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## *Ekmekdjian v. Sofovich*: The Argentine Supreme Court Limits Freedom of the Press

Leon Patricios

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# **EKMEKDJIAN v. SOFOVICH: THE ARGENTINE SUPREME COURT LIMITS FREEDOM OF THE PRESS WITH A SELF-EXECUTING RIGHT OF REPLY**

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## I. INTRODUCTION

Miguel Angel Ekmekdjian, a legal scholar<sup>1</sup> outraged by the

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1. Ekmekdjian has written extensively on Argentine constitutional law. See, e.g., MIGUEL ANGEL EKMEKDJIAN, *ANÁLISIS PEDAGÓGICO DE LA CONSTITUCIÓN NACIONAL* (2d ed. 1988); Miguel Angel Ekmekdjian, *Los casos "Birt" y "Sanchez Abelenda," a propósito de la integración humanitaria latinoamericana*, 1990-B REVISTA JURÍDICA ARGENTINA—LA LEY [L.L.] 1024; Miguel Angel Ekmekdjian, *El derecho a la dignidad y la libertad de prensa*, 1986-C L.L. 981; Miguel Angel Ekmekdjian, *Derecho a la información*, 1985-E L.L. 699.

Also, he has sued unsuccessfully to enforce the right of reply in the Argentine Supreme Court. See Judgment of Dec. 1, 1988 (Ekmekdjian v. Neustadt), Corte Suprema de Justicia de la Nación [CSJN], 311 Fallos 2497 (Arg.).

broadcast of offensive phrases<sup>2</sup> about the relationship between Jesus Christ and the Virgin Mary, filed suit in an Argentine civil court to enforce his right of reply contained in article 14 of the American Convention on Human Rights.<sup>3</sup> After the trial and appellate courts denied him relief, Ekmekdjian filed for extraordinary relief in the Argentine Supreme Court.<sup>4</sup> He argued that Argentina's ratification of the American Convention on Human Rights and the language of article 14 created a self-executing right of reply within Argentina.<sup>5</sup> The Argentine Supreme Court reversed,<sup>6</sup> holding that persons whose fundamental beliefs have been offended by the media have the right to reply.<sup>7</sup> Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), Corte Suprema de Justicia de la Nación [CSJN], — Fallos — (Arg.).

This Case Comment begins with a description of the current conditions of the Argentine political climate, press, and judiciary. Within this context, the Case Comment analyzes the case of *Ekmekdjian v. Sofovich*. The Case Comment argues that, while the Argentine Supreme Court incorporated a provision of a human rights treaty into national law and possibly signalled an aggressive approach to implementing such treaties, analysis of the current Argentine political climate, the Argentine judicial system, and the opinion of *Ekmekdjian v. Sofovich* reveals a Court unlikely to assume the role of a human rights implementer.

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2. The Court never quoted the offensive phrases, probably because Ekmekdjian did not state them in his complaint. Ekmekdjian protested the "expression of a series of offensive phrases that respect and good taste prevent me from repeating, about the relationship of Jesus Christ and the Virgin Mary . . ." Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 1 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part) (Arg.) (author's translation). In Spanish: "*se expresó con una serie de frases agraviantes que el respeto y el buen gusto me impiden repetir, en relación a Nuestro Señor Jesucristo y a su Santísima Madre . . .*"

3. American Convention on Human Rights, Nov. 22, 1969, art. 14, O.A.S. Treaty Series No. 36, OEA/ser. L/V/II.23 doc. rev.2 entered into force July 18, 1978 [hereinafter American Convention]; *Ekmekdjian v. Sofovich*, para. 2 (majority opinion). Article 14(1) of the American Convention on Human Rights provides that "[a]nyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communication's outlet, under such conditions as the law may establish." American Convention, *supra*, art. 14(1).

4. *Ekmekdjian v. Sofovich*, para. 1 (majority opinion).

5. *Id.* at para. 2.

6. *Id.* at para. 32.

7. *Id.* at paras. 23, 27. The Court not only held article 14 to be self-executing, but also adopted an extraordinarily broad view of standing. *Id.* at paras. 24-26. For a discussion of the Court's opinion on standing see *infra* text accompanying notes 97-115.

## II. BACKGROUND

### A. *The Political Climate*

Argentina elected Carlos Saul Menem as President on May 14, 1989.<sup>8</sup> While Argentina's collapsing economy was his first priority,<sup>9</sup> Menem's inaugural address hinted that he would pardon convicted human rights violators.<sup>10</sup> Prosecutors, judges, and Supreme Court Justices appointed by his predecessor, President Alfonsín, had joined in jailing those responsible for earlier violations of human rights.<sup>11</sup> Menem not merely pardoned the violators,<sup>12</sup> but systematically ousted the prosecutors, judges, and justices who had confronted them.<sup>13</sup>

On September 15, 1989, President Menem began a campaign to pack the Argentine Supreme Court by asking Congress to expand the Court from five to nine Justices.<sup>14</sup> The bill passed both Houses of Congress and became law on April 5, 1990.<sup>15</sup> One commentator reported, "[i]n 1990, [Menem] essentially put the Argentine Supreme Court in his pocket when he packed it with new appointees loyal to him. He sneaked this measure through the Congress one night by using busboys and clerks to fill the seats for a quorum."<sup>16</sup>

8. Shirley Christian, *Peronist is Victor by a Wide Margin in Argentine Vote*, N.Y. TIMES, May 15, 1989, at A1. Menem, scheduled to take office in December of 1989, replaced President Alfonsín in July of 1989 upon Alfonsín's resignation. James F. Smith, *Argentina's Alfonsín Hands over the Reins to Menem*, L.A. TIMES, July 9, 1989, at 6.

9. Smith, *supra* note 8, at 6; Christian, *supra* note 8, at A9.

10. Smith, *supra* note 8, at 6.

11. Aryeh Neier, *Menem's Pardons and Purges*, N.Y. TIMES, Oct. 2, 1989, at A19.

12. Eric Ehrmann, *Carlos Menem Blinks*, CHRISTIAN SCI. MONITOR, Jan. 11, 1991, at 18; see also 200 *Military Officers are Pardoned in Argentina*, N.Y. TIMES, Oct. 8, 1989, at A12.

13. Ehrmann, *supra* note 12, at 18; see also Alfonsín, *infra* note 16, at 50. One commentator reported that "protesters were especially angered by the President's attempt to purge the Federal judiciary of zealous human-rights defenders appointed by Alfonsín." Arthur M. Shapiro, *Menem's Dangerous Maneuvers; Revising Peronism; Carlos Saul Menem*, NEW LEADER, Nov. 13, 1989, available in LEXIS, Nexis Library, Newldr File. Menem also forced resignations of the Solicitor General and the Buenos Aires District Attorney, while pressuring several Supreme Court Justices to leave. *Id.*

14. Jose Licinio Scelzi, *La Acordada 44 y la independencia del Poder Judicial*, 1991-C L.L. 741, 741.

15. Ley 23.774, 50-B ANALES DE LEGISLACIÓN ARGENTINA [A.D.L.A.] 1256-57 (1990); see also, Cesar Domingo Yañez, *La nueva Corte Suprema de Justicia de la Nación. Ley 23.774*, 1990-C L.L. 841. For a constitutional analysis see, Ival Rocca & Rodolfo B. Rotman, *Jueces de la Corte*, 1989-E L.L. 1244.

16. Horacio Verbitsky, *Argentina Retreats from Democracy*, N.Y. TIMES, Oct. 3, 1992, at A23; see also Raúl Ricardo Alfonsín, *The Function of Judicial Power During the Transition*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 41 (Irwin

The current Court's nine Justices include only three appointed prior to 1990.<sup>17</sup> Former President Alfonsín has responded that "[t]he present government, opting for immediate gains rather than long-term progress, saw fit to alter summarily the number of Supreme Court judges, and at the same time explicitly mandate that the Judiciary mirror its political goals."<sup>18</sup> Indeed, the goals of the executive and judicial branches, since 1990, have seemed dangerously inter-twined.

