

## AN OVERVIEW OF ADMINISTRATIVE JUSTICE IN ARGENTINA

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*This article provides an overview of the federal administrative justice system in Argentina. It begins with an explanation of how the power to enact procedural law and to organize administrative courts is distributed between the federal state and the local states. It then describes the core constitutional and statutory principles and structures of administrative jurisdiction and the courts, and discusses the lack of a general special procedure to deal with actions involving the federal state and federal subject matter issues (except for interim measures and 'amparo' proceedings). The article goes on to provide an explanation of what is currently happening regarding class actions within this context, and it ends with remarks by the author on some provisional conclusions.*

*Keywords: administrative justice; Argentina; class actions; provisional measures against the state; federal jurisdiction; 'Amparo' proceeding.*

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## 1. Introduction

Argentina is a federal republic, whose central state coexists with twenty-three local states called provinces and with the Autonomous City of Buenos Aires, which has a very particular status recognized by the Supreme Court of Justice (SCJA). As in the U.S., from which we have copied the institutional design of our Federal Constitution (AFC), federal government powers are only those that have been expressly delegated by the local states. As a consequence, the political system assumes that powers not delegated remain in the hands of the local states.

As far as we are concerned with the organization of administrative courts and judges, we should take into account that Article 5 of the AFC establishes as a condition for recognizing the autonomy of the provinces that they must organize their own administrative justice system, a task that includes the enactment of procedural regulations and, of course, the institutional framework regarding courts and judges. Also, when it comes to the enactment of codes, the provision on this in the AFC leaves aside procedural codes (Art. 75, para. 12 of the AFC).<sup>1</sup>

So, we have at least twenty-five different procedural systems in Argentina, each of which has a different approach to the topic of our discussion. In this general context, our focus is on the federal jurisdiction, which, according to Article 108 of the AFC, has to be performed by the ASCJ and other courts regulated by Congress.

## 2. Organization of Administrative Courts and Judges

Determined and limited by the constitutional context briefly described in the Introduction, administrative justice in Argentina is completely exercised by judges appointed by the executive power with Senate agreement, without the popular vote,<sup>2</sup> and after a proceeding regulated by the Judicial Council that includes public competition for selection. This Judicial Council has constitutional status and its own organic regulation passed by Congress.<sup>3</sup>

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<sup>1</sup> The delegation to the federal state in that constitutional provision includes the power to enact civil, commercial, criminal, mining, labor and social security codes, as well as regulations on bankruptcy, jury trials, currency falsification and public documents.

<sup>2</sup> Act No. 26.855 modified Act No. 24.937 regarding the composition of the Judicial Council and the proceedings to elect its members, allowing the popular vote for that purpose. However, this Act was declared unconstitutional by a majority of the SCJA in a class action filed by a member of the Federal Capital Bar Association, in "Rizzo, Jorge Gabriel (Apoderado Lista 3 Gente de Dcho.) s/ acción amparo c/ P.E.N. ley 26.855 – medida cautelar (EXpte. No. 3034/13)," file No. R.369.XLIX, opinion delivered on 06/18/13.

<sup>3</sup> Art. 114 of the AFC and Act No. 24.937. For a general overview of this constitutional body and its political implications, see among others Gelli María A. El Consejo de la Magistratura en contexto político institucional, LL 2009-D-1349; Quiroga Lavie Humberto, El Consejo de la Magistratura de la Nación, LL Sup. Act. 11.07.2006; Jeanneret De Pérez Cortés María, El Consejo de la Magistratura, la independencia del Poder Judicial y la prestación del servicio de justicia, LL 1995-E-817.

The territorial distribution of courts and judges is currently organized in the following way:

1) A federal general administrative jurisdiction located and concentrated in the City of Buenos Aires that comprises an appellate court divided into five chambers (*salas*) of three judges each and twelve courts of first instance.

