The Protection of Religious Freedom by the National Constitution and by Human Rights Treaties in the Republic of Argentina[1]

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I. Religion in Argentine Society. II. Religious Freedom and its Protection under the National Constitution and Human Rights Treaties. III. The National Supreme Court of Justice on Human Rights Treaties. IV. Conclusions and Challenges.

I. Religion in Argentine Society

Argentine society is a society that believes in God. The religious condition has been part of this people since their beginnings and continues to be part to this day, nearly two hundred years after the process that opened the way towards independence. A recent study by an accredited scientific organization is quite revealing on this matter.[3]

According to the study, 91.1% of those surveyed said they "believe in God"[4], and they defined their religious affiliations as follows: Catholic (76.5%), Evangelical (9%)[5], Jehovah's Witnesses (1.2%), Mormon (0.9%), and other religions (1.2%)[6]. 11.3% of respondents claimed to be "indifferent".[7]

That is to say, if multiple factors could lead us to believe in one distinct conclusion, such as the advance of a culture which encourages the exclusion of religion from society – or in other words, one that objects to the public presence of anything related to a belief in a faith - that fact is that the study reveals that Argentina is a religious society that believes in God.[8]

However, we must also note that at the same time, the survey also reveals the existence of a complex process of religious deinstitutionalization. This is confirmed by the fact that more than half of the population says that they relate to God "without intermediaries", and also by the fact that a large

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[3] *Primera Encuesta sobre Creencias y Actitudes Religiosas en Argentina* [First Survey on Religious Attitudes and Beliefs in Argentina], performed by the *Centro de Estudios e Investigaciones Laborales* (CEIL) [Center for Labor Studies], of the *Consejo Nacional de Investigaciones Científicas y Técnicas* (CONICET) [National Council on Scientific and Technical Investigations]. The University of Buenos Aires, the National University – Rosario, the National University – Cuyo, and the National University – Santiago del Estero also participated in the study. The national study included 2403 cases, with a margin of error of +/- 2% and a 95% confidence level. The survey results were presented on August 26, 2008, in the Argentine Chancellery (Ministry of Foreign Relations, International Commerce and Religion). More information available at: http://www.ceil-piette.gov.ar. It must be noted that the last national census which included information on the religious identities of the Argentine population was taken in 1960.

[4] 4.9% responded "no", and 4.0% said that they "doubt" or "sometimes believe".

[5] 7.9% of those listed as "Evangelical" were defined as "Pentecostal", and the rest as Baptist, Lutheran, Adventist or belonging to the *"Iglesia Universal del Reino de Dios"* (IURD) [Universal Kingdom of God Church].

[6] There are many Islamic and Jewish communities in this category.

[7] The category of "indifferent" included agnostics, atheists and those who do not belong to an organized religion.

[8] The data also support the idea that Argentina is dominated by a Christian culture, with Jesus at the top of the "ranking" of beliefs. That is, 91.8% of those surveyed claim to believe "much or somewhat" in Jesus Christ, with 84.8% believing in the Holy Ghost, 80.1% in the Virgin Mary, 78.2% believing in angels, 76.2% believing in Saints, and 64.5% believing in energy.

majority of the population exhibits a certain discrepancy between their own conscience and the official doctrine upheld by the religion to which they claim to belong, especially when it comes to controversial topics.[9]

Another interesting aspect of the survey, which further depicts the way in which Argentines choose to live their religion, was highlighted by responses concerning attendance at religious ceremonies. Of the respondents, 76% reported that they either "seldom" or "never" visit places of worship, while only 23.8% said they attend "very frequently". This percentage is not surprising if you keep in mind the "deinstitutionalization" mentioned above.

So, it is clear that matters of religion can present us with a complex phenomenon; for example, a person may define themselves as belonging to a particular organized religion and say that they frequently attend places of worship, but at the same time choose to relate to God "on their own terms", and, on certain topics, they may believe in their own conscience and make decisions contrary to the postulated doctrines of their church or religious community. Such a person might explain it as such: "I belong to a religion and attend worship services, but I go when I want to, and there are some teachings of my religion that I do not adhere to." In short, they live their religion "in their own way".

Finally, the study finishes off with the topic of "public confidence in institutions", which is very important in a country where the credibility of these institutions has been weak for many decades, especially for those institutions in the political sphere. In general, all of the percentages were low, but it was a religious institution – the Catholic Church – that had the highest rated confidence level of those surveyed (59%). The remainder of the institutions on the survey were ranked as follows: media (58%), Armed Forces (46%), police (42%), legal system (40%), Evangelical churches (39%), Congress (36%), unions (30%), and lastly, political parties (27%).

