THE LEGAL ROOTS OF CORRUPTION: HOW PUBLIC LAW IN ARGENTINA ENCOURAGED CORRUPTION INSTEAD OF FIGHTING IT

Héctor A. Mairal*

Abstract

This article seeks to identify the features of a legal system that, intentionally or not, favor corruption. Rules that are unobtainable, obscure, ambiguous, of doubtful validity or that change continuously; legal requirements that are unrealistic, very costly to comply with, and that are unevenly enforced; unnecessary excessive discretion granted to public officials; regulations that require multiple government authorizations to carry out private activities; and inefficient legal remedies, especially in the face of administrative delays. All these are factors that put private businesses at the mercy of public officials and thus create an incentive for corruption. Apart from reversing these flaws, citizen participation in the drafting of regulations and strengthened judicial control are some of the remedies proposed to rectify this situation. A separate section examines the defects in public procurement and government contracting practices, such as the systematic delay in payments to contractors, that promote corruption. Examples of improper practices drawn from court decisions, other commentators, or

* Abogado, University of Buenos Aires (1961); M.C.L., Southern Methodist University (1963); Doctorate, University of Buenos Aires (1973); Visiting Scholar, Harvard University School of Law (1983), Cambridge University (1986); Professor of Law, University of Buenos Aires (1978-2008); partner emeritus Marval O'Farrell Mairal, Buenos Aires. In addition, Professor Mairal has received a Lifetime Achievement Award from Chambers and Partners (2005), a Platinum Konex award for his contribution to the Social Sciences in Argentina in Administrative Law (2006) and is an elected member of Argentina's National Academy of Moral and Political Sciences since 2011. This article translates and expands on his book LAS RAÍCES LEGALES DE LA CORRUPCIÓN: O DE CÓMO EL DERECHO PÚBLICO FOMENTA LA CORRUPCIÓN EN LUGAR DE COMBATIRLA [The Legal Roots of Corruptions: Or How Public Law Encourages Corruption Instead of Combatting It] (Editorial Astrea 2007).

from the author's own experience are provided throughout the article. While this work focuses on Argentina, its citations to other Latin American sources, and the author's exposure to similar problems across the region, demonstrate that the issues discussed are of a more general nature.

FOREWORD

The first edition of this work was published in Spanish in 2007. It had a silent impact on the Argentine government practices, particularly during the administration of President Mauricio Macri. Thus, some comments and notes providing examples of the then-current incorrect practices are now drafted in the past tense. During the present administration of President Javier Milei, Minister Federico Sturzenegger heads an ongoing effort to deregulate and cut down bureaucratic obstacles that, intentionally or not, favor corruption. Also, recent laws amending the Administrative Procedure Law and the penal tax regime have mitigated some of their more oppressive features.[1] However, the examples that this article offers of how features of Argentina's administrative law and practice both foster and fostered corruption remain relevant not just to understanding Argentina and its history, but to understand issues faced by many developing countries.

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1. *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], Law No. 27742, July 8, 2024, B.O. (Arg.); *Régimen Penal Tributario* [Tax Criminal Regime], Law No. 27799, Jan. 2, 2026, B.O. (Arg.).

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I. INTRODUCTION

A. When Law Nurtures Corruption

In almost all countries, there are people who, from the public or private sector, try to obtain illegitimate advantages from the actions of the State. More precisely, illegal exchanges take place in almost all countries, where public officials obtain money (or other material benefits that can be monetized) from private citizens or groups in return for preferential treatment in governmental decision-making.[2] This has been the case throughout history.[3]

Studies on corruption have gained significant importance in recent decades. Its causes, its institutional and economic consequences, its regional impact, its development in certain countries, and the methods to combat and reduce it have all received significant attention.[4]

While the phenomenon of corruption is observed on a global scale, its degree of pervasiveness differs significantly between countries. In some, the phenomenon is sporadic; in others, corruption has become a necessary way to operate normally in certain sectors of society and of

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2. *See* Luigi Manzetti, *Market Reforms Without Transparency, in* COMBATTING CORRUPTION IN LATIN AMERICA 130, 143 (Joseph S. Tulchin & Ralph H. Espoch eds., 2000) (defining corruption in terms of exchanges of material benefits for preferential governmental treatment).

3. *See generally* CARLO ALBERTO BRIOSCHI, CORRUPTION: A SHORT HISTORY (Antony Shugaar trans., Brookings Inst. Press 2017), http://www.jstor.org/stable/10.7864/j.ctt1hfr1sk (last visited Sept. 26, 2025) (examples of bribery throughout history); JOHN T. NOONAN, JR., BRIBES (1984); Felipe Fucito, *Algunas Consideraciones Sobre La Corrupción Desde La Sociología Jurídica y La Historia Nacional [Some Considerations on Corruption from Legal Sociology and National History], in* ADMINISTRACION PUBLICA Y CORRUPCION [PUBLIC ADMINISTRATION AND CORRUPTION] 157 (Buenos Aires: Scotti, 2017) (corruption throughout history); Carlos Botassi, *Ética, Administración Pública, y Corrupción* [*Ethics, Public Administration and Corruption*], *in* ADMINISTRACION PUBLICA Y CORRUPCION [PUBLIC ADMINISTRATION AND CORRUPTION] 61 (Buenos Aires: Scotti, 2017) (recent corruption in Argentina).

4. *See* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999); ECONOMICS OF CORRUPTION (Arvind K. Jain ed., 1998); CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES (Dieter Haller & Cris Shore eds., 2005); COLIN NICHOLLS QC ET AL., CORRUPTION AND MISUSE OF PUBLIC OFFICE (Oxford Univ. Press 2006); MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION (Cambridge Univ. Press 2005); FRANK VOGL, WAGING WAR ON CORRUPTION (Rowman & Littlefield Publishers 2012); COMBATING CORRUPTION IN LATIN AMERICA (Joseph S. Tulchin & Ralph H. Espach eds., Woodrow Wilson Center Press 2000); REBECCA WEITZ-SHAPIRO, CURBING CLIENTELISM IN ARGENTINA POLITICS, POVERTY, AND SOCIAL POLICY (Cambridge Univ. Press 2014); ALEJANDRO NIETO, CORRUPCIÓN EN LA ESPAÑA DEMOCRÁTICA (Ariel, 1997); JESÚS GONZÁLEZ PÉREZ, CORRUPCIÓN ÉTICA Y MORAL EN LAS ADMINSTRACIONES PÚBLICAS (Thomson Reuters, Civitas 2006); VICIOS PUBLICOS: PODER Y CORRUPCION (Óscar Ugarteche ed., 2005).

the economy.[5] To put it in the words of Mariano Grondona, in the former, there are *acts of corruption,* while in the latter, we can speak of a *state of corruption*.[6]

In Argentina, there is a perception, supported by real data and confirmed by national and international surveys, that the spread of corruption has been very high, even compared to neighboring countries with similar social, economic and cultural characteristics. In 1992 Carlos Nino stated that "the phenomenon of corruption is massively widespread in Argentine society,"[7] and Luis Moreno Ocampo has described the Argentine situation as *hyper-corruption*.[8] According to a 1996 Gallup poll, 97% of the public in Greater Buenos Aires considered the level of corruption in Argentina to be high or very high. *Transparency International* ranked Argentina 35th out of 54 countries ranked from lowest to highest level of corruption, significantly behind Chile (No. 21).[9] This result was repeated in an index prepared by the same organization and in which, with an index of 3 for 1998 (out of a maximum of 10 for countries like New Zealand, where corrupt practices were not observed at all), Argentina was behind Chile (6.8), Uruguay (4.3) and even Brazil (4).[10] This perception had not improved by the early 2020's.[11]

However, what commentators in Argentina fail to recognize are the degrees to which law and the legal system can encourage

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5. Maria-Eleni Syrmali, George Sfakianakis & George Agiomirgianakis, *The Complex Phenomenon of Corruption: An Empirical Analysis*, 13 THEORETICAL ECON. LETTERS 1698, 1708 (2023).

6. Mariano Grondona, *El tercer desafio (The third challenge), in* LA CORRUPCIÓN [THE CORRUPTION] 2, 4 (Mariano Grondona ed., Editorial Planeta Argentina, 1993).

7. CARLOS S. NINO, UN PAÍS AL MARGEN DE LA LEY [A COUNTRY ON THE MARGINS OF THE LAW] 110 (1992).

8. Luis Moreno Ocampo, *Una propuesta de acción (A proposal for action), in* LA CORRUPCIÓN [THE CORRUPTION] 38-48 (Mariano Grondona ed., Editorial Planeta Argentina, 1993); Grondona *supra* note 6, at 42, 46.

9. Transparency Int'l & Johann Graf Lambsdorff, TI Corruption Perceptions Index 1996, (Transparency Int'l & Univ. Of Göttingen 1996), https://files.transparencycdn.org/images/1996_CPI_EN.pdf.

10. Lawrence Whitehead, *High-Level Corruption in Latin America: A "Transitional" Phenomenon?*, *in* COMBATING CORRUPTION IN LATIN AMERICA 114 (Joseph S. Tulchin & Ralph H. Espach eds., 2000).

11. *See Los Políticos Argentinos, Segundos en Corrupción*, LA NACIÓN (Dec. 10, 2004), https://www.lanacion.com.ar/politica/los-politicos-argentinos-segundos-en-corrupcion-nid661851/; VOGL, *supra* note 4, at 271; Transparency Int'l, *Corruption Perceptions Index 2022* (Jan. 31, 2023), https://www.transparency.org/en/cpi/2022.

corruption through their design. When there are excessive or confusing regulations, rules that are impossible to comply with, inconsistent enforcement, and inconsistent or delayed judicial protection, among other aspects of Argentine law, corruption is inevitable. Many of these designs can be found in other countries, and this article aims to serve as a broader guide on how a legal system's design will often foment corruption. Reforming these features can enable a country's regulatory and judicial systems to become important tools for combating corruption rather than indirectly encouraging it.

B. The Different Types of Corruption

When studying countries where corruption is prevalent, analysts distinguish between different systems. The first, termed "kleptocracy," exists wherever corruption is organized in the upper echelons of government. The other system is based on multiple recipients of bribes at the middle and lower levels of the administration.[12] Both can (and usually do) occur together.[13]

The first type can be called "grand corruption" because it involves large bribes and generally occurs in public procurement and natural resource concessions.[14] The second, which involves small bribes (comparatively speaking), is called "*petty corruption*."[15]

Despite what one might believe, the impact of "petty" corruption is very significant. While the number of participants in major corruption is necessarily limited, the tentacles of petty corruption reach much of the public administration. A 2002 survey estimated that the average number of corrupt officials in Latin America was as high as 71%.[16]

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12. *Compare* ROSE-ACKERMAN, *supra* note 4 (describing bribery of high-level officials in connection with major government contracts and concessions), *with* KAREN DAWISHA, PUTIN'S KLEPTOCRACY: WHO OWNS RUSSIA? 1-12, 313-50 (2014) (describing bribes at the middle and lower levels of administration).

13. *See generally* Daron Acemoglu, James A. Robinson & Thierry Verdier, *Kleptocracy and Divide-and-Rule: A Model of Personal Rule*, 2 J. EUR. ECON. ASS'N 162, 167–70 (2004).

14. Jorum Duri, *Definitions of Grand Corruption*, U4 HELPDESK ANSWER 2020:25, (Oct. 2, 2020) https://www.u4.no/publications/definitions-of-grand-corruption.

15. *See generally* Marie Chêne, *Successful Approaches to Tackle Petty Corruption,* (Transparency Int'l 2019), https://knowledgehub.transparency.org/assets/uploads/kproducts/Fighting-petty-corruption-2019.pdf.

16. GONZÁLEZ PÉREZ, *supra* note 4, at 29 (quoting Marta Lagos reporting that a survey placed Argentina at the top of the list with 89% of corrupt officials, a figure that seems to us to be exaggerated even under the worst governments).

There is also a much broader range of companies and individuals who, spontaneously or compulsively, resort to petty corruption. Often, to obtain what they are legally entitled to without exaggerated delays or arbitrary refusals.[17]

Petty corruption is the main compliance problem faced by reputable companies, whose headquarters are located in a country where criminal legislation penalizes bribes paid to foreign officials.[18] Many executives of these companies from the United States and the United Kingdom have lost their careers for agreeing to pay bribes to foreign officials just so they could continue to operate normally. It is very difficult to compare the total amount of bribes paid in each type of corruption, but the sum of small and medium-sized bribes paid on countless occasions surely reaches considerable figures.[19]

Certainly, the harmful effects of petty corruption are very widespread. On the one hand, it destroys respect and trust in the State among the population.[20] On the other hand, it fosters an atmosphere of irregularity in the public administration, thus creating a kind of solidarity among corrupt officials, an *esprit de corps* that makes it difficult to investigate crimes.[21] "Live and let live" is the motto that prevails in this environment and conspires against the detection and punishment of both small and large corruption.[22]

Hence, combating petty corruption will increase the number of people willing to inform and collaborate in the fight against grand corruption and make it easier to eradicate. Where corruption prevails, the reality is the opposite of what it should be: the honest are persecuted, while the accomplices of corruption are tolerated and even rewarded. A medium-sized Argentine company that, faced with unfair

17. Carlo Angelucci & Matteo Bobba, *Petty Corruption and Citizen Reports*, 63 INT'L ECON. REV. 829, 832 (2022).

18. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1–78dd-3 (1977); Bribery Act 2010, c. 23 (U.K.).

19. Marie Chêne, *Evidence of the Impact of Facilitation Payments*, (Transparency Int'l 2013), https://knowledgehub.transparency.org/helpdesk/evidence-of-the-impact-of-facilitation-payments.

20. James Lewis, *Social Impacts of Corruption Upon Community Resilience and Poverty*, 9(1) JÀMBÁ: J. DISASTER RISK STUD. 7 (2017) (S.Afr.).

21. Mariusz Wojtalewicz, *Public Administration as a Structure Vulnerable to Corruption*, Internal Security (2022).

22. *See* Akhil Gupta, *Narrating the State of Corruption, in* CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES 173 (Dieter Haller & Cris Shore eds., 2005) (describing similar patterns of corruption in rural India).

competition, denounced its competitors for tax evasion, ended up being the only one in the entire sector investigated by the authorities.[23]

C. The Various Causes of Corruption

Many factors affect the degree of corruption in a given country: cultural, social, economic, and political. For example, one might ask whether the cult of friendship observed in Latin countries fosters corruption by creating interpersonal ties much stronger than those that bind the citizen to the State.[24] An official who rigorously applies administrative law (customs, tax, etc.) to a relative, a friend, or a colleague will likely be the object of social criticism rather than praise.

With regard to economic factors, it is widely believed that an interventionist economic system, characterized by exchange and price controls and an economy separated from the outside world by high customs taxes, fosters corruption by creating opportunities for significant profits for those who, *de facto* or *de jure*, can be exempted from complying with the restrictive rules. Ludwig von Mises stated it categorically: "Interventionism always breeds corruption."[25] It has even been argued that opportunities for corruption are the real reason that motivates the implementation of interventionist and statist policies. It is not malevolent to think, says Professor Alejandro Nieto concerning the Spanish reality, "that the prodigious increase in administrative intervention in all fields of economic and social life is often inspired by the desire to simultaneously extend the possibilities of corruption."[26]

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23. This case is based on the personal experience of the author. The name of the private party involved is withheld for confidentiality reasons.

24. *See* NINO, *supra* note 7, at 199–201 (describing how Argentines favor intimates and mistreat outsiders, undermining civic duty and fostering corruption); Edward C. Banfield, *The Moral Basis of a Backward Society* 92 (Free Press 1958) (introducing the concept of "amoral familism," in which loyalty to family and friends outweighs civic obligation, thereby weakening state institutions and encouraging corruption).

25. LUDWIG VON MISES, HUMAN ACTION 867 (10th ed., 2011).

26. Joaquín Morales Solá, *Una Corrupción peor que la de la AFA,* LA NACIÓN (Jan. 4, 2026), https://www.lanacion.com.ar/opinion/una-corrupcion-peor-que-la-de-la-afa-nid04012026/ (investigations currently underway in Argentina suggest that profits exceeding one billion dollars were generated during the previous administration through the circumvention of strict exchange-control regulations. Certain individuals, unlawfully authorized by the Central Bank to purchase dollars at the official exchange rate, resold those dollars on the black market at a higher rate).

High levels of inflation is another factor that favors corruption, and it does so in two ways.[27] First, inflation increases the frequency of State interventions in the economy, given the repeated need to arbitrate private interests affected by the continuous change in the value of the local currency and, with it, of relative prices.[28] This leads to a corresponding increase in the opportunities for undue sectorial and individual favors.[29] Secondly, the mere passage of time makes historical amounts expressed in national currency derisory.[30] Public officials are thus able to disclose their declarations of assets based on purchase prices, which, released years later, do not give rise to scandal.[31]

In his classic work *The Other Path*, the Peruvian economist Hernando de Soto is eloquent in his critique of what he calls *redistributive law*, which arises when law is conceived "as an instrument to redistribute wealth and not to facilitate its creation."[32] It should come as no surprise, says this author, "that bribery and corruption are features of a system of law in which competition for rent has become the predominant way of producing the law."[33] These words seem to be written for Argentina, which during the year 2002 experienced an avalanche of regulations that, like the Babylon lottery imagined by Borges, impoverished certain sectors of the population and enriched others.[34]

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27. Miguel Braun & Rafael Di Tella, *Inflation, Inflation Variability and Corruption*, 16 ECON. & POL. 77, 95 (2004).

28. *See* Jon Frye & Robert J. Gordon, *Government Intervention in the Inflation Process: The Econometrics of "Self-Inflicted Wounds,"* 71 AM. ECON. REV. 288 (1981).

29. Braun & Di Tella, *supra* note 27, at 79.

30. *See generally* Matthias Doepke & Martin Schneider, *Inflation and the Redistribution of Nominal Wealth,* 114 J. POL. ECON. 1069, 1070 (2006).

31. *See generally* LAURA POP, DMYTRO KOTLYAR & IVANA ROSSI, ASSET AND INTEREST DISCLOSURE 28 (1st ed., 2023).

32. HERNANDO DE SOTO, ENRIQUE GHERSI & MARIO GHIBELLINI, EL OTRO SENDERO 239 (1st ed., 1987).

33. *See id.* at 241.

34. *See* Hector A. Mairal, *El Derecho en Tiempos de Colera* [*The Law in Times of Anger*], ACTUALIDAD JURÍDICA URÍA MENÉNDEZ [LEGAL NEWS URÍA MENÉNDEZ] 9 (2002) (describing the 2002 Argentine crisis and the mandatory conversion of dollar-denominated debts and deposits into pesos at below-market rates). *See* STAFF OF H. JOINT ECON. COMM., U.S.108TH CONG., ARGENTINA'S ECONOMIC CRISIS: CAUSES AND CURES (June 2003) (noting the causes of the crisis).

Public officials often act with a sense of entitlement.[35] This is not a recent phenomenon, although it has spread in recent decades.[36] Anyone who denounces the practice faces visceral criticism from the entire civil service, especially if the critic is of high economic status. "We all have the right to a system for making money," seems to be the argument implicit in this censorship.[37] "You have yours, and we don't question it. Why do you question this officer's system?"[38]

Moreover, a large part of Argentina's national business community has entered into a Faustian pact with the Government by exchanging their economic freedom for customs protection, which leads many high-level officials to feel that they deserve some recognition for such protection.[39]

Both phenomena result, then, in a sense of entitlement that many public officials have concerning private wealth, which leads them to self-justify their illicit claims.

From another ideological perspective, that of a critical viewpoint of certain aspects of the privatization process in Latin America, it has been observed that corruption can also find opportunities to develop both during the privatization stage itself and in the subsequent regulatory stage.[40] From this viewpoint, therefore, critics take for granted that corruption increases in right-wing governments.[41]

However, when a political system is infected by corruption, it will find opportunities to obtain bribes under any economic regime. Therefore, given the difficulty of establishing precise mechanisms for measuring a largely clandestine phenomenon such as corruption, the comparison between the greater or lesser impact that different economic regimes have on corruption will always be a matter of opinion. An

35. *See* Gonzalo Garcés, *La Vida Bajo el Capitalismo de Amigos* [*Life Under Crony Capitalism*], LA NACIÓN (Arg.), August 26, 2024 https://www.lanacion.com.ar/opinion/la-vida-bajo-el-capitalismo-de-amigos-nid26082024/.

36. *See* Silvana Ferreyra, Romina Garcilazo & Sebastián Pereyra, *Escándalos y Usos Políticos de la Acusación de Corrupción en la Historia Argentina, in* NUEVOS ENFOQUES SOBRE LA CORRUPCIÓN: PERSPECTIVA HISTÓRICA, FEDERAL Y MULTIDIMENSIONAL 71, 71-102 (María Luján Blanco ed., 2023).

37. *See* Inter-Am. Comm'n H.R., *Corruption and Human Rights,* at 154-157, OEA/Ser.L/V/II. Doc. 236 (December 6, 2019) (explaining the risks faced by those who report acts of corruption in the Americas).

38. *Id.*

39. *See* Garcés, *supra* note 35.

40. Manzetti, *supra* note 2, at 130-31, 141.

41. ERNESTO TENEMBAUM, ENEMIGOS 73 (1st ed., 2004).

opinion that is also greatly influenced by the ideological preferences of the interpreter. "Corruption is quantifiable only from a strictly subjective perspective."[42]

Something similar happens with the political causes of corruption. A political system in which an attack on one's adversary replaces the rational discussion of problems, favors corruption, since the civic value of discovering and punishing corrupt officials will normally be sacrificed to party solidarity. The use of partisan attacks in the political struggle, with more rhetorical than substantive effects, is an attitude that has long roots. "A moral weapon was wielded by petty politicians at that time, and it was to accuse each other of embezzling public funds, a rustic resource that had very good effects on the people," said Benito Pérez Galdós, describing Spanish politics at the time of the Junta of Cadiz at the beginning of the XIX Century.[43] On the contrary, other analysts will argue that the alternation in power of bitter political adversaries is what makes it possible to shed light periodically on the phenomenon, while the succession of mutually condescending regimes favors pacts of silence that protect all its members.[44] Again, the position of the interpreter will inevitably color its vision.

For all these reasons, it may be useful to look at the legal causes of corruption, which are more neutral from the point of view of ideological preferences. Although they are not totally neutral, it is possible that the degree of coincidence among political parties, and with it the possibility of generating a political agreement that overcomes partisan discrepancies, is greater when trying to correct legal structures that facilitate corruption. In other words, while combating the economic or political causes of corruption can lead to an intractable discussion, people of different schools of thought, but equally motivated to combat the scourge, can more easily agree on correcting the legal causes of corruption.

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42. ALFONSO SABÁN GODOY, EL MARCO JURÍDICO DE LA CORRUPCIÓN 14 (1st ed., 1991). *See* also Jesús González Amuchástegui, *Corrupción, Democracia y Responsabilidad Política, in* PODER, DERECHO Y CORRUPCIÓN 63, 72-73 (Miguel Carbonell & Rodolfo Vázquez eds., 2003) (discussing the difficulty of comparing levels of corruption in different political regimes).

43. BENITO PÉREZ GALDÓS, EPISODIOS NACIONALES 4 (2nd ed. 1976).

44. INDRO MONTANELLI & MARIO CERVI, L' ITALIA DEGLI ANNI DI FANGO (2013) (ebook); Alberto Vanucci, *La corrupción en los sistemas políticos democráticos. Algunas notas para un análisis comparado, in* PODER, DERECHO Y CORRUPCIÓN 81, 103 (Miguel Carbonell & Rodolfo Vázquez eds., 2003).

D. The Legal Causes of Corruption

We talk about the legal causes of corruption because the law, in addition to serving as an instrument for an economic system that fosters corruption, can also act independently as a factor of corruption. This is paradoxical since its mission should be to help in the fight against the phenomenon. However, in Argentina, in many cases it acts as its ally.

This paper is, therefore, an attempt to describe some of the legal factors that operate as a breeding ground or even as a direct cause of corruption, regardless of the prevailing economic or political system, and to point out preliminarily some possible remedies. The problem goes beyond a particular regime or party. Situations such as those described here have been taking place in Argentina for decades.

The chosen approach is also neutral from a second point of view: the analysis of certain legal regimes that would allow corruption to flourish does not necessarily imply that all the administrative agencies that currently apply those regimes are affected by the vice. Instead of a detective analysis more typical of criminal law, which often falls into unproven accusations and which, in any case, already has rigorous regulations and abundant literature, what we propose is a conceptual analysis that is not aimed at specific agencies or officers. Hence, the examples of inconvenient rules or practices presented in this work do not pass judgment on the conduct of the officers who apply them. Examples will often involve the main organs of the national administration, whose actions are subject to various controls and are carried out under permanent public scrutiny, so it would be unfair to accuse them of being systematically involved in criminal conduct. But such examples are necessary because they demonstrate how, at the highest levels of public administration, rules are used that leave the field open to corruption.

The proposed approach differs from, but is complementary to, the approach generally followed when attempting to combat corruption by legal methods. These methods usually seek to punish those guilty of corruption by establishing disclosure of obligations of various kinds for public officials, typifying crimes, establishing penalties, imposing incompatibilities, prohibitions and controls, permitting presumptions that shift the burden of proof, and adopting other measures of deterrence and prosecution. This is the case with the laws that have been passed in our country in recent years, with the treaties that Congress has approved during those same years, and with the myriad of

administrative regulations that have been issued during that period.[45] There is no shortage of rules.[46]

However, little attention has been paid to the legal framework that fosters corruption and to the possible remedies to avoid such a consequence and, where possible, prevent corruption. As noted by Luis Moreno Ocampo, "To avoid corruption it is more important to detect guilty systems than guilty people."[47]

45. First, *see* CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 256-268 (punishing various offences against the public administration that consist in acts of corruption). In this regard, *see* JORGE LUIS RIMONDI, CALIFICACIÓN LEGAL DE LOS ACTOS DE CORRUPCIÓN EN LA ADMINISTRACIÓN PÚBLICA (1st ed. 2005). In addition, our country has ratified three international conventions to combat corruption: *see Ley de Convención Interamericana contra la Corrupción* [Inter-American Convention Against Corruption Approval Law], Law No. 24759, Jan. 13, 1997, B.O. (Arg.) (approving the Inter-American Convention against Corruption), *Convención sobre la Lucha contra el Cohecho de Funcionarios Públicos Extranjeros en las Transacciones Comerciales Internacionales* [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions] Law No. 25319, Oct. 6, 2000 (approving the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), and *Convención de las Naciones Unidas contra la Corrupción* [United Nations Convention Against Corruption], Law No. 26097, Jun. 6, 2006 (approving the United Nations Convention against Corruption). Argentina has also enacted *Ley de Ética en al Ejercicio de la Función Pública* [Ethics in Public Office Law], Law No. 25188, Oct. 26, 1999, *regulated by* Decree No. 164/99, Dec. 28, 1999 (repealed in large part by Decree No. 808/00, Sep. 20, 2000), and issued Decree No. 41/99, Jan. 27, 1999 (enacting a Code of Ethics for the Civil Service), Decrees No. 201/17, Mar. 21, 2017; and No. 202/17, Mar. 22, 2017 (establishing rules on conflicts of interest), and various resolutions approving special codes of ethics for different departments (*see* Resolution No. 393/2021, Dec. 10, 2021 (Ministry of Public Works) and Order No. 86/18, Mar. 26, 2018 (AFIP, the Argentine IRS)). In this regard, *see* MIRIAM MABEL IVANEGA, MECANISMOS DE CONTROL PÚBLICO Y ARGUMENTACIONES DE RESPONSABILIDAD 234-43 (1st ed., 2003); Agustín Gordillo, *Un Corte Transversal al Derecho Administrativo: la Convención Interamericana contra la Corrupción*, 1997-E L.L. 1091 (1997); Julio Rodolfo Comadira, *Función Pública y Corrupción*, 1 Revista Jurídica de Buenos Aires 463, 463 (2004); María Jeanneret de Pérez Cortés, *Ética y Función Pública*, 2005-D L.L. 1097 (2005); Federico Nielsen & Juan Pablo Comadira, *Apuntes sobre los Principios de la Ética Pública en el Derecho Argentino,* 267-268 Documentación Administrativa, 135 (2004). Finally, *Ley de Responsabilidad Penal Empresaria* [Corporate Criminal Liability Law], Law No. 27401, Dec. 1, 2017, was enacted in 2017 and establishes the criminal liability of private companies for participating in acts of corruption sanctioned by the Penal Code.