In the first major case following Menem's election, the new Supreme Court deliberated 15 minutes before vacating a lower court's injunction that froze Menem's proposed sale of the national airline.<sup>19</sup> In another case, the Supreme Court reversed a lower court's judgment that had dismissed Menem's libel suit against a reporter, ruling that Menem could proceed with the suit.<sup>20</sup> One commentator reports, "[a]t one time or another, most of the six [Justices appointed by Menem] have been spotted by local reporters emerging from furtive meetings with the president."<sup>21</sup>

Menem continues to obstruct the formation of an independent judiciary. On September 8, 1992, he fired his justice minister, who

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P. Stotzky ed., forthcoming 1993), in which Alfonsín states that, "[s]ince the present government's summary increase in the number of Supreme Court judges, it has consolidated an unwavering majority of the Court, influenced other judges, pressured magistrates to force their resignation, and removed officials, including those appointed with the Senate's consent." *Id.* at 50.

17. See JONATHAN M. MILLER, ET AL., *CONSTITUCIÓN Y DERECHOS HUMANOS 1797* (1991). Menem appointed six new Justices in 1990, four after the Court's expansion and two from vacancies created by retirement. *Id.* at 1797.

18. Alfonsín, *supra* note 16, at 49. Arguably, the conservative Reagan and Bush administrations packed the United States Supreme Court, since "there is now a very conservative Court that reaches consistently conservative decisions." Erwin Chemerínsky, *Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 45 (1989). The difference between the packing of the two Supreme Courts is simply one of time. Menem decreed an immediate change, while Reagan and Bush gradually replaced the Justices. Note also that Menem's sweeping economic reforms, combined with a court-packing plan, parallel American history during the Great Depression when President Roosevelt introduced his New Deal legislation with a proposed court-packing plan. For a discussion of Roosevelt's plan see William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

19. Peter Ford, *Menem Uses Court to Sell State Airline*, THE INDEP., July 18, 1990, available in LEXIS, Nexis Library, Indpnt File. Ford reports that, "[o]f the five signatories of the controversial judgment, four were newly appointed judges. Among them was Rodolfo Barra, who drew particular fire because . . . he helped to draft the very tender document whose legality he was called upon to judge last week." *Id.*

20. *In the Americas*, MIAMI HERALD, Jan. 7, 1992, at A10; *Argentine President's Libel Suit Dismissed*, CHI. TRIB., May 28, 1991, at C17.

21. Carl Honore, *Argentine High Court's Prestige Tattered by Scandals*, MIAMI HERALD, Oct. 11, 1993, at A9.

had objected to Menem's interference with the appointment of 235 new judges.<sup>22</sup>

### B. *The Argentine Press*

Menem has recently complemented his attack on the judiciary with an assault on the press. The Argentine press had raised his ire by implicating his cabinet, his advisors, and members of his family in government corruption.<sup>23</sup> President Menem's spokesperson insisted, "[t]he press [could] criticize the president, and he [was] totally prepared to defend freedom of the press . . . ."<sup>24</sup>

Yet, rather than defend freedom of the press, President Menem has responded by creating obstacles and promoting animosity. Beyond calling reporters journalistic delinquents,<sup>25</sup> he has withdrawn government advertising (which comprised 25% of one newspaper's revenues)<sup>26</sup> and sued nearly one hundred journalists for publishing unflattering information about officials.<sup>27</sup> Recently, unidentified assailants attacked several reporters covering a Menem speech.<sup>28</sup> While beating another reporter, assailants advised the victim to stop reporting that government officials were hiring thugs.<sup>29</sup> A commentator remarked, "[t]hough no one is accusing the Menem Government of orchestrating the attacks, it is being blamed for creating an environment hostile to the press."<sup>30</sup>

Menem's antagonism toward the press sharply contrasts with several articles of the Argentine Constitution that protect freedom

22. John Barham, *Argentine Justice Minister Dismissed: Hopes for Independent Legal System Set Back*, FIN. TIMES, Sept. 9, 1992, at 5.

23. Ian Katz, *Argentine Press Gaining Vigor*, MIAMI HERALD, May 7, 1992, at A24; Verbitsky, *supra* note 16, at A23.

24. Katz, *supra* note 23, at A24.

25. *Id.*

26. *Id.*

27. Verbitsky, *supra* note 16, at A23; see also Katz, *supra* note 23, at A24.

28. See Nathaniel C. Nash, *Reporters Facing Peril in Argentina*, N.Y. TIMES, Sept. 1, 1993, at A7; *Start of a 'Dirty War'?*, MIAMI HERALD, Sept. 17, 1993, at A22.

29. Nash, *supra* note 28; see also, Carl Honore, *Assaults on Argentine Journalists Rise as Vote Nears*, MIAMI HERALD, Sept. 23, 1993, at A6 (reporting that polls show that three out of four of all Argentines believe Menem's Peronist party is behind a scare campaign).

30. Nash, *supra* note 28. Actually, a local television crew filmed one of the assailants embracing Menem at an official ceremony. *Id.*; see also *Free Markets, but What about Free Speech—Charges of Ideological Persecution Persist*, in COHA'S WASHINGTON REPORT ON THE HEMISPHERE, Sept. 3, 1993, at 5 [hereinafter *Free Markets*] (reporting that Argentina's press union charged authorities with deliberately ignoring death threats against a journalist and implicated government officials in 38% of all aggressive acts committed against journalists since 1990).

of the press.<sup>31</sup> The Argentine Supreme Court has announced that, "among the liberties preserved by the national constitution, . . . freedom of the press is one of those that possesses the most importance; without its appropriate regard there would exist merely a purely nominal or deteriorating democracy."<sup>32</sup>

### C. *The Argentine Legal Structure*

To examine the confines in which the Argentine Supreme Court must act as an implementer of human rights, this note presents a brief synopsis of the Argentine legal structure.<sup>33</sup>

The Argentine Constitution of 1853 is modeled after the United States Constitution.<sup>34</sup> It provides for executive, legislative, and judicial branches which have powers similar to their United States counterparts.<sup>35</sup> The President negotiates and signs treaties<sup>36</sup> which Congress ratifies by passing a law approving the treaty.<sup>37</sup> Treaties, along with the Constitution and laws passed by Congress, are the supreme law of the land under the Argentine Constitution.<sup>38</sup>

The Argentine federal judiciary is also modeled after the United States' federal system.<sup>39</sup> Argentine federal court structure and jurisdiction are similar to the format created by Article III of

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31. Article 32 of the Argentine Constitution states that "[t]he Federal Congress shall not pass any laws that restrict the liberty of the press or that establish federal jurisdiction over it." CONST. ARG. art. 32. Article 14 states, in part, that "[a]ll inhabitants of the Nation enjoy the . . . right[ ] . . . of publishing their ideas through the press without previous censorship . . . ." *Id.* art. 14.

32. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 6 (majority opinion) (Arg.) (citing 248 Fallos 291 (Arg.)) (author's translation). In Spanish: "En tal sentido, esta Corte ha dicho que entre las libertades que la Constitución Nacional consagra, la de la prensa es una de las que poseen mayor entidad, al extremo de que sin su debido resguardo existiría tan solo una democracia desmedrada ó puramente nominal."

33. For an in depth analysis see, Alberto F. Garay, *Federalism, The Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161 (1991). See generally GERMAN J. BIDART CAMPOS, *TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO* (1989); MIGUEL ANGEL EKMEDJIAN, *ANÁLISIS PEDAGÓGICO DE LA CONSTITUCIÓN NACIONAL* (2d ed. 1988).

