

# ICWA LETTERS

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THE AMERICAS

Martha Farmelo is the Institute's Suzanne Ecke McColl Fellow studying gender issues in Argentina.

## Exploring Solutions to Argentina's Political Crisis: Transforming a Supreme Court That Blackmails the President

By Martha Farmelo

APRIL 20, 2003

**BUENOS AIRES, Argentina** – In late January 2002, in the midst of a cacophonous, pot-banging protest at the Supreme Court, several white-kerchiefed Mothers of Plaza de Mayo sat in silence holding pictures of loved ones who had been “disappeared” by security forces during the grisly, right-wing military dictatorship of 1976 to 1983. Josefina “Pepa” Noia—one of the group of 14 mothers who marched for the very first time in the Plaza— held a hand-printed sign that read:

*“Primero se llevaron a nuestros hijos-hijas (Por algo será...). Ahora se llevan al país. Remoción de la Corte Suprema de In-justicia. Juicio Político!”*

“First they took our sons-daughters (It must have been for something...[a blame-the-victim phrase common during the last dictatorship]. Now they are taking the country. Remove the Supreme Court of In-justice. Impeachment!”

By expressing their disgust with the Supreme Court—whether silently or pounding a metal saucepan—Pepa and her fellow Argentines were addressing a crucial symptom of Argentina’s political crisis. As the last guarantor of citizens’ basic rights, a legitimate Supreme Court is a crucial pillar of a stable democracy. In Argentina, this pillar is precariously weak. Among other aberrations, a majority of the justices have at times acted like the political servants of former President Carlos Menem and are accused of blackmailing Menem’s arch rival, President Eduardo Duhalde.



Josefina “Pepa” Noia (Front, right) on the steps of the Supreme Court in January, 2001.

The Supreme Court emerged on the public agenda following the historic pot-banging *cacerolazo* protests that led President Fernando de la Rúa to resign on December 20, 2001. Just ten days later, similar mobilizations contributed to the downfall of his successor, Adolfo Rodríguez Saá. During the latter protests, the court was singled out for colorful accusations of rampant corruption. Popular

anger at the judges peaked when a December 28, 2001 Supreme Court ruling upheld the government's freezing of bank accounts, known as *el corralito*, widely considered a violation of the constitutional right to private property.

Victor Abramovich is director of the *Centro de Estudios Legales y Sociales* (CELS), one of Argentina's premier human rights organizations. He is a leading analyst of the Supreme Court and one of a handful of civil society leaders who have met with the Justice Minister and members of Congress to lobby for change. In a recent interview, he discussed the court's structural weaknesses, recommendations for correcting them and the prospects for change.

Abramovich told me, "The members of the court have severed their link to society and no longer have the legitimacy necessary to fulfill their role. People no longer trust the justice system because they believe that in large part it is manipulated by political power and responds to individual interests. If you have a pending case, you don't know if it will be resolved according to accepted rules and principles, in an independent and impartial manner," he said.

About a month after the Court upheld the validity of *el corralito*, at President Eduardo Duhalde's behest and riding a wave of popular fury against the Court, Congress initiated impeachment proceedings against the nine justices. Soon thereafter, the judges made a 180-degree turn from their previous decision and ruled that *el corralito* was unconstitutional. This ruling came one day after the fifth furious, weekly *cacerolazo* on the steps of the Court, convened by the association of labor lawyers and supported across the board by neighborhood assemblies. Given that timing, it seemed a pathetic attempt by the court to appease an angry, mobilized populace.

On national radio, President Duhalde said, "[This ruling] is due to the fact that the government did not accede to the blackmail of the Executive and the Congress by members of the maximum court, in which they demanded we not impeach them."

President Duhalde, however, has behaved as erratically as the judges. First, it appeared that he went along with the blackmail. According to Abramovich, in mid-February he signaled the Congress to back off the impeachment proceedings and initiated negotiations with the justices to secure rulings that would uphold *el corralito*—and protect his term in office.

Diana Maffia is Assistant Ombudsman for the City of Buenos Aires. She told me, "When the government so flagrantly violates the right to private property [freezing bank accounts], the Court makes not even a gesture, because of the impeachment proceedings in the Congress. And it begins a courting dance between the government and the Court. The Court threatens the government that it's going to declare the *corralito* unconstitutional. The

government threatens the court that it will spur the impeachment. So people react [in massive protest] to this spectacle, this barter of impunities."