46. That is why it is criticizable that, in the face of a criminal event that moves public opinion, voices are raised calling for changes in the legislation because this, many times, is not necessary to punish the conduct and, in addition, it can imply that such conduct is not provided for by the law then in force and, therefore, cannot be retroactively punished.

47. Moreno Ocampo, *supra* note 8, at 125.

E. Anomie as a Backdrop to Corruption

Based on the classic work of Carlos Nino, it is a commonplace to affirm that Argentina is "a country outside the law."[48] But the causes of this anomie, that is, the reasons why Argentines do not comply with the law, are not always sufficiently emphasized. Although the question is beyond the scope of this article, it is useful to identify these causes because some, if not all, influence the expansion of corruption.

The reasons why people obey laws have been classified as instrumental and normative.[49] The former includes the severity of penalties for violating the law and the effectiveness of their enforcement. The latter, on the other hand, points to the reasons for voluntarily obeying the law. They are: the intrinsic justice of the rule, the legitimacy of the regime that has established it, and the reasonableness and justice of the procedures with which the law is applied, and its violations are judged.

As will be seen throughout this article, several of these reasons have often been absent in Argentina. While penalties are generally severe, enforcement is far from effective and is often arbitrary. With regard to the legitimacy of the rule-making regime, it should be recalled that a large part of our population comes from countries that for centuries, if not millennia, have been subject to foreign domination (southern Italy is an example). Therefore, they maintain a tradition that the violation of the law is an expression of their human dignity. An autochthonous circumstance can be added which is the succession of *de facto* governments that ruled in Argentina during the twentieth century. However, these last forty years of democracy have not made us more compliant.

But the factor of the intrinsic injustice of many Argentine norms is the one that, in our opinion, most favors the culture of non-compliance: a State that (due to high inflation rates throughout the years) deprives its people of a real currency and makes it a crime to try to deal in a real one, cannot demand respect for its legislation. We will discuss this point at length in section III.

48. NINO, *supra* note 7.

49. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1st ed. 2006); *see also* NINO, *supra* note 7, at 110-18, 129-35.

F. Law, an Ally of Corruption

To understand how the law operates in favor of corruption, we start from the premise that a normal person, faced with a clear and reasonable requirement of a norm, the violation of which is controlled and severely sanctioned, will prefer to comply with it rather than risk the sanction. Argentines are no exception. For example, there is no evidence that the many Argentines living abroad engage in frequent acts of corruption when they live in countries with properly designed legal systems.

Certain characteristics of a legal system, however, may change this preference in a certain percentage of cases. Alternatively, even without changing this preference, it may place people in a situation of punishable non-compliance despite trying to comply with the rule or believing that they are doing so. As explained in the next section, this is the case with Argentine law due to certain characteristics that Argentina often presents, namely:

- There are an excessive number of rules.
- The very existence of the applicable rule is often unknown to most of the people who should comply with it.
- Due to the continuous regulatory changes, it is difficult to know for sure what the current text of the applicable regulation is.
- Standards are often obscure and open to a variety of interpretations, some of which raise, and others significantly reduce, the cost of enforcement.
- The rules are often of dubious validity and unreasonable.
- The rules often impose excessive formal requirements.
- In law or fact, the rules usually enable the official to determine the degree of compliance that can be required of each individual or category of individuals.
- Many times, it is difficult or impossible to comply fully with the rule, or its cost of compliance is very high, so it puts at risk the continuity of private conduct or, plain and simple, prevents it.
- Control is usually lax, so the probability of detecting non-compliance is very low.
- Even if the control is not lax, the authority usually allows the operation of a sector of society in violation of the norm and sanctions a small percentage of non-compliant individuals, whom it selects not always with transparent and politically neutral criteria.

 In some cases (as in environmental matters), it is cheaper to face fines than to carry out the tasks, or accept the limitations, imposed by law.

 Even if the punishment envisaged is very severe, the benefits of non-compliance with the rule are generally so high as to justify running the risk of detection.

At the same time, the discretion of the Argentine public official responsible for controlling and sanctioning non-compliance is very great due to the presence of the following additional factors:

 It is not always possible for individuals to obtain appropriate judicial intervention to confirm the meaning or validity of the rule without running the risk of being sanctioned for non-compliance.

 The penalty may be so severe that it can lead to imprisonment or bankruptcy for the defaulter.

 There is little administrative control over the sanctioning officer. Moreover, the sanction of the private individual may be well regarded, even if it is unjust, since it exempts the official from suspicion of favoritism.

 Judicial review of the official's decision is ineffective because it is slow or costly, or because of the existence of legal doctrines that make it possible to predict a decision contrary to the private challenger of the decision.

All these circumstances, on the one hand, encourage non-compliance with the rule and, on the other, create or increase the legal defenselessness of individuals. Corruption is present where the individual is legally defenseless vis-à-vis the public officer. This is because any person placed in a situation of legal non-compliance is subject to corruption, either at the initiative of the person himself when he is discovered, or at the initiative of the public officer. Thus, legal uncertainty, unreasonable regulations, and excessive discretionary power of the administration give rise to a breeding ground for corruption. We will consider these factors in that order.

II. LEGAL UNCERTAINTY AS A BREEDING GROUND FOR CORRUPTION

The lack of legal certainty is frequently mentioned in Argentina as a brake or deterrent to the flow of private investment, national and

foreign, that the country needs.[50] Here, we will consider it as a factor that affects the spread of corruption.

The fact that legal uncertainty acts as an ally of corruption is certainly not a new phenomenon. An author who studied corruption as the cause of the decline of the Roman Empire enumerates certain factors that in that distant era favored corruption by facilitating the extortion of private individuals by public officials. Namely, the increasing degree of violence employed by the Government against private individuals, the ambiguity of the laws, an increase in the number of laws, and the intrusive nature of the rules and officials.[51] These same factors, all of which cause legal uncertainty and oppression of individuals, and indirectly corruption, are present in our country today.

A. Excessive Number of Rules

The lives of private individuals have been hyper-regulated by the Argentine Government. Just as it is impossible to build a dam stopping only part of a river, and as individuals react to new regulations by changing their conduct to circumvent them, new regulations are continuously needed to expand the restrictions and reach new conduct. In 2002, the Central Bank of Argentina issued 1,015 (one thousand and fifteen) regulations,[52] i.e., at a rate of four for each working day. The parallel with ancient history repeats itself: "Innumerable are the decrees that are issued and published every day," said a complaint that has been preserved since the time of the decline of Rome.[53] Also, it is estimated that during our colonial era, the three centuries that it lasted, the Spanish crown, turning a deaf ear to Don Quixote's warning about the excessive number of "pragmatics", issued almost a million laws and regulations.[54] An IMF officer recently called the interference of the Argentine Government with the private economy "brutal".[55] The

50. *See La Seguridad Jurídica y la Credibilidad de Nuestra Palabra,* LA NACION, (June 2, 2024), https://www.lanacion.com.ar/editoriales/la-seguridad-juridica-y-la-credibilidad-de-nuestra-palabra-nid02062024/.

51. RAMSAY MACMULLEN, CORRUPTION AND THE DECLINE OF ROME 137 (Yale University Press, 1988).

52. *See* Banco Central de la República Argentina [Central Bank of Argentina], Indice de Comunicaciones [Index of Regulations] (Comunicaciones"A"–"C"), https://www.bcra.gob.ar/Pdfs/SistemasFinancierosYdePagos/Comunicaciones/indhasta1207.pdf.

53. MACMULLEN, *supra* note 51, at 137.

54. *See* VARGAS LLOSA, ÁLVARO, RUMBO A LA LIBERTAD 51 (Planeta, 2004).

55. This is based on the author's own experience.

simplest transaction, such as the closing of the sale of a house, requires a logistical operation worthy of military maneuvers.[56]

B. Ignorance of the Standard

Panama Refining Co. v. Ryan[57] is famous in U.S. constitutional history because it is one of the few cases in which the U.S. Supreme Court declared a delegation of legislative powers made by Congress in favor of the Executive Branch unconstitutional. One of the factors that influenced the Court to disqualify the regulations approved by the President in exercise of that delegation was the ignorance of the administration itself about the correct text of the regulations in force. This ignorance had been caused by the farrago of regulations that it had issued in recent years, implementing the power that it had been delegated by Congress.[58]

The same phenomenon occurs, to an even greater degree, today in Argentina. There are cases in which the administration invoked repealed rules and the judge issued his ruling applying them. The fact that one of the cases of arbitrary judgment occurs when the judgment is based on a law that is not in force indicates that the phenomenon recurs with some frequency.[59]

Although most national rules are published in the Official Gazette, and electronic data systems are in place,[60] none of these means ensure

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56. *See* Noelle Harff & Eliana Raszewski, *With buyers wary, Argentina's zombie mortgage market has a long road to revival,* REUTERS (July 16, 2024), https://www.reuters.com/world/americas/with-buyers-wary-argentinas-zombie-mortgage-market-has-long-road-revival-2024-07-16/ (describing how inflation exceeding 200% has led major transactions in Argentina to be conducted in U.S. dollars in cash because of widespread distrust of banks and past government "pesification" of dollar deposits and obligations).

57. *See* Panama Refining Co. v. Ryan*,* 293 U.S. 388 (1935) (holding that a delegation of legislative authority to the Executive branch was unconstitutional).

58. *See id*.; *see also* LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 52-53 (Little, Brown & Co., 4th ed. 1976).

59. *See* NÉSTOR P. SAGÜÉS, DERECHO PROCESAL CONSTITUCIONAL: RECURSO EXTRAORDINARIO, VOL. 2, at 252-55 (4th. ed. 2016) (explaining that judgments applying a rule not in force may be reversed as arbitrary).

60. The Legislative and Documentary Information Area of the Documentation and Information Centre of the Ministry of Economy administers a free and publicly accessible database called *Infoleg*. According to the provisions of Decree 67/2003, this area must coordinate the compilation and updating of national legislation on economic matters, its interpretative rules and background, so there is no obligation to compile all national legislation. We would also like to highlight the work carried out by the Congressional Parliamentary Information Office. There is also the Argentine Legal Informatics System (SAIJ), a service under the Ministry of Justice and Human Rights. *See*

complete coverage. In addition, there is no edition of all laws classified by topic and updated periodically. This makes the determination of which of the existing laws and regulations remain effectively in force a cumbersome matter. The phenomenon is even more serious at the provincial and municipal levels. To this day, there are municipalities in Greater Buenos Aires that do not publish their ordinances.[61]

Often, one cannot tell the law in force. New rules usually end with an indiscriminate derogation ("any norm that conflicts with the present one is hereby repealed"), and there is often no express derogation of norms of sublegal hierarchy when the law they regulated is repealed. The same applies to laws that are repealed without amending other laws that refer to them.[62] It has been said that 85% of the laws currently in force in the country are not applicable.[63] The ambitious project of enacting an "Argentine Legal Digest" including only the laws currently in force has not been completed successfully, thus adding more confusion as to which laws should be considered in force.[64] Alberto Vannucci speaks of the *inertial* force of laws that, when they remain

INFOLEG, Ministerio de Justicia, https://www.infoleg.gob.ar/ (last visited Sept. 13, 2025); Sistema Argentino de Información Jurídica (SAIJ), https://www.saij.gob.ar/ (last visited Sept. 13, 2025); Dirección de Información Parlamentaria, Honorable Cámara de Diputados de la Nación, https://www.hcdn.gob.ar/secparl/dgral_info_parlamentaria/ (last visited Sept. 13, 2025).

61. A State company once called a competitive tender to be run under the rules of the company's contracting regulation. When a copy of this regulation was requested by an interested party, the company's officers refused to produce it. The company's in-house counsel, a well-known administrative law author, verbally interceded to no avail. "It's very similar to the national contracting regulation" was the best help that such counsel was able to provide. This is based on the personal experience of the author. The name of the private party involved is withheld for confidentiality reasons.

62. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Visa Argentina S.A.," Fallos (327-2703) (Arg.) (holding that later legislation may implicitly modify earlier laws).

63. Laura Serra, *No sirve el 85 por ciento de las leyes que hoy rigen en el país,* LA NACION (Arg.), June 12, 2005, https://www.lanacion.com.ar/politica/no-sirve-el-85-por-ciento-de-las-leyes-que-hoy-rigen-en-el-pais-nid712271/.

64. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Expreso Tigre Iguazú SRL c. Estado Nacional," Fallos (2024-347-2015) (Arg.) (where the Supreme Court decided a case on the basis of a report that indicated that more than ten years after it had been prepared, the Legal Digest was not yet "operative," so a law described therein as "repealed" was still in effect). *See also* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Empresa San José S.A. c. Estado Nacional," Fallos (2023-346-1070) (Arg.).

in force indefinitely, "increases with inflationary rhythms the number of binding provisions to which individuals are subject."[65]

Hence, over time, the law acquires a sedimentary character caused by the continuous superimposition of norms whose validity, increasingly difficult to analyze, is shrouded in a *cloud of indeterminacy* according to Vannucci.[66] Thus, Argentine exchange controls were reinstated in December 2001 through the repeal of a 1991 decree, which in turn had repealed the decree that had established an exchange regime in 1964.[67] The effect was to revive the 1964 regime and consequent doubt about whether the regulatory rules of the reinstated regime were also reinstated.[68]

Added to the lack of knowledge of the existence of the norms is the confusion created by their repeated modifications, as in the 2002 Central Bank example of 1,015 regulations in one year.[69]

Even discounting the cases in which the main parties affected by the legislation are sophisticated corporations, like in the Central Bank example cited above, (financial entities that receive continuous legal advice and are therefore well prepared to analyze the new rules),[70] the position of the private citizen in the face of such an avalanche of regulations is often one of total uncertainty. The phenomenon is widespread in public administration. As Mario Vargas Llosa warns, "A logical consequence of such abundance is that each legal provision has another rule that amends, attenuates, or rejects it." Which, in other words, means that those who are immersed in such a pile of legal contradictions live transgressing the law, or perhaps more demoralizing

65. Alberto Vannucci, *La Corrupción en Los Sistemas Políticos Democráticos. Algunas Notas para un Análisis Comparado*, *in* PODER, DERECHO Y CORRUPCIÓN 81, 95 (Miguel Carbonell & Rodolfo Vázquez eds., 2023).

66. *Id.*

67. Decreto 1606/2001, *Boletín Oficial* [B.O.] December 6, 2001 (Arg.) (repealing its predecessor Decreto 530/91, (B.O March 28, 1991 (Arg.)), and therefore reinstating Decreto 2581/64, (B.O April 13, 1964 (Arg.)).

68. The Office of the Attorney General of the Treasury has had to rule on the non-tacit reinstatement of rules. See Procuración del Tesoro de la Nación [Attorney General of the Treasury of Argentina], *Dictámenes* 235:*156 bis,* 156 *quinque vta*. (Arg.).

69. Banco Central de la República Argentina, *supra* note 52.

70. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/05/2000, "Cadipsa S.A. v. Estado Nacional et al.," Fallos (2000-323-1146) (Arg.) (recognizing that specialized companies are presumed to have greater knowledge of applicable rules).

than that, in a structure of this nature, any abuse or transgression can find a legal twist and turn that redeems and justifies it."[71]

This normative anarchy is aggravated by the lack of unity in the behavior of the different organs of the administration. At the beginning of 2005, the Central Bank initiated proceedings against exporters who followed a course of conduct considered valid at the time by the Ministry of Economy, but never accepted by the Central Bank.[72] It reached the absurdity of the Central Bank initiating administrative proceedings against companies that had violated terms set by the enforcement authority of a rule deemed invalid by the Central Bank itself.[73] Gordillo's words are relevant: "Regulations are the source of most illegality and arbitrariness in administrative agencies. Nowhere else in administrative law is arbitrariness, caprice, self-contradiction, improvisation and permanent unpredictability, constant countermarches, and misuse of power so enshrined."[74] The result is that, except for large companies (and sometimes without that exception), private individuals carry out their activities in ignorance of many of the rules they must abide by. They learn of their existence when they are punished for their violation, at which point they evaluate whether it is in their interest to correct their behavior for the future, or whether such correction implies such a cost that it would prevent them from continuing their activities,

71. DE SOTO ET AL., *supra* note 32, at XXIV.

72. *See Fuero Penal Económico confirma libre disponibilidad del 70% de las divisas de exportaciones de petróleo y gas* [*The Economic Criminal Court Confirms the Free Availability of 70% of the Foreign Currency Generated from Oil and Gas Exports*], MARVAL (Dec. 13, 2007), https://www.marval.com/publicacion/fuero-penal-economico-confirma-libre-disponibilidad-del-70-de-las-divisas-de-exportaciones-de-petroleo-y-gas-5381?lang=es.

73. The deadlines for the sale to the Central Bank of the foreign currency proceeds of exports, the violation of which was investigated by the Central Bank, had been set by the enforcement authority designated by Decree 1638/01 for the purpose of implementing the same. (*See* S.C. Resolution 269/01). However, the Central Bank in repeated proceedings maintained, with the support of an opinion of the Attorney General of the Treasury, the nullity of Decree 1638/01 because it sought to modify a norm of higher hierarchy, namely: Decree 2581/64 reinstated by Decree of Necessity and Urgency 1606/01. *See* Cámara Nacional de Apelaciones en lo Penal Económico, (CNPenal Económico) [National Court of Economic Criminal Appeals], 12/21/2012, "BBVA Banco Francés S.A. y otros s./ infracción Ley 24.144," La Ley [L.L.] (AR/JUR/71765/2012) (Arg.) (Reversing fines imposed on a private bank and its officers for violations of the Exchange Control Law and its implementing regulations issued by the Central Bank itself, noting that the Central Bank's own officers issued contradictory opinions on the illegality of the Defendants' conduct).

74. AGUSTÍN GORDILLO, TRATADO DE DERECHO ADMINISTRATIVO, VOL. 1, PARTE GENERAL [TREATISE ON ADMINISTRATIVE LAW, VOL. 1, GENERAL PART] at VII-20 (8th ed. Buenos Aires, FDA 2003).

and therefore they persist in the violation, trying to curry favor with the official who controls them.

This situation of perpetual non-compliance, this feeling that the mere knowledge of the rules they must comply with — let alone compliance itself — is unattainable for the common man, makes a large part of the population accept *ab initio* that it will have no legal defenses against the authorities. That is why the solution to one's predicament when accused of violating a norm can only be irregular. Hernando de Soto calculated that the amount that Peruvian informal entrepreneurs had to pay illegally to avoid being sanctioned amounted in some cases to 15% of their gross income.[75]

A partial remedy to the situation is possible. Every department should keep an updated record, ordered by subject, of the rules it applies and that are in force, which must be available to individuals.[76] Electronic databases make this possible today at a very low cost. The rules should also be simplified, and the number of amendments should be reduced. Individuals should be aware of the regulations in force, however imperfect they may be, rather than to sacrifice that knowledge (and therefore the possibility of complying with them) for the sake of the continuous improvement of the regulations. It is also advisable to set a time limit between the publication of the regulation and its entry into force. Individuals should not be forced to suddenly change their conduct but should be granted, unless exceptional reasons of public interest prevent it, a reasonable transition period.

C. The Obscurity or Ambiguity of the Rules

Another important cause of legal uncertainty is the obscurity or ambiguity of the rules, or even the contradiction between them. These same factors of complexity and lack of clarity of the rules have even been accused of being a cause of corruption in the European Union itself.[77]

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75. *See generally* DE SOTO ET AL., *supra* note 32.

76. From 2003 onwards, and for some time, the Central Bank published monthly summaries of the exchange regulations in force. Today it does so without equal regularity.

77. JAIME RODRÍGUEZ-ARANA MUÑOZ, ÉTICA, PODER Y ESTADO [ETHICS, POWER, AND STATE] 174 (2004).

The clarity of norms is one of the cardinal requirements of the "morality of the law" and thus of the existence of the rule of law.[78]

When a rule is obscure, an official may interpret it broadly or restrictively, so that the individual does not know for sure what conduct is expected. It usually happens that, when faced with two possible readings of the rule, individuals choose to follow the less restrictive one, so they are thereafter at the mercy of the implementing authority, which can declare the most restrictive interpretation correct.[79] Only at that point will the public know what to expect for sure. It is common for situations of this type to develop for years in full view and with tolerance of the authorities, but without such tolerance serving as a legal defense when the rule is interpreted in a sense contrary to that which until then was applied by individuals.

The obscurity or ambiguity of rules is a common phenomenon, especially at the regulatory level. Several causes contribute to this situation, and only some of them are unintentional. Carelessness in drafting is common, a defect that is usually due to the urgency of putting into force regulations in an economy that lives from emergency to emergency,[80] to the point that the emergency declared by a law at the beginning of 2002 was successively extended until it expired at the end

78. *See* LON L. FULLER, THE MORALITY OF LAW 35 (1969); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988–93, 2002 (2015); Juan Zocca, Opinion, *Un fallo que recuerda la importancia de la claridad, precisión y coherencia de la actuación administrativa* [*A Ruling that Underscores the Importance of Clarity, Precision, and Consistency in Administrative Action*] (Aug. 5, 2020), https://abogados.com.ar/un-fallo-que-recuerda-la-importancia-de-la-claridad-precision-y-coherencia-de-la-actuacion-administrativa/26466 (discussing the need for clarity and coherence in administrative action).

79. This is based on the author's own experience.

80. *See* JULIO C. CRIVELLI, LA EMERGENCIA ECONOMICA PERMANENTE [THE PERMANENT ECONOMIC EMERGENCY] (2001) (discussing the persistent nature of Argentina's economic crises).

of 2017,[81] only to be renewed in 2019 and 2024.[82] Only carelessness can explain cases not only of obscurity but of real contradiction between the rules of the same law; thus, the law that regulated Private Retirement and Pension Funds established in separate articles different courts to appeal the same measures.[83] Further, regulators often fail to write with precision, since if it is not easy to express legally what the author wishes, it is even more difficult to express *only* what is wished. The problem is compounded by the fact that the power to participate in the drafting of the law depends more on the political proximity of someone to the then-current authorities than on their knowledge of legislative drafting technique or of the subject matter itself. It is regrettable that our country's legislatures seem to lack offices responsible for assuring correct drafting or, where the offices exist, that so little attention is paid to them. The low quality of drafting norms has been pointed to as one of the causes of our national *anomie*.[84] The situation is compounded by the lack of discipline rampant in Argentine administrative law. On the one hand, legislators misuse concepts of univocal meaning.[85] On the other hand, it tolerates academic positions that ignore the mandates of the legislator when they contradict the preferences of the scholar. Thus, the Law on State Companies provided that these entities would be governed by the rules that apply to private

81. *See Emergencia Pública y Reforma del Régimen Cambiario* [Public Emergency and Exchange Rate Reform Law], *Law No.* 25820, Dec. 31, 2003, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 25972, Dec. 22, 2004, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26077, Jan. 10, 2006, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26204, Dec. 20, 2006, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26339, Dec. 21, 2007, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26456, Dec. 22, 2008, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26729, Dec. 28, 2011, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 26896, Dec. 27, 2013, B.O. (Arg.); *Emergencia Pública* [Public Emergency Law], *Law No.* 27200, Nov. 3, 2015, B.O. (Arg.).

82. *See Ley de Solidaridad Social y Reactivación Productiva en el Marco de la Emergencia Pública* [Social Solidarity and Productive Reactivation Law in the Framework of the Public Emergency], Law No. 27541, Dec. 23, 2019, B.O. (Arg.); *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1.

83. *See Sistema Integrado de Jubilaciones y Pensiones* [Integrated Retirement and Pension System Law], Law No. 24241, Oct. 13, 1993, B.O. arts. 118, 152 (Arg.).

84. NINO, *supra* note 7, at 231.

85. CARLOS GRECCO & GUILLERMO A. MUÑOZ, LA PRECARIEDAD EN LOS PERMISOS, AUTORIZACIONES, LICENCIAS Y CONCESIONES [THE PRECARIOUSNESS IN PERMITS, AUTHORIZATIONS, LICENSES, AND CONCESSIONS] 83 (Buenos Aires, Depalma, 1992) (commenting on the discrepancy between legal terminology and that used by doctrine).

corporations and that the laws on public accounting, public works, and administrative procedures would not apply to them.[86] Despite the clarity of these rules, one of their first interpreters, considering that these rules were legally flawed, argued that the excluded regimes should still be applied.[87]

Given that the rules are often drafted by politicians or public officials, it is not surprising that their texts are broad and generous in describing the powers of the State, but timid in defining the rights of individuals. Thus, the Public Works Law includes among the grounds for termination of a contract the non-compliance of the contractor, but not a delay in payment, which is the most common situation of non-compliance of the public administration.[88] At the same time, the Law on State Liability does not expressly provide for compensation for loss of profits in the event of an unlawful act of the administration. But when it regulates such liability for lawful acts, its Article 5 includes the following sentence, "in no case shall reparation be made for loss of profits." The question that arises is whether this exclusion is limited to liability for a lawful act, or does it apply in all cases of State liability? As can be seen, the solution in favor of the individual requires an elaborate construction of the norms, because the solution does not arise expressly from the text of the law itself.

Ambiguity is often deliberate for two reasons. First, it is often a result of political negotiation. "Ambiguity breeds consent," as it allows both sides of the discussion to conclude (or pretend) that they won the argument. Second, because allowing two readings of the rule increases the discretion of the official who applies it. In addition, the author of the rule is protected from criticism because they can always invoke the reading most favorable to the State, even if they have allowed individuals to apply the opposite reading for a long time. The political acceptance of the norm is easier when those subject to it think, *ab initio*, that it allows for a benign interpretation. It is only at a second stage, once the validity of the rule with little negative impact has been

86. *Sociedades del Estado* [State-Owned Companies Law], Law No. 20705, arts. 2, 6, June 6, 1974, [24738] A.D.L.A. 1974-III-2026 (Arg.).

87. Rodolfo C. Barra, *Acerca de la Naturaleza Jurídica de las Sociedades del Estado* [*Regarding the Legal Nature of State-Owned Corporations*], 67 E.D. 601 (Arg.).