34. Garay, *supra* note 33, at 162.

35. CONST. ARG. arts. 36-73 (legislative powers), arts. 74-93 (executive powers), arts. 100-03 (judicial powers).

36. *Id.* art. 86, § 14.

37. *Id.* art. 67, § 19.

38. *Id.* art. 31.

39. Garay, *supra* note 33, at 172-201.

the United States Constitution.<sup>40</sup> Last, like the United States Supreme Court, the Argentine Supreme Court has declared itself the final interpreter of the Constitution.<sup>41</sup>

However, Argentina has not absorbed all of the United States' legal tradition. This is because the Spanish civil law influence has hindered adoption of a strict principle of *stare decisis*.<sup>42</sup> Civil law countries follow the doctrine of *jurisprudencia* in which prior decisions are considered persuasive, rather than binding, authority.<sup>43</sup> That does not mean that prior decisions are of no importance. The doctrine of *jurisprudencia* recognizes the stability of treating a line of analogous cases similarly so that, "[a]s a general principle, once the Argentine Supreme Court has decided a case, both its holding and its *ratio decidendi* should be applied to subsequent cases."<sup>44</sup> The Argentine Supreme Court has referred explicitly to

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40. Article 94 of the Argentine Constitution provides that "[t]he Judicial Power of the Nation shall be vested in a Supreme Court of Justice and in such lower courts as the Congress may establish in the territory of the nation." CONST. ARG. art. 94. Article 100 of the Argentine Constitution is also similar to Article III of the United States Constitution. It provides that:

The Supreme Court of Justice and the lower courts of the Nation have jurisdiction over and decide all cases dealing with matters governed by the Constitution and the laws of the Nation, . . . and by treaties with foreign nations; all suits concerning ambassadors, public ministers, and foreign consuls; of cases in admiralty and maritime jurisdiction; of suits in which the Nation is a party; of suits between two or more Provinces; between one Province and the citizens of another; between the citizens of different Provinces; and between one Province and its citizens against a foreign State or citizen.

*Id.* art. 100.

41. Judgment of Oct. 18, 1864, CSJN, 1 Fallos 345, 347 (Arg.); see also Garay, *supra* note 33, at 197-98 (arguing that the absence of an Argentine provision similar to the 11th Amendment to the United States Constitution strengthens the Argentine Supreme Court's position as the final interpreter).

42. Garay, *supra* note 33, at 185-201. The United States Supreme Court has also rejected a strict principle of *stare decisis*. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992) (outlining reasons why "the rule of *stare decisis* is not an 'inexorable command'"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557-58 (1985) (accusing the majority of ignoring the principle of *stare decisis*) (Powell, J., dissenting). Therefore, any United States influence will no longer compel strict application of *stare decisis*.

43. Garay, *supra* note 33, at 186 (citing JORGE J. LLAMBIAS, 1 *TRATADO DE DERECHO CIVIL: PARTE GENERAL* 79-80 (10th ed.)); see also, Alejandro M. Garro, *Eficacia y Autoridad del Precedente Constitucional en América Latina: Las Lecciones del Derecho Comparado*, 20 U. MIAMI INTER-AM. L. REV. 473, 474 (1989) (asserting that "[i]n order to give firmness and certainty to the constitutional values enunciated by the highest courts, it is necessary to establish a solid and compulsory body of case-law or *jurisprudencia*, formed by a continuous link of cases") (translation of editor). For a discussion of the civil law system see generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985).

44. Garay, *supra* note 33, at 190-91.



stare decisis and its binding effect.<sup>45</sup> Thus, under either the doctrine of *jurisprudencia* or stare decisis, the Argentine Court, though not strictly bound by its prior decisions, should not disregard precedent without some rational basis.<sup>46</sup>

The binding effect of Supreme Court opinions on lower courts is even less definite.<sup>47</sup> Despite the Supreme Court's position as the final arbiter of the Constitution, lower courts have departed from precedent by providing justifiable legal grounds.<sup>48</sup> The doctrine of justifiable legal grounds places all federal courts at the same level because a lower court can disregard precedent, effectively overruling it, by providing justifiable legal grounds. This practice is clearly different from the technique of factually distinguishing precedent because ignoring precedent on new legal grounds overrules the precedent, while factually distinguishing precedent helps define its scope.

This is not to say that the Supreme Court is bound by precedent while the lower courts are not. Rather, the concepts of *jurisprudencia* and stare decisis compel all courts to follow precedent unless there is some rational basis for differing.<sup>49</sup> Garay argues that "[i]f an inferior court can unabashedly question a Supreme Court decision, the idea of binding precedent becomes academic . . . [since] [n]ew arguments and support are easy to articulate."<sup>50</sup>

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45. Judgment of May 15, 1939 (Baretta v. Provincia de Cordoba), CSJN, 183 Fallos 409 (Arg.).

46. However, Garay observes that, "[i]n cases where the Argentine Supreme Court has decided to move away from controlling precedents, the apparent ground for such deviations was either a new majority on the Court or changing conditions (e.g., legal, social, political, and economic)." Garay, *supra* note 33, at 188. Since both conditions have occurred in Argentina, *supra* text accompanying notes 8-22, one could have predicted the Court's disregard for precedent in *Ekmekdjian v. Sofovich*. See *infra* text accompanying notes 131-55 for a discussion of the Court's treatment of precedent.

47. Garay concludes that "(1) [l]ower courts are always bound by en banc court of appeals decisions involving questions of ordinary or non-federal law [the civil codes]; (2) however, lower court judges are not bound by Supreme [C]ourt precedents on questions of constitutional law." Garay, *supra* note 33, at 200. Garay bases his conclusions on cases that bind lower courts to higher courts' interpretations of the civil codes, and cases that allow lower courts to ignore constitutional interpretations if the parties present new and justifiable legal grounds for overruling the precedent. *Id.* at 193-200.

48. See Judgment of July 4, 1985 (Cerámica San Lorenzo), CSJN, 307 Fallos 1094, 1096-97 (Arg.).

49. See *supra* notes 43-48 and accompanying text.

50. Garay, *supra* note 33, at 197.

### D. *The Right of Reply Within Argentina*

The Argentine Constitution does not have a provision granting a right of reply.<sup>51</sup> The Argentine Supreme Court has held that Article 33 of the Constitution, which declares that the rights listed in the Constitution are not all-encompassing, implies no right of reply.<sup>52</sup> The constitutions of most of Argentina's provinces provide for a right of reply,<sup>53</sup> but seem to grant standing only to those persons named or alluded to by the media.<sup>54</sup>

However, Argentina does have other remedies for those claiming to be slandered by the press. In both civil and penal proceedings, the judge can order the publication of the court's judgment if doing so would adequately restore the damaged reputations.<sup>55</sup> These actions, though, might require an entire trial and the judge's cooperation. The right of reply, in most cases, requires a summary proceeding that operates without the help of the judiciary, unless

51. See generally Julio Cesar Rivera, *El derecho de replica, rectificación o respuesta*, 1985-E L.L. 786, 791-92.

52. Judgment of Dec. 1, 1988 (Abelenda v. Ediciones de la Urraca, S.A.), CSJN, 311 Fallos 2553, 2562-64 (Arg.); Judgment of Dec. 1, 1988 (Ekmekdjian v. Neustadt), CSJN, 311 Fallos 2497, 2498-99 (Arg.).

53. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 14 (majority opinion), para. 23 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part) (Arg.) (citing Constitución de Santiago del Estero art. 20; Constitución de Neuquen art. 22; Constitución de La Pampa art. 8; Constitución de Formosa art. 12; Constitución de Chubut art. 15; Constitución de San Luis art. 21; Constitución de Jujuy art. 23; Constitución de Salta art. 23; Constitución de San Juan art. 25; Constitución de Tierra del Fuego Antártida e Islas del Atlántico Sur art. 47; Constitución de Catamarca art. 15; Constitución de Río Negro art. 27; Constitución de Santa Cruz art. 15; Constitución de Santa Fe art. 11). The Constitution of Buenos Aires does not have a right of reply provision. Several of the provincial provisions are reprinted in Rivera, *supra* note 51, at 790-91.

