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# De Facto Government, State of Siege Powers, and Freedom of the Press in Argentina

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## I. INTRODUCTION

To the casual observer, it may seem bizarre to speak of the liberty of the Argentine press during periods of de facto government. A reference to freedom of the press during de facto periods is apt to elicit a dry remark even among Argentines. The dichotomy between the text of the national Constitution and the practices of military governments is still fresh in the Argentine psyche. An analysis of Argentine Supreme Court decisions, however, offers a different perspective. The Court has struggled to uphold basic press freedoms despite the hostile political climate. Moreover, it has helped preserve some semblance of the constitutional structure envisioned by the Argentine framers.

This paper will focus on the freedom accorded the Argentine press and will treat prior censorship as it is understood in Argen-

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tine case law.[1] Particular attention is paid to the closure of publications. This focus has been adopted for two reasons. First, judicial doctrine on prior censorship is of critical importance to a republican system and especially so to Argentina's fledgling democracy. Second, because of the nature of the country's political heritage and a particular provision of its Constitution, the treatment of press closures compels a review of the nation's de facto and state of siege phenomena. These additional factors are of considerable interest: they illuminate the Argentine judiciary's quest to preserve its independence, and hence its efficacy as protector of the individual rights embodied in the Constitution.

A brief review of the Argentine Constitution is in order before moving on to more specific themes. Adopted in 1853, it is the oldest contemporary Latin American constitution. In many ways, it tracks the ideology of the U.S. Constitution.[2] It provides for a republican form of government and a federal state. It creates executive, legislative, and judicial branches, invests them with separate powers, and links them with a matrix of checks and balances. It enumerates a host of individual rights, including religious freedom, the freedoms of expression and of association, the right to due process, the right to petition the government, the right to own property and to its inviolability, the right to work and receive a fair remuneration, and the right to a minimum wage.[3]

It is essential to bear in mind that the juridical optic affords only a limited view of the liberty of the press in Argentina. Those who are skeptical of the power of Argentine constitutional doctrine to channel and structure political activity do, indeed, have a point. Political events have often circumscribed the rights seemingly set forth in the Constitution and Supreme Court decisions. At times,

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1. The Argentine concept of prior censorship enjoys a significantly broader scope than the concept of "prior restraint" as described in Near v. Minnesota, 283 U.S. 697 (1931).

2. Forty-four articles of the U.S. and Argentine Constitutions are nearly identical, twenty-two are similar, forty-eight are different, and sixty articles of the Argentine document do not exist in the U.S. Constitution. Linares Quintana, *Comparison of the United States and Argentine Constitutional Systems*, 97 U. PA. L. REV. 641 (1948-49), *cited in* Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action Under a State of Siege*, 4 HUM. RTS. L.J. 311, 312 n.1 (1983); J.R. VANOSSI, LA INFLUENCIA DE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS DE NORTEAMÉRICA EN LA CONSTITUCIÓN DE LA REPÚBLICA ARGENTINA (1976). *See* 2 S. LINARES QUINTANA, DERECHO CONSTITUCIONAL Y INSTITUCIONES POLÍTICAS, 589-642 (1976)(genesis of constitutionalism in Argentina); JUAN B. ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN DE LA REPÚBLICA ARGENTINA (1852).

3. Constitución de la Nación Argentina [CONST.] arts. 1, 14-18.

this circumscription has been painfully obvious. The late General and President Perón, for example, converted *La Prensa*, one of Argentina's two newspapers of international repute, into a mouthpiece for his pro-labor views. When *La Prensa*'s eighty-year tradition of outspokenness fell out of favor with the General in January 1951, he seized, closed, and then reopened the daily "as the house organ" of his powerful labor confederation.[4] Extrajudicial force was applied to the exclusion of constitutional free press principles in an even more brutal fashion between 1976 and 1983.[5] A minimum of eighty-four journalists were among the estimated 9,000 citizens who "disappeared" during the military's anti-terrorism campaign.[6] The bulk of the disappearances occurred at the outset of the *Proceso*, resulting in heavy self-censorship within the press corps.[7] Today, Argentina enjoys constitutional rule. While the use of overt coercion has disappeared, more subtle forms appear to persist. Current pressures emanate from the size and structure of Argentina's large state budget, which easily makes the state the single largest advertiser in printed publications. The sheer magnitude of the state's advertising budget may entice the press to follow the editorial policy most likely to attract state accounts. The impact of the governmental advertising expenditures upon the editorial policy of the press becomes a serious consideration.[8]

## II. Freedom of the Press and Prior Censorship

Freedom of the press in Argentina is rooted in Articles 14 and 32 of the Constitution. The latter states that, "the federal Con-

4. R.A. Potash, The Army and Politics in Argentina 1945-1962, 104-05 (1980).

5. This is the period of military rule characterized by, among other things, the promulgation of the Statute for the Process of National Reorganization. This epoch will be referred to as the *Proceso*. Compare the peculiarities of the *Proceso* with other Argentine military governments, Pérez Guilrou, *La Corte Suprema de Justicia y el Gobierno De Facto Argentino (1976-1980)*, 9 Anuario Jurídico 811 (1982).

6. Comisión Nacional Sobre la Desaparición de Personas, Nunca Más, 267-74 (1985)[hereinafter Nunca Más]; *see also* Somos, Oct. 23, 1985, at 10 (estimates of the number of "desaparecidos" made by various human rights organizations, all of which ranged between 5,000 and 30,000. The Ministry of the Interior serving during the Proceso calculated a figure exceeding 3,000).

7. Nunca Más, *supra* note 6, at 367-74. *See* Bidart Campos, *La Autocensura en la Libertad de Expresión*, 83 El Derecho [E.D.] 895 (1979)(decries the self-censorship practiced during the *Proceso*; the article was written during the same period).

8. Interview with Dr. Caldas Villar, Director of the *Asociación de Entidades Periodísticas Argentinas* (ADEPA) and Mr. Jorge Vago, Editor and Director of *Prensa Confidencial* (a publication closed several times while under his tutelage), Apr. 18, 1985. *See* 32 ADEPA 6 (1985).

gress shall not dictate laws that restrict the liberty of the press or establish federal jurisdiction over it." This provision raises federalism issues and interpretive questions regarding the word "restrict."[9] While Article 32 is sometimes called upon to support broad assertions of press freedoms, it has not been the focal point in press closings.

Instead, Article 14 commands our attention: it is the primary source of press liberties in the Argentine Republic.[10] Article 14 states that "all inhabitants of the Nation enjoy the following rights according to the laws that regulate their exercise; to wit . . . to publish their ideas through the press without prior censorship."[11] After an initial reading, this language appears too narrow to protect free expression and the freedom of the press. It speaks to only one mode of expression and to just one means of forestalling it.

The Supreme Court, however, has greatly expanded the seemingly narrow scope of Article 14. It now protects a wide range of expression against more than the sole danger of prior censorship. In 1932, the Court set forth an important doctrine regarding the meaning of "prior censorship."[12] It stated that Article 14's protection extends to *all* limitations imposed prior to publication. This includes prior submission of written material for official revision as well as other "similar" tactics "that governments have been known to use."[13]

The Court's expansion of Article 14's temporal, scope however, was even more significant. In essence, the Court read "prior" to mean "before or after publication." It recognized that post-publication punishment may be just as damaging to a free press as prior censorship.[14]

The Court further amplified the scope of Article 14 in the *Eduardo Perez* case.[15] In *Eduardo Perez*, the owner-editor of a

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9. G. BIDART CAMPOS, MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO 225 (1974) [hereinafter MANUAL DE DERECHO].

10. The free press provision of Article 14 traces its heritage back to Article 111 of the Constitution of 1819, which recognized the "right to publish ideas through the press," a right "essential for the preservation of civil liberty." Linares Quintana, *supra* note 2, at 627.