88. *Compare Ley de Obras Públicas* [Public Works Law], Law No. 13064 [Public Works Law], arts. 50 & 53, Oct. 28, 1947, B.O. (Arg.) with Spain's Public Sector Contracts Law of 2017 art. 198 (allowing the contractor to terminate the contract when the administration's delay in paying the price exceeds six months).

established, that the restrictive reading is put into effect, and the restrictive reading can be given retroactive effect because it is the mere interpretation of a rule whose text has not changed.[89] Hence, the reluctance of the author of the rule to clarify it. If, in the face of a change in economic or political circumstances, the tolerated interpretation begins to be criticized, it may be ignored as valid without its author or official interpreter being held responsible. That is why requests for clarification submitted by individuals are often answered with the same degree of ambiguity ("petitioners must conform to the regulations in force") as that of the rule whose clarification is sought. At the same time, it is often the case that the first interpreter of the regulation and the judge of its violation is the same agency that issued it, so the regulation will be interpreted by a party with an incentive to interpret it to absolve it of the accusation of lack of foresight in the drafting.[90]

The first remedy for this situation is the application in public law of the principle *contra stipulatorem*, according to which, in case of doubt, writings are interpreted against their author, in this case, against the State, and in favor of the individual.[91] The reason behind this rule of interpretation is as valid in public law as it is in private law: the sanction should fall on the person responsible for the drafting. First of all, they must assume the risk of the obscurity that they themselves have created, and, more, because in this way they will take care to write clearly in the future. This solution is in line with the traditional rule that mandates the restrictive interpretation of norms that limit individual freedoms and rights: *In dubio pro libertate.*[92] In Argentina,

89. The retroactive effect of normative interpretations is uniformly accepted by case law. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/03/2011, "S.A. Compañía Argentina Agrícola e Industria Ingenio Río Grande c. Nación Argentina," Fallos (2011-285-447) (Arg.).

90. *See Ley de Procedimiento Fiscal* [Fiscal Procedure Law], Law No. 11683, art. 16 (Arg.); *Régimen Penal Cambiario* [Foreign Exchange Criminal Regime], Law No. 19359, t.o. by Decree 480/95, art. 5 (Arg.).

91. CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 987 (Arg.) (laying down the rule for contracts concluded by adhesion to predisposed general clauses, as are, in practice most State contracts); *but see Hotel Internacional Iguazú S.A. v. Nación Argentina*, 308 Fallos 618 (1986) (Arg.) (Argentine Supreme Court following the opposite rule, holding that a private contractor can only claim what is expressly and clearly stated in his favor).

92. AGUSTÍN GORDILLO, TRATADO DE DERECHO ADMINISTRATIVO, VOL. 3, EL ACTO ADMINISTRATIVO [TREATISE ON ADMINISTRATIVE LAW, VOL. 3, CH. V] at V-21 (4th ed. Buenos Aires, FDA 1999).

however, the consequences of the confusing wording used by public officers do not fall on them or the State, but on the private individuals.

The second remedy is to negate retroactive effects to the official interpretation of the norm when it contradicts the open and generally followed practice up to that time. If the Supreme Court has rejected the retroactive application of new jurisprudential criteria[93], the same rule should be applied in administrative proceedings, both in the case of express decisions[94] and of tacit decisions resulting from the tolerance of private conduct carried out in an open and ostensible manner. It should be possible to sustain the non-incrimination of private conduct carried out under an appearance of legitimacy created by the administration itself.[95]

These proposed solutions are fair because behaviors generally adopted by a regulated sector are rarely unknown to its regulatory authority.[96] This would put an end to a corruption that consists of severely punishing conduct that becomes illegitimate only when the interpretative criterion accepted by the State is announced or modified. This improper practice is sometimes combined with the offering of payment plans so that "offenders" prefer a lenient punishment to the risk of a lengthy trial that can lead to a fine that puts their survival as a corporate entity at risk. In this way, the State also avoids the risk that its interpretation will ultimately be rejected by the courts. Non-retroactive interpretation would encourage officials to focus on practices that are really infringing, thus maintaining uniform rules of the game for all those who participate in the activity. Often different operators in the market or industry interpret the same rule differently or are subject to different enforcement which increases the risk of arbitrary advantages.

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93. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "María Esther Tellez v. Bagala S.A.," Fallos 1986-308-552 (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Sacoar and C. v. Province of Buenos Aires," Fallos 1988-311-2082 (Arg.).

94. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "IBM Argentina S.A v. Administración Nacional de Aduanas," Fallos (1998-321-1248) (Arg.) (illustrating a customs fine based on a change of administrative criteria subsequently set aside by the courts).

95. HECTOR A. MAIRAL, LA DOCTRINA DE LOS PROPIOS ACTOS Y LA ADMINISTRACIÓN PÚBLICA [THE DOCTRINE OF ONE'S OWN ACTS AND THE PUBLIC ADMINISTRATION], (Depalma, 1994).

96. *The BCRA announced that it monitors the purchase and sale of bonds and shares,* LA NACIÓN, (March 23, 2006) (reporting that a bond transaction deemed illicit by the Central Bank represented approximately 25% of foreign exchange financial transactions).

By contrast, the practice of knowingly tolerating for a long-time behaviors that are arguably lawful, and then choosing whom to punish as a lesson (the case of the criminal *vedettes* mentioned below) so that only then will others correct their behavior in the future, is a source of corruption, as those subject to the interpretation seek to avoid punishment. And even if the sanction based on a mere change of criteria is general, the civic effect is still harmful; contrary to the very principles of a Republic, society becomes submissive and fearful of the authority on whose fickle criteria private patrimonies depend. We must be categorical on this point: it is incompatible with the rule of law to consider retroactively certain private conduct unlawful only when it reaches a volume that concerns the authorities.

D. Rules of Dubious Validity

A rule of doubtful validity creates legal uncertainty similar to that caused by an ambiguous rule. In both cases, there is uncertainty about whether certain private conduct is lawful, depending on whether the restricting rule is valid or not.

This phenomenon is as old as the law itself, but has expanded significantly in our country following the 1994 constitutional reform, which empowered the Executive to legislate almost on equal footing with Congress. As a result, the Executive now issues general norms whose validity is often highly contested and largely influenced by political perspectives.[97] This subject is more appropriate for an in-depth legal analysis and exceeds the scope of this work.[98] For this paper, it is enough to note that in *Verrocchi* (1999)[99], the Supreme Court

97. *See* Art. 4, Constitución Nacional [Const. Nac.] (Arg.); *Régimen Legal de los Decretos de Necesidad y Urgencia, de Delegación Legislativa y de Promulgación Parcial de Leyes* [Legal Regime of Necessity and Urgency Decrees, Legislative Delegation and Partial Promulgation of Laws], Law No. 26122, 2006 (requiring both Chambers of Congress reject a decree of necessity and urgency for it to be considered abrogated, and then only with future effect); *Compare* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2003, "Provincia de San Luis c. Nación Argentina," J.A. (2003-I-188) (Arg.), *with* CSJN, 26/10/2004, "Alberto Roque Bustos v. Nación Argentina," Fallos (2004) (Arg.).

98. *See* Hector A. Mairal, *La degradación del derecho público argentino* [*The degradation of Argentine public law*], *in* EL DERECHO ADMINISTRATIVO DE LA EMERGENCIA, IV [THE ADMINISTRATIVE LAW OF EMERGENCIES, IV] 17 (2005).

99. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/8/1999, "Verrocchi, Ezio Daniel c. Poder Ejecutivo Nacional – Administración Nacional de Aduanas s/ acción de amparo," Fallos (1999-322-1726) (Arg.); Mario A.R. Midon,

established severe restrictions on the power of the Executive Branch to issue decrees of necessity and urgency (i.e., with the force of law). If these guidelines were strictly enforced, a significant portion of the hundreds of such decrees issued in recent decades—particularly those not expressly ratified by laws—would likely be deemed unconstitutional.

Similar doubts are raised about the scope of the delegation of legislative powers that Article 76 of the new constitutional text begins by proscribing and then allows in matters of administration or public emergency.[100]

The 1994 constitutional reform introduced multiple levels of legal norms, such as treaties, laws, and decrees with differing hierarchies. This raises interpretive conflicts, such as whether a law passed by a simple majority can amend one that requires a qualified majority.

Doubts about the validity of government acts can have serious consequences for individuals. For example, taxpayers who relied on an executive decree exempting them from criminal penalties, despite having paid taxes only after an investigation had begun, were later prosecuted. Courts held the decree unconstitutional because it attempted to override an existing law that required payment before a tax investigation had been initiated in order to qualify for the exemption.[101]

Namely, the State encouraged taxpayers to put aside their defenses and pay the tax claimed, promising they would not be sanctioned. However, after accepting the Treasury's claim and paying the tax (with which they lost their legal defenses), those individuals were also criminally prosecuted because the State itself committed the legal error of issuing an invalid permissive rule. In another case, the tax authority applied, and the Tax Court validated a fine for non-payment of a tax that a ruling of the Attorney for the Treasury had considered repealed.[102]

Decretos de Necesidad y Urgencia en la Constitución Nacional y en los Ordenamientos Provinciales [Decrees of Necessity and Urgency in the National Constitution and in the Provincial Ordinances] (Buenos Aires, L.L., 2001).

100. Art. 76, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.) (Author's translation).

101. Cámara Nacional de Apelaciones en lo Penal Económico, Sala A (CN Penal Económico) (National Court of Criminal Appeal for Economic Crimes, Division A), 30/11/2001, "Haygassar Gostanián," La Ley [L.L.] (2001) (Arg.).

102. *Compare Magariños*, Tribunal Fiscal de la Nación, Chamber B, (Dec. 20, 2004), *with* Dictamen No. 020/2005, Procurador del Tesoro de la Nación (Jan. 21, 2005).

There are two remedies that we propose to correct this situation, one rooted in existing domestic law and another inspired by U.S. law. The first is to apply the general principles of criminal law that protect the accused in economic legal matters. Specifically, courts should reject attempts to shift the burden of proof onto the defendant or to rely on presumptions in prosecuting tax offenses. Defendants should be broadly permitted to invoke the defense of error in non-criminal law,[103] especially when the State, which seeks to punish the conduct, was itself responsible for misleading the accused. If economic penal law wishes to achieve its objectives by resorting to sanctions of similar gravity to those of criminal law, it should accept the limits that civilized countries have developed for the latter over the past three centuries.

The second remedy, which will be discussed in more detail later[104], is to exempt from penalties those individuals who proactively challenge a legal rule with serious and well-reasoned arguments, until a court has passed a judgment on the rule's validity. While those who violate a rule and later contest its legitimacy must bear the risk of losing in court, those who transparently question a rule in advance perform a civic duty by promoting legal certainty. Unfortunately, administrative agencies often respond inappropriately: rather than welcoming legal challenges as a contribution to the rule of law, they punish challengers as threats to their authority. In contrast, those who quietly ignore the rule often go unpunished, as their silence is seen as deference to authority, which allows officials to save face.[105]

Together, these remedies would shift the consequences of vague legislation from individuals to the State. This change would not only promote fairness but also encourage Congress and administrative

103. *See* Enrique R. Aftalión*, El Derecho Penal Economico como capítulo del Derecho Penal Especial [Economic Criminal Law as a Chapter of Special Criminal Law], in* 1 TRATADO DE DERECHO PENAL ESPECIAL, 77, 141-144 (1969).

104. See section F (Restrictions on the Access to Justice) below.

105. A private school in Argentina was once asked by tax officials to disclose the names of the persons who paid for the tuition of its students. The school's lawyers challenged the request as a violation of the families' privacy. The reaction of the authorities was stark: "If you insist in the challenge we will prosecute and see that the name of the school reaches the papers. Comply and, if you are aware of a few sensitive cases, just fail to report them." (This comment is based on the personal experience of the author. The name of the private party involved is withheld for confidentiality reasons).

agencies to draft clear rules and avoid applying new interpretations retroactively.

E. Individual Decisions of Dubious Validity

Another major source of legal uncertainty is the dubious validity of many individual administrative decisions. This phenomenon, which is more widespread than commonly assumed, arises due to two main factors. First, the plethora of requirements required to validate the issuance of an individual administrative decision (e.g., respect of due process, legal opinions by government lawyers, proper explanation of motives). Second, the biased way in which those requirements are applied. While legal authors call for strict compliance with such requirements, many judges believe that if those requirements were rigorously applied, administrative work would be paralyzed. Therefore, to mitigate this risk, the theory of "remediation" allows procedural defects to be corrected after the act has been issued and during the administrative review stage.[106]

This proliferation of procedural requirements, coupled with bureaucratic delays, often leads to administrative paralysis. Government officials are reluctant to approve private requests for fear of being tainted by irregularities that they fail to detect, so they delay their decision or avoid deciding. Ironically, to combat this paralysis, administrations frequently bypass formal procedures altogether, producing decisions that are legally vulnerable. Political motivations then determine which flawed decisions are challenged, while others go unexamined. Often, it is the existence of political reasons that leads to the selection of some decisions that are thus flawed, to annul them and even prosecute their authors, ignoring the fact that countless other decisions are accepted daily despite being equally questionable from a formal point of view. The dilemma faced by a conscientious official is harsh. If they adhere strictly to all formal procedures, their actions may be delayed, and they risk being criticized for inefficiency. However, if they prioritize swift action over formalities, they risk prosecution for breaching their duties, regardless of their good faith, once they lose political protection. This creates another cause of legal uncertainty for

106. HÉCTOR A. MAIRAL, CONTROL JUDICIAL DE LA ADMINISTRACIÓN PÚBLICA, 732-34 (2nd ed., 2021).

individuals, who must base their rights on administrative acts that are often subject to legal challenge.

These procedural defects acquire greater legal significance when invoked by the administration itself to challenge its previous actions. In such instances, administrative and judicial rhetoric often invokes the principle of administrative legality and its foundational role in upholding the rule of law. Administrative decisions issued by the highest authorities of the State, after the intervention of their highest legal advisers and controlling agencies, have been declared null and void by the same agency (generally, but not always, under a different administration from that which issued the decision).

It would seem, then, that two different administrative laws coexist. One that is realistic and tolerant of the infractions and errors of the administration, when those defects are raised by private persons. The other, rigid and formalistic, occurs when the same flaws are cited by the state against its own prior conduct.

The result is an erosion of legal certainty. Individuals cannot rely on the stability of rights granted by the administration. Once again, this dynamic fosters a culture of submission in which citizens are encouraged to ingratiate themselves with public officials rather than trust that the law and the courts will protect their rights.

F. Restrictions on the Access to Justice

The possibility of obtaining judicial protection against the abuse of authority is one of the greatest obstacles to corruption. Where judicial remedies are expeditious, effective, and accessible, corruption declines. Conversely, when access to justice is hindered by excessive costs, procedural delays, obstacles, or other legal constraints, corruption thrives. A damaging restriction arises from rules that defer judicial review until after the sanction has already been enforced.[107] An

107. *Ley de Abastecimiento* [Supply Law], Law No. 20,680, art. 16 (Arg.) (thus providing that appeals from a sentence ordering closure of business premises would not suspend the execution of the closure). This aberration was eliminated by *Nueva Regulación de las Relaciones de Producción y Consumo* [New Regulation of Production and Consumption Relations], Law No. 26,991 (Arg.) (2014) (amending the Supply Law and eliminating the non-suspensive effects of appeals from closure orders). The *solve et repete* (pay and then appeal) requirement to be able to challenge fines was only eliminated very recently by *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1, amending *Ley de Procedimiento Administrativo* [Administrative Procedure Law], Law No. 19,549, Apr. 3, 1972, B.O. (Arg.); *see also id.* arts. 1 bis & 7(d).

arrangement appears that is reminiscent of the absurd regime that astonished the character in *Alice in Wonderland*. First comes the sanction, then the trial, and lastly the crime.

Another deterrent to justice is the imposition of serious penalties for non-compliance, which apply even to those who challenge the validity or interpretation of the rule in good faith and with reasonable arguments. When the cost of being wrong is prohibitively high, few will risk questioning the law. In some cases, even favorable rulings in lower courts will not shield an individual from penalties if the Supreme Court ultimately disagrees. However, due process should protect not only those who successfully challenge a rule, but also those whose legal arguments were reasonable, even if they do not succeed. In the United States, courts have recognized this principle. Litigants who present plausible arguments are protected from punitive consequences, even when the courts do not accept their claims. The U.S. Supreme Court has emphasized that the right to judicial review would be merely nominal and illusory if the affected party could only appeal to the courts at the risk of paying fines so high that it is better to yield to orders of uncertain legality than to ask for the protection of the law.[108] What matters is not the outcome of the case, but whether the individual had a legitimate basis to litigate.[109]

Argentina has moved in the opposite direction. At one time, the Tax Court had the authority to waive interest charges in tax matters, which was sometimes calculated at a punitive rate, for taxpayers who had reasonable grounds to litigate, even if their claims were ultimately rejected. However, even though this dispensation was in the hands of an agency of the same administration, such as the Tax Court (an administrative court), it was considered too generous and was repealed.[110]

Delay in the proceedings also weakens the effectiveness of judicial remedies, especially when individuals face sanctions during the lengthy course of litigation. To address this, the legal system should provide expeditious procedural mechanisms that allow individuals to obtain prompt judicial pronouncements on the interpretation and

108. Wadley S. Ry. Co. v. Georgia, 235 U.S. 651 (1915).

109. Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920).

110. *See Ley de Procedimiento Fiscal* [Fiscal Procedure Law], *supra* note 90, art. 150 (Arg.) (repealed 1998); *Reforma Impositiva* [Tax Reform Law], Law No. 23549, Jan. 8, 1988, L.L., Jan. 26, 1988 (Arg.).

validity of disputed rules. Yet administrative agencies are often reluctant to formally clarify their own rules, and when they do, they tend to favor the interpretation that imposes the greatest restriction on the freedoms and rights of individuals. As a result, individuals hesitate to seek formal clarification, fearing adverse outcomes.

Moreover, administrative agencies frequently attempt to shield their interpretations from judicial scrutiny, as seen in early rules surrounding tax consultations submitted by individuals.[111] This is precisely the area where judicial intervention is most necessary. These disputes often center on legal interpretations, matters in which courts should have the final say, and the harm caused by an official measure should not be prolonged by procedural delays.

In practice, delays in court intervention enable constitutional and legal violations to persist, as only a small minority of individuals challenge such violations. Those who do risk sanctions during litigation or afterward if they lose. Meanwhile, any eventual ruling that invalidates the rule often arrives too late to benefit most affected individuals, who are barred from relief due to the statute of limitations.[112] It is difficult to imagine a policy that is more conducive to the propagation of unlawful State conduct than this temporary tolerance of invalid norms.

G. State Violence Against Citizens

State-imposed legal sanctions have increasingly become a vehicle for disproportionate punishment in Argentina, mirroring patterns of repression observed in other historical periods—just as state violence intensified in Late Imperial Rome, where half of the crimes punishable

111. Article 4 of General Resolution 858/00 of the Federal Administration of Public Revenue provided: "The option for this (consultation) regime implies the commitment to abide by the pronouncement of this Agency in those matters submitted to its interpretation and the waiver of any appeal against the answers that are consequently made." This rule has been amended. Today, the rule in force (Resol. General 4497/2019) requires strict compliance with the technical-legal criterion contained in the response to the consultation or the decision of the Ministry of Finance if the administrative appeal provided for in the same Resolution is filed, but does not establish the obligation to waive other remedies, so the decision should be reviewable by the courts and there are cases in which such review was procedurally admitted but rejected in on the merits (CNCAF, Chamber V, *Righetti v. EN*, 7/3/2017; *Cepas Argentinas S.A. v. EN*, February 2019).

112. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Camaronera Patagónica," Fallos (2014-337-388) (Arg.) (striking down ministerially imposed export duties for want of congressional authorization, though the decision came too late for most taxpayers to recover).

by the death penalty under Constantine were administrative[113] in recent decades, Argentina has seen a significant increase in the harshness of legal sanctions against individuals.[114]

It is baffling to see how the Argentine legal system treats tax offenders in the same manner, or even worse, in procedural aspects, than the person accused of a crime such as homicide or embezzlement of public funds. When the penalties for each crime differ, the difference could be understood, but when the penalties are comparable (a tax evader can be sentenced to nine years in prison and a murderer can receive only eight years), the same due process guarantees should be applied.[115] The contrast becomes even starker when comparing the leniency given to the offenses perpetrated by public officers against the public administration. Offenses such as bribery, influence peddling, embezzlement of public funds, illegal exactions, negotiations incompatible with the exercise of public functions, and illicit enrichment of officials are all crimes that carry a minimum sentence of less than three years and a maximum of six years. Further, these offenses qualify for exemption from imprisonment during the trial and are subject to a suspended sentence.[116] On the other hand, tax evasion receives a maximum sentence of nine years and a minimum of three and a half years when the evaded amount exceeded 15 million pesos (an amount which, due to successive devaluations, had reached $ 10,000 in a given year). Thus, it disqualified the accused from release during trial,[117] which

113. MACMULLEN, *supra* note 51, at 140.

114. A multinational company, with a presence in several Latin American countries, recently estimated that Argentina accounted for 14% of its revenues in the region, but for more than 70% of its legal problems, largely arising from Government regulations and decisions. (This is based on the author's own experience).

115. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 79, *supra* note 45 (Arg.). Compare the penalties established by Article 79 of the Penal Code for intentional homicide with those established by Law 27430 for tax evasion.

116. This was the rule when the minimum sentence did not exceed three years, and the maximum eight. *See* CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 26, 256, 256 bis, 258, 258 bis, 259, 260, 261, 265, 266, and 268 (Arg.); CÓDIGO PROCESAL PENAL DE LA NACION [CÓD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] arts. 316-317 (Arg.). Under the new Federal Code of Criminal Procedure, the possibility of avoiding imprisonment during the trial does not depend solely on the prison terms that may be imposed. CÓDIGO PROCESAL PENAL FEDERAL [FEDERAL CODE OF CRIMINAL PROCEDURE], art. 185 (Arg.).

117. *Reforma Tributaria* [Tax Reform Law], Law No. 27430, Dec. 29, 2017, B.O. (Arg.) (The amount had not been updated since 2017 and, due to successive devaluations, were equivalent to less than $1,000 by 2025). *See also Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1; *Régimen*

meant that the defendant was detained until a decision was made as to whether the evasion existed. This is true even though resolving such cases required complicated and debatable legal and accounting analyses.

Moreover, the crime of negligent management of private pension funds (before they were nationalized) had a four-year minimum sentence. (In Argentina's volatile economy, what pension fund administrator could be sure that he would not be subject to such an accusation?) [118] This means that under Argentine law it is a lesser offense for a public official to pocket millions of dollars of state funds than for an individual to seek to avoid paying a much lower tax out of his pocket, or for another private individual to have been negligent in the management of the money of a private pension fund. These differences defy the constitutional guarantee of reasonableness and our historical commitment to legal equality. In 1810, Mariano Moreno drafted a decree on honors to magistrates, stating "the magistrate is not distinguished from others except because he sees that the laws are kept, in the other functions of society he is a citizen without other considerations than those he deserves for his virtues." The draft Constitution of 1813, went further, requiring that all laws, "whether [] prescriptive, penal or afflictive," be applied equally to all.

The threat of pre-trial incarceration based solely on the minimum penalties established for certain criminal-administrative offenses, has profound civic consequences. It empowers the State to threaten to imprison those who are deemed presumptively guilty until a court determines their innocence. Given the complexity of the issues that must be elucidated to reach such a conclusion, and the ambiguities of the legal system that we have just pointed out, it is not difficult to construct *prima facie* plausible accusations. This procedure echoes the very abuses the Magna Carta sought to prevent 800 years ago: No official

Penal Tributario [Tax Criminal Regime], *supra* note 1 (passed on the last days of 2025 it significantly increased significantly the thresholds mentioned in the text).

118. *See Sistema Integrado de Jubilaciones y Pensiones* [Integrated Retirement and Pension System Law], Law No. 24241, *supra* note 83; ELIZABETH A. MARUM, DELITOS RELACIONADOS CON EL SISTEMA INTEGRADO DE JUBILACIONES Y PENSIONES: INCORPORACIÓN Y TRASPASO INDEBIDO DE TRABAJADORES. INVERSIONES ILÍCITAS DE FONDOS. INCUMPLIMIENTO DE LAS PRESTACIONES PREVISIONALES. ANÁLISIS DE LA LEY 24.241 [CRIMES RELATED TO THE INTEGRATED RETIREMENT AND PENSION SYSTEM: IMPROPER INCORPORATION AND TRANSFER OF WORKERS ILLICIT INVESTMENTS OF FUNDS. FAILURE TO PROVIDE PENSION BENEFITS. ANALYSIS OF LAW 24.241] (2003).

shall put a person on trial, the document proclaimed, solely on the basis of the statements of the same official.[119] The chilling effect of such threats lies not in their execution, but in their potential; like the sword of Damocles, their deterrent power rests from the mere possibility of use.

Beyond incarceration, Argentine administrative penalties themselves are often excessive and unrelated to the actual harm caused. For instance, the Customs Code adopts a very broad definition of smuggling, which is punishable by a fine of up to *twenty times* the value of the goods involved, with imprisonment for up to ten years.[120] One foreign automotive company faced a fine that exceeded the company's net worth, which, if imposed, would have resulted in the total confiscation of the shareholders' investment. A similar disproportion occurs with exchange control fines, which can reach up to ten times the amount of the infringing transaction, amounts that obviously far exceed the exporter's profit or the Treasury's actual loss.[121] In fact, since an export of agricultural products usually yields a profit for the exporter of about 5% on the value of the export, it follows that the merely late sale of the foreign exchange proceeds of an exportation, even if it does not have measurable State damage, can result in penalties that dwarf the exporter's entire interest in the transaction.

Such draconian fines create economic distortions and discourage investment. Entrepreneurs may be reluctant to expose significant assets and capital in an environment where administrative sanctions can destroy entire enterprises overnight. This effect has already been studied in the United States as a consequence of another risk factor of similar magnitude: punitive damages.[122] For this paper, the phenomenon is of interest because it gradually discourages, impoverishes, or ultimately bankrupts honest businessmen. This phenomenon only allows those with political connections to shield themselves from such draconian sanctions and evade enforcement. Civil servants, bound to apply laws uniformly, often enforce rules rigidly on ordinary citizens, while

119. Magna Carta, 25 Edw. 1 (1297) (Eng.) (no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it).

120. CÓDIGO ADUANERO [CUSTOMS CODE], Law No. 22415, arts. 863, 864, 865 & 876 (Arg.).

121. *Ley de Procedimiento Fiscal* [Fiscal Procedure Law], *supra* note 90, art. 2. *Régimen Penal Cambiario* [Foreign Exchange Criminal Regime], *supra* note 90.

122. James Boyd & Daniel E. Ingberman, *Do Punitive Damages Promote Deterrence?*, 19 INT'L REV. L. & ECON. 47 (1999).

political allies benefit from leniency or exemptions. In extreme cases, the draconian nature of penalties increases the value of bribes, feeding corruption rather than curbing it.