2) In addition to this 'general' administrative jurisdiction, also in Buenos Aires there are six courts of first instance specialized in fiscal and tax enforcement, and two special administrative forums to address social security cases and electoral complaints (the former is organized around a Social Security Appellate Court, divided into three chambers, and ten courts of first instance; the latter is concentrated in a National Electoral Court, which was once a chamber of the Administrative Justice Court of Appeals and gained autonomy in 1971 through Act No. 19.277).<sup>4</sup>

3) A federal administrative jurisdiction decentralized across the whole national territory that comprises fifteen appellate courts with jurisdiction in territories that do not necessarily match with the political division into provinces.<sup>5</sup> Some of these courts are also divided into chambers.<sup>6</sup> These courts are vested with a multi-subject matter jurisdiction which includes civil, commercial, criminal, labor, social security, electoral and administrative cases. They review opinions from a total number of eighty-five courts of first instance.<sup>7</sup>

4) Additionally, of course, there is the SCJA. The Court has been defined and developed in a quite similar way to the U.S. Supreme Court, except for the manner in which it usually exercises its jurisdiction and in the number of cases it deals with each year.<sup>8</sup> It is composed of five justices.<sup>9</sup>

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<sup>4</sup> Passed by Congress on 10.01.71.

<sup>5</sup> Federal appellate courts are located in the cities of Bahía Blanca, Comodoro Rivadavia, Córdoba, Corrientes, General Roca, La Plata, Mar del Plata, Mendoza, Paraná, Santa Fe, Misiones, Resistencia, Salta, San Martín y Tucumán.

<sup>6</sup> Córdoba, La Plata, Mendoza, Santa Fe, Salta and San Martín.

<sup>7</sup> The distribution, and number, of federal courts of first instance, excluding those with exclusive criminal subject matter jurisdiction, is: Bahía Blanca (3), Comodoro Rivadavia (7), Córdoba (8), Corrientes (3), General Roca (6), La Plata (7), Mar del Plata (7), Mendoza (7), Paraná (4), Santa Fe (9), Misiones (3), Resistencia (6), Salta (6), San Martín (4), y Tucumán (5).

<sup>8</sup> In 2012, the SCJA delivered 9,586 opinions in 'no social security cases' and 6,452 in social security cases; while in 2013 the total number was 15,792 opinions. In 2014 (last available public statistics), the total number of opinions was 23,183. For a comprehensive and detailed analysis of the SCJA in exercising its appellate jurisdiction, see Giannini Leandro, *El Certiorari. La jurisdicción discrecional de las cortes supremas* (La Plata, Librería Editora Platense 2016).

<sup>9</sup> For a revision of the institutional role of the SCJA, see Oteiza Eduardo, *La Corte Suprema: entre una justicia sin política y una política sin justicia* (Editora Platense, La Plata 1994). Also see the papers gathered in Oteiza Eduardo, Hitters Juan C., Berizonce Roberto O. (coordinadores), *El papel de los Tribunales Superiores* (Rubinzal Culzoni ed., Santa Fe 2006).

### 3. Fundamental Principles and Scope of Administrative Jurisdiction

Federal administrative jurisdiction, as well as any other subject matter under federal jurisdiction, is exceptional and restricted to those cases expressly enumerated in Articles 116 and 117 of the AFC. It is also privative and, because of that, exclusionary of provincial jurisdiction. Because of this particular feature, federal jurisdiction can be declared *ex officio* in any stage of the proceedings.<sup>10</sup>

Moreover, it should be mentioned that federal administrative jurisdiction is mandatory regarding the subject matter, even though in certain cases it can be obviated (when the federal jurisdiction is determined by the persons involved in the dispute).

According to the aforementioned constitutional requirements, federal jurisdiction deals with 'cases or controversies' related to (conf. Art. 116 of the AFC):

- 1) Issues specified by the AFC or regulated by national laws and international covenants and treaties;
- 2) Complaints concerning ambassadors, public ministries and foreign consuls;
- 3) Admiralty and sea jurisdiction;
- 4) Actions involving the federal state;
- 5) Actions involving two or more provinces;
- 6) Actions involving neighbors of one province against neighbors of other provinces, or against other provinces;
- 7) Actions involving provinces or their neighbors against foreign states or citizens.

Additionally, Article 117 of the AFC provides that this kind of exceptional jurisdiction has to be performed originally and exclusively by the SCJA when the case involves ambassadors, ministries and foreign consuls, as well as when there is a province as a party to the dispute. Otherwise, the jurisdiction of the SCJA will be exercised through appellate proceedings regulated by Congress.