54. See Liliana Albornoz, *El derecho a réplica, rectificación o respuesta y la jerarquización del hombre*, 1989-A L.L. 964, 972-74; Rivera, *supra* note 51, at 790-91. Although the provincial constitutions seem to grant standing only to those persons named or alluded to by the media, their language, like that of article 14, is subject to varied interpretation. Albornoz illustrates the problems created by the use of various words in the right of reply provisions. For instance, Salta's provision, arguably the most indefinite, allows replies to offensive or inaccurate information, but requires the suffering of an injury. Albornoz, *supra* at 972. Albornoz argues that the phrase "the suffering of an injury" is imprecise and could include a quantitatively small injury at a future time. *Id.* Note that the American Convention's provision uses the same language. American Convention, *supra* note 3, art. 14(1).

Other provincial constitutions are more definite. The phrase "personal reputation" in San Luis's constitution suggests that only damage to an individual's public image allows a right of reply. Rivera, *supra* note 51, at 790-91. Similarly, La Carta's provision requires a personal attack on one's reputation, honor, or dignity. *Id.*

55. Cód. Civ. art. 1071 bis (Arg.); Cód. PEN. art. 114 (Arg.); see also Judgment of Dec. 11, 1972 (Valdez), CSJN, 284 Fallos 345 (Arg.).

the media is uncooperative.<sup>56</sup>

Arguably, prosecuting a slanderer or obtaining a right of reply could require similar proceedings. A slander suit, like the right of reply, will avoid the courts if the parties settle. Similarly, the right of reply, like most slander suits, might require a full trial if the media refuses to grant a reply. Under both causes of action, the parties may or may not need judicial intervention. Therefore, the critical factor in choosing the right of reply is likely not its summary procedure. Rather, the right of reply's most attractive feature is its reply remedy—a remedy which is not automatic in slander.<sup>57</sup>

This automatic remedy can be found in article 14(1) of the American Convention on Human Rights.<sup>58</sup> Article 14(1) provides that "[a]nyone injured by inaccurate or offensive statements or ideas<sup>59</sup> disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communication's outlet, under such conditions as the law may establish."<sup>60</sup>

Argentina ratified the American Convention on Human Rights with one reservation and three interpretive statements on September 5, 1984.<sup>61</sup> The Convention obliges the State Parties "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [recognized by the Convention]."<sup>62</sup> The Convention also demands that "the States Parties undertake

56. See generally Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 31 (majority opinion) (Arg.).

57. See Cód. Civ. art. 1071 bis (Arg.).

58. See American Convention, *supra* note 3.

59. "The word 'ideas' does not appear in the Spanish, Portuguese or French texts . . . which refer to 'informaciones inexactas ó agravantes,' 'informações inexatas ou ofensivas' and to 'données inexactes ou des imputations diffamatoires.'" Advisory Opinion OC-7/85, Enforceability of the Right to Reply or Correction (arts. 14(1) and (2) American Convention on Human Rights), Inter-Am. Ct. H.R., para. 20 n.\* (1986) [hereinafter Advisory Opinion].

60. The remainder of article 14 reads:

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and every television company, shall have a person responsible who is not protected by immunities or special privileges.

American Convention, *supra* note 3.

61. The National Congress approved the treaty with Ley 23.054, 44-B A.D.L.A. 1250 (1984). Argentina filed the instruments of ratification, a reservation to art. 21, and interpretive statements to art. 5(3), art. 7(7) and art. 10 on September 5, 1984. See Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser. L.V/II.71 doc. 6 rev.1 (1987).

62. American Convention, *supra* note 3, art. 1(1).

to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."<sup>63</sup>

Ekmekdjian's strategy was to argue that article 14 of the American Convention on Human Rights was Argentine law under Articles 31 and 33 of the Constitution.<sup>64</sup> Specifically, Ekmekdjian argued that, because Article 31 provided that treaties were the supreme law of the land,<sup>65</sup> and Article 33 stated that the rights listed in the constitution were not all-encompassing,<sup>66</sup> Argentine law should contain a right of reply.<sup>67</sup>

### III. THE CASE OF *EKMEKDJIAN V. SOFOVICH*

*Ekmekdjian v. Sofovich* presented two key issues:<sup>68</sup> (1) whether article 14 was self-executing,<sup>69</sup> and (2) whether Ekmekdjian had standing to reply to the television program's comments on the relationship between Jesus and the Virgin Mary.<sup>70</sup>

The Justices divided into four factions. A majority of five<sup>71</sup> voted affirmatively on both issues.<sup>72</sup> A second group of three<sup>73</sup>

63. *Id.* art. 2.

64. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos — para. 2 (majority opinion) (Arg.).

65. *See supra* note 38 and accompanying text.

66. *See supra* note 52 and accompanying text.

67. *Ekmekdjian v. Sofovich*, para. 2 (majority opinion).

68. A procedural issue arose concerning whether the lower courts' denial of the right of reply of article 14 of the American Convention presented a case sufficiently important for the Court to hear, since appellate review in the Argentine Supreme Court was discretionary. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 4 (majority opinion) (Arg.); *see also* Ley 23.774, 50-B A.D.L.A. 1256-57, art. 2 (Arg.) (1990) (modifying arts. 280 and 285 of the Código Procesal Civil y Commercial to provide for discretion). All nine Justices agreed that the case presented a federal question of sufficient importance to hear Ekmekdjian's petition for extraordinary relief. *Ekmekdjian v. Sofovich*, para. 4 (majority opinion), para. 3 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part), para. 4 (Levene, CJ., concurring in part and dissenting in part), para. 3 (Belluscio, J., dissenting). The Justices agreed that the Court should hear the case because the lower courts' decisions possibly infringed on rights granted by clauses of the Constitution and the American Convention on Human Rights. *Id.*

69. *Ekmekdjian v. Sofovich*, para. 3 (majority opinion).

70. *Id.* at para. 7.

71. JJ. Martínez, Fayt, Barra, Boggiano, and Nazareno.

72. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 32 (majority opinion) (Arg.).

73. Petracchi, O'Connor, JJ, and Levene, CJ. Justices Petracchi and O'Connor joined in an opinion, *id.* at para. 1 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part) while Chief Justice Levene wrote his own. *Id.* at para. 1. (Levene, CJ., concurring in

agreed that article 14 was self-executing,<sup>74</sup> but took the position that Ekmekdjian did not have standing.<sup>75</sup> One Justice disagreed with the majority's holdings on both issues.<sup>76</sup>

### A. *A Self-Executing Right of Reply?*

The first issue was whether the right of reply contained in article 14 of the American Convention on Human Rights was self-executing.<sup>77</sup> Eight of the nine Justices concurred in the conclusion that it was self-executing.<sup>78</sup> The Court reasoned that implementing legislation was not necessary because an international human rights treaty's provisions were operative when (1) the description of the right was sufficiently concrete, and (2) the right could operate without implementing legislation.<sup>79</sup>

The Court began by affirming the supremacy of international treaties over Argentine law. It noted that the Vienna Convention

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part and dissenting in part).

74. *Id.* at paras. 17, 19, 24 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part). *Id.* at para. 8 (Levene, CJ., concurring in part and dissenting in part).

75. *Id.* at para. 25 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part). *Id.* at paras. 21, 22 (Levene, CJ., concurring in part and dissenting in part).

76. *Id.* at paras. 4-6 (Belluscio, J., dissenting).

77. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 1 (majority opinion) (Arg.).