11. CONST. art. 14 (Argen.).

12. Judgment of Dec. 23, 1932, Corte Suprema de Justicia de la Nación [C.J.N.] XL JURISPRUDENCIA ARGENTINA [J.A.] 309 (1932)[hereinafter *Ministerio Fiscal* case].

13. *Id.* at 311.

14. *Id.*

15. Judgment of Sept. 17, 1962, C.J.N., 257 Fallos de la Corte Suprema de Justicia de la Nación [Fallos] 308 [hereinafter *Eduardo Perez* case].

newspaper published a defamatory advertisement over the signature of the advertisement's author. Although the editor's only connection with the advertisement was his decision to publish it, he was convicted and fined along with the acknowledged author. In reversing the editor's conviction, the Court held that, based upon Articles 14, 32, and 33, the constitutional freedom of the press enjoys a broader scope than the mere exclusion of prior censorship under the terms of Article 14.[16] The Court reasoned that, if the threat of criminal responsibility were to affect the editorial decision to publish, the freedom of the press would be compromised "to the same extent as through pre-publication restrictions, with the consequent frustration of the basic principle of freedom of the press expressly provided for in Articles 14 and 32 . . . . and to which Articles 1, 6, and 33 . . . also refer."[17]

Finally, it is noteworthy that the Court has extended the protection afforded traditional means of expression and dissemination to other media.[18] The Court in *Mallo* faced the issue of whether the prohibition of the projection of a film was a reasonable use of state of siege powers. The threshold question was whether constitutional guaranties were implicated in a case involving the film medium. While recognizing that the founders of 1853 could not have contemplated cinematography, the Court extended the same constitutional protection enjoyed by more traditional means of expression to the film medium.[19]

The reasoning in the *Ministerio Fiscal*, *Mallo*, and *Editorial*

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16. *Id.* at 313. The inclusion of Article 14 in the cluster of provisions that support broad press protections is consistent with the expansive opinion in the *Ministerial Fiscal* case; however, it clashes with statements made in the *Eduardo Perez* case. After making the statement quoted above, the Court declared that Article 14 applies to cases involving *prior* censorship. The contradiction stems from the Court's mix of two modes of interpretation, textual and structural, in the same case. Unfortunately, one is left with a fuzzy view of the dimensions of Article 14, and the feeling that its scope changes according to the Court's prevailing interpretive mode.

17. *Eduardo Perez*, 257 Fallos at 314-15. The pertinent parts of the freshly cited articles all refer to the phrase "federal republican representative form of government." CONST. arts. 1, 6, 33 (Argen.).

18. Judgment of Dec. 7, 1971, C.J.N., 282 Fallos 392 [hereinafter *Mallo* case].

19. Although an important extension of the scope of Article 14, this point was announced cryptically. The Court, in a later case, stated with equal brevity that Articles 14, 32, and 33 also protect artistic expression. Judgment of June 29, 1976, C.J.N., 295 Fallos 215, 217 [hereinafter *Colombres* case]. The Court in *Colombres*, however, also recognized an exhibition of art depicting a tortured human figure and the caption "Made in Argentina" as a valid exercise of the Executive's police power on grounds that the display might affect "the nation's image" in the exterior.

*Perfil* cases stretches the bounds of the constitutional text. The Court's expansive construction, however, is anchored in structural inferences and in an understanding of the strong currents of classical liberalism that permeated the thought of the Argentine framers.[20]

## III. THE DE FACTO DOCTRINE

It must be emphasized that this straightforward account of the textual roots and judicial expansion of press freedoms describes only a portion of the Argentine free press experience. De facto governments and the nation's state of siege experiences have had a strong influence on the exercise of the liberty of the press and on the structural relations between the branches of government.

A de facto government is one that assumes control of state machinery through a rupture in the constitutional process. Its mandate is rooted in power, not compliance with the norms of succession. While Argentina endured a bout of de facto rule during the last century, the bulk of its de facto experience is of relatively recent vintage. Argentina has suffered a string of de facto interruptions since the first military coup of the twentieth century in 1930. Typically, the military expresses its displeasure with the country's state of affairs by ousting the incumbent president and appropriating executive power for itself. The Congress and Supreme Court often join the dethroned executive as casualties of the coup: Congress may be dissolved and judges replaced.[21]

Interestingly enough, no de facto régime has discarded the Constitution altogether. Instead, the practice is to promulgate a

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20. Alberdi was a strong advocate of maximizing civic and commercial freedom. While he favored a liberal constitution because it would best attract the European immigrants that population-starved Argentina needed, he was also a classic liberal at heart. The draft of the constitution published in his "BASES" accorded foreigners and citizens alike the right to publish their ideas through the press without prior censorship as well as to petition all authorities. JUAN B. ALBERDI, *supra* note 2, at 288. *See generally* Linares Quintana, *supra* note 2.

21. The 1976 coup provides a clear example of this phenomenon. After the coup, the ruling junta promulgated the *Statute for the Process of National Reorganization*. The statute replaced the Congress with a legislative commission composed of nine military officers, replaced the members of the Supreme Court, and transferred executive and all important Congressional functions to the junta and its military legislature. Acta Para el Proceso de Reorganización Nacional, 36-B Anuario de Legislación [A.L.J.A.] 1019 (1976); *see also* Acta Para la Revolución Argentina, 26-B Anales de Legislación Argentina [A.D.L.A.] 753 (1976).

"revolutionary statute" or series of "institutional acts" upon seizing power.[22] These revolutionary instruments customarily outline the objectives and operational norms of the de facto régime. The Constitution, in turn, remains in effect insofar as its provisions do not clash with these norms and objectives.[23] Through this mechanism, the Constitution has survived in name, if not always in practice.

The Supreme Court has had the unenviable task of reconciling constitutional and de facto norms. This uneasy orchestration of Argentina's constitutional concepts and political realities began in the last century. In 1865, the Court stated that a de facto régime exercises "provisionally all national powers," a faculty that is rooted in "the right of the triumphant revolution, assented to by the people."[24] Following the 1930 coup, a de facto government was acknowledged to exercise "executive powers, but not legislative and judicial" powers.[25] In 1947, however, the Court abandoned its restrictive approach. It conceded that "a de facto government has legislative powers to the extent . . . necessary to govern," the determination of which was deemed a "matter of political discretion" closed to judicial review.[26] Thus, acts and decrees promulgated by de facto régimes have been incorporated into the body of Argentine law and, indeed, into the nation's constitutional law.[27]

The Court's reaction to the 1930 coup illustrates its means of coping in the de facto environment. It issued an internal memorandum to the national judiciary immediately following the coup: the *Acordada* of 1930.[28] Through the *Acordada*, the Court recognized

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22. Acta Para el Proceso de Reorganización Nacional, at 1019.

23. *See* Garro, *supra* note 2, at 312. Revolutionary norms, however, do not always trump constitutional provisions. *See, e.g.*, the discussion of the *Azul y Blanco* case Judgment of Apr. 30, 1968, C.J.N., 22 E.D. 580; *infra* notes 101-03 and accompanying text.

24. Judgment of May 12, 1865, C.J.N., 2 Fallos 127 [hereinafter *Baldomero Martínez* case].

25. Judgment of Nov. 15, 1933, C.J.N., 169 Fallos 309 [hereinafter *Administración de Impuestos Internos c. Malmonge*].

26. Judgment of Aug. 22, 1947, C.J.N., 208 Fallos 184, 186 [hereinafter *Arlandini* case].

27. *See* Judgment of 1977, C.J.N., 296 Fallos 372 (discussion of the relation between de facto decrees and the Constitution. De facto decrees are "incorporated into" the Constitution inasmuch as the causes that gave the de facto regime its legitimacy persist). G. BIDART CAMPOS, LA CONSTITUCIÓN Y LOS INSTRUMENTOS NORMATIVOS DEL ACTUAL PROCESO DE REORGANIZACIÓN NACIONAL (1979). While the language "incorporated into" implies a parallel ranking, the Court's application of it in Judgment of Sept. 17, 1979, C.J.N., 301 Fallos 771 (1979)[hereinafter *Timerman* case], demonstrates a hierarchical structure with the Constitution held as supreme.