Within this constitutional framework, proceedings before administrative courts, including the SCJA when appropriate, are governed under:

1. Act No. 27, the first Judiciary Act, which regulates the general nature and functions of the federal judges and courts as well as the jurisdiction of the SCJA.<sup>11</sup>

2. Act No. 48, which regulates the jurisdiction of the SCJA and, particularly, the situations in which it is possible to file an extraordinary appeal to reach that instance.<sup>12</sup>

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<sup>10</sup> For a historical revision of administrative jurisdiction and the separation of powers between the federal state and the local states, see Gordillo Agustín, *La protección judicial. Derecho procesal administrativo ('lo contencioso administrativo')* Vol. 9, Chapter XIV of the *Tratado de derecho administrativo y obras selectas. Primeros manuales* (1st ed., Buenos Aires, FDA 2014).

<sup>11</sup> Passed by Congress on 10.13.1862.

<sup>12</sup> Passed by Congress on 08.25.1863.

3. The National Civil and Commercial Procedural Code, which regulates the general proceedings in this field, including both ordinary and extraordinary appeals before the SCJA.<sup>13</sup>

4. Decree-Act No. 1285/58, the principal regulation organizing the national and federal courts, which contains provisions regarding both institutional frameworks and proceedings.<sup>14</sup>

#### 4. Administrative Proceedings

Even though, as noted, there are special courts to deal with administrative cases in Argentina, there are no general special proceedings established in which to deal with the specificities and complexity of cases directly involving the federal state or other situations specified by Article 116 of the AFC.

Several legislative initiatives have been introduced in the Senate and the Chamber of Deputies to establish such proceedings in the federal arena.<sup>15</sup> However, up to the present time we are still discussing administrative complaints with the procedural rules enacted to deal with private actions: the National Civil and Commercial Procedural Code.

There are two relevant exceptions to the application of this general procedural code:

1. The 'amparo' proceeding regulated by Act No. 16.986, enacted in 1966,<sup>16</sup> which provides for an exceptional, fast and effective device in cases of apparent illegal or arbitrary conduct by the State, with a proceeding characterized by a simplified structure, tight periods of time to exercise procedural rights, limited appeals and defenses, as well as particular provisions regarding interim measures. This legislation should be urgently reformed and improved in order to be an adequate regulation of this proceeding, which acquired constitutional status in the 1994 AFC reform.

2. The Interim Measures against the State Act No. 26.854, enacted in 2013,<sup>17</sup> which regulates interim measures in cases involving the federal state and its agencies as

<sup>13</sup> Ordinary appeal in Arts. 254/255, the extraordinary appeal in Arts. 256/258. The ordinary appeal was declared unconstitutional in a recent decision of the SCJA, *in re "Anadon, Tomás Salvador c/ CNC"* (File No. A.494.XLIX), opinion delivered on 08.25.15.

<sup>14</sup> Passed by the *de facto* regime on 02.04.58 and modified by several democratic amendments passed by Congress.

<sup>15</sup> Among others, files No. 0025-PE-2006; 0037-PE-2000; 0057-PE-2001; 2185-D-2010; 2967-D-2013; 3119-D-2001; 3943-D-2002; 4318-D-2007; 4628-D-2012; 4877-D-2009; 5070-D-2002; 6117-D-2004; 7474-D-2002. The complete text of these and other legislative initiatives in this field can be found at <<http://www.diputados.gov.ar/sesiones/proyectos/index.html>> (Chamber of Deputies) and <<http://www.senado.gov.ar/parlamentario/parlamentaria/>> (Senate) (accessed Aug. 14, 2016).

<sup>16</sup> Passed by Congress on 10.18.66.

<sup>17</sup> Passed by Congress on 04.24.13.

plaintiffs or defendants. This Act is quite restrictive and covers a number of issues in this particular field, such as special requisites to obtain these types of orders, a temporal limitation, the sort of guarantees that have to be provided for their entering into effect, some prohibitions depending on the object of the measure, a suspensive effect for the appeal (similar to what is required for the ‘amparo’ proceeding), and exceptions to many of these provisions when there are certain kinds of fundamental rights or disadvantaged groups at risk.<sup>18</sup> Several of these restrictions have been declared unconstitutional by different federal courts around the country, alleging that they imply an undue restriction of access to effective justice.<sup>19</sup>