78. *Id.* at para. 32 (majority opinion), paras. 17, 19, 24 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part), para. 8 (Levene, CJ., concurring in part and dissenting in part).

79. *Id.* at para. 20 (majority opinion). Justices Petracchi and O'Connor's separate opinion concurred with the majority. They stressed that article 14 of the American Convention is part of a human rights treaty, which is inherently different from other treaties because it deals with the relationship between people and their states rather than the reciprocal equilibrium between states. *Id.* at para. 14 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part).

Chief Justice Levene's separate opinion also concurred on the right of reply's self-executing nature. *Id.* at paras. 8, 9 (Levene, CJ., concurring in part and dissenting in part). He discussed the power of the Argentine Supreme Court to exercise its quasi-legislative function in setting the parameters of the right of reply. *Id.* at paras. 10, 14. The Supreme Court of Argentina, according to the Chief Justice, had an implicit power emanating from the Constitution to recognize the existence of human rights and to establish their operation. *Id.* at para. 12. The failure of the national legislature to enact any legislation could not impede judicial compliance with its mandate of protecting human rights. *Id.* at para. 15. Therefore, the absence of implementing legislation was irrelevant, and the judiciary had the power to implement the right of reply itself. *Id.*

Justice Belluscio, in dissent, cited Argentine Supreme Court cases, *see* discussion *infra* text accompanying notes 124-130, which held the right of reply inoperative without enabling legislation. *Id.* at para. 4 (Belluscio, J., dissenting). He also asserted that the Court's actions were the equivalent of legislating—an unconstitutional violation of separation of powers. *Id.* at paras. 5, 6.

on the Law of Treaties<sup>80</sup> altered the internal legal system of Argentina by establishing the supremacy of international law over any conflicts with Argentine law.<sup>81</sup> Therefore, an operative treaty obligation, where it conflicted with Argentine law, would prevail. A conflict could occur, according to the Court, either because established internal laws were contrary to a treaty provision or because establishing measures fulfilling a treaty obligation were omitted.<sup>82</sup> In Ekmekdjian's case, the federal government of Argentina had not installed article 14(1) of the American Convention into Argentine law.<sup>83</sup>

In deciding that article 14(1) was self-executing and thus operative, the Court relied heavily on the grammar of article 14(1) and on an advisory opinion of the Inter-American Court of Human Rights.<sup>84</sup> The Argentine Court asserted that a textual interpretation of the phrase "has the right to reply" in article 14(1) "clear[ed] the doubt over the existence of the alleged self-execution."<sup>85</sup> The phrasing of the right of reply in the present tense, according to the Court, suggested an operative provision that did not require implementing legislation.

However, article 14(1) ends with the phrase "under such conditions as the law may establish."<sup>86</sup> The Argentine Supreme Court referred to an advisory opinion of the Inter-American Court of Human Rights to determine the meaning of this phrase.<sup>87</sup> The Inter-American Court stated "the Convention guarantee[d] a right of reply or correction"<sup>88</sup> and interpreted the last phrase of article 14(1) to refer to procedural matters such as the space allowed in

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80. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. Argentina's Congress approved the Convention in 1972. Ley 19.865, 32-D A.D.L.A. 6412 (1972).

81. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, paras. 17-19 (majority opinion) (Arg.).

82. *Id.* at para. 16. The Inter-American Court of Human Rights has stated that, "[i]f for any reason, therefore, the right of reply or correction could not be exercised by 'anyone' who is subject to the jurisdiction of a State Party . . ." that country would be in violation of the Convention. Advisory Opinion, *supra* note 59, at para. 28.

83. Ekmekdjian v. Sofovich, at para. 19 (majority opinion).

84. Advisory Opinion, *supra* note 59.

85. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 20 (majority opinion) (Arg.). The Court stated: "*La interpretación textual según la cuál toda persona 'tiene derecho a . . . ' despeja la duda sobre la existencia de la alegada operatividad.*"

86. See American Convention, *supra* note 3, art. 14(1).

87. Ekmekdjian v. Sofovich, at para. 21 (majority opinion).

88. Advisory Opinion, *supra* note 59, at para. 26.

the reply, permissible words, and when the response must be published.<sup>89</sup> Relying on the advisory opinion, the Argentine Supreme Court determined that the ending phrase of article 14(1) did not require legislative action to create the right of reply, but merely allowed each countries' internal legal system the opportunity to determine its parameters.<sup>90</sup>

The Argentine Supreme Court concluded that the legislature was not the only body that could determine the right of reply's parameters.<sup>91</sup> The Court cited the American Convention for the notion that "States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or *other measures* as may be necessary to give effect to those rights or freedoms."<sup>92</sup> The Court pointed to the phrase "other measures" as authorizing constitutional bodies other than the legislature to define parameters to the right of reply.<sup>93</sup> The Inter-American Court on Human Rights Advisory Opinion also supported the view that the word "measures" referred to the domestic legal system in general, and not just the legislature.<sup>94</sup>

The Argentine Court bolstered its conclusion that the legislature was not the only body that could determine the right of reply's parameters with a plain reading of article 14(1). The Court cited the clause "under such conditions as the *law* may establish"<sup>95</sup> and concluded that the Argentine Supreme Court makes law in Argentina.<sup>96</sup> Therefore the Supreme Court could determine the parameters of the right of reply in order to stop Argentina's violation of the Convention.

### *B. Standing if the Press Offends One's Beliefs?*

The second issue was whether Ekmekdjian had standing to reply to the television program's comments on the relationship between Jesus and the Virgin Mary.<sup>97</sup> The Justices, voting 5:4,

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89. *Id.* at para. 27.

90. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 22 (majority opinion) (Arg.).

91. *Id.* at para. 22.

92. American Convention, *supra* note 3, art. 2 (emphasis added).

93. Ekmekdjian v. Sofovich, at para. 22 (majority opinion).

94. Advisory Opinion, *supra* note 59, at para. 33.

95. American Convention, *supra* note 3, art. 14(1) (emphasis added).

96. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 22 (majority opinion) (Arg.).

97. *Id.* at para. 24 (majority opinion) (Arg.).

granted Ekmekdjian standing.<sup>98</sup> The majority distinguished *Ekmekdjian v. Neustadt*<sup>99</sup> where Ekmekdjian attempted to reply to a statement of former President Frondizi.<sup>100</sup> The majority reasoned that, in the instant case, Ekmekdjian was a fervent catholic whose convictions on the virtue of Jesus and the Virgin Mary were extremely hurt.<sup>101</sup> The majority explained that issues of public opinion do not grant standing "except with an offense of religious sentiments of a person who has been affected most profoundly."<sup>102</sup> Reinforcing this offended-religious-belief test, the majority referred to foreign media guidelines on religion.<sup>103</sup> It asserted that the College of Television of the United States, the National Association of Radiobroadcasters, and the Filmmakers Association of America granted special protection to religion by publishing codes of behavior barring certain attacks on religion.<sup>104</sup>

The four Justices who dissented on this issue were concerned that a broad right of reply would destroy freedom of the press.<sup>105</sup> Thus, Justices Petracchi and O'Conner wished to limit the right of reply to those persons that the press directly described or alluded to in an inaccurate and offensive manner.<sup>106</sup> Their opinion relied on the laws of other countries which only allowed rights of reply to persons named or alluded to in the press.<sup>107</sup> The Justices also

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98. *Id.* at para. 24 (majority opinion), paras. 25, 26 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part), paras. 21, 22 (Levene, CJ., concurring in part and dissenting in part) (author's translation), paras. 5, 6 (Belluscio, J., dissenting). In Spanish, "*de una persona que se ha sentido mortificada en sus sentimientos más profundos por expresiones insitadamente agraviantes para su sistema de creencias . . .*" *Id.* at para. 25 (majority opinion).