Duhalde loyalists finally overcame the opposition and terminated the impeachment proceedings in mid-October, 2002. Despite widespread clamor for the justices to resign, only Gustavo Bossert—widely considered the least corrupt of the bunch—did so. He claimed his motive was "*hartazgo emocional*" or "emotional exhaustion" resulting from the impeachment proceedings, *i.e.* emotionally, he'd had enough.



Victor Abramovich is the Executive Director of the Centro de Estudios Legales y Sociales. In 1979, CELS began documenting the atrocities committed by the military juntas of 1976 to 1983, and provided legal and social aid to the detained-disappeared and their family members. Photo courtesy of CELS.

In December, the Supreme Court signaled in advance that it was going to rule in favor of "re-dollarizing" deposits that the government had converted to pesos—another profound threat to the Duhalde administration. When pro-dollarization justice Carlos Fayt revealed that he had a frozen bank account (and should have recused himself from all rulings on *el corralito*), Duhalde then urged Congress to re-initiate Fayt's impeachment.

The press covered these events with phrases like "sword of Damocles" to describe the threat that Duhalde held over the head of the Court, and vice versa. At times it appeared that rather than operate within a system of checks and balances, the Executive and Judicial branches were engaged in a high-stakes game of political "chicken" designed to bring down either the President or the justices.

According to Abramovich, Duhalde's initial zest for impeachment hearings reflected his desire to purge the so-called "automatic majority" of five Supreme Court justices loyal to former President Carlos Menem, who in 1990 expanded the number of judges from five to nine. "The Supreme Court is an instrument of power of *Menemismo*," he said. "The constitution doesn't say how many judges should serve on the Supreme Court, so it only took a change in law to alter the number of judges. This law was voted on with the presence of a fake Congressman." A congressional aide took a seat in his congressman's place, was registered as present by an automatic counter and gave the Peronists quorum, he said.

Abramovich said Menem also stacked the federal

courts with judges beholden to him. These maneuvers transformed the most important judicial bodies into servants of the executive branch. They also gave Menem legal cover for a sweeping political and economic restructuring of the country that included privatization of all public utilities and pardons for military dictators who had been jailed after historic trials for human-rights abuses. This majority was also responsible for setting Menem free from house arrest on arms-trafficking charges. “[Supreme Court Justice] Julio Nazareno failed to recuse himself, even though he had been Menem’s law partner in the province of La Rioja,” he said.

President Duhalde contributed directly to the Court’s lack of credibility when he selected Senator Juan Carlos Maqueda to fill the vacancy created by Bossert’s resignation. Maqueda has decent legal qualifications but is considered subservient to Peronist politics (and a Duhalde loyalist) and will likely end up ruling on some of the key legislation he voted to pass.

“Our main concern with the designation of Maqueda was basically the process,” said Abramovich. He argued that as a transitional president naming a judge who will mark the court’s jurisprudence for the next 20 years, Duhalde should have been more careful about procedures—especially given a highly discredited court that recently emerged from a traumatic impeachment process. “He refused to take the time to hear opinions or hold

public hearings, and the approval came one day to the next in a Congressional session that was practically secret,” he said.

“Paradoxically,” he added, “the Senate just reformed its internal regulations to establish a public hearing [for the designation of Supreme Court justices], something that CELS had been asking for. But this won’t take effect until March.” Reflecting on the selection of Supreme Court justices in the U.S., he said, “Normally the designees have an appropriate legal background, so the discussions are about what they think about certain conflicts of values they will have to resolve. We would have liked to have known Maqueda’s opinion about things like procedural guarantees, personal liberty, restrictions on freedom of expression, the use of roadblocks [as a form of protest].”

Maqueda’s designation, like that of the automatic majority before him, points up the process for selection of justices as one of the Court’s biggest flaws. The total absence of debate and openness has allowed the designation of judges who lack basic qualifications and are entirely loyal to the President who designates them, and therefore have almost zero legitimacy. According to Abramovich, only four members of the Supreme Court have the judicial qualifications to be the country’s highest justices. “[Eduardo] Moliné O’Connor was President of the Argentine Tennis Association. He had a corporate



law firm, but nothing to do [with being a Supreme Court judge],” he said.