II. Religious Freedom and its Protection under the National Constitution and Human Rights Treaties

The Constitution of the Argentina was sanctioned in the year 1853, and it underwent its most extensive and important reform in 1994. It is a "theistic" constitution that invokes the name of God in the preamble and which reserves exclusively to God those private actions of men which in no way offend public order or morality, nor injure a third party (Article 19).[10]

At the same time, in addition to giving special status to the Catholic Church, to which we will make reference, the Constitution also set forth, from the very beginning, the right of every inhabitant,

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[9] Controversial topics, according to the survey, were things such as abortion, sex education in schools, the use of contraceptives and women in the priesthood.

[10] Juan Bautista ALBERDI wrote in 1852 in *Bases y puntos de partida para la organización política de la República Argentina* [Bases and starting points for the political organization of the Argentine Republic], a work which inspired the creators of the Constitution in 1853, that the invocation of God in the Preamble must be made "not in a mystical sense, but rather in a profound political sense" (cited in SANTIAGO, Alfonso (h): *Religión y Política, sus relaciones con el actual magisterio de la Iglesia Católica y a través de la historia constitucional argentina* [Religion and Politics: Their Relations with the Current Magistrate of the Catholic Church and Throughout the Constitutional History of Argentina], Ad-Hoc [2007], Buenos Aires, p. 240). This latter author goes on to say that the disposition "means the clear adherence of our Constitution to a theistic and iusnaturalist [natural law] world view", that is "an express acknowledgement of a system of justice that is greater than this document itself and which forms the basis for all of the positive law in our country", and that the "theistic adherence of the constitution demonstrates also that the Argentine State is not, nor can be, a totalitarian State, that does not recognize the limits of its actions." The Argentine Episcopal Conference expressed the following in a document presented prior to the reforms of 1994: "The explicit reference to God reaffirms our most honored roots and gives a sense of our Nation's 'self', which is born and developed in the faith of the majority. The diverse races and cultures that make up Argentina find their unity in the faith in a Supreme Being. Our regime is theistic; not atheist, nor neutral. Even for the Argentine who does not have faith, religion must be valued as a part of the culture that makes up our Nation" (from *Aporte de la Conferencia Episcopal Argentina para la reforma de la Constitución Nacional* [Contribution of the Argentine Episcopal Conference to the Reform of the National Constitution], March 9, 1994, as quoted in *Anuario Argentino de Derecho Canónico* [Argentine Annual of Canon Law], Volume I, Buenos Aires, 1994, section III, 2).

citizen or foreigner, to "freely profess their religion" (Articles 14 & 20), a guarantee which the reform of 1994 reinforced by conferring constitutional hierarchy "in the full force of their provisions" to relevant human rights conventions and declarations that govern religious freedom, expounding upon and clarifying their contents.

In effect, according to Article 75, Item 22, these agreements enjoy constitutional hierarchy and are to be understood as complementing the rights and guarantees recognized in the first part of the founding Constitution. Among these are the following United Nations instruments: the Universal Declaration on Human Rights (1948), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and the Convention on the Rights of the Child (1989).[11]

On a regional level, the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights – Pact of San José, Costa Rica (1969)[12] also have constitutional hierarchy. The Magna Carta and other indicated international documents make up what is commonly referred to as the "bloc of federal constitutionality".

In his report after a visit to the country in 2001, United Nations Special Rapporteur on Freedom of Religion or Belief, Mr. Abdelfattah Amor expressed his satisfaction at "Argentina's accession to most of the international human rights instruments – in fact all the instruments relating to freedom of religion and belief – and the fact that it has incorporated them into the Constitution, with the status that entails."[13]

The reforms of 1994 also granted precedence over common laws to those treaties that don't enjoy constitutional hierarchy.[14]

Now, returning once again to the text sanctioned in 1853, it should be noted that the question of religion occupied a distinguished place in the debates prior to its ratification.[15] Even though the

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[11] Also, the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984). Later, in 2003 (law 25,778), following the mechanism set forth by Article 75, Item 22 (elevation to constitutional rank by a vote of two-thirds of all the members of Congress), the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1969) was added to this category. These instruments can only be denounced by the National Executive Power after the approval of two-thirds of all the members of each House.