In a country where it is estimated that more than half of the employees work in flagrant violation of labor and social security rules, the impartial and widespread application of the law would overwhelm the courts with criminal cases against employers. The fact that it does not occur suggests selective enforcement shaped by political priorities. Regulatory definitions are often tailored to minimize electoral repercussions, narrowing the scope of liability by focusing on the monetary amount of the infraction rather than the degree of deviation from the law, as evidenced by the taxpayer's conduct.[123] As a result of this policy, businessmen prefer to set up several micro-enterprises rather than growing a single business. The loss of efficiency is more than compensated by the tax savings made possible by the lesser control of small enterprises (i.e., flying under the radar).

Finally, inflation further undermines fairness by eroding the monetary thresholds that determine penalty severity. The threshold for imposing prison terms of up to nine years for aggravated tax fraud was the equivalent of 800,000 dollars when the amount was last updated in December 2017. At current exchange rates, that dollar amount has been reduced to approximately 10,000 USD. Despite the rampant inflation that has afflicted Argentina during the last two decades, the lack of adjustment of these figures shows the little importance that the rules on which the liberty of individuals depend has had for successive Argentine administrations. [124]

H. The Contempt for the Law by the State Itself

The Argentine Government presents a paradoxical landscape: the government routinely violates its laws. We are not referring to the violation of the law by unscrupulous officials for spurious purposes. While this phenomenon exists, it is of little importance in the face of a far more troubling pattern of overt and systemic legal violations by the State itself, often carried out under the sincere belief that these actions are to serve the public good. For example, while the national State

123. *See Ley de Obras Públicas* [Public Works Law], *supra*, note 88. However, rampant inflation repeatedly makes the threshold amounts ridiculously low.

124. *See Reforma Tributaria* [Tax Reform Law], *supra* note 117.

persecutes private companies that disguise the labor relationship of their employees under the guise of a service contract, it simultaneously engages in the same practice. The State employs its own workers under the guise of temporary or "hired" contracts, excluding them from essential welfare and retirement benefits.[125] Similarly, the Province of Buenos Aires issued decrees by the Governors acknowledging that the provincial authorities did not respect the rules on Government employment, in view of which it set a transition period for the rules to begin to be enforced.[126]

When the State constantly resorts to practices such as "junk contracts" (i.e. contracts that disguise an employment relationship) or payments to public employees that are not "remunerative" (i.e., are not computed for tax or welfare contributions), it is acknowledging the impossibility of assuming the cost of properly complying with the laws it enacts, yet it rigorously applies those laws to individuals. This double standard is so pervasive that it warrants a special study of the subject.

In a lecture, Mariano Grondona explained the phenomenon of the law-violating State by resorting to Rawls's distinction between the legal and the good.[127] When the law opposes what the Argentine State considers morally or politically "good," it tends to violate the law. In its defense of what it understands to be the public interest, the Argentine State sacrifices the rule of law again and again. Legality yields to the immediate conveniences of the public treasury (if not politics). The long-term institutional advantages that derive from respect for the law are dismissed as luxuries Argentina cannot afford amid its perpetual state of economic and political emergency.

The judicial courts often face a difficult choice. Either they demand immediate respect for the law by the State, at the cost of curbing important public policies, or they initially tolerate the violation and thus end up holding the treasury responsible for large sums, hoping

125. Dec. 1184/2001, Sept. 20, 2001, ERREPAR DIGITAL, https://documento.errepar.com/legislacion/empleo-publico-contratacion-de-servicios-profesionales-regimen-20100922075123604 (Arg.); Dec. 682/2004, May 30, 2004, ERREPAR DIGITAL, https://documento.errepar.com/legislacion/funcionarios-publicos-locadores-de-servicios-asignacion-no-remunerativa-vigencia-20100922075037276 (Arg.).

126. Agustín García Sanz, *Licitación Pública v. Contratación Directa: ¿La Batalla Perdida?, RAP NO. 2006-3*, at 456 (2006) (Spain) (English translation available at https://jccrivelliabogados.com/2021/03/public-tender-v-direct-contracting-the-lost-battle/).

127. JOHN RAWLS, A THEORY OF JUSTICE 392–96 (Harv. Univ. Press rev. ed., 1999).

that inflation, until effective payment, will erode them. It is not surprising, then, that the formal defenses of the State are exaggerated (the well-known problem of complying with all formal requirements to allow the court to hear the case, limitation periods, waivers of rights induced by the State itself) to avoid judgments against the State, or at least delaying such judgments, which in the long run may have the same effect. The Argentinian magistrate who contemplates the legal misconduct of the State evokes Judge Bridoye, Rabelais's fictional magistrate who delayed sentences in the belief that time alone solves all controversies.

Although understandable, judicial tolerance of non-compliance with the rules by the State itself is still subject to criticism. In some cases, jurisprudence ignores the rules themselves. One striking example is the aforementioned doctrine of remediation, which validates the violation of an individual's due process rights in administrative proceedings before the issuance of a decision (although such rights are expressly recognized by the Law on Administrative Procedures[128]). This rationale rests on the possibility that a defense in subsequent administrative proceedings challenging the decision will satisfy that requirement.[129]

When the very author of the law and guarantor of its application ignores it, the problem goes beyond mere legal uncertainty; it implies the absence of law. If the State does not recognize the force of its laws, the message to the population is clear and dramatic: "legal remedies are worthless, so pursue alternative means." Of those alternative means, the main one is corruption.

I. The Consequences of Legal Uncertainty

The pervasive legal uncertainty in Argentina has the consequence of placing citizens and public officials in a climate of defenselessness. In both cases, this legal uncertainty facilitates corruption and has serious consequences for the civic life of the country. As widely recognized in legal theory, the existence of a true rule of law requires that

128. *Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, arts. 1 bis & 7(d); *see* MAIRAL, *supra* note 106, at 560–62.

129. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "S.A. Duperial I.C. v. Nación," Fallos (1979-301-953) (Arg.).

norms be stable, public, and clearly defined.[130] By this measure, Argentina continues to fall short of having a true rule of law.

1. The Defenselessness of the Citizen

One of the most immediate and damaging effects of legal uncertainty in Argentina is the sense of defenselessness it creates for ordinary citizens facing the State and the officers who represent it. As philosopher Carlos Nino once observed, "we Argentines all have the feeling of being outside the law."[131] Statistically, few are willing to confront the State in these circumstances;[132] most submit to authority without protest, and a significant number resort to corruption as a means of self-protection.

This defenselessness harms civic freedoms. As Nino noted, "there is no better breeding ground for authoritarianism than when all citizens are at fault and therefore at the mercy of power."[133] He further states, "the fact that all Argentines are outside the law weakens us as citizens in the face of public power and makes us susceptible to authoritarian or arbitrary attitudes from the authorities. We all have a guilty conscience and that's why we try not to raise our heads or our voices too much."[134]

The helplessness of private individuals has an additional, albeit indirect, effect on corruption. Citizens are discouraged from criticizing public officials when they are at the height of their power for fear of reprisals. This defenselessness creates fear, and that fear becomes an impunity of the powerful. As a result, public criticism of corruption—an unavoidable subject in social and political discourse today—is sporadic and timid in the face of those in power. On the other hand, it is constant, ruthless, and not always fair towards those who no longer possess it. Many of those who criticize corruption are less concerned with getting to the truth about the real cases of corruption, but, under

130. NINO, *supra* note 7, at 117; Santiago R. Carrillo, *Los Procesos Colectivos* [Collective Proceedings], 45 REVISTA DE DERECHO ADMINISTRATIVO [RAP] (2017) (Arg.).

131. *Id.* at 113-14.

132. Freddy Zárate, *Reflexiones de Carlos Nino sobre un país al margen de la ley* [*Carlos Nino's reflections on a country outside the law*], EL DEBER (BOL.) (Apr. 7, 2023), https://eldeber.com.bo/edicion-impresa/reflexiones-de-carlos-nino-sobre-un-pais-al-margen-de-la-ley_331061.

133. NINO, *supra* note 7, at 114.

134. *Id.* at 129.

the cover of the natural delay of judicial proceedings, actually seek to destroy their adversaries politically. The political class has concluded that sin lies in the loss of power and not in the practice of corruption. Consequently, both the national and provincial governments have increasingly pursued constitutional amendments permitting re-election.[135] Cincinnatus is not a model for Argentine politicians.

Importantly, the problems created by legal uncertainty are not solely borne by large companies; they also affect all entrepreneurs and individuals in general. However, legal uncertainty becomes more evident in the case of large companies, as they are often the only ones that take legal action.[136] Moreover, large companies are the most vulnerable to patrimonial forms of political reprisals.[137] However, this phenomenon also affects small and medium-sized enterprises, which often do not have the resources to litigate.[138] These businesses also lack the legal protection to challenge the arbitrariness of the officials. This same vulnerability affects individuals, who also face the legal uncertainty discussed herein.[139]

The widespread non-compliance among small businesses, a situation observed in many countries, deserves a separate paragraph. An English journalist who used to spend the summer in Italy observed how, in the year when the *mani pulite* (clean hands) policy began to be generally applied, none of the small businesses that used to liven up the stay on the beach (boat rentals, street vendors, cafes, etc.) were operating. All of the operations functioned outside the law, so the strict enforcement of the rule by now non-corruptible officials rendered

135. The national Constitution was amended in 1994 for this purpose. *See* MAIRAL, *supra* note 106, at 598-99 (describing the problem of the indefinite re-election of provincial governors). The Argentine Supreme Court has recently declared such indefinite re-election contrary to the republican form of government and thus unconstitutional. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/12/2024, "Confederacion Frente Amplio Formoseño v. Prov. de Formosa," Fallos (2024-347-2071) (Arg.).

136. *See* Laura Barbuto, *Legal Uncertainty, a Worrying Factor*, LA NACIÓN (Dec. 8, 1997), https://www.lanacion.com.ar/economia/la-inseguridad-juridica-un-factor-preocupante-nid82584.

137. A company once had to abandon, with prejudice, an *amparo* (summary action) in which it had obtained a favorable court decision because the defendant agency verbally threatened "we won't let you work anymore." (This is based on the author's experience).

138. *Siete de cada diez empresas advierten que los juicios laborales desalientan las inversiones y la creación de Empleo* [*Seven Out of Ten Companies Warn That Labor Lawsuits Discourage Investment and Job Creation],* INFOBAE, Dec. 2, 2024, https://www.infobae.com/economia/2024/12/02/siete-de-cada-diez-empresas-advierten-que-los-juicios-laborales-desalientan-las-inversiones-y-la-creacion-de-empleo/.

139. *See id*.

them inoperable. A similar pattern happens in Argentina. When tax inspectors arrive in a small town, all the businesses usually close. Can the State ignore this social reality and continue to legislate as if its orders were carried out by the majority of the citizens? If it does, the State should know that the only two attitudes of its officials in the face of massive disobedience to the law are passivity (except for sporadic attempts at control) when they are honest, or corruption when they are not. For this reason, any measure that simplifies and lowers the taxation of small businesses should be welcomed.[140]

This category of corruption is the easiest to reform. While there will always be a minority of persons who try to profit from the mismanagement of public affairs, many citizens prefer to work honestly. For them, corruption is not a choice but a last resort in the face of unreasonable rules and the lack of effective legal remedies.

2. The Defenselessness of the Civil Servant

At first glance, it may seem contradictory to suggest that Government officers are also defenseless against the State. But such a lack of defense exists. There are many directors of the Central Bank that have been, and continue to be, prosecuted for decisions made in the course of their functions. Criminal courts also investigate these officials to determine whether they caused undue damage to the State (for example, by granting loans to a bank that subsequently, and before repayment, went into liquidation). This reveals a stark reality; the State holds overwhelming power, not the individual public official. When acting on behalf of the State to confront the private individual, public officials exercise this supremacy. But when the official confronts the State, he stands defenseless in the face of suspicion and the reversal of the burden of proof that governs the first stage of criminal proceedings in Argentina. Here, the legal uncertainty previously discussed as a burden on private individuals now works against the very officials meant to enforce the laws. Their conduct is analyzed in the light of obscure, ambiguous, contradictory, or doubtful rules. The same uncertainty that

140. *Régimen Simplificado para Pequeños Contribuyentes* [Simplified Regime for Small Taxpayers], Law No. 25865, Jan. 19, 2004, B.O. (Arg.). In the sense proposed, it should be noted that the tax regime for unipersonal businesses in Argentina constitutes an important advance to solve these problems for those who are in the lowest income bracket of the business and professional sector, but this is provided that the ceiling does not leave a large percentage of small entrepreneurs outside the regime.

individuals must deal with operates to the detriment of the public official.

This practice of suspicion has far-reaching consequences. Officials who recognize or grant any legal rights to individuals are often accused of corruption. This paradoxically discourages honest officials from making decisions favorable to the individual. Only through corruption can an individual finally obtain what a corrupt official grants him, something that, by law or reason, should already be rightfully his. Public officials have said countless times that the individual is right, but he cannot recognize it because he would run the risk of being incriminated. As has been rightly said, "in our country, whenever a right is denied, it is possible to act summarily and without further grounds, or even without any grounds, without any fear of corrective intervention by the control agencies. This erroneous and authoritarian practice is one of the greatest sources of corruption in our administrative system. For since the official has the absolute and unchecked power to grant or to refuse, he is in fact empowered to corrupt himself."[141] Only when the unfounded refusal to recognize the individual's legal rights carries the possibility of being punished will this attitude begin to change.

The penal system we have thus constructed is deeply flawed. It fails to curb abuses while simultaneously punishing the innocent with cruelty and the guilty with leniency. While both are equally harassed by the system, usually neither is ultimately punished. Being subjected to a criminal process that can last over a decade—during which, for instance, the accused cannot travel abroad without judicial approval—is an unjust punishment for the innocent and an inadequate one for the guilty.

A pressing question emerges: is it appropriate to establish stricter guidelines to enable the criminal prosecution of public officials? The mere existence of a loss for the State's patrimony should not, in itself, justify criminal charges, and even more so when no damage arose at the date on which the act was issued, but was due to a subsequent

141. Julio C. Crivelli & Susana Vega, *Un nuevo sistema de Redeterminacion de Precios para la Obra Publica: El DNU 1295/02 y sus normas complementarias*, 290 RÉGIMEN DE LA ADMINISTRACIÓN PUBLICA [RAP] 35–45 (2002), https://jccrivelliabogados.com/publicaciones/un-nuevo-sistema-de-redeterminacion-de-precios-para-la-obra-publica-el-dnu-1295-02-y-sus-normas-complementarias/.

change in circumstances.[142] Nor should prosecution for the crime of violation of public duties occur when the invalidity of the official's conduct is doubtful and there is no clear evidence of malice or improper benefits for the officer or related parties. Strikingly, the presumption of legitimacy that ordinarily shields administrative acts does not seem to apply in criminal proceedings. In fact, it seems easier to prosecute an official in the criminal courts for issuing an invalid act (Penal Code, art. 248) than to have that same act annulled by a federal administrative court. Given the principle that criminal law must be interpreted narrowly, the standard should in fact be the reverse. The problem is not unique to Argentina. In Spain, there has been criticism of the practice of annulling, in criminal proceedings, administrative acts whose beneficiaries have not been summoned to trial, and this by decision of magistrates who are not specialized in the matter and who have no experience in resolving complex questions of administrative law.[143]

Under the current system, criminal cases with a purely political content proliferate, which is one of the reasons why justice cannot move more quickly in those cases where there is evidence of bribery. Time and resources are diverted to investigating honest officials, leaving less capacity to pursue the genuinely corrupt.[144] In this way, the persecution of the innocent ends up being the other side of the coin of impunity for criminals.

Given the cross-accusations interchanged by members of opposing political parties about the innocence or guilt of their respective party members accused of crimes against the public administration, and the public skepticism about the real independence of the judges that try them, consideration could be given to establishing a panel of foreign experts who have been members of national or international tribunals to seek their opinion. Although these opinions would not bind our Courts, it can help bolster public trust and offer a neutral, informed perspective.

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142. MIRIAM M. IVANEGA, *De nuevo sobre la responsabilidad patrimonial de los funcionarios públicos [Again on the Patrimonial Responsibility of Public Officials]*, 381 REVISTA DE ADMINISTRAÇÃO PÚBLICA [R.A.P.] 113 (2005).

143. EDUARDO GARCÍA DE ENTERRÍA & TOMÁS RAMÓN FERNÁNDEZ, CURSO DE DERECHO ADMINISTRATIVO [COURSE ON ADMINISTRATIVE LAW], Vol. I (Civitas, 17th ed., 2015).

144. *See* Héctor A. Mairal, Opinion, *El Control de los Honestos* [*The Control of the Honest*], LA NACION (Feb. 27, 2003, updated July 23, 2020), https://www.lanacion.com.ar/opinion/el-control-de-los-honestos-nid476755.

Certain rules of criminal law that were originally justifiable have been distorted by overly broad legislative amendments. This is the case with the crime of negotiations incompatible with public office, which is punishable under Article 265 of the Penal Code. When, at the end of the nineteenth century, the concept was introduced in our law, it punished the official who became monetarily "interested" in a private business subject to his control or jurisdiction. Such was the case of the mayor who invested his own money in a company that operated a casino that he had authorized or should have controlled, so that the punishment was the loss of up to half of his investment.[145] As can be seen, if there has been no favoritism in the price paid by the public officer, there is no bribery here — since no bribe is paid to the official, but rather it is he who pays — but the ethical transgression is unquestionable.

The scope of this rule was expanded in two ways. First, by expanding the concept of "interest" to include any expression regardless of whether the official actually participates in the business, and second, by extending the prohibition to include benefits not only to the official but also to third parties.[146] The vagueness of the term "interest" creates considerable uncertainty. Any advice one official gives another concerning a decision that affects individuals can fall within the purview of the rule, since every decision may benefit some third party directly or indirectly. The breadth of the figure lends itself easily to political persecution.

Supporters of this expanded interpretation argue that the rule serves not only to protect reality but also the image of honesty in the exercise of public functions.[147] However, it is difficult to justify imposing the same maximum penalty for violating this abstract image of honesty, as opposed to causing actual harm to the public treasury, as that applied to officials who commit outright fraud against the public administration.[148] This disparity reflects a troubling lack of proportionality.

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145. SEBASTIÁN SOLER, DERECHO PENAL ARGENTINO [ARGENTINE CRIMINAL LAW], Vol. V, at 211–13 (Tipográfica Editora Argentina 1951).

146. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 260-265, *supra* note 45.

147. República Argentina, RESPUESTA AL CUESTIONARIO MESICIC/OEA – 2DA RONDA [Response to the MESICIC/OAS Questionnaire – 2nd Round] (July 2006), SG/MESICIC/doc.172/06 rev. 2, available at https://www.oas.org/juridico/spanish/mec_rep_arg2.htm.

148. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 174, 265, *supra* note 45.

This rule is most frequently used against those who gain access to public office after working in private practice. Their past professional lives are intensely scrutinized, and any connection, no matter how outdated or tenuous, is considered demonstrative of willful connivance. In effect, the ideal public servant is portrayed as someone who assumes a leadership role in a state-owned company or enterprise without having participated in any business activity in the private sector, a lack of experience that is presented not as a demonstration of inexperience, but as a credential for trustworthiness.

Adopting more precise criteria would prevent the legal scandal of individuals with impeccable reputations[149] being dragged through years of litigation over decisions that, at most, involved debatable questions of policy or discretion. These prosecutions are often prompted by private interests adversely affected by the official's decisions or by political opponents seeking revenge. Reform would not only shield the judiciary from becoming an unwitting accomplice in partisan struggles, but it would also remove the main disincentive that prevents highly qualified people from serving in public office.

By way of comparison, the United States has developed the doctrine of immunity for public officials, which serves to shield public officials from civil liability for decisions taken in the exercise of their official duties. This doctrine, established by the federal courts, aims to preserve the effectiveness and decisiveness of public service by sparing civil servants from the burden of defending their official decisions in court. The rationale is clear: if they were not granted such immunity, officials might hesitate to act in the State's interests. Officials should not be forced to weigh every decision against the costs and risks of legal proceedings. Of course, this immunity does not apply in cases involving well-founded allegations of corruption. This immunity is absolute for high-ranking officials such as the President, Ministers, Judges, and certain other officials, such as Prosecutors. In these cases, any civil action challenging a decision made in an official capacity is dismissed up front (*in limine*) at the request of the defendant, without even reaching the production of evidence. For lower-ranking officials, immunity is qualified rather than absolute. This means that these officials are similarly protected unless the challenged decision violates

149. SECRETARÍA DE DERECHOS HUMANOS, LAWFARE: DEMOCRACIA EN PELIGRO [LAWFARE: DEMOCRACY IN DANGER] (Ministerio de Justicia y Derechos Humanos de la Nación 2023) (Arg.).

clearly established rules that any reasonable person should know exist.[150]

J. Utopia or Reality?

Some readers may agree with the observations made thus far, but may also fear that the systems we criticize cannot be reformed. They might believe that the deficiencies we have identified, particularly the tension between legal uncertainty and institutional integrity, are inherent in any legal system and therefore inevitable. Under this view, changes to the present legal system would be utopian.

This skepticism is understandable, but we argue, ultimately unpersuasive. We can reply to this reasonable reaction with the same argument we made at the beginning. While normative ambiguity exists in every legal system, the degree of uncertainty present in Argentina is exceptional and incompatible with the population's cultural and institutional development. Comparing statistics that purport to measure legal uncertainty in different countries, Argentina places among the countries with the highest level of legal uncertainty, often alongside countries whose cultural development is much lower than ours.[151]

To prove that a more coherent and rights-respecting approach is attainable, one need only consider the jurisprudence of the European Union. In contrast with the Argentine rules that we have just described, the European courts have articulated and enforced legal principles that provide greater predictability, transparency, and protection for individual rights as demonstrated by the following principles:

With respect to the principle of legal certainty: This principle requires that the effect of a legal provision be clear and predictable for the persons subject to it, especially when it imposes economic consequences.[152]

With regard to penalties: Penalties must not go beyond what is necessary to achieve the objective pursued in imposing them, they

150. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE 208 (3d ed., 1994); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 559-60 (2d ed., 1984).

151. *See* WORLD BANK GRP., ARGENTINA: ESCAPING CRISES, SUSTAINING GROWTH, SHARING PROSPERITY 67 fig. 2.28 (2018) (showing that Argentina ranks near the bottom among countries on the Regulatory Enforcement Index, reflecting weak enforcement of laws and regulations).

152. *See What Is the Rule of Law?*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_en (last visited Sep. 18, 2025).

must be as little onerous as possible and they must not be so disproportionate to the seriousness of the offence as to limit the freedoms granted by the founding documents of the Community.[153] No penalty, even if not of a criminal nature, may be applied unless it is based on a clear and unambiguous text.

With regard to changes in legislation: In general, a Community institution cannot provide for a regulation to enter into force on the day of its publication, unless the risk of harm to the Community justifies otherwise. Where a transition period to allow companies to adjust to the new legislation cannot be granted, the new rules should be interpreted liberally.

With regard to legitimate expectations: When a Community institution adopts a practice which tolerates the conduct of a person, it violates that person's legitimate expectations to change that practice with retroactive effect: the change of practice requires an express legal provision or an individual notice given to the person concerned sufficiently in advance. The same principle prohibits, in principle, Community institutions from amending their rules without providing for a transitional period, unless this would be contrary to an overriding public interest.[154]

We Argentines boast of being like Europeans; what are we waiting for to imitate them in this aspect as well?

III. FACTORS THAT HAVE A DIRECT IMPACT ON CORRUPTION

While legal uncertainty creates a breeding ground for corruption, other factors exert a more direct and immediate impact on its expansion. Leading among them, unfair or unrealistic rules and excessive discretionary powers.

153. *See* DANIEL E. MALJAR, EL DERECHO ADMINISTRATIVO SANCIONADOR [ADMINISTRATIVE SANCTIONING LAW] 373-76 (2004).

154. *See* K. P. E. LASOK & TIMOTHY MILLETT, JUDICIAL CONTROL IN THE EU: PROCEDURES AND PRINCIPLES 341-64 (1st ed., 2004); PEDRO JOSÉ JORGE COVIELLO, LA PROTECCIÓN DE LA CONFIANZA DEL ADMINISTRADO: DERECHO ARGENTINO Y DERECHO COMPARADO [THE PROTECTION OF THE ADMINISTRATOR'S TRUST: ARGENTINE LAW AND COMPARATIVE LAW] 86-144 (2004) (analyzing the subject, citing mostly European Union precedents).

A. Unfair, Unrealistic, or Overly Ambitious Rules

Corruption often flourishes in environments where individuals face sanctions for violating laws that are costly or practically impossible to comply with.[155] We are not referring to the norm whose fulfillment is physically impossible, for in that case, that norm would not be valid under the basic principles of legal reasonableness. Rather, we are referring to economic impossibility derived from the high cost involved in compliance.

The Argentine legal scholar Juan Agustín García, in *La Ciudad Indiana*, observed that *contempt for the law* has deep historical roots in Argentine society, dating back to colonial times.[156] This cultural pattern continues to this day, as highlighted in the book of Carlos Nino and confirmed through more recent statistical studies.[157]

However, it is often overlooked that this contempt is motivated, at least partially, by the unreality or injustice of the norms that the State dictates and intends to apply. A modern illustration of this problem can be found in Argentina's monetary history. Since the mid-20th century, successive currency reforms have eliminated thirteen zeros from the peso. If those reforms had not taken place, the price of a cup of coffee would be measured in trillions of pesos. But that same State that failed to maintain a stable currency for its citizens has, as a general rule, forbidden and continues to forbid, adjustment of debts to account for inflation, and then pretends to punish severely those who wish to take refuge in a real currency, i.e., U.S. Dollars.[158] Hence, an important step in reversing this national trend requires a fundamental reassessment of the fairness and feasibility of the rules imposed by the State.

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155. Alfonso Buteler, *Corrupción y Derecho Administrativo* [*Corruption and Administrative Law*], 48 A&C REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL 97, 109 (noting that when laws or regulations are costly or practically impossible to comply with, corruption tends to flourish since people are pressured toward noncompliance and bribery).

156. ANTONIO MARÍA HERNÁNDEZ, DANIEL ZOVATTO & MANUEL MORA Y ARAUJO, ENCUESTA DE CULTURA CONSTITUCIONAL: ARGENTINA, UNA SOCIEDAD ANÓMICA [SURVEY OF CONSTITUTIONAL CULTURE: ARGENTINA, AN ANOMIC SOCIETY] 13-16 (2005) (citing JUAN AGUSTIN GARCIA, LA CIUDAD INDIANA [THE INDIAN CITY] 6-7 (Angel Estrada y cia, eds., 1909)).

157. *Id.* (citing NINO, *supra* note 7).

158. Cámara Nacional de Apelaciones en lo Penal Económico, [CNPE] [National Court of Economic Criminal Appeals of the Federal Capital], 15/12/2004, "Hortensia Elena Murillo y otro s/inf. Ley 19.359," Jurisprudencia Argentina [J.A.] (2005-II-50) (Arg.) (illustrating the lengths Argentina enforces its exchange-rate policies, highlighting a case where an elderly retiree was prosecuted for privately exchanging $200 to avoid waiting in line at a bank; the appellate court reduced a 600-peso fine — effectively forfeiture of the amount exchanged — to a "symbolic" 10 pesos).

Another example of an arbitrary rule is the prohibition on merchants repricing their merchandise.[159] You don't need to be a graduate in business administration to know that, in an inflationary context, if there is no price adjustment, the seller will not be able to replenish their merchandise from sales revenue. As a result, they gradually run out of merchandise.