28. *Acordada sobre reconocimiento del Gorbierno Provincial de la Nación*, 158 Fallos

the new régime and termed it a de facto government. It founded its recognition upon "necessity" and professed "the end of protecting the public." The high court also admitted the futility of contesting the new government's legitimacy or that of its functionaries. In essence, the Court bowed to reality: a confrontation would have only further damaged the weakened constitutional construct.

The Court stopped short, however, of ceding all power to the régime. It warned that:

> [S]hould the functionaries that compose the *de facto* government disregard individual guaranties, those of property, or others guaranteed by the constitution, the Judicial Power entrusted with ensuring compliance with it will reestablish those guaranties with the same reach that it would do in the case of a *de jure* Executive Power.[29]

For obvious reasons, the Court did not detail how it would reestablish trampled individual rights.

In this respect, the *Acordada* pinpoints the basic difficulty which has plagued the judiciary's attempts to exercise its power to check the encroachments of the other branches of government: it lacks the means to implement its will. Some argue that the Court also lacks the will to protect basic liberties. Surely, the Court's record during de facto periods does not reveal a vigorous tribunal. In all fairness, however, it has been subjected to considerable abuse. Frequent purges of the federal judiciary during the de facto experience undermined judicial stability.[30] Judicial independence was damaged in the process; and, indeed, seemingly destroyed when the Proceso's junta appointed a new Court in 1976 and then required its members to swear allegiance to the Constitution as well as the Statute of the Proceso. Allegiance to the former, however, was sworn only insofar as it did not derogate from the norms set forth in the latter.[31] Personal threats issued to judges thought to oppose the régime further eroded the spirit of independence.[32] Moreover, the newly installed judges had arguably inherited a congenital defect from the de facto executive who appointed them;

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290-91 (Sept. 10, 1930).

29. *Id.*

30. The Supreme Court was purged in 1946, 1955, 1966, 1973, and 1976. New justices were appointed in 1983 with the return of democratic institutions. Garro, *supra* note 2, at 314.

31. *Id.* at 315.

32. *Id.* at 334-37.

they gained office via the unconstitutional firing of their de jure predecessors.[33] In this sense, they were de facto judges. Nevertheless, the same factor that led the Court to recognize the legitimacy of de facto governments—necessity—prompted the recognition of the judges such governments appointed.[34]

Despite this background, the Court has produced liberty-reinforcing rulings in the press area. Even more startling is the fact that some of the cases that now serve as pillars of the free press in Argentina were handed down by de facto appointees.[35] The irony of these decisions is best appreciated after the introduction of another theme that is closely linked to the observance of press liberties, namely, the state of siege.

## IV. THE STATE OF SIEGE DOCTRINE

Article 23 of the Argentine Constitution provides for a state of siege. The article is to be invoked during periods of emergency and provides for the suspension of constitutional guarantees.[36] Due to

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33. Article 96 of the Argentine Constitution states that judges shall "retain their offices during good behavior." Article 86 accords the President the power to appoint the members of the federal judiciary with the Senate's concurrence. CONST. art. 86, cl. 5 (Argen.).

34. *See* Judgment of Feb. 14, 1984, C.J.N., 1984-B REVISTA JURÍDICA ARGENTINA—LA LEY [L.L.] 183. Aramayo was a federal judge who took office during the civilian government that preceded the Proceso. The junta relieved him of his post. Upon the return of de jure government in 1983, he contested the validity of his firing and petitioned for reinstatement and retroactive pay. The Court ruled that the "restitution of constitutional order . . . requires that the national powers . . . ratify or reject explicitly or implicitly the acts of the de facto government" and that "the designation of this Court with the concurrence of the . . . Senate implies ratification of the dismissals of the judges" fired by the junta. The implicit ratification theory was strained indeed. The real basis for the decision was the Court's admitted fear of the upheaval entailed in finding that the decisions of de facto judges lacked validity. *Id.* at 183; *see also* 2 G. BIDART CAMPOS, EL DERECHO CONSTITUCIONAL DEL PODER 231 (1967); Cholvis, *Jueces con Investidura De Facto*, 1983-D L.L. 1033, 1037-38.

35. *See, e.g.*, the *Azul y Blanco* case, 22 E.D. at 582; *Prensa Confidencial* case, Judgment of Apr. 30, 1968, C.J.N., 22 E.D. 576; *infra* notes 100-03 and accompanying text. *See* La Nación, May 5, 1968 (editorial celebrating this irony after these cases were decided).

36. Article 23 states:

> In case of internal commotion or foreign attack endangering the exercise of this Constitution and of the authorities created thereby, the province or territory where the perturbation of order exists shall be declared in a state of siege and the constitutional guarantees there shall be suspended, but during this suspension the President of the Republic shall not condemn by himself nor apply penalties. His power shall be limited, in such a case, with respect to persons, to arresting them or conveying them from one point to another of the Nation, if they should not prefer to leave Argentine territory.

CONST. art. 23 (Argen.).

their frequent declaration and lengthy duration,[37] Argentina's states of siege have shaped the contours of constitutional rights. Between 1930 and 1970, Argentina spent forty-five percent of its time under a state of siege.[38] As one might imagine, press freedoms were particularly affected during these periods.

Article 23 sets forth two justifications for the declaration of a state of siege: "foreign attack" and "internal commotion." The procedures for lawful declaration vary according to the exigency at hand. In the case of "foreign attack," Article 86, clause 19, calls for presidential declaration with the concurrence of the Senate. In the event of "internal commotion," Article 67, clause 26 accords Congress the power to declare the state of siege. If Congress is in recess, the same article gives the president the power. Under Article 86, clause 19, however, Congress retains the power to suspend a presidential declaration made during its recess.[39]

Beyond these mechanical prerequisites lie Argentina's practical state of siege experiences. De facto governments have strayed from constitutional use of Article 23 and launched the judiciary's consequent search for a check over emergency edicts. The search dates from 1893 when the Supreme Court held that Article 23 does not alter the constitution's tripartite republican form of government.[40] To the contrary, the Court stated that Article 23 offers an "extreme and transitory recourse" designed to preserve the constitutional order when dislocations threaten to extinguish it.[41]

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37. As the following list shows, states of siege have been imposed twenty times in this century, for increasingly longer periods of time: July 5—July 30, 1901; November 24—December 30, 1902; February 4, 1905, term of sixty days; October 8, 1905, term of ninety days; November 14, 1909, term of sixty days; May 14—October 1, 1910; September 5, 1930, term of thirty days; September 6, 1930, term of thirty days; October 4, 1930—February 22, 1932; December 19, 1932—May 2, 1933; December 29, 1933, partially lifted to permit provincial elections; December 16, 1941—August 6, 1945; September 26, 1945—May 23, 1946; June 17—June 29, 1955; September 2, 1955, term ran into the declaration of the following state of siege; September 16, 1955—June 28, 1957; November 11, 1958, term of thirty days; December 11, 1958—September 21, 1963; June 30, 1969—May 25, 1973; November 6, 1974—October 28, 1983.

38. Garro, *supra* note 2, at 318.

39. The checking power ostensibly conferred upon Congress has not been invoked. Garro notes that of the many examples of executive declarations during congressional recess, not one was overturned when the legislature reconvened. *Id.* at 319.