99. Judgment of Dec. 1, 1988 (*Ekmekdjian v. Neustadt*), CSJN, 311 Fallos 2497 (Arg.).

100. *Id.* at 2497.

101. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 26 (majority opinion) (Arg.) (author's translation). In Spanish, "*en su carácter de católico militante, se sintió agraviado en lo profundo de su personalidad y de sus convicciones por las expresiones vertidas sobre Jesucristo y la Virgen María . . .*"

102. *Id.* (author's translation). In Spanish: "*No se trata pues de una cuestión vinculada con juicios públicos sobre materias controvertibles propias de las opiniones, sino de la ofensa a los sentimientos religiosos de una persona que afectan lo más profundo de su personalidad por su conexión con su sistema de creencias.*"

103. *Id.* at para. 30 (majority opinion).

104. *Id.*

105. *Id.* at para. 25 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part), paras. 21, 22 (Levene, CJ., concurring in part and dissenting in part), para. 6 (Belluscio, J., dissenting).

106. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 24 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part) (Arg.).

107. *Id.* at paras. 21, 22 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part) (citing France, Germany, Italy, Spain, Peru, Brazil, and Uruguay).



listed the rights of reply available in the provinces of Argentina that required the person to be named by the press.<sup>108</sup> They explained that the majority's opinion would allow a person to use the right of reply to refute attacks on one's beliefs by merely proving one's adherence to those beliefs.<sup>109</sup> They worried that the majority's opinion would cause an inevitable loss to the press because the press would have to publish every adverse opinion, resulting "in the absurd position that the media will only be able to publish freely when they have the financial capability to pay for all eventual contradictions."<sup>110</sup> Justices Petracchi and O'Conner closed with a critique: "Economically impracticable, and logically incoherent, this important holding clearly reduces the right of freedom of expression. The reality refutes utopia: there will not be many voices, there will be silence."<sup>111</sup>

Chief Justice Levene also disagreed with the majority's broad definition of standing. He explained that injuries to ideological, political, and religious beliefs were personal rather than societal and so escaped the protection of the right of reply.<sup>112</sup> The majority's broad language "would grant the right of reply . . . such an extensive interpretation as to make it judicially undefinable so that it would collide with the hallowed principles of freedom of the press found in our National Constitution."<sup>113</sup>

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108. *Id.* at para. 23 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part). The province of Buenos Aires does not provide for a right of reply, which was one reason Ekmekdjian did not sue in the provincial court. The other was that he would not have standing under the laws of the provinces. See *supra* note 54 and accompanying text.

109. *Id.* at para. 25 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part).

110. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 25 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part) (Arg.) (author's translation). In Spanish: "*Por el contrario, si se obligara a los medios a costear toda opinión adversa a lo que had difundido, se llegaría rápidamente al absurdo de que sólo sería posible expresarse libremente a través de aquéllos, a condición de poder financiar igual posibilidad a todos los eventuales contradictores.*"

111. *Id.* at para. 25 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part) (author's translation). In Spanish: "*Impracticable económicamente e incoherente del punto de vista lógico, tal pretensión importaría un claro menoscabo al derecho de libre expresión. La realidad desmentiría a la utopía: no habría muchas voces, habría silencio.*"

112. *Id.* at para. 21 (Levene, CJ., concurring in part and dissenting in part).

113. *Id.* at para. 22 (Levene, CJ., concurring in part and dissenting in part) (author's translation). In Spanish: "*Que a la luz de lo expuesto ha de concluirse en la falta de legitimación del actor para interponer la presente demanda, pues extender el derecho de réplica al campo de las opiniones, críticas o ideas, importaría una interpretación extensiva del mismo que lo haría jurídicamente indefinible y colisionaría con los principios sobre libertad de prensa consagrados en nuestra Constitución Nacional.*"

Justice Belluscio dissented from the view that article 14 was self-executing, thus not reaching the issue of standing.<sup>114</sup> However, he still commented that the majority's broad interpretation of standing was unfounded and would destroy freedom of the press.<sup>115</sup>

#### IV. ANALYSIS

##### A. *The Background*

An analysis of the current Argentine political climate, the Argentine judicial system, and the Court's opinion in *Ekmekdjian v. Sofovich* reveals a Court whose role as a human rights implementer is unlikely.

As previously discussed, President Menem not only pardoned many human rights violators, but also ousted those responsible for the violators' prosecution.<sup>116</sup> His agenda is not one of human rights improvement, but economics.<sup>117</sup> The Argentine Supreme Court, whose support was crucial to the violators' prosecution,<sup>118</sup> is now a completely different court, packed by Menem. Recent Supreme Court decisions<sup>119</sup> suggest that the change in composition means an equally significant change in jurisprudence. Its prior agenda, as a supporter of human rights, is unlikely to continue.

While the Court implemented a provision of a human rights treaty in *Ekmekdjian v. Sofovich*, Argentina's political climate casts a pallor of self-dealing over the opinion. The political environment includes hostility between President Menem and the Argentine press<sup>120</sup> and a court-packing plan by Menem.<sup>121</sup> In this context, an opinion implementing the right of reply suggests a political blow against the press by Menem and his Court, rather than firm legal precedent for human rights activists.

Furthermore, the absence of a rigid scheme of stare decisis in the Argentine legal system will likely prevent the Argentine Supreme Court from becoming an implementer of human rights. In order for courts to make law, their opinions must be binding in

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114. *Id.* at para. 5 (Belluscio, J., dissenting).

115. *Id.* at para. 6.

116. *See supra* notes 9-13 and accompanying text.

117. *See generally Free Markets, supra* note 30, at 5.

118. *See* Alfonsín, *supra* note 16, at 42-46, 49-52.

119. *See supra* notes 19-22 and accompanying text.

120. *See supra* notes 23-32 and accompanying text.

121. *See supra* notes 8-21 and accompanying text.

cases with similar facts, or their opinions merely adjudicate claims between two adversaries. The Argentine judiciary has struggled with the binding effect of Supreme Court precedent on the Supreme and lower courts.<sup>122</sup> Under the current system, any court can depart from *Ekmekdjian v. Sofovich* by providing justifiable legal grounds.<sup>123</sup> Simply because this Court granted Ekmekdjian a right of reply, other courts are not required to award a reply to future plaintiffs with similar facts. Under this chaotic system, no Argentine Court can set precedent guaranteeing human rights.

Furthermore, even if other Argentine courts acknowledge that article 14(1) is operative within Argentina, these courts could select different rules for standing. Because any Argentine court can ignore Supreme Court precedent by providing justifiable legal grounds,<sup>124</sup> the Supreme Court's parameters for the exercise of a right of reply are not obligatory.

### B. The Case

The Court's reasoning suggests a limited role for the Court in the human rights area. Although it found article 14 self-executing, the Court specifically limited its role as an implementer to specific types of treaty provisions. First, the Court reasoned that a treaty obligation, if operative, prevailed over internal Argentine law.<sup>125</sup> Therefore, only operative treaty provisions could be considered, eliminating any possibility of customary international law implementation.

Second, the Court reasoned that a treaty provision was operative when adopted through legislation or when the description of the right was sufficiently concrete.<sup>126</sup> Therefore, according to the Court's reasoning, only strictly defined political rights that a court could enforce and oversee without legislative assistance qualified for possible implementation.<sup>127</sup> If the Court was only willing to implement political rights, it eliminated judicial implementation of

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122. See *supra* notes 33-50 and accompanying text.

123. *Id.*

124. *Id.*

125. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, paras. 17-20 (majority opinion) (Arg.).

126. *Ekmekdjian v. Sofovich*, at para. 20 (majority opinion).