These types of rules, where compliance is either practically impossible, very difficult, impractical, or very costly, have been identified as a major cause of corruption. Economist Hernando de Soto has identified such rules as a central factor behind the proliferation of informal economies. In these contexts, bribery becomes the cost paid by the informal entrepreneur to avoid sanctions and continue operating.[160] This phenomenon has also been studied in Brazil.[161] In Argentina, when analyzing the causes of corruption, Carlos Nino observed that, "There are rules that require obligations that are almost impossible or absurd to fulfill," and gave as an example the rules for the opening of a business that impose exaggerated requirements.[162] Vanossi has called regulatory excesses *hotbeds of corruption*.[163]

The same applies to overly ambitious legal norms that shift the cost of legislative goals for social improvement onto individual actors, often with good intentions but without sufficient regard for practical consequences. Such is the case with urban planning regulations, which Nieto considers to be a frequent source of corruption.[164] Since the value of a piece of land varies dramatically according to the discretionary decision of the official or agency that applies zoning regulations, it is disingenuous to expect that corruption will not influence the adoption of that decision. Environmental standards, when enforced within already corrupt bureaucracies, follow a similar pattern. In practice, as

159. *Ley de Abastecimiento* [Supply Law], *supra* note 107, art. 4(b) (Arg.); *see also* Decree No. 70/2023, art. 9, Dec. 21, 2023, B.O. (Arg.) (showing that the law was repealed, 50 years after it was enacted).

160. *See* DE SOTO ET AL., *supra* note 32, at 196-99.

161. *See* Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMPAR. L. 514, 515 (Summer 1971).

162. NINO, *supra* note 7, at 117.

163. *See* Jorge R. A. Vanossi, *Primera aproximación al enfoque jurídico de la corrupción* [*First Approximation to the Legal Approach to Corruption*], 149 EL DERECHO [E.D.] 749 (1992) (Arg.).

164. NIETO, *supra* note 4, at 191.

many studies have shown, "it is usually cheaper to bribe the official than to make the required improvements."[165]

We do not argue against laws that pursue socially beneficial goals. But let us be critical that, unless general and efficient control can be ensured, the more ambitious a rule is, the more it increases the opportunities for corruption. As one writer noted, "Stricter regulation does not guarantee higher quality products (. . .) Rather, it stimulates the rise of corruption."[166] When regulations proliferate without clear prioritization, essential requirements become indistinguishable from minor ones. If compliance with even secondary provisions becomes burdensome, and corruption is used to circumvent them, bribery may ultimately erode respect for both categories of rules.

A country like Argentina, where corruption is embedded in society and there is a strong resistance to legal compliance, should have modest ambitions in setting the objectives of its rules when the values at stake are not people's lives or health. Enacting ambitious regulations without considering the required increase in public spending for enforcement can promote corruption. Therefore, when ambitious targets are set, efficient and permanent control systems should be established with their corresponding budgetary allocation. Otherwise, law-abiding citizens will face burdensome obligations, while those who disregard the law may continue to benefit from non-compliance.

The coexistence of demanding and detailed regulations with a practice that ignores them and behaves carelessly has been a recurring theme in our municipal life. The truth is that a large part of the services and activities provided to the public are carried out in precarious, irregular, unsafe, or unhealthy conditions. Yet, for many civil servants, their duties appear complete once idealized regulations are issued, regardless of whether they are followed. The lack of enforcement in response to widespread non-compliance can be attributed, at lower levels of administration, to factors such as corruption and limited effectiveness of disciplinary measures. At higher levels, authorities may choose not to implement sanctions for minor infractions in order to avoid political repercussions and potential increases in service costs for low-income individuals. When accidents occur, the legal responsibility

165. Susan Rose-Ackerman, *Is Leaner Government Necessarily Cleaner Government?*, *in* COMBATING CORRUPTION IN LATIN AMERICA 89 (Joseph S. Tulchin & Ralph H. Espach eds., Woodrow Wilson Ctr. Press 2000) (quoting *Passage to Cleaner Air*, FIN. TIMES, Apr. 10, 1996).

166. LLOSA, *supra* note 54, at 291.

falls on the businessman responsible for the accident. However, over time, the issue of widespread non-compliance remains unresolved, suggesting that officials may prioritize addressing personal liability over implementing broader corrective measures. A tragedy occurred in the last days of 2004, when a nightclub fire in Buenos Aires, that caused more than 100 deaths,[167] provoked the same official reaction that has been observed in Spain: "[The] authorities who, after an accident or supposed unforeseen event, carry out all the inspections that until then were conspicuous by their absence, are and have always been common currency in our public activity."[168]

In short, the combination of a political class eager to "improve" society by continually imposing new obligations and prohibitions on it (but curiously indifferent to the effective compliance of the rules), with a poorly paid, poorly controlled, and overburdened civil service, is an ideal recipe for corruption. More so when public officials are engaged in the widespread culture of "taking advantage" of public office to obtain irregular benefits. This contradiction generally goes unnoticed. Ironically, those who say they are most interested in fighting corruption are also the ones most in favor of promoting social development through new regulations.

Regulatory overshoot in Argentina derives from a conception of law as a vehicle for social improvement, rather than as a set of minimally enforceable standards. As one scholar noted, "the conception underlying this attitude is that of the law as a pure, marvelous, but ultimately a remote and inapplicable collective ideal."[169] Ernesto Garzón Valdés states: "Latin Americans tend to be experts in cultivating the symbolic dimension of laws."[170] Rather than establishing realistic guidelines that gradually become more demanding over time, Argentine law often imposes unrealistic requirements *ab initio*.[171] Lawmakers frequently adopt norms knowing they cannot be generally obeyed,

167. Uki Goñi & Agencies, *175 Die in Argentinian "Death Trap" Club Fire*, THE GUARDIAN, (Dec. 31, 2004, at 19:07 ET), https://www.theguardian.com/world/2005/jan/01/argentina.ukigoni.

168. SABÁN GODOY, *supra* note 42, at 48.

169. Grondona, *supra* note 6, at 24.

170. Ernesto Garzón Valdéz, *Acerca del Concepto de Corrupci*ón [*About the Concept of Corruption*], *in* POWER, LAW, AND CORRUPTION 179, 190 (Miguel Carbonell & Rodolfo Vazquez eds., 1996).

171. *See* Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMPAR. L. 839, 845-46 (2003).

clinging to the hope that their mere existence will gradually lead individuals to adapt their conduct to the new requirements. These laws are often copied from more developed jurisdictions, without first assessing whether they are compatible with the conditions in which Argentine society operates.[172] But it so happens that the Argentine version is, at times, even stricter than the original. This pattern suggests that legislators and officials aim less to establish reasonable guidelines of conduct and more to demonstrate their zeal. The resulting culture of general non-compliance is not a problem that keeps Argentine regulators awake at night.

A clear example of this is Argentina's implementation of the International Treaty on Hazardous Effluents. This treaty defines hazardous effluents as substances listed in the First Annex that also possess characteristics described in the Second Annex. In contrast, the Argentine law considers a substance hazardous if it either appears in the First Annex *or* meets any characteristics described in the Second Annex.[173] Under this definition, even an ordinary business office qualifies as a creator of hazardous waste and must register in the Registry of Creators of Hazardous Waste provided for by law.[174]

It is difficult to muster a consensus for this critique. Precisely, what has been called *rhetorical adherence* to regulations is a hallmark of corrupt systems.[175]

But there are even less laudable reasons for sanctioning exaggerated rules. Exaggerated rules allow officials to grant exemptions without running a personal risk. Consider, for example, a safety standard: if the requirement of the standard is reasonable, any waiver can lead to an accident and thus make the official who granted it accountable. Conversely, if a rule is overly strict, meaning it demands more than a reasonable safety margin, an official's decision to grant a dispensation without exceeding the truly necessary minimum is unlikely to cause an accident or make the official accountable.

Regardless of the motive, unrealistic norms place those subject to them in a vulnerable position. The application of such a rule cannot be

172. *Id*.

173. *Contrast* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, annex I & annex II, May 22, 1989, 1673 U.N.T.S. 57, *with* Law No. 24051, Jan. 8, 1992, B.O. (Arg.).

174. *Id.* at art. 4.

175. Garzón Valdéz, *supra* note 170, at 190.

general, as it would paralyze all activity in the sector. This is therefore one of the main triggers of discriminatory control. As American Professor Kenneth Culp Davis points out: Exaggerated criminal laws are a major avoidable cause of injustice because such laws inevitably lead to selective control, and cases are often selected for enforcement for irrational reasons.[176]

Even civil servants face institutional vulnerability. An honest official who must enforce an unreasonably onerous rule faces a dilemma: either he brings about the closure or bankruptcy of those he is supposed to regulate, or relax enforcement and face suspicion of corruption. Investigations into such officials are never resolved, left to expire through statute of limitations or rendered moot by inflation to mitigate its amount.[177]

Whether State control is uniform, targeting only the main deviations, or arbitrary, punishing some infringers and not others regardless of their non-compliance, such regulatory schemes replace the rule of law with the discretion of individual officials. Corruption then becomes a way of reconciling the demands of overly ambitious regulations with the limitations of reality.

For example, since 1966, the Province of Buenos Aires has enforced an industrial zoning law that required that all new industrial installations maintain an occupancy factor of 25%.[178] Constructing a ten-thousand-square-meter industrial plant required acquiring at least forty thousand square meters of land. Because this requirement made many investments unfeasible at the time, the enforcement authority was consulted and advised that the law would be applied "reasonably." However, in the absence of legal or regulatory guidelines, the notion of "reasonableness" was left to the discretion of the acting official.

Individuals engaged in activities subject to regulations that impose excessive or onerous requirements may promptly contest such rules on the grounds of unreasonableness. While this occasionally occurs, individuals often refrain from doing so. They benefit from the regulation indirectly because it creates a barrier for new entrants into the market.

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176. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 91 (Illini Books 1971).

177. MATTHEW AMENGUAL, POLITICIZED ENFORCEMENT IN ARGENTINA: LABOR AND ENVIRONMENTAL REGULATION 158–59 (2016) (illustrating that Argentine agencies lack the capacity to enforce, making civil servants either look ineffective or risk being accused of corruption if they bend the rules).

178. *Decreto-Ley de Radicación Industrial* [Industrial Location Decree-Law], Law No. 7229, Nov. 15, 1966, B.O. (B.A. Prov., Arg.).

These operators are typically not subjected to strict enforcement, as doing so could lead to politically undesirable outcomes such as layoffs or bankruptcies. In contrast, new entrants face more rigorous application of the rule, as they have not yet established relationships or structures whose disruption would pose such risks.

Addressing this regulatory disfunction requires the adoption of a procedural safeguard already established in U.S. administrative law: the "notice and comment"[179] rulemaking process. Under this model, regulatory authorities must publish their intent to issue a regulation along with a description of its objectives. Interested parties may then submit analyses and comments, which the authority must consider,[180] and if the final regulation disregards any relevant observations, the authority must justify its reasoning. This process fosters more deliberate policymaking and facilitates subsequent judicial review of a rule's reasonableness.

Hernando de Soto proposes this same solution, to which he adds the need for the Administration to carry out a cost-benefit analysis of the probable social and economic effects of the regulation it proposes, so that "the discussions on the relevance of the projects do not engage in a merely legal analysis and take into consideration their possible effects, even for third parties."[181]

Argentina's Administrative Procedures Law of 1972, art. 7, subsection f, introduced a pioneering requirement of "proportionality" to validate administrative decisions.[182] This rule mandates a three-part test to validate administrative acts: the imposed obligations must be necessary, suitable for achieving their intended purpose, and proportionate, that is, they must not impose excessive burdens on individuals relative to the goal pursued. This principle has seen significant development abroad, particularly in the European Union, where courts have treated proportionality as a cornerstone of human rights under the

179. 5 U.S.C. § 553 (2018).

180. *Contrast* Decree No. 1172/03, Mar. 12, 2003, B.O. (Arg.) (making public hearings optional), *with Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines]; *Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1 (requiring a specific law to impose a public hearing before the issuance of a regulation).

181. DE SOTO ET AL., *supra* note 32, at 309.

182. *Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 7(f).

European Convention.[183] A similar concept exists in the United States: the cost-benefit analysis weighs the societal and individual costs of compliance against the benefits of the regulation.[184] Despite the existence of this rule, Argentine courts have used this doctrine only sparingly.[185]

Judicial control of regulations is at least as vital as the review of individual administrative decisions. Yet, in Argentina, regulatory oversight remains weak. The government has firmly resisted adopting the U.S. "notice and comment" framework, which would require transparency and public input before implementing new regulations. This resistance, combined with the legal presumption of validity of all government acts and judicial reluctance to scrutinize the technical aspects of regulations, leaves Argentine businesses vulnerable to unpredictable administrative discretion. In such an environment, the absence of reliable legal remedies creates incentives for corruption as a means of coping with administrative uncertainty.

While "notice and comment" procedures offer a partial solution, they are not universally effective. As discussed earlier, incumbent operators may prefer rigid rules that, while selectively enforced, serve to exclude new competitors. To address this dynamic, reform must include an additional safeguard: recognition of a *discriminatory enforcement defense*, enabling individuals to challenge the selective and inequitable application of regulations. This approach would reinforce the principle of equal treatment under the law and curb the use of regulations as a tool for corruption.

B. Excessive Granting of Discretionary Powers

As discussed above, corruption often exploits the discretionary powers of the public administration for private gain, whether for the benefit of an individual or of the intervening official, or of both. The broader the discretion, the greater the risk of corruption: discretion is

183. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 183-84 (David Dyzenhaus & Adam Tomkin eds., 2012).

184. *See* Cass R. Sustein, *Is Cost Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299 (2001); Cass R. Sustein*, The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167 (2014).

185. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/03/2009, "Salas, Dino y otros c. Salta, Provincia de y Estado Nacional / amparo," La Ley [L.L.] (2009-1144-663) (Arg.).

the best breeding ground for corruption.[186] Kliegaard's classic formula, monopoly plus discretion minus transparency, captures the systemic conditions most conducive to corruption.[187]

However, some level of discretion is both inevitable and necessary. Laws cannot anticipate every factual scenario, and public administrators must often choose among alternatives to fulfill their mandates. Legal scholarship reflects this reality: while much has been written on the need to limit administrative discretion, no serious doctrine proposes its complete elimination. Kenneth Culp Davis argued that the effective functioning of governments depends on discretionary power.[188]

Recognizing the necessity of discretion does not eliminate the obligation to set its proper boundaries. Davis further argues that the goal must be to "eliminate all *unnecessary* discretionary power."[189] Similarly, other scholars have criticized the tendency of administrative bodies "to make discretionary what is regulated and to evade the Law."[190]

To address this problem, we must identify the systemic conditions that unjustifiably expand discretionary authority and examine the available legal mechanisms for curbing its abuse. Common abuses include: selective enforcement of regulatory violations; arbitrary granting or revocation of licenses or other legal benefits; deliberate delays in resolving petitions submitted by individuals; maintaining legal uncertainty in concessions and permits; and the overall instability of rights derived from administrative decisions. Each of these practices not only erodes legal certainty but also invites corrupt exchanges between public officials and regulated entities.

1. Discretion in the Selection of Controlled Parties

When the State imposes high compliance costs but fails to enforce those obligations uniformly, it creates a perverse incentive structure, as those who comply face a competitive disadvantage against those

186. *See* NIETO, *supra* note 4, at 195; RODRÍGUEZ-ARANA MUÑOZ, *supra* note 77, at 173; Vannucci, *supra* note 65, at 97.

187. Moreno Ocampo, *supra* note 8, at 124 (citing Dr. Robert Kliegaard, a Doctor of Economics at Harvard University).

188. DAVIS, *supra* note 176, at 216.

189. *Id.* at 217.

190. Perfecto Andrés Ibáñez, *Tangentopoli tiene Traducción al Castellano*, CORRUPCIÓN Y EL ESTADO DE DERECHO. EL PAPEL DE LA JURISDICCIÓN 105 (1996).

who do not. In effect, the system rewards noncompliance. The situation worsens when enforcement is not only selective but also arbitrary. As one author aptly observed, "sending the inspector" is something more than an expression with almost theatrical overtones; it becomes one of the most dangerous powers from the point of view of the necessary legal controls that prevent the private use of public powers."[191]

Unfortunately, arbitrary selection of individuals for administrative inspections or sanctions occurs more frequently than commonly acknowledged. Some scholars refer to the practice of targeting "criminal vedettes"[192] while others emphasize how "the choice of sectors to be inspected"[193] serves as a vehicle for corruption. In Argentina, enforcement agencies often investigate individuals or entities whose compliance surpasses the sectoral average. Such partiality enables the use of regulatory power as a tool for political persecution.[194] A notable example involves a major supermarket chain, among the country's top taxpayers, whose facilities meet exemplary hygiene standards. Despite this, it faced relentless inspections and repeated closure orders, all of which were overturned by the courts. Similar abuses have been condemned in the United States, where courts have held that retaliatory enforcement actions, such as targeting critics of the government, violate the First Amendment.[195]

A key procedural flaw enabling this abuse lies in how enforcement agencies and courts compartmentalize violations. Investigations focus narrowly on individual infractions, without regard for the broader pattern of conduct followed by either the accused or the enforcing agency.

First, the Courts should recognize a defense of general compliance. This defense is especially important in cases where agencies bring enforcement actions based on a large number of infractions that, while high in absolute terms, are negligible relative to the overall volume of regulated activity. Sanctions should reflect the regulated entity's overall compliance record. This would align legal outcomes with

191. SABÁN GODOY, *supra* note 42, at 44.

192. JUAN MARIA RODRIGUEZ ESTÉVEZ, EL DERECHO PENAL EN LA ACTIVIDAD ECONÓMICA [CRIMINAL LAW IN ECONOMIC ACTIVITY] 102 (1998) (citing FILLIPPO SGUBBI, EL DELITO COMO RIESGO SOCIAL [CRIME AS A SOCIAL RISK] 46 (Albaco de Rodolfo de Palma ed., 1998)).

193. SABÁN GODOY, *supra* note 42, at 47.

194. *See* Luis Cortina, *Negocios Bajo la Presion del Estado [Business Under State Presure]*, LA NACION, May 7, 2006.

195. Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998) (first citing Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); and then citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

the public interest: promoting substantial compliance rather than penalizing isolated or technical infractions.

Second, Courts should allow a discriminatory enforcement defense that considers not only the conduct of the accused but also that of the regulatory agency. A defendant should be permitted to demonstrate that widespread noncompliance exists, that the agency tolerates such behavior generally, and that enforcement has been selectively applied. If proven, courts should invalidate the sanction and order the regulatory agency to either revise the regulation or enforce it consistently across the industry. This would reintroduce fairness and transparency into the enforcement process and disincentivize the strategic manipulation of administrative power.[196]

In a similar vein, administrative agencies tasked with combating corruption must compare sanctioned actors with similarly situated individuals who are not sanctioned. To this end, agencies should maintain records of the inspections they carry out and the sanctions they apply, as trends are harder to justify than isolated acts. Those who "guard the custodians" would be surprised to discover that, with some frequency, those who are most controlled and sanctioned demonstrate a higher level of compliance than those who receive less attention from official censors.[197] Corruption may explain this anomaly: those who comply with the law are more reluctant to pay bribes, while those who fail to comply are the most inclined. It is not surprising, then, that corrupt officials tend to target the former.

Judges must understand the reality in which alleged violators brought before the bench operate.[198] As long as the judicial analysis is

196. *Cf.* DAVIS, *supra* note 176, at 164 (acknowledging that the case law is reluctant to accept this type of defense. It is worth noting that prosecutors in the United States have discretion in initiating criminal proceedings, unlike in Argentina where it is mandatory upon the presence of an alleged crime; in Argentina the discretionary selection of the individuals to be investigated is exercised at an earlier stage).

197. In February 2005 we learned from the press that while Aerolíneas Argentinas and Iberia (two of the major airlines that operate locally) were repeatedly checked to determine if their airplanes were used for drug trafficking, a smaller airline that took suitcases of drugs to Europe received, in the same period, only one visit from inspectors. This is based on the author's own experience.

198. *Cf.* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "S.R.L. Industria Maderera Lanín v. Nación Argentina," E.D. (1977-298-223) (Arg.) (holding the state responsible for the arbitrary actions of the administration against the plaintiff, for which it took into account the totality of the conduct of the entity); Pedro José Jorge Coviello, *Industria Maderera Lanín: un desconocido precedente de la Corte Suprema, reiteradamente citado en materia de control de razonabilidad de los actos de los poderes públicos* [*Lanin Wood Industry: An Unknown*

limited to comparing the conduct imputed to the transgressor with the applicable law, unrealistic norms will remain in force, and there will be no brake on the corrupt practice of tolerating some breaches and sanctioning others. Instead of operating with a flashlight that only illuminates a small sector of reality, it is necessary to *turn on the light*. Then it will be seen to what extent the norms are, and can be, obeyed. Current enforcement practices often punish individuals lacking political connections, not those who actually violate the law.

But judges alone cannot correct this imbalance. This is where nongovernmental organizations, universities, and study centers must also investigate and expose disparities in enforcement. Rather than expand formal requirements or adopt foreign norms, reform should focus on ensuring consistent enforcement. The tragedy of Cromañon that plunged the City of Buenos Aires into mourning,[199] will provoke, as it seems to have done, an awareness of the need to maintain strict control over the generalized compliance with the rules.

When a reduced selection of the universe to be controlled is unavoidable, the remedy would be to establish impartial mechanisms for making such a selection, removing it from the mere discretion of the enforcement authority. Such mechanisms could be randomized,[200] or the government could create independent boards required to make the selection based on objective grounds and not for persecutory purposes.

While excessive taxes or other official restrictive measures create conditions conducive to corruption, they do not inherently produce unfair competition if enforcement is consistent and comprehensive. Ethical standards in private activity erode when enforcement is selective or when the state imposes burdens and restrictions whose compliance will only be partially followed and sporadically enforced. Corruption thrives not merely due to the severity of the rule but because of the widespread perception that enforcement is rare and arbitrary.

2. The Multiplicity of Special Authorizations

Corruption also stems from excessive demands for special authorizations. At a meeting in Chile discussing possible regulatory measures, an Argentine consultant proposed that, as a control measure,

Precedent of the Supreme Court, Repeatedly Cited on the Manner of Control of the acts of Public Powers], 4 EL DERECHO 28 (2004).

199. *See* Goñi & Agencies, *supra* note 167.

200. RODRIGUEZ ESTÉVEZ, *supra* note 192.

special administrative authorizations should be required for certain minor activities. The reaction of the country's officials was unanimous: "In Chile, we have learned that special authorizations generate corruption. That is why the right thing to do is to establish in a general way the conditions that must be met to carry out certain activities and then to check whether or not those who carry them out comply with those conditions."[201]

Similar practices do not seem to exist in Argentina based on the numerous regulations requiring special authorizations. According to a private report, transporting food across two districts within the Province of Buenos Aires once required 14 separate authorizations. These overlapping jurisdictions create opportunities for bribery and regulatory abuse. For this reason, the state should reduce such permits, especially when they serve no clear purpose or when interjurisdictional duplication occurs. Where control is necessary, post-activity inspections are preferable to prior approvals.

The excessive number of special authorizations reflects the Argentine administration's tendency to micro-manage the economy. A historical analogy illustrates the problem: during the 1950's in Rome, Italy, traffic policemen directed cars not by alternating flow like a traffic light but by individually signaling vehicles to proceed, often arbitrarily, much like a conductor gesturing to an orchestra. This is exactly what the Argentine authorities like to do. Instead of granting general authorizations for categories of transactions, they prefer to authorize each transaction individually.

For example, during recent years of foreign currency scarcity, importers needed a specific authorization for each transaction. The disparity between the official exchange rate and the parallel market rate (the first being half of the second during most of these years),[202] created fertile ground for corruption and irregularities.

As economist Juan Carlos de Pablo aptly observes, this highlights the stark contrast between Argentina and the United States. "It is not necessary to stay long in the United States to realize how easy it is

201. As verbally reported to the author by the Argentine consultant present at the meeting.

202. David Malpass, *El Problema del Tipo de Cambio Paralelo: El Enfoque del Banco Mundial para Ayudar a las Personas en los Paises en Desarrollo* [*The Parallel Exchange Rate Problem: The World Bank's Approach to Helping People in Developing Countries*], BANCO MUNDIAL BLOGS (May 31, 2023), https://blogs.worldbank.org/es/voices/el-problema-del-tipo-de-cambio-paralelo-el-enfoque-del-banco-mundial-para-ayudar-las.

there to operate within the rules and how practically impossible it is to do so by violating them."[203] In Argentina, the situation is exactly the opposite. To give just one example, there are mass-market goods legally sold in the United States and throughout the developed world but prohibited in Argentina, though they are frequently smuggled into the country and openly sold at numerous street kiosks.

In Argentina, complying with the law has often been a complex and time-consuming endeavor due to the proliferation of formal requirements. In contrast, noncompliance is rarely monitored and even less frequently punished. The government's approach resembled placing a door in an open field and mandating that everyone cross through it; while honest citizens line up to follow the rule, others simply walk around it. This dynamic creates a sharp disparity: those who strive to follow the law face burdensome procedures, while those who flout it encounter minimal oversight or consequences, even when engaging in criminal behavior. [204]

Another context rife with opportunities for corruption arises when the Argentine government grants significant benefits, such as tax or customs exemptions, to those who participate in certain regulatory regimes or satisfy complex and onerous conditions. Because these schemes are intricate, they require equally complex oversight mechanisms. As a result, enforcement becomes both difficult and inefficient. Unsurprisingly, such regimes frequently give rise to abuse, with corruption serving to weaken already fragile monitoring systems. Argentina's experience with industrial promotion programs offers numerous examples of this phenomenon.[205]

In light of these challenges, competition, where feasible, often serves as a preferable alternative to regulation. Competitive markets

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203. JUAN CARLOS DE PABLO, ARGENTINA 2024-2027- EL DESAFÍO ECONÓMICO DEL PRÓXIMO GOBIERNO [ARGENTINA 2024-2027- THE ECONOMIC CHALLENGE OF THE NEXT GOVERNMENT] 67 (2022).

204. A person who inherited a property tried to operate a restaurant there but soon found out that she could not run it profitably without employing undeclared waiters and thus cheating on social security taxes. However, when dismissed, these waiters sued and were entitled to collect from her considerable amounts as fines (to encourage private enforcement) which put her at risk of bankruptcy. She thus closed her restaurant and rented the property. The tenant also opened a restaurant and ran it profitably as he cheated on social security taxes too but was never sued because he openly carried a gun in his belt. This account is based on the author's own experience.

205. *See Misterio en San Luis* and *Un régimen cuestionado*, LA NACIÓN, May 3, 1998 (explaining that the province of San Luis had received $4,824 billion pesos (at the time, more than 1 billion USD) as a result of a special tax regime).

reduce the need for discretionary administrative decisions, thereby limiting the opportunities for corrupt influence. When regulation is necessary, such as in the licensing of certain industries, a more transparent approach is to permit entry to any applicant who satisfies clearly established legal or regulatory criteria. Authorities should then focus their efforts on monitoring ongoing compliance. This is far preferable to systems that grant officials broad discretion to approve or deny licenses based on subjective assessments of market conditions or the applicant's qualifications.

