

**THE VIRGIN MARY IN THE TEMPLE OF JUSTICE:
ON HOW US JURISPRUDENCE IS MESSING UP
ARGENTINE CONSTITUTIONAL PRINCIPLES**

***La Virgen María en el Palacio de Justicia: sobre cómo la jurisprudencia
estadounidense está arruinando principios constitucionales en Argentina***

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I

This paper will illustrate how US constitutional law on the “Establishment Clause” of the First Amendment to the Constitution of the United States² is improperly influencing the religious culture and practices of Argentina. It will do so through the example of a dramatic real life situation which led to a momentous judicial decision. While drawing some conclusions from the affair, the paper will briefly consider the relevance of comparative constitutional analysis in the area of law and religion. It will also offer some observations on the comparative enterprise in general in order to attempt to explain how a problematic example, such as the Argentine case of the Virgin Mary in the Palace of Justice, can illuminate the proper understanding of comparative constitutional law.

Practical situations are often solved by lawyers and judges through impractical means. In such instances, disasters usually follow, or at least regrettable consequences. Comparative constitutional law is sometimes used in such way. The case of the image of the Virgin Mary in the main hall of the main Argentine courthouse iridescently illustrates the disaster –or at least the regrettable consequences.

Late in 2001, Argentina was undergoing a tremendous economic crisis.³ In

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² U.S. CONST. amend. I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [...]”.

³ See Horacio Spector, *Don't Cry for Me Argentina: Economic Crises and the Restructuring of Financial Property*, XIV *FORDHAM JOURNAL OF CORPORATE & FINANCIAL LAW* 771, 777–779 (2009). A similar crisis had already taken place in 1989. See Manuel Jose Garcia-Mansilla, *Separation of Powers Crisis: the Case of Argentina*, 32 *GA. J. INT'L & COMP. L.* 307, 353–357 (2004). Indeed, García-Mansilla is right: “Economic

order to cope with it the government froze most bank accounts. People went mad: some went wild while others were simply depressed. Some sued the banks and the government. They were sometimes sent by their lawyers to lobby judges by means of threatening that they would commit suicide if they did not get their money back instantly; others threatened the lives of the very judges who had to decide the cases; people from all walks gathered in front of the main courthouse and even within the main hall of that house: the crippled, the elderly, mothers with babies, persons who had not slept a wink for days, people under heavy medication⁴. They all gathered in a form of protest. Of course, all this was immediately catalyzed by the multiplying effect of television and the internet.

A group of protesters decided to place an image of the Virgin Mary in the main hall of the so called “Palace of Justice”, home to the Supreme Court and to the most important federal courts. The Supreme Court itself acquiesced to the placement of the image. Hundreds gathered there every single day to pray that their deposits would be released. This offered some relief to many.

II

The Palace of Justice had become too a *Temple of Justice*. But some did not like this. They felt that their own constitutional rights were being affected by this transformation of the building. “Asociación por los Derechos Civiles” (“ADC”), a human rights NGO significantly funded by American companies⁵, filed suit against the Supreme Court requesting the removal of the image of the Virgin Mary from the Palace of Justice⁶. The ADC claim was premised in part on a purported analogy between the Constitution of Argentina and the Establishment Clause of the First Amendment to the U.S. constitution; and on American constitutional case law on religious freedom⁷.

ADC did not object the constitutional right to religious freedom of the praying petitioners but contended that it was limited by the rights of others. According to ADC, the Supreme Court’s authorization of the presence of the image of the Vir-

emergencies are familiar in Argentina, as are restrictions on the economic rights of citizens during crisis.” Id. at 354.

⁴ This context was accurately described to me ten years after the events took place by one of the law clerks for the Federal Court of Appeals that in the end solved the case of the image of the Virgin Mary. Email of Juan José Galeano, 28 December 2011, on file with the author.

⁵ See Asociación por los Derechos Civiles, *LA CORTE Y LOS DERECHOS 2005/2007* 24 (Siglo veintiuno editores 2008) (statement by Roberto Saba and Álvaro Herrero in the “Foreword” to this official publication, acknowledging sustained contribution of the Ford Foundation). More information about ADC at http://www.adc.org.ar/sw_contenido.php?id=383, last visited 5 January 2012.

⁶ The suit was joined by two lawyers, Natalia Monti and Sebastián Schvartzman, invoking their own individual rights. Monti and Schvartzman were simultaneously on the legal staff of ADC. See http://www.adc.org.ar/sw_contenido.php?id=383, last visited 5 January 2012.