40. Judgment of Nov. 17, 1893, C.J.N., 54 Fallos 432 [hereinafter *Leandro Alem* case]; Judgment of Mar. 13, 1960, C.J.N., 254 Fallos 116 [hereinafter *Juan C. Rodriguez* case]; J.R. VANOSSI, TEORÍA CONSTITUCIONAL 490 (1976).

41. Judgment of Dec. 3, 1985, C.J.N., G-414-XX (slip opinion on file with the U. MIAMI INTER-AM. L. REV.)[hereinafter *Granada* case]; Judgment of Jan. 18, 1934, C.J.N., 170 Fallos 246 [hereinafter *Julieta Meyans de Pueyrredón* case]; Judgment of Feb. 10, 1933, C.J.N.,

The Court's construction rests on firm ground. Article 23 refers to extraordinary events that "endanger the exercise of the Constitution and the authorities created by it" and provides for the suspension of "constitutional guarantees." Nowhere does it mention dismantling the constitutional framework. Indeed, its very terms presuppose the continued vigor of the Constitution: Article 23 imposes limits on executive power during a state of siege and Congress is empowered to set aside a state of emergency declared during its recess. In light of these provisions, it is evident that the Argentine framers shared the Court's vision of the restricted bounds of Article 23.[42]

Because Article 23 is not intended to impair the norms and functions that govern the components of the Argentine state, the checks and balances that inhere in normal periods, including judicial review, should also operate in times of emergency. The issue is significant because in the absence of judicial review, Article 23 provides an "end-run" around the substantive guarantees of the Constitution.

Judicial review of action taken pursuant to Article 23 may take two forms: review of the decision to impose a state of siege and, once a declaration has been made, review of the measures adopted to restore tranquility. The Supreme Court has consistently held that the decision to declare a state of siege is entrusted to the political branches. As such, the fact-finding and decision-making processes that underlie the declaration are closed to judicial review.[43] This rationale is rooted in respect for the division of powers and the spheres of independent action it implies. The Court has commented that the Executive is best suited to take

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167 Fallos 267, 316-17 [hereinafter *Marcelo T. de Alvear* case].

42. Alberdi championed a strong Executive invested with state of siege powers. He rooted his position in the practical experiences of the newly formed South American republics. After the new states had freed themselves from the rule of Spain, they enacted Constitutions proclaiming individual liberties and creating weak Executives; anarchy ensued. Alberdi proposed the remedy of fortifying the executive power hoping that by bolstering the constitutional government, the observance of constitutional guarantees might be achieved. He lauded the example of the 1833 Chilean Constitution's state of siege provision because it allowed the president to become "king" when anarchy threatened the constitutional order. This was an admitted divergence from the U.S. model, but an essential one. Without it, Alberdi considered that the South American political climate would not permit the exercise of the individual rights ostensibly won with independence. JUAN B. ALBERDI, *supra* note 2, at 171-80.

43. *Granada* case, No. G-414-XX, slip op.; Judgment of May 15, 1981, 1981-C L.L. 108-09 [hereinafter *Moya* case] and cases cited therein; Judgment of Aug. 9, 1977, C.J.N., 298 Fallos 441 [hereinafter *Zamorano* case].

swift, declaratory action in emergencies.[44] Moreover, the investigative capacity of the political branches would seem to render them institutionally fit for the requisite fact-finding. Furthermore, from the perspective of political accountability, it is arguable that declaratory action should be left in the hands of those who will be held responsible for their actions at the polls. It is worth noting that legislators, during recent congressional debate concerning a bill[45] regulating the interposition of writs of habeas corpus during a state of siege, expressly disavowed any intention to sanction judicial review of the declaratory act and the fact-finding behind it.[46]

Similarly, questions relating to the permissible duration of a state of siege have traditionally fallen outside the realm of judicial cognizance.[47] The Court has annulled executive decrees issued pursuant to state of siege powers on grounds that the state of siege has endured too long.[48] The Court has not moved, however, to invalidate the state of siege itself on grounds of its staleness.[49] The text of the Constitution is ambiguous on the temporal aspects of an emergency state.[50]

Although commendable in theory, this display of judicial restraint bred unsavory results. Almost every de facto government declared a state of siege and dispensed with basic guarantees to life and liberty.[51] Furthermore, in those instances where Congress was

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44. Judgment of Mar. 23, 1959, C.J.N., 243 Fallos 504, 515 [hereinafter *Antonio Sofía* case]; *Julieta Meyans de Pueyrredón* case, 170 Fallos at 246.

45. The bill became Law 23.098, Sept. 28, 1984, 44-D A.D.L.A. 3733. *See* 44-D A.D.L.A. 3733 (1984).

46. Diario de Sesiones de la Cámara de Senadores de la Nación, 23a reunión. 15a sesión ordinaria, 19 de septiembre de 1984, at 2033, *cited in Granada* case, No. G-414-XX, slip op., at considerando 5.

47. Bidart Campos, *Duración del Estado de Sitio y de los Arrestos Políticos*, 93 E.D. 489 (1981).

48. *See* the *Mallo* case, 282 Fallos 392 (annulling a specific measure adopted under state of siege powers).

49. The Court may soon assert durational review if it has not already done so. In the latest discussion of Article 23, the Court seems to have abandoned its exhortation regarding the transitory nature of states of siege in favor of substantive doctrine. The Court states that a term of duration, expressed in the declaration, "is a condition of validity" of the suspension of constitutional rights. *Granada* case, No. G-414-XX, slip op. at considerando 6. In *Granada*, the state of siege in question announced its own expiration date.

50. The Argentine Constitution accords the President the power to declare a state of siege with the Senate's confirmation in the event of foreign attack; the declaration is to be made for a limited time. CONST. art. 86, cl. 19 (Argen.). The other state of siege provisions omit this key phrase. Bidart Campos, however, argues that, *a fortiori*, the temporal restraint should enjoy universal application. *See* MANUAL DE DERECHO, *supra* note 9, at 173-74.

51. Not only the state of siege provided for in Article 23 has been abused. In addition, look-alike, extraconstitutional declarations of states of emergency have been declared.

dissolved, the legislative check over executive declarations was dissolved along with it. In short, there has often been little to prevent behavior that responds to the fancy of the executive rather than the constitutional needs of the nation.[52]

In contrast to its passive approach to reviewing the declaratory act, the Court has begun to fashion an active check on measures adopted under a state of siege. The result has been a much needed increase in the protection of individual liberties. This was not always the case, however. Until recently, the Court had held the adoption of specific emergency measures pursuant to a state of siege declaration to be nonjusticiable.[53] Traditional doctrine construed the crucial clause of Article 23 ("suspension of constitutional guarantees") to mean suspension of all guarantees, regardless of their relation to the exigencies that provoked the state of siege declaration.[54] The Court also traditionally characterized acts, such as the closing of a publication or arrest of a person pursuant to state of siege powers, as transitory security measures and not as penalties.[55]

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Perón, for instance, suspended constitutional guarantees when he announced a "state of internal warfare."

52. In retrospect, fervent adhesion to the political question doctrine was a mistake. Argentine history exposes a string of powerful executives, which, contrary to Alberdi's prophecy, did not foster respect for individual rights. Greater control by the Court, not heightened deference, was called for. Nevertheless, vigorous judicial oversight might have backfired; too much control over Article 23 might have prompted de facto regimes to disown the Constitution in its entirety.

53. *See, e.g.*, Judgment of Dec. 30, 1958, C.J.N., 242 Fallos 540 [hereinafter *Monaco* case]; Judgment of Aug. 22, 1956, C.J.N., 235 Fallos 681 [hereinafter *Norberto H. Cuello* case]; Judgment of Apr. 5, 1892, C.J.N., 48 Fallos 17 [hereinafter *Fermín Rodriguez* case].