3. Delay in Resolving Approval Requests

In many instances, legal acts undertaken by private parties produce legal effects only after they have been approved by an administrative agency. For example, the purchase of controlling blocks of shares in a corporation requires approval by the enforcement authority under Argentina's Law on the Defense of Competition[206] and, in the case of financial institutions, such transactions must also be approved by the Central Bank.[207] Excessive delays in obtaining these approvals reflect the broader inefficiencies and institutional weaknesses of the Argentine state's administration of private transactions. The act of control seems to be more important than the controlled activity.

The Central Bank's own regulations reflected a broader disregard for the practical realities of private institutions. Under its rules, both the election and the re-election of the boards of directors of a financial institution required approval from the Central Bank. Without this approval, directors *who were re-elected* could not take office.[208] Given the length of time it typically takes the Central Bank to grant such approvals, often exceeding a year, these rules effectively left financial institutions without legally empowered leadership for extended periods. On their face, the regulations implied that institutions were to remain "headless" for months each year. Worse still, they rendered invalid all board meeting minutes signed by directors who had been elected but not yet approved. The absurdity of this outcome was so

206. *Ley de Defensa de la Competencia* [Competition Defense Law], Law No. 27442, arts. 9, 14 May, 15, 2018, B.O. (Arg.).

207. BANCO CENTRAL DE LA REPÚBLICA ARGENTINA [BCRA] [CENTRAL BANK OF THE ARGENTINE REPUBLIC], Autoridades de Entidades Financieras [Authorities of Financial Institutions] § 5.2.1 (2020).

208. *Id.* § 3.1.6.

apparent that even the Central Bank failed to take its own rules seriously in practice.[209]

Argentine law offers little recourse for such administrative dysfunction and the bureaucracy has impoverished it even more. The traditional rule holds that administrative silence at the request of the individual implies refusal, unless a rule states that silence implies consent.[210] Few exceptions exist. One example is the enforcement authority under the Law on the Defense of Competition, which must expressly deny a request within 45 days or else tacitly approve it. Yet, even this deadline proves illusory, as the agency may suspend the clock simply by requesting additional information.[211] Worse, some individuals who tried to invoke the doctrine of tacit approval reportedly received threats of retaliatory measures.[212]

A preliminary observation is in order here. Interpreting administrative silence as a denial is generally appropriate when individuals submit spontaneous petitions. Otherwise, the State would be inundated with baseless petitions in the hope that inaction would imply consent. But this logic fails when the law itself requires approval. In such cases, after a reasonable period, silence should be deemed approval.[213] If the State subjects individuals to the inconvenience of prior review, it must also ensure that the process is conducted efficiently. Where the State fails to create the necessary administrative agency, the solution is not to paralyze private activity (as some court precedents seem to imply) but rather to suspend enforcement of the restrictive law. Otherwise, the burden of administrative delay falls not on the politicians responsible

209. *See id*. § 3.1.2. (The rule has changed, and re-election is no longer subject to prior approval unless the Superintendent of Financial and Exchange Institutions provides otherwise).

210. *Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.107, art. 10 (providing that silence meant no, except when the law otherwise provided).

211. *Ley de Defensa de la Competencia* [Competition Defense Law] Law No. 25156, arts. 13, 14 B.O. (Arg.); *cf. Ley de Defensa de la Competencia* [Competition Defense Law], Law No. 27442, *supra* note 206, arts. 14, 15 (Arg.) (highlighting current law attempts to remedy previous delays and providing that in some cases silence means acceptance).

212. Mario Zúñiga, *In Reforming Its Antitrust Act, Argentina Should Not Ignore Its Institutional Achilles Heel*, TRUTH ON THE MARKET (Jan. 16, 2024), https://truthonthemarket.com/2024/01/16/in-reforming-its-antitrust-act-argentina-should-not-ignore-its-institutional-achilles-heel/.

213. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.107, art. 10 (providing the current rule in Argentina by allowing administrative silence to be deemed approval but subject to many exceptions). *Cf. Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1, art. 65 (introducing exceptions to Law No. 19549).

for inaction but on private individuals who are powerless to correct it. A striking example is the Tribunal for the Defense of Competition, mandated by Law 25156 of 1999 but never created. A federal court used this omission not to hold executive officials accountable but to penalize individuals who exercised their constitutional right to dispose of their property during the interim. [214]

Delays in resolving cases stem from an official's fear of liability, or at the very least, of incurring the criticism of their superior. This is especially true when the petition lacks political favor or presents ambiguities. In such cases, delay serves as a tactical pause, allowing the contentious elements of the request to emerge and the political landscape surrounding it to take shape. Only then does the official feel equipped to decide with a clearer understanding of the potential implications.

While such caution may occasionally prevent fraud, it imposes high costs on society and fails to prevent the gravest abuses. Legitimate business is routinely stalled in the name of oversight, yet, notoriously, an arms dealer once received Argentine citizenship and a passport with unprecedented speed due to political favoritism.

Officials are often discouraged from issuing timely decisions, as speed is suspected to reflect favoritism. This is because the timing of the administration's decision-making power is largely discretionary. Hence, this is one of the cases in which corruption is most widespread, even if the decision is often of little importance. As Alejandro Nieto observed of Spanish practices, "[i]f the Administration fulfilled its obligations on time, half of the bribes would disappear."[215] A genuine anti-corruption effort cannot ignore this aspect.

First, no law should condition private conduct to prior approval without first ascertaining whether if there are other control mechanisms that can be used, and if the matter is sufficiently important to justify such control. Second, no approval requirement should be

214. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/07/2007, "Belmonte, Manuel y Asociación Ruralista de General Alvear c. Estado Nacional – Poder Ejecutivo Nacional – Ministerio de Economía y Producción – Secretaría de Coordinación Técnica – Comisión Nacional de Defensa de la Competencia/ recuso de hecho," Fallos (2007-331-781) (Arg.).

215. ALEJANDRO NIETO, *La Función Pública y la Corrupción* [*Public Service and Corruption*], *in* DERECHO ADMINISTRATIVO Y APORTES PARA EL REDISEÑO INSTITUCIONAL DE LA REPÚBLICA [ADMINISTRATIVE LAW AND CONTRIBUTIONS TO THE INSTITUTIONAL REDESIGN OF THE REPUBLIC] 451 (María Graciela Reiriz ed., 2004).

enacted without assessing the capacity of the relevant agency. The ambition to control must be matched by sufficient resources. Finally, individuals should not be punished for proceeding without approval when the agency in question chronically fails to respond. For example, can a person who purchases the controlling shares of a radio station without the authorization required by law[216] be sanctioned when the competent authority did not grant, or deny any of the required authorizations for almost a decade?[217]

Tolerance for delays by the State in fulfilling its obligations occurs in various countries. For example, in Spain, scholars have noted that the State is "in permanent non-compliance with everything that it has agreed and even with what is imposed by law."[218] For this reason, the officials responsible for combating corruption should review the average delay of the various agencies in granting mandatory authorizations. Chronic delay, especially when there are exceptional cases of rapid decisions, is an indicator of possible corruption.

When prior State intervention is necessary, express approval may sometimes be substituted with alternatives such as:

(i) The mere communication of the private act, with which the communicated act enters into force immediately or after the expiration of a fixed period, without prejudice to the State's power to decide subsequently, if well-founded reasons exist, to terminate the effects of the communicated act for the future.

(ii) Silence for a certain period of time (or, subject to an extension, for a fixed period to prevent bureaucratic practices from distorting the norm) to be considered as tacit consent. Silence as assent is now a general rule, albeit with important exceptions, in France, Italy, and Spain. As indicated above, this rule was only recently introduced into Argentine law.

Possible approaches to address the issue include:

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216. *See Ley de Radiodifusión* [Broadcasting Law], Law No. 22285, art. 46(f), Sept. 15, 1980, B.O. (Arg.) (supporting law); *cf.* Decree 1062/1998, art. 4, Sept. 22, 1989, B.O. (Arg.) (amending Law No. 22285, art. 46).

217. *See Un Amparo con Poca Frecuencia* [*An Injunction with Little Frequency*], DIARIO JUDICIAL (Mar. 27, 2023), https://www.diariojudicial.com/news-94637-un-amparo-con-poca-frecuencia (reporting on a 2023 case in which, beyond the procedural defects that led to the rejection of the action, there was evidence of a delay of more than 25 years in regularizing the legal situation of a broadcaster).

218. SABÁN GODOY, *supra* note 42, at 25.

(i) The reversal of the burden of proof based on a certain delay in deciding. In other words, after a period of silence, that the regulation would set according to the complexity of the matter, the administration would have to allege and prove the reasons for the non-issuance of the authorization, it would not be sufficient to allege the lack of necessary information. Thus, in the "*amparo por mora*" (a summary court proceeding to obtain the issuance of a decision by the administration), the requested administrative agency would not explain and prove the reasons for the delay but the reasons why it does not positively resolve the individual's request, so that the judge can take such a positive decision if he is not convinced by the reasons and evidence provided by the Administration.[219]

(ii) An inquisitive judicial attitude in the face of the refusal of approval, which admits, if requested by the petitioner, a comparative analysis of the decisions of the entity. The individual subject to the unlimited discretion of the official and skeptical of the depth of judicial control is an easy victim of corruption. On the contrary, the certainty that the rejection of the petition will be scrutinized by a court that will agree to delve into the technical aspects of the decision to determine its reasonableness, comparing it with other decisions of the same entity, is the best antidote to avoid incorrect attitudes. Likewise, knowing that future petitioners will be able to invoke an unduly tolerant precedent before the court will dissuade the official from favoring someone who only supports his or her application with improper offers. The use of electronic files now facilitates these controls.

It is emphasized that these solutions are intended exclusively for situations where legal provisions necessitate prior State involvement

219. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.107, art. 28; *see generally* David Andrés Halperin, *La acción de amparo por mora de la Administración* [*The Action of Amparo for Administrative Delay*], *in* LIBRO HOMENAJE AL PROFESOR JESÚS GONZÁLEZ PÉREZ [BOOK IN HONOR OF PROFESSOR JESÚS GONZÁLEZ PÉREZ] (Buenos Aires, Vol. 2, Hammurabi 2004); Miriam Mabel Ivanega, *Algunas cuestiones sobre el amparo por mora en el Derecho Procesal Administrativo* [*Some Issues on Amparo for Delay in Administrative Procedural Law*], *in* LIBRO HOMENAJE AL PROFESOR JESÚS GONZÁLEZ PÉREZ (Buenos Aires, vol. 2, Hammurabi 2004). *See also Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 28, as *amended by Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1 (authorizing courts, when setting a deadline for the administration to decide, to warn that failure to issue a decision within the prescribed time will result in the petitioner's request being deemed approved).

to validate private actions, and do not apply to voluntary submissions by individuals.

Conversely, the relevant agency should only apply the law that it has been entrusted to implement. Delaying approval solely on the mere suspicion that other laws may have been violated effectively requires applicants to obtain a comprehensive certificate of general good conduct[220] before successfully carrying out any procedure. The agency's responsibility should be limited to notifying appropriate enforcement authorities of any suspected legal violations, without suspending or withholding the requested approval.

In Argentina, the prevailing administrative practice is exactly the opposite of what sound governance would require. The government often imposes obligations that are at odds with the interests of individuals (keeping prices below the rate of inflation, not distributing dividends, etc.) and then secures compliance by tying unrelated regulatory approvals to those obligations. These authorizations, which individuals and firms need to operate normally, are often made contingent on adherence to conditions that bear no relation to the legal purpose of the underlying regulatory scheme. For example, the Commission for the Defense of Competition made the authorization of a large economic concentration operation conditional on the realization of a significant investment by the acquiring party, an investment unrelated to the competitive impact of the transaction and which, if anything, exacerbated market concentration. This practice constitutes a "misuse of power": the exercise of lawful authority for purposes (even of a public nature) other than those intended by the legislature and, as such, is banned by the Administrative Procedure Law. Yet, in practice, this rule seems to have been tacitly abandoned.[221]

4. The Unnecessary Precariousness of Concessions and Permits for the Use of the Public Domain

A significant source of administrative discretion lies in the State's authority to revoke, for reasons of public interest or convenience,

220. *See* Manuel Andrés Pereira, *Políticas de Control Migratorio en Argentina: de las Tecnologías del Límite a las Tecnologías de la Frontera (1915-1950)* [*Migration Control Policies in Argentina: From Technologies of the Limit to Technologies of the Border (1915-1950)*], 106 COLOMBIA INTERNACIONAL 115 (2021).

221. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 7(f).

concessions and permits for the occupation of the public domain. A similar situation of discretion arises when such authorizations expire and renewal is sought. This raises an important question: can and should administrative discretion in this area be more narrowly circumscribed?

It appears legally incorrect to describe all such authorizations as "precarious." Administrative law distinguishes between concessions (bilateral agreements whose termination for public convenience gives rise to a right to compensation) and permits (unilateral acts granting merely precarious rights, whose revocations do not give rise to compensation).[222] Yet in practice, these theoretically distinguishable situations are largely similar.

In the first place, there are laws that declare, in a general way, the precarious nature of both permits and concessions for the occupation of the public domain.[223] Second, it is common administrative practice to label as "permits" what are, in substance, true "concessions," thereby avoiding the legal consequences of termination.[224] Even in cases where the concession is not legally declared precarious, two factors significantly erode the concessionaire's position: (i) enforcing the right to compensation requires initiating litigation that may well exceed ten years, not counting the subsequent delays and vicissitudes of collection; and (ii) if *ante tempus* termination without fault of the concessionaire does not entail the right to compensation for lack of profits, as some rules provide,[225] it is easy to imagine the power possessed by public officials vis-à-vis those concessionaires.[226]

It is difficult to formulate general rules for these situations. Abuses involving private occupation of public land, often enabled by administrative inaction or even the willful complicity of public officials, are well documented. But a sound legal system should be able to distinguish cases where nonprofit institutions have lawfully occupied public land for decades, enhancing the nation's cultural and sporting life. For this reason, it is worth considering whether the law should recognize a

222. MIGUEL S. MARIENHOFF, TRATADO DE DERECHO ADMINISTRATIVO [TREATISE ON ADMINISTRATIVE LAW] 421-25, (Buenos Aires, Abeledo-Perrot., 5th ed. 1993).

223. Decree Law 9533 of Province of Buenos Aires, art. 28, May 23, 1980, B.O. (Arg.).

224. *See* GRECCO & MUÑOZ, *supra* note 85, at 68-76.

225. Decree No. 1023/2001, art. 12, Aug. 13, 2001, B.O. (Arg.).

226. *See* ANDRE DE LA LAUBADERE ET AL., TRAITE DE DROIT ADMINISTRATIF [TREATISE ON ADMINISTRATIVE LAW] 131-36, 210-14 (Paris: L.G.D.J.0, 2nd ed., 1984).

concession's perpetual character, conditioned on the continued fulfillment of the institution's public purposes,[227] when a nonprofit has legally occupied public land for an extended period (e.g., thirty years). This would prevent such long-standing occupations from being dismissed as temporary favors granted by a particular administration. In rare instances where the State must recover such property, it retains its power of expropriation, and reasonable limits on compensation could be established in advance.

An additional principle worth considering is that if a concessionaire of public domain property has made substantial investments (especially where such investments are stipulated in the concession terms), then, in the event of revocation of the concession for reasons of public convenience before its scheduled expiration, compensation should be provided before requiring the concessionaire to vacate the premises. Allowing a public official to expel the concessionaire while relegating it to protracted litigation, potentially lasting over ten years. to obtain compensation for unamortized investments can create a power imbalance that may encourage corrupt practices.

5. The Instability of Utility Concessions

The issue also arises as to why authorizations for private companies to operate public utilities are subject to fixed terms of duration and to potential early termination or "redemption" by administrative decision based on public interest considerations.

It is often argued that terms of duration are necessary to allow for early termination if technological advances render the existing service obsolete, a scenario most notably seen in the historical shift from gas to electric lighting.[228] However, this hypothetical advantage must be weighed against a significant downside: shorter concession terms increase opportunities for favoritism and improper business deals by public officials, as each expiration creates a new occasion for negotiation and potential influence.

Defenders of term limits also claim they encourage service improvement and protect the public interest, particularly through provisions requiring concessionaires to transfer all assets to the State at the

227. CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 1965, *supra* note 91 (Arg.) (mandating a ten-year limit for the revocable domain, but allowing for special rules to be established for the public domain).

228. *See* MARIENHOFF, *supra* note 222, at 614-15.

end of the term, free of charge. But this apparent benefit masks two hidden costs. First is the so-called "Hong Kong syndrome," a well-documented decline in investment as the concession nears expiration.[229] Second, the transfer is not truly cost-free. Under the established principles of public utility concessions, concessionaires are entitled to recover their full investment along with a reasonable return. This means that rates must be structured to amortize all investments, including those that will not be fully amortized by the end of the concession. In effect, users fund the gift of those unamortized assets to the State, which in turn uses them to negotiate with the next concessionaire.[230]

Why not, then, adopt the U.S. model, in which utility licenses are issued with no fixed terms of duration, but remain conditional on ongoing compliance with performance and service improvement standards, adjusting rates as needed? Argentina has already implemented similar approaches: in the privatization of telephones, licenses were granted without a term of duration, while electricity concessions extended up to 95 years.[231]

As for the State's ability to reclaim operation of a public utility for reasons of convenience, a process known as "redemption", this authority is rooted in the French doctrine that operating a *service public* is an inherently administrative function. We have challenged that doctrine elsewhere, and it should have no place in Argentine law.[232] At a

229. *See* Zhiguo He et al., *How Does Political Uncertainty Affect the Valuation of Long-Term Property Rights? Lessons From Hong Kong*, PROMARKET (Sept. 3, 2020), https://www.promarket.org/2020/09/03/how-does-political-uncertainty-affect-the-valuation-of-long-term-property-rights-lessons-from-hong-kong/ (demonstrating that when properties are subject to political uncertainty, they are sold at a more significant discount than those with promised protection, and the discount is higher when people's confidence declines or where residents feel more uncertain of the city's future).

230. *See* Paolo Di Rosa, *The Recent Wave of Arbitrations against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 45-46 (Fall 2004).

231. *See* Decree No. 731/89, art. 2, Bs. As., Sept. 12, 1989, B.O. (Arg.); JOSÉ R. DROMI, REFORMA DEL ESTADO Y PRIVATIZACIONES [REFORM OF THE STATE AND PRIVATIZATIONS] (Astrea de A. y R. Depalma, eds., 3rd ed., 1991) (discussing telephone privatization); CARLOS MANUEL BASTOS & MANUEL ANGEL ABDALA, TRANSFORMACIÓN DEL SECTOR ELÉCTRICO ARGENTINO [TRANSFORMATION OF THE ARGENTINE ELECTRICITY SECTOR] 243-46 (1st ed., 1993).

232. *See* Héctor A. Mairal, *La ideología del Servicio Público* [*The Ideology of Public Service*], 14 REV. DE DERECHO ADMINISTRATIVO 359 (1993) (challenging the doctrine that public service is an inherently administrative function).

minimum, however, the same prepayment rule suggested in an earlier section should apply here.[233]

6. The Instability of Any Right Arising from an Administrative Decision

The issue described in the previous sections reflects a broader legal problem. Argentine law grants a general legal authorization to revoke, for reasons of public interest, any decision that confers rights on individuals, provided compensation is paid for the resulting harm.[234] This effectively functions as a standing declaration of "public utility" enabling the expropriation of a valid right through administrative decisions alone, without a legislative declaration of utility, raising serious constitutional concerns. For this reason, some legal systems, such as Spain's, reject the rule outright.[235]

This rule also raises questions regarding the revocability of permits, concessions, and licenses granted under legislation that neither explicitly provides for nor excludes this ground for termination. This is particularly relevant to offshore exploration permits issued pursuant to Hydrocarbons Law 17319 and licenses granted under Audiovisual Communication Services Law 26522, where revocation on grounds of public convenience remains uncertain.

Moreover, under certain rules[236] and according to certain legal scholars,[237] compensation for lost profits is not available in cases of administrative revocation, further weakening the position of affected individuals.

Addressing this issue requires legislative reform to establish the opposite principle: revocation of decisions that confer rights should be permitted only when authorized by a specific law, or when those rights

233. *See id.*

234. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 17.

235. GARCÍA DE ENTERRÍA ET AL., CURSO DE DERECHO ADMINISTRATIVO [Administrative Law Course] 716 (20th ed., 2022).

236. *Ley de Responsabilidad Estatal* [State Liability Law], Law No. 26944, art. 5, Aug. 7, 2014, [32943] B.O. (Arg.).

237. JULIO R. COMADIRA & LAURA MONTI, PROCEDIMIENTOS ADMINISTRATIVOS: LEY NACIONAL DE PROCEDIMIENTOS ADMINISTRATIVOS, ANOTADA Y COMENTADA [ADMINISTRATIVE PROCEDURES: NATIONAL LAW OF ADMINISTRATIVE PROCEDURES, ANNOTATED AND COMMENTATED] 390-96 (2002).

were expressly and validly granted on a revocable basis. In all other cases, compensation for lost profits should be the default rule.[238]

C. Legal Obstacles to the Abusive Exercise of Discretionary Powers

Certain legal mechanisms can serve as safeguards against the abusive exercise of discretionary powers. This section examines some of the most relevant tools available for that purpose.

1. Prior Controls

The two "readings" system,[239] requiring two successive approvals by the municipal legislature, is a well-established safeguard for granting exceptions to urban planning regulations and other general frameworks, as provided in paragraph 6 of Article 89 of the Constitution of the Autonomous City of Buenos Aires. Another common safeguard is the mandatory prior review by oversight bodies such as the Court of Accounts, established in various provincial constitutions, which may issue "observations" that suspend implementation of the decision in question.[240]

However, in practice, this type of control is not always effective. First, the possibility of overcoming the observation using an Executive decree, or even a decree of necessity and urgency (and thus with the force of law), allows the Executive to authorize non-compliance with the requirement or to justify such non-compliance *a posteriori*. In addition, partisan politics conspire against the independence of the control agency when the will of the Executive Branch supports a decision taken without meeting the legal requirements. In practice, when an effective sanction is absent, these decisions may be implemented, and any potential sanctions are postponed until those responsible are no longer in political office. The very proliferation of controls conspires

238. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art.17 (providing compensation for loss of profits in the case of revocation for unilateral decisions, but not for contracts).

239. Art. 89(6), Constitución de la Ciudad Autónoma de Bs. As. (Arg.).

240. Domingo Sesín, *Tribunal de Cuentas. Importancia y Alcance del Control Previo. Nuevas Perspectivas* [*Court of Auditors. Importance and Scope of Prior Control. New Perspectives*], *in* CONTROL DE LA ADMINISTRACIÓN PÚBLICA [CONTROL OF PUBLIC ADMINISTRATION] 289 RAP (2003); JAVIER I. BARRAZA ET AL., EL CONTROL DE LA ADMINISTRACIÓN PÚBLICA [THE CONTROL OF PUBLIC ADMINISTRATION] 97-98 (Abeledo-Perrot ed., 1995) (explaining the national regime moved to a system of subsequent control).

against their effectiveness: "In this country of thousands of controls, there is really no real control because there are too many." Although this remark was made about Italy, it aptly describes the Argentine context as well.[241]

2. Citizen Participation

In certain situations, initial control of activities directly related to an individual's interests may be appropriately delegated to those individuals. This is what happens in the Province of Mendoza with the control of the water regime,[242] following the ancient example of the Water Tribunal of Valencia, whose origins date back to the thirteenth century.[243] This mechanism should be extended to encompass all situations in which public and private interests align rather than conflict.

Administrative appeals provide an important mechanism for citizen participation in governance by allowing individuals to challenge government decisions. Although a detailed discussion of administrative procedure falls within the broader scope of Administrative Law, a few key principles merit attention. These procedures favor public engagement in the oversight of state action, as individuals may challenge both the legality and appropriateness of administrative decisions. Standing extends to those asserting collective or diffuse interests; proceedings are cost-free, in contrast to often-prohibitive judicial litigation; the procedure favors informalism to benefit private parties; it adheres to the principle of objective truth;[244] and it imposes a duty on the administration to issue a decision.[245]

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241. MONTANELLI & CERVI, *supra* note 44, at 308; s*ee also* VANNUCCI, *supra* note 65, at 98-99 (highlighting references from Italy and France).

242. Rodolfo Arland, *Cómo Controlar la Corrupción en la Prestación en un Servicio Público Vital* [*Controlling Corruption in the Provision of a Vital Public Service*], 8 REVISTA PROBIDAD 7 (May-June 2000).

243. *Id.*

244. *See generally* Corte Suprema de Justicia de la Nación (CSJN) [Supreme Court of Justice of the Nation], *Verdad Jurídica Objetiva [Objective Legal Truth]* April, 2024 (Arg.) (requiring the administration to make a decision based on the evidence and facts known by the administration, not only the facts and evidence presented).

245. AGUSTÍN GORDILLO, *Capitulo IX: El Procedimiento Administrativo. Concepto y Principios Generales* [*Chapter IX: The Administrative Procedure. Concept and General Principles*]*, in* TRATADO DE DERECHO ADMINISTRATIVO: LA DEFENSA DEL USUARIO Y DEL ADMINISTRADO [TREATISE ON ADMINISTRATIVE LAW: THE DEFENSE OF THE USER AND THE ADMINISTERED] 2 (8th ed., 2006).

Despite these characteristics, the system of administrative remedies is ineffective in practice. A significant structural flaw lies in the lack of independence of government attorneys, who typically belong to the same agency whose decision is under appeal. This institutional arrangement undermines impartial review. A more robust system would place these legal advisors within the Treasury Attorney's Office and protect them from arbitrary removal, ensuring greater independence.[246] The United States offers a model worth considering. "Administrative judges" are tasked with reviewing appeals of administrative decisions, but do not report to the same agency whose decisions they review. Instead, they operate under a different agency, preserving impartiality. An administrative appeal, in contrast to the prevailing practice in Argentina today, is a substantive process rather than a mere procedural formality. [247]

3. Transparency of Public Decisions

In a constitutional republic, the acts passed by or before the State, as well as the analysis and motives on which they are based, must, in principle, be public and, as such, accessible to all individuals. Many countries have enacted transparency laws that provide for this.[248] Argentine Law 27275, enacted in 2016, grants "every person" the right

246. *See* Julio R. Comadira, La Nacion (Jan, 9, 2005).