127. See *Ekmekdjian v. Sofovich*, at paras. 14, 15 (Petracchi and O'Conner, JJ., concurring in part and dissenting in part) (presuming that economic, social, and cultural rights are goals, not rights).

economic, social, and cultural rights.<sup>128</sup>

Except for distinguishing between the implementation of political versus other rights, the Court's reasoning is rational because the provisions of treaties ratified by countries without qualification should become the internal law of those countries.<sup>129</sup> This is especially true in Argentina and the United States where both Constitutions make treaties the supreme law of the land.<sup>130</sup> However, the argument has not worked in the United States because of reluctance to unequivocally ratify human rights conventions.<sup>131</sup> The Argentine Supreme Court, nevertheless, recognized that the right of reply, as part of a ratified treaty, should be operative as internal law.

### 1. A Self-Executing Right of Reply?

While the Court seems correct in holding that the right of reply was operative, the Court, if correct, was correct for the wrong reasons. The first error was their disregard of prior precedent. The second was their erroneous reliance on an advisory opinion of the Inter-American Court of Human Rights.

The term, "self-executing," is divided into two concepts: domestic validity and domestic applicability.<sup>132</sup> Domestic validity is

128. For an in depth discussion of the implementation of civil and political versus economic, social, and cultural rights, see Rhoda Howard, *The Full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1983).

129. See generally Susansa Albanese, *Operatividad y programaticidad de las cláusulas de los tratados internacionales*, 1987-C L.L. 974 (a review of recent Argentine case law on self-execution); Juan Antonio Travieso, *La recepción de la convención americana de derechos humanos en el sistema jurídico argentino*, 1987-C L.L. 645 (discussing the force and applicability of the American Convention on Human Rights within Argentina). But see Jorge Bustamante Alsina, *El derecho de réplica debe ser reglamentado solamente por Congreso de la Nación*, 1986-C L.L. 798.

130. See *supra* notes 33-63 and accompanying text.

131. See generally NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

132. See Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: a Critical Analysis*, 26 VA. J. INT'L L. 627, 632 (1986); Travieso, *supra* note 130, at 646-47 (discussing the force and applicability of the American Convention on Human Rights within Argentina). Many Argentine scholars have written on the whether article 14 is self-executing. See generally Liliana Albornoz, *supra* note 54, at 964; Jorge Bustamante Alsina, *supra* note 129, at 978; Miguel Angel Ekmekdjian, *Los casos "Birt" y "Sanchez Abelenda," a propósito de la integración humanitaria latinoamérica*, 1990-B L.L. 1024.

the force of law a treaty has within a country,<sup>133</sup> while domestic applicability refers to whether a treaty is operative within a country.<sup>134</sup> The Argentine Supreme Court stated that the American Convention on Human Rights was in force within Argentina because ratified treaties were the supreme law of the land under Article 31 of the Argentine Constitution.<sup>135</sup> Therefore, domestic validity of the American Convention on Human Rights was not disputed in *Ekmekdjian v. Sofovich*.<sup>136</sup>

However, the Court departed from precedent on the issue of domestic applicability.<sup>137</sup> Previous Argentine Supreme Court cases held that article 14(1) needed implementing legislation.<sup>138</sup> In *Abelenda v. Ediciones de la Urraca, S.A.*,<sup>139</sup> a man whose name was published in a list of conspirators by the defendant newspaper sued to enforce his right of reply after the Minister of the Interior and a criminal court found him uninvolved.<sup>140</sup> The justices denied him relief holding that article 14(1) was neither implied in Article 33 of the Argentine Constitution nor self-executing.<sup>141</sup> *Abelenda* presented a more compelling case than *Ekmekdjian v. Sofovich* because the newspaper listed Abelenda as a conspirator when he

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133. Iwasawa, *supra* note 132, at 632 n.26.

134. Domestic applicability means that a provision is "capable of being applied without the need for further measures." *Id.* at 632, n.27; *see also* Albanese, *supra* note 129, at 974-78 (reviewing recent Argentine case law on self-execution); Travieso, *supra* note 129, at 646 (discussing the force and applicability on the American Convention on Human Rights within Argentina).

135. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, — Fallos —, para. 2 (majority opinion) (Arg.).

136. Commentators agree that treaties have domestic validity. *See, e.g.*, Albanese, *supra* note 129, at 975. "In the United States, for example, the Constitution recognizes that treaties are 'the supreme Law of the Land.' . . . Thus, ratified treaties have domestic validity in the United States." Iwasawa, *supra* note 132, at 632 n.26.

137. Several Argentine commentators wrote articles criticizing the Court's prior opinions. They argued that article 14 was self-executing. *See, e.g.*, Alborno, *supra* note 54, at 964; Ekmekdjian, *supra* note 132, at 1024.

138. Judgment of Dec. 1, 1988 (*Abelenda v. Ediciones de la Urraca, S.A.*), CSJN, 311 Fallos 2553 (Arg.); Judgment of Dec. 1, 1988 (*Ekmekdjian v. Neustadt*), CSJN, 311 Fallos 2497 (Arg.); Judgment of May 12, 1987 (*Costa v. Ciudad de Buenos Aires*), CSJN, 310 Fallos 510 (1987) (Arg.); Judgment of May 15, 1986 (*Campillay v. La Razón*), CSJN, 308 Fallos 789 (Arg.). For the self-execution of other provisions *see*, Judgment of June 9, 1987, CSJN, 1987-D L.L. 335 (Arg.) (holding that article 17(5) of the American Convention dealing with equal rights for children born out of wedlock only became operational when Congress passed a law implementing the provision).

139. Judgment of Dec. 1, 1988 (*Abelenda v. Ediciones de la Urraca, S.A.*), CSJN, 311 Fallos 2553 (Arg.).

140. *Id.* at para. 2.

141. *Id.* at para. 4.

was not.<sup>142</sup> The newspaper damaged Abelenda's personal reputation that could have been restored by a reply. In contrast to *Abelenda*, the television program in *Ekmekdjian v. Sofovich* did not name or allude to Ekmekdjian. Instead, Ekmekdjian complained because the press allegedly attacked his religious beliefs.

Similarly, in *Ekmekdjian v. Neustadt*<sup>143</sup> the justices refused a television viewer the right of reply to comments made by former Argentine President Arturo Frondzi (1958-62).<sup>144</sup> The majority in *Ekmekdjian v. Sofovich* distinguished *Ekmekdjian v. Neustadt* by explaining that Ekmekdjian's character as a fervent catholic was extremely offended in *Ekmekdjian v. Sofovich*, while Ekmekdjian merely tried to reply to the opinions of former President Frondzi in *Ekmekdjian v. Neustadt*.<sup>145</sup> Most remarkably, the majority in *Ekmekdjian v. Sofovich* expressly stated that "in its actual composition this court does not share the cited precedents, which means that they are solely formal analogies with the present case."<sup>146</sup> Such an explanation reveals little regard for precedent because the Court did not even provide justifiable legal grounds for ignoring the prior cases.<sup>147</sup>

The second error of the *Ekmekdjian v. Sofovich* majority was its erroneous reliance on an advisory opinion of the Inter-American Court of Human Rights. In the advisory opinion, Costa Rica asked the Inter-American Court whether Costa Rica had guaranteed article 14's right of reply to all persons within its jurisdiction by ratifying the American Convention on Human Rights.<sup>148</sup> The Inter-American Court replied "that the question . . . contain[ed] two different issues which [were] clearly distinguishable."<sup>149</sup>

The first issue concerned the validity of article 14 within Costa Rica.<sup>150</sup> The Inter-American Court accepted jurisdiction over this

142. *Id.* at para. 2.

143. Judgment of Dec. 1, 1988 (*Ekmekdjian v. Neustadt*), CSJN 311 Fallos 2497 (Arg.).

144. *Id.* at 2499-500.

145. Judgment of July 7, 1992 (*Ekmekdjian v. Sofovich*), CSJN, \_\_\_ Fallos \_\_\_, para. 26 (majority opinion) (Arg.).