### 5. Class Actions

In Argentina, it is not possible to find a systematic and comprehensive procedural mechanism to deal with mass administrative complaints.<sup>20</sup> The lack of adequate procedural devices at the federal level is particularly problematic due to the fact that, since the 1994 reform to the AFC, standing to sue to enforce collective rights has acquired constitutional pedigree, as well as some collective substantive rights labeled ‘collective incidence rights.’<sup>21</sup>

In this respect, since 1994 Article 43, 2nd paragraph of the AFC explicitly recognizes that different social actors (the ‘affected’ person and certain kinds of NGOs) and the Ombudsman have the right to bring ‘amparo colectivo’ on behalf of groups and against “any kind of discrimination and with regard to the rights that protect the environment, free competition, users and consumers, as well as rights of collective incidence in general.” Article 86 of the AFC, in turn, is even more explicit about the

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<sup>18</sup> For a general analysis of this Act, see Oteiza Eduardo, *El cercenamiento de la garantía a la protección cautelar en los procesos contra el Estado por la ley 26.854*, LL Sup. Esp. Cámaras Federales de Casación. Ley 26.853, 05.23.2013, at 95. For a specific analysis regarding its implications in the field of collective redress, see Verbic Francisco, *El nuevo régimen de medidas cautelares contra el Estado Nacional y su potencial incidencia en el campo de los procesos colectivos*, LL Sup. Esp. Cámaras Federales de Casación. Ley 26.853, 05.23.2013, at 155.

<sup>19</sup> For an overview of case law regarding the Act, including these declarations of unconstitutionality, see Diegues Jorge A. *Medidas cautelares contra el Estado. Aplicación jurisprudencial de la ley 26.854*, LL 04/20/16.

<sup>20</sup> Verbic Francisco, *Access to justice of disadvantaged groups and judicial control of public policies through class actions*, draft in progress.

<sup>21</sup> For an explanation of the problem, see Oteiza Eduardo, *La constitucionalización de los derechos colectivos y la ausencia de un proceso que los ‘ampare’*, in Oteiza Eduardo (coordinador), *Procesos Colectivos* (Rubinzal-Culzoni ed., Santa Fe 2006). For a survey of some of the most relevant precedents in the area of collective redress in Argentina and further discussion about the problems entailed in the absence of adequate procedural means, particularly after the 1994 reform to the AFC, see Giannini Leandro J. *La Tutela Colectiva de Derechos Individuales Homogéneos* (Librería Editora Platense, La Plata 2007); Salgado José M. *La corte y la construcción del caso colectivo*, L.L. 787 (2007-D); Verbic Francisco, *Procesos Colectivos* (Astrea Ed., Buenos Aires 2007).

Ombudsman (it plainly states that the figure ‘has standing to sue’). We can add the Public Ministry to the list of collective plaintiffs, because Article 120 of the AFC states that it has ‘functional autonomy’ and freedom to allocate its budget in order to fulfill its constitutional mission: protect the general interest of the population.

On top of that, Articles 41 and 42 of the AFC (also incorporated into the text by the 1994 reform) recognize several environmental and consumers’ and users’ substantive rights, while Article 75, section 17 vests Congress with the power to enact protective legislation on indigenous peoples. These and other collective rights have been expressly recognized by the 1994 reform to the AFC. The scope of the class action litigation field gets even wider if we take into account the constitutional status recognized by Article 75, section 22 of the AFC of several international covenants subscribed by Argentina (in whose texts we could easily find rights that belong to certain kinds of disadvantaged groups).<sup>22</sup>

Aside from those constitutional provisions, there are only two federal regulations available to deal with collective actions involving groups of people in Argentina, the General Environmental Act and the Consumer Protection Code.<sup>23</sup> Both of them were passed by Congress and can be characterized as ‘substantive’ laws. However, in both of them we can find certain isolated procedural provisions applicable, in principle, to dealing with collective administrative complaints involving those particular areas of substantive law.

Here, it is worth mentioning that, due to the institutional relevance and the public interest involved in class actions, the SCJA put in motion its inherent powers and created different administrative regulations to amplify and strengthen citizens’ involvement, improve publicity and increase transparency in those kinds of cases.<sup>24</sup> Notwithstanding the relevance of these regulations, their implementation has been far from positive. For example, since 2004 only eight decisions have been published by the SCJA allowing the intervention of *amici curiae*. Other *amicus curiae* briefs have been filed in other cases, for example in the leading case *Halabi*, but the number of official publications (which operate as a public notice) may show that the SCJA is not comfortable with opening up for discussion every public interest proceedings.