[12] In 1997, (Law 24.820) the Inter-American Convention on the Forced Disappearance of Persons (1994) was elevated to constitutional rank through the process described in the previous footnote.

[13] See point 121 of the report dated January 16, 2002, (E/CN.4/2002/73/Add.1). English text available at http://daccessdds.un.org/doc/UNDOC/GEN/G02/101/47/PDF/G0210127.pdf?OpenElement. Spanish text available at: http://www.calir.org.ar/libro/13.pdf.

[14] With respect to the religious factor, we can cite the following universal and regional instruments ratified by Argentina: the Geneva Conventions (1949), the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO, 1954), the Abolition of Forced Labour Convention (ILO, 1957), the Discrimination (Employment and Occupation) Convention (ILO, 1958), the Convention against Discrimination in Education (UNESCO, 1960), the Bienne Convention on Diplomatic Relations (1961), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – "Protocol of San Salvador" (1988), the Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT, 1995), the Rome Statute of the International Criminal Court (1998), the Inter-American Convention against Terrorism (OAS, 2002), the Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO, 2003), the *Protocolo Constitutivo del Parlamento del MERCOSUR* (2005) [Constitutive Protocol of the Parliament of MERCOSUR], etc. More complete details can be found in: *Digesto de Derecho Eclesiástico Argentino* [Digest of Argentine Ecclesiastical Law], Secretary of Worship (2001), Buenos Aires, p. 87 and on. There is also a list on the CD accompanying the cited book, *La libertad religiosa en el Derecho argentine* [Religious Freedom in Argentine Law].

[15] A summary of the debate in the Constitutional Assembly of 1853, in: PADILLA, Norberto: *Ciento cincuenta años después en La libertad religiosa en la Argentina. Aportes para una legislación.* [One Hundred Fifty Years Later in Religious Freedom in Argentina: Contributions to Legislation], CALIR-KAS, Buenos Aires (2003), p. 31 and on; and in SANTIAGO, Alfonso: *Religión y Política, sus relaciones con el actual magisterio de la Iglesia Católica y a través de la*

Constituent Assembly delegates said they were "Christians and Democrats" (including some who were Catholic priests), they still held diverse opinions concerning the position that the Catholic Church should hold, and whether or not they should recognize religious freedom.

At that time, the Catholic religion was professed by almost the entire population, and its declaration as the "official" religion could have been seen as a natural result, but one of the primordial objectives of the Assembly was to create an Argentina that was open to immigration – which was needed to populate and develop the nation – and that objective necessitated a guarantee of religious freedom.[16] And so it was that a compromise was made, creating a synthesis in which, along with religious freedom being guaranteed to all, for those who were already here and for those who would come[17], the Constitution granted the Catholic Church special status, a supremacy,[18] principally by obligating the federal government to "sustain the apostolic Roman Catholic faith" (Article 2) – a clause that is still in effect today[19] – without conferring upon it the characteristics of an "official" State religion.[20]

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historia constitutional argentina [Religion and Politics: The Relationship with the Current Teachings of the Catholic Church and throughout the Constitutional History of Argentina], p. 236 and on.

[16] Juan Bautista ALBERDI, in effect, considered it to be absolutely essential that European and North American immigrants came to the country, many of whom were not Catholic. In his cited work, *Bases*, he expressed the following: "The dilemma is fatal: we can be exclusively Catholic, or we can be populated and prosper and be tolerant in matters of religion. To call the Anglo Saxon race and other populations from Germany, Sweden and Switzerland, and then deny them the exercise of their religion is the same as only inviting them on ceremony, through the hypocrisy of liberalism. This is true to the letter. To exclude those differing religions from South America is to exclude the English, Germans, Swiss, and North Americans who are not Catholic; that is, we would be excluding those settlers that this continent needs most. To bring them here without their religion is to bring them here without the agent that makes them who they are; to make them live without religion; to make them atheist" (cited in BERMUDEZ, Horacio R.: *La libertad religiosa en la Constitución Nacional* [Religious Freedom in the National Constitution] in: BOSCA, Roberto y NAVARRO FLORIA, Juan G. (editors): *La libertad religiosa en el Derecho argentino* [Religions Freedom in Argentine Law], CALIR-KAS, Buenos Aires [2007], p. 81-82).

[17] The policy on open immigration was established not only through the recognition of freedom of worship, but also through specific regulations that consolidated the idea (Articles 25 and 67, Part 16, and Article 75, Part 18). The Preamble itself designates the Constitution "to all men of the world who wish to dwell on Argentine soil".