⁷ Hernán Gullco, main counsel of ADC (and the attorney in charge of the law suit), kindly provided me with a copy of the claim. Email of Hernán Gullco, 27 December 2011, on file with the author. In Argentina there is a limited public access to legal documents produced by the parties.

gin Mary and of collective recitation of prayers within the Palace of Justice would jeopardize the right of everyone to be treated equally under the law. Non-religious people could reasonably have the impression that Catholics might be favored by the courts.⁸ ADC distinguished the situation of the image of the Virgin Mary from the one in the American case *Lynch v. Donnelly*,⁹ where the U.S. Supreme Court held that the public exhibition of a Christmas crèche by a municipality did not violate the First Amendment, given that it had a “secular purpose”¹⁰ independent of its religious origin.¹¹ This kind of purpose was clearly absent, according to ADC, in the placement of the image in the Palace of Justice.

The district court agreed with ADC and ordered the removal of the image. Several persons (invoking their affiliation to the Catholic religion) and “Corporación de Abogados Católicos” (an NGO that promotes Catholic values in the legal profession) appealed. When the Court of Appeals was considering the case, the image was removed as a consequence of an executive order of the Supreme Court intending to comply with the district court’s judgment. Nevertheless, the Court of Appeals determined the case had not become moot and rendered a decision on the merits.¹² One judge dissented, determining that the Supreme Court’s acquiescence of the district court’s ruling rendered unnecessary a judgment on the merits.¹³

The Court of Appeals disagreed with ADC’s reasoning, which had been endorsed by the district court. A key tenet of the higher court’s holding was that the Argentine system of religious freedom is different from “other systems such as, for example, that of the U.S.”¹⁴ Therefore, the Court of Appeals held mistaken “the plaintiffs’ invocation of foreign caselaw, rendered in the context of legal systems different from ours and hence inapplicable to this claim”.¹⁵ The Court proceeded to explain what I have termed “the Argentine system of religious freedom” and argued that it is distinct or even unique. It awarded special relevance to article 2 of the Constitution stating that “[t]he Federal Government supports the Roman Catholic Apostolic Faith”.¹⁶

Even though the Court of Appeals consequently overruled the district court’s decision, the image of the Virgin Mary did not return to the Palace of Justice. ADC’s claim and reasoning had been rejected but the Supreme Court did not issue a new authorization for the placement of the image. Nevertheless, and given the rejection

⁸ Law suit, at section 3.1, on file with author.

⁹ *Lynch v. Donnelly* 465 U.S. 668 (1984).

¹⁰ *Id.*, at 679–680.

¹¹ In section 3.2, the claim invokes another U.S. Supreme Court decision, affording it apparent precedential value: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). For the reasons offered in section III of this note this a serious mistake.

¹² Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, Sala IV [Cámara] [Federal Court of Appeals], 20/04/2004, “Asociación por los Derechos Civiles (ADC) y otros c/ EN (PJM)”, Fallos de la Cámara [Fallos] (2004) (Arg.), at section 6.2 (available at <http://www.pjn.gov.ar/Publicaciones/00001/00015218.Pdf>, last visited 11 January 2012).

¹³ *Id.*, dissent of Judge Uslenghi, at section 5.

¹⁴ *Id.*, vote of Judge Jeanneret de Pérez Cortés, who was joined by Judge Galli, at section 8.2.

¹⁵ *Id.*, vote of Judge Jeanneret de Pérez Cortés, who was joined by Judge Galli, at section 9.1.

¹⁶ ARG. CONST. art. 2.

of its claim, ADC appealed. The Supreme Court reversed the Court of Appeals' decision in a 5–4 judgment without giving an opinion on the merits. Rather, in vacating the Court of Appeals' decision the majority of the Supreme Court held that a decision on the merits was unnecessary given that the image of the Virgin Mary was no longer in place at the time the Court of Appeals had decided the case. Four Justices dissented, reasoning that while a Supreme Court's decision on the merits had become unnecessary there was no need to overrule the Court of Appeals. Both the majority and the dissent agreed in that they would not pronounce a view of their own about the Court of Appeals reasoning, which remained uncontradicted.