54. *See* Judgment of Mar. 3, 1970, C.J.N., Argen. 138 L.L. 464 [hereinafter *Primera Plana* case](Article 23 of the Argentine Constitution "imports the suspension of individual guarantees, among them the liberty of the press."); *see also* Judgment of May 9, 1962, C.J.N., 252 Fallos 244, 247 [hereinafter *Suaze Almagro* case]; J.R. VANOSSI, *supra* note 40, at 487.

55. *See, e.g., Suaze Almagro* case, 252 Fallos at 248 (closing of a newspaper and sequestration of its issues are not penalties, but rather "transitory security or defense measures"); *Julieta Meyans de Peurredon* case, 170 Fallos at 246 (arrest of a person pursuant to a state of siege does not constitute a penalty, as the term is employed in Article 23). Thus, the executive measures escape various pitfalls: they steer clear of Article 23's prohibition of penalties; they avoid entanglement in Article 18's injunction that, "no inhabitant of the Nation may be penalized without a prior trial based on laws enacted prior to the cause"; and finally, they are subjected to the Court's reasonableness review and not the more rigorous scrutiny applied in the *Moya* case, 1981-C L.L. 108. The landmark *Timerman* case, 301 Fallos 771, however, departed from this position in the field of arrests of people. Whether this change spills over to the press remains to be seen. For arguments that it should, see J.R. VANOSSI, *supra* note 40, at 499; G. BIDART CAMPOS, LA CORTE SUPREMA 169 (1982).

In the landmark case *Antonio Sofía*,[56] however, the Court unveiled judicial review over measures adopted to quell an internal commotion. In *Antonio Sofía*, the executive had invoked state of siege powers to ban the proposed meeting of a "leftist" political group. The organization, known as The Argentine League for Human Rights, had applied for permission to hold a meeting in a Buenos Aires theater. The discussion was to center on the observance of human rights in Paraguay. Permission to convene was denied on the basis of the extant state of siege, which had been declared in response to a series of labor strikes and insurrections in key Argentine industrial sectors.[57] The League contested the executive's ban arguing that the proposed meeting had no connection whatsoever with the labor strife that prompted the imposition of the emergency state.

In passing upon the League's contentions, the Court made its usual observation that the declaration itself was non-reviewable. It continued, however, with the novel assertion that measures adopted thereunder must be "reasonable."[58] While this posture marked a departure from the past, the actual control asserted was weak. Review of ameliorative measures was deemed to be "outside the sphere of judicial competence except in strictly exceptional cases."[59] An exceptional case would arise "when measures adopted are clearly and manifestly unreasonable, in other words, when . . . they bear no relation whatsoever to the ends of Article 23."[60] In the interest of clarity, the Court postulated an example of what might constitute such manifest irrationality: denying a foreigner the right to marry on the basis of Article 23 would be so unreasonable as to be susceptible of judicial review.[61]

Finally, the Court gave the criterion by which it would measure reasonableness. In so doing, it seemingly emasculated the test altogether. Judges were advised to refer to "the immediate cause of the state of siege—internal commotion—and not to the concrete

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56. *Antonio Sofía* case, 243 Fallos at 504.

57. *Estado de Sitio*, 18-B A.D.L.A. 1223 (1959).

58. *Antonio Sofía* case, 243 Fallos at 515. This reasonableness review extended to all individual liberties except physical liberty which was deemed to have been textually committed to the president via the terms of Article 23. It was not until 1977 that the Court extended this control over physical liberty as well. *See* G. BIDART CAMPOS, LA CORTE SUPREMA 157-67 (description of this evolution).

59. *Antonio Sofía* case, 243 Fallos at 515.

60. *Id.*

61. *Id.* at 516.

motives that the legislature may have mentioned as its causal factors."[62] As if the newfound power of review could withstand further whittling, the Court added that restrictions on activities that "may" contribute to, maintain, or aggravate the internal commotion should be considered reasonable.[63] A generic, and hence ineffectual, reasonableness test was born. Needless to say, the prohibition of the meeting in the *Antonio Sofía* case fell easily within the elastic contours of "reasonableness."[64]

The reasonableness test, however, soon outgrew its humble beginnings. The Court's present test spells out specific criteria by which to measure the reasonableness of state of siege restrictions. Indeed, these measurements are being made with ever-increasing precision with the result that all Executive decrees are no longer deemed reasonable.[65]

The current reasonableness test is two-tiered. It considers the relation between the guarantee affected by the restrictive measure and the state of internal commotion that prompted the declaration, and whether the restrictive measures are of proportions justified by the ends sought through the declaration.[66] Significantly, the Court has narrowed its hitherto generic view of "internal commotion" and the myriad of factors that "may" exacerbate it. It has begun to focus on the motives set forth in the declaration of the state of siege as the relevant facts against which to measure the reasonableness of a given restriction. In *Mallo*, for example, an executive decree banned and sequestered a documentary film about recent Argentine history on the grounds that its showing would disturb the public peace. The film addressed, among other events, the dethroning of Perón in the coup of 1955.[67] The Executive

62. *Id.*

63. *Id.*

64. *See* Bidart Campos, *Reflexiones sobre la Libertad de Frensa durante el Estado de Sitio*, 31 E.D. 456 (1970)(critique of the sieve-like qualities inherent in *Antonio Sofía* reference points).

65. The power of review has also been asserted in areas that do not involve application of the reasonableness test. In these areas, review is rooted more firmly in the text of Article 23 of the Argentine Constitution. *See, e.g., Moya* case, 1981-C L.L. at 108 (the Executive may not deny a detainee the option to leave the country); *Timerman* case, 301 Fallos at 771 (the Executive may not apply penalties under Article 23; indefinite detention without explanation of cause exceeds bounds of transitory security and acquires penal character); *see generally Granada* case, No. G-414-XX, slip op., at considerando 5.

66. *Granada* case, No. G-414-XX, slip op., at considerando 6, *citing* 300 Fallos 816, 820 (1978).

67. *Mallo* case, 282 Fallos at 392.

based its prohibition on the state of siege it had declared three years earlier to subdue terrorist and labor violence in the northern province of Córdoba. In overturning the Executive's prohibition, the Court did not refer to the existence of "internal commotion" in the generic sense. Instead, it measured the ban's reasonableness against the particular provocation that motivated the declaration, *i.e.*, the labor strife in Córdoba.[68]

The second significant shift in the state of siege doctrine relates to the suspension of guarantees. As previously discussed, the Court no longer adheres to the interpretation that would sweep all rights into suspension regardless of their relationship to the events that prompted the state of siege declaration. This was made clear in the *Mallo* case where the Court stated that only "some" rights—"those [rights] that are incompatible with the end of controlling the internal commotion or exterior attack"—should fall prey to suspension.[69]

It is noteworthy that the Court's state of siege doctrine appears to be winning an audience in the political branches. This was evident in the case of the Executive's most recent declaration, which was interposed with the aim of stopping a wave of bombings that preceded the November 3, 1985 congressional elections. The Executive decree contained a number of self-limitations along the lines suggested by the Court.[70] It professed a sixty-day duration, expressly stated that all guarantees were not suspended (it singled out press liberties for special preservation), and set forth its antecedent causes.[71]

Recently, Congress has also taken note of the Court's reasonableness standard. On October 19, 1984, Congress embodied its recognition of Court doctrine in Law 23.098. The legislation regulates the interposition of writs of habeas corpus during a state of siege and Article 4 of the statute directs every court that reviews a writ to investigate,

> (1) [t]he legitimacy of the declaration of the state of siege, (2) the correlation between the order of privation of liberty and the

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68. *Id.* at 399.

69. *Id.* at 397; G. BIDART CAMPOS, LA CORTE SUPREMA 164.