[18] It should be noted, however, that the position of privilege was, in its own time, obscured by the establishment of the institution of the Patronato in the Constitution, which took away some freedom from the Catholic Church, submitting it to the civil powers in matters of its own competency (designation of authorities, communication between the hierarchy and the faithful, etc.). The Constituents understood the Patronato as a legacy of the Spanish kings and they judged it appropriate for their national sovereignty. In the year 1871(Argentina Magazine, 10), José Manuel ESTRADA, enemy of the Patronato and defender of the rights of the Church, held that that the religious freedom of the 1853 Constitution was "contradictory", since it was full and unlimited for all religions, but less so for the Catholic Church, for which is was null. He added that the Patronato "limits religious freedom, attacks its principle and annuls it, and the extension of all of this was all based on a doctrinal error: the right of the State to legislate in religious matters…" (ESTRADA, José Manuel: *La Iglesia y el Estado* [The Church and The State] in: ESTRADA, José Manuel: *La Iglesia y el Estado y otros Ensayos Políticos y de Crítica Literaria* [The Church and the State and Other Political Essays and Literary Critiques], "Great Argentine Writers" collection, volume 35, Jackson Edition, Fourth Edition [1945], Buenos Aires, p. 36 and 41-42).

[19] The Argentine Episcopal Conference did not oppose at that time an eventual modification of the rule, proposing the following inspired formula in the Constitution of the Cordoba Province in 1987: "The Argentine Nation, in accordance with its cultural tradition, recognizes and guarantees to the Apostolic Roman Catholic Church, the free and public exercise of its worship. The relationship of this Church and the Federal State is based on the principles of autonomy and cooperation. It also guarantees free and public exercise to other religions, with no further limitations than those prescribed by morals, good customs and the public order" (*Aporte de la Conferencia Episcopal Argentina para la reforma de la Constitución Nacional* [Contributions of the Argentine Episcopal Conference to the Reforms of the National Constitution], p. 260, point VII).

[20] Also by other dispositions which the reforms in 1994 removed, such as, for example, the requirement that the president and vice president be Catholic and to swear to the Gospel Saints (Articles 76 & 80), or that they uphold the obligation mandated to the National Congress to "keep peace with the indians, and convert them to Catholicism" (Article 65, Point 15). In the "*Villacampa"* verdict of 1989, the National Supreme Court of Justice expressed that, "Articles 2, 67 Point 15, 76 and 80, of the National Constitution relate intimately to legislative customs and traditions of the Argentine people, and also, were a consequence of the rights that the State exercised through the Patronato, but they do not mean, however, that the apostolic Roman Catholic religion should disguise the character of official religion of the State nor that its religious guidelines should

Faced with this constitutionally designed scenario, it is worth asking then if religious freedom is compatible with a position of preeminence for a determined religion as granted by the constitutional text itself.

In particular, as the United Nations Organization has stated, the connection of privilege between the State and a particular religion is not "in and of itself" contrary to human rights. It would be if that particular religion took advantage of that status to impinge upon the rights of other religious communities, or to discriminate against those persons who ascribe to different religions.[21] But what is certain is that in Argentina this has not happened, since the non-Catholic religions have been able to develop their activities without problems – other than what is required in order to justify their legal status, as we'll talk about later – and the people can freely profess their beliefs. The satisfactory answer to this question was consolidated in the reform of 1994, which abolished requirements such as the president having to be Catholic.

What all of this means is that in the more than 150 years since Argentina has been a nation, there have been no major conflicts or situations of discrimination, including prejudice of the Catholic Church. But of course there have been small exceptions.

The special status which the Catholic Church enjoys under the Constitution translates, for example, into the fact that it has public legal personnel recognized by the Civil Code, that have made agreements with the State (such as the one in 1996 that stripped the Patronato of its power, and that of 1957, put into effect in 1992, which created the Military Ordinariate) and which receive direct government financial subsidies. These concessions themselves do not create a detriment to the rights of other religions since the Constitution justifiably regulated the form in which the "question of religion" was asked, based on historical foundations that justify the different treatment.[22] And so, the Special Rapporteur, echoing the observations of the previously-mentioned Committee on Human Rights, said that "from the viewpoint of international law and jurisprudence in this field, the status of the Catholic Church as enshrined in the Constitution is not called into question."[23]

For the rest, regarding government financing of religions, we must note that the most important financing is that which is indirect – through tax benefits – and in this respect, the treatment is equal for all churches or religious communities. We come to similar conclusions about other subsidies as well, for example, access to the media, opportunities to establish schools or universities, as well as declaring holy days and having a religious presence in medical centers or jails.