247. MAIRAL, *supra* note 106, at 424-25, 506.

248. *See* The Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250; The Freedom of Information Act, Pub. L. No. 110-175 (2007) (codified as amended at 5 U.S.C. § 552); Loi 78-754 du 17 juillet 1978 modifiant certaines dispositions du livre IX du code du travail relatives à la promotion individuelle, au congé de formation et à la rémunération des stagiaires de la formation professionnelle [Law 78-754 of July 17, 1978 amending certain provisions of Book IX of the Labour Code relating to individual promotion, training leave and the remuneration of vocational training trainees], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1978, p. 2857; Loi 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public [Law 79-587 of July 11, 1979 relating to the motivation of administrative acts and the improvement of relations between the administration and the public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 11, 1979 p. 1711; Loi 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations [Law 2000-321 of April 12, 2000 relating to the rights of citizens in their relations with administrations], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], April 12, 2000, p. 5646; art. 22-25; Decreto Legislativo 7 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi [Legislative Decree 7 New Rules Regarding Administrative Procedure and the Right of Access to Administrative Documents], n. 241, 7 August 1990 (It.); Law 19/2013, Transparency, Access to Public Information, and Good Governance (B.O.E. 2013, 295) (Spain); Freedom of Information Act 2000, c. 36, § 8, (Eng.).

to "request and receive public information."[249] The law applies to all the public sector and also to private entities that perform public functions or receive public funds, but in these last two cases only in respect of the exercise of such functions or the use of such funds.[250]

To enhance accountability, the use of secret laws should be limited to the very exceptional cases where national defense is at stake. They must not serve as vehicles for covert payments to high-ranking public officials. Moreover, given Argentina's adoption of the Inter-American Convention against Corruption, which, under Article 75(22) of the National Constitution, holds superior status to ordinary legislation, one may question whether payments authorized under secret laws remain legally valid. The Convention obliges "the applicability of measures that create, inter alia, systems for the declaration of the income of public officials."[251]

4. Deepening Judicial Control

Since this subject extends beyond the focus of this work, it is only noted that allowing judicial courts to thoroughly review administrative decisions, including areas traditionally viewed as outside judicial oversight, such as cost/benefit analysis, may serve as a mechanism to address corruption. In the United States, this function is bolstered by the *hard-look* doctrine, which fosters such control.[252]

The following paragraphs highlight specific areas where this in-depth analysis is particularly relevant.

First, from a procedural perspective, oral presentations at court-appointed hearings may serve as an effective mechanism. The authority of civil servants is moderated when they are aware that they must explain and orally justify their decisions before a judge, who can then compare their rationale with that of experts presented by private parties.

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249. *Ley de Derecho de Acceso a la Información Pública* [Right of Access to Public Information Law], Law No. 27275, Sept. 14, 2016, B.O. (Arg.).

250. *Id*. arts. 4, 7.

251. *Convención Interamericana contra la Corrupción* [Inter-American Convention Against Corruption Approval Law], *supra* note 45, art. 3(4); *see also* Gordillo, *supra* note 45 (arguing the Inter-American Convention is operative immediately).

252. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 346-92 (8th ed., 2017).

A particularly important area for judicial oversight concerns the severity of the *quantum* of administrative penalties. In practice, authorities have imposed very high penalties that are nothing more than a punishment against individuals who refuse to pay a bribe, penalties meant "*pour (dé)courager les autres*." Such abuses could be curtailed if courts consistently applied a reasonableness standard, such as by comparing the penalty with analogous sanctions in jurisdictions whose legal models Argentina has adopted. Unfortunately, Argentine jurisprudence follows a very restrictive standard of review, holding that "the graduation of penalties belongs, in principle, to the scope of the discretionary functions of the administrative authority (. . .) and they can only be reviewed by the courts in cases of manifest arbitrariness or illegality." However, there have been instances in which the courts have reduced the imposed penalties. [253]

Closely related is the recurrent misuse of punitive powers. Argentine authorities routinely wield the full arsenal of sanctions offered by the legal system to punish private actors who deviate from government policy, even if such deviation is perfectly lawful. Once again, we observe a serious violation of the rule of law by the State itself. The penalties imposed by each law should only be applied for the purposes pursued by the respective law, as expressly required by Article 7(*f)* of the Administrative Procedures Law, a rule that, as we have already noted, has been forgotten. It is deeply troubling that public officials threaten to apply the Antitrust Law against those who do not conform to official wishes on price increases, without any adverse legal comment or reaction from the press or the public. This silence enables the normalization of unlawful state coercion.

IV. SHORTCOMINGS IN PUBLIC PROCUREMENT

Public procurement has long been viewed as a high-risk area for corruption. The picaresque in this regard is universal: a Spanish novel character says, "Mr. Mayor, I sell you a batch of ten thousand lanterns at the price of fourteen thousand lanterns. A bargain."[254]

In Argentina, much like in Brazil, procurement scandals have gained significant public attention. We define "major corruption" as a

253. HIISA 308 Fallos at 618 (Arg.).

254. *See also* JOHN T. NOONAN JR., BRIBES 453, 561, 577, 602 (1984) (describing real-life examples from U.S. history).

counterpart to minor corruption, noting that both exist together except in tyrannical regimes, where leaders restrict corruption to their own ranks. When there is no fear of oversight, lower and mid-level officials emulate the example of their superiors. In turn, senior officials prefer not to stir up scandals by denouncing their subordinates, since those scandals might have repercussions against them.

In this section, we will identify some shortcomings in public procurement that conspire against the transparency of procedures, as well as against the efficiency of government procurement, and thus facilitate corruption. Precisely, the adoption of systems for the acquisition of goods and services by the State "ensure the publicity, fairness and efficiency of such systems."[255] This falls under one of the categories of preventive measures outlined in the Inter-American Convention against Corruption. [256]

Given the State's immense purchasing power, improving efficiency and correctness in the acquisition of goods and services must necessarily have a beneficial effect on the national economy, by rewarding efficient and compliant sectors. On the contrary, tolerating practices such as corruption leads to the paradox of the "prize going to the worst." Put beyond the economic stakes, transparent procurement would serve an even greater civic purpose; it would help rebuild public trust in democratic institutions and the political class.

A. Who Decides and Who Should Decide

The first question that arises is: why entrust the management and implementation of procurement to political officials who, as a rule, are not experts in business administration or management tasks? On the contrary, procurement should be entrusted to career civil servants, ideally within a specialized agency operating under the control of the Ministry of Finance. This institutional redesign offers several benefits.

First, separating procurement responsibilities from political office would enhance oversight. Currently, large contracts made by high-ranking state officials often escape scrutiny because it implies

255. *Convención Interamericana contra la Corrupción* [Inter-American Convention Against Corruption Approval Law], *supra* note 45, art. 2.

256. *Id.* art. 3(5).

criticizing the political power of the day.[257] Timely criticism may prevent possible irregularities, but in Argentina, criticism is usually made *after the fact*, and this is usually only when the individual responsible is no longer in a position of political power. This results in limited oversight, which manifests as revenge rather than effective control.[258] If the individual responsible for determining the contract award does not hold significant political influence, any associated criticism may occur promptly rather than at a later stage.

Second, such separation would help reduce public spending by eliminating or reducing those contracts designed to raise funds for the individual official or for his or her political party. Furthermore, the proposed separation would support the integrity of political parties by ensuring that holding an elective or political office does not automatically grant authority over public resource management. This measure aims to deter individuals whose primary motivation for entering politics is personal financial gain.

Finally, oversight would be improved by clearly defining the responsibilities of career civil servants in contracting decisions. This approach would prevent situations in which civil servants defer accountability to political officials who may only be formally involved in procurement procedures that have largely been determined by the former. As Nieto says, "[i]n most of the procedures, the political authorities limit themselves to approving and signing the proposals presented to them by the officials."[259] The dissociation between actual decision-making power and legal-political responsibility fosters corruption by concealing who truly holds authority. A system that brings this responsibility into the open would make misconduct more traceable and preventable.

Naturally, many key decisions will remain under the authority of legislators and government officials, including policy determination, selection of public works, and the establishment of general guidelines for awarding contracts, such as preferences for cooperatives, small and medium-sized enterprises, or domestically owned firms. However, the selection of contractors and the management of expenditures, along

257. Vincente López, Letter to the Editor, *A Letter from the Civil Association,* LA NACIÓN, Aug. 4, 2016.

258. *See* Grondona, *supra* note 6, at 61.

259. NIETO, *supra* note 4, at 134.

with any associated risks of impropriety, would be removed from political influence.

This institutional decoupling would be welcomed by conscientious political officials, who pursue office out of genuine civic duty and who find themselves burdened by administrative procurement responsibilities. Consider the case of a university dean who would prefer to focus on academic leadership rather than navigating procurement procedures that expose her to personal liability for technical missteps.[260]

Since the crises of 2000 and 2001, Argentina has introduced several transparency measures in public procurement.[261] Nonetheless, progress needs to be made. One promising proposal comes from Gordillo, who has proposed adopting in Argentina the system of *qui tam* actions of U.S. federal law.[262] Such actions can be brought by any individual against a contractor who is alleged to have submitted fraudulent claims against the Government. The Government may initiate and prosecute the action; however, should it choose not to proceed, the whistleblower is permitted to continue the action independently. Successful claimants receive between 15% and 25% of the proceeds of the lawsuit or settlement.[263] It is estimated that during the first few years since this procedure was adopted in 1986, the U.S. Government recovered $2.2 billion in civil fraud penalties, and approximately $300 million was collected by individual whistleblowers.[264] This proposal deserves to be considered in Argentina.

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260. *See* AGUSTÍN A. M. GARCÍA SANZ, CONTRATOS ADMINISTRATIVOS, LENGUAJE Y REALIDAD [ADMINISTRATIVE, CONTRACTS, LANGUAGE AND REALITY] 19 (2004) (explaining 95% of contracts in the University of Buenos Aires School of Medicine are made through direct contracting, and the national administration directly awards 50% of contracts). *But see* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/07/2000, "Servicios Empresarios Wallabies S.R.L. v. Provincia de Salta," Fallos (2000-323-1841) (Arg.) (the Supreme Court has rejected claims by contractors where contracts were awarded without prior competitive bidding).

261. Law No. 29412, June. 5, 2000, [CVIII] B.O. 1 (Arg.); Law No. 29712, Aug. 16, 2001, [CIX] B.O 1 (Arg.); Law No. 1023, Sep. 15, 2016, B.O. 1 (Arg.); *Ley de Ética en el Ejercicio de la Función Pública* [Ethics in Public Office Law], *supra* note 45.

262. AGUSTÍN GORDILLO, *El Informalismo y la Concurrencia en la Licitación Pública* (*Informalism and Attendance in Public Tendering*), *in* TRATADO DE DERECHO ADMINISTRATIVO Y OBRAS SELECTAS [TREATISE ON ADMINISTRATIVE LAW AND SELECTED WORKS] 729 (Dr. Mario Rejtman Farah ed., 1st ed., 2015).

263. *See* JOHN CIBINIC, JR. ET AL., FORMATION OF GOVERNMENT CONTRACTS 170-73 (3d ed., 1998).

264. DONALD P. ARNAVAS & WILLIAM J. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK 7-3 (2d ed., 1994).

B. The Stages of Contracting

Government procurement involves four main stages: public bidding, contract performance, payment, and final resolution of disputes. Each stage presents opportunities for corruption.

1. Public Bidding

Irregularities in public bidding often begin with the drafting of the specifications. Certain practices have become common and have therefore been expressly forbidden by the Government contracting regulations, such as requiring conditions that can only be met by a given bidder.[265]

But more subtle forms of discrimination exist. An example of this is establishing a deadline that, although compliant with legal minimum requirements, is in practice relatively brief for the submission of tenders. For long-term contracts involving significant business risk, such as public works concessions, the cost of preparing a bid may exceed one million dollars. Given this complexity, it is unlikely that a comprehensive bid can be prepared within the minimum period stipulated by current national regulations, 20 calendar days (or 40 calendar days for international bids). In one case, a call for bids for legal services was published at the end of December, just before the courts' summer recess, with the opening date set for early February. [266]

This practice can provide an advantage to those who receive advance notification of the upcoming call for tenders. In some cases, despite the complexity of the specifications, the time allowed for submitting offers has not been sufficient to complete the required formalities (notarial certifications, legalizations, translations, etc.) described in the tender documents.

The issue of excessive formalities should also be noted. For bidders who are not familiar with the process or who have not been informed in advance, this can discourage participation or increase the likelihood of procedural errors that may lead to challenges from other bidders. As Gordillo points out, "[b]ids submitted by foreign companies in national or international public tenders rarely comply exhaustively with all the formalities required by the specifications, to which,

265. Decree No. 1023/2001, art. 18 (Arg.).

266. This is based on the author's own experience.

however, they should conform in every detail according to the traditional doctrine."[267]

The solution to this problem is simple: require signature certifications and legalizations only from the winning bidder, after the award has been made. To safeguard against frivolous or bad-faith submissions, all bidders should provide a substantial, formally valid bid guarantee. This would serve to discourage irresponsible or fraudulent actions during the bidding process by requiring a formal bid guarantee of a specified amount from all bidders.

In practice, however, excessive formal requirements often serve a different purpose. To outsiders, they may signal diligence or rigor on the part of procurement officials. In reality, they often obscure questionable decisions behind a façade of bureaucratic thoroughness. These unnecessary formalities delay decisions that, if made impartially, could be resolved quickly. When decisions are not impartial, the delay becomes a tool for behind-the-scenes negotiation and opportunistic bargaining.

In one notable case involving the privatization of a major state-owned industrial enterprise, each bidding consortium was required to submit approximately one cubic meter of documentation—most of which proved unnecessary. Once the first submission box ("Envelope No. 1"), which contained all supporting documents along with the sealed offer ("Envelope No. 2"), was opened, it became clear that only two consortia had submitted bids. Both groups were composed of well-qualified companies. Recognizing the inefficiency of the process, the attorneys for both consortia jointly requested that the bidding authority expedite review of the eligibility documents so that the sealed bids could be opened the same day, rather than waiting several weeks, as required by the formal rules. The request was granted. Within two hours, counsel for both the government and the bidders reviewed the documentation and unanimously agreed that both consortia met the eligibility criteria. The offer envelopes were opened immediately, and the contract was awarded that same day, avoiding unnecessary delays that would have invited lobbying and undermined the transparency of the process. [268]

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267. GORDILLO, *supra* note 262, at 730.

268. *See generally id.* at 744-46 (discussing Envelope No. 1, excessive documentation, and the correction of formal defects in the YPF privatizations).

This example underscores a broader concern: bidding procedures warrant suspicion if they impose short deadlines for bid submissions but allow long delays for qualifying bidders (whether originally established or resulting from extensions later awarded). To address this improper practice, it is recommended to allow sufficient timeframes for offer submission while maintaining brief deadlines for the selection of bidders and evaluation of submissions.

Additional restrictive practices include imposing excessively stringent qualification criteria that effectively exclude firms outside the circle of usual bidders. Similarly, drafters often insert one-sided, "leonine" contractual clauses that discourage participation or compel bidders to inflate their prices, unless they are confident they will receive favorable treatment from the contracting agency.[269] In major tenders, the appropriate remedy is to require an independent assessment by a reputable consulting firm or investment bank to evaluate the likely impact of such requirements and clauses on the pool of potential bidders.

Discrimination also occurs when the contracting agency reserves options that can drastically alter the financial equilibrium of the contract, the exercise of which can only be trusted by "friends of the house". For example, an agency might retain the option to advance 50% of the contract price upfront or repeatedly renew a short-term contract despite obligating the contractor to assume major risks at the outset. These practices deter genuine competition and skew the playing field. When such issues are brought to light, the agency should cancel the tender and remove the responsible officials to safeguard the integrity of any subsequent bidding process.

In practice, high-level tenders are often decided not by the official formally authorized to issue the award but by the most senior official with a vested interest in the outcome. This interest may not be corrupt in the narrow sense, for instance, a political official might favor awarding a contract to a foreign company to strengthen diplomatic ties with that company's country, but it still undermines fairness. If a minister lacks a direct interest but a deputy minister or undersecretary does, the latter may exert decisive influence. This dynamic repeats itself down the administrative hierarchy. This happens because neutral officials typically provide cautious, balanced opinions highlighting both

269. *See id.* at 809-10.

advantages and drawbacks. By contrast, an official with a strong preference often issues forceful, unqualified recommendations. Between the neutral official's desire to preserve an image of impartiality and the interested official's determination to achieve a specific outcome, the latter's position frequently prevails, at the expense of fair and transparent decision-making.

The remedy against this involuntary delegation of decision-making power is to limit administrative discretion in both the selection of bidders and the award of contracts. For this reason, this goal is best achieved through objective, automatic criteria.[270] For bidder pre-qualification, pass/fail standards grounded in clear and realistic guidelines are preferable to scoring systems, which inevitably introduce a certain degree of arbitrariness. Similarly, awarding contracts based solely on price enhances transparency. When price is merely one of multiple factors, particularly when those factors are vague or subjective, such as "national interest," the process becomes opaque and vulnerable to manipulation. In cases where bidders offer to pay the government (as in privatizations or concessions), upfront payment should be required to deter bidders from proposing inflated figures they later attempt to renegotiate. This discourages strategic overbidding and ensures the award goes to the most credible, not the most deceptive, bidder.

For the same reason, it is advisable to avoid the system of awarding concessions based on a promise of greater investments or a low rate of return. Instead, tender specifications should establish mandatory minimum investment levels and a fixed, non-negotiable rate of return. The contract should then be awarded to the bidder willing to pay the highest amount for the right to operate under those conditions.[271] This approach reduces the likelihood of post-award renegotiation and associated risks of corruption. If we look back at Argentina's privatizations in the 1990s, we will see that those that followed these principles, such as those involving gas distribution and transportation,

270. *See* Garzón Valdéz, *supra* note 170, at 34 (arguing that if discretionary decisions allow for bribery, then mechanical decisions are better than discretionary).

271. Fred Aarons, *Renegotiation of Concessions in the Latin American Context*, *in* CAN PRIVATIZATION DELIVER? INFRASTRUCTURE FOR LATIN AMERICA 111, 111 (Federico Basañes et al. eds., 1999).

experienced few renegotiations disputes, in contrast with less disciplined processes.[272]

Many instances of actual or apparent corruption, which are also detrimental to the State's reputation, could be prevented by recognizing that government tendering procedures serve multiple public objectives, all of which require equal consideration. Both efficiency and transparency are essential and must not be compromised for one another. For example, if following a public bidding process, the contracting authority enters into direct negotiations with the two top-ranked bidders, it may indeed secure a lower price than initially proposed. However, such post-bid negotiations fundamentally distort the competitive process, undermine transparency, and invite favoritism. Similarly, once the bid submission period has closed, the agency cannot eliminate a costly requirement from the tender, regardless of whether all bidders consent, and even if doing so would avoid the delay of restarting the process. The reason is clear: the agency cannot know which potential bidders were deterred by the original requirement and chose not to participate. Removing the condition after the fact unfairly alters the playing field and defeats the purpose of open competition.

One possible reform would be to enact a law that would allow access to international public tenders only to companies from those countries whose domestic legislation considers it a crime to bribe a public official of a foreign country, such as the United States under the Foreign Corrupt Practices Act, or Spain with similar announced statutes.[273] This restriction would create a dual enforcement mechanism: if corruption arises, both the Argentine authorities and the foreign government could investigate, thereby increasing the likelihood of detection and prosecution. The added oversight would serve as a deterrent and reduce the incidence of bribery in international procurement. This initiative bears some resemblance to the signing of an honesty pact in which the government and participating firms agree, in advance, to denounce corrupt practices. Under such an agreement, firms commit to denouncing officials who demand bribes, and the Government guarantees that none of its officials will make such demands.[274]

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272. *See* David Stiggers, *Private Participation in Water and Wastewater Services in Trinidad and Tobago*, *in* CAN PRIVATIZATION DELIVER? INFRASTRUCTURE FOR LATIN AMERICA 245, 277-81 (Federico Basañes et al. eds., 1999).

273. AGUSTÍN GORDILLO, THE FUTURE OF LATIN AMERICA: CAN THE EU HELP? 117 (2003).

274. *See* Moreno Ocampo, *supra* note 8, at 53, 58-64.

Finally, one could envisage the creation of an independent public procurement office that would act as an "ombudsman" for public biddings, which would report to the Office of the Attorney General of the Treasury. This office would maintain delegations in each ministry and possess the authority to suspend a bidding process upon the identification of manifest defects reported by interested parties.[275]

2. Performance of the Contract

Contract execution often escapes public scrutiny, which tends to concentrate on the bidding stage. Once the competitors are defeated and resigned, the relationship is generally hidden from the eyes of strangers and develops between old acquaintances, the recurring contractor, and the same officials who have always been responsible for overseeing past contract performance.

It is a contradiction that is both illogical and problematic. Strict monitoring of the bidding process is ineffective if the contract's execution goes unchecked. Awarding a contract to the lowest bidder has little value if the delivered quantities or quality fall short and go unverified.[276] In the same way, the modifications to the contract, even those that may appear to be imposed unilaterally by the administration, distort the previous bidding process.[277]

At the performance stage, the issue of leonine clauses becomes particularly evident. Often justified by the need to sufficiently safeguard State interests, contractual provisions drafted by the administration may exhibit undue severity. Common features include stringent compliance deadlines, substantial penalties, and extensive powers granted to the State, enabling it to issue binding orders requiring

275. *See* Carlos Enrique Mamberti, *Contratación Pública y Corrupción*, *in* ADMINISTRACIÓN PÚBLICA & CORRUPCIÓN 257, 281-82 (2017) (proposing a special system of appeals to an administrative tribunal composed of specialized persons, operating at the pre-contractual stage); *see also* MAIRAL, *supra* note 106, at 858-60 (noting in France, there is a system of summary judicial remedies (*référés*), also for the pre-contractual stage).

276. Mirta Sotelo de Andreau, *Un nudo gordiao en la contratación pública: la corrupción* [*A Fat Knot in Public Procurement: Corruption*]*, in* EL DERECHO ADMINISTRATIVO DE LA EMERGENIA, IV [THE ADMINISTRATIVE LAW OF EMERGENCIES] 64-65 (2002).

277. *See* Beltrán Gambier, *El Principio de Igualdad en la Licitación Pública y la Potestad de Modificar Los Contratos Administrativos* (1998) (Arg.) (explaining the phenomenon of contractual modifications and their possible contradiction with the principle of equality that governs public bidding); Public Sector Contracts Law arts. 203-07 (B.O.E. 2017, 272) (Spain) (In Spain, the scope of modifications during the execution of the contract has been severely limited, whether they are unilaterally imposed by the administration or agreed with the contractor).

immediate action. The sole recourse for contractors is often a claim for compensation, which may be resolved only after a prolonged judicial process. Such terms frequently appear explicitly or are presumed by virtue of principles rooted in the administrative contract theory, as derived from French law. This tendency toward overreach may stem either from a well-intentioned, yet misguided, effort to protect public interests or, less commendably, a desire to maintain the contractor in a subordinate position, thus increasing their responsiveness to administrative directives. Clauses that offer extensive protection to the State, even when introduced for legitimate reasons, may not align with public interest. When contractors perceive that these clauses are enforced strictly, it can lead to increased costs in public procurement. In the United States, the issue is clearly stated, "The American taxpayer is not willing to pay the cost of a risk-free contract," states the Federal Acquisitions Regulation.[278] This pattern is often seen in Argentina. Policies that appear to serve the public interest on the surface frequently produce the opposite effect in practice. To address this disconnect, public administration must move beyond legal formalism. Training should include not only administrative law but also essential principles of business administration, enabling officials to make decisions that are both legally sound and economically rational.

In this respect, classical Argentine administrative law theory has contributed to placing government contractors in a position of legal defenselessness. The sheer enumeration of the State's prerogatives in public contracts, paired with significant limitations on contractors' rights, often deters private entities from doing business with the government. For example, contractors are barred from invoking the *exceptio non adimpleti contractus* (i.e. the defense based on the default of the other party to the contract), even when the State, chronically short on funds, fails to perform its payment obligations.[279]

Among the State's unilaterally exercisable powers are the authority to modify or terminate contracts for reasons of public interest without compensating for lost profits, the right to issue binding directives to the contractor, and the ability to enter the contractor's premises to

278. 48 C.F.R. § 1.102-2(c)(2) (2025).

279. *See* Héctor A. Mairal, *De la Peligrosidad o Onutilidad de una Teoría General del Contrato Administrativo* [*On the Dangerousness or Uselessness of a General Theory of the Administrative Contract*], 180 EL DERECHO 773 (1999) (Arg.); Héctor A. Mairal, *Government Contracts Under Argentine Law: A Comparative Law Overview*, 26 FORDHAM INT'L L.J. 1716, 1734 (2002).

conduct inspections without prior consent.[280] At the same time, contractors must continue performing even when the State defaults. They must also challenge any adverse administrative decision within a matter of days and litigate during the life of the contract, or risk forfeiting their rights altogether.[281]

The current regime is undeniably oppressive, yet it has proven ineffective in shielding the State from excessive or exaggerated claims. Paradoxically, the same legal framework that emphasizes transparency during the contracting phase also imposes disproportionate burdens on contractors during performance. This contradiction overlooks a critical reality: the same abuses and inefficiencies that transparency rules seek to prevent at the bidding stage can resurface during contract execution, precisely because contractors are placed in a position of legal vulnerability.

Argentine administrative law has deviated significantly from the French model on which it was originally based. In France, when the State unilaterally modifies or terminates a public contract for reasons of general interest, it must compensate the contractor for both actual damages and lost profits.[282] Furthermore, French courts exercise more robust judicial review over the existence and sufficiency of the public interest invoked to justify such actions. Finally, the French State is reliably solvent.

The Argentine State claims powers similar to those exercised by the French State, yet refuses to compensate contractors for lost profits. Its invocation of the public interest receives comparatively weaker judicial scrutiny, and in recent decades, the State has repeatedly cited financial hardship to compel contractors to accept government bonds in lieu of payment and to pressure other creditors into restructuring their claims.[283] As a result, the legal position of Argentine contractors is markedly more precarious than that of their French counterparts. The misconduct frequently observed in public contracting in Argentina

280. *See* Decree No. 1023/2001, arts. 12, 13 (Arg.).

281. *See Ley de Procedimiento Administrativo* [Administrative Procedure Law], *supra* note 107, art. 23, recently *amended by Ley de Bases y Puntos de Partida para la Libertad de los Argentinos* [Law of Bases and Starting Points for the Freedom of Argentines], *supra* note 1.

282. ANDRÉ DE LAUBADÈRE ET AL., TRAITE DES CONTRATS ADMINISTRATIFS [TREATISE ON ADMINISTRATIVE CONTRACTS], VOL. II, 407-08, 556, 669 (2d ed., 1984).

283. *See Consolidación de Deuda Pública* [Public Debt Consolidation Law], Law No. 23982, Aug. 23, 1991, B.O. (Arg.); *Emergencia Económico-Financiera* [Economic and Financial Emergency Law], Law No. 25344, Nov. 14, 2000, B.O. (Arg.).

does not stem from an overly permissive legal framework favoring contractors. Rather, it arises from systemic deficiencies that expose contractors to legal uncertainty and abuse. In an environment where legal protections are lacking and where bribery often becomes the only effective safeguard, contractors are disincentivized from limiting their claims to what the contract strictly entitles them to. If integrity is not rewarded, opportunism becomes rational. Eventually, the Argentine State must recognize that the short-term advantages gained from this imbalance come at a long-term cost. Establishing legal rules that offer contractors genuine protections ultimately serves the State's own interests—by encouraging fair competition, reducing corruption, and attracting qualified participants to public procurement.

From this same perspective, the legislative practice of authorizing the renegotiation of contracts executed by prior administrations[284] undermines the principle of the State's continuity over time. It conveys a damaging message: each new government honors only the agreements it has signed and regards those of its predecessors with suspicion. This approach erodes legal certainty and fosters institutional instability. Moreover, it creates broad opportunities for discretionary renegotiation, conditions that are particularly vulnerable to corruption.

