court, it is advisable to have as a priority in its conformation to confine its jurisdiction -at least in times of serious institutional crisis- to play a watchdog role of the democratic political process, as a moderator worried about the systemic needs of the State. It also seems advisable to require the judges on the Court -or at least most of them- to have a public law background to ensure the understanding of the problems that a national state with the characteristics of Argentina faces these days.

This requirement is most urgent in countries like Argentina that are subjected to immense pressure from various internal and external sectors and have little ability to maneuver around them: "... The excessive use of the Tribunal may have located in certain cases at dangerous intersections to their prestige, as the distortion of the function of an institution can denature its original and correct *raison d'être* ..."[28]

[27] The City of Buenos Aires is a federal district with the status of an autonomous city. The province of Buenos Aires is a state member of the federal state. The city of La Plata is the capital city of the Province of Buenos Aires and has its own national university. The City of Buenos Aires along with its suburbs concentrate about a third of country's population. In fact, the urban area largely exceeds the City and its suburbs, virtually linking Buenos Aires and La Plata with almost no interruption. Taking this into account, I consider that judges that were born in that area and/or have completed their studies at one of the two universities mentioned above are not as linked to their province of birth as to identify and represent its interests.

[28] Francisco Tomás y Valiente on "Writings on and from the Constitutional Court", Center for Constitutional Studies, Madrid 1993, page 50.

The excessive use of the Court has both a quantitative and a qualitative aspect. The activism of a court acting as a court of individual constitutional rights in a system of judicial review overloads it with the treatment of common issues that could be filtered or treated by lower courts of the judiciary without compromising the highest court in it. Regarding the qualitative overload I think especially about the always latent tension between the Federal and Provincial States. The issue of federalism and the distribution of responsibilities will require new responses in the near future through the public policy design and a new constitutional engineering to be assumed by the inevitable progress of the processes of supranationality and conformation of extended geopolitical spaces. For a technically homogeneous Court that must deal with these complex scenarios, it is not important that judges be appointed to fill any deficit of representation.

What it will be necessary and important is to have judges with a public law background, political experience and strategic perspective. These technical requirements can be met by experts in constitutionalism, administrative law, political sociology, theory of state and other political science, legal and institutional disciplines.