70. Estado de Sitio, Decreto 2069, 45-D A.D.L.A. 3722 (1985).

71. It may be noted, however, that President Alfonsín arguably ignored the first principle of the Court's teachings: Article 23 is to be invoked in periods of extreme danger, not as a knee-jerk response to minor disorder. *See* La Nación, Oct. 25-26, 1985 (editorials criticizing the measure).

> situation that gave rise to the state of siege . . . [and] (4) the effective exercise of the right to opt to leave the country provided for in the final section of Article 23 of the National Constitution.[72]

The latter directives embody the Court's reasonableness test and its textually-based review over the option to leave the country asserted in the *Moya* case.[73] On the other hand, the first directive, Article 4(1), seems to mark a departure from the Court's political question policy. This first clause appears to sanction judicial review over the declaration and perhaps the duration of a state of seige. This interpretation stems not only from the straight-forward text of Article 4(1), but also from the historical context of the enactment. Law 23.098 was adopted less than one year after the rebirth of democracy in Argentina. At that time, the extended state of siege of the Proceso, the rash of disappearances that accompanied it, and the impotence of habeas corpus as a means of locating and liberating those seized, were still fresh in the minds of the Congress.[74]

The Supreme Court, however, decided otherwise. The Court, relying in part on remarks made by the bill's author in congressional debates, concluded that Law 23.098 did not intend to vary traditional state of siege doctrine.[75] The result is that declarations are still unreviewable. Interpretive issues aside, Law 23.098 remains significant. Its contents demonstrate that the legislature, like the executive, is engaged in constitutional dialogue with the Court over the proper scope of Article 23. To be sure, political history provided the impetus for the dialogue. Judicial doctrine, however, provided its conceptual lexicon.

## V. Freedom of the Press and the State of Siege

The evolution of the reasonableness test is linked to the ascendence of press freedoms. Two cases involving such freedoms and one implicating freedom of expression through the film medium

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72. Law 23.098, 44-D A.D.L.A. 3733 (1984). *See* Cárdenas, *Legal Memoranda: Argentina*, 16 U. Miami Inter-Am. L. Rev. 695 (1985)(succinct summary of the law's contents).

73. *See Moya* case, 1981-C L.L. 108; Amadeo, *El Valor de la Doctrina de la Corte Suprema*, Nov. 1, 1985, L.L. (treatment of the importance of the Court's doctrine in the genesis of Law 23.098).

74. *See* Garro, *supra* note 2, at 330-36 (discussion of the utter futility of thousands of habeas corpus proceedings); Nunca Más, *supra* note 6, at 400-07.

75. *Granada* case, No. G-414-XX, slip op., at considerando 5.

lay bare this relationship. They also, however, expose some cracks in the Court's exercise of judicial review.

As recently as 1970, the Court applied an extremely weak reasonableness test to the closure of a publication.[76] The *Primera Plana* case involved the closure of a weekly publication and the sequestration of one of its issues pursuant to an executive decree promulgated under state of siege powers.[77] *Primera Plana* employed a watered-down reasonableness standard under which a decree need only survive scrutiny for "manifest unreasonableness."[78] The required minimum rationality was easily discovered in both tiers of the reasonableness test in this case. First, the guarantee affected—freedom of the press from prior censorship—was held to bear a reasonable relation to the generic motive (internal commotion) for the state of siege declaration. Second, the measures were properly proportioned, or tailored, to the aims of the declaration. In the Court's view, the declaration sought to calm contemporaneous disturbances and, additionally, to prevent dislocations that might surface in the future.[79] The excessive elasticity of this analysis is obvious.

Shortly after *Primera Plana* was decided, the *Mallo* case arose. In *Mallo*, the Court applied a standard of review with considerably more bite although the factual setting did not differ markedly from that presented in *Primera Plana*. In *Mallo*, an executive decree issued under a state of siege prohibited the showing of a documentary film.[80] Authority for the ban was rooted in the same state of siege that served as the basis for the closure in

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76. *Primera Plana*, 138 L.L. 464.

77. *Primera Plana* was a popular news magazine with a reportage and layout akin to those of *Time Magazine*. On the evening of August 5, 1969, federal police appeared at its offices and informed the managing editor that edition 345 was to be sequestered by executive decree. The measure also closed the magazine and prohibited it from publishing under another name. No copy of the decree was presented. At midnight, however, the Ministry of the Interior announced that,

> the Executive has given repeated evidence of its respect for free expression, which it has protected in the exercise of its public function. Circumstances that are of public knowledge obliged the implantation of a state of siege to guarantee liberty and public safety. As a consequence of this obligation and considering that *Primera Plana* is engaged in a campaign based on inexact information destined to create a climate of confusion, the Executive ordered its closure.

Decree 4179, officially closing the magazine, was promulgated the following day. *See* La Nación, Aug. 6-7, 1969 (editorial coverage).

78. *Primera Plana*, 138 L.L. at 461.

79. *Id.*

80. *Mallo* case, 282 Fallos 392; *see supra* text accompanying notes 67-68.

*Primera Plana*. Similar constitutional guarantees were implicated because the Court held that the film medium falls within the ambit of constitutionally protected freedom of expression.[81]

In *Mallo*, the Court seemed to unveil a new mode of inquiry. The *Mallo* analysis focused on whether a *current* showing of the film in question might intensify the specific internal commotion that triggered the siege declaration. The Court, answering this question in the negative, scrutinized the film's character and contents *in camera*, the particular factors that prompted the 1969 state of siege declaration and the country's contrasting political state when *Mallo* was decided. The shift from the *Primera Plana* approach is evident. Instead of offering only vague analysis, the *Mallo* decision concentrated on specific facts.

In annulling the de facto decree at issue in *Mallo*, the Court emphasized the birth of new "circumstances that condition the present reality of the country."[82] Chief among these "circumstances" ranked the recent announcement of elections, the resuscitation of political parties, the authorization of public gatherings and the consequent freedom to examine public issues. These intervening events created a new socio-political environment. Viewed in the context of this distinct environment, the Executive decree was deemed an exorbitant and unreasonable use of state of siege powers. In so holding, the Court attacked the heart of the executive decision-making process and evaluated for itself the country's past and present need for emergency measures.

The Court gave great weight to its *in camera* screening of the film at issue. It pronounced the film "objectively" devoid of insurrectional content. The Court admitted that the film treated current historical events that had caused profound divisions among Argentines and that it therefore might well stimulate "polemics." Still, these "circumstantial reactions" were "certainly not to be confused with the deep and widespread disturbance that Law 18.262 refers to" (declaring the 1969 state of siege).[83]

The *Mallo* analysis, "reasonableness review with bite," relies on changed circumstances and particularized *in camera* review of banned materials. It was later employed in another landmark free-

81. *Mallo* case, 282 Fallos at 397.
82. *Id.* at 399.
83. *Id.* at 398, 400.

dom of the press case.[84] The *Editorial Perfil* case arose out of the closing of a weekly magazine, entitled *La Semana*, during a state of siege. The events that prompted the closing reveal the incumbent régime's extremely attenuated tolerance levels.

*La Semana*, a popular mainstream magazine, features interviews with artistic and political personalities. The cover of its October 28, 1982 issue displayed a photograph of Gerardo Sofovich, a leading Argentine television director. Sofovich was depicted wearing a large grin and a military officer's hat with his hands outspread at either side of his head with palms forward, gesturing in mocking fashion. The accompanying caption read, "the Russian against the colonels." The cover story consisted of innocuous interviews with Sofovich and the colonel who had been appointed to direct the television channel during the *Proceso*. It was clearly the cover, not the story, that provoked the closing.[85]

The Junta responded with a decree promulgated on October 29, 1982[86] introduced by a verbose statement on the need to strengthen constitutional institutions and foster the transition to democracy. The decree indicated that an inability to countenance "systematic and reiterated degradations to essential institutions of the Republic" and to those "invested with the public function" had prompted the closing. *La Semana*'s cover had "exceeded the mark of healthy criticism."[87] The decree's operative sections closed *La Semana*, prohibited the printing and circulation of its magazine and production of future issues, and sequestered all copies of the offensive issue. Phones, typewriters, and other printing equipment were seized.