Interestingly, the administration's regular suppliers continue to contract under these rules without hesitation. Those familiar with administrative practice understand the extent to which the State asserts its prerogatives over essential contractors, those it cannot afford to do without. The potential for abuse is seen as an acceptable tradeoff for maintaining a regime that limits competition from new bidders, which is precisely what this exorbitant public procurement system achieves. In the worst cases, suppliers resort to bribery to ensure fair, or even favorable, treatment from the officials overseeing contract performance. In Italy, for example, large public works that span several years are often sustained not by the low initial bid prices, but by the profits generated through successive cost increases during the execution of the project.[285]

Addressing this problem requires a multi-pronged approach. One solution is to conduct an impartial review of standard procurement

284. *See Ley de Reforma del Estado* [State Reform Law], Law No. 23696, Aug. 18, 1989, B.O. (Arg.); *Emergencia Económico-Financiera* [Economic and Financial Emergency Law], *supra* note 283.

285. MONTANELLI & CERVI, *supra* note 44, at 300.

specifications, comparing them with those used in countries with efficient public procurement systems and incorporating recommendations from international organizations. Another is to outsource contract compliance oversight to specialized firms.[286] This latter recommendation does not assume that private actors are inherently more ethical than public officials, but rather acknowledges a key structural difference: individuals and private firms face legal and financial sanctions that rarely apply to public agencies. For example, a major international auditing firm collapsed in the wake of the Enron scandal, an outcome that has never befallen Argentina's public oversight bodies, despite their longstanding failure to prevent widespread corruption. The reason is clear: the State does not sue itself, and the officials it could sue often lack the financial means to be held accountable. In contrast, private firms typically carry liability insurance and possess substantial assets that are vulnerable to enforcement and bankruptcy proceedings.

3. Payment

The stage of administrative activity most vulnerable to corruption is the disbursement of payments to contractors. As Spanish scholar Alejandro Nieto observes, "[t]hose who claim what is theirs have to suffer continuous extortion and shower money on intermediaries, commission agents and administrators who mock them again and again until they are completely robbed." [287] In Argentina's public culture (and to a large extent its private sector as well), the payment of a debt often reflects not the fulfillment of a legal obligation but a discretionary favor. This mindset has become so entrenched that prompt payment to certain contractors is frequently treated as presumptive evidence of corruption, particularly when contrasted with the State's general pattern of delayed payments. This situation stems largely from the absence of effective legal remedies for unpaid contractors. Those who are not paid by the State do not have adequate legal means to obtain their funds quickly, which in turn fosters opacity and corruption. The lack of recourse often leads to a lack of transparency. [288]

286. The author witnessed how, on one occasion, a similar proposal was unanimously rejected by both civil servants and the contractors: the latter also preferred their performance to be controlled by the administration itself rather than by internationally renowned consultants.

287. NIETO, *supra* note 4, at 9.

288. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 195 (Arg.) (demonstrating laws

Delayed payment also undermines fiscal accountability. When the State regularly defaults on its financial obligations, it distorts price signals in public procurement. Vendors justify inflated bids by factoring in the risk and cost of delayed payments, making it nearly impossible to assess whether the State pays fair market prices. Thus, payment delays not only injure individual contractors but also compromise the broader integrity of public spending.

The State often fails to comply even with final court judgments. Legal scholar Jorge Sáenz offers a telling account of this conduct:

> After many years, the State will then compensate its creditors with a ridiculously low interest rate and pay with devalued bonds, cynically affirming that it has 'honored' the court ruling. Of course, to obtain this result, the creditor must have had to hire another professional to obtain the satisfaction of his right, with the consequent costs, not to mention the unholy ones that he may have had to bear. Or it will have had to mobilize the files of cronyism or political contacts, corrupt methods that are popular in the administrative sphere, for the administration to comply with the requirement of 'expeditious treatment' which, sarcastically, is mentioned in Article 1 of the Law of Administrative Procedure as the guiding 'principle' of that procedure.[289]

To promote transparency, the State should implement mechanisms that ensure automatic payment once the fulfillment of the respective contractual provision has been certified, as well as the payment of invoices and judgments in strict chronological order. Electronic record-keeping systems that log payments would increase transparency in the treatment of contractors and enable effective oversight of payment sequencing. This mechanism has already begun[290] and should remain a top priority for public authorities.

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have attempted to protect the State from claims by individuals by prohibiting precautionary measures that affect State resources); *Consolidación de Deuda Pública* [Public Debt Consolidation Law], *supra* note 283, arts. 22, 165 (Arg.) (permitting delays of two to three years in the judicial enforcement of judgments); Pedro Aberastury, *Ejecución de Sentencias contra el Estado* [*Execution of Sentences against the State*], *in* DERECHO PROCESAL ADMINISTRATIVO [ADMINISTRATIVE PROCEDURAL LAW] 1699 (Jose Luis Depalma ed., 2004); *see also* MAIRAL, *supra* note 106, at 1039-43 (1st ed., 2021).

289. Jorge A. Sáenz, Introduction to Pedro Aberastury, *Ejecución de Sentencias contra el Estado* [*Execution of Sentences against the State*], *in* DERECHO PROCESAL ADMINISTRATIVO [ADMINISTRATIVE PROCEDURAL LAW], Prologue, (Jose Luis Depalma ed., 2004).

290. Decree No. 436/2000, art. 7(c) (Arg.); *see also* Decree No. 1023/2001, art. 9 (Arg.); Decree No. 1030/2001, art. 31-34 (Arg.) (promoting the use of computer technologies).

Additional or alternative mechanisms could further strengthen accountability. For example, in contracts financed by international loans, the lending institution or designated local bank should disburse payments directly to the contractor once performance is certified. This would bypass bureaucratic delays and reduce opportunities for corruption. Another option is to amend the Treasury's budget rules to prohibit the State from entering new contracts, except in essential cases, when existing contractual arrears surpass a predetermined threshold.[291] At the very least, why not allow contractors to suspend their work or supply when the State's arrears exceed a certain ceiling? This is the case in Spain when the State's arrears in a given contract reach four months.[292] In this way, the disorder or arbitrariness of the State in allocating budgetary resources would have repercussions on the civil servants, who are precisely the ones who can correct it, and not on the contractors, who are not responsible for this disorder and do not have the possibility of correcting it. Currently, contractors must continue to comply despite the State's arrears.[293] And the tax authorities want them to advance the rate of 21% value-added tax on the amounts owed by the State.[294] This unjust burden further distorts the relationship between public and private actors. Finally, why not allow expedited summary judgments against the State based on certifications of work completed?[295] Aren't *amparos* (summary actions) allowed against State measures of greater importance than the mere payment of a debt?

291. *See* Public Sector Contract Law art. 165 (B.O.E. 2017, 272) (Spain).

292. *See id.* at art. 198(5) (Spain) (providing contractors to suspend their work or supply when the State's arrears exceed a certain amount); Public Administration Contracts Act art 99(5) (B.O.E. 1995, 119) (Spain) (repealed and superseded by later legislation).

293. *See* MARIENHOFF, *supra* note 222, at 380 (explaining limits on contractor suspension rights); Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal [CFed.] [National Court of Appeals in Federal Administrative Litigation], 3/9/1982, "Rancevich c. Estado Nacional," El Derecho [ED] (1982-40-112) (Arg.) (allowing the contractor to suspend the performance of the contract only when the State's failure to comply with its own obligations reaches such an extreme that it is unable to comply with its own obligations); Decree 1023/2001, art. 13 (Arg.).

294. *See Ley de Impuesto al Valor Agregado* [Value Added Tax Law], Law No. 23349, art. 5(b), T.O. 1997 (Arg.); J.E. Tisocco, *Los deudores morosos e incobrables en el I.V.A.* [*Delinquent and Uncollectible Debtors in V.A.T.*], 78 PERIÓDICO ECONÓMICO TRIBUTARIO [ECONOMIC TAX NEWSPAPER] (1995) (Arg.).

295. *See, e.g.,* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Argentina], 15/05/1968, "Nación Argentina c. Finger, Rouede y Cía.," Fallos (1968-270-425) (Arg.) (demonstrating precedents do not admit summary collection proceedings against the Nation, based on the Law on Claims against the Nation, which establishes the declaratory nature of judgments issued against it).

Spain's 2017 Public Sector Contracts Law goes further; it authorizes precautionary measures compelling immediate payment of State debts.[296] Argentina should consider similar legal innovations to restore fairness and accountability in public contracting.

The issue of advance payments to contractors (which traditionally was 10% of the total amount of the contract, but recently has been higher) warrants separate attention.[297] Governments typically justify these advances to allow the initiation of the work. However, such payments often become vehicles for misappropriation. It is widely known, for example, that mayors commonly request their provincial (i.e. State) governments to advance them funds at the start of election cycles. These funds, ostensibly allocated for public works, frequently find their way back to political campaigns—minus the cost of signage announcing the upcoming project. To reduce such abuse, advance payments should be limited to the minimum amount strictly necessary to mobilize work. Independent professionals should audit the application of these funds. While money is inherently fungible, tighter oversight would at least make diversion more difficult and potentially reduce the scale of misuse.

Since 2002, the Argentine Government has increasingly interfered in the contracts granted to the private companies, many of which were created because of the privatization wave of the last decade of the 20th Century. This interference has taken two primary, non-transparent forms that facilitate corruption. First, although the government authorizes rate increases, private utility operators must deposit the additional revenue into public trusts. Government officials then manage these funds to award new contracts purportedly meant to satisfy the operator's investment obligations. This structure shifts control of the funds to political actors while shielding them from direct responsibility. Second, the government often mandates utility rates that fall below the actual cost of service. To fill the gap, it pays subsidies, usually insufficiently and selectively, to the operators. The courts should realize that, in Argentina, this system, although announced as a means to protect the user, constitutes an open invitation to corruption. As an alternative, where feasible, utilities should adopt a model of "cross

296. *See* Public Sector Contract Law art. 199 (Spain).

297. International Federation of Consulting Engineers (FIDIC), CONDITIONS OF CONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER 41 (1st ed., 1999).

subsidies," in which higher-income users pay slightly more to offset lower rates for economically vulnerable users. Unlike opaque state subsidies, this approach maintains market discipline, increases transparency, and reduces the opportunities for political manipulation.

4. Dispute Resolution

Currently, the State's mechanisms for resolving contractual disputes fail to satisfy both the State and the contractors. The State has become disillusioned with arbitral tribunals, going so far as to dissolve the long-standing Public Works Arbitral Tribunal in 2001, which had existed since 1947.[298] In high-profile cases, the state has frequently challenged arbitral awards before the Supreme Court with varying success.[299] Meanwhile, contractors lacking an arbitration clause must navigate an arduous and protracted dispute resolution process. This path typically includes at least six stages, namely: exhaustion of administrative remedies, lower court, court of appeals, Supreme Court review, and finally judgment enforcement, often triggering a renewed round of administrative and, eventually, judicial procedures. The full process can easily stretch over a decade, and sometimes as long as twenty years.[300] At some point during this legal odyssey, contractors may be compelled, under legislation consolidating public debt, to accept government bonds of questionable value instead of payment.[301]

Such extreme delays impair the ability to resolve disputes on the merits. By the time cases reach the evidentiary stage, public officials no longer recall the relevant facts, or claim not to, and the State's legal

298. Decree No. 11511/1947, Apr. 28, 1947, B.O. (Arg.), *repealed by*, Decree No. 1349/2001, Oct. 26, 2001, B.O. (Arg.).

299. *Compare* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice of the Nation], 05/11/2002, "Meller Comunicaciones S.A. U.T.E c. Empresa Nacional de Telecomunicaciones / demandas contra la Nación," L.L. (2002-B-906) (Arg.) (rejecting the State's challenge), *with* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice of the Nation], 01/06/2004, "José Cartellone Construcciones Civiles S.A. c. Hidroeléctrica Norpatagónica S.A. (HIDRONOR S.A.) / proceso de conocimiento," L.L. (2004-E-419) (Arg.) (admitting the State's challenge).

300. COMM. ON INT'L ECON. POL'Y & REFORM, REVISITING SOVEREIGN BANKRUPTCY 20 (Oct. 2013).

301. *See Consolidación de Deuda Pública* [Public Debt Consolidation Law], *supra* note 283; *Emergencia Económico-Financiera* [Economic and Financial Emergency Law], *supra* note 283 (explaining both bonds later defaulted; they were included among the public securities that the State offered to cancel at 25% of their face value); Resolución 158/2003 (Arg.) (deferred payments on public debt service contracted before December 31, 2001).

counsel must defend its position with limited information and scarce documentation. As a result, the State's defenses tend to be formalistic and often ineffective.

To address these shortcomings, reinstating arbitration would be a sensible reform. This is provided for in Law 27328 of 2016, governing public-private partnerships, which already provides for this possibility and additionally authorizes the creation of standing technical panels. These panels are constituted at the inception of the contract and remain in place throughout its performance.[302] As proposed in the first edition of this work and modeled on mechanisms developed by the International Chamber of Commerce,[303] these panels offer two key benefits: they secure contemporaneous input from government officials while still in office and provide timely relief for contractors facing abuse of authority. Reintroducing arbitration and adopting such mechanisms would enhance fairness, reduce delays, and restore credibility to the resolution of public contract disputes.

V. CONCLUSION

As this article has shown, Argentina's legislative and administrative frameworks—both in their drafting and implementation—often undermine efforts to combat corruption. Many of these rules, rather than curbing misconduct, unintentionally facilitate it: they create unnecessary or overly expansive opportunities for corrupt practices to flourish. Some function as breeding grounds for corruption; others promote it directly or fail to erect effective safeguards against it.

However, we recognize that honest public officials (who, in our opinion, are the majority) may view the proposals advanced here as misaligned with reality. These officials operate within a society that routinely resists legal compliance and, at its upper tiers, enjoys sophisticated counsel capable of outmaneuvering a State with limited institutional capacity and underfunded legal defenses.

From their perspective, overly broad regulations and severe sanctions may seem like necessary tools to correct this imbalance and

302. *Id.*; Decree 118/2017, art. 9(13), Feb. 17, 2017, B.O. (Arg.) (provision within Law No. 27328 establishing a method for calculating financial compensation in cases where a Public-Private Partnership contract is rescinded. The lack of practical validity of this law due to the problems of the national economy has so far prevented this mechanism from being tested in practice).

303. *See* International Chamber of Commerce, *Dispute Board of Rules* (Oct. 1, 2015) (explaining these rules went into effect on September 1, 2004, and the rules were updated in 2015 and 2018).

compel at least some level of legal adherence. Yet these same tools are frequently circumvented by those with proximity to political power or access to corrupt networks. As a result, the pursuit of compliance through increasingly complex rules often comes at the cost of expanding corruption's reach. When the State emulates European regulatory rigor without matching its institutional performance, it generates social, political, and economic consequences that exceed the scope of this article. Here, our focus is narrower: to highlight the civic and ethical costs of Argentina's current legal policy choices. In our view, those costs outweigh the marginal gains in legal compliance produced by these overreaching standards.

Therefore, if Argentina is to prioritize the fight against corruption and treat it as a true matter of genuine State policy, then every legislative or administrative initiative, especially those that require special authorizations, burdensome oversight mechanisms, or broad public interest tradeoffs, should also be evaluated from this point of view: Are the benefits of various kinds that the new law would entail greater than the social and political cost derived from the possible increase in corruption that it would produce? This is the critical question that Hernando de Soto proposes, and one that Argentine policymakers must begin to ask with urgency.[304]

Moving forward, Argentina should adopt a more proactive, institutionalized approach to anti-corruption policymaking. Just as an environmental impact study is required for certain infrastructure projects, policymakers should mandate a "moral impact study" before approving any bill or regulation that regulates an industry or sector of activity, or that otherwise creates opportunities for corruption.

This type of analysis could be entrusted to a permanent anti-corruption body, such as the Anti-Corruption Office.[305] Such a role would allow this Office to complement its function of investigation and

304. DE SOTO ET AL., *supra* note 32, at 309.

305. *See Ley de Ministerios* [Ministries Law], Law No. 25233, art. 13, Dec. 10, 1999, B.O. (Arg.) (creating the Anti-Corruption Office, which is responsible for the development and coordination of anti-corruption programs in the national public sector); José Massoni, *La Oficina Nacional Anticorrupción* [*The National Anti-Corruption Office*], *in* CONTROL DE LA ADMINISTRACIÓN PÚBLICA [CONTROL OF PUBLIC ADMINISTRATION] 681 (Revista Régimen de la Administración Pública, 2002).

denunciation, typically after the criminal act,[306] with preventive action and become less conflictive and more effective in combating the problem.[307] This preventive function, also contemplated by current legislation, is already entrusted to this agency, which has an area dedicated to improving regulations,[308] an objective related to the task we propose. Alternatively, or complementarily, non-governmental organizations with expertise in governance and integrity could undertake these assessments to ensure independence and pluralism in oversight.

The analysis of each proposed regulation could be based on a list of facets that favor corruption, many of which this article has examined. Each legislative or regulatory proposal could receive a score reflecting its exposure to corruption risks and the availability of alternative mechanisms that would achieve the same policy objectives more safely and transparently.

In time, such assessments would promote the development of regulations that balance public goals with administrative structures less conducive to corruption. Legislators, regulators, and the public would no longer be able to feign ignorance when enacting laws that expand the scope for corrupt behavior, especially when less risky alternatives exist and do not undermine governmental effectiveness. Argentina could even consider enacting a comprehensive Moralization Law, one that builds upon the principles outlined in this work, to formalize preventive mechanisms and reduce the structural opportunities for corruption. Given the overabundance of detection and punishment provisions in existing law, the time has come to shift focus toward systemic prevention and institutional design that disincentivizes misconduct at its root.

Of course, corruption does not reside solely within the State: as the saying goes, it takes two to tango. Historically, it was only the corrupt official who was punished and not the private individual who

306. *See Ley de Ministerios* [Ministries Law], *supra* note 305, art. 13 (Arg.); *see also Ley Orgánica del Ministerio Público* [Organic Law of the Public Ministry], Law No. 24946, arts. 26, 45, and 50, Mar. 30, 1998, B.O. (Arg.) (describing the functions of the Anti-Corruption Office).

307. *See* Decree 625/2000, Annex II, July 28, 2000, B.O. (Arg.) (stating that an objective of the Anti-Corruption Office is to "advise national public sector agencies to implement policies or programs for the prevention and fight against corruption."); *see* Decree 102/1999, arts. 2, 12, Dec. 23, 1999, B.O. (Arg.).

308. Nicolás Raigorodsky, *Políticas de prevención de la corrupción en el ámbito de los organismos de seguridad pública* [*Policies for the prevention of corruption in the field of public security agencies*], *in* ARGENTINE-BRITISH DIALOGUE – GOVERNABILITY AND DEMOCRACY 170-71 (2005).

bribed him.[309] Today, we recognize that both parties are complicit. The State inevitably reflects the character of the society that forms it, but the relationship is reciprocal. Society also takes shape in response to the incentives and messages it receives from the State. A corrupt State is, to a certain extent, the product of the corruption that exists within society, but at the same time the degree of corruption in society increases when its members notice not only that it helps to gain positions vis-à-vis the State and competitors, but that it is itself considered valuable conduct: "The internalization of a transgressive mentality is often experienced as a vernacular sign of cleverness and even personal brilliance, without noticing that such behavior degrades the individual who practices it and, at the same time, is socially projected as a community disvalue, which, in a perverse feedback, gravitates on the individual conscience, neutralizing or deforming it."[310] In such a society, nothing is more disheartening to an honest person, a civil servant, an investigator, a businessman, than to see others succeed through incorrect and illegal maneuvers. The message that the State sends to the population is deleterious: the system favors the unscrupulous over the principled.

Dismissing this reality by claiming that "it has always been this way" offers no solace, as there are popular songs that have pointed it out for more than half a century. Those who have lived through Argentina's recent history know that the phenomenon has only deepened over time. Nor is it any consolation to argue that corrupt officials represent only a small fraction of public servants. For example, a card club in which there is only one member suspected of cheating may continue to exist, but it only takes ten percent of the members to engage in that behavior for honest members to become discouraged and leave. In the same way, even a minority of corrupt actors can destroy institutional trust. Corruption often functions as a magnet, drawing high-stakes matters toward the very officials least suited to handle them. This phenomenon creates a kind of "forum of attraction" for corruption, in which power and influence disproportionately accumulate around those suspected of unethical behavior. Honest magistrates and public officials, by contrast, typically make no distinction regarding the importance of the cases they handle. In some instances, they may

309. JOHN T. NOONAN JR., BRIBES 690 (1984).

310. Comadira, *supra* note 45, at 496-97.

even prefer lower-profile matters, which pose lower reputational risk and are less likely to invite political pressure or unfounded accusations. Dishonest actors, on the other hand, actively seek out high-impact cases precisely because these offer the greatest opportunities for personal gain. As a result, it is not uncommon to find those with the most troubling reputations assigned to, or maneuvering into, positions of heightened authority over sensitive or valuable decisions.

Each person, depending on their political position, will identify those whom they will blame (in whose alleged misconduct they will believe without the need for proof, describing it as *symptomatic*) and those whom they will excuse (whose faults they will consider unproven or, in any case, *anecdotal*). But as a society, it is time to reverse these partisan reflexes. Reversing the spread of corruption must become a national priority and not merely the banner of a particular political party, but as a State policy common to all parties.

Improving the ethical conduct of the State would have direct, positive effects on public life. It would initiate a virtuous cycle in which incentives and rewards promote excellence and integrity rather than opportunism and dishonesty. However, ethical exhortations to civil servants are not enough to achieve this. Stalin is credited to have said that with a dozen St. Francis of Assisi, the Russian Revolution would not have happened.[311] The solutions that require a change in human nature are the province of religions and not of the social sciences. It's human nature to follow incentives. If we change the system, most people will adjust to the new system, not because they have morally transformed, but because they will adapt to the new stimuli.

We therefore conclude that it is not enough to combat the effects of corruption; we must target its structural causes. Among these, the legal causes are the most amenable to reform. The legal corrections proposed in this article will not eliminate corruption, but they would reduce the scope of corrupt behavior, particularly in situations where misconduct arises in the absence of correct mechanisms for resolving conflicts with the State or where poorly designed laws create unnecessary opportunities for abuse. We use the term "unnecessary" advisedly. There will always be official favors to grant, and restrictive rules whose non-application will produce benefits to those who irregularly obtain that favor or dispensation. The task is to determine which legal

311. John Piper, Lenin, Francis, and Paul (Dec. 22, 1981) (quoting Stalin), https://www.desiringgod.org/articles/lenin-francis-and-paul.

rules, whether granting privileges or imposing restrictions, should be removed as unworthy because they either fail to deliver meaningful public benefits (even if they do for the officials) or, more critically, because their negative social consequences outweigh the positive ones. Eliminating such provisions will simultaneously reduce the opportunities for corruption to flourish.

Public pressure to combat corruption will also increase. The spread of what we have called *petty corruption* turns many otherwise honest persons into accomplices, often unwittingly, of corrupt individuals and officials. While public denunciations of corruption have become commonplace, many still regard it as a necessary evil: a pragmatic, if regrettable, cost of operating within an imperfect society. Calls for the eradication of corruption will continue to be loud but not always sincere, as long as corruption persists as a system that large segments of the population must navigate to access basic services or protections. Meaningful reform will only become possible when individuals are no longer compelled to rely on corrupt practices as a matter of survival or efficiency. Moreover, eliminating the widespread petty corruption described at the beginning of this article would allow the concentration of anticorruption efforts on combating grand (i.e., high-level) corruption. At present, anticorruption mechanisms risk being diluted in their effectiveness by the sheer breadth of lower-level infractions currently under their purview.

Addressing the regulatory abuses outlined in this article will not compromise the public interest. On the contrary, more advanced legal systems can efficiently manage the general interest without the need for such abuses. Yet many civil servants are tempted to have a legal regime that allows them to always be right in the face of individuals, imposing their will on them unappealingly in reality, even if not in theory. The most extreme cases of this dynamic have been the subject of intense social criticism and legal repudiation, so well-known that these abusive policing practices have earned a popular nickname: "trigger-happy" enforcement. While administrative and tax laws may not result in physical violence, many of their provisions function as figurative "triggers," enabling bloodless but coercive actions that place individuals at the mercy of unchecked authority.[312] Such rules erode

312. *Ley Modificatoria del Código Fiscal* [Law Modifying the Tax Code] Law No. 13405, art. 13, Dec. 30, 2005, B.O. (B.A. Prov., Arg.); Letter to the Buenos Aires Legislature, Fundamentos de la Ley 13.405 [Fundamentals of Law 13.405], (Dec. 13, 2005) (Arg.) (amending the provincial

the dignity of individuals, corrode the integrity of public officials and the State itself, and end up encouraging corruption. Many of the most harmful examples are among those that we have examined in these pages.

Let us recall Lord Acton's enduring phrase: "*Absolute power corrupts absolutely.*"[313] The traditional norms of the rule of law not only safeguard the freedom of citizens but also serve to combat corruption. But the theoretical validity of these rules is not enough. These principles must be enforced in practice and must not be undermined by lower-ranking regulations or administrative distortions. In Argentina, there is a stark contrast between the constitutional principles–enshrined for more than a century and a half to shield individuals from governmental abuse—and the lived reality, in which poorly crafted regulations and misguided theories of administrative law routinely expose citizens to arbitrary and unchecked power. Juan Bautista Alberdi foresaw this danger when he warned that "Administrative Law must not be a fallacious means of eliminating or scuttling constitutional freedoms and guarantees."[314]

It is, of course, necessary to improve oversight mechanisms and ensure their effectiveness by making the oversight bodies independent from those whom they control (e.g., in the case of the legal advisers of each national department who should report to the office of the Attorney of the Treasury instead of the respective minister or secretary). Moreover, their findings should carry a suspensive effect, halting implementation of contested actions until proper review occurs. However, even these institutional safeguards, although necessary, are insufficient on their own.

"Corruption accompanies power like shadow accompanies the body," Alejandro Nieto observed.[315] It is, therefore, illusory to believe that Argentina can meaningfully reduce corruption without placing limits on the power currently exercised by public officials in the name of the State. There will be those who, while deploring corruption,

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tax code to allow tax authorities to attach private bank accounts, real estate, and other assets by their own decision).

313. Letter from Lord Acton to Archbishop Creighton (Apr. 5, 1887) https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#.

314. Juan Bautista Alberdi, *Bases y Puntos de Partida para la organización política de la República Argentina* [*Bases and starting points for the political organization of the Argentine Republic*], *in* ACADEMIA NACIONAL DE CIENCIAS MORALES Y POLÍTICAS, 54-55 (2002).

315. NIETO, *supra* note 4, at 7.

believe that limiting the power of the State would undermine the best defense that the State makes of the public interests, and that the foreign examples of limitation of public powers that we have cited are inapplicable in our reality. Those who take this position will be reduced to advocating the improvement of the ethical quality of our rulers as the only solution to the problem, because continuing to add more sanctions and controls to those that already exist would have a diminishing return. These appeals to the morality of our rulers will be even more naïve than some of the solutions we propose in this article. Instead, let us not rely only on ethical invocations; let us limit the power of the Argentine State vis-à-vis its citizens, and we will see how corruption declines.