<sup>22</sup> Among others, the American Convention on Human Rights.

<sup>23</sup> See Lorenzetti Ricardo, *Justicia colectiva 275–276* (Rubinzal Culzoni ed., Santa Fe 2010) (arguing that the CPA establish an ‘acción colectiva’, but in a “very insufficient way taking into account the abundant comparative law materials completely omitted by the legislator”).

<sup>24</sup> Among these regulations we can present: 1) Acordada No. 36/2003, which regulated the proceeding to provide priority treatment to cases of ‘institutional transcendence’; 2) Acordada No. 28/2004 (amended by Acordada No. 7/2013), regulating the *amicus curiae*; 3) Acordada No. 30/2007, providing for public hearings; 4) Acordada No. 36/2009, creating an Economic Analysis Unit to perform ‘economic studies’ ordered by the Court to assess the eventual impact of its decisions; 5) Acordada No. 1/2014, creating an Environmental Justice Office for a better treatment of environmental cases; 6) Acordada No. 36/2015, creating the Judicial Secretary of Consumers Relationships; and 7) Acordada No. 42/2015, creating the Secretary of Communication and Open Government.

Something similar happens concerning public hearings. From their creation in 2008 to today only twenty-five of these hearings have been conducted.<sup>25</sup> This is far from a significant number if we take into account the cases of institutional, social, political and economic relevance the SCJA has decided during this period.

Two other administrative regulations must be particularly considered because they have carried into the law in force several requirements and standards established by precedents:<sup>26</sup>

1) Acordada No. 32/2014, creating the Collective Proceedings Public Registry and establishing in its Article 3 a sort of 'certification stage', because it demands federal judges to deliver an opinion on admissibility requirements, notice and adequacy of representation before communicating the existence of the case to the Registry.

2) Acordada No. 12/2016, to be in effect for cases filed after the first workday of October 2016, enacting a Regulation of Collective Proceedings that contains provisions on jurisdiction, appeals, registration and *lis pendens*, among others.

It is difficult to sustain the constitutionality of these last two regulations because they provide for procedural law that should be enacted by Congress. However, it is hard to believe that the SCJA would review in such a way its own administrative acts. Furthermore, it is worth mentioning that these regulations came about to occupy a statutory empty space, which implies huge problems of legal certainty as well as severe difficulties of coordination between overlapping and parallel litigation (just to mention a couple of critical issues).

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<sup>25</sup> See the SCJA special website at <<http://www.cij.gov.ar/audiencias.html>> (year / number of hearings: 2008 – 5 / 2009 – 4 / 2010 – 2 / 2011 – 2 / 2012 – 6 / 2013 – 2 / 2014 – 2 / 2015 – 2) (accessed Aug. 8, 2016).

<sup>26</sup> The leading case being "*Halabi, Ernesto c/ P.E.N. – Ley 25.873 y dto. 1563/04 s/ amparo ley 16.986*", opinion delivered on 02.24.2009, *Fallos* 332:111. When deciding this case, the majority of the SCJA asserted that in Argentina it was possible to file class actions (which it labeled 'acción colectiva') with "analogous characteristics and effects to the US class actions." It also plainly held that Art. 43 AFC provisions are clearly operative and must be enforced by the courts, even in the absence of legislation. Moreover, in this opinion the SCJA enunciated constitutional requirements for obtaining a valid collective opinion under due process of law standards. After underscoring the lack of an adequate procedural regulation enacted by Congress on class actions, the Court delivered several remarks to provide guidance to protect the due process of law of absent members in future uses of the 'acción colectiva'. In this respect, the SCJA held that the 'formal admissibility' of any 'acción colectiva' must be subject to the fulfillment of the following requirements: 1) there has to be a precise identification of the group of people that is being represented in the case; 2) the plaintiff must be an adequate representative of the class; 3) the claim has to focus on questions of fact or law common and homogeneous to the whole class; 4) there has to be a proceeding capable of providing adequate notice to all persons that might have an interest in the outcome of the case; 5) that notice proceeding has to provide members of the class an opportunity to opt-out or to intervene; and 6) there should be adequate publicity and advertising of the action in order to avoid two different but related problems – on the one hand, the multiplicity or superposition of collective proceedings with similar causes of action and, on the other hand, the risk of different or incompatible opinions on identical issues (Verbic Francisco, Access to justice of disadvantaged groups and judicial control of public policies through class actions, draft in progress).