*La Semana* contested the decree's validity arguing that the executive had exceeded the bounds of reasonableness in exercising state of siege powers. The Federal Appeals Court, like the *Mallo* Court, scrutinized the banned material and denied that it partook of the qualities the Executive had ascribed to it.[88] The court underscored the existence of "changed circumstances." In examining whether a reasonable link bridged the events that triggered the

84. Judgment of Nov. 10, 1982, C.J.N., 103 E.D. 284 (1982)[hereinafter *Editorial Perfil* case].

85. *See* La Semana, Oct. 28, 1982, edition 313. *See* La Nación, Oct. 30-31, 1982 (contemporary commentary on the closing); *La Semana*, Dec. 16, 1983, edition 314 (summary).

86. *Editorial Perfil* case, 103 E.D. at 294.

87. Decreto 1075, XLL-D A.D.L.A. 3753 (1982).

88. *Editorial Perfil* case, 103 E.D. at 295.

state of siege declaration and the closing of *La Semana*, the court noted that eight years separated the declaration and the decree. Without further elaboration, the court found that, "the present circumstances are incompatible, in light of the well-known tendency toward institutional normalization, with extensive application of those powers that conspire against a means that is integral to achieving that normalcy such as the freedom of expression."[89]

The changed circumstances standard seems well established. It remains to be seen whether this standard can withstand critical analysis. This type of review is in one sense salutary: it helps uphold press freedoms. Moreover, the focus on temporal aspects in overseeing state of siege measures rests on a firm foundation. The Argentine founders envisioned limited, transitory states of siege that respond to truly extraordinary events. The Court aligned itself with this view nearly a century ago.[90] Finally, close scrutiny of the allegedly offending materials in the *Mallo* and *Editorial Perfil* cases seems justified; a serious application of the second prong of the reasonableness test, which probes proportionality, demands it.

The *Mallo* and *Editorial Perfil* decisions are nevertheless disturbing. The Court has created a task for the judiciary for which it is institutionally unfit. It also appears to have contradicted itself. The *Mallo* and *Editorial Perfil* courts reviewed the prohibited material to ascertain whether it would exacerbate or prolong the original state of commotion. This analysis requires fact-finding in two areas. The first inquiry assesses the nature of the banned material and its potential impact upon its audience. The second inquiry, examines the link—or lack thereof—between the contemporary state of commotion and the condition that had triggered the state of siege declaration. These factors form the core of the *Mallo* and *Editorial Perfil* reasonableness standard. Yet, these happen to be factors that a court is ill-equipped to evaluate. The framers of the Constitution recognized this in allocating state of siege powers to the political branches. The Court has also acknowledged its own inadequacy in this area by refusing to review declarations. It is not the Court's function to undertake periodic diagnoses of the nation's political, social, and economic health. This task falls within the purview of the executive and legislative branches.

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89. *Id.* The normalization process alluded to resulted in the reinstatement of democratic government in late 1983.

90. *Leandro Alem* case, 54 Fallos at 432.

The contradiction in avoiding review of the factual bases for state of seige declarations, while scrutinizing the same factual predicates under the rubric of "changed circumstances" review, arose from quirks in the constitutional structure. Theoretical tension inheres in a legal order that weds the separation of powers to a checking matrix. Independence clashes with the checking powers invested in other branches. Events in Argentine history have exacerbated this tension. The habitual abuse of Article 23 and the frequent dissolution of Congress have pressured the Court into fashioning a checking power over state of siege measures. At the same time, however, the Court has continued to recognize the value of separated powers and independent decision-making with respect to the declaration and duration of a state of seige.

The Court should adopt a more consistent line of thought and admit its assumption of fact-finding duties when it exercises its control over measures adopted. Recent history suggests that consistency be achieved by instituting review over the declaration and duration of a state of siege. The Court is already engaged in the requisite analysis under a different guise. Moreover, an attempt to cure the inconsistency by abandoning all judicial review would subject important rights to unbridled abuse. A weak form of the minimum rationality test propounded in *Primera Plana* might be adopted at the outset. In this respect, it is important to recall that the Constitution offers guidance on the conditions that properly give rise to a state of siege declaration. Article 23 refers to "commotion that endangers the operation of the Constitution and its institutions." Small scale disturbances do not meet this standard. Accordingly, they should not be permitted to trigger a state of siege declaration.[91] The Court could develop standards on a case by case basis that provide the executive branch flexibility without relinquishing the power of review. The Court has already laid the theoretical foundation for review over declarations. In cases involving control over specific measures, the Court has stated that its

91. Vanossi, for example, postulates that principled review is feasible when a declaration is made under conditions that "clearly" lack the degree of severity contemplated in Article 23 of the Argentine Constitution. Argentine politics may make the judicial task easier than might first appear. Vanossi opines that a state of siege has frequently been invoked when conditions "manifestly" failed to measure up to the constitutional standard. J.R. VANOSSI, *supra* note 40, at 487. Bidart Campos constructs a different argument for review, stating that Article 100 of the Argentine Constitution gives the Court "jurisdiction to decide all cases . . . governed by the Constitution"; the declaration of a state of siege is governed by the Constitution; hence, it is logically subject to review. MANUAL DE DERECHO, *supra* note 9, at 451; MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO 455-60 (1981).

powers of review "must be extended [to] the point where they converge with the values of Argentine society" that have been entrusted to the Court.[92] These values are synonymous with those embodied in the Constitution. It is time to recognize that safeguarding these values requires control over arbitrary decisions destined to damage them.

## VI. Protection of the Press in the de Facto Setting

Two 1968 cases illustrate the interaction between the de facto doctrine and Article 14 within the context of press closings.[93] The cases arose as follows. In 1966, the military unseated civilian President Illia, proclaimed the Statute of the Argentine Revolution and dissolved the provincial and national congresses.[94] A state of siege, however, was not declared. In late 1967, the de facto Executive banned the publication and circulation of two periodicals that had been engaged in rather virulent criticism of the military government. In the Executive's opinion, this behavior obstructed the achievement of the government's goals.[95] The Executive argued that constitutional rights could not operate in opposition to the political aims of the revolution, and that the criticism in these periodicals ran counter to this caveat.

The *Azul y Blanco* and *Prensa Confidencial* cases questioned the scope of de facto power and the breadth of press freedoms. The Court reasoned that the absence of a state of siege declaration left all constitutional guarantees in full effect despite the "revolution" and used two arguments to rebut the Executive's contentions. First, the Court reconciled the aims in the revolutionary statute with the continued enjoyment of constitutional freedoms,[96] relying upon the statute's expressed intent to restore the "concept of authority, the sense of respect for the law and the reign of true

92. *See Zamorano* case, 298 Fallos at 444.

93. Judgment of Apr. 30, 1968, C.J.N., 22 E.D. 576 [hereinafter *Prensa Confidencial* case]; Judgment of Apr. 30, 1968, C.J.N., 22 E.D. 580 [hereinafter *Azul y Blanco* case].

94. The statute also provided for the replacement of the Supreme Court's members, for the dissolution of all political parties, for provisional sequestration of their assets, and for federal intervention in each of the provinces and the national territories. *Acto de la Revolución Argentina*, 26-B A.D.L.A. 753 (1966).

95. *Prensa Confidencial* was a weekly, highly politicized publication of about a dozen pages. Its habit of criticizing the incumbent military regime provoked several closings in the late 1960's. *Azul y Blanco*, another small weekly with similar characteristics, suffered a similar fate for the same reasons.