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be consecrated in our statutory law" (see Verdicts 312:122, The Law 133-647. See also extracts on the Court's web page: http://www/csjn.gov.ar). Regarding the reference to the "conversion of the Indians to Catholicism", it states in the same verdict that "it was done in order to ensure an adequate integration of these racial groups into a mostly-Catholic society." The Catholic Church, in the above-mentioned document, requested the suppression of Article 67, Point 15, due to its being offensive "to the indigenous people, to the Catholic Church, and also to the National Congress" (cited in *Aporte de la Conferencia Episcopal Argentina para la reforma de la Constitución Nacional*, p. 266, point XIV, 4).

[21] Committee on Human Rights, 48th Session, General Comment 22 ("the right to freedom of thought, conscience and religion" Article 18 of the International Covenant on Civil and Political Rights), July 30, 1993: "The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. . .".

[22] For example, the direct financing, as well as being an almost symbolic support that in definition complies with the constitutional mandate to "sustain the Catholic religion" (Article 2), also recognizes historical arguments that are applicable only to the Catholic Church. See LO PRETE, Octavio: *La financiación estatal de las confesiones religiosas* [State Financing of Religions], in MARTIN SANCHEZ Isidoro, and NAVARRO FLORIA, Juan G. (editors): *La libertad religiosa en España y Argentina* [Religious Freedom in Spain and Argentina], Fundación Universitaria Española (2006), Madrid, p. 271/285. Published also at: http://www.calir.org.ar/docs/Financiaciondelasconfrelig2006.pdf.

[23] See point 153 of the report. However, the official followed up these comments by saying that "a number of steps should be taken to ensure wholly equal treatment of all communities of religion or belief."

Keeping this in mind, it is appropriate to acknowledge a repeated demand by some non-Catholic religious communities for "equality". On this point, it seems necessary for us to make a distinction between the different facets of religious freedom.

On the individual level, basic human dignity demands that we recognize the rights of all people on an even footing, independent of the religious beliefs they hold. Protection against religiously-motivated acts of discrimination was set forth in a special legal protection of the Anti-Discrimination Law of 1988.[24] Discrimination based on religious motivation, for example, having to belong to a particular religion in order to hold a public office, would not pass the test of reasonability demanded by the practice of jurisprudence.

On the other hand, if we look at the collective or communal face of religious freedom, this situation takes on another dimension. Here is where is verified, with greater clarity, the principle by which "absolute" or "arithmetic" equality is incompatible with liberty and justice,[25] in line with the concept of "equality" invariably upheld by our National Supreme Court of Justice (modeled after the jurisprudence of the United States Supreme Court): "equal treatment to equals in equal circumstances", that is to say, you cannot exclude from one that which, in equal circumstances, is given to others.

But this equality does not mean that they cannot be considered differently in different situations, as long as those distinctions are not arbitrary or unreasonable. In summary, different legal treatment is not necessarily discriminatory, nor does it violate Constitutional rights, since there are factual inequalities that can translate into justified inequalities.

Of course, the State must be very careful and adequately substantiate the different treatment that it does or does not give to a particular religion. Recognizing the complexity that this challenge entails, we believe that reasonable points should be sought out so that each religion can be treated according to what it represents in historical, cultural, sociological or analogous terms, while avoiding the situation of conceding to one religion that which is denied another religion in similar circumstances, that is to say, so that the differential treatment is not used to the detriment of the rights of other religious communities or used for legal discriminations against those who belong to a different religion.

Lastly, we want to stress that this constitutional model has allowed Argentina to be a model in matters of cultural integration and religious coexistence, and the dialogues of these religions have been ever more profound and productive. Argentina is a certainly an example to follow based on the high level of importance given to the development of peaceful coexistence.

III. The National Supreme Court of Justice on Human Rights Treaties

We have seen that Argentina is a signatory to the principle treaties on human rights which encompass a more extensive protection of religious freedom than what is established in our Constitution.

It is therefore necessary to, even in a synthetic way, expound on how the Supreme Court has interpreted the hierarchal relationship between the treaties and State law, as well as in what way the jurisprudence of the enforcing bodies of the international instruments should be received, especially since 1994 when the most significant human rights treaties were given constitutional hierarchy.