## 6. Final Remarks

Argentina is going through a profound transformation of the kinds of administrative complaints that the judiciary deals with, processes and adjudicates. This transformation is mostly due to the Copernican change produced by the AFC reform in 1994, which established a new institutional framework that demands reshaping the traditional separation of powers paradigm. This is a challenge that should include a serious discussion of proceedings, structures and the role of the judiciary within contemporary Argentine democracy.

This is a complex phenomenon that finds its roots in the constitutional status given by the reform to several international human rights covenants, treaties and conventions, and also – as we have seen – to the explicit recognition of collective standing to sue granted to citizens, NGOs and the Ombudsman for acting in defense of ‘collective incidence rights’. By doing so, the reform has recognized the judiciary’s power to take collective decisions when these kinds of rights are affected.

In this landscape, current Argentine civil procedure appears each day more and more inadequate to provide for an open, robust, transparent and informed discussion for the sort of socially, politically and economically complex collective actions that affect groups of people. Because of that, it is also failing to provide judges with an adequate method to address, to process and to deliver politically legitimate decisions for society.

In this regard it is worthwhile to mention that at the time of this writing, the SCJA delivered a 112-page opinion on a class action filed against the federal government for the rise in natural gas rates nationwide, implemented by two administrative acts that did not comply with a prior public hearing requirement mandated by regulations governing this public service and Article 42 of the AFC. The Court confirmed that the acts were void for lack of that requirement. The implications of the decision are still to be measured. What does appear quite clear from this, though, is that the ‘amparo’ proceeding is far from a reasonable means by which to address actions of this sort.<sup>27</sup>

If the need for a specific proceeding to deal with ordinary actions involving the State is evident (as almost every province of Argentina has recognized by enacting special judicial administrative proceedings,<sup>28</sup> and the federal state as well by enacting

<sup>27</sup> SCJA *in re* “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad y otros c/ Ministerio de Energía y Minería s/ amparo colectivo” (File No. FLP 8399/2016/CS1), opinion delivered on 08/18/16. The complete opinion and a short overview are available at <<https://classactionsargentina.com/2016/08/18/la-sentencia-colectiva-de-la-csja-en-la-causa-cepis-limitacion-subjetiva-de-sus-sanciones-audiencias-publicas-como-requisito-constitucional-y-la-cuestion-de-las-costas-fed/>>.

<sup>28</sup> Tucumán, Act No. 4537; Santiago del Estero, Act No. 2296; Santa Fe, Act. No. 11.330; Santa Cruz, Act. No. 2600; San Luis, Act. No. VI-0156-2004; San Juan, Act No. 3784; Salta, Act No. 5.348; Neuquén, Act No. 1284; Misiones, Act No. I-89; Mendoza, Act No. 3909; La Rioja, Act No. 1005; La Pampa, Act No. 952; Jujuy, Act No. 1886; Formosa, Act No. 1.390; Entre Ríos, Act. 7.061; Corrientes, Act No. 3460; Córdoba, Act No. 7182; Chubut, Act No. I-18; Chaco, Act No. 1140; Catamarca, Act No. 3559; Ciudad Autónoma de Buenos Aires, Act No. 189; Buenos Aires Province, Act No. 12.008.

special provisions regarding interim measures), this need is even more compelling if we recognize and face the aforementioned phenomenon regarding the 'new' kind of (collective) actions that are being addressed every day before Argentine courts.

The urgent need for reform encompasses not only procedural rules, but also the institutional structures in charge of processing cases raised by these kinds of collective actions (which are, at least for that characteristic, social and political actions). This institutional change should be aimed at making judges more accountable for the huge amount of power they have gained due to the development of constitutional and conventional review of public policies and administrative decisions. It is a power they exercise very frequently, particularly since 2009 thanks to the scope that the SCJA gave to the 'case or controversy' doctrine in *Halabi* by recognizing the existence of 'collective cases and controversies' that allow the judiciary to exercise its jurisdiction over these sorts of issues.

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