146. *Id.* (author's translation). In Spanish: "en su actual composición este Tribunal no comparte los precedentes citados, resulta útil señalar que aquéllos guardan sólo analogía formal con el presente."

147. The Court could not say that it was distinguishing the prior cases on their facts because *Abelenda's* facts presented a better case for a right of reply. See *supra* note 140 and accompanying text.

148. Advisory Opinion, *supra* note 59, at para. 13.

149. *Id.* at para. 14.

150. *Id.*

question because it "concerns the interpretation of article 14(1) of the Convention in relation to article 1(1) . . . ."<sup>151</sup> Article 1 obligated the countries to respect the rights granted by the Convention.<sup>152</sup> Therefore, the Inter-American Court concluded that Costa Rica had guaranteed or given force of law (validity) to the right of reply.<sup>153</sup> The domestic validity of the right of reply was not disputed in *Ekmekdjian v. Sofovich*.<sup>154</sup>

The second issue concerned the application of article 14 to the internal legal system of Costa Rica.<sup>155</sup> The Inter-American Court refused to address the issue of domestic applicability because "[t]he second issue . . . [fell] outside the advisory jurisdiction of the Court."<sup>156</sup> Therefore, the Argentine Supreme Court relied on an opinion that confronted the issue of domestic validity rather than domestic applicability to sustain the proposition that article 14 was domestically applicable.

## 2. Menem's Influence

This case demonstrates Menem's influence over the Argentine Supreme Court. The Argentine Supreme Court had five Justices when Menem took office in 1989.<sup>157</sup> Two Justices left the Argentine Supreme Court before 1990.<sup>158</sup> Two Justices from the *Abelenda* and *Ekmekdjian v. Neustadt* cases remained on the Argentine Supreme Court. One of those two Justices voted that article 14(1) was self-executing in *Ekmekdjian v. Sofovich*, while one voted that it was not.<sup>159</sup> Another Justice, who said that article 14(1) was self-executing,<sup>160</sup> also remained on the Supreme Court and voted for self-execution with the *Ekmekdjian v. Sofovich* majority. Most no-

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151. *Id.*

152. *See supra* text accompanying note 62.

153. Advisory Opinion, *supra* note 59, at paras. 26, 30.

154. *See supra* notes 134-36 and accompanying text.

155. Advisory Opinion, *supra* note 59, at para. 14.

156. *Id.*

157. *See supra* notes 8-21 and accompanying text.

158. The two Justices were Jorge A. Bacqué and José S. Caballero. *See MILLER, supra* note 17, at 1797.

159. Justice Petracchi voted that article 14 was self-executing while Justice Belluscio voted that it was not.

160. *See* Judgment of May 15, 1986 (*Campillay v. La Razón*), CSJN, 308 Fallos 789 (Arg.) (dissent of Fayt para. 6 states that the right of reply is self-executing). For a discussion of the *Campillay* case see Atilio Anibal Alternini & Anibal Filippini, *Responsabilidad civil derivada de la difusión de noticias inexactas: acto ilícito o acto abusivo*, 1986-C L.L. 406; Miguel Ekmekdjian, *El derecho a la dignidad y la libertad de prensa*, 1986-C L.L. 981.

tably, Menem's six appointees all voted for holding article 14(1) self-executing.<sup>161</sup>

### 3. The Standing Problem

While the Court's decision concerning the right of reply's operative status seems correct, its grant of standing to Ekmekdjian was without legal foundation.

The majority asserted that most South American countries had internal rights of reply.<sup>162</sup> However, the dissenters responded that these internal rights of reply would not grant standing to Ekmekdjian.<sup>163</sup> In Brazil, rights of reply have been granted to persons accused and offended by the media.<sup>164</sup> The Chilean code has restricted the right to those alluded to by the media.<sup>165</sup> The Uruguayan code has given the right to those named or alluded to by the press.<sup>166</sup> Therefore, the majority should not have relied on any of these laws as support for the proposition that a statement offensive to one's religious beliefs granted standing.

The majority also cited rights of replies found in the regional constitutions of Argentina.<sup>167</sup> Again, the dissent replied that Ekmekdjian would not be granted standing under these constitutions because he was not named or alluded to in the television program.<sup>168</sup>

The majority's citation to the publishing codes of the media in the United States<sup>169</sup> was also without merit. These codes are self-

161. Compare MILLER, *supra* note 17, at 1797 (listing the new Justices) with Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 32 (majority opinion) (Arg.) (listing the Justices in the majority).

162. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 13 (majority opinion) (Arg.) (citing Uruguay (art. 7 of law 16.099), Chile (law 15.476), Brazil (art. 29 of law 5250-Feb. 9, 1967)).

163. *Id.* at para. 27 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part).

164. *Id.* at para. 27 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part) (citing art. 29, law 5250, Feb. 9, 1967 (Braz.)).

165. *Id.* at para. 27 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part) (citing art. 8, law 15.476, 1964 (Chile)).

166. *Id.* at para. 27 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part) (citing art. 7, law 15.672, 1984 (Uru.)).

167. Judgment of July 7, 1992 (Ekmekdjian v. Sofovich), CSJN, — Fallos —, para. 14 (majority opinion) (Arg.).

168. *Id.* at para. 28 (Petracchi and O'Connor, JJ., concurring in part and dissenting in part).

169. See *supra* text accompanying note 104.



regulating standards, not laws of the United States. Therefore, the majority cited existing rights of reply to strengthen the proposition that Argentina requires one, but ignored the text of the same laws when granting standing to Ekmekdjian.

Instead of relying on legal sources, the Court wrote fervently about the plight of the common person in the modern era of conglomerates.<sup>170</sup> The common person, the Court observed, does not have the technological and financial resources to shape public opinion via journalism.<sup>171</sup> The Court lamented that "an unjust distribution of the social powers demands to be corrected by reasonable and appropriate mechanisms."<sup>172</sup>

## V. CONCLUSION

While the Argentine Supreme Court in *Ekmekdjian v. Sofovich* has incorporated a provision of a human rights treaty into Argentine law, the climate is not favorable for the Court to repeat its efforts. Commentators justifiably suspect the Court of complying with Menem's political agenda<sup>173</sup> which excludes the improvement of human rights. Also, due to Menem's antagonism toward the press, the Court's opinion can be characterized as a political blow against the press, rather than a human rights case.

The Argentine doctrine on precedent is another obstacle to judicial implementation of other human rights in Argentina. Since the Argentine legal system allows a second court to disregard precedent with similar facts, where the second court can provide justifiable legal grounds, the Argentine Supreme Court cannot implement human rights law unless all other courts agree. However, this lack of law-making power by the Supreme Court could be encouraging to human rights activists who may not want a packed court deciding the future of human rights in Argentina.

Although some human rights organizations could see a Supreme Court implementing rights guaranteed by treaties as long-

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170. *Ekmekdjian v. Sofovich*, at paras. 7-12.

171. *Id.* at para. 8.

172. *Id.* at para. 8 (author's translation). In Spanish: "*Se manifiesta así un injusto reparto de los poderes sociales que exige ser corregido a través de mecanismos razonables y apropiados.*"

173. See Carl Honore, *Argentine High Court's Prestige Tattered by Scandals*, *MIAMI HERALD*, Oct. 11, 1993, at A9. Honore reports "[a]t different times, a cloud of impropriety has hung over every judge on the [Supreme Court]." *Id.*

overdue progress for human rights, *Ekemekdjian v. Sofovich* does not signal the beginning of such a trend in Argentina.

LEON PATRICIOS\*

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\* J.D. Candidate 1994, University of Miami School of Law. The author would like to thank Stephen J. Schnably, Professor of Law, for his invaluable assistance with every part of this Case Comment.