III

While there is some value in a comparative approach to legal matters, not least in the area of constitutional law,¹⁷ it is one thing to recur to foreign materials as sources of illumination when interpreting one's own law but it is a different thing to substitute one's law for someone else's law affording the latter an authority it does not have in one's own legal system. This is what ADC would have had the Argentine judiciary do in the case of the image of the Virgin Mary—but an instance of a repeated technique of substitution under the guise of borrowing: substitution of what one does not like of a given legal system for what one prefers of another one.

The Court of Appeals was right in acknowledging that even though the Argentine Constitution was modeled after the U.S. Constitution, Argentine constitutional principle regarding law and religion differs significantly from its American counterpart. Argentina has its own religious culture and practices which have been interwoven into Argentine law and the Argentine Constitution. The same could be said of many other countries and this should serve as a warning before deciding whether to borrow from foreign law in this area.¹⁸

The case of the Virgin Mary is particularly enlightening. The kind of reasoning offered by ADC illustrates a mistake that ought to be avoided—a mistake swallowed writ large by the district court but well-spotted by the Court of Appeals. ADC's reasoning has the following steps: i) The US Supreme Court decided in *Lynch v. Donnelly*¹⁹ that the public exhibition of a Christmas crèche by a municipality did not violate the Establishment Clause of the First Amendment, given that it had a “secular

¹⁷ The literature on the problem of the use of comparative constitutional law is ever growing and it now includes the famous debate between Justices Scalia and Breyer, which took place in Washington DC in January of 2005. I consider Waldron's the best attempt to tackle the problem, even if his analogy with experimental science is in the end faulty, on my view. See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 143–144 (2005); Legarre, S. y Orrego, C. (2010). “Los Usos del Derecho Constitucional Comparado y la Universalidad de los Derechos Humanos”. En 88 REDC (REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL) 11, 22.

¹⁸ See Ran Hirschl, *Comparative Constitutional Law and Religion*, in COMPARATIVE CONSTITUTIONAL LAW, 422 (Tom Ginsburg. & Rosalind Dixon eds. Edwar Elgar, Cheltenham 2008) (arguing that there is more cross-country divergence in the comparative constitutional jurisprudence of religious freedom than with respect to most other freedoms).

¹⁹ 465 U.S. 668 (1984).

purpose” independent of its religious origin; ii) The image of the Virgin Mary in the Argentine Palace of Justice does not have such secular purpose; iii) The exhibition of the latter image is in violation not only of the First Amendment of the U.S. constitution but also of article 2 of the Argentine Constitution.

Step (iii) of the above reasoning clearly is a non-sequitur. From the fact that the exhibition of the image of the Virgin Mary would be in violation of the First Amendment it does not follow that the display of the image would also be in violation of the Argentine constitution. This should be quite obvious. U.S. caselaw is not the law of the land in Argentina even when the Argentine Supreme Court often invokes decisions of its US counterpart.²⁰ A precedent of the U.S. Supreme Court, such as *Lynch*, ought not to be treated as in need of distinguishing as if it were otherwise binding for the Argentine Supreme Court.

Furthermore, the invocation of U.S. precedents by the Argentine Supreme Court is normally circumscribed to areas of the law where the text and the history of the constitution permit it.²¹ This is not the case with the area of religious freedom. Although the Argentine constitution recognizes a right to freedom of religion,²² a unique provision in article 2 of the constitution states that “[t]he Federal Government supports the Roman Catholic Apostolic Faith”. This is in stark contrast with the Establishment Clause of the First Amendment to the U.S. constitution declaring that “Congress shall make no law respecting an establishment of religion”. The difference is so evident that no more need be said on this score.

The case of the image of the Virgin Mary shows what happens when the context is overlooked and set aside out of preference for grand principles. The district court made a great deal of the simple placement of a religious object of devotion in the hall of a court of justice at a particular time when people especially needed it there. Instead of considering the transient, critical situation the court opted for looking toward a foreign jurisprudence that was out of place. Practical situations are often solved by lawyers and judges through impractical means...

²⁰ See Jonathan M. Miller, *The Authority of a Foreign Talisman: a Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith* 46 AM. U.L. REV. 1483, 1544–1553 (2005) (providing examples of the Argentine Supreme Court's borrowing of U.S. precedents).

²¹ Rivera, J. C. Jr. (2011). “El uso del derecho comparado por parte de la Corte Suprema y la importación de la doctrina de la real malicia”. En *Jurisprudencia Argentina*, 2011-IV, 3, 8.

²² ARG. CONST. art. 14 “All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely: [...] of freely practicing their religion.”