It should be noted first that in the year 1992, the highest Tribunal determined, in the "*Ekmekdjian*"[26] verdict, that these treaties prevail over internal law, a principle which stems from the

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[24] Law 23.592 (1988). The Special Rapporteur reported that "the legislation which directly or indirectly governs freedom of religion or belief explicitly or implicitly enshrines the principles of tolerance and non-discrimination, which are the foundation of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief" (point 124 of the report).

[25] See NAVARRO FLORIA, Juan G.: *Los desafios de la libertad religiosa* [Challenges of Religious Freedom[, work presented at the International Congress "Religious Liberty: Origin of All Liberties" organized in Buenos Aires by CALIR in April of 2008. Full text available at: http://www.calir.org.ar/congreso/documentos/NAVARRO.FLORIA.pdf.

[26] Verdicts 315:1492 (Law 1992-C, 543: The Law 148-354).

Vienna Convention on the Law of Treaties (1969), which established that a State party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27).[27]

The doctrine of the mentioned ruling was incorporated into the constitutional reforms of 1994, by prescribing in Article 75, Item 22, that the treaties "have a higher hierarchy than laws". But while the Article conferred constitutional hierarchy on relevant human rights instruments, it also created double category of treaties: the "ordinary" treaties, and those that hold constitutional hierarchy.[28]

With respect to the latter, the new scenario led to various interpretive difficulties, mostly because the mentioned *status* was conferred to them "in the full force of their provisions", adding that they "do not repeal any section of the First Part of this Constitution" and that they "are to be understood as complementing the rights and guarantees recognized herein."[29]

Logically, the intelligence of such precepts is decisive when trying to determine the scope of the treaties (and of the rights that are encompassed in them), so that we can definitively know the relationship between said treaties and the Constitution itself, and the value that should be assigned to the body of law stemming from the organisms and tribunals established by these treaties.

In the first place, regarding the treaties that "do not repeal any section of the First Part of this Constitution", we encounter the question of how to resolve possible conflicts of rights; that is, which has supremacy? While there have been votes for giving the Constitution superiority over treaties,[30] the majority of the Court judges have leaned towards the interpretation that the formula used in the reform indicates that the Constituent Assembly of 1994 made a definitive judgment on the compatibility between treaties and the Constitution, that cannot be revised, and that it shall be the function of the Judicial Power, in every concrete case, to determine the harmonization that – in any particular case – should be effected. In other words, the harmony or concordance between the treaties and the Constitution is a judgment of the Constituent Assembly that the constituted powers cannot challenge.[31]

It states in Article 75, Item 22, that the treaties "are to be understood as complementing the rights and guarantees recognized herein." This complimentary nature has been understood as a *plus* that gives

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[27] The Convention was ratified by the Argentine Republic in 1972 (Law 19.865) and entered into force on January 27, 1980. The Supreme Court expressed, in the cited verdict, that the Convention "has altered the situation of the Argentine legal code" in part because the application of Article 27 "imposes upon Argentine governmental bodies to assign priority to the treaty in the case of an eventual conflict with internal laws, or with the omission of dictating provisions that, in their effects, equate to the failure to fulfill the international treaty according to the terms of the cited Article 27 (Majority Considerations 18 and 19). This last part implies that the verdict acknowledged operability to the rights encompassed in the international instruments. "*Ekmekdjian*" was also relevant because it advanced a criterion later developed, by establishing that the interpretation of the Covenant be guided by the jurisprudence of the Inter-American Court of Human Rights (Majority Consideration 21).

[28] The first, while still ranking higher than the law, are still subject to the Constitution, since Article 27 of the fundamental law demands that all treaties be in accordance with the "principles of public law laid down by [the] Constitution." In the "*Fibraca*" ruling in 1993, the Court upheld that the Vienna Convention grants priority to the treaties in the case of a conflict with an contrary internal law, as long as they are in accordance with the constitutional "principles of public law" (see Ruling 316:1669, Consideration 3).

[29] Law 24.309, which declared the need for constitutional reform, established in its Article 7 that the Convention could not "introduce any modification to the Declarations, Rights and Guarantees contained in Chapter One of the First Part of the National Constitution" (Articles 1 and 35).