The selection process is only one problem. According to CELS, others include:

1. The Court rules on more than 14,000 cases each year—an average of 54 each workday—compared to about 80 per year in the U.S. Combined with exclusively closed-door proceedings, the public can neither follow nor interpret the results and corruption is eminently possible.

2. There are no mechanisms for citizen participation, which could be as simple as receiving and reviewing *amicus curiae* briefs, as does the US Supreme Court.

3. The nine justices are not required to declare their assets—hence no one knew about Fayt’s bank account until he let it slip by accident—nor do they pay income taxes, as all other public officials must.

4. The process of their removal is not documented and is subject to exclusively political criteria—witness Duhalde’s flip-flops on the impeachment process.

The solutions to these problems are as simple as new legislation by Congress or changes to the court’s regulations by the Supreme Court justices. What is lacking is not a mechanism for change, but political will. There seems to be zero disposition toward change among the members of the court, and almost none among the current Congress and Executive branch. Abramovich and colleagues met with the Justice Minister and several legislators to discuss the issues outlined above and recommend solutions. Since then, the Congress incorporated public hearings for Supreme Court nominations, approved a law requiring new judges to pay income taxes and agreed to study a bill on access to public information (including court documents) along the lines of the U.S. Freedom of Information Act—but nothing more.

The Congressional impeachment commission brought dozens of charges against the nine justices. Could all of those charges hold water? Abramovich said, “I think the impeachment process was very quick and poorly done. One of the big errors was to go after all of the judges instead of going after those with the worst charges—to shoot at everybody instead of using one fatal shot.”

Furthermore, Abramovich pointed out that one cannot justify impeachment based on the content of a ruling unless it is entirely arbitrary. “In law the margin of interpretation is always large—even the decision to liberate Menem [on arms trafficking charges] is a ques-



Argentine protestors are masters of black humor and vulgarity. This sign at a Supreme Court protest reads, “If this is social justice, my balls are two pears and my ass is a garden.”

tion of interpretation of the penal code,” he said.

“Some of those charges would have to be better investigated. For example, if it’s true that there was a political negotiation during the impeachment process to halt the charges in exchange for a decision to rule a certain way in particular cases, that would justify impeachment. But you have to prove it,” he said.

Obviously, simple turnover of faces in the Supreme Court is not enough to transform the Court into a pillar of a solid democracy. In fact, the whole justice system needs reform.

However, according to Abramovich, “I think our most important role right now is to keep things from getting worse, and to try to generate consensus in public opinion. For example, I lived in the U.S. during the last election, of Bush and Gore. One of the things that most interested me was that the discussion was about how the next president was going to name a Supreme Court judge. The logic in that campaign was key: that the question of the Court is a question for everyone, it is a question of



At a February 27, 2003 protest on the steps of the Supreme Court, Argentines rallied under a banner declaring, "Let's Clean Up the Court!" Pepa Noia (photo, left) is the middle white-kerchiefed Mother of Plaza de Mayo just below the row of police officers



your rights. I think that's key for trying to keep the justice system in the center of public discussion," he said.

"The issue of *el corralito* and the pending ruling on the conversion of bank accounts from dollars to pesos help meet that goal, as does the court's decision to force the government to reimburse the 13 percent cut in public salaries and pensions [implemented at the end of 2001 to balance the national budget]. I think our job is to show that the discussion about who is on the Court and what kind of Court we have is just as important as who will be Economy Minister or Labor Minister," he said.

"I think it is impossible to influence the current authorities until we're out of this [Presidential] transition," he added. The government has other priorities. It is trying to maintain a certain normality. It's not going to take on profound, institutional reforms that mean having to fight and make enemies—even though it would give them enormous political credit."

And after the upcoming Presidential elections? "It's  
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impossible to know," he said. And if the winner is Elisa Carrió, who was active on the Congressional impeachment commission? She has built her reputation on her personal honesty and non-negotiable stands on corruption.

"It's impossible to know," he said again. "Changes in the court will depend not just on who is in the executive but with what legitimacy they take office, with what popularity, and what power they have in the Congress. And about that, even God doesn't know what is going to happen. The uncertainty is so big that the scenarios could be totally different. I can't predict any scenario."

Transforming the Supreme Court is arguably a necessary precondition for Argentina to overcome its current political crisis. For someone accustomed to the U.S. justice system—notwithstanding its numerous flaws—the likelihood of correcting the defects in Argentina's justice system is so minuscule as to make resolution of the political crisis seem nearly impossible.