96. *Azul y Blanco* case, 22 E.D. at 581-82; *Prensa Confidencial* case, 22 E.D. at 580.

justice, in a republican regime in which the exercise of duties, rights, and individual freedoms will have full operation."[97] Second, the Court implied that were this common purpose absent, the goal of achieving national security to advance the objectives of the revolution could not, of itself, negate "essential human rights."[98] The Court reasoned that if a true threat to the nation's security arose, the political branches could invoke Article 23. The decisions recognize the competence of de facto governments to reach the objectives set forth in their revolutionary programs so long as they do not trample on constitutionally protected rights in so doing.[99] In short, if guarantees are to be suspended, they must be constitutionally suspended.

The Court, however, went further in clarifying the relationship between de facto power and press liberties. In these cases, the Court considered perhaps the foremost function of a free press in a democratic society—its service as an informative bridge between the government and its citizens. A free press supplies the electorate with the information it needs to intelligently exercise its sovereign power. An unfettered press insures that government officials remain responsive to the population at large.[100] In *Azul y Blanco*, the Court found that "the exercise of free criticism of public officials for official acts must be recognized as an essential manifestation of freedom of the press as it is one of the very pillars of republican government."[101] The Court also noted that the Executive's prior dissolution of political parties had not suspended press protections because the dissolution "does not deny that man, as the political being that he is, partakes of the natural right to think and

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97. *Id.* This is not the only time the Court has interpreted a revolutionary statute in a way that opposes the construction proffered by the de facto Executive that drafted it. *See, e.g., Timerman* case, 301 Fallos 771. While we may laud the outcome of this tactic, it seems suspect as a judicial device. It is likely that the Executive is best informed as to its aims and how to achieve them.

98. *Azul y Blanco* case, 22 E.D. at 582; *Prensa Confidencial* case, 22 E.D. at 580.

99. *See* Bidart Campos, *La Libertad de Prensa "Aquí y Ahora,"* 22 E.D. 576 (1968).

100. See J. Brandeis' classic concurring opinion in Whitney v. California, 274 U.S. 357, 372 (1927)(Brandeis, J., concurring); New York Times v. Sullivan, 376 U.S. 254 (1964); F. SHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 36 (1982).

101. *Azul y Blanco* case, 22 E.D. at 582 *citing* Judgment of Oct. 30, 1967, C.J.N., 20 E.D. 192 [hereinafter *Moreno y Timerman* case]. These cases involved the crime of *desacato*. Its elements consist of "threatening, injuring, or in any way offending the dignity of a public functionary *because of the exercise of his functions.*" Código Penal art. 244 (Argen.)(emphasis added). The collision between *desacato* and the enlightened prose quoted from *Azul y Blanco* is apparent. The Court's narrow construction of Article 244, however, reduces the incidence of *desacato* convictions.

to express his thought on public matters."[102]

These pronouncements, together with the Court's declaration that "although Article 14 announces only individual rights, it is clear that the Constitution, in establishing law over the freedom of the press, is fundamentally protecting its democratic essence,"[103] reaffirm the Court's appreciation of the bonds between a free press and democracy. In *Azul y Blanco* and *Prensa Confidencial*, the Court transformed its appreciation into action by annulling the Executive's closure decrees.

## VII. Conclusion

During the last half century, the Argentine Constitution has endured severe strain. De facto régimes usurped power, dissolved Congress, and trampled constitutional guarantees. While the intrusion of this "fourth branch" was traumatic, important aspects of constitutionalism endured. In this connection, two questions remain unanswered. First, why the constant trauma? Second, why did the Constitution and its values survive?

Juan B. Alberdi's remarks shed light on the sources of Argentina's constitutional turmoil. Writing well over a century ago, the father of the Argentine Constitution observed:

> [T]here is always a stated hour in which the human word is given flesh. When this hour has sounded, he who utters the word, orator or author, makes law. In this case the law is not his, it is the product of the times. But this is the law that lasts, because it is the true law.[104]

Alberdi was writing to catalyze the adoption of the 1853 Constitution. He believed the hour was ripe for his constitutional proposals to become law, and in large measure, they did. History has shown, however, that Argentina was not as prepared to follow its new constitution as a handful of Argentine intellectuals and statesmen were to adopt it.[105]

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102. *Azul y Blanco* case, 22 E.D. at 582.

103. Judgment of Nov. 11, 1960, C.J.N., 248 Fallos 291 [hereinafter *Edelmiro Abal* case].

104. J.B. Alberdi, *supra* note 2, at 31.

105. Interestingly enough, Alberdi was aware of this. *Id.* at 52-56. His intention was to convert Argentina into a receptacle for the "civilizing" and democratizing effects of European immigration. The Constitution was in large measure written toward that end. On the critical importance of intersection between the set of constitutional precepts and a society's universe of social norms, see R.A. Dahl, A Preface to Democratic Theory (1956).

The country's intermittent bouts with de facto governments and the corresponding, erratic observance of basic guarantees are partly explained by the importation of ideals unleashed in the American and French Revolutions into a society lacking a receptive political climate.[106] In stark contrast to the colonial experience in North America, pre-constitutional Argentina had no experience with a limited constitutional government. A spate of authoritarian *caudillos* ruled the divided nation until 1852. Autocratic rule persisted until 1912 despite the existence of the 1853 Constitution. Grafting liberal ideals onto an authoritarian tradition might be expected to produce a hybrid, and it has.

Speculation about the perseverance of constitutionalism implicates a number of factors. Among them are Argentina's identification with western traditions and values and the military's frequent, ironic, expressions of its desire to guide the nation back onto a constitutional course. Surely, another crucial factor is the behavior of the Supreme Court. From the inception of the de facto phenomenon, the Court reacted to de facto reality by relinquishing the inevitable while clinging to the concepts of judicial review and constitutionalism. The Court ensured that the judicial voice would be heard, even if at muted levels. In so doing, the Court helped to guarantee that Argentina's tradition of strong-armed executives would not suffocate its less developed juridical heritage of limited government.

The Court has also struggled to establish principled standards of review over the use of Article 23. Because the use of state of siege power implies the suspension of individual guarantees and a concomitant shift of power to the Executive, judicial oversight has bolstered both the constitutional framework and the rights it upholds. Unfortunately, the vacuum created by the absence of congressional checking power has placed undue strain on the Court. Judicial review may, of necessity, entail overstepping the traditional boundaries of judicial power.

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106. Following the classic Latin American configuration, political and economic power were too highly concentrated for too long. Authoritarianism thrived below a democratic veneer. *See generally* L.E. HARRISON, UNDERDEVELOPMENT IS A STATE OF MIND: THE CASE OF LATIN AMERICA (1980); R.A. POTASH, THE ARMY AND POLITICS IN ARGENTINA: 1945-1962 (1980); R.A. POTASH, THE ARMY AND POLITICS IN ARGENTINA: 1928-1945 (1969); J.R. SCOBIE, ARGENTINA, A CITY AND A NATION (1971); A.P. WHITAKER, ARGENTINA (1964). The books by Scobie and Whitaker are general historical works. Harrison's recent publication treats Argentine culture as it relates to development. Potash's work is a fascinating look at the seminal role of the Argentine armed forces in politics.

In an area that is closely linked to the evolution of the de facto and state of siege doctrines, such as the freedom of the press, the Court has expanded the ambit of relevant constitutional provisions and expounded classic principles of free expression. This expansion of rights has entailed annulling those de facto decrees that do not share these principles.

Unfortunately, the repressive distortions of de facto Executives often have overshadowed the Court's flashes of constitutionalism. This sobering perspective, however, does not mean that the Court has labored in vain. Important press freedoms have been salvaged in specific cases. Dialogue between the Court and the political branches over the scope of Article 23 has begun. The Court may take pride in the knowledge that it remained an important constitutional symbol during periods when such signs were sadly lacking.