[30] Judge BELLUSCIO, in the "*Petric*" ruling, indicated that the treaties mentioned in Article 72, Point 22, make up constitutional rules of second rank; they prevail over ordinary laws, but are valid only to the extent in which they to not affect the rights enshrined in the First Part of the Constitution (Consideration 7). This doctrine was reiterated in the "*Aranciba Clavel*" precedent (2004, Rulings 327:3312; see Consideration 15). In this ruling, Judge FAYT also alluded to the categorization of the treaties listed in Article 75, Point 22, as "second rank" and that this demands an unavoidable verification of their agreement with those rights and guarantees which the Court, in its custody and final interpretation of the Constitution, has the right to safeguard (Consideration 24). The full texts of these rulings and the additional references can be found at: http://www.csjn.gov.ar.

[31] See for example, "*Chocobar*" (1996) in Rulings 319:3241 (Majority Considerations 11, 12 and 13); "*Cancela*" (1998) in Rulings 321:2637 (Majority Consideration 10).

the declarations an internal order, with either the Constitution or the treaties prevailing, depending on whichever gives the greatest protection.[32]

For its part, in relation to the formula "in the full force of their provisions", it has been said that this indicates not only the method by which the treaties were approved and ratified by the Republic of Argentina, or rather, with the respective reservations, but also the interpretive reach given to the clauses of the treaty by the international legal system.[33]

In the "*Giroldi*" ruling in 1995, the Supreme Court ruled that the constitutional hierarchy of the American Convention on Human Rights, was established by the express will of the constituent assembly in the full force of its provisions; that is, "such that the Convention is valid in the international sphere and particularly considering its effective legal application by the international courts through their interpretation and application." The ruling pointed out that "the cited jurisprudence should serve as a guide for the interpretation of the convention precepts in the manner in which the Argentine State recognizes the competence of the Inter-American court in all cases relative to its interpretation and application of the American Convention."[34]

In "*Arancibia Clavel*" (2004), Judge BOGGIANO stated this doctrine and held that the treaties "must be applied in Argentina just like they function in the international sphere, including the international jurisprudence relative to those treaties and the rules of customary international law as complemented by the pertinent international practice", adding in his vote that, the signatory countries, among them Argentina, "have greatly reduced the scope of their respective internal jurisprudence by way of agreement with many treaties and declarations on human rights and by participating in the formation of a delineated body of international customary law regarding human rights."[35]

In 2007, in the "*Mazzeo*" ruling, the Court cleared up the international doctrine according to which "the Judiciary therefore must exercise a type of 'conventionality control' between the domestic legal provisions, applied to specific cases, and the American Convention on Human Rights", and that this task must keep in mind "not only the treaty, but also the interpretation of the same as made by the Inter-American Court, the highest interpreter of the American Convention."[36]

Lastly, with regards to the advisory opinions and recommendations of the Inter-American Commission on Human Rights, the Court, in their "*Bramajo*" ruling (1996) stated that the same must also serve as an "interpretation guide" for the precepts of the American Convention[37], despite the fact that later, in the "*Acosta*" ruling (1998), it limited the reach of said directive by indicating that if the State must make all necessary efforts to give a favorable response to the Commission's recommendations, then "this is not equivalent to establishing as a must that judges give compliance to its content by not dealing with decisions that are reserved for the Judiciary."[38]

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[32] GELLI, María Angélica: *Constitución de la Nación Argentina, comentada y concordada* [Constitution of the Argentine Nation], 4th edition expanded, LA LEY, Buenos Aires [2008], Volume II, p. 227. The Court has stipulated in "*Monges*" (1996) that "the constitutional clauses and those of the treaties have the same hierarchy, are complementary, and therefore, cannot displace or destroy the other" (see Rulings 319:3148, Majority Consideration 22).

[33] GELLI, María Angélica: *Constitución de la Nación Argentina, comentada y concordada*, p. 221. Argentina approved, with reservations and/or declarations, the Convention on the Prevention and Punishment of the Crime of Genocide, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child (see, Decree-Law 6.286/1956 and Laws 23.054, 23.313 and 23.849, respectively). Keep in mind that according to the Vienna Convention on the Law of Treaties (1969), a reservation may never be "incompatible with the object and purpose of the treaty" (Article 19), that is, it may not be stripped the treaty of its original nature.

[34] See Rulings 318:514 (Consideration 11). When Argentina approved the American Convention on Human Rights (Pact of San Jose, Costa Rica) in 1984, it recognized "the competence of the Inter-American Commission on Human Rights and on the jurisdiction of the Inter-American Court of Human Rights . . . for an indeterminate period and on condition of reciprocity on all cases related to the interpretation or application of the Convention cited" (Article 2 of Law 23.054).

[35] See Rulings 327:3312, Consideration 11.