The modesty of Abramovich's aspirations for this

year illustrate the gravity of that crisis. “I think the maximum we can achieve is that the justice system remain on the agenda. Later, when things are a bit clearer, we can try to see if we can achieve reforms in another political context.”

The situation of the Supreme Court is so grave that CELS along with other human rights organizations have asked the Inter-American Human Rights Commission of the Organization of American States to intervene. The commission had already required the government to respond to reports that Army Chief-of-Staff Ricardo

Brinzoni met with Supreme Court justices to ask them to uphold two laws that established near-total immunity for the horrific human rights abuses committed during the last dictatorship against tens of thousands of individuals, including Pepa Noia’s daughter.

Meanwhile, Pepa is not giving up, as demonstrated at a recent protest outside the court. While Pepa and others held up a banner declaring, “Let’s Clean Up the Court!,” fellow Argentines with mops, brooms, detergent—and even air freshener—went to work on the steps. □

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### Fellows and their Activities

#### **Alexander Brenner** (June 2002 - 2004) • **EAST ASIA**

A linguist who has worked as a French-language instructor with the Rassias Foundation at Dartmouth College and also has proficient Mandarin and Spanish, upper-intermediate Italian, conversational German and Portuguese, and beginning Cantonese, Alex received a B.A. in History from Yale in 1998 and has just completed a Master's degree in China Studies and International Economics at the Johns Hopkins School of Advanced International Studies. He is preparing for his two-year ICWA fellowship in China with four months of intensive Mandarin-language study in Beijing. His fellowship will focus on the impact of a new government and a new membership in the World Trade Organization on Chinese citizens, institutions and regions both inside and far from the capital.

#### **Martha Farmelo** (April 2001- 2003) • **ARGENTINA**

A Georgetown graduate (major: psychology; minor, Spanish) with a Master's in Public Affairs from the Woodrow Wilson School at Princeton, Martha is the Institute's Suzanne Ecke McColl Fellow in Argentina. Married to an Argentine economist and mother of a small son, she is focusing on economic and societal issues. Martha has been involved with Latin America all her professional life, having worked with Catholic Relief Services and the Inter-American Development Bank in Costa Rica, with Human Rights Watch in Ecuador and the Inter-American Foundation in El Salvador, Uruguay and at the UN World Conference on Women in Beijing.

#### **Andrew Rice** (May 2002 - 2004) • **UGANDA**

A former staff writer for the *New York Observer* and a reporter for the *Philadelphia Inquirer* and the Washington Bureau of *Newsday*, Andrew will be spending two years in Uganda, watching, waiting and reporting the possibility that the much-anticipated "African Renaissance" might begin with the administration of President Yoweri Museveni. Andrew won a B.A. in Government from Georgetown (minor: Theology) in 1997 after having spent a semester at Charles University in Prague, where he served as an intern for *Velvet* magazine and later traveled, experienced and wrote about the conflict in the Balkans.

#### **Matthew Z. Wheeler** (October 2002-2004) • **SOUTHEAST ASIA**

A former research assistant for the Rand Corporation specializing in South and Southeast Asia, Matt will spend two years looking into proposals, plans and realities of regional integration (and disintegration) along the Mekong River, from China to the sea at Vietnam. With a B.A. in liberal arts from Sarah Lawrence and an M.A. from Harvard in East Asian studies (as well as a year-long Blakemore Fellowship in Thai language studies) Matt will have to take long- and short-term conflicts in Burma, Thailand, Laos and Cambodia into account as he lives, writes and learns about the region.

#### **James G. Workman** (January 2002 - 2004) • **Southern Africa**

A policy strategist on national restoration initiatives for Interior Secretary Bruce Babbitt from 1998 to 2000, Jamie is an ICWA Donors' Fellow looking at southern African nations (South Africa, Botswana, Mozambique, Zambia and, maybe, Zimbabwe) through their utilization and conservation of fresh-water supplies. A Yale graduate (History; 1990) who spent his junior year at Oxford, Jamie won a journalism fellowship at the Poynter Institute for Media Studies and wrote for the *New Republic* and *Washington Business Journal* before his years with Babbitt. Since then he has served as a Senior Advisor for the World Commission on Dams in Cape Town, South Africa.

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