[36] See ruling of July 13, 2007, (Cause M.2333.XLII.), Majority Consideration 21.

[37] See Rulings 319:1840, Consideration 8 (majority vote).

[38] See Rulings 321:3555, Majority Consideration 13.

In summary, as can be deduced from what I have heretofore said, the Argentine legal system is going through a period of redefinitions and transformations. The generally expressed characteristics show that the National Supreme Court of Justice has set about in recent years, on a path towards the functionality and obligations of international law governing human rights, clearing up the interpretations made by the respective enforcing bodies, principally the Inter-American Court of Human Rights.

IV. Conclusions and Challenges

It is necessary to point out, first and foremost, that religious freedom is guaranteed by Argentine law and that, in general terms, the status of the question is highly satisfactory.[39] Religions can perform their work without inconveniences and we see very few cases of discrimination based on religion, and the few that have surfaced, have been isolated cases and the majority of the time have been satisfactorily resolved.

In the previously-mentioned report, the U.N. Special Rapporteur underlined that not only do the "federal and provincial constitutional provisions guarantee freedom of religion and belief and freedom to manifest religion or belief in accordance with relevant international law," but also that, in general terms, "Argentine legislation furnishes solid constitutional foundations and important legal guidelines to guarantee freedom of religions and belief," and that "the State's policy generally embodies respect for freedom of religion or belief and freedom to manifest religion or belief, in keeping with international human rights standards in this field."[40]

As we have stated, Argentina has ratified the principle international instruments that protect and prescribe the scope of religious freedom, and has even given them a substantial elevation by granting them constitution hierarchy in the reform of 1994.[41]

Adding to this is the interpretative path which the Supreme Court has been treading, which has been favorable to the reception of the opinion and jurisprudence that the transnational courts and organizations carry out in the application of treaties.

In any case, we understand that in order to further the validity of religious freedom, we must face the following challenges:

- Sanctioning a law that will set forth the standards of religious freedom in their widest interpretation possible, extended to both individuals and religious communities, and granting at the same time to non-Catholic religions a legal status more in line with their own uniqueness.[42]
- Consolidating policies in order to increase the understanding and importance given to religious freedom as a fundamental right, especially in education.[43]

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[39] We should remember that in 1989, the Supreme Court, in partially allowing a case of conscientious objection to obligatory military service, demonstrated that religious freedom is "particularly valuable" and that humanity has achieved it "thanks to many efforts and tribulations" (Consideration 8, Majority Vote). See Rulings 312:496 (Law 1989-C, 405; The Law 133:365).

[40] See Points 118, 128 and 130 of the report. The Rapporteur added in this last point that, "the authorities permit the practice of religion, the construction of places of worship, religious education and, in fact, apart from special situations and cases, the expression of all manifestations of freedom of religion." He goes on to say that "the State grants public funds to a variety of religious communities, but the predominant Catholic Church and religious minorities," and that, "in general, the State does not interfere in the internal affairs of communities of religion and belief" and that "it is very active in dialogue and cooperation with religious communities."

[41] Reform which also struck down the requirement that the president be Catholic, and eliminated all of the regulations of the Patronato (which had not been in effect since the Agreement between the Argentine Republic and the Holy See in 1966) and gave way to the consolidation of the principle of non-discrimination, establishing that the swearing in of the president and vice-president be performed according to their own religious beliefs (Article 93).

[42] At the time of this writing, the Secretary of Worship is elaborating on a new draft legislation that will incorporate previous proposals, among them, the draft bill by the Argentine Council on Religious Freedom (CALIR), published at: http://www.calir.org.ar/docs/Anteproyecto.de.ley.LR.doc.

[43] Take, for example, the "inter-religious pledge of allegiance to the flag" that every year reunites students from public schools and private schools (both religious and lay), with the objective of strengthening the values of peaceful

- Authoring cooperative agreements between the State and various religious entities on matters of mutual interest.
- Protecting, including through reforms of penal legislation, religious feelings from offense or ridicule of sacred dogmas, things or places.
- Expanding the recognition of the right to conscientious objection, extending to the Armed Services.
- Condemning expressions that seek to nullify the opinion of, or even reject the public participation of, religions in matters of common interest.

coexistence. The initiative, created by the "Institute for Inter-Religious Dialogue" and the "Christian Youth Association", together with the Secretary of Worship, is complemented by various activities held in the separate schools with parents, docents and students. See http://www.cancilleria.gov.ar, (Press Release No. 225/07).